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The Pariah Principle

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THE PARIAH PRINCIPLE

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The Supreme Court's recent decision in *Romer v. Evans*[1] has caused both joy and consternation. Among legal scholars, however, it has mostly engendered puzzlement. The Court explicitly avoided the most doctrinally plausible grounds for invalidating Colorado's ban on anti-discrimination protections for homosexuals. Instead it purported to strike down the state constitutional amendment under minimal scrutiny or rational basis review. The word on the street—or, in the case of lawyers and law professors, the word on the internet—is that *Romer* cannot mean what it says, but instead must be a way-station to declaring homosexuality a quasi-suspect classification like gender or illegitimacy. The speculation is that the Court will eventually use *Romer* to strike down prohibitions on same-sex marriages and other restrictions on gay rights.

We believe this line of reasoning gives the *Romer* majority too little credit for intellectual honesty, if perhaps too much credit for progressive impulses.[2] In this essay, we suggest that the decision in *Romer* means no more and no less than what it says (or at least tries to say): that Colorado's Amendment 2 is invalid regardless of the level of judicial scrutiny. Moreover, we contend that this conclusion does not significantly expand current law but is instead perfectly justifiable under existing precedent. The decision also does not necessarily threaten most other restrictions on homosexuals, including bans on same-sex marriage.

We will begin by exploring the seemingly perplexing failure of the *Romer* Court to invoke some familiar doctrinal support.

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

2. Given the overall tenor of the current Court, it hardly seems plausible that the Justices are about to launch a new crusade for social justice on behalf of the downtrodden.

We will then attempt to articulate the principle we believe underlies *Romer* but is imperfectly explained in the opinion. 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). We believe this principle is firmly rooted in existing constitutional law. Finally, we consider the difficulties of applying this principle to Amendment 2 and other legislation. We hope at least to persuade the reader that, contrary to the views of the dissenters and of many commentators, Justice Kennedy's opinion in *Romer* makes an intellectually respectable argument.

I. THE ROADS NOT TAKEN

In 1992, Colorado voters ratified an amendment to the state constitution that effectively prohibited the state or any of its subdivisions from enacting laws that protect homosexuals from discrimination.[3] The Colorado Supreme Court ultimately enjoined the state from enforcing the provision (Amendment 2), and the United States Supreme Court affirmed in *Romer*. At first blush, there seem to be three plausible arguments for invalidating Amendment 2. First, it might deprive homosexuals of a fundamental right, thus triggering (and failing) strict scrutiny under the equal protection clause. This, in fact, was the basis for the Colorado court's decision. Second, it might be directed at a discrete and insular minority, again triggering some form of heightened scrutiny under the equal protection clause. Although plaintiffs made this argument, and many commentators support it,[4] none

3. Amendment 2 provided:

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

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

The Colorado Supreme Court interpreted the Amendment to invalidate all existing laws—including municipal ordinances, executive orders, and the like—prohibiting discrimination against gays and lesbians and to preclude any future such laws. *Evans v. Romer*, 854 P.2d 1270, 1284-85 (1993).

4. See, e.g., Bobbi Berstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 Stan. L. Rev. 269 (1995); John Charles Hayes, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. Rev. 375

of the various courts in the *Romer* litigation accepted it. Finally, the Supreme Court might have relied on cases that apply a somewhat stricter form of minimal scrutiny, sometimes called "rational basis with teeth." In fact, the Court did none of these things.

The Colorado Supreme Court held that Amendment 2 deprived homosexuals of "the right to participate equally in the political process."[5] Applying strict scrutiny to the deprivation of this fundamental right, the court concluded that it was unsupported by a sufficiently compelling governmental interest.[6] In holding that "the right to participate equally in the political process" is a fundamental right, the Colorado court relied partly on voting rights cases, but primarily on cases which it said "bore a much closer resemblance to the question presented by Amendment 2."[7] According to the Colorado court, these cases, including *Reitman v. Mulkey*,[8] *Hunter v. Erickson*,[9] and *Washington v. Seattle School District No. 1*,[10] stand for the broad proposition that a "'[s]tate may no more disadvantage any particular group by making it more difficult to enact legislation [on] its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size.'"[11] The United States Supreme Court explicitly disavowed this rationale, noting that it was affirming "on a rationale different from that adopted by the state supreme court."[12]

The Colorado court itself rejected another potential basis for applying heightened scrutiny to Amendment 2. Plaintiffs had contended that homosexuals should be considered a suspect or quasi-suspect class, thus subjecting Amendment 2 to strict or intermediate scrutiny. The trial court rejected this argument, and the Colorado Supreme Court explicitly refused to consider it.[13]

(1990); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197 (1994); Eric A. Roberts, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 Drake L. Rev. 485 (1993).

5. 854 P.2d at 1285.

6. The court first reached these conclusions in upholding the trial court's grant of a preliminary injunction against enforcement of Amendment 2. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*). It later reaffirmed the same conclusions in affirming the issuance of a permanent injunction. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) (*Evans II*).

7. 854 P.2d at 1279.

8. 387 U.S. 369 (1967).

9. 393 U.S. 385 (1969).

10. 458 U.S. 457 (1982).

11. 854 P.2d at 1283, quoting *Hunter v. Erickson*, 393 U.S. 385, 389 (1969).

12. 116 S. Ct. at 1624.

13. 882 P.2d 1335, 1341 n.3 (Colo. 1994).

The United States Supreme Court also ignored this argument, reviewing the Amendment under the standard applying to legislation that "neither burdens a fundamental right nor targets a suspect class."[14]

Finally, the Supreme Court might have relied on the approach taken in a pair of cases from the 1980s. In each case, the Court had purported to apply minimal scrutiny to a statute that neither burdened a fundamental right nor targeted a suspect class, but it nevertheless invalidated the challenged law after a close examination of its purposes and effects. In *Plyler v. Doe*,[15] Texas had attempted to prohibit illegal alien children from attending public schools. The Supreme Court, after holding that illegal alien children do not constitute a suspect or quasi-suspect class and that education is not a fundamental right, rejected every justification for the law offered by the state. In *City of Cleburne v. Cleburne Living Center*,[16] the city of Cleburne (also in Texas) had zoned a group home for the mentally-disabled out of a residential neighborhood. Again, after explicitly concluding that the rational basis test provided the appropriate level of scrutiny, the Court struck down the zoning restriction. Given the Court's rather cavalier rejection of the plausible governmental interests behind these two laws, it is difficult to reconcile the two cases with ordinary applications of the rational basis test. Indeed, commentators have generally viewed these two cases as evidence of a fourth tier of scrutiny under the equal protection clause, sometimes labeled "rational basis with teeth."[17] Although these cases might thus have provided support for invalidating Amendment 2 using minimal scrutiny, the *Romer* opinion did not cite either one. Instead, the Court relied on hoary cases embodying weak formulations of the rational basis test, including *F.S. Royster Guano Co. v. Virginia*,[18] *Williamson v. Lee Optical of Oklahoma, Inc.*,[19] and *Railway Express Agency v. New York*.[20] The Court apparently believed that Amendment 2 failed to satisfy even the most minimal scrutiny.

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14. 116 S. Ct. at 1627.
15. 457 U.S. 202 (1982).
16. 473 U.S. 432 (1985).
17. David O. Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112 (Oct. 1985) (quoting Victor Rosenblum); see also Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779 (1987). Although the Court did not cite these cases, it did cite a later case limiting them, *Heller v. Doe*, 113 S. Ct. 2637 (1993).
18. 253 U.S. 412 (1920).
19. 348 U.S. 483 (1955).
20. 336 U.S. 106 (1949).

The Court also declined the invitation to apply a literal reading of the equal protection clause to Amendment 2. At oral argument, the suggestion had been made that Amendment 2 deprived homosexuals of any right to legal protection, even under laws of general application such as the assault statutes.[21] Given the lack of any textual basis in Amendment 2 for this interpretation, the Court wisely eschewed this analysis. Nor did the Court follow the suggestion, made in an amicus brief filed by some leading constitutional scholars, that Amendment 2 amounted to a form of outlawry. Their premise was that the equal protection clause "requires a regime that gives all persons equal access at least to the possibility of protection under the laws of the state from the wrongs that may befall them—whether such wrongs as robbery or such wrongs as discrimination, and whether privately or officially inflicted."[22] Apart from one passing remark,[23] however, the Court did not explicitly endorse this line of analysis any more than it did a heightened level of scrutiny.

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21. See 116 S. Ct. at 1630.

22. Brief of Laurence H. Tribe, John Hart Ely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as amici curiae in support of respondents. The principle that the government may not create a class of outlaws seems sound. See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 U.C.L.A. L. Rev. 1425, 1440-42 (1995). Surely, however, the status of outlawry depends on the degree to which the laws actually protect a person's rights, not on the degree to which he might be able to obtain future legislation protecting them. For example, ordinary legislation that deprived a group of any protection from the criminal law would surely create a state of outlawry, even though the group retained the right to seek a repeal of the law. But the right to protection by anti-discrimination laws is clearly not in the same class as the right to protection from criminal conduct—otherwise, every group in America would have an inherent right to be made a "protected class" immediately.

23. The Court does remark at one point that "[a] law declaring that *in general* it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 116 S. Ct. at 1628 (emphasis added). This statement is probably correct if the kind of general declaration to which the Court refers includes the ordinary protection of criminal and tort law. For instance, a rule prohibiting 911 calls by homosexuals would surely violate equal protection in some primal sense. On the other hand, it must clearly be true that the state can selectively bar groups from some kinds of aid; the Court surely did not mean to invalidate a state constitutional provision barring farm assistance, even though such a provision makes it more difficult for farmers to obtain a form of government "aid." Amendment 2 fell short of the kind of general declaration to which the Court seems to be referring. It did not declare that "in general" it would be more difficult for homosexuals to receive aid from the government than members of other groups; it only restricted a specific type of aid.

Although the Court did not explicitly endorse the amicus brief's analysis, the brief may well have contributed to the opinion by nudging the Court toward reconceptualizing the case. Although the brief takes the idea in a different direction than the Court or our own analysis does, it does put forward the view that *Romer* involved a kind of outcast status.

Hence the puzzlement of legal commentators. As we all teach our students,[24] the Court never invalidates statutes unless it applies something more than "real" minimal scrutiny; it has not done so, our lectures recite, since 1937. Indeed, both of the authors play the following game with students as part of the unit on the rational basis test: "You think of a ridiculous statute and I will give a sufficiently rational justification to withstand minimal scrutiny." We have justified requiring cars to be painted blue (to give a boost to the blue paint industry, or to make it easier to identify emergency vehicles), allocating benefits based on astrological signs (perhaps there is something to the personality differences astrologers attribute to date of birth, or else division by astrological sign is a convenient alternative to a lottery), and requiring all contracts to be written in Sanskrit (to foster education and increase employment opportunities for linguists). We have been stumped only once, when a student proposed the "Jim Jones law": everyone in the United States has to drink deadly poison at a particular time.[25] So how could the Supreme Court have invalidated a provision that three Justices considered eminently reasonable?

The Court's puzzling reliance on the rational basis test, while eschewing seemingly more promising lines of argument, left it vulnerable to a blistering dissent by Justice Scalia. Justice Scalia argued that the rational basis test was easily met. If a state can make homosexual conduct a crime, "surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct."[26] Furthermore,

> [A]ssuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. 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. Indeed, where

24. This is a variant on "what every schoolchild knows," a somewhat suspect formulation. See Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 Case W. Res. L. Rev. 695, 696 & n.10 (1996). Nevertheless, the statement in the text appears to be uncontroverted.

25. One of us argued that the statute is rationally related to environmental protection because the elimination of the human population would reduce pollution and conserve natural resources. Students—and the other author—were not persuaded, however, though this argument does seem sufficient to satisfy rational basis as it is usually articulated. (Note that this example really involves the use of the rational basis test under substantive due process rather than equal protection: the hypothetical statute cannot be faulted for failing to treat all groups equally.)

26. 116 S. Ct. at 1631 (Scalia, J., dissenting).

> criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct.[27]

Thus, Justice Scalia concluded, "[n]o principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here."[28] Accusing the majority of "heavy reliance upon principles of righteousness rather than judicial holdings," Justice Scalia characterized the decision as an imposition of elite cultural values on the populace.[29]

If, as Justice Scalia so forcibly argues, the *Romer* opinion is indefensible on its own terms, is there any explanation for the opinion other than sheer lawlessness? One response, which has already circulated among Court-watchers, is that *Romer* is a temporary ruling, which will eventually be replaced by a decision recognizing sexual orientation as a quasi-suspect classification subject to intermediate scrutiny. Adherents to this view have some historical evidence on their side: both of the classifications currently accorded intermediate scrutiny—gender and illegitimacy—were initially subject to exactly the sort of "heightened minimal scrutiny" that the Court is said to have used in *Romer*. In *Reed v. Reed*,[30] the Court purported to use minimal scrutiny to invalidate a law preferring men over women in the choice of estate administrators. Under traditional minimal scrutiny, the administrative convenience of a rule preferring the gender more likely to have had business experience[31] should have been sufficient to justify the law. Five years later, the Court abandoned the pretense of minimal scrutiny and declared gender discrimination subject to intermediate scrutiny.[32] The same pattern unfolded in the illegitimacy cases, although over a longer period of time: after invalidating several laws discriminating against illegitimate children or their parents under the rubric of minimal scrutiny, the Court eventually determined that intermediate scrutiny should apply.[33]

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27. Id. at 1632 (Scalia, J., dissenting).
28. Id. at 1633 (Scalia, J., dissenting).
29. Id. at 1629 (Scalia, J., dissenting).
30. 404 U.S. 71 (1971).
31. This assumption obviously was more valid in 1971, when the case was decided, than it is today.
32. *Craig v. Boren*, 429 U.S. 190 (1976). In the interim, four members of the Court indicated their willingness to apply strict scrutiny to gender distinctions. *Frontiero v. Richardson*, 411 U.S. 677 (1973).
33. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968) (statute invalidated under minimal scrutiny); *Labine v. Vincent*, 401 U.S. 532 (1971) (statute upheld under minimal scrutiny); *Trimble v. Gordon*, 430 U.S. 762 (1977) (statute invalidated under minimal scrutiny); *Lalli v. Lalli*, 439 U.S. 259 (1978) (statute upheld under minimal scrutiny); *Clark v. Jeter*, 486 U.S. 456 (1988) (intermediate scrutiny applied).

But using "rational basis with teeth" to predict the eventual application of intermediate scrutiny does not always work. As *Plyler* and *Cleburne* both show, the Court does not always take the second step. It would be easier, of course, to fit *Romer* into the latter pattern if the Court had cited *Plyler* or *Cleburne*. As it is, viewing *Romer* as an example of "heightened minimal scrutiny" leaves open the question of which category it fits into. Is *Romer* a way-station on the route to intermediate scrutiny or does it instead establish yet another instance of "semi-quasi-suspect classification"?

This question arises only because of the premise that some form of heightened scrutiny is necessary to justify the result. This premise seems to be common ground between Justice Scalia's dissent and *Romer*'s supporters. Scalia assumed that because of *Hardwick v. Bowers*, homosexuals as a class are entitled to no special degree of constitutional protection, and thus that *Romer* cannot be justified. *Romer*'s supporters are likely to argue that *Romer* amounts to a covert recognition that something more than minimal judicial scrutiny is required in gay rights cases. We would like to explore a third possibility: that the majority was correct to invalidate the law without using heightened scrutiny. We suggest that the result in *Romer* can be defended without resolving any general questions about the degree of scrutiny for laws affecting homosexuals. In other words, we contend that the Court correctly concluded that every group—whether homosexuals, smokers, left-handers, or the overweight—is entitled to protection from certain kinds of legislation.

Our proposition requires rejection of Justice Scalia's apparent assumption that, if the state has the right to criminalize certain conduct, it necessarily has the unlimited right to promote private discrimination against any group with a propensity to engage in that conduct. Rather, we believe, a distinction must be drawn between the state's power to regulate conduct and its ability to designate groups as untouchable. Indeed, we believe that this principle, once properly articulated, is firmly rooted in existing law—if not almost too obvious to be debatable. What is less obvious is how to apply the principle, and it is for this reason that *Romer* at first blush seems to require the assistance of some extra level of judicial scrutiny. Properly understood, however, Amendment 2 was not, as Justice Scalia would put it, an unexceptional effort to block a group from obtaining special privileges, but rather an effort to single out a group for pariah status.

II. PARIAHS AND THE CONSTITUTION

A. DEFINING THE PARIAH PRINCIPLE

i.

A 23-year-old woman had just given birth to her first baby when she learned something devastating about her husband. He was secretly a burakumin, a descendant of outcasts. So the woman refused to touch her own baby. She returned to her parents' house and abandoned her husband and child forever.[34]

ii.

Tyranny of [the] caste system, experienced by him in his early life is as follows: when he was only 5 years old, he learnt that no barber would cut his hair for fear of pollution and so this chore had to be done by his sister. Stranded with his sister on the railway platform at Gurgaon, he found that no bullock cart driver would take them. And when he found one cart, the driver would not drive the cart, a job he had to do . . . himself. . . . Returning from England, with a Doctorate degree to serve the Baroda state according to the terms of scholarship he availed, Ambedkar found that no one was willing to rent a house to him.[35]

No member of a Hindu caste may accept cooked food, salt, milk or water from an untouchable. His touch is polluting, even his nearness is often sufficient to defile a man of high caste. In some cases even his sight is polluting. He is debarred from using all public conveniences, roads, vehicles, ferries, wells, schools, restaurants and tea shops.[36]

iii.

Cornelia Otis Skinner, the noted actress, found it virtually impossible to obtain hotel reservations for herself and her Negro maid during a 1948 tour of the segregated territory. One Southern theatrical agent suggested that accommodation might be more readily available if the maid would wear a nurse's uniform. Only four hotels in the South would finally take in both, and even these insisted that the two sleep in separate rooms, and that the maid use only the service elevator. . . . Taxis would accept both, but if Miss Skinner went to her hotel first, the maid would be dumped on the sidewalk and

34. Nicholas D. Kristof, *Japan's Invisible Minority: Better Off Than in Past, but Still Outcasts*, N.Y. Times at A18 (Nov. 30, 1995).

35. W.C. Deb, *Crime Against Humanity* 67 (Uppal Publishing House, 1993).

36. Stephen Fuchs, *At the Bottom of Indian Society: The Harijan and other Low Castes* 4 (Munshiram Manoharlal Publishers, Pvt. Ltd., 1981).

> told to call a Negro cab for the remainder of the ride to a Negro hotel.[37]
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> Summer, 1965. Father, mother, brother, me. En route to New York City, by way of Gettysburg, Pennsylvania, Washington, D.C., and Annapolis, Maryland. First stop Annapolis, late, tired from hours of driving, and hungry. Hotel, after hotel, after hotel, we find. Simply no room for a family like mine. . . .
>
> I could talk about how it felt to see my father go in and out of those red and brown brick buildings, in the rain, wondering how they said what they said to him, but I've promised myself not to get angry this trip.[38]
>
> The state's table was placed at right angles to that of the defense so that opposing counsel were almost face to face. The weather was extremely warm that day and, although pitchers of ice water and cups were placed on the judge's bench and on the state's table, none was provided for the defense. Defense counsel were told, however, that they might use a "for colored only" fountain located outside the courtroom.[39]
>
> Not only are Negro corpses commonly barred from burial in white cemeteries; in the nation's capital a cemetery for pets refuses to inter the remains of pets that were owned by Negroes.[40]

What these passages have in common is that they describe the daily indignities of social pariahs. Whether they are called outcasts or untouchables or worse, pariahs are not simply the group at the bottom of the social or economic ladder. To be a pariah is to be shunned and isolated, to be treated as if one had a loathsome and contagious disease. The message is that outcasts are not merely inferior; they are not fully human, and contact with them is dangerous and degrading.

That such a system once existed in this country will forever be a source of shame; that it is now an anathema cannot be doubted. If the equal protection clause means anything, it means that the government cannot pass caste legislation: it cannot cre-

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37. Stetson Kennedy, *Jim Crow Guide: The Way It Was* 194 (Florida Atlantic U. Press, 1990).

38. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. Cal. L. Rev. 2231, 2279-80 (1992). See also Karen Fields, Introduction to Mamie Garvin Fields, *Lemon Swamp and Other Places: A Carolina Memoir* xiii (The Free Press, 1983).

39. *Henry v. Williams*, 299 F. Supp. 36, 41 (N.D. Miss. 1969)

40. Kennedy, *Jim Crow Guide* at 85 (cited in note 37). See also C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford U. Press, 1974); Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (U. of Illinois Press, 1989).

ate or sanction outcast groups. The Court has recognized that when the government treats a group of citizens as pariahs, it imposes two unacceptable harms. It simultaneously brands them as inferior and encourages others to ostracize them. Thus, in *Strauder v. West Virginia*,[41] the Court invalidated a law that prohibited blacks from sitting on juries on the ground that it was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice."[42] Our Constitution does not permit the government to declare "an open season" on some group of citizens.[43]

Indeed, as Justice Harlan wrote in his justly lauded dissent in *Plessy v. Ferguson*, "[t]here is no caste here."[44] "We boast of the freedom enjoyed by our people above all other peoples," he continued, "[b]ut it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law."[45] Various Justices have reiterated his sentiment. *Plyler*, in which the Court struck down a mean-spirited attempt to deprive illegal alien children of a public education, is only the most recent example. In that case, the Court noted that "[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based . . . legislation."[46] Caste legislation, wrote Justice Douglas in 1941, is "utterly incompatible with the spirit of our system of government."[47] The Court has noted that the Constitution does not permit states to "divide citizens into . . . permanent classes."[48] The Court has frequently quoted Senator Howard, who defended the proposed Fourteenth Amendment on the floor of the Senate by suggesting that its ma-

41. 100 U.S. 303 (1879).

42. Id. at 308.

43. See *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75 (1968) (invalidating a law that "creates an open season on illegitimates in the area of automobile accidents"). In extreme cases, an "open season" law would be equivalent to outlawry. See supra note 22.

44. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

45. Id. at 562.

46. *Plyler v. Doe*, 457 U.S. 202, 213 (1982); see also id. at 217 n.14 (Texas statute invalidated by the Court "suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish"). For other examples of condemnation of caste, see, e.g. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 471-72 (1985) (opinion of Marshall, J.); *Garner v. Louisiana*, 368 U.S. 157, 185 (1961) (Douglas, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (Douglas, J., concurring); *Furman v. Georgia*, 408 U.S. 238, 255, 257 (1972) (Douglas, J., concurring); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 469 (1988) (Marshall, J., dissenting).

47. *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring).

48. *Zobel v. Williams*, 457 U.S. 55, 64 (1982); see also *Plyler v. Doe*, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

jor purpose was to "abolis[h] all class legislation . . . and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another."[49]

The Court has also endorsed the related notion that the government cannot impose disabilities on an individual who bears no responsibility for his status. In invalidating laws discriminating against illegitimate children, for example, the Court noted that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[50] In *Plyler*, too, the Court stressed the injustice of imposing "a lifetime hardship on a discrete class of children not accountable for their disabling status."[51] This principle goes beyond the criminal justice principle demanding individualized determinations of actual wrongdoing before punishment is imposed. It is instead another formulation of the anti-caste aspect of the equal protection clause: the government cannot single out a whole group of people to brand them with inferior status.

The pariah principle is at its strongest when the individuals so targeted are not responsible for their status, but it has force even where the individual bears some responsibility. In the immediate aftermath of the Civil War, the Court invoked the bill of attainder clause to strike down occupational disabilities imposed on former Confederates. *Cummings v. Missouri*[52] held unconstitutional a provision of the Missouri Constitution that required an oath regarding past loyalty as a precondition for several occupations, including the priesthood. The Court said the loyalty oath sought "to reach the person, not the calling" and was intended as punishment rather than a bona fide occupational qualification.[53] If it had been upheld, the Missouri constitutional provision would have created a large caste of individuals barred from key occupations because of their unworthiness. In *Ex Parte Garland*,[54] the Court applied the same rationale to invalidate a ban on former Confederates practicing law in federal court. More

49. Cong. Globe, 39th Cong. 1st Sess. 2766 (1866). The Court has quoted Howard in numerous cases, including *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982); *Jones v. Helms*, 452 U.S. 412, 424 n.23 (1981); *Reynolds v. Sims*, 377 U.S. 533, 600 (1964) (Harlan, J., dissenting). See also *Adamson v. California*, 332 U.S. 46, 52 n.8 (1947) (quoting Senator Sumner to effect that the Fourteenth Amendment abolished "oligarchy, aristocracy, caste, or monopoly with peculiar privileges and powers").

50. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

51. 457 U.S. at 223.

52. 71 U.S. (4 Wall.) 277 (1866).

53. Id. at 320.

54. 71 U.S. (4 Wall.) 333 (1866).

recently, the Court reaffirmed this broad approach to the bill of attainder clause in *United States v. Brown*,[55] in which the Court struck a ban on the holding of union office by current or former members of the Communist Party. In each of these cases, the Court was unpersuaded that the occupational disability was a rational attempt to prevent future harm as opposed to a sanction for past misconduct.

The trait in question in each of these cases was immutable, in the sense that the relevant conduct was in the past and unchangeable.[56] On the other hand, the disability was imposed on the basis of some actual past conduct, rather a presumed "orientation" toward misconduct. The broader principle would seem to be that the function of legislation is to regulate future conduct rather than to express moral judgments about past conduct or character flaws. Indeed, the Court has gone so far as to hold that any criminal punishment whatsoever for even such a serious defect as drug addiction would violate the cruel and unusual punishment clause.[57] Yet drug addiction is certainly something that the state has every right to discourage. Likewise, as Justice Scalia seems to have conceded, the state could not possibly criminalize homosexual orientation (as opposed to homosexual conduct). The bill of attainder cases suggest that the state similarly could not use occupational limitations as a means of expressing its disapproval of homosexual orientation or even of past homosexual conduct.

Thus, the Court has recognized a broad principle in a wide range of cases, including equal protection cases, bill of attainder cases, and even cruel and unusual punishment cases. The principle is that the government cannot brand any group as unworthy to participate in civil society. Even the most serious past misconduct—the Confederates were, after all, guilty of treason—does not provide a basis for this kind of group sanction. Still less can a group be deprived of civil equality based on immutable characteristics such as sexual orientation. This principle is at the heart of the *Romer* Court's declaration that Amendment 2 "has the peculiar property of imposing a broad and undifferentiated

55. 381 U.S. 437 (1965). The application of the bill of attainder clause to *Romer* is brilliantly argued in Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness* (forthcoming, Mich. L. Rev.).

56. For this reason, the bill of attainder clause normally does not apply when individuals have the ability to exit the targeted class. See *Selective Service System v. MPIRG*, 468 U.S. 841 (1984).

57. *Robinson v. California*, 370 U.S. 660 (1962).

disability on a single named group, an exceptional and . . . invalid form of legislation."[58]

The Court has rarely invoked the pariah principle,[59] perhaps because such legislation is rare. But there are some indications that the majority in *Romer v. Evans* relied on the pariah principle to invalidate Colorado's Amendment 2. Justice Kennedy's opinion for the Court concluded that a state "cannot . . . deem a class of persons a stranger to its laws,"[60] nor "make them unequal to everyone else."[61] He also suggested that it is "not within our constitutional tradition" to enact laws "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government."[62] Animus and hostility are not legitimate governmental motivations. Even Justice Scalia did not seem to dispute that the equal protection clause might embody the pariah principle; he simply denied that Amendment

58. 116 S. Ct. at 1627.

59. A computer search reveals that the word "caste" appears in 36 Supreme Court cases. Aside from the ones cited earlier in this essay, the bulk of the citations are concurring or dissenting arguments that a particular piece of legislation—usually affirmative action—does or does not create a forbidden caste system. Each argument contains an implicit recognition that legislation that *does* create a caste system is unconstitutional. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) ("a 'quota is . . . a creator of castes'") (Scalia, J., concurring); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2120 (1995) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.") (Stevens, J., dissenting); id. at 2123 n.5 ("I would not find Justice Thomas' extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system . . .—at all persuasive.") (Stevens, J., dissenting); *Miller v. Johnson*, 115 S. Ct. 2475, 2498 (1995) (quoting Stevens' dissent in *Adarand*) (Stevens, J., dissenting); id. at 2506 (same) (Ginsburg, J., dissenting); *United Steelworkers of America v. Weber*, 443 U.S. 193, 254 (1979) ("the racial quota is nonetheless a creator of castes") (Rehnquist, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) ("[a] segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom.") (Douglas, J., dissenting); *U.S. v. Yazell*, 382 U.S. 341, 361 (1966) (system of 'coverture' is an "archaic remnant of a primitive caste system") (Black, J., dissenting); *Bell v. Maryland*, 378 U.S. 226, 287 (1964) ("denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States") (Goldberg, J., concurring); *Lathrop v. Donohue*, 367 U.S. 820, 882 (1961) (requiring bar membership dues "has the mark of 'a lawyer class or caste'") (Douglas, J., dissenting); *Hall v. DeCuir*, 95 U.S. 485, 504 (1877) (discussing whether "separation tended to deepen and perpetuate the odious distinction of caste") (Clifford, J., concurring); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 91 (1872) (discussing whether commercial regulation "makes a caste of [one class of persons] to subserve the power, pride, avarice, vanity, or vengeance of others") (Field, J., dissenting). There are also a few cases which quote the certificate of incorporation of the NAACP, which states that one of the organization's principle objectives is to "eradicate caste." See *NAACP v. Overstreet*, 384 U.S. 118, 120 n.2 (1966) (Douglas, J., dissenting); *NAACP v. Alabama*, 357 U.S. 449, 451 n.* (1958); *Bates v. Little Rock*, 361 U.S. 516, 526 (1960).

60. 116 S. Ct. at 1629.

61. Id.

62. Id. at 1628.

2 constituted the sort of caste legislation that would violate the principle.

B. The Pariah Principle and Other Approaches to Equal Protection

Not surprisingly, given its intuitive appeal, the pariah principle resonates with other constitutional theories pertaining to the exclusion of minority groups. It is distinguishable from those theories primarily by its sharper focus.

One approach to the problem of group exclusion focuses on the stigma imposed on members of the "outgroup." The stigma approach is exemplified by Justice O'Connor's "endorsement" test in establishment clause cases.[63] In Justice O'Connor's view, the government can neither "send a message to nonadherents [to a particular religion] that they are outsiders, not full members of the political community,"[64] nor "mak[e] adherence to religion relevant to a person's standing in the political community."[65] Whether or not this is an appropriate test for the religion clauses,[66] it is an apt description of caste legislation. Indeed, the message sent by caste legislation is even stronger: all right-thinking people should avoid any contact with those the legislation makes pariahs. Pariahs are outsiders not only to the political community, but to the human community. The hostility expressed by pariah legislation is visceral and deep-seated, reflecting a view of the pariahs as contaminating—literally untouchable.

The concept of stigma has also played a role in thinking about equal protection. Most notably, the Supreme Court relied on the stigmatizing effect of segregation as a reason for invalidating it in *Brown v. Board of Education.* Charles Lawrence has expanded the idea of stigma as part of a full-blown theory of antidiscrimination law. Lawrence argues that strict scrutiny should apply when legislation operates to "shame and degrade a class of persons by labeling it as inferior."[67] Stigma causes two kinds of harm: it inflicts psychological injury on its victims and signals in-

63. See *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring).

64. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

65. *Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring).

66. For criticism of the endorsement test in the religion context, see, e.g., Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 147-57 (1992).

67. Charles R. Lawrence, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 350 (1987).

ferior status to others.[68] Consequently, Lawrence calls on courts to invalidate government actions that convey a "cultural meaning" of racial inferiority, such as the building of a wall between a white and black community.[69] Similarly, Kenneth Karst has articulated a principle of equality that "centers on those aspects of equality that are most closely bound to the sense of self and the sense of inclusion in a community."[70]

These stigma-based theories have an obvious resemblance to the pariah principle. The pariah principle is narrower, however. Rather than addressing all government actions that may lead to damaging feelings of exclusion, it is limited to the extreme form of exclusion faced by untouchables. Moreover, although psychological impact may be a supporting rationale for the pariah principle, the principle is primarily focused on the victims' right to participate in civil society rather than on their feelings of self-esteem.

In this respect, it is more closely allied with the views of the Framers of the Fourteenth Amendment. During the Reconstruction period, political and legal theorists distinguished between civil rights and social rights. The Fourteenth Amendment was in large part an effort to assure a firm constitutional basis for the 1866 Civil Rights Act, which in turn was a response to the post-Civil War black codes in the South. The black codes deprived blacks of a variety of rights regarding employment, property ownership, free movement, and participation in the legal system, and the Civil Rights Act was meant to guarantee the right of blacks to participate in civil society.[71] Guarding the self-esteem of blacks was a much lower priority. Although the pariah principle does not ignore psychological trauma or the handicaps on social interaction created by untouchable status, it gives equal attention to the evil of what the *Romer* Court called "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."[72]

Another approach to equal protection focuses on the subordinate position of certain groups in society. This approach, and its connection with the concept of caste, has been most ambi-

68. Id. at 351.

69. Id. at 355-56, 363-64.

70. Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 3 (Yale U. Press, 1989).

71. The history is recounted in Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 298-305 (West Publishing Co., 1990). See also Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2435-36 (1994) (black codes as paradigm denials of equal protection).

72. 116 S. Ct. at 1627.

tiously developed by Cass Sunstein. Sunstein articulates his anticaste principle as follows:

> [T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. On this view, a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.[73]

In his terms, society's treatment of women and blacks violates the anticaste principle; discrimination against Jews, homosexuals, and the poor does not.[74]

Sunstein's principle is both broader and narrower than the pariah principle. It is broader in that the concept of caste is wider than that of untouchability. Indeed, the Indian caste system predated the creation of untouchable castes.[75] Clearly, a group may occupy a subordinate position without being untouchable—women, whom Sunstein consider to be a subordinate caste, are the most obvious example. On the other hand, Sunstein's view is also narrower because he limits his definition of caste to visible characteristics—a definition that might paradoxically exclude the Indian untouchable caste. More importantly, Sunstein's approach is an effort to identify protected classes whose low economic and political status deserves special solicitude, whereas the pariah principle protects *any* group from being legislated into outcast status.

Sunstein's approach is an ambitious reconceptualization of existing equal protection doctrine. Like his anticaste principle, the conventional concept of suspect classes is related to the pariah principle but is nevertheless quite distinct.

One factor the Court considers in determining whether legislation is directed at a discrete and insular minority—a "suspect classification" in equal protection parlance—is whether the trait that identifies the target group is immutable.[76] Thus race and

73. Sunstein, 92 Mich. L. Rev. at 2411-12 (cited in note 71).

74. Id. at 2438, 2444.

75. See Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 200-01 (Harvard U. Press, 1995).

76. For an elaboration, see Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Georgetown L.J. 89, 113-14 (1984).

gender qualify, but age and poverty do not. Pariah legislation is typically directed at status rather than conduct, and often that status is hereditary. While not identical to the question of immutability, these characteristics also focus on the extent to which the targets of the legislation can control the trait that distinguishes them from the rest of the population. But just as it overlaps imperfectly with Sunstein's caste principle, the pariah principle is simultaneously broader and narrower than the idea of immutability. Status is not simply the possession of an immutable trait: it is the labeling of a person based on who he is rather than what he does. It carries with it echoes of pre-Enlightenment hierarchies based on birth and parentage. Status need not be either immutable or hereditary. A child with a hideous defect, born of normal parents, would once have been (and unfortunately might still be) accorded pariah status; if surgery corrects the defect, the child's status might change.

Another crucial difference distinguishes standard three-tiered equal protection doctrine from the pariah principle. Conventional doctrine looks to the target group's general status in society. If the Court determines that that status is too vulnerable—that is, that the group constitutes a discrete and insular minority—then all legislation intentionally disadvantaging the group is subject to heightened scrutiny. The pariah principle, by contrast, looks only to the particular legislation at issue to determine whether it creates or encourages pariah status. Thus under conventional analysis, all intentional discrimination against people of color, however mild, is subject to strict scrutiny. Discrimination against left-handers, however, is acceptable under three-tiered equal protection doctrine. It violates the Constitution only if it makes them pariahs—and even after such legislation is invalidated, other discriminatory statutes are left untouched. In other words, a determination that a particular statute violates the pariah principle does not convert the target group into a discrete and insular minority.[77]

The pariah principle does not fit neatly within any of these current ways of thinking about equal protection, but its family

77. Of course, if enough such statutes exist, that might show the group's vulnerability to hostile legislation and thus provide some evidence for a conclusion that the group is a discrete and insular minority. Nevertheless, there is a significant difference between concluding that some people are, as a class, *generally considered* pariahs by society, and concluding that a particular statute *treats* them as pariahs. The pariah principle is thus broader than *Carolene Products* in that it is not limited to those generally disadvantaged by our society, but it is also narrower in that it has nothing to say about run-of-the-mill discriminatory legislation against even the most vulnerable groups.

resemblance to them is no coincidence. Modern thinking about equal protection centers around *Brown*, which means that Jim Crow is the paradigm violation of the equal protection clause. But there are many overlapping ways of conceptualizing the evils of Jim Crow. *Carolene Products* centers around the political subordination of blacks in the old South; the anticaste principle focuses on their social and economic subordination; and the stigma theory focuses on the racist ideology of inferiority. The pariah principle focuses on the resemblances between their situation and that of untouchable castes: the taboos based on their presumed inferiority that prohibited blacks from engaging freely in many of the ordinary transactions of everyday life. Except for Jim Crow, legislation giving credence to such taboos has been rare in American society, which is why other ways of generalizing from the rejection of Jim Crow have seemed more fruitful. Apart from Jim Crow, such legislative judgments of inferiority typically have been based on past conduct, which is why the bill of attainder cases are closely allied with the pariah principle. Indeed, in a sense, Jim Crow might have been considered a bill of attainder against blacks—except that the disabilities placed on blacks were even worse than a bill of attainder in that they did not even purport to be based on past misconduct, but instead on inherent inferiority. Whether the badge of inferiority is a black skin, or a yellow star, or a pink triangle, the pariah principle forbids the government from relegating any class of citizens to the status of untouchables.

We doubt that Justice Scalia or other supporters of Amendment 2 would quarrel with this principle. They might well, however, question whether the principle has any application to the much less dramatic situation before the Court in *Romer*. In the next section we will explain why the Court correctly viewed Amendment 2 as a violation of the pariah principle.

III. APPLYING THE PARIAH PRINCIPLE

We turn then, to the question of how to determine whether a law violates the pariah principle. In other words, what does it mean to say that a particular law creates or sanctions outcasts? It might help to begin with an example that does not trigger emotional or ideological responses. Some studies suggest that left-handed people die earlier than right-handed people, and some speculate that this might be due to greater involvement in vari-

ous kinds of accidents.[78] Suppose further research shows that lefties indeed have automobile accidents at a significantly higher rate. Under the usual form of minimal scrutiny, the legislature would be permitted to curtail—or even to eliminate—driving privileges for left-handers. Draconian as that step might be, it is rationally related to the legitimate state interest of preventing accidents. A state would even have a rational basis for prohibiting left-handers from marrying each other in order to prevent the perpetuation of the genetic "defect."

But the government could not require left-handers to wear a scarlet L: despite the likely insistence that such a law serves only to warn others in order to avoid accidents, it is apparent that the primary, if not the sole, purpose of such a law is to brand lefties as outcasts.[79] This is what the Court meant in *Romer* when it quoted *Department of Agriculture v. Moreno* to the effect that "'a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[80] Notice that it is irrelevant that left-handers do not constitute a discrete and insular minority or that choice of apparel is not a fundamental right.

Beyond the scarlet L, the analysis becomes more difficult. It is clearly not caste legislation for the government, knowing that many people hate or fear left-handers (viewing them as sinister or at least as gauche), to refuse to enact legislation protecting them from private discrimination. The government may even contribute to the discriminatory atmosphere in some ways, as, for example, if public schools force left-handed children to write with their right hands. (There are generations of lefties who will testify that this is unlikely to be a particularly successful strategy: all it produces is people who can't write well with either hand.) The government might exclude left-handers from the military because of their accident rate or to simplify training and equipment

78. See Stanley Coren, *Age Trends in Handedness: Evidence for Historical Changes in Social Pressure on the Writing Hand?*, 9 J. Social Behavior and Personality 369 (1994); John P. Aggleton, Robert W. Kentridge, and Nicholas J. Neave, *Evidence for Longevity Differences Between Left Handed and Right Handed Men: An Archival Study of Cricketers*, 47 J. Epidemiology and Community Health 206 (1993). See generally, John J. Sciortino, *Sinistral Legal Studies*, 44 Syracuse L. Rev. 1103 (1993). Although we are both right-handed, we should note that our selection of this example should not be considered evidence of animosity toward lefties. Indeed, each of us has happily produced left-handed progeny.

79. This should be true even leaving aside the possibility that such legislation might violate the First Amendment by compelling speech. On the speech issue, see, e.g., *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).

80. 116 S. Ct. at 1628, quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

procurement. Moreover, under the reasoning of such cases as *Maher v. Roe*,[81] the government could presumably encourage left-handers not to reproduce, or at least to reproduce only with right-handed mates. And, as noted earlier, the government could enact all sorts of restrictions on left-handers themselves.

Defining the precise circumstances under which such anti-southpaw legislation goes too far, and becomes caste legislation, is tricky. Indeed, identifying legislation that violates the pariah principle is better described as reasoning by analogy—determining how close the law is to the core case of the scarlet L—than as applying a particular test.[82] Thus it would be difficult to construct a bright-line rule for distinguishing legitimate legislation from caste legislation. Nevertheless, keeping in mind the paradigm case, we can focus on some identifying factors. Caste legislation sends a message that it is perfectly reasonable for someone to avoid sitting near the pariah on a bus, or using the same drinking fountain, or playing on the same baseball team. As Justice Harlan noted, caste legislation proceeds on the ground that some citizens "are so inferior and degraded that they cannot be allowed to sit in public coaches occupied" by other citizens.[83] It also encourages ostracism; as the Court noted in *Strauder v. West Virginia*, one problem with a statute forbidding blacks to sit on juries was that it is "a stimulant to . . . prejudice."[84] Another problem with caste legislation is that it suggests that the pariahs as a group are inherently unequal and have core societal rights only on sufferance. Finally, caste legislation tends to be directed at status rather than conduct and to involve hereditary or quasi-hereditary traits. Justice Brennan condemned the Texas statute at issue in *Plyler* in part because it "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[85] These are certainly core features of all of the examples that began this section, as well as of the scarlet L. One way to summarize our view of improper caste legislation would be to say that such legislation condemns the sinner, as well as the sin.

The key question, of course, is whether Colorado's Amendment 2 is close enough to a scarlet L to violate the equal protection clause. The thrust of Justice Scalia's dissent is to argue that it is not: he suggests that the law is not based on a "bare . . . desire

81. 432 U.S. 464 (1977); See also *Harris v. McRae*, 448 U.S. 297 (1980).
82. See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford U. Press, 1996).
83. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).
84. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).
85. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

to harm," but is rather a run-of-the-mill "singl[ing] out for disfavorable treatment,"[86] presumed to be constitutional unless irrational. Amendment 2, according to Scalia, does not even disfavor homosexuals, but merely prohibits giving them special benefits; it is, moreover, merely the manifestation of mild, and legitimate, antipathy toward disfavored conduct. The appropriate analogy is not to the scarlet L but to *Bowers v. Hardwick*,[87] which allows the state to criminalize homosexual conduct.

The majority opinion, while not fully satisfactory, contains the seeds of a response based on the pariah principle. The majority is rightly suspicious of the unusual nature of the restrictions imposed by Amendment 2: the Amendment "identifies persons by a single trait and then denies them protection across the board."[88] Under what circumstances might it be rational to impose such broad disabilities on the basis of a single trait? Only if the mere possession of that trait brands its bearer as less than a full citizen. As Richard Epstein—no defender of antidiscrimination laws—has explained, society's general acceptance of antidiscrimination laws puts advocates of measures like Amendment 2 in the position of arguing that homosexuals deserve an exceptionally disfavored status:

> [T]hey [advocates of Amendment 2] have to make it appear as though they harbor special animus against the groups that want to claim the protection of the antidiscrimination ordinance. . . . [P]roponents of the amendment must give long and elaborate explanations as to why some groups are unworthy, by some public standard, of a guarantee of the same level of protection that is accorded to other groups. . . . The inability to rely on freedom of association means that all refusals to associate have to be for cause, so that individuals and groups who wish to be left alone now have to engage in the unhappy task of group defamation in order to achieve that rather simple end. The upshot is that the entire process sanctions a level of antigay and antilesbian rhetoric that is better left unspoken in public settings.[89]

In fact, the problem is worse than Epstein realizes. Advocates of Amendment 2 must not only explain why homosexuals are entitled to less protection than protected classes such as veterans, the unmarried, and the elderly, all of whom are covered by Colorado

86. 116 S. Ct. at 1629 (Scalia, J., dissenting).
87. 478 U.S. 186 (1986).
88. 116 S. Ct. at 1628.
89. Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 Mich. L. Rev. 2456, 2472 (1994).

civil rights law. They must also explain why, unlike any other group in society, homosexuals should be permanently disbarred from seeking such protection. The only apparent explanation for this unique treatment is that discrimination against homosexuals is desirable and therefore entitled to constitutional protection.[90]

The Amendment also shares with other caste legislation the fact that it penalizes a status. One need not engage in homosexual conduct to come within the purview of the Amendment: it includes "[h]omosexual, [l]esbian, or [b]isexual *[o]rientation*" and "relationships" (which could, in fact, be sexually chaste), in addition to "conduct" and "practices." This focus on status is not an accident. Homosexuals are hated not just for what they do but for who they are, and thus anti-gay and anti-lesbian sentiment is directed at status as well as conduct. As Judge Richard Posner has observed, the "real horror of homosexuality" today, "for those who feel it as horror, is the preference itself."[91] It is the inclination toward homosexuality, not particular sex acts—which sometimes may be committed by someone with basically heterosexual inclinations—that is the basis for condemnation: "if you (being male) say that you'd like to have sex with that nice-looking young man but of course will not because you are law-abiding, afraid of AIDS, or whatever, you will stand condemned in the minds of many as a disgusting faggot. Homosexual acts are punished in an effort, however futile, to destroy the inclination."[92] This targeting of homosexuals for who they are is, as noted earlier, one hallmark of pariah legislation.

To deprive a single class of the right to approach legislative bodies for protection against discrimination serves not only to demonize members of the class as unworthy of the respect of other citizens. It also encourages private discrimination. It creates a specific constitutional right to discriminate, implying that its targets deserve to be shunned. It sends a message that unlike everyone else, homosexuals are not entitled to the ordinary pro-

90. Press reports indicate that the supporters of Amendment 2 engaged in a concerted effort to identify homosexuals with otherwise deviant lifestyles and with sexual abuse of children. See Michael Booth, *Gay-rights Amendment Fight Costly, Heated*, Denver Post at B4 (Oct. 29, 1992); Michael Booth, *Controversial Researcher Focus of Rights Debate*, Denver Post at 6A (Sept. 27, 1992); Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 Fordham Urban L.J. 1057, 1069, 1073 (1994); Bella Stumbo, *The State of Hate*, 120 Esquire 73, 78, 81, 84 (Sept. 1993).

91. Richard A. Posner, *Sex and Reason* 232 (Harvard U. Press, 1992).

92. Id. at 233. Like Epstein, Posner is also skeptical about discrimination laws but sees no basis for protecting other groups while excluding homosexuals: "Is there less, or less harmful, or less irrational discrimination against homosexuals than against the members of *any* of these other groups? The answer is no." Id. at 323.

tections of our legislative process. They are, in other words, citizens only on sufferance.

Nor does it matter that Amendment 2 does not mandate private discrimination. The Court in *Romer* disavowed the Colorado court's reliance on such cases as *Reitman v. Mulkey*[93] and *Hunter v. Erickson*,[94] presumably because those cases involved restrictions on racial anti-discrimination provisions. Nevertheless, both cases are similar to *Romer* in that they involved provisions making it difficult or impossible to enact anti-discrimination laws. In *Reitman*, California had enacted a constitutional amendment prohibiting the state legislature or any local lawmaking body from limiting the right to sell or lease property to any person, with the obvious effect of invalidating all existing or future laws against housing discrimination. In *Hunter*, an amendment to the Akron city charter required that housing discrimination ordinances, unlike all other local ordinances, had to be approved in a citywide referendum. In invalidating these two provisions, the Court held both that encouragement of private racial discrimination can constitute state action susceptible to an equal protection challenge and that a state provision constitutionalizing the right to discriminate is different from a mere repeal or refusal to enact anti-discrimination provisions.

Where *Romer* differs from *Hunter* and *Reitman* is that the general type of discrimination—against homosexuals—is not itself prohibited by the equal protection clause as so far interpreted. The Court would not apply strict scrutiny to a state law prohibiting same-sex marriage, for example. But the pariah principle eliminates this difference. Just as the state would be prohibited from requiring homosexuals to wear a pink triangle, it is prohibited from deliberately encouraging private individuals to treat homosexuals as pariahs or from constitutionalizing the right to treat homosexuals as pariahs. (It is a nice question, not at issue in *Romer* itself, whether mere symbolic encouragement without the actual legal protection of the right to ostracize would be sufficient to invalidate state legislation.)

Notice that the pariah principle, as thus defined and applied, is quite narrow, allowing a great deal of legislation that might be considered discriminatory. By itself, it does not necessarily prevent the government from restricting gays and lesbians from some occupations thought to involve peculiar dangers. Nor does it prohibit legislation that has the incidental but unintentional ef-

93. 387 U.S. 369 (1967).
94. 393 U.S. 385 (1969).

fect of keeping one identifiable group of people toward the bottom of the social and economic ladder.

The conflict between Amendment 2 and the pariah principle remains unclear so long as we conceptualize it, as did the Colorado Supreme Court, as a limit on the ability to lobby for new legislation of a specific kind. But a ban on legislation is equivalent to the recognition of a constitutional right: to say that Congress may pass no law abridging the freedom of speech is to make free speech a constitutional right. Similarly, to say that the legislature may pass no law protecting homosexuals from discrimination is to make discrimination against homosexuals a protected constitutional right. By singling out discrimination against homosexuals for this special commendation by the state, Amendment 2 renders them a pariah class. It essentially places the right to be free from economic or social contact with homosexuals on a higher plane than the right to avoid members of any other group in society. As the *Romer* Court said, such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[95]

The pariah principle is not, however, implicated by other forms of discrimination against homosexuals. One example is the prohibition on gay marriage. To say that gay men cannot marry each other is not to brand them as untouchables. On the contrary, untouchables are only allowed to mate within their own group. A rule that prohibited homosexuals from marrying heterosexuals would be more analogous to pariah status. Similarly, the "don't ask, don't tell" policy for homosexuals in the military[96] is quite contrary to a rule of untouchability. By pointedly tolerating closeted homosexuality, the policy in effect declares that other soldiers have no valid complaint about association with homosexuals; if the military considered homosexuals to be untouchables, it would either not allow them to serve at all, segregate them, or require them to announce their status so that others could avoid unwanted association.[97] This is not to say that

95. 116 S. Ct. at 1628. Even if not all of the supporters of Amendment 2 shared this animus, they apparently believed that this particular form of animus is uniquely deserving of accommodation by government.

96. 10 U.S.C. § 654(b) (1994).

97. See David Cole and William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 333 (1994) ("[a] 'don't ask, don't tell' policy makes sense only if homosexual conduct and identity are not in themselves problematic: if they were, there would be no basis for directing military officers *not* to ask about or investigate homosexuality."). There is some dispute about whether the "don't ask, don't tell" policy is being implemented in a way that might implicate the pariah principle. See, e.g., *The Military and*

the ban on gay marriages and the current military policy are necessarily beyond constitutional reproach, but they do not offend the pariah principle.

The boundaries of the pariah principle are to some extent fuzzy, although Amendment 2 is well within them. The factors noted above can combine in various ways to produce legislation that looks more or less like the paradigm case of a scarlet L. In close cases, there are likely to be disputes. For example, while legislation prohibiting cigarette smoking in various places is not caste legislation (it condemns the sin but not the sinner), there might be greater question about a state constitutional amendment providing that employers, landlords, and the like are affirmatively permitted to discriminate against those who smoke. Despite some misgivings, we would argue that this is not caste legislation: first, it focuses on continuing conduct rather than immutable status, and, second, the health costs (for employers) and likelihood of cheating, with its attendant costs (for both employers and landlords), provide plausible rationales for the law beyond mere hostility toward smokers.

Recent enactments that require convicted sex offenders to register with the local police present an even closer question. These laws also provide for public disclosure of the identity of these individuals, even if the conviction was prior to the enactment of the disclosure law. It is this public disclosure that is troublesome. By subjecting a single class of persons to this treatment, these laws—sometimes called "Megan's Law" after a New Jersey girl who was raped and killed by a previously convicted sex offender—signal to the public that members of the class are so despicable that reasonable people should do everything they can to avoid them. It seems very close to a scarlet L, especially since once a person has joined the class (purely on the basis of conduct, which may distinguish *Romer*), his status becomes permanent. On the other hand, a key feature of Colorado's Amendment 2 is that the disability imposed was so broad that the Court could find no reason for it other than pure hostility. Megan's Law may be justified as a prophylactic measure to allow individuals to protect themselves or their children from individuals who present a particularly grave risk of harm. Nevertheless, this rationale arguably might not be sufficient to validate the law. Contrary to popular myth, it is not at all clear that sex offenses are

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Gays: Still Asking, 290 Harper's Magazine 18 (June 1995); Robert Lammé, *Dazed in the Military*, Advocate 43 (Jan. 24, 1995).

more likely than other offenses to be the subject of recidivism.[98] Moreover, the group in question is generally despised by society, so it is not unlikely that the legislation will (not accidentally) trigger additional social sanctions against members of the group.

The courts are already struggling with the question whether Megan's Law is a bill of attainder (or for similar reasons, an ex post facto law).[99] The question of whether it violates the pariah principle is difficult for similar reasons, and may turn on the extent to which the detailed drafting and implementation of the law give credence to the purported remedial purpose.[100]

Now that we have (we hope) clarified the pariah principle, it may be useful to compare it with its closest doctrinal cousins. One is the bill of attainder clause. Like the pariah principle, the bill of attainder clause limits the legislature's ability to impose disabilities on groups. The major difference is that the attainder cases turn on whether a disability is properly termed a "punishment," whereas the pariah principle focuses on group exclusions from participation in civil society, a category that overlaps with punishment but is nevertheless distinct. Similarly, the pariah principle has a focus different than that of the *Cleburne* and *Plyler* line of equal protection cases. There are two significant differences. First, the way we have articulated the principle is somewhat different from *Cleburne*'s amorphous concern with malignant legislative intent or *Plyler*'s somewhat forced effort to draw support from suspect class and fundamental rights theories. Second, we do not find it particularly helpful to divide the analysis between a list of triggering characteristics and an ends-means review. Traditional equal protection doctrine conceptualizes levels of scrutiny as meaning that certain kinds of legislation need a better justification than others. We would prefer to say that certain kinds of legislation are impermissible, but that one factor in determining whether a law falls within this category is whether it has some plausible regulatory justification. Our approach has the advantage of not artificially dividing the inquiry—and more importantly, of keeping firmly in mind that the ulti-

98. See Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. Rev. 113, 139, 140-141 (1996).

99. See *W.P. v. Poritz*, 1996 W.L. 374036 (D.N.J. 1996); *Doe v. Poritz*, 662 A.2d 367 (N.J., 1995); *Doe v. Pataki*, 919 F. Supp. 691 (S.D.N.Y. 1996); *Artway v. Attorney General*, 876 F. Supp. 666 (D.N.J. 1995), rev'd on other grounds, 81 F.3d 1235 (3d Cir. 1996); *Washington v. Ward*, 869 P.2d 1062 (Wash. 1994).

100. Notably, in the most thorough and thoughtful opinion upholding such legislation, the New Jersey Supreme Court was at some pains to construe the statute and the administrative guidelines narrowly. *Doe v. Poritz*, 662 A.2d at 381-87 (limiting extent of public notification and requiring prior judicial review).

mate concern is not ensuring that laws are well-designed to achieve their means, but preventing the legislature from treating citizens as outcasts.

Despite these differences, there are obvious similarities between these various approaches. Indeed, the results in some of the bill of attainder cases might well have been justified under the pariah principle, since blocking a group from pursuing a broad range of occupations is a clear indicator of pariah status. Similarly, *Plyler* and *Cleburne* might have been argued as pariah cases. In the modern world, exclusion from the public schools might well be considered an expulsion from the right to participate in civil society, and in *Plyler*, that exclusion was based on group characteristics beyond individual control. In *Cleburne*, being judged unfit to live in certain neighborhoods might well have been considered a form of pariah treatment, particularly given that the exclusion was based on status (mental retardation). In short, as we remarked earlier, the pariah principle does have a strong family resemblance to some important existing doctrines. We regard this resemblance as a strength, not a disability.

CONCLUSION

The pariah principle is not likely to find broad application. The reason is not that it is unimportant, but that it is so fundamental to our understanding of equality. Given the fundamental place of the principle in our society's conception of equality, we would not expect violations to be numerous or blatant. As a result, violations are likely to be sporadic; and when the principle is invoked at all, the case will often be on the borderline. Thus, the practical legal importance of the principle is limited. But the *Romer* Court's recognition of this basic principle is nonetheless important because it illuminates a neglected aspect of the constitutional guarantee of equality.

Romer predictably will be castigated as a result-oriented, ad hoc decision, or a disingenuous *sub rosa* effort to adopt a higher standard of judicial review. In our view, on the contrary, the Court deserves credit for recognizing the unusual nature of the case before it and the fundamental principle that was at stake.