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Romer v. Evans and Democracy's Domain

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Romer v. Evans and Democracy's Domain

Jane S. Schacter*

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I. INTRODUCTION

As we gather at this Symposium to probe the definition of democracy in the coming century, it seems fitting to note that we are continuing a very old political conversation rather than initiating a new one. The meaning of democracy has long been contested.¹ One of the most vexing aspects of the debate has always centered on whether and how to limit the majority's prerogative to act in ways that disadvantage minorities.² Viewed from a different angle, the question is how to configure the relationship between majority preferences and equality norms. It is the basic dilemma of democratic equality: What kind and measure of equality does democracy require? Formal political equality alone? Social, economic, or cultural equality as an aspect of political equality? On what basis?

Although a topic of lively debate among political theorists, these questions by no means constitute a purely academic exercise. Constitutional law regularly enters this debate as courts confront laws that reflect, create, or entrench *social inequality*, by which I mean group-based social subordination, stigmatization, or disadvantage. When courts decide whether majoritarian laws of this kind violate constitutional equality norms, judges necessarily—if only tacitly—join the enterprise of negotiating the relationship between democracy and social equality. Cases involving a range of constitutional provisions might be understood to pit democracy and social equality against one another,³ though none quite as conspicuously as equal protection cases. At least since the appearance of the famous footnote four in *United States v. Carolene Products Co.*,⁴ the intersection of democracy and social equality has been a controversial one in

1. See generally Philip Green, "Democracy" as a Contested Idea, in Philip Green, ed., *Democracy: Key Concepts in Critical Theory* 2-22 (Humanities Press, 1993).

2. See generally John W. Chapman and Alan Wertheimer, eds., *NOMOS XXXII Majorities and Minorities* (New York U., 1990).

3. Consider, for example, a law prohibiting Medicaid funding of abortions, which implicates (among others) the right of privacy, see *Harris v. McRae*, 448 U.S. 297, 312-318 (1980), or a law denying unemployment benefits to Native Americans who were fired from their jobs because they ingested peyote in a religious ritual, which implicates freedom of religion, see *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 874-82 (1990). In neither of these cases did the Supreme Court sustain the constitutional claim asserted. *Harris*, 448 U.S. at 318; *Smith*, 494 U.S. at 890. Both decisions may be seen as undermining social equality because they disadvantage historically marginalized groups.

4. 304 U.S. 144, 152 n.4 (1938). Footnote four significantly influenced constitutional theory by linking defects in the political process to the legitimacy of heightened judicial scrutiny of legislation. The footnote's third paragraph is most relevant to the dilemma of democratic equality. It suggested the possibility of judicial solicitude for "discrete and insular minorities" who may be subjected to prejudice, and for "particular religious, or national or racial minorities" who might be targeted in statutes. *Id.* (citations omitted).

constitutional law, and its contours remain unsettled. Footnote four's vision of democratic equality has gone largely unrealized.⁵ And, apart from scattered assertions by various justices simply pronouncing democracy to be inconsistent with discrimination without explaining why,⁶ the Supreme Court has never elaborated a clear conception of democratic equality within the context of its equal protection decisions.

Last term's pathbreaking decision in *Romer v. Evans*⁷ poses in especially high relief the dilemma of democratic equality. *Romer* was the Court's first foray into applying the Equal Protection Clause to gays, lesbians, and bisexuals, groups long burdened by a legacy of both legal and social inequality. By a six-to-three majority, *Romer* struck down on equal protection grounds an expansively worded amendment to the Colorado Constitution that, at the very least,⁸ sought to bar any governmental entity in the state from protecting gays, lesbians, or bisexuals from discrimination based on sexual orientation. "Amendment 2," enacted in 1992 by voter initiative, would have wiped out existing city ordinances barring discrimination based on sexual orientation, prevented state lawmakers from legislating against such discrimination in the future, and, perhaps, limited even the ability of state courts to entertain discrimination claims of any kind pressed by gay claimants.

5. See generally Thomas W. Simon, *Democracy and Social Injustice: Law, Politics, and Philosophy* 71-101 (Rowman & Littlefield, 1995).

6. Assertions of this kind are particularly common in the context of race discrimination cases. See, for example, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress. . . ."); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting Alexander M. Bickel, *The Morality of Consent* 133 (Yale U., 1975) ("[D]iscrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring) ("A sound democracy cannot allow [race] discrimination to go unchallenged."); *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) ("Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life."). Compare *Daniel v. Paul*, 395 U.S. 298, 306 (1969) (construing public accommodations provisions of the Civil Rights Act of 1964 and quoting presidential statement that "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from restaurants, hotels, theatres, recreational areas and other public accommodations and facilities").

7. 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

8. The scope of the contested provision dominated the questions at oral argument and was vigorously debated between the majority and dissenting opinions. See notes 66-68 and accompanying text. I discuss at length the difficulty of interpreting voter-enacted initiatives in Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L. J. 107 (1995).

The apparent tension between social equality and democracy in *Romer* is not subtle: by a margin of 54% to 46%, a voting majority sought to disqualify gays, lesbians, and bisexuals from securing legislative protection from discrimination. The question for the Court was whether the electorate was free to impose upon a sexual minority a categorical disqualification imposed upon no other group. The *Romer* majority answered in the negative. Score one for social equality, zero for democracy? Certainly that is how Justice Scalia sized it up in a dissenting opinion that can only be called blistering, even by recent standards of contentiousness on the Court. Repeatedly invoking claims about democracy, Justice Scalia pronounced it “most unlikely that any multilevel democracy can function under [the] principle” adopted by the majority opinion.⁹

Contrary to Justice Scalia’s characterization, I argue in this Article that *Romer* should be read to vindicate *both* democracy and social equality, and to suggest some new directions in thinking about the dilemma of democratic equality. I find in *Romer*’s approach to gay inequality and Amendment 2’s exclusionary aspiration the traces of intriguing new insights about the problem of democratic equality. Most centrally, *Romer*’s logic suggests ways in which we might view the democratic enterprise in a wider frame by expanding democracy’s domain to encompass—for some purposes and in some ways—the social sphere, what *Romer* calls the terrain of “ordinary civic life.” Some of the broad ideas I distill from *Romer* can help us begin to sketch a more fluid conception of collective self-government, one that spills over the conventional boundaries placed around formal political institutions to embrace a more expansive, less purely institutional, understanding of core democratic concepts like participation, deliberation, and representation. To a greater degree than the ideas about democratic equality that inspire familiar political and constitutional theories, the approach that *Romer* invites points in some promising new directions in thinking about democratic equality.

It may seem curious to read *Romer* as a case about democratic theory. For one thing, the *Romer* opinion is strikingly enigmatic in ways that make it perilous to venture strong claims about what the case means.¹⁰ For another, the majority opinion did not explicitly invoke the idea of democracy and, indeed, conspicuously abandoned the “political process” reasoning that the Colorado Supreme Court used to invalidate Amendment 2. This political process theory was

9. *Romer*, 116 S. Ct at 1630 (Scalia, J., dissenting).

10. See note 65 and accompanying text.

expressly cast in the vocabulary of democracy, and held that because Amendment 2 selectively placed civil rights protections based on sexual orientation outside the reach of the legislature, it unfairly limited gay and lesbian participation in the ordinary political process. I will argue that the Supreme Court's retreat from process theory should not be taken as a retreat from democratic theory. Instead, the Court's objection to Amendment 2, while not expressed in terms of democratic theory, in fact centrally implicates ideas about democracy's domain. Whatever the subjective intention of the justices who joined the *Romer* majority opinion, I will argue that the case is best understood as expressing important principles of democratic equality.

In Part II, I discuss the background of discrimination against gay men and lesbians, anti-gay-rights initiatives, Colorado's Amendment 2, and the *Romer* litigation. In Part III, I set out two traditional approaches to the democratic equality problem, consider how we might understand *Romer* in terms of these two approaches, and then criticize both as problematic. In Part IV, I outline the contours of a different approach, one that provides a normative foundation for *Romer* that is grounded in democratic theory and that distills from the distinctive character of gay inequality some larger insights about the problem of democratic equality.

II. AMENDMENT 2 AND ITS BACKGROUND

Antidiscrimination laws like those that Amendment 2 sought to outlaw have been a principal legislative remedy sought by advocates of gay equality since the inception of the contemporary gay rights movement over twenty-five years ago.¹¹ The effort to secure the enactment of gay civil rights laws¹² like these persists today, having recently found its way for the first time to a floor debate in the United States Senate.¹³ In the next section, I briefly review the history of the ongoing debate about gay civil rights legislation and anti-gay-rights initiatives. Because understanding this history requires understanding something about the distinctive dynamics of gay inequality and

11. See generally Barry D. Adam, *The Rise of a Lesbian and Gay Movement* 122-28 (Twayne Publishers, 1995).

12. When I refer to "gay civil rights laws" in this Article, I specifically mean antidiscrimination laws of this kind, rather than laws providing any type of gay rights.

13. See Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. Times A1 (Sept. 11, 1996).

the impetus for legal protections against discrimination, I first look at the character of gay inequality.

A. Amendment 2 in Context: The Character of Gay Inequality

Many date the birth of the contemporary gay rights movement to a 1969 riot prompted by repeated police harassment of gay patrons in a Greenwich Village bar known as Stonewall.¹⁴ Since the Stonewall uprising, advocates of gay equality have achieved important victories—legal, political, and cultural.¹⁵ But some twenty-seven years after Stonewall, powerful legal and social markers of lesbian and gay inequality remain entrenched.

In several areas, gay men and lesbians are unequal in both a formal and a legal sense—that is, the inequality is explicitly reflected in governmental commands. These contexts of formal legal inequality include, most prominently, criminal, family, and military law.¹⁶ Moreover, in the most important pre-*Romer* Supreme Court decision on gay issues, *Bowers v. Hardwick*, the Supreme Court upheld the constitutionality of criminal antisodomy laws as applied to same-sex partners.¹⁷ Currently, several states criminalize only same-sex sodomy.¹⁸ In other states where sodomy is illegal without regard to the gender of those who engage in it (as it was under the statute upheld in *Bowers*), the government enforces or defends the law, if at all, only with respect to gay sex acts.¹⁹ This constitutional prerogative to criminalize consensual gay sodomy has, in turn, provided justification for other anti-gay policies, including the policy enforcing formal gay inequality in the military, where by law, revealing one's homosexuality continues to result in a discharge from service.²⁰

14. See generally Martin Duberman, *Stonewall* (Dutton, 1993).

15. For a comprehensive overview, see William B. Rubenstein, ed., *Cases and Materials on Sexual Orientation and the Law* (West, 2d ed. 1997).

16. These are not the only areas where legally imposed or legally sanctioned inequalities exist. Consider, for example, the rise of rules and policies outlawing gay clubs or gay-positive curricula in public schools. See generally Carolyn Moreau, *Coming Out of the Closet: Schools Address Homosexuality*, *Hartford Courant* A1 (July 7, 1996).

17. 478 U.S. 186 (1986).

18. See Nan D. Hunter, *Life After Hardwick*, 27 *Harv. C.R.-C.L. L. Rev.* 531, 538-39 (1992) (noting that since 1973, eight states have amended their antisodomy statutes to cover only activity between same-sex partners).

19. See Evan Wolfson and Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 *Fordham Urban L. J.* 997, 997 (1994).

20. On the "Don't Ask, Don't Tell" policy, see David Cole and William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 *Harv. C.R.-C.L. L. Rev.* 319, 319-22 (1994).

In the most high-profile area of contemporary debate, family law likewise relegates gay men and lesbians to formal inequality. No state has yet permitted gay men and lesbians to marry,²¹ and this ban on same-sex marriage packs a powerful legal punch. It works to deny a forbiddingly long list of legal rights and benefits to gay men and lesbians. Some are intangible, like the community recognition afforded marriage and denied gay unions. Others are quite concrete and implicate rights governed by tort, inheritance, tax, criminal, immigration, benefits, and other areas of law.²² The ban on marriage and the corresponding lack of domestic partnership benefits in most jurisdictions and workplaces, for example, produces substantial employment discrimination that is widely tolerated under current law. In some circumstances, the denial of equal employment benefits for gay partners can mean that gay employees earn fully thirty percent less than a married colleague.²³ And this marital discrimination shows little sign of abating. To the contrary, fearing that Hawaii might soon legalize gay marriage and ignite a national chain reaction, Congress recently enacted by an overwhelming majority its first-ever legislation to proactively *relieve* states of any obligation that the Full Faith and Credit Clause might impose upon them to recognize actions taken by another state. This "Defense of Marriage Act" not only licenses states to ignore same-sex marriages performed in other states, but also denies recognition of same-sex marriage for purposes of federal law.²⁴

Marriage law, moreover, is not alone in powerfully disadvantaging gay men and lesbians in family matters. Several states also limit the rights of gay men and lesbians to be parents, either by banning gay men and lesbians from adopting children or serving as foster parents,²⁵ or by applying rules for custody and visitation that penalize and disadvantage gay parents.²⁶

21. Hawaii appears poised to become the first. See *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 68 (1993) (subjecting statute prohibiting gay marriage to "strict scrutiny" test).

22. See Rubenstein, *Sexual Orientation* at 752 (cited in note 15) (discussing legal rights and benefits dependent upon marriage).

23. Leonard Novarro, *Balanced Benefits, Coverage Urged for Partners of Gay Employees*, San Diego Union and Tribune C1 (Nov. 4, 1995).

24. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 28 U.S.C. § 1738C (1996).

25. See Rubenstein, *Sexual Orientation and the Law* at 846 (cited in note 15) (noting that New Hampshire and Florida expressly ban lesbian and gay adoption and foster parenting). Compare *In re Angel Lace M.*, 184 Wis.2d 492, 516 N.W.2d 678 (Wis. 1994) (holding that lesbian partner of child's lawful parent may not adopt under state adoption law).

26. See, for example, Rubenstein, *Sexual Orientation* at 810 (cited in note 15) (noting that a few courts take the position that "homosexuality alone is a *per se* reason for denying custody or visitation rights," and that others have used the ostensibly less discriminating "nexus" test to

These legal inequalities are formidable, but they are matched and sometimes exceeded by daunting social inequalities. In many quarters, gay men and lesbians remain the object of intense social hostility. Political scientist Kenneth Sherrill recently analyzed a decade's worth of responses to the American National Election Study's questions asking respondents to assess their feelings toward various groups.²⁷ The survey uses a "feeling thermometer" to probe sentiments about a range of groups, including "Blacks," "Whites," "Jews," "People on Welfare," "Illegal Immigrants," "Immigrants," "Gay Men and Lesbians," and "Christian Fundamentalists."²⁸ Across four separate surveys spanning a decade, gay men and lesbians were consistently at or near the bottom, registering the "coldest" or near-"coldest" temperature of all the listed groups. Only the group identified in the survey as "Illegal Immigrants" earned worse or similar scores. Moreover, Sherrill's analysis of this data reveals that the social hostility recorded in these surveys is not concentrated in a small anti-gay cohort, but finds widespread expression.²⁹

These election surveys ask respondents only about the relatively diffuse subject of their "feelings," but other survey data suggest that social antipathy for gay men and lesbians is also reflected in the alarmingly high rates of anti-gay hate crimes and harassment. High percentages of gay and lesbian respondents in several surveys report that they have been physically assaulted, pelted with objects, threatened with violence, and/or subjected to harassing anti-gay epithets.³⁰ Anti-gay harassment and violence can be particularly acute in high schools, creating excruciating conditions for gay youth.³¹ And suicide rates among gay teenagers are notoriously high.³²

restrict a gay parent's rights based on a finding that the parent's homosexuality adversely affects the child's welfare).

27. Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals*, 29 PS: Political Science & Politics 469, 470 (1996).

28. *Id.*

29. *Id.*

30. See generally Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in Gregory M. Herek and Kevin T. Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19-25 (Sage Publications, 1992); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 Harv. C.R.-C.L. L. Rev. 387, 401-419 (1994).

31. For a good overview, see Donna Dennis and Ruth Harlow, *Gay Youth and the Right to Education*, 4 Yale L. & Pol. Rev. 446 (1986). For a disturbing example of one high school student's experience, see *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

32. See Rubenstein, *Sexual Orientation* at 289 (cited in note 15) (reprinting excerpt of Paul Gibson, *Gay and Lesbian Youth Suicide*, U.S. Dept. of Health and Human Services Youth Suicide Report 110 (1989)).

This climate of animus and fear, combined with the very concrete legal disadvantages and disqualifications that may accompany coming out as gay, unsurprisingly inhibits gay self-identification and makes many people afraid to reveal themselves as non-heterosexual. This invisibility has high personal costs for those who live a life thus restrained.³³ It also has high aggregate costs for gay men and lesbians, whose social presence is obscured and sometimes erased entirely under the force of this pressure. Gay inequality is thus critically structured and given shape by a legally and socially coerced marginalization and invisibility.

It would, of course, be inaccurate and ahistorical to view the legal and social status of homosexuality as static over time. Since the Stonewall riots, a lot has changed, and gay men and lesbians have become distinctly more visible in American life. More gay people have come out, and more gay images appear in various media. To some extent, the higher profile of homosexuality in American culture surely is due to legal reforms that gay advocates have won in various jurisdictions.³⁴ These include the repeal or invalidation of sodomy laws; the reform or inclusive interpretation of adoption, visitation, and custody laws; the enactment of domestic partnership laws; the repeal of federal immigration law expressly banning immigration by gay citizens of other countries; and, most significant for our purposes, the enactment of laws banning discrimination based on sexual orientation in various public and private sector arenas.³⁵

Significant as the legal reforms and cultural changes over the last twenty-five years have been, we would make a critical mistake to equate these developments with the disappearance or even inevitable decline of the legally—and socially—coerced invisibility I have described. To the contrary, the increasing gay and lesbian presence in public life has triggered a powerful response from forces determined to reinforce the regime of invisibility. Many contemporary debates

33. An excellent source on this point is Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in John C. Gonsiorek and James D. Weinrich, eds., *Homosexuality: Research Implications for Public Policy* 60, 73-75 (Sage Publications, 1991). See also Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237, 323-27 (1996) (reviewing social science literature).

34. I explore the roles of, and relationships between, cultural and legal strategies for gay equality in Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 Harv. L. Rev. 684 (1997) (reviewing Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (Knopf, 1995); Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay and Lesbian Liberalism* (Doubleday, 1995)).

35. See generally Ruhenstein, *Sexual Orientation* (cited in note 15). The Hawaii Supreme Court would make an important addition to this list if it invalidates that state's law limiting marriage to heterosexuals, as many expect. See note 21.

about gay equality can be best understood as struggles about this regime. Consider the closet-codifying "Don't Ask, Don't Tell" policy in the military,³⁶ the fervent opposition to permitting openly gay marchers in St. Patrick's Day parades,³⁷ and the growing attempts to banish materials about homosexuality from schools or school curricula.³⁸ At its core, each is an attempt to suppress the visibility of homosexuality in public life. Consider, as well, common arguments that gay men and lesbians can effectively opt out of any discrimination simply by "choosing" the closet and thus conspiring in their own invisibility. In upholding the constitutionality of a local initiative similar to Amendment 2, the Sixth Circuit invoked this line of argument:

Many homosexuals successfully conceal their orientation. Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct (such as public displays of homosexual affection or self-proclamation of homosexual tendencies), they cannot constitute [a class meriting heightened constitutional protection]. . . .³⁹

Arguments similarly asserting the protective virtues of the closet have been pressed even in defense of anti-gay violence. For example, in a recent case involving the liability of school authorities for an ongoing pattern of violence and harassment targeted against a high school student, one school official apparently told the victim and his parents that he should expect such incidents because he is "openly" gay.⁴⁰ This official's logic vividly illustrates how a climate that sanctions anti-gay violence creates a crude, yet quite potent mechanism for coercing gay invisibility. As psychologist Gregory Herek has observed in studying anti-gay hate crimes, "[b]y alternately denying and stigmatizing homosexuality, [cultural heterosexism] creates the

36. See note 20.

37. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (upholding, under the First Amendment, the right of parade organizers to exclude Irish gays, lesbians, and bisexuals from St. Patrick's Day parade).

38. See note 16.

39. *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), vacated and remanded, 116 S. Ct. 2519, 135 L. Ed. 2d 1044 (1996). Precisely this logic lies at the heart of the "Don't Ask, Don't Tell" policy. It also regularly surfaces in the context of gay civil rights debates. See 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, 299, 313-17 (1994) (noting barmfulness of the closet and the benefits of visibility).

40. *Nabozny*, 92 F. 3d at 451. After remand and a jury trial on the question of liability, the case settled for a substantial sum. See *Gay Bashing Case Settles*, Nat'l L. J. A8 (Dec. 2, 1996) (reporting a settlement of \$900,000 plus up to \$62,000 in medical expenses).

conditions under which lesbians and gay men can be routinely victimized."⁴¹

The idea that invisibility is a comfortable option readily available to those who want to avoid discrimination misconceives the dynamics of gay inequality by missing the central point: Coerced invisibility *is* a principal form of anti-gay discrimination. Far from being a benign safety net, the closet reflects the particular way in which gay men and lesbians are coerced to live in conditions not imposed on heterosexuals and to participate in maintaining the circumstances that sustain their own inequality.

In sum, post-Stonewall developments reflect an intense struggle over the legitimacy of suppressing gay presence in public life. The regime of coerced gay invisibility I have described has come to be sharply contested, both by those gay men and lesbians who seek to dislodge it, and by those opponents of gay equality who seek to entrench it. The power of measures like Amendment 2, I will argue, lies in their capacity to reinforce the invisibility regime.

B. Contested Remedies: Gay Civil Rights Laws, Anti-Gay-Rights Initiatives, and the Passage of Amendment 2

Against this defining background of coerced invisibility, we can begin to understand the battle over enactment of public- and private-sector laws banning discrimination based on sexual orientation in employment, housing, public accommodations, education, credit, insurance, real estate, and other areas. Because of the many spheres of collective life that can be encompassed by antidiscrimination laws, and the ways in which the protections afforded by these laws can encourage gay people to self-identify, these laws have long formed a centerpiece in the organized campaign for gay equality.

The first municipality to adopt a measure banning discrimination based on sexual orientation was East Lansing, Michigan in 1972.⁴² Since then, some one hundred sixty-five municipalities have adopted similar measures.⁴³ In 1982, Wisconsin enacted the first

41. Gregory M. Herek, *The Social Context of Hate Crimes: Notes on Cultural Heterosexism*, in Gregory M. Herek and Kevin T. Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 101 (Sage Publications, 1992). On the links between anti-gay violence and anti-gay subordination more generally, see Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum. L. Rev. 1431, 1461-92 (1992).

42. Human Rights Campaign, *The State of the Workplace for Gay and Lesbian Americans: Why Congress Should Pass the Employment Non-Discrimination Act* (July 1996) <<http://www.hrcusa.org/issues/workplac/enda/endarept.html>>.

43. *Id.*

statewide antidiscrimination law, and it has since been joined by eight other states and the District of Columbia.⁴⁴ The battles surrounding enactment of these laws have frequently been bitter, with initial legislative passage often representing round one, and a ballot measure to repeal the legislation round two.⁴⁵ This pattern dates to Anita Bryant's "Save Our Children" effort, launched in 1977, to repeal an antidiscrimination ordinance adopted in Dade County, Florida.⁴⁶ The first statewide anti-gay-rights initiative to repeal a gay civil rights measure was Oregon's Measure 8, passed by that state's voters in 1988.⁴⁷ Measure 8 repealed a gubernatorial executive order banning discrimination based on sexual orientation.⁴⁸

Since the passage of Oregon's Measure 8, several more measures hostile to gay civil rights laws have made their way to statewide ballots.⁴⁹ Yet 1992 marked an important turning point. That was the year that both Colorado's Amendment 2 and Oregon's Measure 9 went to the voters. Although there were significant differences between the Colorado and Oregon measures, they shared an important characteristic. In neither state had the legislature yet passed a statewide gay civil rights law. Instead, both ballot measures sought to repeal existing local gay civil rights measures, and proactively to prevent the state legislature from enacting any statewide antidiscrimination law in the future. This preemption strategy ushered in a new genre of measures that, rather than waiting for the enactment of state laws, sought to head legislatures off at the pass.⁵⁰

44. The additional states are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, and Vermont. See *Developments in the Law—Employment Discrimination*, 109 Harv. L. Rev. 1568, 1625-26 (1996); Schacter, 29 Harv. C.R.-C.L. L. Rev. at 286-88 (cited in note 39).

45. See generally Schacter, 29 Harv. C.R.-C.L. L. Rev. at 288-90 (cited in note 39).

46. *Id.* at 284 & n.10.

47. *Id.* at 288. Ten years earlier, an anti-gay-rights initiative called the "Briggs Amendment" appeared on the California ballot, but it did not seek to repeal an enacted antidiscrimination measure. Instead, it would have empowered school boards to fire or refuse to hire teachers for "soliciting, imposing, encouraging, or promoting homosexual conduct." *Id.* at 288 & n.34. With opponents as diverse as Ronald Reagan and Jerry Brown, the Briggs Amendment was defeated. *Id.* at 288.

48. *Id.* at 288 & n.5.

49. For a listing of similar initiatives in other states, see Thomas E. Baker, *U.S. Supreme Court; Exiling Homosexuals from State Politics; The High Court Faces a Dilemma on Colorado's Anti-Gay-Rights Law*, Texas Law. 34 (October 9, 1995). For cases prohibiting anti-gay-rights initiatives from appearing on the ballot based on state-law restrictions, see *Collins v. Secretary of Commonwealth*, 407 Mass. 837, 556 N.E.2d 348 (1990); *In re Advisory Opinion to the Attorney General—Restricts Law Related to Discrimination*, 632 So.2d 1018 (Fla. 1994).

50. A measure recently defeated by Maine's voters also took a proactive approach. See Bob Sipchen, *Maine Voters Reject Rights Referendum*, L.A. Times A12 (Nov. 8, 1995).

Although 1992's Colorado and Oregon measures shared this characteristic, in another respect they sharply differed. The language of the Oregon measure directly targeted and impugned homosexuality, requiring government entities to teach that homosexuality is "wrong, unnatural, and perverse."⁵¹ Colorado's Amendment 2, in contrast, did not expressly condemn homosexuality, but employed this distinctly more muted language:

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 or 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.⁵²

Turning away from the harshly anti-gay rhetoric that had characterized previous initiative battles, the campaign for Amendment 2 emphasized a "no special rights" theme that has since become a principal rallying cry for opponents of gay civil rights laws.⁵³ Rather than attacking homosexuality per se, many of Amendment 2's proponents stressed the illegitimacy of antidiscrimination laws covering sexual orientation. They argued that statutory protection is unwarranted because gay men and lesbians are insufficiently "like" other legally protected groups and because sexual orientation is insufficiently "like" other widely protected aspects of identity.⁵⁴ Building on this com-

51. Measure 9 provided in relevant part as follows:

(1) This state shall not recognize any categorical provision such as "sexual orientation," "sexual preference," and similar phrases that includes homosexuality, pedophilia, sadism or masochism. Quotas, minority status, affirmative action, or any similar concepts, shall not apply to these forms of conduct, nor shall government promote these behaviors.

(2) State, regional and local governments and their properties and monies shall not be used to promote, encourage, or facilitate homosexuality, pedophilia, sadism or masochism.

(3) State, regional and local governments and their departments, agencies and other entities, including specifically the State Department of Higher Education and the public schools, shall assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.

Oregon Laws 1995, ch. 1.

52. *Romer*, 116 S. Ct. at 1623.

53. See Samuel A. Marcossou, *The "Special Rights" Canard in the Debate Over Lesbian and Gay Civil Rights*, 9 Notre Dame J. L. Ethics & Pub. Policy 137 (1995); Schacter, 29 Harv. C.R.-C.L. L. Rev. at 293-94 (cited in note 39).

Oregon Laws 1995, ch. 1.

54. I discuss what I have called this new "discourse of equivalents" at greater length in Schacter, 29 Harv. C.R.-C.L. L. Rev. at 283 (cited in note 39).

parative structure, the "special rights" idea holds that gay men and lesbians neither "need" nor "deserve" the protection of antidiscrimination laws legitimately enacted to protect other groups, and the attempt to secure legislative protection thus amounts to a grab for privilege and advantage.

As I have previously argued at length, the coded rhetoric of "special rights" permits opponents of gay rights to tap into deep and powerful reservoirs of social anxiety and anger about other antidiscrimination laws based on race, gender, and disability—particularly affirmative action measures—even as these opponents claim to champion existing civil rights protections.⁵⁵ This represents a significant tactical shift, although it by no means filtered out of the Amendment 2 campaign all anti-gay rhetoric or animus, much of which was simply rechanneled into the new comparative arguments. For example, the leader of the Amendment 2 campaign argued that "gays are one of the most privileged groups in the country" and that "militant gays would create a whole new protected class of affluent, well-educated, sexually deviant power brokers. The true meaning of civil rights would never be the same."⁵⁶ Perhaps reflecting an assumption that the tactical shift in Colorado was a wise one that may have explained why Amendment 2 won, while the Oregon measure lost, post-Amendment 2 ballot initiatives became even more muted. An unsuccessful 1995 statewide initiative in Maine, for example, did not mention homosexuality at all; instead, it enumerated all the categories already protected under Maine's antidiscrimination law and forbade the state legislature from adding any new categories.⁵⁷

C. *The Romer Litigation*

Shortly after Colorado citizens approved Amendment 2 by a 54% to 46% margin, its constitutionality was challenged on several grounds. The trial judge issued an order enjoining the measure's enforcement, and the Colorado Supreme Court upheld that injunction ("*Evans I*"). A trial was held on the constitutionality of the initia-

55. *Id.* at 300-07.

56. Will Perkins, *Views on Gay Rights Conflict*, Denver Post 1D (Oct. 11, 1992).

57. See Sipchen, L.A. Times at A12 (cited in note 50). This strategy emulated a tactic used in Florida. The Florida measure never made it to the ballot because the Florida Supreme Court found that it violated that state's "single subject rule." See *In Re Advisory Opinion to Attorney General*, 632 So.2d at 1019-20.

tive,⁵⁸ and Amendment 2 was struck down as a result. The case then returned to the Colorado Supreme Court.

In its final decision ("*Evans II*"), the Colorado Supreme Court relied on the political process theory that it had first set out in the *Evans I* opinion sustaining the injunction. The court's theory was that Amendment 2 triggered strict scrutiny not because sexual orientation is a suspect classification, but because the initiative unconstitutionally infringed the "[fundamental] right to participate equally in the political process."⁵⁹ Amendment 2 did so, held the court, "by 'fencing out' an independently identifiable class of persons. . . ."⁶⁰ The court went on to elaborate its political process theory, explaining that Amendment 2

bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment. Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes.⁶¹

In support of this theory, *Evans I* relied upon cases about voting rights and election law,⁶² as well as cases placing limits on the use of direct democracy.⁶³

The most important case relied upon by the Colorado court, one from this second line of cases, was the Supreme Court's decision in *Hunter v. Erickson*.⁶⁴ *Hunter* invalidated an Akron city charter amendment that would have prevented the city council from implementing any ordinance regarding discrimination in housing based on race, religion, or ancestral origin unless the council first obtained a majority vote in a referendum. The *Evans I* opinion relied

58. At trial, testimony was taken from a wide array of witnesses, including some prominent classical philosophers who faced off on how to interpret ancient Greek texts on homosexuality. See generally Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 *Fordham Urban L. J.* 1057, 1070, 1078-79 (1994).

59. *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994) ("*Evans II*") (quoting *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) ("*Evans I*").

60. *Id.* (quoting *Evans I*, 854 P.2d at 1282).

61. *Id.* (quoting *Evans I*, 854 P.2d at 1285).

62. *Evans I*, 854 P. 2d at 1277-78.

63. *Id.* at 1279-82.

64. 393 U.S. 385 (1969).

upon broad language in *Hunter* about the unconstitutionality of disadvantaging "any particular group" in the political process. *Hunter*'s meaning had been sharply contested in the *Evans* litigation. Colorado had argued for a narrow reading of the opinion's language referring to "any particular group," treating *Hunter*, in which the plaintiff was African American, as a race case. The state read *Hunter* to apply only to groups already protected by strict scrutiny based on the separate suspect classification branch of equal protection doctrine. The plaintiffs, by contrast, situated *Hunter* within a line of cases concerned not specifically with race, but with group-based burdens on access to the political process that trigger strict scrutiny independent of race-based classifications.

D. *The Romer Majority Opinion*

The Supreme Court's grant of certiorari seemed likely to clear up the ambiguities in *Hunter* and the boundaries of equal protection doctrine protecting rights of participation in the political process. The six-justice *Romer* majority did not do so. Instead, the Court invoked a single, spare phrase in declining both to rely and to comment on the political process theory in its opinion.⁶⁵ Exactly what the Court substituted in place of the Colorado Supreme Court's political process theory is far from obvious on the face of the opinion, and this question seems destined to generate extended commentary. The notion that the future reveals what happened in the past always has force when it comes to saying what a case "means," for meaning is forged as legal texts are applied and interpreted over time. But this idea seems especially true in the case of the elusive *Romer* opinion, which is as notable for what it did not say as for what it did. I distill from the majority opinion four central points that provide a framework for exploring the case.

1. The Sweep of Amendment 2: "Ordinary Civic Life"

The majority opinion heavily emphasized the sweeping breadth of Amendment 2. The opinion is not long, but Justice Kennedy

65. The opinion first distinguished the two lines of cases marshalled by the Colorado Supreme Court in support of its political process theory, characterizing one line as "voting rights cases," and the other as "precedents involving discriminatory restructuring of governmental decisionmaking." 116 S. Ct. at 1624 (omitting citations). The majority then simply noted, without commenting upon the reach or meaning of these cases, that it was affirming the judgment below, "but on a rationale different from that adopted by the State Supreme Court." *Id.*

devoted a significant portion of it to this point. He characterized the terrain covered by Amendment 2 as embracing "an almost limitless number of transactions and endeavors that constitute *ordinary civic life* in a free society."⁶⁶ The opinion carefully catalogued the many private- and public-sphere activities as to which gay men and lesbians could seek no legal protection from discrimination, pointing to public accommodations, private and government employment, housing, health and welfare services, insurance, and real estate. All of these areas were, or could have been, the subject of municipal antidiscrimination laws that extended to sexual orientation. Moreover, the Court did not regard these identified spheres of "ordinary civic life" as exhausting Amendment 2's reach. Pursuing a theme foreshadowed by several questions asked in oral argument, Justice Kennedy's opinion also raised (but did not resolve) the possibility that the provision was so broad as to bar gay claimants from asserting rights under laws that make no mention of sexual orientation, including laws of general application, like laws forbidding "arbitrary discrimination."⁶⁷ Justice Kennedy then juxtaposed Amendment 2's expansive reach with the narrowness of the class on which it was focused, noting that the amendment paradoxically "identifies persons by a single trait and then denies them protection across the board."⁶⁸

2. Caste and the Unequal Protection of the Laws

Signalling another point of emphasis in the decision, Justice Kennedy began by dramatically quoting Justice Harlan's *Plessy v. Ferguson* dissent for the principle that the Constitution "neither knows nor tolerates classes among citizens."⁶⁹ Stressing the way that Amendment 2 singled out lesbians, gays, and bisexuals for explicitly disfavored legal treatment, the majority opinion characterized the provision as a "disqualification of a class . . . unprecedented in our jurisprudence,"⁷⁰ one that sought simply to make homosexuals

66. Id. at 1627 (emphasis added).

67. Id. at 1626. At the argument, several justices had queried Colorado's counsel about Amendment 2's potential reach. The justices asked, for example, whether Amendment 2 would permit public libraries to refuse to lend books to a gay patron or public hospitals to limit kidney dialysis to heterosexuals. See Tony Mauro, *This Argument Shed Little Light*, *Legal Times* 8 (Oct. 23, 1995).

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

69. Id. at 1623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

70. Id. at 1628.

"unequal to everyone else."⁷¹ Justice Kennedy repeatedly returned to the claim that Amendment 2 was *sui generis* in the far-reaching restrictions that it sought to impose only upon a single class of citizens.⁷² The opinion underscored Amendment 2's caste-like character by focusing on the formally unequal tiers of access to protective laws that the measure sought to codify.⁷³

In pursuing this theme, the justices in the majority appear to have been influenced by the argument offered by five prominent constitutional law professors who filed a brief *amicus curiae*.⁷⁴ This *amicus* brief argued that Amendment 2 amounted to a *per se* violation of the Equal Protection Clause, one so literal as to require no inquiry into the applicable level of scrutiny. The idea was that just as a state could not categorically disqualify one class of citizens from the protection of robbery or assault laws, so it was also inconsistent with the phrase "equal protection of the law" to make the protection of antidiscrimination laws off limits to a single group. Even if a state has no constitutional obligation to enact particular protective laws, the brief argued, it still may not, through the state constitution, limit who is eligible even to seek that legal protection. The majority opinion seemed to echo this point, albeit tersely and in somewhat cryptic terms, when it said, "[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*."⁷⁵

A closely related point, of course, lay at the heart of the political process theory relied upon by the Colorado Supreme Court. The core of that theory was that it was unfair to subject one group to a substantially more burdensome set of procedures (securing a constitutional amendment) than those available to everyone else (securing a piece of legislation). But the *Romer* majority declined to embrace that doctrinal expression of the point, perhaps fearing that to do so would cast doubt on too many policy decisions made through state constitutional amendments that have the effect of remitting adversely af-

71. *Id.* at 1629.

72. See, for example, *id.* at 1625, 1627.

73. For arguments placing an anticaste principle at the center of equal protection analysis, see *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("There is no caste here."); Cass R. Sunstein, *The Partial Constitution* (Harvard U., 1993); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Affairs* 107 (1976).

74. See Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as *Amici Curiae* in Support of Respondents, *Romer v. Evans*, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (available in LEXIS, Genfed Library, Briefs File).

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

ected groups to the amendment process for relief. The Court also rejected the unabashed proceduralism of the Colorado Supreme Court's opinion in favor of the per se argument, which can more readily be characterized as either substantive, procedural, or both,⁷⁶ and which, in any event, offered a more textually grounded way to address Amendment 2's unseemly hierarchy of equal protection rights and access to antidiscrimination laws.

3. Animus and Irrationality

A third principal point in the opinion relates to the justification and motivation for Amendment 2, which the Court addressed in applying the rational basis test. Although the opinion neither raised, nor claimed to resolve, the larger question of what level of scrutiny is appropriate for sexual-orientation-based classifications, the Court applied a rational basis standard to Amendment 2. The state had argued that several rational bases supported Amendment 2, including conserving the limited resources said to be available to enforce antidiscrimination laws; protecting the privacy and associational interests of landowners and religious institutions who do not want to open their facilities to gay men and lesbians; and securing the efficiency benefits of adopting a single statewide policy on gay civil rights laws rather than permitting local variation.⁷⁷

Focusing on the "sheer breadth"⁷⁸ of Amendment 2, the Court found its sweep to be "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."⁷⁹ Notwithstanding the notoriously forgiving quality of the rational basis standard and the exceedingly rare judicial willingness to find laws wanting under it,⁸⁰ the Court could find no justification for Amendment 2 other than anti-gay animus, and thus deemed the measure irrational.

76. See notes 148-49 and accompanying text.

77. See Brief for Petitioners at 41-48, *Romer v. Evans*, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (available in LEXIS, Genfed Library, Briefs File).

78. *Romer*, 116 S. Ct. at 1627.

79. *Id.*

80. The notable exceptions in the Supreme Court are *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), cases in which the Court applied a distinctly more demanding version of the rational basis test to invalidate restrictions on group homes for people with mental retardation, *Cleburne*, 473 U.S. at 446-50, and food stamp eligibility for unrelated members of the same household, *Moreno*, 413 U.S. at 534.

A doctrinal puzzle created by the rational basis discussion in the case may offer some guidance about the scope of the *Romer* animus principle. The puzzle is why the Court applied the rational basis test at all. Given the opinion's apparent embrace of the claim that Amendment 2 represented a "literal" equal protection violation,⁸¹ it is unclear why the court regarded itself as compelled to designate any level of scrutiny. Entrenched as that habit is in the Court's equal protection jurisprudence, the theory that Amendment 2 violated the plain terms of the Equal Protection Clause would seem to have obviated the need to conduct a level of scrutiny inquiry, as the amicus brief laying out the theory had indeed argued.⁸² The fact that the Court nevertheless applied rational basis as the standard of review in this case raises the question whether the "literal violation" and "animus" rationales are independent or interdependent. If they are independent of one another, why did the Court invoke both? If they are interdependent, in what sense?

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. That is, notwithstanding the uncertain relationship between these two rationales, it seems fair to draw from *Romer* at least this conclusion: laws reflecting so clear a desire to exclude and subordinate gay men and lesbians will be regarded with suspicion, even under the normally toothless rational basis review.

Indeed, *Romer*'s "animus" principle holds enormous promise for future gay equality litigation and could prove to be the decision's doctrinal blockbuster. But its meaning is uncertain. For one thing, the opinion invites interpretation about what constituted the anti-gay animus that doomed Amendment 2. Does the animus finding depend upon Amendment 2's breadth? If so, how will the Court measure the breadth of other anti-gay laws such as the ban on same-sex marriage, which seems destined to reach the Supreme Court before too long? On the one hand, denying gay people the right to marry is a more targeted prohibition than the sprawling Amendment 2. On the other hand, marriage laws are themselves striking for their breadth if one

81. See notes 68-75 and accompanying text.

82. See Amicus Brief at 3 (cited in note 74).

focuses on the formidable array of legal rights and benefits that flow from marriage.⁸³

The opinion also raises, but does not answer clearly, the critical question whether intolerance of homosexuality framed in terms of traditional values is the same thing as anti-gay animus. That is, when the majority opinion condemns Amendment 2 as unacceptably motivated by animus and the dissent defends it as wholesomely inspired by "moral disapproval of homosexual conduct,"⁸⁴ are Justices Kennedy and Scalia describing the same attitude but reaching different conclusions about the constitutional implications of this attitude? If so, then *Romer* spells very big trouble for anti-gay measures of all kinds, which are regularly defended in the name of traditional moral values. As *Bowers v. Hardwick* reflects,⁸⁵ in other doctrinal contexts the Supreme Court has frequently been willing to accept as the governmental justification for anti-gay laws nothing more precise, targeted, or verifiable than a cursory, seemingly self-justifying reference to this traditional condemnation of homosexuality. After *Romer*, it appears that something more than bare condemnation of homosexuality must be marshalled in defense of anti-gay measures challenged on equal protection grounds, but the opinion does not delineate exactly what that something is.

4. Rejecting "Special Rights"

The fourth point central to the majority's opinion is its apparent rejection of the "special rights" argument that has been the signature slogan of the organized opposition to gay civil rights for the last several years. The special rights idea, enthusiastically embraced in the dissent as an accurate description of Amendment 2, is representative of a contemporary species of political argument that invokes "special" as a term of opprobrium and appeals to a thin, but apparently beguiling, idea of egalitarianism.

The Court's observations on this issue came in the context of considering whether Amendment 2 might be constitutionally salvageable if read to bar only laws that protect against discrimination based on sexual orientation, as opposed to the broader reading of Amendment 2 as barring protection for gay men and lesbians under even laws of general application.⁸⁶ On this point, the Court said that

83. See note 22 and accompanying text.

84. See note 114 and accompanying text.

85. See notes 118-24 and accompanying text.

86. See notes 67-68 and accompanying text.

even if only sexual-orientation-specific laws were embraced by Amendment 2, the claim that such laws conferred "special rights" could not save it. First, the Court found that what was objectionably "special" was *not* the protections of antidiscrimination law, but the substantial and unique legal and political barriers erected by Amendment 2.⁸⁷ Beyond this reconfiguration of what was "special," the Court directly took on and rejected the logic of the special rights idea:

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.⁸⁸

Many gay-rights activists will, I suspect, count this passage among the opinion's most satisfying. Succinctly, if without helpful explication, the Court credits an idea long stressed by advocates of gay equality: antidiscrimination measures seek equality, not privilege. "Special" antidiscrimination laws are necessary to bring about equality only where there is a "special" history and pattern of discrimination.

5. Weaving the Pieces Together

How do these four points cohere, or do they? Justice Kennedy does little to link the components of the opinion into any clear, thematic rationale. Although I will reserve for the last Part of this Article the question of what the majority opinion might offer in terms of the dilemma of democratic equality, let me suggest at this point one means by which we might weave together these somewhat disparate points.

At the core of the *Romer* opinion seems to be a resistance to the categorical exclusion of a targeted group of citizens from the sphere of "ordinary civic life."⁸⁹ The decision does not mandate gay inclusion, of course, because it does not require that any antidiscrimination laws be enacted. But it does decisively reject a legal attempt to

87. The Court said that it could not "accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Romer*, 116 S. Ct. at 1626-27.

88. *Id.* at 1627 (emphasis added).

89. *Id.*

relegate and confine gay men and lesbians to the legal and social margins. Thus, *Romer's* powerful insight is not merely to notice the breadth of Amendment 2's exclusionary project (who could miss that?), but to connect that project to ideas about caste and anti-gay animus. By emphasizing Amendment 2's intrinsically caste-like qualities (those constituting a "literal" equal protection violation) and the anti-gay animus that inspired it (which leaves it with no rational basis as justification), the decision invites a connection between subordination, animus, and the social invisibility that characterizes gay inequality, which Amendment 2 would have raised to the level of state constitutional policy. The very connection of these elements, moreover, underscores what is problematic about the exclusion and subordination of gay people in ways that drain the "special rights" idea of its force.

E. The Romer Dissent

Justice Scalia's dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas, is a long and bitter one. It begins with an incendiary but seemingly misconceived German-language reference that accuses the Court's majority of "mistak[ing] a Kulturkampf for a fit of spite."⁹⁰ For reasons not explained, Justice Scalia apparently preferred a German language word for the American phrase "culture war" that he later twice uses in the opinion.⁹¹ The problem is that the German word does not translate as a contemporary American-style "culture war," but is instead a specific historical reference to the "struggle with the Catholic Church"⁹² waged by Bismarck in the late nineteenth century. This war included legislation criminalizing the discussion of public affairs by clerics and attempting to transfer to German agencies papal jurisdiction over the Catholic Church in Prussia.⁹³ The opening sentence in the dissent is quite puzzling if the term "Kulturkampf" is understood in this light,

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

91. *Id.* at 1637 (Scalia, J., dissenting) (arguing that courts should not "take sides in this culture war"); *id.* (Scalia, J., dissenting) ("[w]hen the Court takes sides in the culture wars"). The phrase "culture war" was made famous by, among others, presidential candidate Patrick Buchanan's speech to the 1992 Republican National Convention in Houston. Buchanan used the phrase to refer to contentious contemporary debates over social issues, including the place of homosexuality in American life. E.J. Dionne, Jr., *Buchanan Defends Focus on "Values"; Conservative Reasserts Convention Remarks*, Wash. Post A10 (Sept. 12, 1992).

92. Hajo Holborn, *A History of Modern Germany: 1840-1945* at 262 (Knopf, 1969); Helmut Walser Smith, *German Nationalism and Religious Conflict: Culture, Ideology, Politics, 1870-1914* at 19-49 (Princeton U., 1995).

93. Holborn, *History of Modern Germany* at 262-64 (cited in note 92).

for Justice Scalia would then be inexplicably characterizing Amendment 2 as a state-sponsored war against the Church, which the majority opinion has unfairly taken to be a fit of spite. It would be surprising, to say the least, to see Justice Scalia identify homosexuals, Amendment 2's target, with the Catholic Church, the Kulturkampf's target. Moreover, this error, if it is one, is both strange and troubling. Given that homosexuals were among the Holocaust's victims, a German language reference has particularly troubling resonations and is an unfortunate choice in this context.⁹⁴

Taking strong issue with the Court's characterization of Amendment 2's troubling breadth, the dissent saw it as a relatively modest measure, calling it "an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment."⁹⁵ In Justice Scalia's view, the amendment put to the electorate the simple question, "[s]hould homosexuality be given special protection?", to which the voters answered "no."⁹⁶

As this question reflects, the dissent, unlike the majority opinion, is framed in the express vocabulary of democracy. Sounding a theme later pursued in his dissent from a decision to vacate and remand in a constitutional challenge to a local charter amendment banning the Cincinnati City Council from enacting gay civil rights protections,⁹⁷ Justice Scalia strongly objected to the notion that Amendment 2 amounted to "electoral-procedural" discrimination⁹⁸ because it removed the decision whether to enact gay civil rights protections from cities like Aspen, Boulder, and Denver, and remitted it to the statewide electorate.⁹⁹ The dissent instead saw the Amendment as an unobjectionable change of democratic venue that is

94. See generally Erwin J. Haeberle, *Swastika, Pink Triangle, and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, in Martin Bauml Duberman, Martha Vicinus, and George Chauncey, Jr., eds., *Hidden From History: Reclaiming the Gay and Lesbian Past* 365-79 (New American Library, 1989) (discussing treatment of homosexuality in Germany between 1933 and 1945).

95. *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

96. *Id.* at 1634 (Scalia, J., dissenting).

97. *Equality Foundation of Greater Cincinnati Inc. v. City of Cincinnati*, 116 S. Ct. 2519, 2519, 135 L. Ed. 2d 1044 (1996) (Scalia, J., dissenting) (defending a city charter amendment barring municipal protection against discrimination based on sexual orientation and arguing that it "involves a determination by what appears to be the lowest electoral subunit that it does not wish to accord homosexuals special protection") (emphasis omitted).

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

99. Professor Zeppos suggests that a limitation of local antidiscrimination laws may raise questions about the right to travel. Nicholas Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 *Vand. L. Rev.* 445, 447-50 (1997).

fair game in a "multilevel democracy" and implicit in state constitutionalism.

Beyond this structural argument for letting voters mark the boundaries of the legal protections from discrimination available to a specified group, Justice Scalia argued that gay civil rights questions are not only *fairly*, but also *wisely* remitted to voters. Invoking a populist justification for direct democracy, the dissent characterized gay rights questions as reflecting a classic face-off between popular and elite forces. Apparently distancing themselves from the "elite class from which the Members [of the Court] are selected,"¹⁰⁰ the dissenting justices associated the view that discrimination based on sexual orientation is wrong with a small cadre of privileged, out-of-touch interests. Along these lines, for example, the dissent ridiculed the antidiscrimination policy adopted by the American Association of Law Schools as a "law-school view of what 'prejudices' must be stamped out" that stands far from the more "plebeian" views ascribed to the electorate at large.¹⁰¹ Framing the battle in these terms emphasized the wisdom of permitting voters to decide the question and conceived direct democracy as a way for the masses to reject views being imposed upon them by a small, concentrated elite.

Moreover, building on this charge of elitism, Justice Scalia strongly disputed any suggestion that gay men and lesbians cannot compete fairly in the democratic process. Taking direct aim at the Court's characterization of gay men and lesbians as a "politically unpopular group,"¹⁰² and its image of Amendment 2's exclusion of gay men and lesbians from "ordinary civic life in a free society,"¹⁰³ the dissent saw gay men and lesbians at the very political and cultural center. Consider this assertion: "[I]t is...nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2."¹⁰⁴ Along similar lines, the dissent described gay men and lesbians as "a politically powerful minority,"¹⁰⁵ a group with "high disposable income"¹⁰⁶ and as possessing "disproportionate political power."¹⁰⁷

100. Id. at 1629 (Scalia, J., dissenting).

101. Id. at 1637 (Scalia, J., dissenting).

102. Id. at 1628 (Scalia, J., dissenting) (quoting *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

103. Id. at 1627.

104. Id. at 1637 (Scalia, J., dissenting) (emphasis added).

105. Id. at 1629 (Scalia, J., dissenting).

106. Id. at 1634 (Scalia, J., dissenting).

Putting aside the inflammatory rhetoric and weak empirical predicate for these characterizations,¹⁰⁸ the contrast with the majority opinion is striking. Far from perceiving any political disadvantage or malfunction that might justify robust judicial review, the dissent painted a picture of elite affluence, influence, and power. The picture strongly evokes the political arguments emphasized by Amendment 2's proponents in the electoral campaign, particularly the special rights claim.¹⁰⁹ This characterization, in turn, is important from the vantage point of democratic theory, for it suggests among other things that the majoritarian political process is friendly and hospitable to gay interests. Indeed, the special rights emphasis and the anti-elitist theme in the dissent suggest that gay people have, if anything, excessive and unfair power that must be checked by the populace through means of direct democracy. The dissent never reconciled this view of vast gay political power with its later observation that gay men and lesbians have consistently lost in Congress on civil rights questions,¹¹⁰ but this notion nevertheless forms a central theme of the dissent's argument that there is nothing undemocratic about Amendment 2.

While the dissent most strongly emphasized its defense of the democratic process that spawned Amendment 2, the opinion also made two other conceptual points. First, it seemed to endorse not only the popular prerogative to decide the gay civil rights question but also the substantive merits of the voters' decision. At various points, Justice Scalia adopted a formal posture of substantive neutrality on the issue of gay civil rights. Quoting from a previous decision upholding a statute that conditioned federal voting rights on state prohibition of polygamous cohabitation,¹¹¹ he noted that decision's endorsement of traditional marriage, and added that he "would not [himself] indulge in such official praise for heterosexual monogamy, because [he] think[s] it is no business of the courts (as opposed to the

107. *Id.* at 1634 (Scalia, J., dissenting). See also *id.* (Scalia, J., dissenting) (asserting that homosexuals have "political power much greater than their numbers").

108. For an analysis challenging the blanket characterization of gay men and lesbian as wealthy, see Sherrill, 29 PS: Political Science and Politics at 471-72 (cited in note 27).

109. I review these arguments at length in Schacter, 29 Harv. C.R.-C.L. L. Rev. at 291-94 (cited in note 39).

110. The persistent loss on civil rights legislation does not stand alone in the realm of federal legislative policy. Organized gay political interests also recently lost by a wide margin in opposing both the "Don't Ask, Don't Tell" policy, see Clifford Krauss, *With Caveat, House Approves Gay-Troops Policy*, N.Y. Times A15 (Sept. 23, 1996), and the Defense of Marriage Act, see Schmitt, N.Y. Times at A1 (cited in note 13).

111. *Romer*, 116 S. Ct. at 1636-37 (Scalia, J., dissenting) (citing *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885)).

political branches) to take sides in this culture war."¹¹² At another point, he said that he did "not mean to be critical of [the] legislative successes [won by homosexuals at the local level]."¹¹³ These assertions ring hollow, however, in light of other passages in the dissent. For example, it is hard plausibly to view Justice Scalia as indifferent on the place of homosexuality in American life when he says:

First, as to [Amendment 2's] eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as Unamerican. Of course, it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely, that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.¹¹⁴

Appearing to place homosexuality on a moral par with murder, ridiculing the notion that discrimination based on homosexuality might be deemed objectionable,¹¹⁵ and evoking the "love the sinner, hate the sin" notion associated with the Catholic Church, all belie the stance of neutrality claimed in the dissent. Claims of substantive neutrality seem similarly unpersuasive in light of the dissenting opinion's contemptuous incredulity at the notion that sexual orientation discrimination might be deemed to deserve the same legal treatment as discrimination based on race or religion,¹¹⁶ and the seething umbrage expressed on behalf of the voting majority that enacted Amendment 2.¹¹⁷

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

113. *Id.* at 1634 (Scalia, J., dissenting).

114. *Id.* at 1633. Elsewhere in the dissent, Justice Scalia appears to credit the view that homosexuality is a moral scourge. See *id.* at 1629 (characterizing Amendment 2 as "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").

115. This ridicule is also evident in the passage skewering the American Association of Law Schools nondiscrimination policy. See *id.* at 1637 (Scalia, J., dissenting). See also note 101 and accompanying text.

116. *Id.* at 1629 (Scalia, J., dissenting) (castigating the Court's majority for "plac[ing] the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias").

117. *Id.* (Scalia, J., dissenting) (ridiculing notion that "animosity" toward homosexuality is "evil"); *id.* at 1637 (Scalia, J., dissenting) (accusing majority of "insulting" the voters of Colorado by "verbally disparaging [Amendment 2] as bigotry"); *id.* at 1633 (Scalia, J., dissenting) (asserting that the majority's suggestion that Coloradans have "fallen victim to pointless, hate-filled 'gay-bashing' is so false as to be comical").

A second conceptual point stressed by the dissent is a defense of the constitutionality of Amendment 2 based on the Supreme Court's 1986 decision in *Bowers v. Hardwick*, which upheld the constitutionality of Georgia's antisodomy law.¹¹⁸ The dissent's argument on this point was simple: if the state may constitutionally criminalize homosexual sodomy, then it follows that the state must also be permitted to deny antidiscrimination protections to gay men and lesbians. The majority opinion conspicuously said nothing about *Bowers*, and the attractive target created by that silence drew repeated barbs from Justice Scalia. In maintaining its silence on *Bowers*, the justices in the majority chose neither to expressly overrule that case (as we may well one day say that *Romer* did *sub silentio*), nor to offer any of several possible responses to Justice Scalia's point.¹¹⁹ The majority opinion might, for example, have noted that *Bowers* did *not* uphold the constitutionality of criminalizing *all* homosexual conduct, but only sodomy as defined by Georgia law;¹²⁰ that not all those who regard themselves, or are regarded by others, as gay within the broad language of Amendment 2 necessarily engage in sodomy;¹²¹ that *Bowers* might be read to apply to *all* sodomy prohibitions, whether directed at homosexual acts, heterosexual acts, or both, and thus to have no bearing on an equality-based challenge, as distinct from a privacy-based challenge;¹²² or that the privacy principles at issue in *Bowers* have a different purpose and scope than the equality principles at issue in *Romer*.¹²³ In the end, however, *Bowers* was the case that dare not speak its name, and *Romer* left substantial lingering questions about the continuing vitality of that case and thus about *Romer's* own reach.¹²⁴

118. *Id.* at 1631-33, 1636 (Scalia, J., dissenting). With less emphasis but no less vociferousness, the dissent also attacks the majority opinion as fatally inconsistent with previous rulings upholding laws regulating polygamy. *Id.* at 1636-37 (Scalia, J., dissenting).

119. As Professor Eskridge argues in his contribution to this Symposium, the majority's silence on *Bowers* may have prudential value. William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 Vand. L. Rev. 419, 426 (1997).

120. See, for example, Feldhlum, 57 U. Pitt. L. Rev. at 288-91 (cited in note 33); Hunter, 27 Harv. C.R.-C.L. L. Rev. at 543 (cited in note 18).

121. This status/conduct distinction is reviewed at length in Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Va. L. Rev. 1551 (1993); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L. Rev. 503 (1994); Hunter, 27 Harv. C.R.-C.L. L. Rev. at 543-46 (cited in note 18).

122. See Hunter, 27 Harv. C.R.-C.L. L. Rev. at 531-46 (cited in note 18).

123. 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).

124. For an early judicial reaction, see *Nabozny*, 92 F.3d at 458 n.12 (arguing that *Bowers* "will soon be eclipsed in the area of equal protection" by *Romer*).

III. TWO STANDARD ACCOUNTS OF DEMOCRATIC EQUALITY

What does *Romer* suggest about the dilemma of democratic equality? How can our understanding of that dilemma be enriched by situating the problem of gay inequality within the framework of democratic theory? We can put these questions in perspective by first identifying the dominant accounts of democratic equality in constitutional theory and then exploring why neither one proves compelling.

A. *Constitutional Brakes and Process Perfection*

Two characteristic approaches to democratic equality suggest themselves. Both accounts are such venerable parts of the constitutional canon that, for our purposes, they require little detailed elaboration. First, the most standard and straightforward account of democracy and social equality is to conceive of democracy in majoritarian terms and to embrace without apology the notion that the Constitution imposes frankly antidemocratic limits on majority prerogatives, including the Equal Protection Clause. The famous, if overworked, "countermajoritarian difficulty" arises because democracy is equated with majoritarianism and courts that invalidate majority-endorsed legislation are thereby thwarting the democratic will. In a constitutional (as opposed to purely majoritarian) democracy, it is said, courts may apply brakes on democracy because, in some circumstances, constitutional values outweigh democratic values.¹²⁵ The majority may be thwarted in enacting legislation that creates or entrenches certain inequalities, but thwarted in the name of *constitutionalism*, not democracy. On this account of democratic equality, the central question is the scope and reach of the antidemocratic trump card. How expansive is the Equal Protection Clause and does it properly override the majority's will in a given circumstance? Because equality norms function as a brake on democracy, we can say that this theory sees social equality as *exogenous* to democracy. By contrast only political equality is *endogenous* to democracy under conventional majoritarian theory. Political equality is an open-textured concept that is deployed by different theorists in very different ways,¹²⁶ but Charles Beitz, a leading theorist, characterizes as the "most widely

125. On the complex tensions inherent in the concept of "constitutional democracy," see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 701-06 (1995).

126. See generally Charles R. Beitz, *Political Equality: An Essay in Democracy Theory* x (Princeton U., 1989) ("[T]here is no consensus about the meaning of this principle.").

held view" the notion that "democratic institutions should provide citizens with equal procedural opportunities to influence political decision."¹²⁷ Thus, on the dominant view, political equality is formal, or procedural, and focuses on institutional dimensions of the electoral process. Requirements like universal adult suffrage or one-person, one-vote are examples of political equality principles that are generally viewed as endogenous to majoritarian democracy.¹²⁸

Contrast a second standard view, one famously adopted in footnote four of the *Carolene Products* decision and elaborated in the subsequent work of John Hart Ely through his "representation-reinforcing" theory of judicial review. The Elyist approach most decisively changes the terms of the debate and departs from the standard majoritarian/constitutionalist paradigm by reconceiving social equality (at least in some form) as *endogenous* to democracy. Building upon the judicial solicitude for "discrete and insular minorities" reflected in footnote four,¹²⁹ Ely recast constitutional equality protections as consistent—not in tension—with democracy by identifying inequality born of social "prejudice" as democracy's nemesis. Positing that

127. *Id.* at 12. Beitz goes on to criticize the traditional view "because it too readily identifies the abstract ideal of political equality with the more precise, institutional standard of *procedural* equality and because it wrongly portrays the latter as an unambiguous and univocal requirement." *Id.* at 16.

128. I intend the endogeneity/exogeneity distinction I am drawing to capture the structure of arguments within the traditional framework of majoritarian/constitutionalist theory. It is important to recognize, however, that political equality claims that are more aggressive than those accepted by conventional theory may challenge this distinction for two reasons. First, some more demanding principles of political equality can verge on, or at least implicate, ideas about social equality. See, for example, Lani Guinier, *Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 102-05 (Free Press, 1994) (arguing that the Voting Rights Act embodies statutory norms of political equality that require representation of historically marginalized interests). Compare J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *Colum. L. Rev.* 609, 636-42 (1982) (arguing that free speech principles should be interpreted to permit expanded campaign finance laws that counter wealth disparities and enhance the quality of political debate because "equality is part of the central meaning of the first amendment"). Second, the relationship between the Constitution and democratic theory is complex, for constitutional norms shape the very architecture of the American political system and thus necessarily play an explicit role in *defining*, rather than simply *limiting*, majoritarian democracy. For example, the requirements of one-person, one-vote and universal adult suffrage—now widely acknowledged to reflect minima of formal political equality—were imposed through the Constitution. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 *U. Pa. L. Rev.* 1391, 1392 n.6, 1421 (1993). The constitutional pedigree of political equality principles suggests, however, that not *all* such principles can be categorically regarded as endogenous to majoritarian democracy, for some of these principles may be claimed to violate majority will, and thus themselves represent constitutional brakes on majoritarian democracy.

129. See note 4.

“prejudice is a lens that distorts reality,”¹³⁰ Ely enlisted judges in the enterprise of political process perfection—that is, in self-consciously correcting for the ways that prejudice compromises the democratic process.¹³¹ Ely counted among these compromising effects, for example, the outright exclusion or underrepresentation of certain minority interests in “the pluralist’s bazaar” that constitutes the political process,¹³² and the creation of policies therefore skewed by the bias that infects them. Seen in these terms, equality-enhancing judicial review *enables* democracy rather than applies a brake on it.

Ely’s approach was particularly influential and it will be the focus in my analysis because it is paradigmatic in the way that it captures a broad conceptual approach to reconciling democracy and equality. Ely’s approach, however, is not unique in this regard. Other theories also frame process-perfecting principles of judicial review intended to address problems of democratic inequality. For example, we can understand some versions of civic republicanism in this way. Civic republicans characteristically stress the centrality of deliberation to democracy and argue that politics should represent a constructive, public-regarding dialogue in which all groups participate as “political equals.”¹³³ Like Ely, civic republicans respond to the pathologies they perceive in pluralist politics by generating principles of judicial review designed to counter these imperfections,¹³⁴ and, like Ely, the civic republican theories have a distinctly procedural cast.¹³⁵

Each of these two standard frameworks is problematic. Neither, in my view, powerfully captures *Romer’s* potential contribution to the problem of democratic equality.

B. Romer as a Constitutional Brake on Democracy?

Within a framework equating majoritarianism with democracy, we might understand the *Romer* decision as flatly antidemo-

130. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 153 (Harvard U., 1980).

131. *Id.* at 73-104. See generally *Symposium on Democracy and Distrust: Ten Years Later*, 77 Va. L. Rev. 631 (1991).

132. Ely, *Democracy and Distrust* at 152 (cited in note 130).

133. Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L. J. 1539, 1550 (1988). See generally *Symposium: The Republican Civic Tradition*, 97 Yale L. J. 1493 (1988) (essays analyzing and critiquing republican model).

134. See Sunstein, 97 Yale L. J. at 1579-81 (cited in note 133).

135. See Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 Duke L. J. 561, 568-78 (arguing the procedural character of civic republicanism). Where Ely charges judges with locating the absence of fair representation in the political process, the republicans ask judges to correct for the absence of the ideal political dialogue upon which their aspirational vision of democracy is based.

cratic because it rejected the will of the voting majority in Colorado's 1992 election, but as nevertheless justified by the force of a countervailing constitutional principle of social equality that trumped democracy. The majority and the dissent can be read to agree on this conceptual approach to the question—and thus to share a perception of social equality as exogenous to democracy—but to disagree vigorously about whether this case presented an appropriate occasion for applying the constitutional brake.

As a descriptive matter, this approach may well reflect how the justices in the majority would, if asked, set out their own analysis of democracy and equality. None of the majority's arguments was offered as vindicating democratic values. Instead, the opinion set out reasons why Amendment 2 violates the Equal Protection Clause and then built a case for why the Court is justified in limiting the electorate's prerogative. As for Justice Scalia, he could not have made any clearer his claim that the Court's decision thwarted what he regarded as the important democratic prerogative to choose moral standards. The difference is that Justice Scalia thought the Court did so without a legitimate countervailing justification.

As a normative grounding for *Romer* and a theory of democratic equality, however, this approach has significant weaknesses. Even on its own terms, majoritarianism is subject to powerful critique. That is, even granting the premise that formal political equality is all that democratic theory should demand, majoritarianism is assailable because it categorically places the imprimatur of "majority support" on all enacted legislation without any critical inquiry about the extent to which a law can or does necessarily reflect majority sentiments.¹³⁶ Amendment 2 and the dynamics of direct legislation nicely reflect why that critical inquiry is important, although direct democracy is by no means the only context in which these problems surface.¹³⁷ The process by which the electorate comes to understand ballot measures is riddled with opportunities and incentives for strategic manipulation of information that can and does mislead voters.¹³⁸

136. For an extended analysis of the descriptive shortcomings of majoritarianism, see Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577 (1993).

137. In the legislative context, public choice theorists have pointed out, for example, the ways in which problems like agenda setting and cycling call into question the conclusion that enacted legislation necessarily reflects the will of a legislative majority. See generally Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988). For more general critiques of the standard equation of majoritarianism with democracy, see, for example, Erwin Chemerinsky, *Foreword—The Vanishing Constitution*, 103 Harv. L. Rev. 43, 74-77 (1989); Friedman, 91 Mich. L. Rev. at 628-53 (cited in note 136).

138. I discuss these problems at length in Schacter, 105 Yale L. J. at 107 (cited in note 8). See also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503, 1513-22 (1990).

I have argued that anti-gay-rights initiatives like Amendment 2 are promoted in ways that confuse voters about the effect and meaning of the initiatives.¹³⁹ Specifically, the "special rights" theme plays on voter confusion between antidiscrimination laws and affirmative-action measures.¹⁴⁰ Indeed, in a recent dissertation about Amendment 2, Evan Gerstmann studied public-opinion polling done in Colorado before and after passage of the initiative.¹⁴¹ That polling revealed that, contrary to the outcome of the vote on Amendment 2, there appeared to be high public support for the notion that people should not be denied a job or housing based on sexual orientation.¹⁴² Based on analysis of polling data and focus-group interviews, Gerstmann, like several participants in the Amendment 2 campaign whom he interviewed, linked the majority vote for Amendment 2 in the face of this contrary data to voter antipathy for affirmative action.¹⁴³ It thus appears that Amendment 2's proponents succeeded in inducing voters to believe that Amendment 2 was principally about affirmative action, and to conflate affirmative action with antidiscrimination laws.

Moreover, it is problematic to regard ballot initiatives (like other laws) as necessarily commanding continuing majority support once they are enacted. Doing so ignores important temporal factors. As Barry Friedman has pointed out, laws often represent, at best, a static snapshot of public sentiment that cannot account for the ways in which that sentiment is dynamic, changing, and always in flux.¹⁴⁴ Given the formidable costs and difficulties associated with mounting a ballot measure, this problem is a substantial one in the arena of direct democracy because many questions will not be revisited at the ballot box.¹⁴⁵

(criticizing the plebiscite as a means of representing the genuine voice of the people). In addition, the phenomenon of low voter turnout and high voter "drop off" on ballot questions (that is, high rates at which voters vote for candidates on the ballot but do not vote on initiatives) raise important questions about what a majority of voters represent a majority of.

139. Schacter, 105 Yale L. J. at 156-59 (cited in note 8); Schacter, 29 Harv. C.R.-C.L. L. Rev. at 300-03 (cited in note 39) (discussing "special rights" language as a tool used to confuse voters).

140. See notes 53-57 and accompanying text.

141. Evan Gerstmann, *At the Constitutional Crossroads: Gays, Lesbians and the Failure of Class Based Equal Protection* 179-83 (1996) (unpublished Ph.D dissertation at the University of Wisconsin-Madison, on file with the Author).

142. *Id.* at 180-81.

143. *Id.* at 182-89.

144. See Friedman, 91 Mich. L. Rev. at 640-42 (cited in note 136).

145. See generally Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* 64-66 (Harvard U., 1989) (discussing high cost of efficient means for securing necessary signatures to place initiative on ballot).

But for our purposes, the far more significant problem is precisely the premise that conventional majoritarianism grants: the premise that formal political equality is all democratic theory ought to demand. Defining democracy solely with reference to formal requirements like universal adult suffrage or one-person, one-vote is impoverished because it brackets some of the very questions that should be central.¹⁴⁶ To the extent that democracy, properly understood, depends upon some conception of political equality, it does so in order to ensure the fair and equal allocation of opportunities to participate in and shape collective decisions.¹⁴⁷ But formal political equality is a bad proxy for the equal distribution of opportunities for democratic influence. We simply cannot know very much about who exercises democratic influence, and to what extent, if we insist upon indifference to the background, or substantive, inequalities that shape political communities. Inequalities in wealth, social power, and cultural representation bear significantly upon the opportunity to influence collective decisions, but none of these is noticed on the conventional account of majoritarian democracy. Put differently, the problem with positing that democracy requires only formal political equality is the failure to consider the *conditions* in which democracy operates, and thus the failure to account for the ways that these conditions can either enable or sabotage democratic aspirations. Conceptions of democracy that require only formal political equality thus suffer from the characteristic problems of formal equality theories more generally: failing to appreciate that formal equality in a context of substantive inequality tends to reproduce the underlying inequalities and to make putatively "equal" opportunities much more valuable to some than to others.

146. There are, of course, vital and contested questions about what the requirements of formal political equality should be. See notes 126-28 and accompanying text. My argument is not intended to diminish the importance of generating more robust conceptions of formal political equality, but only to highlight the problems of limiting the democratic inquiry to institutional questions alone.

147. One need not accept the most demanding accounts of democratic equality to see the power of this proposition. Consider the simple formulation of Robert Dahl, a canonical democratic theorist, in his later work examining the implications for democracy of economic inequality: "opportunities to exercise power over the state, or more concretely over the decisions of the government of the state, are, or at any rate ought to be, distributed equally among all citizens." Robert A. Dahl, *Democracy and Its Critics* 325 (Yale U., 1989). For other helpful discussions, see Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* 95-119 (Princeton U., 1996); Simon, *Democracy and Social Injustice* at 143-71 (cited in note 5).

C. Romer as Process Perfection?

The *Romer* majority decision might alternatively be explained as judicial process perfection in the style of Elyist representation reinforcement. Perhaps the Court sought to even out a political process that it viewed as unfairly stacked against sexual minorities by virtue of Amendment 2's passage.

Descriptively, it is hard to find support in the *Romer* opinion for this attribution of Elyism. To the contrary, the majority was quite explicit in rejecting the political process theory that had formed the core of the Colorado Supreme Court's holding,¹⁴⁸ and in doing so, the *Romer* majority bypassed a clear opportunity to use *Hunter* to create a doctrinal toehold for process perfection. And while Ely signed the apparently influential amicus brief submitted by constitutional law professors, it takes some work to convert the argument offered in that brief into the grammar of representation reinforcement. The conversion works, in fact, only at a high level of abstraction. As a matter of fair process, all groups should be unfettered in their right to seek the equal protection of the law, and no process can be justified if it selectively places protective laws out of the reach of disfavored groups. But, as discussed above, the Ely construct is decidedly procedural in nature, while the per se argument has important substantive dimensions. The latter argument seems to place an equality-based limit on electoral prerogatives (no categorical disqualification from eligibility for legal protection) that applies irrespective of the particular democratic processes that produce it and the social status of the group that may be harmed by it.¹⁴⁹

As a descriptive matter, it is also difficult to restate the majority's rational basis discussion in the terms of representation reinforcement. We might well see the majority's finding of irrational anti-gay animus as evoking Ely's distorting lens of prejudice,¹⁵⁰ but nothing in the opinion characterizes this animus in terms of its procedural effects. On the contrary, the doctrinal punch of *Romer* is precisely that it seems to treat anti-gay animus, standing alone, as a *substantively* unacceptable basis for laws, without regard to procedures.

148. See note 65 and accompanying text.

149. While the character of the per se argument is not entirely clear, viewing it through the lens of both substance and procedure does, at the very least, underscore that the distinction between the two is fuzzy and subject to easy manipulation.

150. Ely, *Democracy and Distrust* at 153 (cited in note 130).

Moreover, whether or not the *Romer* majority had any element of Elyism in mind, the process-perfecting theory of judicial review has its own well-rehearsed normative shortcomings. It is more attractive than the majoritarian view because it complicates and thickens democracy by making some measure of social equality endogenous, rather than exogenous, to democracy. Yet the approach founders on a different axis: substance versus procedure. Ely aggressively offered his theory in procedural terms and argued that it could be applied without requiring judges to make value-laden substantive distinctions that he regarded as institutionally unsuited to courts. But this is exactly the point on which Ely has proven most vulnerable.¹⁵¹ Ely has been widely criticized for the notion that equality principles can disclaim any substantive dimension. Several critics pursuing this line of argument have suggested that Ely simply chose the *wrong set* of substantive principles to anchor his notion of political malfunction. By doing so, these critics have underscored the ways in which Ely's vision of process is itself rooted in contestable substantive ideas. For example, Ely focuses heavily on ferreting out illicit legislative motives, but as Neil Komesar has argued, political malfunctions may arise by virtue of inequalities of information, resources, or organization, without regard to any specific showing of legislative prejudice or ill-will toward a particular group.¹⁵² Bruce Ackerman has likewise argued for criteria more sensitive to structural inequalities.¹⁵³

Moreover, even taking at face value Ely's criteria for identifying process imperfections, other critics have pointed out that substantive criteria or norms must guide judges in applying the principles of representation reinforcement and determining when a law is the product of an Elyist distorting lens of prejudice, making it fair game for judicial override.¹⁵⁴ *Romer*, in fact, draws us back to Laurence

151. See Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 Va. L. Rev. 721, 722 n.6 (1991).

152. Komesar also criticizes Ely on other grounds. He argues that structural inequalities can create both *majoritarian* and *minoritarian* forms of bias, and challenges Ely for addressing only the problem of powerless minorities (majoritarian bias), while ignoring the problem of powerful minorities (minoritarian bias). Komesar also faults Ely for looking only at the defects in the political process, while failing to undertake a comparative institutional analysis that also considers defects and limits in the adjudicative process. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 198-215 (U. of Chicago, 1994).

153. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 713 (1985) (arguing that diffuse and anonymous groups can require more judicial solicitude than the discrete and insular groups of footnote four).

154. See Ortiz, 77 Va. L. Rev. at 742-44 (cited in note 151) ("Any attempt to identify process imperfections ultimately must employ substantive judgments."); Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 Ohio St. L. J. 223, 236-39 (1981); Laurence H.

Tribe's well known critique of Ely's proceduralism, in which Tribe argued that substantive criteria are needed to distinguish between homosexuals (who pose a strong case for representation-reinforcing judicial review) and burglars (who do not).¹⁵⁵ The *Romer* dissent might be read to restate this "burglar" problem as the "murderer," "animal abuser," or "polygamist" problem. Recall Justice Scalia's argument that political majorities ought to be as free to condemn homosexual conduct as they are to condemn murder, animal cruelty, or polygamy.¹⁵⁶ By raising these putative parallels, albeit not in the context of an Elyist argument, Justice Scalia recalls Tribe's critique of Ely: courts cannot avoid making substantive distinctions by seeking refuge in value-free procedural ideas, and the application of proceduralist rules requires drawing value-laden lines.¹⁵⁷ As Justice Scalia's argument suggests, moreover, the inevitability of drawing value-laden lines is not limited to the context of Elyist argument. Although different doctrinal frameworks and conceptual structures may be advanced to resolve constitutional questions about laws creating or maintaining gay inequality, none convincingly allows courts *entirely* to sidestep questions of substance.

The problem with Ely's equality principle, in other words, is that its assertedly procedural character leaves it without an answer to the cases of animal abuse, murder, and polygamy invoked by Justice Scalia. A strong theory of democratic equality needs a framework for addressing issues like these. A robust egalitarian democracy may, indeed, marginalize and disadvantage murderers as a group, but only for defensible reasons. Substantive distinctions are unavoidable. Some lines that courts might draw between homosexuality and the other contexts raised by Justice Scalia are morally agnostic (emphasizing Mill's "harm" principle);¹⁵⁸ others are rooted in conceptions of morality denominated as such (emphasizing the social

Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063, 1075-76 (1980).

155. Tribe, 89 Yale L. J. at 1075-76 (cited in note 154). Along similar lines, see Paul Brest, *The Substance of Process*, 42 Ohio State L. J. 131, 135-37 (1981) (discussing burglar and homosexual distinction).

156. See note 114 and accompanying text.

157. To the extent that the brief submitted by Tribe and other constitutional law professors is properly characterized in proceduralist terms, see notes 148-49 and accompanying text, it is an ironic turn given Tribe's well-known critique of Ely as avoiding the resort to substance that Tribe argued to be inevitable.

158. See John Stuart Mill, *On Liberty* 92 (Penguin, 1978) (arguing for liberty where "a person's conduct affects the interests of no persons besides himself").

good and moral value of homosexual love).¹⁵⁹ The framework most appropriate for making these distinctions should, in my view, resist the inevitability of a sharp dichotomy between these two lines of inquiry. It ought to be relevant to equality principles that homosexual love *both* lacks Millian negative qualities (because the case for its "harm" to the community is weak) *and* strongly furthers positive, constitutive values in the lives of gay men, lesbians, and the community of which they are a part. Undoubtedly, some boundary questions are more complex than others. For example, animal abuse and murder are more obviously distinguishable from homosexuality than is polygamy, although there are powerful distinctions to be made in the case of polygamy given the historical linkage between polygamy and equality-undermining patriarchy.¹⁶⁰ But for our purposes, the important point is that it is a fair critique of Ely that his failure both to acknowledge the necessary resort to substance and to elaborate his guiding substantive commitments leaves his theory of representation reinforcement deficient as an approach to democratic equality.¹⁶¹

IV. A DIFFERENT DIRECTION: EXPANDING DEMOCRACY'S DOMAIN

Against these two standard accounts, *Romer* can point us in some new directions for thinking about democratic equality. The distinctive dynamics of gay inequality, when considered within a framework of democracy, reveal some important but underdeveloped ideas by throwing into relief the democratic implications of social

159. See, for example, Feldblum, 57 U. Pitt. L. Rev. at 330-34 (cited in note 33) (arguing the moral virtues of homosexual love); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 533-38 (1989) (setting out the line of argument that "articulates the virtues of homosexual intimacy").

160. If polygamy is viewed entirely in the abstract, and as a matter of sexual autonomy and personal choice, it might be appropriately analogized to homosexuality or, more specifically, to same-sex marriage. But ignoring the context in which polygamy has been practiced would obscure crucial points. As Maura Strassberg has recently noted, the history of polygamy is overwhelmingly one of polygyny (men with multiple wives), not one of polyandry (women with multiple husbands), and polygamy has most frequently been part of strongly patriarchal systems and inspired by overtly patriarchal norms. Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage* (forthcoming 1997). Framing polygamy solely in the abstract terms of liberty therefore masks the inequalities that have accompanied its use and the ways in which polygamy has been enmeshed with problems of gender subordination. This context makes it highly problematic to protect polygamy in the name of equality ideals and suggests some fundamental differences between homosexuality and polygamy.

161. Many of these same problems surface in debates of political theory about substantive versus procedural conceptions of democracy, and there is considerable overlap. See generally Cohen, *Procedure and Substance in Deliberative Democracy*, in Benhabib, ed., *Democracy and Difference* at 95-119 (cited in note 147).

exclusion. I have discussed the principal existing approaches in terms of two axes: endogenous/exogenous and procedural/substantive. My analysis has found the two standard approaches wanting, and has suggested the promise of seeing social equality as endogenous to democracy (unlike the constitutional brake framework, but like the process-perfection approach), and as a matter of substantive and not exclusively procedural democratic commitment (unlike either the constitutional brake or process-perfection frameworks).

Let me suggest a third axis: one that distinguishes between democracy's *vertical* and *horizontal* dimensions.¹⁶² In the sense in which I use the word, "vertical" questions focus on what democratic theory requires in core elements of the formal political process. Last term's cases about voting rights¹⁶³ and campaign finance,¹⁶⁴ for example, represent vertical inquiries that test the depth of principles about fair representation and election procedures, institutional principles that are widely regarded as central to the democratic process. Indeed, the *Hunter* political process theory relied on by the Colorado Supreme Court likewise concerns a vertical dimension of democracy. Contrast with this vertical perspective a horizontal inquiry, one that engages the question of democracy's domain and explores the role of democratic ideas and practices in social spheres of collective life beyond the political process. The horizon I have in mind radiates from the formal, institutional, political process and reaches social aspects of our collective public life that we conventionally distinguish from politics.¹⁶⁵ Unlike the earlier distinctions (exogenous/endogenous and substance/procedure), this one should not be regarded as an either/or proposition. The vertical dimensions of democracy are plainly central to any serious discussion, and, indeed, I do not mean to suggest that the vertical dimensions of democracy are unimportant in the struggle for gay equality. Instead, this distinction is useful not

162. These terms are alluded to in Simon, *Democracy and Social Injustice* xx-xxi (cited in note 5) (distinguishing between "the vertical depths" and the "horizontal sweep" of democracy).

163. *Bush v. Vera*, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996).

164. *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996).

165. On the centrality of a public/private distinction in theories of liberal democracy, see David Trend, *Democracy's Crisis of Meaning*, in David Trend, ed., *Radical Democracy* 11 (Routledge, 1996). Much of what I say in this section also has relevance for the market, which is similarly subject to a horizontal democratic analysis of this kind. For an exploration of economic inequality and democratic theory, see Joshua Cohen and Joel Rogers, *On Democracy: Toward a Transformation of American Society* 47-71 (Penguin, 1983). Although economic inequality is relevant to the lives of many gay men and lesbians, I do not focus on it here because it is not a characteristic that unites the group in the way that coerced invisibility does.

only in understanding *Romer* but in highlighting that there *are* horizontal dimensions of democracy that are easily obscured by the habits of an exclusively vertical focus.

Viewed in the horizontal perspective, Amendment 2 is objectionable because it is an engine of social disenfranchisement. It entrenches the legally and socially coerced invisibility, as well as the associated subordination and stigmatization, of gay men and lesbians. This disenfranchisement has democratic implications which, once identified, suggest some important insights about democratic equality. We can distinguish two distinct senses in which the social disenfranchisement of gay men and lesbians undermines democratic equality; one is relatively modest, the other more bold. Each reflects a separate horizontal dimension of democracy, and I want to defend both.

First, social disenfranchisement corrodes the fairness of the political process by selectively hampering the ability of gay citizens and groups to achieve or influence preferred political outcomes. This claim about democracy's horizontal dimensions is relatively modest because it links social inequality to the formal political process. Maintaining a social regime of coerced gay invisibility inhibits and burdens political organization and advocacy because it prevents gay men and lesbians from demonstrating their political strength in the ways that interest group politics has traditionally rewarded. In his critique of the constitutional protection afforded only "discrete and insular" minorities under the *Carolene Products* formula, Bruce Ackerman argued that homosexuals, as an *anonymous* minority, are politically disadvantaged in potent ways by that anonymity; gay political organizers must induce "each anonymous homosexual to reveal his or her sexual preference to the larger public and to bear the private costs this public declaration may involve."¹⁶⁶ To borrow Robert Dahl's formulation about economic inequality, the social disenfranchisement of gay men and lesbians thus leads to unequal distribution of "opportunities to exercise power over the state."¹⁶⁷

This first horizontal dimension of democracy should not be highly controversial. Indeed, even Justice Scalia seems tacitly to

166. Ackerman, 98 Harv. L. Rev. at 731 (cited in note 153). See also Hunter, 27 Harv. C.R.-C.L. L. Rev. at 547-48 (cited in note 18). Compare Sherrill, 29 PS: Political Science and Politics at 472-73 (cited in note 27) (exploring the political "[c]osts of [b]eing [b]orn into a [d]iaspora").

167. See note 147 and accompanying text. Kenneth Sherrill expresses this in terms of lacking access to political "resources." Sherrill, 29 PS: Political Science and Politics at 469 (cited in note 27) ("[The] quest for political power is disadvantaged by barriers to the formation of political community as well as by lack of access to significant power resources.").

accept the proposition that factors like cultural or economic power are relevant to questions of democratic fairness. His reference to asserted gay "influence" in the media, though caricatured and provocative, signals an implicit recognition that social factors matter in measuring political power.

Indeed, if this were the extent of democracy's horizontal dimensions, then Ely also had this perspective. Recall his emphasis on how prejudice "distorted reality" and thus undermined a fair political process.¹⁶⁸ But Ely's horizontal perspective was both limited and flawed. By limiting his analysis to instances of bad legislative motives, he missed structural factors that, quite apart from discrete instances of ill will, limit the political resources and opportunities available to groups. Invisibility burdens gay political organizing and strength, in other words, in ways that do not depend upon showing bad legislative intentions in a particular case.¹⁶⁹ Similarly, by justifying his theory solely in proceduralist terms, he failed to ground his approach in its necessary substantive commitments.¹⁷⁰ This void left his theory unable to offer any framework by which gay claims to social equality could be distinguished from similar claims made on behalf of burglars (or polygamists, or others).¹⁷¹ The approach I am sketching, by contrast, accepts the need to draw value-laden lines within a guiding vision of social equality.

The second horizontal dimension of democracy reflects a more controversial idea. There are ways in which the social sphere can *itself* be conceived as a political domain and thus have neglected implications for democratic ideas and practices.¹⁷² The regime of

168. See notes 130-32 and accompanying text.

169. See Ackerman, 98 Harv. L. Rev. at 731 (cited in note 153); Komesar, *Imperfect Alternatives* at 60 (cited in note 152) ("The behavior of massive and complex social institutions is only tenuously related to the motives of the individual participants.").

170. Some versions of civic republicanism may likewise be criticized for failing to acknowledge and engage questions of substance. For a critique along these lines, see Kathleen M. Sullivan, *Rainbow Republicanism*, 97 Yale L. J. 1713 (1988).

171. See notes 151-61 and accompanying text.

172. Arguments to extend the scope of democratic theory and practice in this direction may be found in Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton U., 1996) (collecting essays exploring the reach and contours of democratic theory); Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press, 1992) (arguing for democratization of civil society); Chantal Mouffe, *Radical Democracy or Liberal Democracy?*, in David Trend, ed., *Radical Democracy* (Routledge, 1996) (calling for "extension of the democratic ideals of liberty and equality to more and more areas of social life" and arguing "to use the symbolic resources of the liberal democratic tradition to struggle against relations of subordination in not only the economy but also those linked to gender, race, or sexual orientation, for example"). Many political theorists exploring the horizontal reach of democracy respond to or build upon the influential work of Jürgen Habermas, and particularly Habermas's concern with the processes of "political opinion-and will-formation." Jürgen Habermas, *Between*

coerced gay invisibility helps to reveal these implications by drawing our attention to the difficult question of what it means to be *governed*. Democratic theory, though contested and fractured in contemporary debates, has at its core some notion of consensual, collective self-determination about the rules and norms under which citizens live.¹⁷³ The dynamics of gay inequality suggest that, contrary to conventional political theory, laws and formal policies are not the only communal judgments that operate to shape people's lives in powerful ways, and thus should not be uncontroversially regarded as the only forms of governance that implicate democratic ideals. Laws are coercive in unique and sometimes brutal ways,¹⁷⁴ but they do not exhaust the universe of collective social regulation. Social norms and the cultural meanings that are attached to particular actions and identities also have regulatory qualities. These non-legal forces powerfully affect people's lives, both indirectly (by shaping formal legal rules) and directly (by creating the more diffuse social rules under which we live).¹⁷⁵ If we mean to take seriously the importance of creating a meaningful equality of opportunity for political influence as part of democratic practice,¹⁷⁶ then we are obliged to ask the question: influence over what? Seeing governance and collective self-determination as a larger and more fluid enterprise points to a broader range of what we can think of as opportunities for "normative influence" that is broader than that which democratic theory conventionally assumes. Put differently, if formal law is not the only mode of social regulation that exercises significant power over citizens, then it is problematic for democratic theory to ignore categorically this expanded range of opportunities for normative influence. Thinking in

Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 298 (MIT Press, 1996). As I discuss below, however, the horizontal dimension of democracy that I urge neither assumes nor depends upon the dialogic ideals associated with Habermas and other theorists of deliberative democracy. See notes 181-85 and accompanying text.

173. See, for example, Dahl, *Democracy and Its Critics* at 326 (cited in note 147).

174. See generally Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4, 40 (1983) (arguing that law operates "in the shadow of coercion" and that courts are "jurispathic").

175. On the formation of social norms generally, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 917 (1996) ("In a way social norms reduce freedom, understood very broadly as the power to do whatever one would like to do."). Sunstein specifically discusses the ways in which social norms can entrench or reduce social inequalities. See *id.* at 908. For an exploration of the complex links between laws and social norms, see Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. Pa. L. Rev. 2055 (1996).

176. Seeing political equality in terms of equal opportunities for political influence obviously has important implications for democracy's "vertical" dimensions, most clearly in the realm of campaign finance reform. See generally *Symposium on Campaign Finance Reform*, 94 Colum. L. Rev. 1125 (1994).

these terms suggests that social inequalities can *be*—as opposed to only *cause*—democratic inequalities.

When we view the social sphere in this way, the antidemocratic implications of the regime of coerced gay invisibility become clearer. Social disenfranchisement and caste-like practices severely limit the ways in which gay men and lesbians can participate in and influence not only lawmaking processes, but also the more diffuse, yet quite powerful, processes of collective deliberation that take place in the social sphere. What people know and think about homosexuality is necessarily influenced by the social experiences and images available to them. Prevailing cultural representations and discursive frameworks regulate how people understand the world around them, and critically structure social norms and cultural meanings. The social sphere—*Romer's* domain of “ordinary civil life”—is an arena in which uncodified social norms, like those about homosexuality, are forged based on available cultural and epistemological resources.¹⁷⁷ Maintaining a regime of invisibility, in turn, powerfully shapes social knowledge about homosexuality by leaving anti-gay attitudes and animus unchallenged. Opinion polls, for example, reflect that people who know openly gay people are much more likely to tolerate and support gay rights and are much less likely to possess the anti-gay animus that *Romer* found underlying Amendment 2.¹⁷⁸ Coerced invisibility thus works to reinforce gay inequality.

Romer's stance against caste and the banishing of gay men and lesbians from ordinary civic life invites us to consider the democratic implications of coerced social absence. In her recent book *The Politics of Presence*,¹⁷⁹ Anne Phillips argues that democratic theory has traditionally been concerned with a “politics of ideas,” but that its underlying notion of ideological diversity and representation has recently been supplanted by a “politics of presence,” which is instead concerned with identity group diversity and representation.¹⁸⁰ Phillips's

177. I have explored this subject in greater detail in Schacter, 110 Harv. L. Rev. at 715-17 (cited in note 34), and Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 618-26 (1995) (discussing “reconstructionist” theories of democracy and underlying ideas about epistemological pluralism). On the centrality of narrative strategies to the gay rights struggle, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 516-37 (1992).

178. See Schacter, 29 Harv. C.R.-C.L. L. Rev. at 313 (cited in note 39).

179. Anne Phillips, *The Politics of Presence* (Oxford U., 1995).

180. *Id.* at 1-26. Demands for “presence”—in the political and social arenas—are vulnerable to critiques of identity essentialism, to the extent that such demands crudely assume a necessary and singular link between identity and ideas, such that gay presence is deemed sure to bring with it a monolithic set of distinctively gay ideas and contributions. See generally *id.* at

book focuses on the formal political process, and in that sense it stops short of the expanded, horizontal domain of democracy that I address here. But the animating idea of presence as relevant to democratic thought is at the core of what I find so powerful in the *Romer* opinion: some recognition of the devastating consequences of the social erasure and marginalization of gay lives.

My focus on the democratic character of the social sphere and the diffuse processes that generate public opinion has affinities with some of the themes stressed by theorists of deliberative democracy.¹⁸¹ Frank Michelman, in particular, has specifically addressed the problematic social exclusion of gay men and lesbians in terms of civic republican theory.¹⁸² But there is an important distinction between my call to recognize the democratic implications of socially disenfranchising gay men and lesbians and the premises associated with strong theories of deliberative democracy: one need not share the deliberative democrat's belief that contemporary American public culture can be reconstituted as an ideal, public-regarding, political dialogue in order to see the democratic virtues of rejecting the regime of coerced gay invisibility. Widening the frame of politics to encompass social disenfranchisement carries with it no necessary belief in the normative or empirical strength of idealized models of collective deliberation. Indeed, in the context of sexuality debates, it would be naive to think that increased gay visibility would always be received with empathy or understanding from other citizens. The contested contemporary character of gay visibility itself suggests that

9 (discussing the problematic "search for authenticity" created by identity-based politics). More nuanced ideas about "presence" are beginning to emerge, however, and ideas like these can move beyond categorical assumptions about groups while still retaining a strong claim for presence. See, for example, David A. Hollinger, *Postethnic America: Beyond Multiculturalism* (Basic Books, 1995) (arguing that advocates of multiculturalism must reconsider some elements of the doctrine but continue to welcome different ethical and racial backgrounds); Martha Minow, *Not Only For Myself: Identity, Politics and Law* (forthcoming 1997).

181. For leading contributions, see Habermas, *Between Facts and Norms* at 298 (cited in note 172) (on "political opinion-and will-formation"); Frank Michelman, *Law's Republic*, 97 Yale L. J. 1493, 1533 (1988) (arguing for the normative priority of "social plurality" in deliberative democracy); Sunstein, 97 Yale L. J. at 1580-81 (cited in note 133) (linking republican aspirations, but not republican traditions, to antisubordination norms).

182. In challenging the *Bowers* ruling based upon his interpretation of civic republicanism, Frank Michelman argued against sodomy laws on these grounds:

[A]mong the effects of a law like Georgia's on persons for whom homosexuality is an aspect of identity is denial or impairment of their citizenship, in the broad sense which I have suggested is appropriate to modern republican constitutionalism: that of admission to full and effective participation in the various arenas of public life. It has this effect, in the first place, as a public expression endorsing and reinforcing majoritarian denigration and suppression of homosexual identity. It also—and for my purposes more interestingly—denies citizenship by violating privacy.

Michelman, 97 Yale L. J. at 1533 (cited in note 181) (footnotes omitted).

this will not be so.¹⁸³ Gay visibility does and should bring a range of images into the public domain, including images that transgress traditional gender roles in ways that will disturb and alienate some. Moreover, some people are hostile to homosexuality in ways and for reasons that visibility will not dislodge.

My claim does not assume an empathetic political mindset or a self-conscious communal commitment. I argue, more narrowly, that coercing social invisibility shapes public understandings and beliefs, as well as laws, about homosexuality in ways that deny gay men and lesbians full and meaningful participation in the ongoing normative enterprise that is a central part of collective life. The invisibility regime has left the available public iconography of homosexuality impoverished in ways that bear centrally upon how homosexuality is understood and assigned public meaning, and that powerfully function to reinforce normative heterosexuality. Increasing gay presence and participation in social life is a vitally important way to expand the public imagination about the meaning of homosexuality. For example, making more visible the lives of diversely configured gay families or the many gay men and lesbians engaged in a wide array of life pursuits can, by multiplying the available public images of homosexuality, change for some citizens the very concept of what it means to be gay or lesbian. Indeed, whether or not change takes place at any conscious level,¹⁸⁴ disrupting the invisibility regime can enrich the base of social experience and knowledge in ways that will enhance democracy.¹⁸⁵

In sum, a principal and distinctive characteristic of gay inequality is disenfranchisement from arenas in which knowledge, norms, and meanings are collectively negotiated. These public deliberations, though not conventionally denominated as "politics," are an important aspect of the public processes that generate legal and social rules about homosexuality, as well as many other aspects of life. Yet the democratic implications of these processes have been neglected. Although *Romer* was not cast in terms of an expanded democratic domain, the opinion recognized the way that Amendment 2 socially disenfranchised gay men and lesbians and thus used the Equal

183. See notes 27-41 and accompanying text.

184. See Fajer, 46 U. Miami L. Rev. at 524-27 (cited in note 177) (discussing the phenomenon of "preunderstanding" and attitudes toward gay men and lesbians).

185. The fact that citizens would not necessarily regard themselves as engaging in political activity in "horizontal," non-institutional settings might be problematic for building new ideas about democracy. See Kathryn Abrams, *Law's Republicanism*, 97 Yale L. J. 1591 (1988). One of the challenges of building an expanded democratic domain is to think about ways to generate support for the notion that "ordinary civic life" has significant democratic dimensions.

Protection Clause to protect a horizontal dimension of democracy as I have described it here.¹⁸⁶ Viewed from this perspective, *Romer* encourages us to reconsider the conventional understanding of political participation and representation, to explore the consequences of excluding gay men and lesbians from the complex collective processes that generate social meanings, and to take seriously the ways in which coerced invisibility limits the ability of gay men and lesbians to participate in the broader enterprise of governance.

It is fair to ask whether this is a better reading of *Romer*—one that improves upon an interpretation that focuses more straightforwardly on the constitutional brake on majoritarian democracy that the Court seemed to be applying. Additionally, one may ask if there is any reason to think that a court unwilling to accept a (vertical) *Hunter* theory would embrace the horizontal participational norms that I have suggested. Perhaps the best way to understand what I see as the important possibility *Romer* opens is that it challenges us to develop and deepen the links between equal protection, social equality, and democracy in the horizontal terms I have sketched out. This challenge can be part of a large and difficult but important effort to generate more complex ways of thinking about democracy. Branding all that is majoritarian as necessarily democratic ignores the powerful legitimating force of democracy as a concept. Thus, it is problematic to rely on constitutional constructs that concede that judicial invalidation of equality-undermining laws is antidemocratic, even if justifiably so. By contrast, generating more demanding concepts of equality and participation and situating them within claims about democracy have promise, in the long run, to serve better those who continue to struggle for equality and social justice. *Romer*, in this and other ways, is very much a beginning and not an end.

While I have sketched out some directions for thinking about how the Equal Protection Clause might figure into an evolving jurisprudence more sensitive to issues of democratic equality, many important questions need to be addressed in developing these ideas further. One task is to begin to disaggregate and explore further the

186. The Equal Protection Clause is by no means alone as a constitutional route to the presence I am describing. The First Amendment, in particular, also has a central role to play in enriching the public imagery of homosexuality. For arguments rooted in the First Amendment, see generally, Lisa Duggan and Nan D. Hunter, *Sex Wars: Sexual Dissent and Political Culture* (Routledge, 1995); Cole and Eskridge, 29 Harv. C.R.-C.L. L. Rev. at 319 (cited in note 20). But as Amendment 2 and *Romer* reflect, the Equal Protection Clause has an important role to play in creating conditions for democracy in ways that the free speech protections, standing alone, cannot achieve.

“social sphere” to which I have referred, and to consider how democratic norms should apply to social life. For example, my reading of *Romer* raises the question of how other kinds of social disenfranchisement (race- or gender-based, for example) or other forms of non-political disenfranchisement (economic, for example) translate into ideas about democratic equality.¹⁸⁷ The litigation challenging the anti-affirmative-action initiative passed by California’s voters in 1996 may provide some important early insights into this question.¹⁸⁸

More fundamentally, the social sphere as an operative concept in democratic theory is by no means self-defining. The related concept of “civil society” has been deployed in work on democracy and democratization, but it, too, has its ambiguities.¹⁸⁹ Because Amendment 2 and *Romer*’s image of ordinary civic life are my focus, I have centered on arenas of collective social life addressed by traditional antidiscrimination laws. I have meant particularly to include nominally private spheres made public for some purposes by their coverage in such laws, including workplaces, housing units, businesses providing credit and insurance, and other public accommodations, in addition to more uncontroversially public settings, like schools.¹⁹⁰ My purpose has been to explore the democratic character of these settings, but it would be unwise to use antidiscrimination laws as an exclusive point of reference for defining those areas of collective

187. Professor Abrams’s contribution to this Symposium considers invisibility and inequality in other contexts. Kathryn Abrams, *The Supreme Court, Visibility, and the “Politics of Presence”*, 50 *Vand. L. Rev.* 411 (1997).

188. See Tim Golden, *U.S. Judge Blocks Enforcing of Law Over Preferences*, *N.Y. Times* A1 (Dec. 24, 1996) (discussing initial stages of litigation challenging the initiative).

189. For example, two recent works exploring links between civil society and democracy define civil society in different ways. Jean Cohen and Andrew Arato offer a descriptive definition of the term. See Cohen and Arato, *Civil Society and Political Theory* at ix (cited in note 172) (“We understand ‘civil society’ as a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication.”). By contrast, Ernest Gellner insists that the term be more normative. Ernest Gellner, *Conditions of Liberty: Civil Society and Its Rivals* 211 (Hamish Hamiltan, 1994) (“Civil Society is a notion which serves a double function: it helps us understand how a given society actually works, and how it differs from alternative forms of social organization. It is a society in which polity and economy are distinct, where polity is instrumental but can and does check extremes of individual interest, but where the state in turn is checked by institutions with an economic base; it relies on economic growth which, by requiring cognitive growth, makes ideological monopoly impossible.”). See also *id.* at 5-6 (criticizing definition that posits civil society as antidote to domination by the state but does not contemplate other potential sources of domination). Many contemporary accounts build on the work of Alexis de Tocqueville. See Alexis de Tocqueville, *Democracy in America* (Knopf, 1945).

190. Of these areas, the workplace has been most subject to theorizing about democracy. See Carole Pateman, *Participation and Democratic Theory* 45-66 (Cambridge U., 1970); Simon, *Democracy and Social Injustice* at 244-46 (cited in note 5).

social life that should be embraced within an expanded conception of democracy. Focusing only on these contexts would be underinclusive in omitting important arenas not subject to conventional antidiscrimination laws—some large and diffuse, such as the realm of mass media and popular culture;¹⁹¹ others small and highly concentrated, such as the realm of the family.¹⁹² At the same time, employing antidiscrimination law as a benchmark would also be overinclusive in light of the Supreme Court's 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.¹⁹³ In that case, the Court rejected the application of a state antidiscrimination law to compel the organizers of the St. Patrick's Day parade in Boston to include a contingent of gay, lesbian, and bisexual marchers.¹⁹⁴ By upholding the expressive liberties of the parade organizers, *Hurley*, which was decided only a year before *Romer* and was unanimous, suggests at the very least that *Romer* cannot be understood to stand for an undifferentiated democratic right to gay social presence.¹⁹⁵ Thus, *Romer* and the context in which it arises bring to the foreground some of democracy's horizontal dimensions by rejecting the exclusion of gay men and lesbians from ordinary civic life, but cannot generate any exhaustive or universal definition of those aspects of social life that may be proper objects of democratic theory. The inquiry may shift in important ways in different circumstances.

This leads me to a final, but important point. In analyzing *Romer*, I have focused on the role of courts in developing constitutional principles of democratic equality. As *Romer* itself suggests, courts, by virtue of their structure, political insulation, and reflective

191. See, for example, Jim Cullen, *The Art of Democracy: A Concise History of Popular Culture in the United States* (Monthly Review Press, 1996); Douglas Kellner, *Television and the Crisis of Democracy* (Westview Press, 1990); Benjamin Page, *Who Deliberates? Mass Media in Modern Democracy* (U. of Chicago, 1996).

192. See Cohen and Arato, *Civil Society and Political Theory* at 538-41 (cited in note 172); Susan Moller Okin, *Justice, Gender, and the Family* 134-70 (Basic Books, 1989); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983).

193. 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

194. 115 S. Ct. at 2351.

195. Contrast *Hurley* with other first amendment cases decided by lower courts that affirm a notion of gay "presence" by recognizing the right of gay student groups on college campuses to be recognized. *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1553 (M.D. Ala. 1996) (holding that statute that prohibits state college from spending public funds on groups that "foster" or "promote" a lifestyle or actions prohibited by sodomy laws is unconstitutional); *Gay Lib v. University of Missouri*, 558 F.2d 848, 854-55 (8th Cir. 1977) (finding that refusal of university to recognize homosexual student group violates the First Amendment); *Gay Students Organization of Univ. of New Hampshire v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974) (holding that a university's prohibition against gay organization's social functions violates the First Amendment).

capacities, have an important role to play in identifying and helping to secure *the conditions* of democracy as they interpret open-textured constitutional commands like the Equal Protection Clause. But the judicial role is decidedly limited and constrained in several ways. It is surely a mistake to expect judges to exercise what Michael Klarman calls a "heroic countermajoritarian function."¹⁹⁶ Courts are significantly constrained by the presence or absence of social consensus; it is exceedingly difficult, for example, to imagine the Supreme Court deciding *Romer* before the Stonewall riots. In addition, courts see only a tiny number of cases in relation to the massive scale of politics.¹⁹⁷ And constitutional interpretation only goes so far.

Consider *Romer* itself. The decision removes a formidable obstacle in the path of gay civil rights laws, but it does not mandate that any such laws be enacted. That battle must be fought in the legislative arena. If gay civil rights laws are to play an important role in eradicating the coerced invisibility and continuing subordination of gay men and lesbians, the political process will have to play an important role in bringing that about. There are also significant functions here for the market. In fact, an increasing number of corporate employers are adopting antidiscrimination policies in the absence of laws, and IBM recently joined a growing list of companies offering domestic partnership benefits (like health insurance coverage) to gay employees and their partners.¹⁹⁸

The vision of democratic equality I have sketched out, moreover, must go beyond the realm of rules, for laws and policies of any kind can play only a partial role in more fully enfranchising gay men and lesbians in collective social life. The media and other forms of popular culture, for example, are involved in powerful though complex ways in shaping public understandings and social knowledge, and they must also figure centrally in securing democratic equality for gay men, lesbians, and others still relegated to the American social margins.¹⁹⁹

It is important to think about these multiple arenas because it helps to clarify the distinctive yet inevitably partial role for courts. It also suggests that the ideas about democratic equality I have set out

196. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 2, 6 (1996). See also Komesar, *Imperfect Alternatives* at 198-215 (cited in note 152).

197. Komesar, *Imperfect Alternatives* at 213, 260 (cited in note 152).

198. See *Gay Rights, Corporate Style*, Bus. Week 170 (Oct. 7, 1996).

199. See Schacter, 110 Harv. L. Rev. at 723-30 (cited in note 34).

are not ideas only about the Equal Protection Clause and the way it should be understood. Instead, the very notion that democracy's domain extends horizontally beyond the formal political process means that ideas about democratic equality need to be engaged in many spheres simultaneously. In the end, *Romer* can powerfully enable, but cannot itself deliver, meaningful democratic equality for gay men and lesbians.