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READING ENTRAILS: ROMER, VMI AND THE ART OF DIVINING EQUAL PROTECTION*

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I. INTRODUCTION

Two equal protection cases decided by the Supreme Court in 1996, *Romer v. Evans*¹ and *United States v. Virginia*² (“VMI”), were the special focus of media coverage. Both of these cases were characterized as fraught with *political* significance far beyond their respective facts and as the vehicles through which the Supreme Court might well force a reconceptualization of cultural norms. The Court would accomplish this reconceptualization by broadly redrawing the fundamental legal rules governing the way in which society, through its legal institutions, can behave toward women and sexual minorities.

With these cases, the Court has managed both to satisfy and disappoint these expectations. The *decisions* in these cases were fairly direct and easy to understand. In *Romer*, six justices³ held that even the most benign standard of equal protection had been offended by a popularly adopted amendment to the Colorado Constitution, which repealed all previous ordinances that protected homosexuals and prohibited “all legislative, executive or judicial actions at any level of state or local government designed to protect . . . ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships.’”⁴ In *VMI*, seven justices⁵ held that equal protection had been offended by the gender discrimina-

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1995 Supreme Court Term*, at The University of Tulsa College of Law, December 6, 1996. In order to keep as close to the original flavor of the remarks, the text has been edited sparingly and footnotes have been added.

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

2. 116 S. Ct. 2264 (1996).

3. Justice Kennedy, writing for the Court, was joined in the judgment by Justices Stevens, O'Connor, Souter, Ginsburg and Breyer.

4. *Romer*, 116 S. Ct. at 1623 (quoting COLO. CONST. art. II, § 30(b)). Justice Scalia, joined by Justice Thomas and the Chief Justice, filed a colorful dissent.

5. Justice Ginsburg wrote the majority opinion, and was joined by Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. Justice Rehnquist concurred in the judgment. Justice Thomas took no part in the deci-

tory actions of the State of Virginia through one of its institutions of secondary education, the Virginia Military Institute ("VMI"), and that its offense was not cured by the state's insistence that the alternative arrangements it made were adequate.⁶

The *opinions* in these cases, however, are neither straight forward nor clear. Neither case provided the context for jurisprudential revolution. And indeed, the majority in neither case expressly indicated any inclination to engage in jurisprudential revolution-making.⁷ However, in both cases, the Court chose to speak oracularly, mysteriously, and open-endedly. In the end, the only people who can be truly happy with the *opinions* in the cases, other than the winners in each of the cases, are litigators, and (of course) law professors like me! Both cases appear to permit the inference that any number of legal, political or social policies have now been approved (and others discredited), but neither case provides any definitive answer. In both cases, the Court has also taken what had been relatively straight forward legal theory and complicated, perhaps muddled, the legal analysis thoroughly. As a consequence, like the suppliants at the ancient oracle at Delphi⁸ or the devotees of the daily astrological predictions in the newspaper, the professorate, lawmakers and litigants who will try to effectuate what they think has been propounded can safely refer to the cases to justify their positions, no matter how irreconcilable their positions might be. Ultimately, the decisions are good for business. They will keep the populace guessing, keep everyone's hopes up that something (or nothing) has changed, and keep the inferior courts busy.⁹

sion and Justice Scalia filed a dissent.

6. See *VMI*, 116 S. Ct. at 2287.

7. Notwithstanding the dissents' whinings to the contrary. See *Romer*, 116 S. Ct. at 1629-1637 (Scalia, J., dissenting); *VMI*, 116 S. Ct. at 2294 (Scalia, J., dissenting).

8. The oracle of Apollo was found at the ancient Greek city of Delphi. "Legend has it that, four days after his birth on Delos, Apollo came to Delphi. After shooting the guardian dragon, Python, he took possession of the oracular seat for himself. Through his priestess, the Pythia, Apollo uttered prophesies received from his father, revealing Zeus's will to mankind." ALEXANDER LIBERMAN, GREECE, GODS AND ART 21 (1968). A Delphic utterance is still defined as obscure in meaning or ambiguous.

9. And busy they have been, despite the newness of these decisions. For cases relying on *Romer*, see *Richenberg v. Perry*, 97 F.3d 256, 260 n.5 (8th Cir. 1996) (military discharge under "don't ask, don't tell" policy; in resisting effort to apply heightened scrutiny to the discharge the *Richenberg* court noted that the "Supreme Court applied rational basis review in reviewing a state constitutional amendment adversely affecting homosexuals"). See also *Nobozny v. Podlesny*, 92 F.3d 446, 457 n.12 (7th Cir. 1996) ("Of course *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court's holding in [*Romer*]."); *Able v. U.S.*, 88 F.3d 1280, 1292 (2d Cir. 1996) (declining to reach the merits of a constitutional challenge and suggesting that *Romer* may be important in determining "the appropriate level of scrutiny to be applied to equal protection cases").

For cases relying on *VMI*, see *Women Prisoners v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996) (holding fewer programs for female inmates than for male inmates consistent with the Fourteenth Amendment under *VMI*); *Cohen v. Brown Univ.*, 101 F.3d 155, 183 n.22 (1st Cir. 1996) (holding that exceptions to law of the case doctrine did not apply to invalidate decision of prior panel in this gender discrimination action, supporting that determination, in part, by arguing that *VMI* "adds nothing to the analysis of equal protection challenges to gender based classifications that have not been part of that analysis since 1979."); *Engineering Contractors Ass'n v. Metropolitan Dade County*, 943 F. Supp. 1546, 1556 (S.D. Fla. 1996) (in a challenge to Dade County's Black, Hispanic, and Women Business Enterprise Programs, the court "cannot say for certain whether the Supreme Court intended that the *VMI* decision signal a heightening in scrutiny of gender-based classifications").

It is in this context that I will first explore the rhetorical teasings of *VMI* and then survey the magisterial ambiguity of *Romer*.

II. UNITED STATES V. VIRGINIA

VMI is a particularly interesting case, because for the first time the Supreme Court was asked to confront the issue of the legal relationship of the sexes within the context of American core political parameters. This wasn't any old single-sex academy; *VMI* was the archetype of *the* model of academy (as a philosophical and political construct) on which our Republic was built. It represented the implementation of the wisdom our founding parents distilled from one of their cultural heroes—Machiavelli.¹⁰ Recall the mission of *VMI*, a state supported, all-male institution since its founding in 1839—to develop “citizen-soldiers” who would be prepared for leadership in civilian life and military service.¹¹ That only 15% choose careers in military service¹² might be considered irrelevant; most graduates went on to assume positions of prominence in American society. But that is the point of *VMI*. The institution was meant to serve as a sorting device; it served as the pool from which the elite could be drawn. It is no surprise, then, that *VMI* enjoyed a substantial reputation because of the accomplishments of its alumni.¹³ However, this elite choosing machine did not include women. Who in 1839 but the ghost of Abigail Adams would

10. Nicolo Machiavelli was widely known at the time of the American Revolution for, among other things, his defense of the notion of a citizen militia as the bedrock of a stable defense of a republic. See, e.g., NICOLO MACHIAVELLI, *THE ART OF WAR*, reprinted in *THE CHIEF WORKS AND OTHERS* 561, 563-65 (Allan Gilbert trans., 2d ed. 1965) (1512). Machiavelli argued:

[N]o principality is secure without having its own forces; on the contrary, it is entirely dependent on good fortune, not having the valour which in adversity would defend it. And it has always been the opinion and judgment of wise men that nothing can be so uncertain or unstable as fame or power not founded on its own strength. And one's own forces are those which are composed either of subjects, citizens or dependents; all others are mercenaries or auxiliaries.

See NICOLO MACHIAVELLI, *THE PRINCE*, reprinted in *23 GREAT BOOKS OF THE WESTERN WORLD* 3, 21 (Mortimer Adler ed. & W.K. Marriott trans., 1952) (1513).

George Washington, in urging the creation of a military academy, similarly noted that a thorough examination of the subject will evince that the art of war is at once comprehensive and complicated; that it demands much previous study; and that the possession of it, in its most improved and perfect state, is always of great moment to the security of a nation. This, therefore, ought to be a serious care of every government.

George Washington, Message to Congress, in *13 THE WRITINGS OF GEORGE WASHINGTON* 344-51 (Worthington C. Ford ed., 1889-93) (1795), reprinted in *3 THE ANNALS OF AMERICA* 604, 605 (1968).

11. See *VMI*, 116 S. Ct. at 2269. *VMI* uses an “adversative” method to instruct its students, constantly trying to instill mental and physical discipline in them. The adversative model features “[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.” See *id.* at 2270 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)). From its establishment in 1839, *VMI* had been supported by the State of Virginia, and subject to the control of the state legislature. *Id.* at 2270.

12. See *id.*

13. See *id.* at 2269. These included various national leaders. As a result, *VMI* enjoyed tremendous alumni support. At the time of the litigation, *VMI*'s endowment was the largest per-student of all public undergraduate institutions in the Nation. See *id.* at 2269-70.

have thought otherwise?¹⁴ The model questioned in the 1990s had been "industry standard" for over 175 years.

But as Justice Scalia observed (to *his* chagrin), the times they are a-changing.¹⁵ And so, with *VMI*, we (and the courts) are again, as has so often happened since the Great Depression, presented with the problem of *change*. Have we changed? Is the change real? Does the change affect our institutions? Must we modify our institutions to accommodate the change? If so, how? The Virginia legislature could (or should) have addressed these questions and acted accordingly as a representative of the people. It did not, or not quickly enough.

As a result, in 1990, the United States sued Virginia and *VMI*, asserting that their exclusion of women from admission to *VMI* violated the Equal Protection Clause of the Fourteenth Amendment.¹⁶ Although some experts at trial pointed out the benefits of having a co-ed *VMI*, the District Court ruled in favor of *VMI*.¹⁷ The Fourth Circuit reversed, holding that Virginia had not advanced reasons sufficient to justify the continuation of *VMI*'s traditional gender-based enrollment policies.¹⁸ In remanding, the court suggested three alternatives: (i) admit women to *VMI*; (ii) establish a parallel institution or program, or (iii) allow *VMI* to pursue its policies as a private institution and forego state support.¹⁹

Virginia chose to create a parallel program for women called the Virginia Women's Institute for Leadership ("VWIL").²⁰ It would be located at the private liberal arts school for women—Mary Baldwin College.²¹ VWIL would offer the same "citizen-soldier" mission as *VMI* did; however, VWIL's academic offerings, financial resources and educational methods would differ from *VMI*'s.²² The District Court approved this plan as constitutionally sound.²³

14. See Ralph Ketchum, *The Puritan Ethic in The Revolutionary Abigail Adams and Thomas Jefferson*, in *WOMEN IN AMERICAN HISTORY* 49 (Carol V.R. George ed., 1975). Indeed, the Seneca Falls Declaration was not published until almost ten years after the establishment of *VMI*. See *THE SENECA FALLS DECLARATION ON WOMEN'S RIGHTS* (July 19-20, 1848), in *7 ANNALS OF AMERICA* 438 (1968). This declaration, styled a "Declaration of Sentiments," modeled after the American Declaration of Independence, together with a number of resolutions was adopted by a meeting called by Lucretia Mott and Elizabeth Cady Stanton in Seneca Falls, New York.

15. See *VMI*, 116 S. Ct. at 2291 (Scalia, J., dissenting).

16. See *id.* at 2271.

17. See *United States v. Virginia*, 766 F. Supp. 1407, 1413 (W.D. Va. 1991). The court based its decision on *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), where the Court held that "a party trying to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." *VMI*, 116 S. Ct. at 2271. "The defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (citing *Hogan*, 458 U.S. at 724 (internal quotations omitted)). The District Court found that *VMI*'s single-gender environment yields substantial benefits (in terms of diversity) to Virginia's educational system. See *Virginia*, 766 F. Supp. at 1415. Although women are denied this type of educational experience, the "adversative" type of system could not survive if women were admitted. This was sufficient justification to continue *VMI*'s policies of female exclusion. See *id.*

18. See *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992).

19. See *id.* at 900.

20. See *United States v. Virginia*, 852 F. Supp. 471, 476-77 (W.D. Va. 1994).

21. See *id.*

22. See *id.* Mary Baldwin was previously a liberal arts college. *VMI* offered degrees in the sciences, engineering and liberal arts. Furthermore, many of the rigors that made *VMI* what it was would not be required at VWIL. The VWIL students would not be required to eat together, nor dress in uniform during

Acknowledging that *some* women might prefer the VMI method of teaching to the VWIL method, the court stated that "controlling legal principles . . . do not require the Commonwealth to provide a mirror image of VMI for women."²⁴ The Court of Appeals affirmed.²⁵

Upon granting certiorari, the U.S. Supreme Court considered two issues. First, it asked whether "Virginia's exclusion of women from the educational opportunities provided by VMI . . . deny to women 'capable of all the individual activities required of VMI cadets,' the equal protection of the laws guaranteed by the Fourteenth Amendment?"²⁶ Seven justices were "exceedingly persuaded" that this exclusion denied women the equal protection of the law.²⁷ A seventh, though not "exceedingly persuaded," agreed that under a more traditional formulation of the standard, equal protection was indeed offended.²⁸

The Court then pondered the question "if VMI's 'unique' situation, as Virginia's sole single-sex public institution of higher education, offends the Constitution's equal protection principal, what is the remedial requirement?"²⁹ Seven justices agreed that the remedy proposed by Virginia, the creation of a sort of consolation prize women's academy, was certainly separate, but it was not equal enough to prevent further offense to equal protection.³⁰

A. *Standard, Standard, What is the Standard: Playing Games With "Exceedingly Persuasive Justification"*

Writing for the majority, Justice Ginsburg begins her analysis with a matter-of-fact rendition of a standard of review which ought to be viewed as *any-*

school and VWIL would encourage a "cooperative" method of training as opposed to VMI's cherished "adversative" method of training. With respect to VMI's vast alumni network, the VMI Alumni Association agreed to open its network to VWIL graduates. *See id.*

23. *See id.* at 484.

24. *Id.* at 481.

25. *See United States v. Virginia*, 44 F.3d 1229, 1241 (4th Cir. 1995). The Court of Appeals decided to give "greater scrutiny to the selection of means than to the [State's] proffered objective." *Id.* at 1236. Providing a single-gender education was a legitimate objective and VMI's "adversative" model was not designed to *per se* exclude women, but was not designed to accommodate them either. *See id.* at 1239. To permit women to participate in VMI's "adversative" training would destroy the decency between the sexes. *See id.* The only way to achieve the legitimate objective of a single-gender educational institution would be to exclude men from VWIL and women from VMI. The Court of Appeals recognized, however, that this type of analysis risked bypassing equal protection scrutiny. Therefore, the question becomes "whether men at VMI and women at VWIL would obtain 'substantially comparable' benefits at their institution or through other means offered by the State." *Id.* at 1237 (emphasis added). They found that the two were sufficiently comparable. *See id.* at 1241.

26. *VMI*, 116 S. Ct. at 2274 (citing *United States v. Virginia*, 766 F. Supp. 1407, 1412 (W.D. Va. 1991)).

27. *See id.* at 2287.

28. *See id.* at 2288 (Rehnquist, C.J., concurring).

29. *Id.* at 2274.

30. *See id.* at 2291 (Rehnquist, C.J., concurring). On the new separate but equal jurisprudence of the court with respect to educational institutions, see *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), where the Court held that a party trying to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. "The defender of the challenged action must show at least that the classification serves important governmental objectives and that the discriminatory means employed [are] substantially related to the achievement of those objectives." *Id.* at 724 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (internal quotations omitted)).

thing but matter-of-fact: “[A] party seeking to uphold government action based on sex must establish an ‘exceedingly persuasive justification’ for that classification.”³¹ To satisfy the burden that a justification is “exceedingly persuasive,” the State must show that the classification “serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”³² Furthermore, this justification must be genuine and one that actually motivates the state, not one that is invented as a result of litigation. The justifications must not rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”³³

This is too much for Chief Justice Rehnquist, who concurred. He felt that the test put forth by the majority introduced an element of uncertainty into an already established test,³⁴ and confused things by saying the state must demonstrate an exceedingly persuasive justification to support a gender-based classification.³⁵ He would rather stick with the standard that gender-based classifications “must bear a close and substantial relationship to important governmental objectives”³⁶ and leave it at that. The rest of Justice Ginsburg’s language gets too messy for him, and its implications are troubling. The Chief Justice smells a rat.

Justice Scalia also smells a rat, but one with a different odor. He is particularly unhappy about the arbitrary nature with which the Court applies different levels of scrutiny to equal protection challenges.³⁷ And although he has no problem applying the abstract tests of equal protection jurisprudence, it is his view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.”³⁸ Justice Scalia exclaims that an “honest” application of the intermediate scrutiny standard leads to the preservation of VMI as a single-sex institution.³⁹ Instead, the majority uses the term “exceedingly persuasive justification” and interprets it “in a fashion that contradicts the

31. *VMI*, 116 S. Ct. at 2275 (quoting *Hogan*, 458 U.S. at 724).

32. *Id.* at 2275 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

33. *Id.*

34. *See id.* at 2288 (Rehnquist, C.J., concurring). The established standard was that “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

35. *See id.*

36. *Id.*

37. *See id.* at 2292 (Scalia, J., dissenting).

38. *Id.* (quoting *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting)). Justice Scalia points out that VMI comes from a long line of such tradition. Scalia also points out that all of the federal military colleges were single-sex until 1976, when the people, through their elected representatives, changed that. *See id.* “The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law.” *Id.* at 2293.

39. *See id.*

reasoning of *Hogan* and . . . other precedents.”⁴⁰ The result reached by the majority naturally follows: “Only the amorphous ‘exceedingly persuasive justification’ phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single-sex composition is unconstitutional because there exist several women . . . willing and able to undertake VMI’s program.”⁴¹ The majority’s standard of review only “muddies the waters” and forces the State to “guess about the outcome of Supreme Court peek-a-boo.”⁴²

Ironically, *history* appears to be the mother of all three versions of this singular jurisprudence, and its political use is what separates them. For Justice Ginsburg, the standard of skeptical scrutiny is one which “responds to volumes of history.”⁴³ This volume speaks the strains of oppression and emancipation of women. It is heard in the detailed history of discrimination against women and evolution of women’s rights which Justice Ginsburg offers her audience. She sees history as a progression to the emancipation and integration of women into an otherwise minimally changing social order. For Justice Rehnquist, history would speak volumes to the injustice of punishing an institution for acting correctly in accordance with social conventions of the times which are thereafter overturned. For Justice Scalia, it is the value of patriarchy which speaks volumes. Justice Scalia sees history as a series of equilibrium positions which are subject to traumatic disturbances. In this case the disequilibrium affected single-sex institutions of higher education funded by the state. Once celebrated and thought quite ordinary, such institutions have been transformed into objects of suspicion and scorn. Justice Scalia blasts the majority for what he believes is an opinion “devoted to deprecating the closed-mindedness of our forebears with regard to women’s education.”⁴⁴ What he fears, I think, is the dilution of the notion of citizen-soldier so crucial to the success of the state in Machiavellian terms.⁴⁵ While Justice Scalia admits that our country’s ancestors may have been insensitive to the feelings and needs of women with regard to education, he notes that they did leave us with one “virtue”—the First Amendment. As

40. *Id.* at 2294.

41. *Id.* at 2294-95. Justice Scalia pressed the point in the usual way: The proper level of scrutiny has never required that the least restrictive means analysis between the classification and the states interest be used—only a “substantial relation” must be used. *See id.* at 2295.

42. *Id.* at 2295. Having explained that the Court used the wrong standard, Scalia proceeded with an analysis under what he considered to be the proper standard and framed the issue as “whether the exclusion of women from VMI is substantially related to an important governmental objective.” *Id.* at 2296.

43. *Id.* at 2274-75.

44. *Id.* at 2291 (Scalia, J., dissenting).

45. This unease could not be caused by the words of the majority. Justice Ginsburg is not interested in changing the citizen-soldier character of the VMI experience. The foundations of the Republic are not at stake, at least from the jurisprudence of Justice Ginsburg. But Justice Scalia *should* fear. The attack he sees comes from a different quarter, from those who may find in the citizen soldier model the archetype of oppressive patriarchy which must be rooted out. *See* Lucinda M. Findley, *Sex-Blind, Separate But Equal or Anti-Subordination: The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. L. REV. 1089, 1105-06 (1996).

generations and attitudes change, the country's laws can change also, but such change should come from the democratic system and not the Court.⁴⁶

With history invincible, if confused—with facts standing as proxy for the Republic and the place of women within it—with the representatives of the people indifferent to social reality—the question necessarily becomes a political one for the Court. Ought it to pronounce social reality as a matter of constitutional law, and if so, by what formula should that expression of social reality be expressed? This is the level at which the contest is fought.

Justice Scalia thinks he has the answer. Justice Scalia thinks that the majority has seized the political occasion to declare “single-sex public education . . . unconstitutional”⁴⁷ and “functionally dead.”⁴⁸ The Court's new definition of intermediate scrutiny is in fact no different from strict scrutiny.⁴⁹ Under this new approach, even single-sex private institutions may not be immune from constitutional challenge, for financial assistance (tax deductions for charitable contributions) might be held to be state action (supporting discrimination).⁵⁰ Commentators have begun to take the majority's opinion as a call for strict scrutiny.⁵¹

The strength of Justice Scalia's argument depends on how one approaches the majority opinion. A close reading of *VMI* as a speech to the American people could leave one fairly well convinced that the majority means to apply a stricter form of intermediate scrutiny than that applied before, all the while adhering to the language of prior cases and the fetish of “intermediate scrutiny.”⁵² *VMI* as a rhetorical device is extremely nonoriginalist and yet as coercive as any originalist precept.⁵³ Consider the call to history, the notion of “strict liability” for institutions that fail to maintain “state of the art” approaches to the “social contract.”⁵⁴ Ponder Justice Ginsburg's suspicion of “officially pronounced” state motivation, the presumption that programs devised in confor-

46. See *United States v. Virginia*, 116 S. Ct. 2264, 2307 (1996) (Scalia, J., dissenting).

47. *Id.*

48. *Id.* at 2306.

49. See *id.*

50. See *id.* at 2306-07.

51. See Jon A. Soderberg, *The “Constitutional” Assault on the Virginia Military Institute*, 53 WASH. & LEE L. REV. 429, 456-61 (1996).

52. See *VMI*, 116 S. Ct. at 2275-76. Recall that the heightened standard of review doesn't make sex a proscribed class such as race or national origin. See *id.* at 2276. Sex classifications may be used to compensate women “for particular economic disabilities suffered,” *id.* (quoting *Califano v. Webster*, 430 U.S. 313, 320 (1977)); to “promot[e] equal employment opportunity,” *id.* (quoting *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987)); to “advance full development of the talent and capacities of our Nation's people,” *id.*, but not “to create or perpetuate the legal, social and economic inferiority of women,” *id.*

53. Consider Daniel Ortiz's description of this sort of non-originalism:

A value is to be enforced not because a majority of individuals agrees to it but because it helps defines what the political community is—even when a majority of individuals within the community does not realize that or does not care. Put simply, nonoriginalism judges values according to their importance in maintaining the identity of our political community, not according to the extent of their popular acceptance.

Daniel R. Ortiz, *The Price of Metaphysics: Deadlock in Constitutional Theory*, in PRAGMATISM IN LAW AND SOCIETY 311, 318 (Michael Brint & William Weaver eds., 1991).

54. See *VMI*, 116 S. Ct. at 2275; *id.* at 2291 (Rehnquist, C.J., concurring).

mity with community norms subsequently abandoned (at least officially) are worthy of little credibility.⁵⁵

However, this is not what the majority says it is doing. Read closely, as a justification for the holding in the particular *case*, the majority opinion provides little more than a description of constitutional business as usual. The *holding* is palatable in accordance with the current standard. The flights of rhetoric can be contained. These words are creatures of the particular factual context in which they arose—and no more. And so the short answer to the “standards” question is that Justice Ginsburg has equated sex with religion, ethnicity and race. But her “equating” is a tender flower, hidden under the snow of the words of her opinion. If a majority of the Court is willing to follow, the path has been laid. But the path is subtly created; current precedents on intermediate scrutiny remain intact if Justice Ginsburg’s moving dicta is treated as merely hortatory.

We stand here before a grand piece of evidence of the marvel of *hermeneutics*. One can arrive at a substantial change in the content of a text without altering the words of the text themselves. I take seriously the argument that Justice Ginsburg has done just that. She certainly meant to push the Court as far as she could in the direction of strict scrutiny.⁵⁶ I am less inclined to believe that the rest of the six concurring Justices are fellow travelers in this particular hermeneutical journey.⁵⁷ But that may not matter—the intermediate courts may take the hint and make it increasingly impossible for the high court to contain the language of the opinion.⁵⁸

The brilliance of Justice Ginsburg’s opinion is not that she was able to impose strict scrutiny in gender cases—she did not in this case—but that she was able to craft an opinion that opened up the possibility that the Court might soon move in that direction.⁵⁹ It is to that possibility that a good bit of the venom of the dissent is directed.

B. Applying the Standard: When is the State Liable For Changing Cultural Norms?

Two subsidiary points are worth discussion in this case. The first concerns the timing of the occurrence of constitutional injury, especially when the constitutional injury results from changing legal consequences of changing cultural

55. See *id.* at 2277-79.

56. Justice Ginsburg has made no secret of this agenda, arguing, for instance, that whether gender classifications are “inherently suspect” is still an open question. See, e.g., *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring). See also Soderberg, *supra* note 51, at 455.

57. It is interesting to note, though, that only the Chief Justice challenged Justice Ginsburg’s characterization of the intermediate scrutiny test (other than Justice Scalia, of course). It is tempting to take this silence as the opening salvo in the struggle to ultimately reach strict scrutiny in gender cases, drawing on the historical analogy to the progression (if such it was) from *Reed v. Reed*, 404 U.S. 71 (1971) (“strict” rational basis) to *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny adopted).

58. See cases cited *supra* note 9.

59. This would be in keeping with Justice Ginsburg’s lifelong strategy for protecting women’s rights. For a discussion of Justice Ginsburg’s litigation strategy, see Deborah L. Markowitz, *In Pursuit of Equality, One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335 (1992).

norms. When did Virginia begin violating the equal protection rights of women by its exclusionary policies at VMI? Does the question matter? The different ways in which the justices conceptualize constitutional injury in this case portends a long period of turmoil within the Court in this regard.

The second question relates to the first. Assuming you can determine the starting point of constitutional injury, what remedies are permitted or necessary for violation of constitutional gender norms? The real fight here, as Justice Scalia went to some pains to point out, revolves around the merits of single-sex education in this country.⁶⁰ The majority clothes this in the language of adequacy of remedy. In the end, the majority does not absolutely close the door to single-sex education, but it does provide the rhetorical (some would call it jurisprudential) base for substantially narrowing the circumstances under which single-sex educational institutions can exist.⁶¹ And, indeed, the majority's discussion of remedies might well evidence that something more than intermediate scrutiny is at work in *VMI*.

Injury. As interesting as Justice Ginsburg's subtle prodding of the majority on the strict scrutiny issue is her discussion of the triggering of injury, or, more specifically, the way one is to measure discriminatory intent. The critical question focuses on the characterization of conduct which remains unchanging as social norms change. When does conduct, previously deemed unproblematic, become significant for constitutional purposes when it, at some point, becomes constitutionally unacceptable? Here the parallels to the contemporary discussion of liability for design defects in product liability cases are unmistakable.⁶² What *VMI* makes clear is that the justices are significantly split on the proper approach. Justice Ginsburg applies something approaching a traditional "strict liability" approach for design defects, here the design of VMI.⁶³ Justice Rehnquist argues for adoption of a softer standard based on a "good faith" or "state of the art" approach.⁶⁴ While applying the different standards in this case lead to the same result—recall the Chief Justice concurred in the result in *VMI*—application of the different standards could have significant effects in other cases. Unfortunately, these issues were dealt with only indirectly by the Court, framed around a consideration of the reasons Virginia offered in support of the continued sex segregation of VMI.⁶⁵

The majority opinion's basis for the rejection of all proffered rationales for continuing sex segregation provides some insight into the strict liability approach. Virginia offered a *current conditions* rationale to support the maintenance of sex segregation at VMI *in the future*.⁶⁶ The majority uses the *historic*

60. See *United States v. Virginia*, 116 S. Ct. 2264, 2293 (1996) (Scalia, J., dissenting).

61. See *id.* at 2279, 2286-87.

62. For a discussion of the changing approaches to strict liability as is being developed by the American Law Institute's Restatement project, see David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743.

63. See *VMI*, 116 S. Ct. at 2275.

64. See *id.* at 2291 (Rehnquist, C.J., concurring).

65. See *id.* at 2276-77.

66. See *id.* at 2279.

realities rationale of sex segregation at VMI to dismiss Virginia's arguments defending the constitutional possibility of *continued or future* sex segregation at VMI. Thus, the majority placed significant emphasis on its view, true enough for what it was worth, that VMI was not created nor maintained with an eye toward diversity.⁶⁷ It was created at a time when all-male institutions were common. At no time in Virginia's history is the pursuit of diversity through single-sex education evident.⁶⁸ Diversity was not the "actual state purpose"; rather, diversity is just a "rationalization for actions in fact differently grounded."⁶⁹ The fact that Virginia was not arguing the past but attempting to find a principled basis for its conduct in the future was dismissed on the basis of the implication that historic rationales cannot change and new justifications are presumptively a sham.⁷⁰

The Chief Justice, in concurrence, attempts a "state of the art" approach. He agreed that Virginia failed to prove that diversity provided an adequate rationale for sex segregation in this case, but he does so for reasons critically different from that of the majority, couched in language with the overtones of products liability, and very close in spirit to the ideas expressed by Justice Scalia in dissent.⁷¹ Essentially, the argument goes something like this: Sex segregated education was once unproblematic, even when such segregation resulted in a gendered division of social roles in which the opportunities providing the greatest possibility of access to the most social power were denied to females. Institutions which conformed their behavior to this standard could not possibly have been doing something wrong (as a legal construct). There was only the intent to conform to permitted, even celebrated, conduct norms. Their institutions were, in this sense, state-of-the-art. The institution's conduct becomes "bad" (that is actionable) only when the intent to be "bad" forms, and that cannot occur until the time when it is reasonable to infer that the manifestation of such intent was (at least legally) possible. That inference may be supported by a reasonable review of current conditions, but it may also be evidenced by the conduct of those institutions with a duty to warn—in this case, the courts.⁷²

Put in the language of the case, the Chief Justice argued that the decision in *Mississippi University for Women v. Hogan*⁷³ was the first time VMI or Virginia should have been on "notice that VMI's men-only admissions policy was open to serious question."⁷⁴ Therefore, no negative inferences should be drawn

67. *See id.*

68. *See id.* at 2277.

69. *Id.* at 2277. *See also id.* at 2279 ("A purpose genuinely to advance an array of educational options . . . is not served by VMI's historic and constant plan . . . to afford a unique educational benefit only to males.").

70. The use of history and tradition in defense of change and to resist new arguments supporting continued sex segregation provides a wonderful moment of table turning on Justice Scalia. Here is history as parody. The irony could not have been lost on Justice Scalia.

71. *See VMI*, 116 S. Ct. at 2287-91 (Rehnquist, C.J., concurring).

72. *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (Tentative Draft No. 3, 1996).

73. 458 U.S. 718 (1982).

74. *VMI*, 116 S. Ct. at 2289 (Rehnquist, C.J., concurring).

from the State's inaction prior to that decision.⁷⁵ However, it is proper to draw such inferences from conduct occurring after Virginia was put on notice that its single-sex institutions might no longer meet current constitutional standards. Since *Hogan* placed VMI on notice in 1982, Virginia should have taken steps to remedy an anticipated challenge to VMI's admission policy. However, the governing body of VMI studied the situation and decided to do nothing.⁷⁶ "Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation."⁷⁷

Justice Rehnquist's approach is both alluring and yet ultimately unsatisfying. Its allure lies in the subjective "fairness" of the measure. There is something to the notion that single-sex institutions were not constitutionally problematical for a long period of our history (however wrongheaded that might *now* seem to us). A standard which would penalize conduct *post facto* tends to problematize all conduct. How can we ever be sure that following current conduct norms will not subject us to liability in the future? Where the "technology" of the law changes, as it has with increasing frequency since the 1940s, how can the state ever be sure that something it does today will not be the basis of liability tomorrow?⁷⁸ He suggests a standard imposing liability only on the basis of proof of conduct from the time the action foreseeably became suspect.

And yet Americans, and particularly the American Congress, have developed a taste for the very proposition that actors, and especially state actors, may be penalized *civily post facto*. Consider our approach to environmental liability.⁷⁹ As a result, the Chief Justice's "products liability by analogy" approach may be unsatisfying. When it comes to fundamental rights, we will insist that the state bear the risk.⁸⁰ And why not? As the Chief Justice himself recognizes, it is the state which not only fashions the conduct challenged through its legislative branch, but provides the warning that the conduct at issue may no longer fall within the strictures of the organic law by the pronouncements of its judicial branch.

Remedies. Virginia offered two major rationales supporting the continuation of single-sex (male) education at VMI. First, they argued that "single-sex education provides important educational benefits. . . [and]. . . contributes to diversity in educational approaches."⁸¹ Second, they contended that VMI's "adversative" approach to character development and leadership training would

75. *See id.*

76. *See id.*

77. *Id.*

78. Consider this by analogy to the "state of the art" problem in products liability law. *Cf.* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (Tentative Draft No. 2, 1995).

79. *See, e.g.,* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675 (1996). For a discussion, see, for example, William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives and the Costs of Interminable Liability*, 80 MINN. L. REV. 35 (1995).

80. *Cf. Gideon v. Wainwright*, 372 U.S. 355 (1963) (state must provide indigent criminal defendant with counsel—applied retroactively).

81. *United States v. Virginia*, 116 S. Ct. 2264, 2276 (1996) (quoting Brief for Cross-Petitioners 20).

necessarily have to be modified if women were to be admitted.⁸² These changes would be so radical and drastic as to deprive men of the opportunities and eliminate the reason that women would want to go there.

The majority applies the common rule for determining the appropriate remedy for a constitutional violation—the remedy must closely fit the violation, and “[i]t must . . . place persons unconstitutionally denied an opportunity or advantage in ‘the position they would have occupied in the absence of [discrimination].’”⁸³ The majority framed the constitutional violation in this case as the exclusion of women from a VMI education. While the Court noted that single-sex educational facilities can benefit some students and serve the public good,⁸⁴ in this case the alternate offered by Virginia in the form of VWIL was indeed separate but unequal.⁸⁵

For the majority, the idea that admission of women would destroy VMI’s system of training and stature is an exaggeration. Justice Ginsburg dismisses this argument, noting that no such dreadful outcome has befallen the various federal military academies which have admitted women.⁸⁶ VMI is free to maintain its adversative method of training—women will come and succeed even in that environment. Ginsburg’s subtext is simple. She has no quarrel with the citizen-soldier model for the Republic; she merely expects that such a model will be available to all women who seek to test themselves against the rigors of such a regimen. Since she has no quarrel with the mission or methods of VMI, and believes that women as individuals ought to be given the chance to fail or succeed in such an environment, the state’s justifications for the exclusion of women are not “exceedingly persuasive.”

Justice Rehnquist arrives at the same conclusion, but for vastly weaker reasons, reasons substantially more subversive of tradition than those of Justice Ginsburg. The Chief Justice suggests that the preservation of the adversative method of training does not serve an important governmental objective. This method is devoid of evidence that it is “pedagogically beneficial or is any more likely to produce character traits than other methodologies.”⁸⁷ He appears to

82. *See id.*

83. *Id.* at 2282 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). This issue had been addressed by some commentators. *See, e.g.,* Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the ‘Record’ in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN’S STUD. 186 (1996).

84. *See VMI*, 116 S. Ct. at 2276-77.

85. The majority concluded that VWIL does not offer the same experience as VMI. It “affords women no opportunity to experience the rigorous military training for which VMI is famed.” *Id.* at 2289. Instead, VWIL offers a “cooperative” method of education. VWIL students do not experience the barracks type of lifestyle either. *See id.* Furthermore, since the VWIL students are not presented with the pressure and stress of VMI training, they will not know the “feeling of tremendous accomplishment” common to VMI cadets. *See id.* Additionally, VWIL does not equal VMI in many other areas. “VWIL’s student body, faculty, course offerings, and facilities hardly match VMI’s. Nor can the VWIL graduate anticipate the benefits associated with VMI’s 157 year history, the school’s prestige, and its influential alumni network.” *Id.* at 2284. For an extensive discussion of the comparative deficiencies of VWIL, *see id.* at 2284-86. Essentially, the VWIL program is a “pale shadow” of VMI and their resources and opportunities. “[V]irginia has not shown substantial equality in the separate educational opportunities the state supports at VWIL and VMI.” *Id.* at 2286.

86. *See id.* at 2281.

87. *Id.* at 2291 (Rehnquist, C.J., concurring).

hint that, as with the benefits of a single-sex education, had there been merit to the adversative methodology it might well have survived as a justification. But he has it all wrong. The problem isn't the methodology. The problem is the assumption that women are incapable of succeeding under it. Justice Ginsberg, following the traditional liberal feminist axiom that men and women are equal, rejects this argument out of hand.⁸⁸ The Chief Justice, ironically appearing to adopt a cultural feminist approach,⁸⁹ presumes that women are different, methodology is gendered, and that gendered methodology can only survive if the state can show that it is important for men!

And so, for the Chief Justice, the majority has misdefined the constitutional violation.⁹⁰ By doing so, they imply that the only adequate remedy would be to admit women to VMI. But the violation was not the "exclusion of women" from VMI. The real violation was in "the maintenance of an all male school without providing any—much less a comparable—institution for women."⁹¹ Framed this way, "separate but equal" could be a viable method of satisfying the *minimal* requirements of equal protection; "[i]t would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber."⁹² In the end, however, Virginia did not provide an adequate remedy for even this constitutional violation.

As far as Justice Scalia is concerned, though, Virginia has satisfied the intermediate level of scrutiny, when the standard is properly applied. Therefore, the Court's reasons for finding otherwise are "irrelevant or erroneous as a matter of law, foreclosed by the record in this case, or both."⁹³ To Justice Scalia, instead of focusing on the evidence of Virginia's witnesses, the majority ignores it in favor of "their view of the world."⁹⁴ So reduced, Justice Scalia can take comfort in what has become his jurisprudential signature—the Court is playing politics, and *that* lust is best satisfied in Congress, not within the Court.

For the reasons Justice Scalia finds the majority opinion political, he finds the Chief Justice's approach wholly beside the point. The adversative model serves a pedagogical benefit and thus justification for an important governmen-

88. While Virginia justified sex segregated schools as necessary due to the important differences between men and women, *see id.* at 2289, Justice Ginsburg emphasizes that "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description," *id.*

89. There has been a substantial body of writing on relational feminism. Its genesis is largely traced to the work of Carol Gilligan. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

90. *See* *United States v. Virginia*, 116 S. Ct. 2264, 2289 (1996) (Rehnquist, C.J., concurring). The majority defines it as "the categorical exclusion of women from an extraordinary educational opportunity afforded to men." *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2298 (Scalia, J., dissenting). Justice Scalia points out that the rationale adopted by the majority that some women were capable of meeting the requirements of VMI amounted to an adoption of strict scrutiny and is inappropriate in sex discrimination cases. *See id.* He also argued that the majority opinion's determination that Virginia has failed to offer women the opportunity to be educated under the adversative training model completely disregarded the findings of the District Court and the testimony of expert witnesses as to the merits of a single-sex education. *See id.* at 2300.

94. *Id.* The Court found that the "findings" were grounded in opinions "about typically male or . . . female tendencies" and essentially disregarded these gender based classifications. *Id.*

tal interest “was a given in this litigation.”⁹⁵ The women who were applying to VMI did not want to go there because it was all male (the institution would not be all-male once they matriculated). They were applying to experience the “distinctive adversative education that VMI provided.”⁹⁶ But this conclusion does not lead him to Justice Ginsberg’s point of view. Justice Scalia notes that none of the United States’ experts testified that VMI’s approach was appropriate for women. VMI’s goal of “learning, leadership, and patriotism” is therefore not “great enough to accommodate women.”⁹⁷

* * * * *

For Justice Scalia, VMI is in line with other decisions of this term in which “a self-righteous Supreme Court, acting on its Members’ personal view of what would make a more perfect Union, . . . can impose its own favored social and economic dispositions nationwide.”⁹⁸ In Justice Scalia’s view, VMI serves to again narrow the ambit of self-government reserved to the people by the founders of the Republic.⁹⁹ And his view is delivered in operatic style. Indeed, on first reading, the dissent struck me much as does Electra’s “mad” aria in Mozart’s *Idomeneo*.¹⁰⁰ “*Oh smania! oh furie! of disperata Elettra! . . . Vedro Idamante alla rivale in braccio? . . . Ah no, il germano Oreste ne’ cupi abissi io vïo seguir, or or compagna m’avrai la dell’inferno, a sempiterni guai, al pianto eterno.*”¹⁰¹

Having lived to see the Republic in the hands of his jurisprudential rivals, there is nothing to do but to follow his “brothers” on the bench to the bottomless pit of hell. And to my mind, in the realm of equal protection, this proved particularly true with the far more significant equal protection case decided this past term, *Romer v. Evans*.¹⁰² It is to this version of Justice Scalia’s personal vision of Hell that I turn next.

95. *Id.* at 2304.

96. *Id.*

97. *Id.* at 2301. Those educational values are ones shared by all of Virginia’s schools. VMI only describes them in a particular manner—in accordance with their military character. *See id.* Scalia finds that this particular “mission is not ‘great enough to accommodate women.’” *Id.* (internal citations omitted). Scalia finds that if the majority view is applied generally, “it means that whenever a State’s ultimate objective is ‘great enough to accommodate women’ . . . then the State will be held to have violated the Equal Protection Clause if it restricts to men even one means by which it pursues that objective. . . .” *Id.* (internal citations omitted). It was untrue that VMI would not have to change very much to admit women. The key elements of the adversative model revolve around such aspects as a total lack of privacy, barrack style living, no locked doors or window coverings and regulation of minute details of behavior. Additional changes would include physical training modifications and “aggressiveness of the current program.” *Id.* at 2302. Justice Scalia noted that both the District Court and the Court of Appeals found that these changes would substantially alter the “egalitarian ethos that is a critical aspect of VMI’s training.” *Id.*

98. *Id.* at 2308.

99. *See id.*

100. Wolfgang Amadeus Mozart, *IDOMENEO: RE DI CRETA*, libretto by Giambattista Varesco (1780).

101. *IDOMENEO: RE DI CRETA*, *supra* note 101, at Act III, Scene X, No. 29 Recitative (Elettra) (“Oh frenzy! Oh fury! Of desperate Electra! Am I to see Idamante in the arms of my rival? Oh no, I shall follow my brother Orestes into the dark deep; soon you shall have me there in the bottomless pit as your companion, ever suffering, ever weeping.”).

102. 116 S. Ct. 1620 (1996).

III. *ROMER V. EVANS*

Several Colorado municipalities passed ordinances effectively banning discrimination in housing, employment, education, public accommodations and health and welfare services.¹⁰³ In due course, these provisions were extended in some Colorado jurisdictions to discrimination based on sexual orientation. Unhappy with the result, organized special interest groups were able to put on the ballot, and the voters of Colorado adopted, Amendment 2 ("the Amendment") to the Colorado State Constitution.¹⁰⁴ The Amendment repealed any previous ordinances to the extent they protected homosexuals and prohibited "all legislative, executive or judicial actions at any level of state or local government designed to protect . . . homosexual, lesbian or bisexual orientation, conduct, practices or relationships."¹⁰⁵

Following adoption of this referendum, a number of people in the purported class covered by the Amendment, the Colorado municipalities, and government entities whose non-discrimination provisions were voided under the Amendment brought suit in Denver state court seeking declaratory and injunctive relief from enforcement of the Amendment.¹⁰⁶ The district court granted a preliminary injunction, which was appealed to the Colorado Supreme Court.¹⁰⁷ The Colorado Supreme Court held that the Amendment was subject to strict scrutiny under the Fourteenth Amendment of the U.S. Constitution because "it infringed the fundamental right of gays and lesbians to participate in the political process,"¹⁰⁸ and remanded for further proceedings. The state district court then found the state's interests in the Amendment insufficient and enjoined its enforcement, and the Colorado Supreme Court affirmed this ruling.¹⁰⁹ On review, the Supreme Court of the United States also affirmed, but on different grounds.

A. *Just What Are they Trying to Do, Anyway?*

Justice Kennedy, writing for the majority, found the state's argument that the Amendment really does no more than put homosexuals in the same position

103. See *id.* at 1623. For example, the Court lists DENVER REV. MUNICIPAL CODE art. IV, §§ 28-91 to 28-116 (1991); ASPEN MUNICIPAL CODE § 13-98 (1977); BOULDER REV. CODE §§ 12-1-1 to 12-1-11 (1987).

104. See *Romer*, 116 S. Ct. at 1632. It sets out:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30(b).

105. *Romer*, 116 S. Ct. at 1623 (quoting COLO. CONST. art. II, § 30(b)).

106. See *id.* at 1624.

107. See *id.*

108. *Id.*

109. See *id.*

as all other people “implausible.”¹¹⁰ After noting the Supreme Court of Colorado’s finding that the Amendment’s “ultimate effect” would be comprehensive prohibition of protection for homosexuals, he reiterates that the Amendment actually withdraws certain legal protections from homosexuals without realistic hope of their reinstatement.¹¹¹ Further detrimental consequences of the Amendment include “nullifi[ed] specific legal protections for [homosexuals] in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”¹¹² Additionally, the Amendment would rescind prohibition of discrimination against state employees based on sexual orientation, and would repeal laws prohibiting discrimination based on sexual orientation at state colleges.¹¹³

In discussing Colorado’s state and local government history of anti-discrimination protection, the Court points out that several localities protect against discrimination of such traits as “age, military status, marital status, pregnancy, parenthood, custody or a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation,”¹¹⁴ in addition to the traditionally protected classes of sex, race, ancestry, and illegitimacy. Essentially, the Amendment would forbid “the[se] safeguards that others enjoy or may seek without constraint.”¹¹⁵ Predicting the impact of the Amendment, the Court further noted that it may not be limited to “specific laws passed for the *benefit* of gays and lesbians.”¹¹⁶ They determined that the Amendment could, if read broadly, deprive homosexuals of protections against arbitrary discrimination in both governmental and private settings.¹¹⁷

Next, the Court addressed Colorado’s argument that the Amendment was “intended to conserve resources to fight discrimination against suspect classes.”¹¹⁸ Here, the Court indulged the assumption that homosexuals could find protection in laws of general application but nevertheless found that the Amendment “imposes a special disability upon those persons alone.”¹¹⁹ Homosexuals would be barred from safeguards of anti-discrimination laws and could only seek protection by succeeding in the difficult task of amending the state constitution, or by passing “helpful laws of general applicability.”¹²⁰ Essentially, the Amendment withholds “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹²¹

110. *Id.*

111. *See id.*

112. *Id.* at 1626.

113. *See id.*

114. *Id.* at 1626.

115. *Id.* at 1627.

116. *Id.* at 1626.

117. *See id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1627.

With respect to the Fourteenth Amendment, the Court acknowledges that equal protection must co-exist with the reality that legislation does classify people and as a result disadvantages various groups.¹²² Therefore, all that is needed is a rational basis here for classifications based on sexual orientation. But what sort of rational basis? At a minimum, the majority seems to favor an inquiry as skeptical of the rational tie between legislation and purpose as that used to analyze the rationale for single-sex military education in *VMI* (though not by any means suggesting that the rationale need be exceedingly persuasive). Prepared to be skeptical, the majority found that the Amendment lacked a rational relationship to a legitimate state interest.

First, the Amendment attempted to identify a group of people by a single trait and then broadly deny them protection.¹²³ The Court expressed that such an attempt to prohibit a class of people the right to seek protection of the law is unprecedented and not within our "constitutional tradition."¹²⁴ Kennedy further noted that the idea of a government open to all is central to equal protection jurisprudence. Hence, laws which effectively single out one class of citizens for "disfavored legal status" are rare.¹²⁵ Anticipating Justice Scalia's dissent, Kennedy explained that *Davis v. Beason*¹²⁶ does not stand for the proposition that the Amendment is within our "constitutional tradition." In fact, *Davis* was overruled by *Brandenburg v. Ohio*¹²⁷ regarding its denial of voting rights to those advocating polygamy.¹²⁸ Further, Kennedy held that *Davis*'s deprivation of a group's right to vote because of their status "could not stand without surviving strict scrutiny."¹²⁹

Second, the Court noted that the Amendment was really "inexplicable by anything but animus toward the class it affects."¹³⁰ Desire to harm a politically unpopular group is not a legitimate state interest.¹³¹ Colorado's argument that the Amendment offers respect for other citizen's freedom of association and forwards the state's interest in conserving resources to fight other discrimination does not meet this requirement. Actually, the Court found that the Amendment was "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests" and was actually an attempt to make homosexuals "unequal to everyone else."¹³²

The majority opinion generated a particularly blistering dissent from Justice Scalia. He begins by rejecting the majority's assertion that the Amendment was a "bare . . . desire to harm." Rather, it was an attempt by the majority of

122. *Id.*

123. *Id.* at 1628.

124. *See id.*

125. *See id.*

126. 133 U.S. 333 (1890). In *Davis*, the Supreme Court approved an Idaho statute barring polygamists or advocates of polygamy from voting or holding office. *Id.*

127. 395 U.S. 444 (1969) (mere advocacy protected under First Amendment).

128. *See Romer*, 116 S. Ct. at 1628.

129. *Id.* at 1629.

130. *Id.* at 1627.

131. *See id.* at 1628.

132. *Id.* at 1629.

the people of Colorado to "preserve traditional sexual mores against the efforts of a politically powerful minority. . . ."133 He asserts that the Amendment prohibits special treatment of homosexuals and nothing more; the import of the Supreme Court of Colorado in *Evans II* is that the general prohibitions against arbitrary discrimination "would continue to prohibit discrimination on the basis of homosexual conduct as well."¹³⁴ Effectively, they could not be discriminated against because they were gay, but they would not be afforded any "extra" protections. For Scalia, all the Amendment does is deny homosexuals "preferential treatment" unless they amend the Constitution.¹³⁵ Scalia illustrates the "absurdity" of the majority's assertion through his 'municipal contracts' example;¹³⁶ equal protection is not denied when a group "to obtain advantage . . . must have recourse to a more general and hence more difficult level of political decision making than others."¹³⁷

With what for me amounted to a strange whiff of the European Jew-baiting tracts of another age, refurbished, of course, for use against a different kind of "Jew,"¹³⁸ Justice Scalia went on to explain that as many states (Colorado included) decriminalize homosexuality, other problems arise. Homosexuals tend to reside disproportionately in certain communities, have high disposable incomes and become politically active with regard to homosexual causes, devoting this power to societal acceptance of homosexuality.¹³⁹ As a result, the Amendment sought to resolve many Coloradans' concerns by having a statewide, single issue vote.

After quoting the Court's reasoning for finding this legislation unconstitutional,¹⁴⁰ Scalia dismissed them as wholly false. When a state law prohibiting or disfavoring certain proscribed conduct is passed, the adversely affected group (such as smokers, drug addicts, motorcyclists or gun owners) are prohibited "from changing the policy . . . established in 'each of [the] parts' of the state."¹⁴¹ Scalia also pointed to several state constitutional prohibitions of polygamy as authority that it is within our "constitutional tradition" for a "majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it."¹⁴² If the Amendment is unconstitutional, then several state con-

133. *Id.* (Scalia, J., dissenting).

134. *Id.* at 1630.

135. *See id.*

136. *See id.* He explains that a law prohibits awards of municipal contracts to relatives of the city mayor unless they (relatives) persuade the state legislature (unlike other citizens) to award the contract. To Scalia, this is not a denial of equal protection.

137. *Id.*

138. Didi Herman has begun to explore the ways in which the anti-gay rhetoric of recent years has begun to bear an uncanny resemblance to the old Jew-baiting tracts of fundamentalist Christian groups. *See* DIDI HERMAN, *NORMALCY ON THE DEFENSIVE: THE CHRISTIAN RIGHT'S ANTI-GAY AGENDA* (1996); *see generally* STEPHEN M. FELDMAN, *DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY AND ANALYSIS OF THE SEPARATION OF CHURCH AND STATE* (1996).

139. *See id.* at 1634.

140. Specifically, that such a law is "unprecedented" and "not within our constitutional tradition." *Id.*

141. *Id.*

142. *Id.* at 1635.

stitutional provisions prohibiting polygamy must also be found unconstitutional, and such nonconformity "must be permitted in these states on a state-legislated, or perhaps even local-option, basis."¹⁴³ Furthermore, Scalia points out that such anti-polygamy provisions were required by the U.S. Congress as a requisite for admission of certain states into the Union,¹⁴⁴ and that the Court had previously approved an Idaho Territory provision which denied polygamists the right to vote.¹⁴⁵ Scalia concludes by once again attacking the majority, accusing them of taking sides in the culture war. He repeats that the Amendment does not "disfavor" homosexuals, but only denies them preferential treatment. The state's interest, prevention of "piecemeal deterioration of the sexual morality" of a majority of the people, was an "appropriate means to [a] legitimate end."¹⁴⁶

B. Searching for Meaning in *Romer*

The problem with *Romer*, of course, is in its meaning. It is exceedingly difficult to search for meaning in *Romer* with any degree of confidence. It is even harder to divine the utility of the case. As a rhetorical device, the majority opinion is a study in majesty. It is Handelian in its oratory, truly the voice of the Divinity speaking to its children. Truly, it *is* the voice of the Divinity speaking to its children. As *rhetoric* it works well to camouflage the ambiguities inherent in the stately procession of the words of that opinion. More importantly, Justice Kennedy's Olympian tone effectively casts the dissent, not in the role of Milton's Lucifer,¹⁴⁷ but rather in that of the archetypal mad heroine of *opera seria*.¹⁴⁸ "*Tutte nel cor vi sento, Furie del crudo averno, Lunge a si gran tormento, Amor, merce, pieta. Chi mi rubo quel core, Quel che tradito ha il mio, Provin dal mio furore, Vendetta e crudelta.*"¹⁴⁹ So reduced, the power of its argument is lost in the "mad" lust of its rhetoric, and it can be avoided by that large number in the Academy with a taste for the antiseptic.

143. *Id.*

144. They include Arizona, New Mexico, Oklahoma and Utah. *See id.*

145. *See Davis v. Beason*, 133 U.S. 333 (1890).

146. *Romer*, 116 S. Ct. at 1637.

147. John Milton, *Paradise Lost*, in *THE COMPLETE POEMS OF JOHN MILTON WRITTEN IN ENGLISH* 89-362 (Charles W. Eliot ed., 1909) (1658-1663). There is, though, a touch of Lucifer's famous speech in the dissent:

. . . Hail horrors! Hail,
Infernal World! and thou, profoundest Hell,
Receive thy new possessor — one who brings
A mind not to be changed by place or time.
The mind is its own place, and in itself
Can make a Heaven of Hell, a Hell of Heaven.

Id. at 96.

148. *See* IDOMENEO: RE DI Creta, *supra* note 101. The passion is evident; its flames, however, incinerate the argument Justice Scalia attempts. In the end, all we can really recall is the passion . . . and the calm, sensible progression of the arguments of the majority.

149. *See id.* at Act I, Scene VI, No. 4 Aria (Elettra) ("All of them I feel within my heart, the furies of crude Hades, far removed from these torments are love mercy and pity. He who has stolen that heart, He who has betrayed (that) which is mine, shall feel in my fury revenge and cruelty.").

And so the Divinity speaks. Phrases redolent with meaning pour from the pages of the opinion, promptly to be scattered by the winds of obfuscation. And into the void created by this Olympian rhetorical clearing rush those with an extreme need for guidance, and those with the even greater need to provide the definitive interpretation of that which cannot be interpreted directly. Those who want to draw positive value from the decision for this or that ideological, cultural or political program have been far less reticent in the months since the decision has come down. Some have argued that *Romer* is a "seminal decision in the jurisprudence of equal protection for gay people."¹⁵⁰ Like *Reed v. Reed*¹⁵¹ for females, *Romer* will lead to some sort of heightened scrutiny for laws which adversely impact gay people.¹⁵² It is also possible to argue that the Court employed what has been described as a new tier of equal protection analysis—rational basis with teeth.¹⁵³ Andrew Jacobs argues that "*Romer* heralds: (1) a muscular rational basis review that may invalidate civil laws aimed at the class of gays; (2) a significant possibility of overruling *Bowers*; and (3) a greater solicitude for gay claims in many areas of the law."¹⁵⁴

Others take a more cautious approach. Daniel Farber and Suzanna Sherry have recently argued that the case merely articulates a far-reaching but narrow principle which they christen the pariah principle. "This principle, in a nutshell, forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some special degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals)."¹⁵⁵ This is a minimalist approach to the potential inherent in the hortatory expressions of the majority opinion, which seeks to avoid the problems which a broad interpretation of the majority's "rational basis" analysis might pose.¹⁵⁶ In a similar vein, Akhil

150. Tobias Barrington Wolff, Note, *Principled Silence*, 106 YALE L.J. 247, 248 (1996).

151. 404 U.S. 71 (1971).

152. See Wolff, *supra* note 150, at 248. See also Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating 'Outness' Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995). Art Leonard has eloquently argued that

Romer was a case in which the Supreme Court did not discuss or decide the issue of the level of scrutiny. *Romer* was a case in which the Supreme Court did decide that in this particular case . . . there was no rational basis to sustain the [A]mendment. . . . The Court did not say, did not decide, and did not address, the issue of what level of scrutiny in general should be used in cases about anti-gay discrimination by state actors. It did not. We must not fall into the trap of saying that *Romer* establishes a rational basis standard for gay equal protection cases.

Letter from Art Leonard, Professor of Law, New York University Law School, to queerlaw listserv (December 5, 1996) (on file with author).

153. See, e.g., Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779 (1987) (criticizing the "rational basis with bite" standard).

154. Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Argument Over Gay Rights*, 1996 WIS. L. REV. 893, 963. For a critique of rational basis with teeth as an additional category, see Pettinga, *supra* note 153.

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

156. Indeed, this approach highlights the singular importance of Justice Scalia's dissent for those who value theory and process purity. See Farber & Sherry, *supra* note 155, at 263. How do you habilitate the majority opinion without becoming entangled in Justice Scalia's quite valid point that the rational basis analysis of the majority was anything but? See *Romer v. Evans*, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting). The entanglement problem is particularly acute for those who do not wish to see in the opinion a move to heightened scrutiny for "homosexual" issues.

Amar has reconfigured this pariah principle more formally as a constitutional event implicating the ancient "attainder principles" of the federal Constitution.¹⁵⁷ The majority opinion reflected the rejection of a law imposing unprecedented disabilities on a group with little in the way of reason to support it, and with the substantial effect of attainting people by reason of membership in the proscribed group.

The narrowest reading suggests that the majority opinion reflected the rejection of a law imposing unprecedented disabilities on a group with little in the way of reason to support it. Animus may well be a *result* and even a permissible result of reason, but reason must support the animus. This might well be one of those cases where rational basis actually suffices to invalidate a statute.¹⁵⁸ Here, a variant of this reasoning goes, the state was unable to offer reasons even arguably connected with the disability and (more importantly) its breadth.¹⁵⁹ Passion, alone, is insufficiently rational to support the disability. In the future, the state will be more careful.

And then there is Robert Bork. He finds no "logical or constitutional foundation for the majority's decision."¹⁶⁰ Taking his cue from the dissent, he finds in *Romer* little more than naked politics. The decision reflects the power and ability of the homosexual elite and their worldwide conspiracy to substitute their culture for that which preceded it. For Bork, *Romer* does for gay people what *Roe v. Wade*¹⁶¹ did for heterosexual (im)morality. In both cases, the "Court, without authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own."¹⁶²

For me, though, *Romer* exudes (and quite perversely, too) that all too familiar aroma of Sunsteinianism. I refer, of course, to Professor Cass Sunstein and his quite accomplished political defense of that *Guess Who's Coming to Dinner*¹⁶³ partisan process liberalism.¹⁶⁴ Like the country club republicans of the late 1950s, the process liberals of the 1990s have midwived a bizarre apo-

157. See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996); but see Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236 (1996).

158. See, e.g., *Constitutional Law Scholars Attempt to Distill Recent Supreme Court Term*, 65 U.S.L.W. 2274, 2277 (October 29, 1996) (remarks by Jesse H. Choper).

159. See Hills, *supra* note 157, at 236 (arguing that Amendment 2 met its demise on the basis of the breadth of the disabilities it imposed).

160. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE* 114 (1996).

161. 410 U.S. 113 (1973).

162. See BORK, *supra* note 160, at 114.

163. GUESS WHO'S COMING TO DINNER (Columbia Pictures 1967) (a liberal white couple must test their convictions when their daughter brings home her fiance to dinner, an African-American).

164. This style of liberalism is most recently expressed in Professor Sunstein's latest expression of faith. See Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). It is interesting to note that process liberalism of this kind, extremely popular in the United States over the last two or so generations, has begun to gain a sort of respectable toehold in Europe. Consider Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 776 (1996). A number of thoughtful analyses of Habermas' proceduralism can be found in Symposium, *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767 (1996).

theosis of substantive liberalism into a jurisprudence of English Restoration comedy of manners:

We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, as 'decisional minimalism.' . . . All of these ideas involve the constructive use of *silence*. Judges often use silence for pragmatic or strategic reasons or to promote democratic goals. Of course it is important to study what judges say; but it is equally important to examine what judges do not say, and why they do not say it.¹⁶⁵

The theory is one of the Court as coquette, flirting with democracy behind the fan of its decisions; never saying yes, never saying no. An interesting conceptualization of the function of the judiciary—definitely female from the patriarchal point of view. And so Professor Sunstein's minimalism.¹⁶⁶ *Romer* is good because it decides nothing; it forecloses nothing; it is the zygote that dare not speak its name.¹⁶⁷ This is the model of classic conservative judging.¹⁶⁸ In reality it might also be the mark of a Court that does not yet know its own mind. Less does it know or understand the popular reality—society is struggling still about how it "really" feels about homosexuals. In that environment, the Court *must* remain at its most tentative, for in the end the Court must serve to recognize political reality, not create it.¹⁶⁹

In the end, I believe *Romer* demonstrates the power of *politics* as the vehicle for determining *law*, and the utility of explaining the *law* in terms of the

165. See Sunstein, *supra* note 164, at 6, 7.

166. See *id.* at 6. Thus, "the case for minimalism is especially strong if the area involves a highly contentious question that is currently receiving sustained democratic attention." *Id.* at 32. And, yet, there is more than a whiff of Scalia in Professor Sunstein's view. Consider an earlier articulation of Professor Sunstein's reticence on such delicate issue as same-sex marriage and referenda such as the Amendment:

Under contemporary conditions, a judicial holding of this sort [requiring states to allow same sex marriage] would probably be a large mistake, even though the basic principle is sound. It would be far better for the courts to proceed slowly and incrementally. I have suggested that they should build on 'rationality review' in the most egregious cases and also invalidate measures that combine restrictions on the democratic process with discrimination. Broader rulings should be avoided. Elected officials, including the president, have somewhat more flexibility in carrying out their own independent constitutional responsibilities.

Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 27-28 (1994).

167. According to Sunstein:

Romer combined a degree of caution and prudence with a good understanding of the fundamental purpose of the Equal Protection Clause and a firm appreciation of the law's expressive function. Thus understood, *Romer* was a masterful stroke—an extraordinary and salutary moment in American law. It was a masterful stroke in part because it left many issues open.

Sunstein, *supra* note 165, at 9. I do agree that the porousness of *Romer* was a masterful stroke. I am not so sure that, as Professor Sunstein characterizes it, that stroke was good.

168. Conservatism, of course, has recently acquired multiple meanings. I refer here, of course, not to the activist populist conservatism of some aggressive members of the Supreme Court, but rather to the classical conservatism of judicial restraint, of a philosophy restraining judges from deciding issues other than the narrow ones before them in a particular case. On the differences between judicial restraint and interventionist conservatism on the Court, see Bernard Schwartz, 'Brennan v. Rehnquist' *Mirror Images in Constitutional Constructions*, 19 OKLA. CITY U. L. REV. 213 (1994).

169. This is a point I have argued elsewhere at greater length. See Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 538-54 (1996). However, Professor Sunstein recognizes the value of *Romer* as cultural artifact as well as law. It "communicate[s] social commitments and may well have major social effects just by virtue of their status as communication." Sunstein, *supra* note 164, at 69. But then *Bowers* had the same effect. See *id.* at 70-71.

concurrence of jurisprudence and politics.¹⁷⁰ Jurisprudentially speaking at least, *Romer* was a little case—a game of dirty pool. *Romer* illustrates the power of decisions which recognize at some subliminal level that sex is politics. In a sense, the Court merely confirmed what our political society had long held true—that everyone should be allowed to ‘play’ the game of republican politics.¹⁷¹ “Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution.”¹⁷² The majority sought to do little more than to identify the basic rules within which republican principles of politics works in this country. These are not new rules, or rules with no connection to actual practice. The majority directed its inquiry to understanding the way in which Americans played the political game of republicanism in this century.¹⁷³ Indeed, the majority relies on tradition to support their decision.¹⁷⁴

Justice Scalia, in dissent, correctly states (though he seems to fail to understand) the strength of that argument.¹⁷⁵ Scalia’s dissent, ironically, is also based on tradition, but of a different kind.¹⁷⁶ In the end, Justice Scalia’s traditional values had to give way to those championed by the majority, and sensibly so—Colorado’s legislature is as capable of protecting traditional moral

170. These themes are explored in greater detail in Larry Catá Backer, *Reflections on the Law of ‘Moral and Social Disapprobation’ in Romer v. Evans: Conformity and the Political Functions of Courts in the U.S. and U.K.*, (1996) (unpublished manuscript, on file with author).

171. In a recently published article, Michael Mannheimer refers, generally, to the Equal Protection Clause’s “equal citizenship principle.” See Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 *TEMPLE L. REV.* 95, 114-17 (1996).

172. *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996). Justice Scalia, in dissent, had a far narrower view of what sort of political participation would be enough. Homosexual political advances are subject “to being countered by lawful, democratic countermeasures as well.” *Id.* at 1634 (Scalia, J., dissenting). This includes “the democratic adoption of provisions in state constitutions.” *Id.* at 1635. The problem, of course, as the majority saw, and as Justice Scalia’s ideology could not fathom, is that our popular political culture does not permit the use of the democratic process to push any participant *out of the game*. And that is what the amendment at issue in *Romer* effectively did. The Justices spent some time considering this point at oral argument, where the issue was crystallized. See *Romer v. Evans* (No. 94-1039) Official transcript of oral argument, October 10, 1995, at 51-56, available in 1995 WL 605822. As Jean E. Dubofsky argued on behalf of respondents, the question was whether the referendum process constituted a prohibited “restructuring of the political process.” *Id.* at 51.

173. This was made quite apparent in oral argument. Thus, for instance, Justice Ginsburg drew analogies to the political give and take of the suffragists at the turn of the twentieth century. See *Romer v. Evans* (No. 94-1039) Official transcript of oral argument, October 10, 1995, at 14, available in 1995 WL 605822 (“I was trying to think of something comparable to this, and what occurred to me is that this political means of going at the local level first is familiar in American politics.”).

174. See *Romer*, 116 S. Ct. at 1628.

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

Id.

175. “Lacking any cases to establish that facially absurd proposition [that the sort of statewide constitutional amendment through referendum at issue in the case], it simply asserts that it *must* be unconstitutional, because it has never happened before.” *Id.* at 1634 (Scalia, J., dissenting) (emphasis added). That is precisely the point. Tradition militates against this sort of fundamental wrenching of political culture in the absence of evidence of a substantial amount of acceptance of these rules *in fact*.

176. “The Court today. . . employs a constitutional theory heretofore unknown to frustrate Colorado’s reasonable effort to preserve traditional American moral values.” *Id.*

values as is the population it represents. In the end, our founders chose for our political home republican Rome, not democratic Athens.¹⁷⁷ That choice imports with it a sense of the dignity of each of the citizens of that polity. *Romer* is a case in sync with that core social reality. It will survive. The more interesting question, however, is what precisely about *Romer*, beside its particular holding, will survive to govern future cases. It is in this form that *Romer* necessarily leads us back to *Bowers v. Hardwick*.¹⁷⁸

C. Bowers, Bowers, *Where Have You Gone?*

The issues are easily stated. Was the decision of the *Romer* Court consistent with *Bowers*? How does *Bowers* fit into the analysis of the *Romer* majority. Here are questions that will keep litigators, academics and the courts busy for a long time. The *Romer* majority was deliberately silent on *Bowers*. That silence has opened a tremendous hole—not because the members of the majority do not know their own minds on the question, but because they chose to throw the question back to the litigating community.

Many have already rushed in to fill that hole for the Court, not the least of which have been the *Romer* dissenters. Justice Scalia seems to have a clear idea of what the majority was doing. He argues eloquently that *Bowers* is ultimately incompatible with *Romer*: “If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is a constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct.”¹⁷⁹ As he points out, the Amendment targets the homosexual class based on four characteristics: sexual orientation, conduct, practices and relationships. So even if a person has a homosexual “orientation” and does not engage in such conduct, *Bowers* would still provide a rational basis for the Amendment. “If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”¹⁸⁰

The only real answer to these questions is—we don’t know. It is clear that read narrowly, *Romer* is irrelevant to the question. The protection of civil status in society, the limitations on the ways in which the state may deal with individuals purely as a result of their membership in some group of our creation, remain stubbornly aloof from the way in which we analyze the rules for the imposition of consequences for conduct.¹⁸¹ The fact that a person may be imprisoned for touching the genitals of another person of the same sex with his or her mouth or genitals has little to do with the power to impose civil disabilities on

177. THE FEDERALIST NOS. 10, 39 & 63 (James Madison).

178. 478 U.S. 186 (1986).

179. *Romer*, 116 S. Ct. at 1631.

180. *Id.* at 1632.

181. There has been a mountain of material written on the status/conduct divide. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’* in *Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

such people because they have been placed within the group of people who might like to do the same. Recall that the majority invoked a particular *tradition* of American political ordering to support its holding. *Bowers* may well speak as strongly to a tradition of a different sort. In the more traditionalist language of Professor Sunstein, "The Equal Protection and Due Process Clauses have very different offices, and [*Bowers*] is not in tension with *Romer* so long as those different offices are kept in mind."¹⁸²

But there is something to be said for the notion that Justice Kennedy in *Romer* does for gay rights and the effort to overturn *Bowers* what Justice Ginsburg has done for the effort to subject gender issues to strict scrutiny. The brilliance of Justice Kennedy's opinion is *not* that he was able to overrule *Bowers* by implication—my guess is that he had no intention of doing that—but that he was able to craft an opinion that opened up the possibility that the Court might soon well move in that direction.

One might be tempted to scoff at an opinion which can offer little more than a *possibility*. Yet Justice Ginsberg's subtlety in offering the possibility of recreating the scrutiny standard for females in *VMI* applies with equal if not greater force to Justice Kennedy's project in *Romer*. The possibilities of *Romer* are momentous, precisely because it appeared that such possibility could not exist, as case law, after *Bowers*. Justice Scalia understood this quite well in arguing against the majority's reasoning in *Romer*. I think everyone does. But this is another one of those cases where the majority would prefer the intermediate courts to do their dirty work for them, and the intermediate courts have jumped to the task.¹⁸³

The work of the lower courts will be made easier because, read broadly, the language of *Romer* is incompatible with *Bowers*, *even though the holdings of the two cases are not*. Robert Bork certainly understands this: "The majority did not even mention its prior decision that homosexual conduct is not a constitutional right, but it is well on the way to holding that it is."¹⁸⁴ The incompatibilities of the two decisions are fairly easy to spot; Justice Scalia has done an admirable job of highlighting some of them.¹⁸⁵ Perhaps more importantly, the differences with which *tradition* is viewed in both cases will significantly weaken the rationale underlying much of what *Bowers* offered, making it possible to ultimately limit that case strictly to its facts.¹⁸⁶ Justice White, writing in *Bowers*, placed a significant emphasis on tradition as a key element supporting the

182. Sunstein, *supra* note 164, at 67.

183. See cases cited *supra* note 9.

184. See BORK, *supra* note 160, at 113.

185. Although the majority categorizes Colorado's effort as consisting of animosity towards homosexuals, Justice Scalia argues that certain types of "animus" are acceptable. For example, conduct such as murder, polygamy, cruelty to animals is considered reprehensible. See *Romer*, 116 S. Ct. at 1632. That, after all, was the basis of *Bowers*. Such was the type disputed here—"moral disapproval of homosexual conduct." *Id.* Although Coloradans have a right to feel hostile to homosexuals, the Amendment is a very conservative display of this hostility. See *id.*

186. Patricia Cain, for example, has suggested this as an attainable goal of an anti-*Bowers* strategy. See Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

continued power of the state to regulate non-heterosexual sexual activity.¹⁸⁷ Yet the passions which can direct political action following a long tradition of treating homosexuality in a particular way carries significantly less weight in the majority opinion in *Romer*.¹⁸⁸

On a more theoretical level, it is difficult to escape the conclusion that there is no rational relationship between the criminalization of private, adult consensual homosexual activity and any legitimate state policy, if such professed policies are subject to the kind of strict-rational-basis-scrutiny exercised in *Romer*. This is especially so if we understand broadly the Court's admonition that moral disapproval, disapproval of a lifestyle that is distasteful, is insufficient as a basis for legislation which negatively impacts the target.¹⁸⁹ Unhappily to be sure, traditionalists have recognized this aspect of the equal protection jurisprudence of the Court. "Moral objections to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus."¹⁹⁰ Richard Posner has reached such a conclusion in what may well have been a dry run for this sort of argument in his recent book, *Sex and Reason*.¹⁹¹ Lots of people, it seems, are hedging their bets on this one. †

In the end, *Romer* is at its most important for what it does not do. It does not foreclose the affirmance of *Bowers* (though it makes this alternative more difficult), yet also does not foreclose the limitation of *Bowers* to its facts. And there may well be something appealing about abandoning substantive due process and substituting for the indeterminacy of that doctrine the potentially more principled interpretive model of equal protection. *Romer* even permits the overruling of *Bowers* and the eventual conflation of sex and sexuality in constitutional jurisprudence.¹⁹² As such, it will be most interesting to see how the Court resolves the challenge inherent in its decision, so well put by Robert Bork: "If homosexuality may not be discouraged by state constitutions, it is

187. See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986). That his view of the rise and extent of this tradition was wrong has become a commonplace belief. See, e.g., Anne B. Goldstein, *History, Homosexuality and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1081-87 (1988).

188. See *Romer*, 116 S. Ct. at 1627-28.

189. Cf. *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (voiding state food stamp regulation disallowing eligibility to households containing unrelated persons on rational basis grounds where it was clear that the regulation meant to target hippie communes). At this point, of course, the arguments—acts versus status—sneaks in. In a sense, one can characterize the differences between the *Romer* majority and the dissent as one of characterization. The majority treated the issue as one of status; the dissent concentrated on the acts underlying the political action of the people of Colorado. A number of commentators have sought to engage this status-conduct divide on a variety of different theories. See, e.g., Anne B. Goldstein, *Reasoning About Homosexuality: A Commentary on Janet Halley's "Reasoning About Sodomy: Act and Identity In And After Bowers v. Hardwick"*, 79 VA. L. REV. 1781 (1993); Janet Halley, *The Politics of the Closet: Towards Equal Protection for Lesbian, Gay, Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Jacobs, *supra* note 154; Valdes, *supra* note 181, at 31.

190. See BORK, *supra* note 160, at 113.

191. See RICHARD POSNER, *SEX AND REASON* 181 (1992). His project of imagining sex as a morally indifferent concept finds significant resonance in the opinion of the *Romer* majority.

192. For a provocative discussion of the possibilities of this conflation, and perhaps of its necessity, see, for example, Valdes, *supra* note 181.

difficult to see how the provisions of various state constitutions banning polygamy can stand. They can't as a logical proposition, but the Court (like modern liberal culture) is not as solicitous of polygamy as it is of homosexuality."¹⁹³ The response to this challenge will tell us much about the interplay of politics and theory in the Court.

IV. DIVINING MEANINGS AND POSSIBILITIES

Each of us would like to play the role of Teiresias.¹⁹⁴ We all know what the ruminations of the Court *really* mean, what they auger for the future. We are assisted in this endeavor by our ideology, our politics, our sociology, our politics, and our economics; perhaps we are even moved to predict the future because of these as well. We read the entrails of the oracles of the Court the way that Œdipus understood the meaning of the Delphic command to rid Thebes of the murderer of Laius.¹⁹⁵ In this sense we always tend to read meaning in ignorance of our own involvement as both judge and judged, and oblivious to the real consequences of our judging. In the end, and strictly read, the cases offer us precious little beyond their holdings—no clear bright line rule, no formula for balancing, no direction for the future. *Romer* and *VMI* are particularly powerful examples of jurisprudence by implication. It will be with the potentially irreconcilable implications of these cases that those of us who must interpret and implement the words of the oracles must struggle—until the oracle speaks again!

193. See BORK, *supra* note 160, at 113-14.

194. Teiresias was a blind prophet of Thebes, counsellor to Œdipus and his uncle/brother-in-law, Creon, who was able to discern the meaning of the Gods. See Sophocles, *Œdipus the King*, in SOPHOCLES: THE THREE THEBAN PLAYS 159, 175-85 (Robert Fagles trans., 1984) (441 B.C.?). "The truth and all its power lives inside me." *Id.* at 179 (Teiresias).

195. Œdipus, of course, was both son and murderer of Laius. He had been sent away from Thebes at an early age to avoid the consequences of the prophecy that he would murder his father and marry his mother. As a young man he found out about the prophecy, and, thinking it applied to his adoptive parents (whom he thought his biological parents), he ran away to Thebes. He murdered his father on the road to Thebes, defeated the sphinx plaguing the city, and accepted the grateful city's reward—leadership of Thebes and the hand of the widow of Laius. The story is richly related in Sophocles, *supra* note 194. What I am relating here is the irony inherent in the judicial project of interpreting our basic law.