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settled on any general approach to constitutional law. Because of these doubts, many judges have not generated an "account" of the First Amendment, the Equal Protection Clause, the Takings Clause, and other provisions that form the staple of the Court's constitutional work.

-Footnotes-

n186. Skepticism is not a coherent position in this context, because it would not lead to a commitment to any position at all. See Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil. & Pub. Aff. 87, 89-94 (1996).

n187. See Elliot L. Richardson, The Spirit of Liberty Is Skeptical, 75 B.U. L. Rev. 231 (1995) (reviewing Gerald Gunther, Learned Hand: The Man and the Judge (1995)).

-End Footnotes-

To be sure, and importantly, cases cannot be decided without some understanding of the purpose or point of the legal provisions at issue. Reasons are by their very nature abstractions, and cases that depend on reasons will necessarily rest on an account of some kind. But some Justices attempt to decide cases in the hope and with the knowledge that several different conceptions of the point will facilitate convergence on a particular outcome. Their attempts stem from their understanding that some of their convictions may not be right and from [\*44] their effort to accommodate reasonable disagreement. Minimalism is thus rooted in a conception of liberty amidst pluralism. n188

-Footnotes-

n188. There is an obvious and close relationship between what I am exploring here and the notion of an overlapping consensus as set out in Rawls, Political Liberalism, cited above in note 4, at 133-72. Rawls's conception of liberalism is designed to bracket "comprehensive views" and to allow people to converge on liberal principles from diverse starting points. Id. In a crucial respect, political liberalism also leaves things undecided. There is, however, a difference. Political liberalism hopes to ensure convergence on a set of abstractions - the set of abstractions that constitute political liberalism. Narrow and shallow decisions often put abstractions of that kind to one side and attempt to ensure, for example, that political liberals and their adversaries can converge on a certain outcome. Cf. Gutmann & Thompson, supra note 3, at 5 ("In politics the need is to find some basis on which to justify collective decisions here and now in the absence of foundational knowledge of the sort that would (presumably) tell us whether the fundamental premises of utilitarianism or contractarianism are correct."). Thus those who seek shallow decisions try to take the aspirations of political liberalism a bit further by bracketing (if they can) the very dispute between political liberalism and other conceptions of liberalism.

-End Footnotes-

V. Minimalism in Action: Problems and Prospects

Because we cannot be confident that for purposes of judging speech

restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2402 (1996) (Souter, J., concurring).

The plurality opinion... is adrift.... It applies no standard, and by this omission loses sight of existing First Amendment doctrine.

Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2404 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

A. Four Cases

Let us now consider some prominent examples of minimalism in law.

1. - In Kent v. Dulles, n189 the Supreme Court was confronted with the Secretary of State's denial of a passport to someone who had long been a believer in Communism. n190 The relevant statute said that the "Secretary of State may grant and issue passports ... under such rules as the President shall designate and precribe for and on behalf of the United States." n191 Several opinions would have been simple to write. [\*45] The Court could have invalidated the statute as an open-ended delegation of authority to the executive. It could have said that the denial of the passport violated the right to travel or the right to free speech. Or it could have said that the statute was valid and plainly authorized the Secretary's decision. The Court did none of these things. It refused to construe the statute, despite its open-ended language, in a way that would enable the Secretary to limit Kent's right to travel. n192 The Court did not reach the question whether Congress could constitutionally empower the Secretary to limit this right. Proceeding in minimalist fashion, it merely said that a clear statement from Congress would be required.

-Footnotes-

n189. 357 U.S. 116 (1958).

n190. See id. at 117-18.

n191. Id. at 123 (alteration in the original) (quoting Act of July 3, 1926, 44 Stat., Part 2, 887 (codified as amended at 22 U.S.C. 211a (1994))) (internal quotation marks omitted).

n192. See id. at 127-30.

-End Footnotes-

2. - In Griswold v. Connecticut, n193 the Court posited a broad "right of privacy," n194 the most controversial of modern constitutional rights. The dissenters thought that to find this right required implausible constitutional creativity. n195 Rejecting both the majority opinion and the dissents, Justice White wrote in very narrow terms. n196 He agreed with the dissents that a prohibition on premarital or extramarital activity would be legitimate. n197 He doubted, however, that the ban on the use of contraceptives within marriage "in any way reinforced the state's ban on illicit sexual relationships." n198 Thus he concluded that the real problem with the law lay in the weak relationship between the state's justification and the particular prohibition at issue. n199

- - - - -Footnotes- - - - -

n193. 381 U.S. 479 (1965).

n194. Id. at 484-86.

n195. See id. at 508-10 (Black, J., dissenting); id. at 530 (Stewart, J., dissenting).

n196. See id. at 502-07 (White, J., concurring in the judgment).

n197. See id. at 505.

n198. Id.

n199. See id. at 505-07.

- - - - -End Footnotes- - - - -

In so saying, Justice White suggested that the weakness of the connection between means and ends showed that the statute in fact rested on something other than the state's asserted justification. The statute was invalid because the statute's end did not justify the statute's means. n200 In all likelihood, the belief that actually supported the statute when it was passed was that nonprocreative sex was immoral even within marriage (though Justice White did not press that point). That belief helped produce the enactment of the statute and probably helped ensure against its repeal. But the belief no longer reflected anything like the considered judgment of the Connecticut citizenry and hence would not support criminal prosecutions. n201 In essence, Justice White's opinion reflects both a refusal to speak about a broad right to privacy and a decision to focus narrowly on the actual absence of a [\*46] plausible connection between the state's justification and the statutory prohibition. Justice White's opinion was both shallow and narrow.

- - - - -Footnotes- - - - -

n200. See id. at 506-07.

n201. See id. at 505 ("There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself ....").

- - - - -End Footnotes- - - - -

3. - Justice Powell's famous opinion in *Regents of the University of California v. Bakke* n202 provides a more recent example of minimalism in action. In *Bakke*, four Justices thought that the Constitution required government color-blindness, n203 whereas four other Justices thought that affirmative action programs should be upheld as efforts to undo the continuing effects of past discrimination. n204 Justice Powell rejected both positions. His opinion rested instead on a close analysis of the relationship between the particular affirmative action program at issue and the justifications invoked on its behalf. n205 In his view, the most important justification involved the medical school's need to ensure a racially diverse student body, not because racial diversity was an end in itself, but because racial diversity could promote the educational mission of the school. n206 Justice Powell found the latter justification legitimate and significant, but concluded that the University of California program was not necessary to promote that interest. A system that treated race as a "plus," rather than a rigid, two-track admissions system, would have been adequate for the University's purposes. n207 Thus Justice Powell rejected the view that all affirmative action programs would be illegitimate (essentially the view of Justice Stevens) and also the view that all such programs should be upheld as a response to past discrimination (not far from the view of the four [\*47] remaining Justices). n208 In this way Justice Powell's opinion was very narrow; it left many questions open. n209

-Footnotes-

n202. 438 U.S. 265 (1978).

n203. See *id.* at 416-18 (Stevens, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Burger and Justices Stewart and Rehnquist).

n204. See *id.* at 355-79 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part)

n205. See *id.* at 305-20 (opinion of Powell, J.).

n206. See *id.* at 311-20.

n207. See *id.* at 316-19.

n208. Consider in this regard intriguing findings on people's "extremeness aversion," and what might therefore be seen as the perils of seeking to be "moderate." See, e.g., Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Judgment*, 25 *J. Legal Stud.* 287, 287-95 (1996). When presented with two polar options, people like to avoid the extremes and hence to appear moderate. But whether they are moderate is intensely sensitive to framing effects. Whatever the options are, people try to be moderate as between them. But this may not be moderate in any normatively appealing sense, if the options are terrible, and if the most extreme option (say, the total abolition of slavery, as compared with continued slavery in the states that currently allow it) is much better on the merits. The search for moderation can thus be understood as a heuristic device that allows people to escape the normative issues and to "split the difference" between reasonable people. But this heuristic device can produce big mistakes when the people who frame the poles are not reasonable.

Minimalism should not be confused with moderation. Note also that minimalists are always minimalist in relation to some assumed background that has rule-ish features. This is certainly true for Justice Powell in Bakke.

n209. It was not at the same time shallow, because it offered a number of relatively abstract judgments about the legitimate grounds for affirmative action programs.

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4. - In Hampton v. Mow Sun Wong, n210 the Court addressed a constitutional challenge to a Civil Service Commission regulation barring most aliens from civil service positions. n211 The plaintiffs, five legal, Chinese aliens, urged that the bar violated the equal protection component of the Due Process Clause. n212 The government responded that it had several important interests in reserving positions in the federal civil service for American citizens. n213

- - - - -Footnotes- - - - -

n210. 426 U.S. 88 (1976).

n211. See id. at 90-92.

n212. See id. at 96.

n213. See id. at 103-04.

- - - - -End Footnotes- - - - -

The Supreme Court rejected both positions. It left open the possibility that "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." n214 But it noticed that the ban had been issued by the Civil Service Commission, not by the President or the Congress. n215 The ban therefore faced a legitimacy deficit. n216 This was especially true insofar as the Civil Service Commission could be said to have relied on the interests in providing aliens an incentive to become naturalized and in allowing the President an expendable token for treaty negotiation. n217 These interests were far afield from the ordinary mission and competence of the Commission. n218

- - - - -Footnotes- - - - -

n214. Id. at 100.

n215. See id. at 103-05.

n216. See id.

n217. See id. at 105.

n218. See id.

- - - - -End Footnotes- - - - -

The Court said that if a class of people were going to be deprived of federal employment, it had to be as a result of a decision by politically accountable officials acting within their ordinary competence, and not by a decision of bureaucrats invoking considerations beyond [\*48] their expertise. n219 In so saying, the Court declined to decide whether the President or Congress could make precisely the same decision. n220 Thus the Court's decision was exceedingly narrow. And because the Court did not give much of a theoretical account of its judgment, the decision was shallow as well.

-Footnotes-

n219. See id. at 114-17.

n220. In fact, following Mow Sun Wong, the President issued an Executive Order doing what the Commission had done, and a lower court upheld the President's decision. See Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).

-End Footnotes-

These examples have a great deal in common. They involve narrow judgments that leave the largest questions for another day. They also involve judgments on which people with diverse views may - certainly need not, but may - converge. They are highly particularistic. And they all have democracy-forcing functions. This point is most conspicuously true for Kent v. Dulles and Hampton v. Mow Sun Wong, for in both instances the Court's judgment was expressly founded on the idea that publicly accountable bodies should make the contested decision that was challenged in the case. But democratic considerations underlie Justice White's Griswold concurrence as well. We do not need to venture far from the text of Justice White's opinion to see that the poor match between articulated means and ends suggested that an unarticulated end, one that no longer matched public convictions, actually underlay the enactment under review. The fact that no democratically accountable body had in the recent past offered a reflective endorsement of the Connecticut law links Griswold closely with Kent and Mow Sun Wong. Justice White's opinion is centrally concerned with the absence of sufficient democratic support for the relevant statute.

Justice Powell's Bakke opinion was also influenced by some of these concerns. In particular, Justice Powell noted that the program in Bakke had received no democratic endorsement. n221 The narrowness of his opinion left the democratic process ample room to maneuver, adapt, and generate further information and perspectives. Thus Justice Powell's opinion can be understood as an effort to promote both democracy and deliberation.

-Footnotes-

n221. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978) (Opinion of Powell, J.).

-End Footnotes-

B. Three Maximalist Decisions

It is useful to compare the preceding cases with three of the most important cases in American constitutional law, all of which reject minimalism. One of them, Dred Scott v. Sanford, n222 ranks among the most vilified decisions in

the Court's history; another, *Brown v. Board of Education*, n223 may well be the most celebrated; and a third, *Roe v. Wade*, n224 is one of the most sharply contested. In saying a few words about the three cases here, I do not, of course, mean to offer full evaluations of the Court's opinions. My goal is to draw attention to the sheer ambitiousness of the three decisions and to see how that ambitiousness might be evaluated.

-Footnotes-

n222. 60 U.S. (19 How.) 393 (1857).

n223. 347 U.S. 483 (1954).

n224. 410 U.S. 113 (1973).

-End Footnotes-

In *Dred Scott*, the Court decided several crucial issues about the relationship between the Constitution and slavery. Most importantly, the Court struck down the Missouri Compromise, n225 which abolished slavery in the territories, and ruled that freed slaves could not qualify as citizens for purposes of the Diversity of Citizenship Clause of Article III. n226 Of course the Court's decision was a disaster, helping to fuel the Civil War. But let us put the substance to one side. One of the notable features of the case was that far from deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide. If the Court had wanted to do so, it could have avoided the controversial issues entirely. After concluding that it lacked jurisdiction under Article III, the Court could have refused to discuss Congress's power to abolish slavery in the territories. Or the Court could have rested content - as it had first voted to do n227 - with a narrow judgment holding that Missouri law controlled the question of Scott's legal status. In either event, the large issues in the case would have been left alone, and the *Dred Scott* decision would have been an unimportant episode in American law. Notably, the Court itself rejected its initial minimalist approach because it wanted to take the slavery issue out of politics and to resolve it once and for all time. n228 This attempted course was a disaster, partly because of the moral judgment itself and partly because of the futility of the Court's attempt in light of the Court's limited institutional role. We cannot draw firm inferences from single cases. But the Court's abysmal failure in this regard is certainly a cautionary note. It is a cautionary note because it shows the possible unreliability of moral judgments from the Court, and also because it shows that judicial efforts to resolve large questions of political morality may well be futile.

-Footnotes-

n225. See *Dred Scott*, 60 U.S. (19 How.) at 404-06, 452-54.

n226. See *id.*

n227. See Bernard Schwartz, *A History of the Supreme Court* 113 (1993).

n228. See *id.* at 114.

-End Footnotes-

In Roe v. Wade, the Court addressed for the first time whether a constitutional right of "privacy" protected the decision to have an abortion. An inspection of the pleadings in Roe, however, reveals a potentially important aspect of the case: Roe alleged that she had been raped. Of course Roe is known for the elaborate trimester system it established and for the complex body of rules and standards contained in that system. A minimalist court would have said more simply that the state may not forbid a woman from having an abortion in a case [\*50] involving rape. n229 Such a decision would have left the constitutional status of the abortion right to be determined by lower courts and democratic judgments. As noted earlier, the appeal of such a minimalist approach cannot be evaluated without analyzing the underlying issues of constitutional substance. Perhaps the Roe outcome was correct as a matter of substantive constitutional theory; perhaps an inquiry into decision costs and error costs would support the Roe opinion. But at least it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously and in a more dialogic and interactive way. n230

-Footnotes-

n229. Cf. Ginsburg, supra note 69, at 376, 382, 385-86 (arguing that the Court should have simply invalidated the state statute in question because it improperly made all forms of abortion absolutely criminal).

n230. See id. at 381-82.

-End Footnotes-

Brown appears to be the strongest argument against the claim that I mean to defend here: that minimalism is the appropriate course for large-scale moral or political issues on which the nation is sharply divided. Brown may require the thesis to be qualified, perhaps for the most compelling cases in which the underlying judgment of constitutionally relevant political morality is insistent. n231 As I have indicated, the choice between minimalism and the alternatives depends on an array of contextual considerations, and it would be extravagant to say that minimalism is always better.

-Footnotes-

n231. I do not think it is promising to suggest that judgments of political morality can be left aside in favor of a purely historical inquiry into constitutional meaning. In any case, such an inquiry would not support Brown, despite the valiant, recent effort of Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 1131-40 (1995) (defending Brown on historical grounds).

-End Footnotes-

But before taking Brown as an exception to the general thesis, let us notice two important features of the Brown litigation. The Brown decision did not come like a thunderbolt from the sky. Along this dimension, it was entirely different from Dred Scott and Roe. The Brown outcome had been presaged by a long series of cases testing the proposition that "separate" was "equal," and testing that

proposition in such a way as to lead inevitably to the suggestion that "separate" could not be "equal." n232 In short, Brown was the culmination of a series of (more minimalist) cases, not the first of its kind.

-Footnotes-

n232. See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, Constitutional Cases 520-23 (3d ed. 1996).

-End Footnotes-

There is a further point. Brown itself was not self-implementing; it said nothing about remedy. Brown II, the remedy case, had a minimalist dimension insofar as it allowed considerable room for discussion and dialogue via the "all deliberate speed" formula. n233 Brown II made clear that immediate implementation would not be required. In this way it had much in common with Kent v. Dulles and Hampton v. Mow Sun Wong. It left some crucial matters undecided. It allowed [\*51] those matters to be taken up by other officials in other forums. Brown was thus more minimalist than Dred Scott both because it was the culmination of a long line of cases and because it left a good deal of room for future debate at the level of implementation.

-Footnotes-

n233. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

-End Footnotes-

There are of course reasons to question this degree of flexibility on both strategic and moral grounds. n234 I do not mean to answer these questions here. Of course Brown II ended up placing courts in charge of complex implementation questions, and thus required managerial judgments for which courts are ill-suited. n235 But it is at least relevant to the evaluation of Brown that the Court did not impose its principle all at once, and that it allowed room for other branches to discuss the mandate and to adapt themselves to it. n236

-Footnotes-

n234. See Elliot Aronson, The Social Animal 340-42 (6th ed. 1995) (offering the strategic objection).

n235. See Donald L. Horowitz, The Courts and Social Policy (1977).

n236. For a contrasting approach, refer to Reynolds v. Sims, 377 U.S. 533, 587-88 (1964) (Clark, J., concurring in the affirmance), which announced the "one person/one vote" rule. Justice Stewart offered the more minimalist approach, see id. at 588-89 (Stewart, J., concurring), saying that the apportionment system at issue was irrational. Justice Stewart did not claim that "one person/one vote" was constitutionally mandated. The problem with Stewart's approach is that it would be less administrable than the "one person/one vote" rule.

-End Footnotes-

C. The Passive Virtues

The project of the minimalist judge is easily linked with the project of exemplifying the "passive virtues," a project that is associated with a court's refusal to assume jurisdiction. n237 Sometimes judges do not want to decide cases or issues at all, and even the minimal amount necessary to resolve a conflict seems to require them to say too much. A denial of certiorari might well be based on this understanding. Perhaps it is premature for the Court to participate in a certain controversy. Perhaps the Court wants to receive more information, is so divided that it could not resolve the case in any event, or is attuned to strategic considerations stemming from the likelihood of destructively adverse public reactions. In all these situations it may be prudent to wait. Of course a denial of certiorari reduces decision costs for the Court. It may reduce error costs as well, if the Court is not in a good position to produce a judgment about which it has confidence, or if the Court thinks that additional discussion, in lower courts and nonjudicial arenas, is likely to be productive. Thus the denial of certiorari can be seen as a form of minimalism and evaluated by reference to the criteria I have previously discussed.

- - - - -Footnotes- - - - -

n237. See Bickel, supra note 8, at 127-33.

- - - - -End Footnotes- - - - -

Of course principles of justiciability - mootness, ripeness, reviewability, standing - can be understood as ways to minimize the judicial presence in American public life. It may be tempting to see these principles as rooted in positive law and as allowing no room for discretionary judgments about when courts properly intervene. n238 But realistically speaking, justiciability doctrines are used prudentially and in response to considerations of the sort I am discussing here. n239 Thus, for example, a judgment that a complex issue is not ripe for decision may minimize the risk of error and preserve room for continuing democratic deliberation about the issue. It should not be surprising to find some pressure to find otherwise borderline cases "not ripe" or "moot" precisely because of the costs associated with deciding the substantive question.

- - - - -Footnotes- - - - -

n238. See Gerald Gunther, The Subtle Vices of the "Passive Virtues" - A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 1, 5 (1964).

n239. See, e.g., Poe v. Ullman, 367 U.S. 497, 508-09 (1961) (dismissing appeals concerning the dismissal of the complaints because the issues were inappropriate for the Supreme Court's decision, and because the "actual hardship" to the petitioners of denied relief was minimal); Naim v. Naim, 350 U.S. 985, 985 (1956) (per curiam) (denying motions to recall the mandate, to set the case down for argument, and to amend the mandate and noting the lack of a federal question); Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam) (refusing to consider the Virginia statute on miscegenation because the record inadequately addressed the relationship of the parties to the state).

- - - - -End Footnotes- - - - -

The Supreme Court's general unwillingness to resolve questions involving sexual orientation may well stem from concerns of this sort. The same can be said about its caution until just this term about using the Due Process Clause to control the award of punitive damages. My suggestion is that the notion of the "passive virtues" can be analyzed in a more illuminating way if we see that notion as part of judicial minimalism, closely associated with the rules-standards debate, and regard it as an effort to permit more democratic choice and to reduce costs.

I now try to explore some of these points in detail through a discussion of several cases from the 1996 Term. My principal vehicles are Romer v. Evans and United States v. Virginia; I discuss 44 Liquormart, BMW of North America, and Loving as well. I conclude that Romer v. Evans is unsatisfactorily reasoned but that it is a legitimate and in many ways salutary exercise in judicial minimalism. Romer is especially salutary insofar as it connects with a correct and longstanding understanding of the function of the Equal Protection Clause. United States v. Virginia was theoretically ambitious, but it was also narrow rather than broad. The depth of the opinion was justified in light of the context and the Court's own experience; the narrowness makes sense in light of the diversity of same-sex programs in education.

More briefly, I endorse the narrow outcome of the BMW case, but criticize 44 Liquormart for unnecessarily renovating the law governing commercial advertising and, in the process, overruling recent precedent. I suggest that Loving might well have been treated as a modern-day Kent v. Dulles. The Court should have said that if the federal government is going to impose the death penalty on a member of the [\*53] United States military, it must do so pursuant to standards laid down by Congress. In the course of discussing these cases, it will be necessary to investigate the underlying substantive law and thus to venture afield from the particular issue of minimalism.

VI. Minimalism, Animus, and Equal Protection: Romer v. Evans

A. The Case

Amendment 2 to the Colorado Constitution provided:

Neither the State of Colorado ... nor any of its agencies ... shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall be the basis of or entitle any person or class of persons to have or claim any minority status, quotas preferences, protected status or claim of discrimination. n240

- - - - -Footnotes- - - - -

n240. Colo. Const. art. II, 30(b).

- - - - -End Footnotes- - - - -

In Romer v. Evans, the Court was asked to determine whether this provision violated the Equal Protection Clause. The Court had various obvious options:

- It could have concluded that the statute's prohibition was not a form of discrimination and hence that there was no equal protection issue.

- It could have concluded that the provision was a form of discrimination against homosexuals, but that this type of discrimination would be subject to "rational basis" review, and that Amendment 2, like almost all forms of discrimination subject to rational basis review, should be upheld.

- It could have concluded that discrimination on the basis of sexual orientation should be subject to special judicial scrutiny, like discrimination on the basis of race and sex, and that therefore Amendment 2 should be invalidated.

- It could have emphasized that some of the amendment was targeted not against conduct at all but against status, and that Amendment 2 was unconstitutional because it created a kind of status offense.

- It could have said that the amendment was unconstitutional because it involved a disability in the political process, as the Colorado Supreme Court had concluded. n241

-----Footnotes-----

n241. See Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993) (en banc).

-----End Footnotes-----

The Court adopted none of these options. Instead it claimed that Amendment 2 violated rational basis review because it was based not on a legitimate public purpose but on a form of "animus," with the apparent suggestion that statutes rooted in "animus" represent core offenses against the equal protection guarantee. n242 This claim is more minimalist [\*54] than any of the options listed above, but it also raises more complex issues.

-----Footnotes-----

n242. See Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

-----End Footnotes-----

The Court began its analysis by rejecting the view that Amendment 2 merely puts homosexuals in the same position as everyone else. n243 It said that by enacting a special prohibition against any protective measures, the Amendment actually put homosexuals in a distinctive and disadvantaged position: "The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." n244 Understood as a special disability, the amendment, in the Court's view, failed "rationality" review because it did not

bear a rational relation to a legitimate statutory end. n245 The Court offered two different (but evidently overlapping) explanations.

-Footnotes-

n243. See id. at 1624-27.

n244. Id. at 1625. The Court suggested that Amendment 2 might extend further, but for purposes of decision the Court assumed a relatively narrow reach; that is, it assumed that Amendment 2 would not prevent homosexuals from taking advantage of general civil and criminal law. See id. at 1626. This assumption undermines the argument of "per se" violation of equal protection, discussed below at pages 55-56.

n245. See id. at 1627.

-End Footnotes-

First, it said that Amendment 2 "is at once too narrow and too broad," n246 because it defines people by "a single trait and then denies them protection across the board." n247 Thus the state failed to show an adequate connection between the classification and the object to be attained. "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." n248 A measure that disqualifies a class of people "from the right to seek specific protection from the law" n249 violates the requirement of impartiality.

-Footnotes-

n246. Id. at 1628.

n247. Id.

n248. Id.

n249. Id.

-End Footnotes-

Second, the Court said that the law is too broad to be justifiable by reference to the reasons the State invoked on its behalf. Hence it "seems inexplicable by anything but animus toward the class it affects." n250 Amendment 2, "in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it." n251 The state invoked its desire to respect the associational liberty of other citizens, including employers and landlords; but this interest was too broad to justify Amendment 2. n252 The state also expressed concern that it wanted to [\*55] conserve its resources to prevent other forms of discrimination. n253 But Amendment 2 was far too broad to be justified by reference to that purpose. Thus it stands, and falls, as "a status-based ... classification of persons undertaken for its own sake." n254

-Footnotes-

n250. Id. at 1627.

n251. Id. at 1628-29.

n252. See id. at 1629.

n253. See id.

n254. Id.

- - - - -End Footnotes- - - - -

B. Preliminary Evaluation

At first glance, neither of the Court's two arguments is convincing. If rationality review is the appropriate standard, Amendment 2 seems constitutional, as an effort either to discourage the social legitimation of homosexuality or to conserve scarce enforcement resources and protect associational privacy. The first interest may seem of doubtful legitimacy - I will discuss this possibility below - but rationality review by itself does not have the resources to declare it illegitimate; the legitimacy or illegitimacy of government interests is an independent issue. Colorado did not, to be sure, advance the interest in discouraging homosexuality, but under existing law that is not relevant to a rationality challenge. n255 The second and third interests do seem to be crudely connected to the measure itself - they are both over-inclusive and under-inclusive. But this does not doom a statute under rational basis review; over-inclusive and under-inclusive legislation is perfectly acceptable, indeed quite common. n256

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n255. See Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

n256. See e.g., id. at 487-89.

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The Court's first argument - involving the elimination of "protection" - is a confusing amalgam of an argument based on means-ends scrutiny and an argument based on the "literal" meaning of the words "equal protection." The means-ends concern seems identical to the Court's second argument, to be taken up shortly, so let us focus on the Court's suggestion n257 to the effect that Amendment 2 is a "literal" denial of equal protection of the law. What does this mean? Perhaps Amendment 2 could be characterized as akin to a law declaring certain people to be outlaws - as in a provision that murderers, the elderly, felons, or people with blue eyes cannot claim the protection of the laws. Such a law would - it might be urged - amount to a per se or "literal" violation of the Equal Protection Clause, because it deprives some people of the power to seek state protection through the laws.

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n257. The Court's approach is a variation on one offered in an ingenious amicus brief. See Brief of Laurence H. Tribe, John Hartely, Gerald Gunther, Philip B. Kurland, and Kathleen M. Sullivan, as Amici Curiae in Support of Respondents, Romer (No. 94-1039).

- - - - -End Footnotes- - - - -

But there are serious problems with this argument. It is not at all clear that Amendment 2 is really akin to the hypothesized law. The amendment does not declare homosexuals to be outlaws. They continue to be protected by the ordinary civil (contract, tort, property) [\*56] and criminal law. Amendment 2 says instead that homosexuals cannot claim the (unusual, in a sense "special") protection of antidiscrimination law simply by virtue of their status as homosexuals; n258 it added the (unusual, in a sense "special" and admittedly somewhat bizarre) provision preventing homosexuals from getting such protection without amending the state constitution. But such provisions do not make anyone into an outlaw. If Colorado enacted a constitutional amendment saying that unwed mothers, or unwed mothers who refuse work, or unwed mothers who live with a man out of wedlock, may not claim the protection of the welfare statutes, Colorado would not be committing a literal or per se violation of the Equal Protection Clause. The fact that some people do not get statutory protection, while others do, is not decisive. To know whether there has been a violation of the right to "equal" protection, we must know about the grounds for differential treatment. The technical question would be whether the provision faced rational basis review or heightened scrutiny, and whether it was valid or invalid under the appropriate standard of review.

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n258. See supra note 243 (discussing the reach of Amendment 2).

- - - - -End Footnotes- - - - -

In other words, an act of this sort appears to be akin to one that makes certain people (constitutionally) unable to invoke the protection of laws granting welfare benefits. If the analogy is correct, the claim of "literal" denial of equal protection is really a kind of verbal trick, a play on the word "protection." It is a pun, not an argument. I conclude that the Court's first argument adds nothing and that the real argument is the second.

The state had two possible responses to the Court's second argument. The state could say:

1. "The interest in conserving enforcement resources is, to be sure, crudely connected to Amendment 2. But there is some connection. We believe that if a locality is spending its time on preventing discrimination against homosexuals, it will spend less of its time on preventing discrimination against blacks and women, which we think are more important concerns. In any case, many people have strong religious or other reasons to discriminate on grounds of sexual orientation. We want to respect their convictions. Amendment 2 may be imperfectly matched to our goals - we acknowledge that it covers many contexts in which those goals are not involved - but if rationality review is the appropriate standard, we think we have said more than enough."

2. "We do not want to legitimate homosexuality as a social practice. We are not tyrants, and we do not seek to subject homosexual acts to criminal punishment (as we are permitted to do under Bowers v. Hardwick). But we do want to make a statement that homosexuality is not officially sponsored. That is, homosexuals do not, as such, qualify for legal protection from discrimination. We are trying to express a [\*57] widely held moral commitment that homosexuality is not to be approved even if it is to be tolerated. We choose to express that view through a prohibition on special protections against discrimination. True, our law applies to people with homosexual tendencies who do not engage in homosexual activity; but people with tendencies are likely to engage in acts. We do not punish through criminal law the tendencies alone; hence we think our basic goal is well enough matched to our amendment."

The Court did not offer much of a response to these possible arguments. The most troubling minimalism of the opinion lies in this failure; I will return to the problem below. Let us now turn to a question that received particular attention in the case: Was Amendment 2 a unique disability, or a denial of special privileges? And how, if at all, is this a relevant question?

C. Special Benefits and Unique Disabilities

We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them ....

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

The Court thought that Amendment 2 was a unique disability because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." n259 Justice Scalia thought that Amendment 2 forbade the creation of special privileges because most characteristics are not bases for statutory protection from discrimination. In Justice Scalia's view, Amendment 2 restored the status quo ante, in which only a few groups receive that protection. n260

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n259. Romer, 116 S. Ct. at 1625.

n260. See id. at 1629 (Scalia, J., dissenting).

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There is a sense in which both sides were right. Most group-based characteristics are not bases for statutory protection against discrimination. Short people, tall people, movie-makers, singers, horse-riding people, dog owners - all these and innumerable others receive no special legal protection against discrimination. In this sense it is fair to say that Amendment 2 simply restored homosexuals to a status like that of nearly everyone else. On the other hand, there is another sense in which Amendment 2 imposed on homosexuals a unique disability. Short people, tall people, movie-makers, singers, horse

riders, dog owners - all these can petition relevant legislatures for protection against discrimination. Homosexuals are subject to a unique disability in the sense that only they are required to amend the Colorado Constitution to obtain such protection. In this sense there is indeed discrimination.

Thus Justice Scalia and the Court are both in a sense right. The weakness of Justice Scalia's opinion is that it does not see or come to [\*58] terms with the respect in which Amendment 2 puts homosexuals at a special disadvantage. In the striking quotation at the beginning of this section, the Court seemed to embrace a baseline of nondiscrimination. But this special disadvantage is not necessarily fatal to the legislation. If, for example, Colorado said - in, say, Amendment 3 - that no governmental body may allow cigarette smokers to claim minority status, quota preferences, or protected status for any claim of discrimination, it would probably be acting constitutionally. n261 Amendment 3 would be constitutional because a state could legitimately decide that it wants to prevent itself and its subdivisions from giving special safeguards to smokers. It could make that decision because it is legitimate to think that smokers create serious risks to themselves and to others. It is possible that some localities would reject this position and want to treat smokers as the functional equivalent of blacks and women. But a state could reasonably choose to override this view. It seems clear that smokers thus disadvantaged would face a unique disability. This burden would not, however, fail rationality review, because it would be reasonably related to the state's legitimate interest in decreasing risks to life and health. It follows that a finding that Amendment 2 imposes a unique disability is not fatal to its constitutionality. The amendment's constitutionality will depend on whether there is a public-regarding justification for the imposition of the disability.

-Footnotes-

n261. At least this assertion would be true if Amendment 3 were understood in the narrow way the Supreme Court was willing to understand Amendment 2. See 116 S. Ct. at 1626-27 (stating that Amendment 2 is unconstitutional even if construed not to prevent ordinary operation of the criminal and civil law).

-End Footnotes-

The only possible distinction between Romer and the smokers' case is that there is no legitimate reason to constitutionalize a judgment that homosexuals should not be protected from discrimination, perhaps because there is no legitimate reason to think that homosexuals pose a risk in the way that smokers do. Thus, the case does not turn on whether there is removal of a special benefit or imposition of a unique disability, but instead on whether the state has legitimate reasons for its action. An understanding of this kind seems to underlie the Court's suggestion that Amendment 2 is unconstitutional because it is undergirded by a "bare ... desire to harm a politically unpopular group." n262

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n262. Id. at 1628 (alteration in original) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

-End Footnotes-

On this point, however, Justice Scalia has a seemingly powerful response. In this context, the "bare desire to harm" can be translated into one side in a "culture war." n263 Those who take this side believe that the state should not approve homosexuality through antidiscrimination law, and "surely it is rational to deny special favor and protection to those [\*59] with a self-avowed tendency or desire to engage in the conduct." n264 The relevant animus here is not a bare desire to harm but a product of a widespread "moral disapproval of homosexual conduct." n265 In Justice Scalia's eyes, this kind of animus is not objectionable from the constitutional point of view.

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n263. Id. at 1629 (Scalia, J., dissenting) (quoting Romer, 116 S. Ct. at 1628) (internal quotation marks omitted). "The Court has mistaken a Kulturkampf for a fit of spite." Id. Admittedly, "Kulturkampf" is a puzzling term of (apparent) approval.

n264. Id. at 1632.

n265. Id. at 1633.

-End Footnotes-

The majority must be saying the opposite: that any such animus is illegitimate at least if it is the source of an unusual, blunderbuss prohibition on antidiscrimination measures. Here, then, is the crux of the Romer case.

D. The Moreno-Cleburne-Romer Trilogy

Laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.

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

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

John Rawls, Political Liberalism 430-31 (2d ed. 1996).

In a handful of cases, rationality review has actually meant something. n266 Each of these cases has been minimalist in character. The Court has found an inadequate connection between statutory means and ends; in doing so, it has attempted to "flush out" impermissible purposes.

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n266. See, e.g., Romer, 116 S. Ct. at 1629; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

-End Footnotes-

A number of the key cases have involved issues of federalism. n267 The Court has struck down state statutes that purport to protect public-regarding goals but actually seem to reflect protectionism - a desire to protect in-staters at the expense of out-of-staters. If the federal system is understood to ban protectionism, these cases are not at all hard to understand. The Court looks beyond the articulated justifications, which typically bear a weak though not wholly implausible relation to the classification. These cases are not entirely minimalist - they depend on an account of a prohibited end, an account that leads to a degree of width and depth - but they tend toward the minimalist end of the continuum. They offer narrow, targeted bans on certain kinds of reasons for law.

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n267. See, e.g., Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985); Zobel v. Williams, 457 U.S. 55, 63 (1982).

-End Footnotes-

[\*60]

But there is a more puzzling set of cases; we may now refer to them as the "Moreno-Cleburne-Romer trilogy." In these cases, the Court ruled off-limits a constitutionally unacceptable "animus" not involving federalism or discrimination on the basis of race or sex. The difficulty lies in identifying the impermissible goal that links the three cases. What precisely is "animus"?

The problem in United States Department of Agriculture v. Moreno n268 arose from Congress's decision to exclude from the food stamp program any household containing any individual who was unrelated to any other member of the household. n269 The Court said that the articulated justification - minimizing fraud in the food stamp program - seemed only weakly connected to the statutory classification. n270 The Court noted that the legislative history suggested a congressional desire to exclude "hippies" and "hippie communes." n271 To this, the Court said, in words echoed in Romer: "If the constitutional conception of "equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest ...." n272 Then-Justice Rehnquist dissented on the ground that Congress could reasonably decide that it wanted to support, with taxpayer funds, only those units that are a "variation on the family as we know it." n273 Justice Rehnquist's strategy - like Justice Scalia's in Romer - was to describe what the majority characterized as the "bare ... desire to harm" n274 as an effort to promote a moral commitment by funding traditional rather than untraditional families. n275

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n268. Moreno, 413 U.S. at 528.

n269. See Food Stamp Act of 1964, Pub. L. No. 91-671, 3(e), 84 Stat. 2048 (1971) (current version at 7 U.S.C. 2012 (i) (1994); Moreno, 413 U.S. at 529.

n270. See Moreno, 413 U.S. at 536-37 (expressing "considerable doubt" that the "amendment could rationally have been intended to prevent" fraud).

n271. Id. at 534 (citing H.R. Conf. Rep. No. 91-1793, at 8 (1970), and 116 Cong. Rec. 44,439 (1970) (statement of Sen. Holland)).

n272. Id.; accord Romer v. Evans, 116 S. Ct. 1620, 1628 (1996).

n273. Moreno, 413 U.S. at 546 (Rehnquist, J., dissenting).

n274. Romer, 116 S. Ct. at 1628 (quoting Moreno, 413 U.S. at 534).

n275. See id. at 1636 (Scalia, J., dissenting) (characterizing the amendment as "a reasonable effort to preserve traditional American moral values"); Moreno, 413 U.S. at 546 (Rehnquist, J., dissenting) ("This unit provides a guarantee ... that the household exists for some purpose other than to collect federal food stamps.").

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In City of Cleburne v. Cleburne Living Center, Inc., a city in Texas denied a special use permit for the operation of a group home for the mentally retarded. n276 The Court rejected the view that discrimination against the mentally retarded people should be subject to "heightened scrutiny." n277 But applying rational basis review, it nonetheless found the city's requirement of the permit unacceptable. n278 It appeared to think [\*61] that the requirement was imposed on the basis of prejudice, or animus, rather than any legitimate public purpose. n279 The city had pointed to the fears of elderly residents, the negative attitudes of property owners, the concern that students nearby might harass the residents, the size of the home and the number of people who would occupy it, and the fact that the home would be located on a floodplain. n280 Unquestionably these concerns would satisfy ordinary rationality review as traditionally formulated. For purposes of that standard, it is not decisive - nor even relevant - that there was a poor fit between these ends and the means chosen by Cleburne. n281 But the Cleburne Court signaled its concern that something illegitimate underlay the city's decision when it admonished that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for" unequal treatment. n282 Thus the Court concluded that the discriminatory action under review was based "on an irrational prejudice." n283

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n276. See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

n277. See id. at 442-47.

n278. See id. at 450.

n279. See id. (expressing the belief that the city's position "rested on an irrational prejudice").

n280. See id. at 448-49.

n281. See, e.g., New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979); Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

n282. Cleburne, 473 U.S. at 448.

n283. Id. at 450.

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Each case in the Moreno-Cleburne-Romer trilogy partakes of decisional minimalism. None of the cases establishes a new "tier" of scrutiny. Cleburne and Romer are notable for having failed to do so. All three cases reflect the possible use of rationality review as a kind of magical trump card, or perhaps joker, hidden in the pack and used on special occasions. In these cases, rationality review, traditionally little more than a rubber stamp, is used to invalidate badly motivated laws without refining a new kind of scrutiny. In this way too, they are minimalist; they need have no progeny.

The trilogy is also linked with the federalism cases, for both sets of cases involved judicial disapproval of a constitutionally illicit purpose. But there is a substantial difference. In the federalism cases, the illicitness of the purpose (disfavoring citizens of other states) is easy to understand. But what is constitutionally illicit about the purposes in the trilogy? This is the question pressed by Justice Scalia in Romer. If the Court was to offer a theoretically adequate opinion, Justice Scalia should have received a better answer.

In both Cleburne and Romer, the Court was concerned that a politically unpopular group was facing discrimination as a result of irrational hatred and fear. As with homosexuality, many people appear to think that mental retardation is contagious and frightening for that reason. Antipathy toward the retarded is frequently rooted in an absence of empathetic identification, a belief that they are not entirely human and should be avoided and sealed off. The Court's invalidation of the law under rationality review depended on its explicit belief that irrational [\*62] fear was likely to be at work. n284 And if Cleburne is to make sense, it must be because the state cannot discriminate against the mentally retarded simply because people are afraid of them.

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n284. See id. ("Requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded ....").

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But we have seen enough to be able to say that hatred and fear can always be translated into public-regarding justifications. Thus in Cleburne the city was able to point to neutral-sounding grounds, such as a potential drop in property values. n285 Thus in Romer it might have been said that the state was attempting to protect associational liberty or not to legitimate homosexual behavior,

just as in Moreno, the state was attempting not to promote nontraditional living arrangements. Along this dimension the trilogy cases are very close. In all three cases, there were poorly fitting but probably rational justifications (property values in Cleburne, discouragement of fraud in Moreno, conservation of resources and protection of association in Romer) and also well-fitting justifications whose legitimacy was in doubt (response to private fears in Cleburne, desire to exclude nontraditional families in Moreno, desire to avoid legitimizing homosexuality in Romer).

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n285. See id. at 448-50.

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With this we come close to the heart of the matter. The underlying judgment in Romer must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior. The state must justify discrimination on some other, public-regarding ground. The underlying concern must be that a measure discriminating against homosexuals, like a measure discriminating against the mentally retarded, is likely to reflect sharp "we-they" distinctions and irrational hatred and fear, directed at who they are as much as what they do. Note that Amendment 2 involved status as well as conduct, a point emphasized by the Court. n286 It would be hard to imagine a similar measure directed against polygamists, adulterers, or fornicators. Polygamists, adulterers, and fornicators are punished through law or norms because of what they do; homosexuals are subject to a deeper kind of social antagonism, connected not only with their acts but also with their identity. It is this status feature that links discrimination on the basis of sexual orientation with discrimination on the basis of race or sex. Here, as with the mentally retarded, we can find a desire to isolate and seal off members of a despised group whose characteristics are thought to be in some sense contaminating or corrosive. n287 In its most virulent forms, this desire is rooted in a belief that members of the relevant group are not fully [\*63] human. n288 On this count, Cleburne and Romer are at one. And because the proffered justifications were so weakly connected with the measures at issue, the Court was right to do what it did in both cases.

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n286. See Romer v. Evans, 116 S. Ct. 1620, 1625 (1996).

n287. Justice Scalia's references to political power, see id. at 1634 (Scalia, J., dissenting), are not responsive. Blacks and women can elect people too. The real question is not whether members of the group have some electoral power (they always do), but whether illicit motives are likely to be at work.

n288. See, e.g., Avishai Margalit & Gabriel Motzkin, The Uniqueness of the Holocaust, 25 Phil. & Pub. Aff. 65, 70 (1996) (explaining that the Nazis "denied the shared humanity of humankind").

-----End Footnotes-----

Moreno is a harder case, because there was less reason to believe that hatred and fear were at work. But the reference to "hippie communes," seen in the context of the time, may be taken to suggest a similar kind of "we-they" antagonism. Taken in these terms, the three cases are linked not only with each other, but also with the defining case of discrimination against the newly free slaves. Moreno, Cleburne, and Romer reflect an understanding that other groups, not only African-Americans, may be subject to unreasoning hatred and suspicion. Hence the Romer Court's opening reference to Justice Harlan's dissenting opinion in Plessy v. Ferguson. n289

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n289. See Romer, 116 S. Ct. at 1623 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954)).

-End Footnotes-

With this point we can see that the outcome in Romer was not minimalist in the less controversial way that Kent v. Dulles n290 and Hampton v. Mow Sun Wong n291 were minimalist. Romer turned on a substantive judgment about what grounds for state law are legitimate. For this reason we can understand Justice Scalia's complaint that Romer did not promote but instead usurped democratic deliberation. n292 If Romer is to be defended, it must be because the grounds for Amendment 2 are, in a deliberative democracy, properly ruled off-limits, because the Amendment reflects a judgment that certain citizens should be treated as social outcasts. This argument for Romer associates Amendment 2 with measures like those in Plessy and Bradwell v. Illinois n293 (which is not to suggest that the harms of Amendment 2 are the same in degree). Romer thus embodies a ban on laws motivated by a desire to create second-class citizenship, a point that connects the outcome with United States v. Virginia n294 as well. This was the forbidden motivation that the Court described as "animus."

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n290. 357 U.S. 116 (1958).

n291. 426 U.S. 88 (1976).

n292. See Romer, 116 S. Ct. at 1629 (Scalia, J., dissenting) ("Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means .... This Court has no business imposing upon all Americans the resolution [it favors] ....").

n293. 83 U.S. 130 (1873) (upholding the exclusion of women from the practice of law).

n294. 116 S. Ct. 2264 (1996).

-End Footnotes-

Should the Court have been clearer on these points? From the standpoint of traditional judicial craft, the answer is yes. Such an opinion would be more coherent. It need not be very broad, though it would be more deeply theorized. We could certainly imagine an opinion saying that if the government is going

to discriminate against homosexuals, it must do so on some ground other than its dislike of homosexuals and [\*64] homosexuality. We could certainly imagine an opinion linking this form of discrimination with discrimination on the basis of sex n295 and race. If the argument I am offering is correct, it would be hard to object to its judicial adoption. But perhaps at this stage, it makes sense for the Court to have been even more minimalist than that - to have rendered an opinion lying somewhere between a denial of certiorari and a fully articulated defense. It may have made sense to do what the Court did partly because of the simple practical difficulties in obtaining a more ambitious majority opinion; partly because of the Justices' lack of confidence in their own understandings of exactly what the Constitution requires in this setting; and partly because of strategic considerations having to do with the timing of judicial interventions into politics.

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n295. Cf. Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 202 (1994) (treating discrimination on the basis of sexual orientation as a form of sex discrimination).

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What the Court did had the vice of its own distinctive brand of minimalism - the failure even to do what is minimally necessary for self-defense. This is a genuine vice. But if we consider the entire context, it may also be an act of statesmanship, reflecting a prudent awareness of the need for democratic rather than judicial conclusions on this topic. The narrow and shallow decision may turn out to be broader and deeper; ultimately analogical reasoning and principles of stare decisis will determine its scope. Romer imposes unusually few constraints on its own interpretation. One of the central issues here has to do with the fate of Bowers v. Hardwick. n296

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n296. 478 U.S. 186 (1986).

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E. The Dog That Didn't Bark, or Equal Protection vs. Due Process

If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.

Romer v. Evans, 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting).

I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and concurring in the judgment).

We have not yet explored a central, indeed obvious question: What about Hardwick? Astonishingly, the Court did not discuss or even cite Hardwick. n297 Its failure to do so is remarkable in light of the fact that Hardwick seemed to belie the argument just offered. That is, Hardwick seemed to say that it is legitimate for the state to express disapproval of [\*65] homosexual conduct, indeed that it is legitimate for the state to express that disapproval via the criminal law. If it is acceptable for the state to criminalize homosexual activity, why does it not follow that it is acceptable for the state to prohibit legal protections against discrimination against homosexuals? Criminal punishment is a far more severe response to moral opprobrium than a ban on antidiscrimination claims.

-Footnotes-

n297. The Court's omission is made only slightly less astonishing by the fact that Colorado did not invoke Hardwick either.

-End Footnotes-

An important aspect of the Court's minimalism - indeed, subminimalism - consists in its failure to answer the question just posed, or indeed to say anything about how Romer and Hardwick fit together. We might even say that the Court's silence on Hardwick is under ordinary circumstances an unacceptable exercise of judicial power. An apparently relevant precedent ought to receive at least some discussion, especially if it is raised seriously in dissent. n298

-Footnotes-

n298. See Romer, 116 S. Ct. at 1629 (Scalia, J. dissenting).

-End Footnotes-

Why, as a matter of fact, did the Court say nothing about Hardwick? I speculate that the Court's silence about Hardwick stemmed from the fact that a majority could not be gotten to (a) distinguish Hardwick, (b) approve Hardwick, or (c) overrule Hardwick. If each of these options was unavailable, silence was the only alternative. The Court's silence probably resulted from the multimember tribunal's inability to converge on any rationale, a common explanation for minimalism.

But what, then, is the current status of Hardwick? This is a pressing question. Justice Scalia is correct to suggest that there is tension between the two cases. The tension lies in the fact that Hardwick says that disapproval of homosexual sodomy is a sufficient reason for criminal prohibition, n299 whereas Romer denies that disapproval of homosexuality is a sufficient reason to bar use of antidiscrimination law.

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n299. See Hardwick, 478 U.S. at 196.

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If the Romer Court had chosen to address Hardwick, five alternative approaches were available. The Court could have (1) overruled Hardwick because it was wrongly decided; or it could have distinguished Hardwick because it involved (2) a due process challenge rather than an equal protection challenge; (3) a narrowly targeted prohibition on a particular act rather than a broad, blunderbuss ban aimed at a group; (4) a traditional, rather than a novel, legal rule; and or (5) conduct (sodomy) rather than status (homosexuality).

Argument (4) is inadequate. The Court did refer to the novelty of Amendment 2, with the apparent thought that the novelty helped signal that something odd and perhaps untoward was at work. But novelty is not synonymous with unconstitutionality. Although tradition helps give content to the Due Process Clause, and although novelty may give rise to suspicion, tradition does not have the cross-constitutional weight that argument (4) attempts to give it. n300 In any case the Court's emphasis on the unusual nature of Amendment 2 was doubtful. Only very recently have localities begun to forbid discrimination on the basis of sexual ori- [\*66] entation; tradition is hardly inconsistent with such discrimination; and thus Colorado might have said that it was restoring the traditional status quo ante by undoing those laws.

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n300. See Cass R. Sunstein, Against Tradition, 13 Soc. Phil. & Pol'y 207, 226-27 (1996).

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Argument (3) is more plausible. The law in Hardwick was hardly over- or under-inclusive, and this was the Court's objection to Amendment 2. n301 Hence it could be said that Romer, invalidating a badly fitting law, falls in the protectionism-Moreno-Cleburne line of equal protection cases, whereas Hardwick, upholding a nicely fitting law, is like any case upholding a statute against substantive due process attack. This is not an unreasonable position, but it seems unconvincing. The key question, uniting Hardwick and Romer, is whether it is permissible for the state to try to delegitimize, or to decide not to legitimize, homosexual relations. If it is, Hardwick is right and Romer is wrong, even if Amendment 2 was over- and under-inclusive. Thus it seems that argument (3) does not work unless it is accompanied by argument (2) or (5).

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\* n301. See Romer, 116 S. Ct. at 1628 ("It is at once too narrow and too broad.").

- - - - -End Footnotes- - - - -

Argument (5) does connect with some of the Court's statements in Romer. Amendment 2 had the most peculiar feature of targeting people regardless of their actions. n302 Hardwick says that government can legitimately act against homosexual sodomy; but it does not follow that it can punish mere homosexual status. It would certainly be unconstitutional to make "homosexual status" a crime. n303 But it is not clear that this is sufficient to support Romer and distinguish Hardwick. There was no criminal ban in Romer. The Court's opinion

did not principally stress the status offense issue; if it had, it might well have invalidated Amendment 2 only insofar as it targeted the mere status of homosexual orientation, and preserved it insofar as it targeted homosexual conduct.

-Footnotes-

n302. The point is stressed by Akhil Reed Amar, Attainder and Amendment 2: Romer's Rightness, 95 Mich. L. Rev. (forthcoming Oct. 1996).

n303. Cf. Robinson v. California, 370 U.S. 660, 666 (1962) (holding unconstitutional a California law that made the status of narcotics addiction a crime).

-End Footnotes-

In any case, Justice Scalia argued that it follows from Hardwick not that government can make homosexual status a crime, but that government can prohibit the use of the antidiscrimination law to protect people who have an inclination to engage in conduct it disfavors. n304 In other words, it is not clear that a government that is disabled from creating "status offenses" is also disabled from saying that people inclined to engage in disfavored activity cannot, because of that inclination, seek the protection of antidiscrimination laws. Consider a law defining as addicts people inclined to heavy drinking and smoking, and prohibiting them from claiming the protection of antidiscrimination laws. This form of discrimination would be status-based, in a sense, but it is not obviously unconstitutional. Now let us turn to argument (2), which points in promising directions.

-Footnotes-

n304. See Romer, 116 S. Ct. at 1631-32 (Scalia, J., dissenting).

-End Footnotes-

[\*67]

The Equal Protection and Due Process Clauses have very different offices, and Hardwick is not in tension with Romer so long as those different offices are kept in mind. The Hardwick Court was careful to say that plaintiffs had raised no equal protection challenge, and this is important, for the category of legitimate state interests is provision-specific rather than Constitution-general. n305 Perhaps the rights protected by the Due Process Clause must grow out of longstanding practices. But as it has come to be understood, the Equal Protection Clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting. n306 The Equal Protection Clause sets out a normative ideal that operates as a critique of existing practices; the Due Process Clause safeguards rights related to those long-established in Anglo-American law. In view of the different constitutional provisions at issue, Romer leaves Hardwick untouched, simply because different provisions were at issue. And on this view, Justice Scalia is wrong to think it anomalous that the state can prohibit homosexual sodomy while being barred from enacting Amendment 2. The validity of state action depends on the particular constitutional challenge being mounted and the particular provision being invoked. For example, the Equal Protection Clause makes animus against African-Americans constitutionally unacceptable, even though there is nothing

specifically objectionable about that animus under the Due Process and Contracts Clauses. n307

-Footnotes-

n305. It is notable that the Hardwick Court explicitly created a distinction between heterosexuals and homosexuals. The plaintiffs attacked the sodomy law in a way that was neutral with respect to sexual orientation. It was the Supreme Court that made the distinction, by upholding the law as applied to homosexuals (while, in good minimalist fashion, leaving undecided its status as applied to heterosexuals). See Bowers v. Hardwick, 478 U.S. 186, 196 (1986). Because the Court in Hardwick discriminated on the basis of sexual orientation, it may seem odd to suggest that the Equal Protection Clause draws discrimination on the basis of sexual orientation into doubt. The best response is that Hardwick did not involve an equal protection claim. See id. at 196 n.8. The Court gave the minimal answer necessary to decide the due process attack. It should not seem terribly odd if the Court's distinction turns out to raise problems when an equal protection challenge is raised. See Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1174-76 (1988).

n306. See United States v. Virginia, 116 S. Ct. 2264, 2269 (1996) (holding that the maintenance of an all-male military college violated the Equal Protection Clause); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985) (holding that requiring a home for the mentally retarded to obtain a special use permit violated the Equal Protection Clause); Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (holding that segregation based on race violated the Equal Protection Clause). Interestingly, Justice Scalia contends in his dissenting opinion in United States v. Virginia that the Equal Protection Clause should be understood by reference to tradition. See United States v. Virginia, 116 S. Ct. at 2291-92 (Scalia, J., dissenting).

The historical understanding of due process has long roots. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J. concurring); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Murray's Lessee v. Hoboken, 59 U.S. (18 How.) 272, 277 (1855).

n307. Consider as an illustration the maximalist opinion in Loving v. Virginia, 388 U.S. 1 (1967), in which a ban on miscegenation was struck down on both equal protection and due process grounds. If the ban had been upheld against due process attack in Loving, it would not have followed that an equal protection challenge would have been unavailable. Indeed, if the Loving Court had held that the Due Process Clause is purely procedural, the equal protection attack would not have been affected in the least.

-End Footnotes-

[\*68]

Thus Romer might be seen to hold that the Equal Protection Clause forbids states from discriminating against homosexuals as a class (regardless of their behavior), unless the discrimination can be linked to some goal other than the bare desire to discourage homosexuality. Romer stands for the proposition that any discrimination against homosexuals must rest on a public-regarding justification; the goal of preventing or delegitimizing homosexual behavior is not by itself sufficient to support discrimination. This holding leaves open

questions involving discrimination in education or the military. On this view, it remains possible that the Due Process Clause allows states to punish homosexual behavior. In view of the reasonable distinction identified in argument (2), especially when linked with argument (5), it was appropriate for the Court to reject argument (1) and decline to overrule Hardwick at this stage. And if the distinction between equal protection and due process is maintained, Romer may be right even if Hardwick remains good law.

Notwithstanding what I have just said, it may well be that Hardwick is now very fragile and that eventually argument (1) will prevail. We could certainly imagine worse outcomes than the overruling of Hardwick, a casually written (subminimalist) opinion and one of the most vilified decisions since World War II. n308 But the Court should be cautious about overruling its own decisions, even those a majority thinks wrong, and perhaps Hardwick is not so egregiously wrong as to be overruled ten years later. On the other hand, there is good reason to think that Hardwick was indeed wrong; at least it is unlikely that the present Court would uphold a law imposing an actual jail sentence on someone for engaging in consensual sexual activity. Probably Hardwick should have been decided (if it was to be decided by the Court at all n309) the other way and very narrowly - as a case involving the old and nicely minimalist idea, with democratic foundations, of desuetude. n310 A challenge of this sort was not raised or passed on by the Court, and hence that challenge could be accepted without overruling Hardwick's substantive due process holding.

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n308. See, e.g., William N. Eskridge, Jr., The Case for Same-Sex Marriage 250 n.31 (1996); Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 770, 799-801 (1989); Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 52 U. Chi. L. Rev. 648, 655-56 (1987).

n309. The thoroughgoing minimalist would want the Court to have dismissed that case as moot. Although I have not defended thoroughgoing minimalism here, I do think that dismissal would have been best, all things considered.

n310. See infra p. 96. In his curious concurring opinion, Justice Powell characteristically groped toward a minimalist solution. See Hardwick, 478 U.S. at 197 (Powell, J., concurring) (suggesting that a jail sentence for Hardwick might violate the Cruel or Unusual Punishment Clause).

-End Footnotes-

To summarize a lengthy discussion, a minimalist (as opposed to subminimalist) opinion in Romer would have said the following: [\*69]

Hardwick held only that the ban on homosexual sodomy did not violate the Due Process Clause, whose content has been defined at least partly by reference to tradition. This case involves the Equal Protection Clause, which was not at issue in Hardwick. The content of the Equal Protection Clause is not given by tradition; that Clause is rooted in a principle that rejects many traditional practices and in any case subjects them to critical scrutiny. Our narrow conclusion today is that when the state discriminates against homosexuals, the Equal Protection Clause requires that the discrimination must be rational in

the sense that it must be connected with a legitimate public purpose, rather than fear and prejudice or a bare desire to state public opposition to homosexuality as such. In this case, Colorado has been unable to show any such connection. Its reference to associational liberty is an implausible justification for its broad ban, a judgment fortified by Amendment 2's reference to "orientation" as well as "conduct." To reach this conclusion, it is unnecessary for us to say whether and when other, less unusual forms of discrimination on the basis of sexual orientation are connected with legitimate public purposes.

#### F. A Note On Meaning and the Expressive Function of Law

Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that can be claimed for it.

Romer v. Evans, 116 S. Ct. 1620, 1628-29 (1996).

The constitutional claim before us ultimately depends for its success on little more than speculative judicial suppositions about the societal message that is to be gleaned from race-based districting.

Shaw v. Hunt, 116 S. Ct. 1894, 1910 (1996) (Stevens, J., dissenting).

It is sometimes observed that the Supreme Court's decisions have educative effects. n311 The nature and extent of these effects raise serious empirical questions. But short of an empirical investigation, it can at least be said that Supreme Court decisions have short-term effects in communicating certain messages containing national judgments about what is and is not legitimate. Official pronouncements about law - from the national legislature and the Supreme Court - have an expressive function. n312 They communicate social commitments and may well have major social effects just by virtue of their status as communication. Consider, for example, recent debates about whether the Constitution should be amended to allow criminalization of flag-burning, or whether universities should be permitted to regulate "hate" speech. Such measures are debated largely because of their expressive effects, rather than their more direct consequences. By communicating certain messages, law may affect social norms. It may also humiliate people, or say that people may not be humiliated.

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n311. See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 962 (1992).

n312. See Amar, supra note 302 (discussing the social meaning of Amendment 2).

-End Footnotes-

Much of the debate about measures relating to equality, or about "animus," concerns the law's expressive function. We do not get an adequate handle on such debates by asking about the empirically observable consequences of the law. There are, for example, vigorous debates about the impact of Brown v. Board of Education and the Civil Rights Act of 1964. n313 These debates are extremely illuminating, but part of the importance of Brown and the Civil Rights Act of 1964 lay in their expressive effects. When Brown was announced, it had an immediate impact on the attitude of black Americans toward the nation and their role in it. Similarly, the Civil Rights Act of 1964 had immediate importance for what it said, quite apart from what it did, or from what it would turn out to do. This is not to say that "statements" are most of what matters, or that law should be celebrated if it makes good statements regardless of what else it does. But one of the things that law does is to make statements, and these statements matter, partly because of their potential effects on social norms and partly because of their immediate effects on both self-esteem and self-respect.

-Footnotes-

n313. See, e.g., Rosenberg, supra note 8, at 49-106 (arguing that Brown did not desegregate the schools); John J. Donohue III, Employment Discrimination Law in Perspective: Three Concepts of Equality, 92 Mich. L. Rev. 2583, 2603-10 (1994); John J. Donohue III & James J. Heckman, Re-Evaluating Federal Civil Rights Policy, 79 Geo. L.J. 1713, 1715-22 (1991) (discussing the impact of the Civil Rights Act of 1964 and other federal civil rights policies).

-End Footnotes-

What did the Romer Court mean by its assertion that the "general announcement" in Amendment 2 inflicts on gays and lesbians "immediate, continuing, and real injuries"? n314 The answer may well lie in the expressive content of the amendment. How could the injuries otherwise be an "immediate" function of the mere "announcement"? And if the Court is understood in this way, Romer is important in large part because of its own expressive effects, which are directly counter to those of Amendment 2. This observation explains the immediate, intense public reaction to Romer. n315

-Footnotes-

n314. Romer v. Evans, 116 S. Ct. 1620, 1629 (1996).

n315. See Barbara Vobejda, Gay Rights Ruling Highlights Society's Fault Lines, Wash. Post, May 22, 1996, at A13; George F. Will, "Terminal Silliness", Wash. Post, May 22, 1996, at A21; Editorial, The Supreme Court Overreaches, Chi. Trib., May 21, 1996, 1, at 16.

-End Footnotes-

Similarly, the importance of Bowers v. Hardwick does not lie in its direct effects on the criminal law. The decision probably has not spurred many prosecutions of homosexuals. But it can be counted as one of the few genuinely

humiliating decisions in American constitu- [\*71] tional law, n316 joining Plessy v. Ferguson n317 and Bradwell v. Illinois. n318 At least in the short run, the importance of Romer v. Evans may lie more in its expressive function than in its concrete effects on law and policy. n319 It says something large about the place of homosexuals in society. Whatever the doctrinal complexities, it claims, and is understood to claim, that they are citizens like everyone else. In fact this may be the meaning of the Court's stunning first sentence: "One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens.'" n320 Attention to the expressive function of law thus shows how even a minimalist opinion may have social effects by "making statements" about the legitimacy or illegitimacy of certain widespread social attitudes and practices. n321

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n316. See Avishai Margalit, *The Decent Society* 9-27 (1996). Of course, there are many complexities in the term "humiliation." To be usable for purposes of political or legal theory, the term must depend on a substantive account of some sort, not just on people's subjective feelings. See *id.* at 9-10.

n317. 163 U.S. 537 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

n318. 83 U.S. (16 Wall.) 130 (1873).

n319. See Adam Nagourney, *Affirmed by the Supreme Court*, *N.Y. Times*, May 26, 1996, 4, at 4.

n320. *Romer*, 116 S. Ct. at 1623.

n321. At this point it is worthwhile to say something about the tone of Justice Scalia's dissenting opinion. His opinion in *Romer*, like others in this and recent Terms, has not merely a harsh quality but a high degree of sarcasm and contempt. See, e.g., *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353, 2361 (1996) (Scalia, J., dissenting); *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2361-62 (1996) (Scalia, J., dissenting); *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1436 (1994) (Scalia, J., dissenting). Thus Justice Scalia accuses the majority opinion of "terminal silliness" and says that the Court's analysis is "nothing short of preposterous," "nothing short of insulting," "facially absurd," and (for that matter) "ridiculous." *Romer*, 116 S. Ct. at 1630, 1634, 1637 (Scalia, J., dissenting). Aggressive dissenting opinions are of course nothing new. But Justice Scalia has on occasion resorted to something new and different, often amounting to an attack on his colleagues' motives and competence. See *id.* *Civic magnanimity*, however, is an important democratic virtue: "Citizens who respect one another as moral agents are less inclined toward the moral dogmatism, and its accompanying attitude of arrogance, that is common among those who take moral opposition as a sign of ignorance or depravity." Gutmann & Thompson, *supra* note 3, at 80. It is a judicial virtue as well.

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Acknowledgement of the *Romer* decision's beneficial expressive effects does not imply approval of its technical analysis. Perhaps the Court should have made clearer that a state may not defend discrimination solely by reference to a

desire to discourage, to delegitimate, or not to legitimate homosexuality. But some sort of minimalist approach seems right in this context. Indeed, the Court's inadequate treatment of the technical issue may actually be a virtue. An adequate treatment would have required the Court to write with a breadth and a depth that could not easily have commanded a majority opinion, and that may have foreclosed democratic debate about a series of issues currently engaging the nation and deserving, broadly speaking, a democratic rather than judicial solution. [\*72]

VII. VMI and "Actual Purpose"

There is no caste here.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) n322

It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." ... I am therefore persuaded that this discrimination ... is merely the accidental byproduct of a traditional way of thinking about females.

-Footnotes-

n322. Overruled by Brown v. Board Of Educ., 347 U.S. 483 (1954).

-End Footnotes-

Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring in the judgment).

It will certainly be possible for this Court to write a future opinion that ignores the broad principles of law set forth today, and that characterizes as utterly dispositive the opinion's perceptions that VMI was a uniquely prestigious all-male institution, conceived in chauvinism, etc., etc. I will not join that opinion.

United States v. Virginia, 116 S. Ct. 2264, 2307-08 (1996) (Scalia, J., dissenting).

At first glance, the Court's decision in United States v. Virginia n323 seems to be at the opposite pole from Romer. In Virginia, the Court said a great deal about the appropriate approach to sex equality and the foundations of sex equality doctrine. But United States v. Virginia had distinctive minimalist dimensions, and it can be understood as democracy-forcing as well.

-Footnotes-

n323. 116 S. Ct. 2264 (1996).

- - - - -End Footnotes- - - - -

A. What the Court Said

The Virginia Military Institute (VMI) was the only single-sex school among Virginia's public colleges and universities. After the Fourth Circuit found that VMI's single-sex organization violated the Constitution, n324 Virginia proposed to create a parallel program for women. The Supreme Court held that the operation of VMI as a single-sex school was unconstitutional, and [that] the parallel program would be an inadequate remedy. n325

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n324. See United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).

n325. See United States v. Virginia, 116 S. Ct. at 2287.

- - - - -End Footnotes- - - - -

The Court's opinion, written by Justice Ginsburg, came in three simple steps. First, the Court said that those who seek to defend gender-based discrimination must show an "exceedingly persuasive justification." n326 Before Virginia, it had seemed well settled that gender discrimination would face "intermediate scrutiny," n327 that is, the state [\*73] would have to show that the classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." n328 Virginia heightens the level of scrutiny and brings it closer to the "strict scrutiny" that is applied to discrimination on the basis of race. n329 The Court said that the state must at least meet the requirements of intermediate scrutiny, and it placed a great emphasis on the need for an "exceedingly persuasive justification," n330 which seems to have become the basic test for sex discrimination.

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n326. Id.

n327. Id. at 2293 (Scalia, J., dissenting) (citing Clark v. Jeter, 486 U.S. 456, 461 (1988)).

n328. Id. at 2294 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

n329. See id. at 2292-96.

n330. 116 S. Ct. at 2287.

- - - - -End Footnotes- - - - -

Second, the Court said that the state could not justify VMI's exclusion of women by pointing to the educational benefits of single-sex schooling or to the unique VMI "adversative" approach and its suitability for men alone. n331 In perhaps the most interesting part of the opinion, the Court acknowledged that

"single sex education affords pedagogical benefits to at least some students." n332 The Court, however, emphasized that it was the state's burden to show that it had actually sought to promote this purpose. n333 The Court's historical inquiry revealed no evidence that the state had this intention. n334 The Court observed that the state initially considered higher education too "dangerous for women," n335 a sentiment that reflected "widely held views about women's proper place." n336 With respect to Virginia, "the historical record indicates action more deliberate than anomalous: First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation." n337 Despite its rejection of Virginia's assertions, the Court suggested that a self-conscious effort to promote educational diversity through same-sex schools, at least if it was committed to equality of opportunity, could be constitutional. n338

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n331. See id. at 2276-82. An illuminating discussion of the VMI culture may be found in Dianne Avery, Institutional Myths, Historical Narratives and Social Science Evidence, 5 S. Cal. Rev. L. & Women's Stud. 189, 218-68 (1996).

n332. United States v. Virginia, 116 S. Ct. at 2276.

n333. See id. at 2277-79.

n334. See id.

n335. Id. at 2277.

n336. Id.

n337. Id. at 2278.

n338. See id. at 2276-78.

-----End Footnotes-----

After assuming for the purposes of the decision that most women would not choose VMI's adversative method of training, n339 the Court also rejected Virginia's argument that the adversative method is in [\*74] compatible with the presence of women. n340 In reaching this conclusion, the Court pointed to the absence of sufficient evidence to support that argument. n341 The Court added that the same argument historically has been made in a number of other contexts, including admission of women to the practices of law and medicine. n342 Thus the Court referred to past "'self-fulfilling prophecies' once routinely used to deny rights or opportunities" to women. n343 Even if many women were ill-suited to the VMI method, the same would be true for many men, and VMI would have to rely on individualized assessments about applicants, not on sex-based classifications. n344

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n339. See id. at 2280.

n340. See id. at 2279-82.

n341. See id. at 2280.

n342. See id. at 2280-82.

n343. Id. at 2280 (alteration in original) (citation omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982)) (internal quotation marks omitted).

n344. See id. at 2280-82.

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Third, the Court rejected Virginia's remedial plan. n345 The parallel program would be inferior in academic offerings, methods of education, and financial resources. n346 The Court especially criticized Virginia's decision to exclude the adversative method from the sister school, dismissing Virginia's stereotypical generalization that women are ill-suited for that method. n347 The Court concluded that the new program would be separate and unequal and thus inadequate. n348

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n345. See id. at 2282-87.

n346. See id.

n347. See id. at 2284.

n348. See id. at 2285-86.

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The continued existence of an all-male military school in Virginia may have been more significant for its expressive effects than for the actual deprivation of educational opportunities. The public debate over the case becomes more intelligible if we examine the debate in its expressive capacity, as raising questions about the extent to which nature prescribes gender roles. And the outcome of the case, together with its language, is important in large part because of the general statements the Court made about the relationship between government and sex-role stereotyping. By invalidating a practice rooted in old stereotypes rather than contemporary convictions, the Court can be taken to have promoted democratic deliberation, indicating that single-sex institutions must be rooted in an effort to promote educational diversity and equal opportunity.

B. Deep But Narrow

In several ways, Virginia is an ambitious opinion. First, it offers a distinctive understanding of sex equality. The problem with the Virginia system was not that the state noticed a difference between men and women, but that it turned that difference into a disadvantage. n349 [\*75] "Inherent differences remain cause for celebration, but not for denigration of the members of either

sex or for artificial constraints on an individual's opportunity." n350 The Court understood the equality principle to mean that the state cannot use gender as a basis for deprivation of educational opportunities. n351 Similarly, the Court noticed that some "differences" may be a product of past practices, and thus sometimes differences become a kind of "self-fulfilling prophecy." n352

-Footnotes-

n349. See id.

n350. Id. (internal quotations omitted).

n351. See id.

n352. Id. at 2280 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)).

-End Footnotes-

Second, the Court did not merely restate the intermediate scrutiny test but pressed it closer to strict scrutiny. After United States v. Virginia, it is not simple to describe the appropriate standard of review. States must satisfy a standard somewhere between intermediate and strict scrutiny. n353

-Footnotes-

n353. See id. at 2286-87.

-End Footnotes-

By setting out an ambitious account of equality along with this new standard, the Court said more than it needed in order to justify its decision in the case (while the Romer Court said less than it needed for that purpose). This new standard, however, is not a dramatic innovation. The revision of the standard of review is unlikely to produce different results from those that would have followed under the intermediate scrutiny standard, which has operated quite strictly "in fact." The Court has deepened the foundations of sex equality law by giving a clearer sense of its basic purpose, but what it said is broadly consistent with what has been said in the recent past. n354

-Footnotes-

n354. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

-End Footnotes-

What is the reach of Virginia? It would be incorrect to conclude, as Justice Scalia does in his dissent, that the Court has by its rationale committed future courts to invalidation of all educational programs, public and private, that separate the sexes. n355 The Court was careful to base its decision on Virginia's failure to prove that it had been attempting to promote educational diversity and that its programs provided equality of opportunity. n356 Significantly, the Court left open the possibility that a new legislature, acting on the basis of a concern for the well-being of both men and women,

could separate the sexes so long as it provided equal opportunity. n357

-Footnotes-

n355. See United States v. Virginia, 116 S. Ct. at 2305-09 (Scalia, J., dissenting).

n356. See 116 S. Ct. at 2276-79, 2282-86.

n357. Cf. infra note 487 (noting that the VMI case might even be seen as one of desuetude).

-End Footnotes-

In this way Virginia shares a common theme with both Romer and Kent. It is linked with Romer insofar as it harbors skepticism about the state's articulated justification for single-sex education and seeks to discover the actual, illegitimate motivation - here, the state's belief that it can regard women as a class as less well-suited for certain educational practices than men. Virginia is linked with Kent insofar as it requires a current legislative judgment - here, that same-sex education is necessary to promote educational diversity. Virginia certainly does not invalidate the state's decision to separate men and women in the interest of ensuring equal opportunity. Such a separation may well promote, rather than undermine, equal opportunity. If the state reached its decision deliberately and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program. It follows that federal funding of private, same-sex educational institutions may well be constitutional after Virginia. A general funding program may itself be neutral and therefore nondiscriminatory even if some funded institutions discriminate. n358 Even if private institutions are for statutory reasons subject to constraints parallel to those imposed by the Equal Protection Clause, it is not clear that they must admit both men and women. In particular, educational institutions for women alone have potential benefits for women, benefits that are connected with the promotion of equality. n359

-Footnotes-

n358. Cf. Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justifications, if in practice it benefits or burdens one race more than another ... would raise serious questions about, and perhaps invalidate, a whole range of ... statutes that may be more burdensome ... to the average black than to the more affluent white."). But see Norwood v. Harrison, 413 U.S. 455, 463-68 (1973) ("A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.").

n359. See United States v. Virginia, 116 S. Ct. at 2276 & n.7 (citing Brief for Twenty-Six Private Women's Colleges as Amici Curiae 5).

-End Footnotes-

For these reasons, the Court's decision is far more minimalist than it seems, and properly so. The Court did not decide a number of future questions about same-sex programs; in view of the diversity and possible legitimacy of such programs, it was right to leave things open. The decision is also democracy-forcing insofar as it makes "actual purpose" crucial to the legitimacy of sex discrimination.

C. Depth Defended

The depth of the Court's opinion in United States v. Virginia can be found in the Court's understanding of the principle of gender equality. The Court emphasized that there are indeed biological and social differences between men and women, and that these differences are to be "celebrated," not turned into a source of inequality. n360 The opinion suggests that the problem of gender inequality is a problem of second-class citizenship, in which the state uses women's differences from men as a justification for prescribing gender roles in a way that deprives women of equal opportunity. n361 Significantly, this conception of gender equality avoids a claim that women are not biologically or socially different from men. It also avoids a claim that those differences justify unequal treatment. Finally, it avoids a claim that equal treatment is necessarily required in all contexts. In short, the Court left open the possibility that it would uphold a law that promotes both educational diversity and equal opportunity.

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n360. See id. at 2276.

n361. See id.

- - - - -End Footnotes- - - - -

Would it be possible to criticize the Court for adopting a controversial understanding of the equality principle when a less controversial understanding would have sufficed? A thorough-going minimalist would certainly support this criticism. And if we think that the Court's understanding was misconceived, we might also think that it was hubristic for the Court to announce it. But a deep understanding of a constitutional provision is nothing to lament when diverse Justices can converge on it and when they (and we) have good reason to believe that it is correct. Both of these conditions were met in Virginia. This was hardly the first constitutional case involving sex discrimination; after so many encounters with so many such cases, the Court was entitled to have confidence in its understanding of the point of the equality guarantee. The particular situation of a wholesale exclusion of women from a top-flight military academy provided a good occasion on which to announce that point. This was a relatively rare occasion when it was appropriate to give an ambitious account of the underlying constitutional principle. It is parallel to Brown v. Board of Education, when the Court also spoke ambitiously after encountering the underlying problem for a period of years; the difference is that Virginia was properly narrow, while Brown was properly broad in view of the differences between sex and race segregation in education.

D. Equal Protection Now

It should be clear by this point that the 1995 Term has modified traditional equal protection doctrine. Romer suggests that rationality review will not always result in validation; its form of rationality review is far more like the intermediate variety. Virginia suggests that intermediate scrutiny no longer applies in cases involving gender discrimination, and it moves closer to a strict scrutiny standard. Finally, last year's decision in Adarand Constructors, Inc. v. Pena n362 holds that strict scrutiny is not "fatal in fact" n363 and in that way treats strict scrutiny as if it were similar to intermediate scrutiny. The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests.

-Footnotes-

n362. 115 S. Ct. 2097 (1995).

n363. Id. at 2117.

-End Footnotes-

This development is reminiscent of Justice Marshall's famous argument in favor of a "sliding scale" rather than a tiered approach to equal protection issues, n364 and of Justice Stevens's reminder that there [\*78] is "only one Equal Protection Clause." n365 But a general movement in the direction of balancing would be nothing to celebrate. The use of "tiers" has two important goals. The first is to ensure that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work. "Strict scrutiny" is based on a presumption of distrust, to be rebutted only in the extreme cases. By contrast, "rational basis" review is rooted in a presumption of good faith, rebutted only in rare instances. The second goal of a tiered system is to discipline judicial discretion while promoting planning and predictability for future cases. Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor's foot is not a promising basis for antidiscrimination law.

-Footnotes-

n364. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1973) (Marshall, J., dissenting).

n365. Adarand, 115 S. Ct. at 2122 (Stevens, J., dissenting) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451-55 (1985) (Stevens, J., concurring)).

-End Footnotes-

Understood in this way, a tiered approach has all of the advantages and disadvantages of rule-bound law, while balancing has the corresponding vices and virtues of open-ended standards. If the Court simply were to balance all relevant factors in all equal protection cases, the rule of law would be at

excessive risk. To avoid this risk, we should understand the recent cases in the following ways. Romer is part of the Moreno-Cleburne line, using rationality review "with bite" when prejudice and hostility are especially likely to be present. Adarand recognizes that some affirmative action programs are supported by sufficient public-regarding justifications. Virginia is a vigorous insistence, generally consistent with prior law, that if a government draws lines between men and women, it ought not to be perpetuating old stereotypes about appropriate roles. Thus conceived, the three cases have limited applications and do not mark a general movement in the direction of open-ended balancing. They retain the basic structure of "tiers" with modest modifications, allowing rationality review occasional "bite," modestly strengthening scrutiny of sex discrimination, and recognizing that affirmative action poses special questions.

One issue remains: What is the substantive evil at which the Equal Protection Clause is aimed? There is an answer in the conception of "animus" n366 in Romer and the concern about sex-role stereotyping in Virginia. Both cases seem inspired by Justice Harlan's suggestion in Plessy v. Ferguson that "there is no caste here," n367 an idea recalled explicitly by the opening words of Romer n368 and implicitly by the Virginia Court's discussion of "volumes of history" demonstrating "official action denying rights or opportunities based on sex." n369 In the case of [\*79] homosexuals, "animus" typically takes the form of hatred and fear, whereas the motivation for discrimination against women has more often been a kind of "chivalry" associated with perceptions of women's appropriate role. n370 In both cases, however, the central equality concern is that government ought not to be permitted to turn a morally irrelevant characteristic into a basis for second-class citizenship. This was the basic problem in both Romer and Virginia; in the end it unites the two cases.

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n366. See Romer v. Evans, 116 S. Ct. 1620, 1627 (1996).

n367. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

n368. See Romer, 116 S. Ct. at 1623 (quoting Plessy, 163 U.S. at 559 (Harlan, J., dissenting)).

n369. United States v. Virginia, 116 S. Ct. 2264, 2274 (1996).

n370. The significance of this difference should not be overstated; fears of contamination and contagion play a role in both settings and indeed help explain the forms of discrimination in both Romer and Virginia. See Koppelman, supra note 295, at 267-70.

- - - - -End Footnotes- - - - -

VIII. Punitive Damages, Commercial Advertising, and Death

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness ... properly enters into the constitutional calculus.

Pacific Mutual Life Insurance v. Haslip, .  
499 U.S. 1, 18 (1991) n371

This section pursues the theme of minimalism by focusing on three cases from the 1995 Term. The cases involve constitutional limits on punitive damages, the constitutional status of commercial advertising, and the interaction between death penalty law and the nondelegation doctrine.

-Footnotes-

n371. Quoted in BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1602 (1996) and in TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993).

-End Footnotes-

A. Punitive Damages

In recent years, the Court has been asked to set aside punitive damages awards as inconsistent with the Due Process Clause. n372 Although the Court refused to do so, it left open the possibility that in an extreme case an award could be constitutionally unacceptable. n373 In short, the Court refused to endorse the rule, proposed by Justice Scalia, n374 that the Constitution imposes no constraints on a jury's punitive damages award.

-Footnotes-

n372. See TXO, 509 U.S. at 446; Pacific Mut., 499 U.S. at 7-8. The author is now engaged in an empirical study of punitive damages awards, with Daniel Kahneman and David Schkade. The study is funded but not subject to restrictions by Exxon Corporation. The purpose of the study is to test the sources of variability in jury judgments.

n373. See TXO, 509 U.S. at 458; Pacific Mut., 499 U.S. at 18.

n374. See BMW of N. Am., Inc., 116 S. Ct. at 1610-11 (Scalia, J., dissenting).

-End Footnotes-

In BMW of North America, Inc. v. Gore, n375 the plaintiff sought punitive damages because BMW failed to inform him that it had repainted his new automobile prior to sale. n376 The jury granted an [\*80] award of punitive damages that was one thousand times the compensatory damages awarded in the case. n377 Presented with this disparity, the Court ruled for the first time that a grossly excessive award of punitive damages violated the Due Process Clause. n378 There was, however, a sharp division within the Court. The opinion of the five-member majority, written by Justice Stevens, spoke in terms of a form of "substantive due process." n379 Justice Breyer's concurring opinion was procedurally oriented; it involved the lack of constraint on jury discretion. Four Justices seemed to believe that no punitive damage award could ever violate the Due Process Clause. n380 One of the purposes of these opinions was to provide incentives for the democratic branches of government to confront the issue of punitive damages. n381.

-Footnotes-

n375. 116 S. Ct. 1589 (1996).

n376. See id. at 1593.

n377. See id. at 1593-94.

n378. See id. at 1604.

n379. See id. at 1611-12.

n380. See id. at 1610-14 (Scalia, J., dissenting, joined by Thomas, J.); id. at 1614-18 (Ginsburg, J., dissenting, joined by Rehnquist, C.J.).

n381. Compare this goal to the idea of a "penalty default" in the law of contracts and statutory construction. See Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 87-95 (1989). Maximalist validation (cell 1 in the table on page 40 above) can be understood as part of the same family of rules designed to impose good incentives on the other branches of government. Minimalist invalidation can also be understood as part of this family of rules. See Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976); Kent v. Dulles, 357 U.S. 116, 129-30 (1958).

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In finding the award grossly excessive, the Court emphasized three points: the degree of reprehensibility of the nondisclosure, the disparity between the harm incurred and the punitive damages award, and the difference between the remedy and the civil penalties assessed in comparable cases. n382 First, the Court held that nothing about BMW's behavior was particularly reprehensible or egregious. n383 The presale refinishing of the car had no effect on performance or safety, and "BMW evinced no indifference to or reckless disregard for the health and safety of others." n384 Second, the ratio of punitive damages to compensatory damages was especially high: over five hundred to one. n385 Third, the civil and criminal penalties that could be imposed for comparable misconduct were far more limited; for example, the maximum civil penalty authorized by Alabama law for deceptive trade practices was two thousand dollars. n386 The punitive damage award was thus inconsistent with judgments about the relevant conduct in other areas of the law. n387

- - - - -Footnotes- - - - -

n382. See BMW of N. Am., Inc., 116 S. Ct. at 1598-99.

n383. See id. at 1599.

n384. Id.

n385. See id. at 1602.

n386. See id. at 1603.

n387. See id.

- - - - -End Footnotes- - - - -

In his concurrence, Justice Breyer stressed some different points. He suggested that the most serious problem was not the sheer excessiveness of the award but the absence of legal standards that could minimize decisionmaker caprice. n388 Here the relevant standards were "vague and open-ended to the point where they risked arbitrary results." n389 Justice Breyer noted that the jury had not operated under a statute with standards distinguishing among permissible punitive damage awards. n390 The jury had not applied the seven factors used to constrain punitive damage awards in a way that actually constrained the decision-making process. n391 Finally, the state courts had not made any effort to discipline the use of those factors in such a way as to generate a legally constraining standard. n392 According to Justice Breyer, the problem lay in the violation of the rule of law. n393 Understood in this way, Justice Breyer's opinion connected BMW of North America, Inc. both with void-for-vagueness cases n394 and with the constitutional attack on the death penalty in Furman v. Georgia. n395 A central problem lies in unconstrained discretion; BMW of North America, Inc. is not best understood simply by reference to excessiveness.

- - - - -Footnotes- - - - -

- n388. See id. at 1605 (Breyer, J., concurring).
- n389. Id.
- n390. See id.
- n391. See id. at 1606.
- n392. See id. at 1607.
- n393. See id. at 1609.
- n394. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 169-71 (1972).
- n395. 408 U.S. 238, 255 (1972). The Furman approach is a form of minimalism as compared with the Brennan-Marshall approach, and, insofar as it is designed to require legislative clarity, it is of a piece with Kent v. Dulles, 357 U.S. 116 (1958), and the nondelegation doctrine.

- - - - -End Footnotes- - - - -

Both the Stevens approach and the Breyer approach are minimalist. They depend on a range of variables, not on a rule. They set aside an extreme outcome but do not provide much guidance for future cases. Both approaches are shallow and narrow, though Justice Breyer's is deeper insofar as it recalls the aspirations of the rule of law. In short, both opinions leave a great deal undecided. The very fact that Justice Breyer's argument is so different from the Court's adds to the rule-free quality of the outcome.

With respect to punitive damages, a minimalist approach of some kind is probably the wisest course for the present time. The appropriate constraints on such awards are very hard to announce in advance, for it is still not clear

what factors should be relevant to a judgment of excessiveness. Certainly there is reason to consider the relationship between compensatory damages and punitive damages, and an enormous disparity between the two is a signal that something may have gone wrong. But punitive damages may justifiably be awarded for deterrence purposes in situations in which the probability of detection is low; when this probability is low, it makes economic and legal sense to [\*82] award punitive damages that far exceed compensatory damages. n396 In view of the complexity of the underlying issues, it is best for the Court to pursue a minimalist course in which it invalidates only the most extreme outcomes. To return to our basic theme, minimalism can be seen as a way of reducing decision costs and error costs, and the Court is not now in a good position to generate anything like clear rules to constrain punitive damages.

-Footnotes-

n396. See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 160-63 (1987).

-End Footnotes-

If this is right, Justice Breyer's approach seems best of all. It centers the inquiry on some procedural questions, avoids judicial judgments about substance, and thus links the due process inquiry with its most time-honored and uncontentious function, the control of discretion through procedural safeguards. Because of its procedural character, Justice Breyer's approach can be connected with many of the cases discussed thus far, including *Kent v. Dulles* and *Hampton v. Mow Sun Wong*. Most importantly, it requires state officials to set out criteria on their own and is in that way democracy-forcing. Like the void-for-vagueness doctrine, it is intended to catalyze and improve, rather than preempt, democratic processes.

B. Commercial Advertising

Until recently, commercial advertising was not thought to be protected by the First Amendment. Since its 1976 ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, n397 the Court has analyzed restrictions on commercial advertising in a highly minimalist, rule-free fashion. n398 Clear guidelines have yet to emerge.

-Footnotes-

n397. 425 U.S. 748 (1976).

n398. See, e.g., *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995); *United States v. Edge Broad. Co.*, 113 S. Ct. 2696, 2703 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 552, 566 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770-71.

-End Footnotes-

The question in the 44 *Liquormart* case seemed very narrow: whether Rhode Island could bar the advertisement of retail liquor prices except at the place of sale. n399 The guiding legal standard came from *Central Hudson Gas &*

Electric Corp. v. Public Service Commission, n400 which suggested a kind of balancing test for evaluating restrictions on commercial advertising. n401 But the most obvious precedent was Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, n402 where the Court had upheld a ban on advertisements for casino gambling. In Posadas the Court reasoned that the state's greater [\*83] power - to ban the sale - included the lesser power to ban advertisements for the underlying product. n403 Also necessary to the Court's decision was its judgment that the state had a substantial interest in preventing an increase in casino gambling. n404 Posadas suggested that the government had broad power to prevent advertising for products that it deemed harmful - gambling, drinking, tobacco smoking, and more. n405

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n399. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1501 (1996).

n400. 447 U.S. 557 (1980).

n401. Central Hudson provided that a state must assert a substantial interest in regulating commercial communication that is neither misleading nor related to illicit conduct. Moreover, the regulation must be directly related to the state interest, see id. at 564, and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive," id.

n402. 478 U.S. 328 (1986).

n403. See id. at 345-46.

n404. See id. at 341.

n405. Cf. id. at 346 (agreeing that legislatures may respond to harmful products by restraining the stimulation of demand for them).

- - - - -End Footnotes- - - - -

Despite Posadas, the Court unanimously struck down the Rhode Island law. The most remarkable and characteristically nonminimalist opinion came from Justice Thomas. n406 Writing for only himself, Justice Thomas rejected the balancing test set out in Central Hudson n407 and announced instead that government may never regulate truthful, nonmisleading commercial advertising. n408

- - - - -Footnotes- - - - -

n406. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1515-20 (1996) (Thomas, J., concurring).

n407. See id. at 1515-16.

n408. See id. at 1520. In Justice Thomas's view, government may never "suppress information in order to manipulate the choices of consumers." Id. at 1517.

- - - - -End Footnotes- - - - -

It is worthwhile pausing over Justice Thomas's opinion. In just a few pages, he would (a) abandon the First Amendment distinction between commercial and noncommercial speech, a breathtakingly large step, n409 (b) reject the Central Hudson test, n410 used by the Court in many cases and not questioned in 44 Liguormart by any of the parties, and (c) overrule Posadas even though this did not appear necessary to the outcome in the case. It is possible that Justice Thomas was ultimately right on all three points. But because his opinion proposes to do so much so quickly, and in a case in which none of this was necessary, it is fair to say that his is a most surprising opinion. There are many historical and philosophical reasons for distinguishing between commercial and noncommercial speech. n411 Perhaps none of them is convincing, but before they are rejected, the Court should give them attention in a case that genuinely presents them. n412 Certainly an originalist should investigate the historical record.

-Footnotes-

n409. "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." Id. at 1518.

n410. See id. at 1515-16.

n411. See generally C. Edwin Baker, Human Liberty and Freedom of Speech 197-206 (1989) (claiming that commercial speech is disconnected from the individual liberty and self-realization that are essential to constitutional freedom of speech); Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1 (1979) (arguing that the values of the First Amendment are not threatened by regulation of commercial speech).

n412. Justice Thomas's opinion in 44 Liguormart parallels his opinion in Colorado Republican, which called on the Court to overrule Buckley even though that issue had not been briefed or argued, and the case could be decided without addressing it. See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2323 (1996).

-End Footnotes-

[\*84]

At the opposite pole was Justice O'Connor's concurring opinion, in which she spoke for four Justices. n413 Justice O'Connor argued that the statute failed the Central Hudson test and was invalid for that simple reason. n414 The Rhode Island restriction was more intrusive than necessary to promote the state's interest. The state invoked the goal of keeping prices high in order to keep consumption low. But the less restrictive way to promote this goal would be through mandatory minimum prices or increased sales taxes. n415 Although Justice O'Connor acknowledged that the Court had employed a far less stringent level of scrutiny in Posadas, she observed that post-Posadas cases n416 had looked more carefully at the state's justification. n417 That more careful look, signalled by Central Hudson itself, was sufficient to doom the Rhode Island law.

-Footnotes-

n413. Chief Justice Rehnquist and Justices Souter and Breyer joined Justice O'Connor's opinion.

n414. "Because Rhode Island's regulation fails even the less stringent standard set out in Central Hudson, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation." 44 Liquormart, 116 S. Ct. at 1522 (O'Connor, J., concurring).

n415. See id. at 1521-22.

n416. See, e.g., Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2376 (1995); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1590 (1995).

n417. See 44 Liquormart, 116 S. Ct. at 1522 (O'Connor, J., concurring).

- - - - -End Footnotes- - - - -

The most distinctive feature of Justice O'Connor's argument is its narrowness. The opinion answers only those questions that are necessary to the disposition of the case. It leaves First Amendment law very much as it was. And unlike the opinion in Romer v. Evans, Justice O'Connor's opinion answers the questions it raises.

Justice Stevens's plurality opinion steered a course between Justice O'Connor and Justice Thomas. It did signal an important departure from previous understanding: in the plurality's view, a flat ban on truthful commercial messages - if that ban is imposed for reasons unrelated to the preservation of a fair bargaining process - should henceforth meet rigorous judicial review. n418 The plurality explained that commercial speech generally receives less protection because of the state's interest in protecting consumers against commercial harms. n419 The Rhode Island law, however, was unrelated to consumer protection. n420 And when consumer protection is not at stake, the government is likely to be acting "on the offensive assumption that the public will respond 'irrationally' to the truth." n421 The state was therefore required to demonstrate that the advertisement ban would advance a legitimate state interest "to a material degree." n422 (The Court did not address and in that sense left open important questions about [\*85] protection of children and teenagers, or protection of a large class of people including children and teenagers.)

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n418. See 116 S. Ct. at 1508.

n419. See id.

n420. See id.

n421. Id.

n422. Id. at 1509 (citation omitted).

- - - - -End Footnotes- - - - -

The Rhode Island law did not pass the rigorous scrutiny that the plurality demanded. There was no evidence that the speech prohibition would have a

significant effect on marketwide consumption, n423 the stated goal of the advertisement ban. In any case, alternative means of regulation that did not suppress speech could promote this goal. n424 The plurality also rejected Posadas: "[A] state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes . . . ." n425 The plurality appears to have adopted what David Strauss has called the "persuasion principle": the principle that the government may not regulate speech solely on the ground that it will persuade some people to engage in conduct that the government sees as harmful. n426

-Footnotes-

n423. See id.

n424. See id. at 1510.

n425. Id. at 1511.

n426. David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 335 (1991).

-End Footnotes-

In Posadas, the Court had reasoned that because the state had the greater power to ban casino gambling within its borders, it must also have the lesser power to ban the advertisement. The 44 Liquormart Court responded that such reasoning ignores the command of the First Amendment:

The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

....

That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right. n427

-Footnotes-

n427. 44 Liquormart, 116 S. Ct. at 1512-13.

-End Footnotes-

But as Justice O'Connor's opinion illustrates, and as the plurality itself seems to concede, n428 it was not necessary to reject any aspect of the Posadas

opinion. The Court might have preserved the greater-includes-the-lesser principle in this context but kept that principle in check with a "substantial interest" and "reasonable fit" test.

-Footnotes-

n428. See id. at 1510-11.

-End Footnotes-

In sum, the plurality opinion is narrow and deep; Justice Thomas offers an approach that is both broad and deep; Justice O'Connor's is [\*86] narrow and shallow. Should the plurality have signed Justice O'Connor's narrower opinion? If we have full confidence in the plurality's reasoning, and full confidence that Posadas was wrong, the judicial adoption of the reasoning should not be cause for alarm. But if the reasoning seems questionable in particular applications, and if Posadas seems plausibly correct, the reasoning should not have been announced in a case that did not require its announcement. n429

-Footnotes-

n429. Justice Stevens conceded that the Court could have reached the same decision without applying the stricter standard laid out in the plurality opinion: "Even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a "reasonable fit" between its abridgment of speech and its temperance goal." Id. at 1510.

-End Footnotes-

For the moment let us rest with some simple suggestions. Even truthful and technically nondeceptive commercial advertising may mislead people. The real question is whether many people will be misled by it and whether many more people will not be. n430 Moreover, the idea that commercial speech should be treated the same as political speech is historically unsupported. It is also doubtful in principle. The protection of commercial speech has a great deal in common with the protection of market arrangements in the Lochner era, and it has similar pitfalls. n431 In this light, the Court's general caution has made a great deal of sense, and in 44 Liquormart the best course was Justice O'Connor's. The plurality's broader principle may create difficulties for the future, as in easily imaginable cases involving protection of teenagers from cigarette advertising or violent programming. n432 In 44 Liquormart, there was no reason for the Court to create this risk.

-Footnotes-

n430. See Richard Craswell, Interpreting Deceptive Advertising, 65 B.U. L. Rev. 657, 681-82 (1985).

n431. Cf. Jackson & Jeffries, supra note 411, at 25-40 (arguing that notions of economic liberty do not justify according commercial speech full First Amendment protection).

n432. See, e.g., 21 C.F.R. 897.25 (West, WESTLAW through Oct. 1, 1996).

-End Footnotes-

C. Death and Delegation

Dwight Loving killed two taxi drivers. n433 Because he was in the Army, he was tried for murder under Article 118 of the Uniform Code of Military Justice (UCMJ). n434 He was subject to the death penalty because the court-martial found that aggravating factors were present. n435 What made his case complicated was the fact that the set of aggravating factors had been identified not by Congress but by the President. The relevant statute said only that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the Code. n436

-Footnotes-

n433. See Loving v. United States, 116 S. Ct. 1737, 1740 (1996).

n434. 10 U.S.C. 918(1), (4) (1994).

n435. The court-martial found three aggravating factors: (1) premeditated murder committed during a robbery; (2) triggerman in a felony murder; and (3) two murders rather than one. See Loving, 116 S. Ct. at 1740.

n436. 10 U.S.C. 856 (1994).

-End Footnotes-

[\*87]

Loving contended that the death penalty was unconstitutional in his case because it had been issued under an unconstitutional delegation of legislative power to the President. n437 The Court rejected the contention. It reasoned that the Commander-in-Chief Clause entrusted the President with the authority to superintend the military, and that the delegated duty applied in an area that the Constitution already had assigned to the President. n438 Congress had authority to delegate to the President broad discretion to prescribe conditions on the use of capital punishment in military courts. n439

-Footnotes-

n437. See Loving, 116 S. Ct. at 1743-44.

n438. See id. at 1750-51.

n439. See id. at 1751.

-End Footnotes-

Loving is a useful foil to the cases discussed thus far; it is a minimalist validation that might have been better as a minimalist, democracy-promoting invalidation. The Court could have issued a minimalist opinion ensuring that the death penalty would be imposed on American soldiers only pursuant to decisions made by Congress, not (realistically speaking) by bureaucrats. Viewed through the perspective afforded by three lines of precedent, the Loving case seems much harder than the Court acknowledged.

The first set of cases imposes stringent procedural protections on the imposition of the death sentence. In *Furman v. Georgia*, n440 the key opinions came from Justices who were not willing to strike down the death penalty in its entirety, but who followed the more minimalist path of requiring constraints on jury arbitrariness. They required a death penalty process that would limit discretion in imposing death sentences. n441 The second set of cases involves the delegation of discretionary authority to the executive branch. In two cases in 1935, most prominently *Schechter Poultry Corp. v. United States*, the Court struck down delegations that it considered open-ended. n442 These cases say that Congress may delegate its legislative powers to other officers only when such delegation is restrained by meaningful guidelines. n443

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n440. 408 U.S. 238 (1972) (per curiam).

n441. See, e.g., *id.* at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

n442. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414-20 (1935).

n443. See *Schechter Poultry*, 295 U.S. at 529-31; *Panama Ref.*, 293 U.S. at 421-30. The nondelegation doctrine has played a modest but explicit role in a few more recent cases, if only in the context of statutory construction. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645 (1980) (construing an act that delegated to the Secretary of Labor authority to promulgate occupational safety and health standards).

- - - - -End Footnotes- - - - -

In the third and in some ways most interesting line of cases, the Court has narrowly construed statutes in order to avoid constitutional questions. n444 These cases have become especially controversial in light [\*88] of claims that they authorize courts to "bend" statutes even though there may be no constitutional defect. n445 But we can make more sense of such cases if we see that they reflect a concern about the exercise of open-ended executive discretion produced by an absence of congressional guidance on important questions. Such cases suggest that the nondelegation doctrine is not entirely dead; on the contrary, these cases are (modest and targeted) nondelegation cases, vindicating the doctrine where it is most important. They require a "clear statement" from Congress, thus prohibiting Congress from delegating to the executive, through ambiguously drafted statutes, the power to invade constitutionally sensitive domains. Congress itself must make that decision in a focused and particularized way. Thus *Kent v. Dulles* is directly related to *Schechter Poultry*. n446

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n444. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988); *American Petroleum Inst.*, 448 U.S. at 645-46; *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

n445. See Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74.

n446. Compare Schechter Poultry, 295 U.S. at 529-42 (invalidating an overly broad delegation of authority), with Kent, 357 U.S. at 129-30 (narrowly construing an ambiguous delegation of congressional power).

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There is an additional point. A minimalist court is reluctant to reject focused and deliberate congressional judgments that a certain course is constitutionally acceptable. A court may uphold such judgments because of principles of deference and, in that way, "underenforce" the Constitution. In the "clear statement" cases, the Supreme Court has recognized a domain in which it might not invalidate a deliberative congressional judgment but in which a broad delegation of authority will pose constitutional problems. n447 By steering ambiguous statutes away from that domain, the Court informs Congress that any intrusion will have to be supported by a focused legislative judgment, and not by an ambiguous delegation of discretionary authority to the President. n448

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n447. See, e.g., Kent, 357 U.S. at 129 (holding that all delegations of power to regulate the right to travel will be narrowly construed).

n448. Frederick Schauer offers a valuable criticism of the approach I am suggesting here. See Schauer, supra note 445, at 71. Schauer suggests that clear statement principles often operate to foreclose congressional judgments without requiring the Court to take on the responsibility associated with a constitutional ruling. See id. at 87-88, 94-96. The dangers of an excessive judicial role via principles requiring clear statements from Congress are real. But in the above cases, the application of the "clear statement" approach was guided by a genuine constitutional preference for nondelegation and thus was, I think, legitimate.

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When combined, the three lines of cases support the following argument on Loving's behalf. The Court will ordinarily allow Congress to grant a considerable amount of discretionary authority to the President; the modern delegation cases prove the point. But the death penalty decisions show that special procedural safeguards are necessary in capital sentencing. The factors that justify a decision of death should be chosen by the legislature, not by the President (in this context, bureaucrats of some kind, realistically speaking). Congress may not grant open-ended discretion to impose the death sentence to someone who is not, under the constitutional regime, the national law maker. [\*89] The authority for this proposition comes from the clear statement cases, which show that there is a problem from the standpoint of legitimacy when certain constitutionally sensitive decisions are made by the executive.

It therefore makes sense to say that if death is to be imposed on a member of the United States military, it must be as a result of a deliberate and specific decision by Congress, rather than by the President and his subordinates pursuant to a standardless, open-ended grant of power. Nothing in the Commander in Chief Clause compels otherwise, for nothing in that clause authorizes the President to impose criminal penalties without statutory authority. n449 The Loving case was not simple. But the Court might have done better to have

issued a modern equivalent of Kent v. Dulles.

-Footnotes-

n449. See U.S. Const. art. II, 2, cl. 1.

-End Footnotes-

IX. The Future

What is not ready for decision ought not to be decided.

Quill v. Vacco, 80 F.3d 716, 732 (2d Cir. 1996) (Calabresi, J., concurring in the result). n450

Rather than seeking an analogy to a category of cases, ... we have looked to the cases themselves.

-Footnotes-

n450. Cert. granted, 65 U.S.L.W. 3218 (U.S. Oct. 1, 1996) No. 95-1858).

-End Footnotes-

Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2388 (1996) (plurality opinion) (Breyer, J.).

This section attempts to apply the central ideas of this Foreword to three subjects of unusual importance with which future courts will inevitably grapple. These subjects are affirmative action, the right to die, and same-sex marriages. I do not mean to settle these issues here. Instead I mean to suggest, in a tentative way, how the project of leaving things undecided might bear on judicial treatment of these controversies. In all three contexts, I will be arguing for an approach that is narrow and shallow. The central factors in the first two cases are (1) the existence of a currently vibrant democratic debate, (2) the informational deficit faced by the courts, and (3) the wide variety of situations for which a simple constitutional rule makes little sense. In the case of same-sex marriage, unlike the first two, strategic or tactical considerations are especially important.

A. Affirmative Action

The nation is in the midst of a large debate over race-conscious programs. Although much of this debate is occurring in democratic [\*90] arenas, n451 many people have vigorously urged the Supreme Court to resolve the controversy by invalidating such programs on constitutional grounds. n452 For the most part, the Court has taken a narrow and incompletely theorized course. n453 Very recently, the Supreme Court has been more ambitious, construing the Equal

Protection Clause to require the most careful judicial scrutiny of any race-conscious program. n454 But the Court said that this form of scrutiny would not lead to automatic invalidation. It would not be "strict in theory, but fatal in fact." n455

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n451. In November, 1996, Californians will vote on Proposition 209, which would change and largely eliminate many affirmative action programs. See California Ballot Pamphlet: General Election November 5, 1996 (visited Oct. 26, 1996) <<http://Vote96.ss.ca.gov/Vote96/html/BP>>, see also S.26, 104th Cong. (1996) (sponsored by Sen. Helms) (seeking to amend the Civil Rights Act of 1964 to make preferential treatment based on race, color, sex, religion, or national origin an unlawful employment practice); H.R. 3190, 104th Cong. (1996) (sponsored by Rep. Franks) (seeking to prohibit federal agencies from requiring or encouraging preferences based on race, sex, or ethnic origin in connection with federal contracts).

n452. See, e.g., William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 778 (1979).

n453. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 556-57, 589, 598 (1990) (upholding an FCC policy of awarding a "plus" for minority ownership in comparative proceedings for new licenses where the FCC considered six additional race-neutral factors, and upholding an FCC policy allowing licensees to transfer their licenses without a hearing to FCC-approved minority enterprises where the policy was not a fixed quota and applied to only a small fraction of licenses), overruled in part by *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277-78, 283-84 (1986) (holding that societal discrimination alone was insufficient to justify a race-conscious state layoff policy, where there was no evidence of prior discrimination in hiring practices and where other less drastic means were available); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-20 (1978) (holding that a state university could not totally exclude nonminorities from a percentage of seats in an entering class, but that a race-conscious admissions process was not per se unconstitutional).

n454. See *Adarand*, 115 S. Ct. at 2113.

n455. *Id.* at 2117 (citation omitted).

-----End Footnotes-----

1. Case-by-Case Analysis vs. Rules. - Despite this cautionary note, it might be concluded, as the Fifth Circuit recently did in *Hopwood v. Texas*, n456 that the Court has come to understand the Equal Protection Clause to embody a principle of race neutrality. n457 All affirmative action programs might well be held to violate this principle, n458 including those in the educational system. In its remarkable decision striking down an affirmative action plan for the University of Texas Law School, the court of appeals held that race consciousness was acceptable only to remedy present effects of past discrimination. n459 Otherwise public universities must proceed on a race-neutral basis. Through Title VI, this view may extend to private universities as well. n460