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ESSAYS

THE LAWFULNESS OF *ROMER V. EVANS*

H. JEFFERSON POWELL*

Almost forty years ago, Professor Charles L. Black, Jr., wrote that if *Brown v. Board of Education*¹ and its companion cases² “were wrongly decided, then they ought to be overruled. One can go further: if dominant professional opinion ever forms and settles on the belief that they were wrongly decided, then they will be overruled, slowly or all at once, openly or silently.”³ The lawfulness of *Brown* was therefore a matter of “practical and not merely intellectual significance,” bearing as much on the future of constitutional law as on the justification of a past decision.⁴ Believing as he did that *Brown* was correctly decided—a lawful exercise of the judicial power rather than a lawless exertion of will—Black set out to explain why.⁵

On May 20, 1996, the Supreme Court of the United States decided *Romer v. Evans*.⁶ That decision, as anyone likely to read this essay knows, invalidated an amendment to the Constitution of Colorado (“Amendment 2”), adopted by a statewide referendum in 1992, that forbade the adoption or enforcement of “any statute, regulation, ordinance or policy” prohibiting discrimination on the

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1. 347 U.S. 483 (1954).

2. See *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1959); *Gayle v. Browder*, 352 U.S. 903 (1956); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 829 (1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

3. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 421 (1959). Professor Black was my first constitutional law teacher. I hope that the reader will understand this essay's emulation of the form and ambition of his *Lawfulness* article, while no doubt painfully short of his accomplishment there, as a small expression of my admiration and gratitude for his influence and example.

4. *Id.*

5. And did so marvelously, in my judgment. But that is another story.

6. 517 U.S. 620 (1996). Justice Kennedy wrote the opinion of the Court, which was joined by five of his colleagues. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.

basis of homosexual "orientation, conduct, practices, or relationships."⁷ *Romer* has attracted an enormous amount of attention, both positive and negative: the decision has been hailed as a "radical" and "unexpected revival of Warren Court activism,"⁸ and has been condemned as "a replay of *Griswold v. Connecticut*" and "[t]he operation of judicial policymaking in the name of the Constitution."⁹ But, as these curiously similar descriptions from opposite ends of the critical spectrum suggest, there is considerable sentiment for the proposition that *Romer* is difficult to justify on conventional terms or that it must rest on some basis not easily reconciled with the opinion of the Court itself.¹⁰

If *Romer* was wrongly decided, then it ought to be overruled. The legitimacy of the Court's exercise of power in that case, as always, lies in the lawfulness of its decision. In his dissent, Justice Scalia asserted that "[n]o principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here."¹¹ If Justice Scalia is correct, then the decision in *Romer* was unlawful and the Court's exercise of power illegitimate. But I think that *Romer* was a lawful decision, and my purpose in writing this essay is to explain that conclusion.

7. COLO. CONST. art. II, § 30b. The amendment was referred to popularly and in the opinion of the Court as "Amendment 2." The amendment read in full:

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

Id.

8. Louis M. Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 67.

9. Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 409, 412 (1997). *Griswold*, of course, was the Warren Court decision invalidating a state ban on the use of contraceptives by married couples that is now seen as the first of the modern substantive due process privacy decisions. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

10. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996); Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996); Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361 (1997).

11. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

I.

In presenting his defense of the lawfulness of *Brown*, Professor Black explained that his “liminal difficulty” in doing so was the very simplicity of his argument.¹² “Simplicity is out of fashion, and the basic scheme of reasoning on which these cases can be justified is awkwardly simple.”¹³ I believe that the lawfulness of *Romer* can be shown to rest in a line of reasoning that is also “awkwardly simple.”¹⁴ First, the early cases of the Supreme Court interpreting the Fourteenth Amendment construed the Equal Protection Clause as an affirmative requirement that the states extend the protection of their laws to all individuals who claim injury and seek redress.¹⁵ Second, those same cases make it clear that state action that identifies a class of law-abiding individuals and places them at a disadvantage in seeking the protection of the laws against injury violates this requirement.¹⁶ The earliest judicial decisions construing the Equal Protection Clause fully articulate both steps in this short and simple line of reasoning. Nothing in subsequent case law contradicts them or sets them in question, and they are, as it seems to me, fully applicable to the issue before the Court in *Romer v. Evans*.

A.

Many years before the ratification of the Fourteenth Amendment, *Marbury v. Madison*¹⁷ defined the meaning of the protection of the laws in terms of governmental openness to individual claims of harm: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”¹⁸ This understanding of the meaning of the protection of the laws was no invention of Justice

12. Black, *supra* note 3, at 421.

13. *Id.*

14. I think that the possibility of a simple justification is worth exploring despite the great energy and intellect that have already been brought to bear on the question of *Romer*'s legitimacy: simplicity is often, though not always, an attribute of persuasive legal argument. The reader should not infer any disdain for the existing literature on *Romer* from this observation. I have learned a great deal from that portion of it that I have been able to read. See *supra* notes 8-10.

15. See *infra* notes 17-48 and accompanying text.

16. See *infra* notes 49-56 and accompanying text.

17. 5 U.S. (1 Cranch) 137 (1803).

18. *Id.* at 163. The principle is not unknown to modern Supreme Court case law. See, e.g., *Davis v. Passman*, 442 U.S. 228, 242 (1979) (recognizing a cause of action directly under the Fifth Amendment to provide a remedy for injurious sex discrimination by a member of Congress).

John Marshall. In his *Commentaries on the Laws of England*, Blackstone included among “the rights, or, as they are frequently termed, the liberties of Englishmen,” the “right of every Englishman . . . of applying to the courts of justice for redress of injuries” as well as the “right appertaining to every individual . . . of petitioning the king, or either house of parliament, for the redress of grievances” in the case of “any uncommon injury” “which the ordinary course of law is too defective to reach.”¹⁹ These rights to the protection of the laws and the attention of government were necessary elements of the “political or civil liberty” that is “the direct end of [England’s] constitution.”²⁰ Like Marshall, Blackstone stressed not only that the protection of the laws extends to all—it is “the right of every individual” or of “every Englishman”—but also that it extends to every form of cognizable grievance: “It is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.”²¹ From sources such as the *Commentaries* and *Marbury*, the association of the protection of the laws with the right of every individual to seek effective public redress for injury became commonplace.²²

From its earliest dealings with the Fourteenth Amendment, the Supreme Court clearly interpreted the Equal Protection Clause to

19. 1 WILLIAM BLACKSTONE, COMMENTARIES *137, *138-39.

20. 1 *Id.* at *141. In Blackstone’s opinion, these rights were auxiliary to “the principal absolute rights which appertain to every Englishman”—personal security, personal liberty, and private property; they were nonetheless constitutional in status and essential in practice as the means necessary to “protect and maintain inviolate the three great and primary rights.” 1 *Id.* at *136.

21. 3 *id.* at *109; see also 3 *id.* at *23 (noting that, with limited exceptions, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded”).

22. See, for example, St. George Tucker’s widely-read American edition of the COMMENTARIES, which included an editorial note defining “the right of protection from injury” as a social right that “appertain[s] to every individual” and “which the whole society has engaged to afford him.” 2 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 145 (Philadelphia, Birch & Small 1803). Justice Bushrod Washington’s opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), a text frequently quoted in Reconstruction-era debates as authoritative, classed “protection by the government” as one of the “privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this Union.” *Id.* at 551. The Reconstruction-era Supreme Court invoked this fundamental principle of “our political institutions” even outside the context of the Fourteenth Amendment. See, e.g., *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321-22 (1866) (“[I]n the protection of these rights [to life, liberty and the pursuit of happiness] all are equal before the law.”).

create a specific federal constitutional guarantee of the states' preexisting duty to provide every individual with the protection of the laws.²³ In 1876, Chief Justice Morrison Waite wrote:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.²⁴

As Professor Black noted years ago, "Inaction, rather obviously, is the classic and often the most efficient way of 'denying protection.'"²⁵ From its inception, the Equal Protection Clause was interpreted in light of this common sense observation: the early federal cases maintained, without exception as far as I know, that the negative wording of the Equal Protection Clause imposes, or rather enforces, an affirmative obligation actually to afford legal protection to all persons.²⁶ Three years after the adoption of the Fourteenth Amendment, Judge (later Justice) William Woods explained:

Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as the enactment of such laws.²⁷

This construction of the Equal Protection Clause was consistent with the preexisting understanding of "the protection of the laws," as well as with other legal concepts of the era such as the duty to accord

23. See Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954) (discussing the historical evidence that the Fourteenth Amendment's framers and ratifiers understood it to be the enforcement of preexisting norms).

24. *United States v. Cruikshank*, 92 U.S. 542, 555 (1876).

25. Charles L. Black, Jr., "State Action," *Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 73 (1967).

26. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). The Court in *Strauder* stated:

By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection . . . was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws.

Id.

27. *United States v. Hall*, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282).

justice to lawfully present aliens.²⁸

The Fourteenth Amendment, as finally drafted and adopted, appears to have embodied a deliberate decision to impose on the states primary responsibility for guaranteeing to all persons the equal protection of the laws. While an early version of the Amendment introduced in Congress would have placed on Congress "primary responsibility for enforcing legal equality,"²⁹ as adopted, the Amendment imposed the obligations of Section One directly on the states. This point is fundamental to an understanding of *Romer* because of the fact that in light of the great body of federal cases enforcing the Equal Protection Clause, it is easy to forget that the Clause, and Section One as a whole, primarily addresses the states. Federal judicial enforcement and congressional legislation pursuant to Section Five are secondary safeguards, not substitutes for state action.³⁰ Congressional debates over federal enforcement legislation included repeated references to the states' affirmative obligations under the Equal Protection Clause:

The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. . . . By the first section of the fourteenth amendment a new right, so far as it depends upon express constitutional provision, is conferred upon every citizen; it is the right to the protection of the laws. This is the most valuable of all rights, without which all others are worthless and all right and all liberty but an empty name. To deny this greatest of all rights is expressly prohibited to the States as a breach of that primary duty imposed upon them by the

28. Contemporaneous international law recognized "denial of justice" as a lawful ground for military reprisal by the nation whose citizen was unable to obtain redress for legal injury. See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 390-391 (1866). I owe this point to a personal communication from Professor Black. His seminal article on the state action doctrine long ago noted the parallel between the constitutional and international law prohibitions on denial of legal protection. See Black, *supra* note 25, at 73.

29. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2165 (1997); see also *id.* at 2164-66 (analyzing the history of the Fourteenth Amendment's framing).

30. The congressional debates over the framing of the Fourteenth Amendment clearly display the importance of the antebellum understanding of "the protection of the laws" in the Amendment's origins. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2459 (May 8, 1866) (statement of Rep. Stevens) ("[T]he law which operates upon one man shall operate *equally* upon all. . . . Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all."); *id.* app. at 256 (July 9, 1866) (statement of Rep. Baker) (commenting that the Equal Protection Clause mandates "simple justice. Is it not a disgrace to a free country that the poor and the weak members of society should be denied equal justice and equal protection at the hands of the law?").

national Constitution.³¹

The Supreme Court acted on this understanding of the protection of the laws in the early equal protection cases, holding in *Strauder v. West Virginia*³² that the exclusion of African-Americans from jury service violated the Fourteenth Amendment.³³ In the Court's view, such exclusion was "practically a brand upon" African-Americans "affixed by law, an assertion of their inferiority," and therefore an infringement of their Fourteenth Amendment "right to exemption from unfriendly legislation."³⁴ But the exclusion of African-Americans was equally a diminishment of "the security of their enjoyment of the rights which others enjoy" and therefore transgressed the "immunity from inequality of legal protection" secured by the Amendment.³⁵ Racially-exclusive juries were both a "[s]tate denial" and a state "invasion" of "equal protection of the laws" and "the enjoyment of perfect equality of civil rights" that the Fourteenth Amendment guarantees.³⁶

31. CONG. GLOBE, 42d Cong., 1st Sess. app. at 608 (April 12, 1871) (statement of Sen. Pool). Senator Pool went on to note that Congress's enforcement power was available when "any State, by commission or omission, denies this right to the protection of the laws." *Id.*; see also *id.* app. at 153 (April 4, 1871) (statement of Rep. Garfield) ("[T]he provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection.")

The text of the Civil Rights Act of 1866, while directed to Congress's specific concern with racial discrimination, plainly drew upon the traditional understanding of the protection of the laws: it provided that "all persons born in the United States . . . shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1982 (1994)).

32. 100 U.S. 303 (1879).

33. See *id.* at 310.

34. *Id.* at 308.

35. *Id.* at 308, 310. Justices Field and Clifford dissented in the jury cases, in part because they disagreed with the Court's evaluation of the impact of excluding African-Americans from juries, but they emphatically subscribed to the general understanding that the Fourteenth Amendment requires the states to extend to all persons the protection of the laws:

The amendment . . . opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offences. It secures to all persons their civil rights upon the same terms . . .

Ex parte Virginia, 100 U.S. 339, 367 (1880) (Field, J., dissenting).

36. *Ex parte Virginia*, 100 U.S. at 346.

The jury cases to one side, it is well known that the Supreme Court generally gave the Fourteenth Amendment a narrow construction. The *Slaughter-House Cases*,³⁷ for example, limited the Privileges and Immunities Clause of the Amendment to guarantee only rights derived from the individual's relationship as a citizen to the federal government,³⁸ while the *Civil Rights Cases*³⁹ created the "state action" limitation on the scope of the Amendment.⁴⁰ These narrowing interpretations of the Amendment have often been criticized,⁴¹ but—regardless of their correctness—their importance for our purpose is the confirmation they provide for my claim about the early judicial understanding of the Equal Protection Clause. The *Slaughter-House* majority saw not only the infamous "black codes" but also the perceived failure of the former Confederate states to provide African-Americans the protection of the laws as parts of "the evil [the Reconstruction-era amendments] were designed to remedy."⁴² While it rejected the dissenters' argument that the Amendment federalized the corpus of substantive civil rights, the majority justices agreed with their dissenting colleagues that a state's failure to provide equality of legal protection, at least to African-Americans, would violate the Equal Protection Clause.⁴³

The logic of the *Civil Rights Cases*, which invalidated the Civil Rights Act of 1875⁴⁴ because it attempted to protect certain ordinary civil rights against purely private infringement, rested on the premise that the states were obligated to provide the protection of the laws in the traditional sense and that their failure to do so would violate the Fourteenth Amendment.⁴⁵ The private actions of racial discrimination prohibited by the 1875 Act were, the Court

37. 83 U.S. (16 Wall.) 36 (1873).

38. See *id.* at 78.

39. 109 U.S. 3 (1883).

40. See *id.* at 13.

41. Professor Black has been one of the most trenchant critics of these cases. See, most recently, CHARLES L. BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED* 55-84 (1997).

42. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 72. "It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or not enforced." *Id.* at 70. As the Court also noted, some aspects of the "black codes" overtly lessened the protection of the laws afforded African-Americans. See *id.* ("[African-Americans] were not permitted to give testimony in the courts in any case where a white man was a party.").

43. See *id.* at 81 (opinion of the Court); *id.* at 100-01 (Field, J., dissenting); *id.* at 112-13 (Bradley, J., dissenting); *id.* at 127-28 (Swayne, J., dissenting).

44. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (declared unconstitutional by *The Civil Rights Cases*, 109 U.S. at 25-26).

45. See *The Civil Rights Cases*, 109 U.S. at 17.

maintained, merely the infliction of “an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears.”⁴⁶ But, “[i]ndividual invasion of individual rights is not the subject-matter of the amendment;” instead, it “nullifies and makes void all State legislation, and State action of every kind . . . which denies to any [person] the equal protection of the laws.”⁴⁷ Without a showing that the states were failing to carry out their duty of equal protection, the Court concluded, the clause could not be invoked as a basis for congressional legislation or, obviously, federal judicial relief.⁴⁸

Whatever one may think of the justices’ candor, or lack thereof, in assuming that Congress had no basis for doubt that the states were fulfilling their equal protection duties, the reasoning articulated in the *Civil Rights Cases* confirms the Supreme Court’s early, consistent adherence to an understanding of the Equal Protection Clause as an affirmative requirement that the states must extend the protection of their laws to all individuals who claim injury and seek redress.

B.

The second point in my argument is my claim that the early equal protection decisions broadly identify as a violation of the Fourteenth Amendment any state action that designates a class of law-abiding individuals and places them at a disadvantage in seeking the protection of the laws against injury. In so holding, the Court rejected any argument that the Equal Protection Clause is limited to racial discrimination. In the *Slaughter-House Cases*, the Court toyed with the idea that the Equal Protection Clause in particular was limited by the specific “evil to be remedied by” it, the post-Civil War effort by white Southerners to reduce the freed men and women to a state of semi-slavery.⁴⁹ But even in that opinion, the Court admitted that the general terms of the Amendment should “have their fair and just weight in any question of construction,”⁵⁰ and later cases assumed without significant hesitation that the Amendment’s clauses were not limited to discrimination against African-Americans, regardless of how important an understanding of the Amendment’s

46. *Id.* at 24.

47. *Id.* at 11.

48. *See id.* at 25 (“If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment . . .”).

49. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

50. *Id.* at 70.

historical origins might be in interpreting its sweeping terms.⁵¹

The early decisions sometimes employed the concept of "class legislation" in outlining those situations in which a state would have failed to provide the equal protection of the laws.⁵² The Equal Protection Clause, the Court repeatedly explained, requires that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights," and that all persons "should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts."⁵³ The Clause thus forbids state action that "single[s] out" a class and accords it a lesser degree of protection by the laws,⁵⁴ whether by express discrimination or by practical effect.⁵⁵ As the Court stated:

What is called class legislation . . . would be obnoxious to the prohibitions of the Fourteenth Amendment The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.⁵⁶

51. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 367-68 (1886).

52. The idea of "class legislation," like the term "equal protection," originally entered American constitutional discourse in the Jacksonian era. See, e.g., WILLIAM LEGGETT, *DEMOCRATIC EDITORIALS: ESSAYS IN JACKSONIAN POLITICAL ECONOMY* (Lawrence H. White ed., 1984) (collecting the writings of the journalist and political commentator William Leggett).

I completed this essay before having the opportunity to read Professor Melissa Saunders's wonderful article on nineteenth century notions of class legislation and their implications for contemporary constitutional law. See Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245 (1997). I believe, however, that my argument is consistent with her article.

53. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

54. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879); see also *Yick Wo*, 118 U.S. at 367-368 (describing the scope of protection provided by the Fourteenth Amendment and noting that "[c]lass legislation, discriminating against some and favoring others, is prohibited" (quoting *Barbier*, 113 U.S. at 32)). In *Missouri v. Lewis*, 101 U.S. 22 (1880), the Court explained that state laws structuring the state's judicial system are valid as long as they "do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made." *Id.* at 30.

55. See *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6546) ("[O]rdinances, general in their terms, [which] operate only upon a special class, or upon a class, with exceptional severity . . . incur the odium and [are] subject to the legal objection of intended hostile legislation against [the class].").

56. *The Civil Rights Cases*, 109 U.S. 3, 24 (1883). Congressional debates over enforcement legislation also invoked the concept. See, e.g., CONG. GLOBE, 42d Cong., 2d Sess. 847 (Feb. 6, 1872) (statement of Sen. Morton) ("The very idea involved in [the Fourteenth] [A]mendment [is] the idea of class legislation.").

II.

As I read the Court's cases, it long ago adopted as part of the correct interpretation of the Equal Protection Clause the points discussed above. The Clause requires states to provide the protection of the laws by affording effective means for seeking redress when an individual receives a legal injury, and it prohibits any state action that accords any individual or any group of individuals less effective means for seeking legal protection than are generally available. The requirement and the prohibition are perfectly general and apply to all levels and forms of state authority. "The constitutional provision . . . must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."⁵⁷ This does not of course mean that a state's laws must grant to every individual the same set of protected legal interests: every legal system draws innumerable differences between the interests enjoyed by different groups of individuals, and the constitutional limits on the state's power to do so must be sought elsewhere than in the principle we are discussing. However, with respect to whatever legal interests state law grants to an individual, the state cannot give an individual a different and less favorable means of seeking the protection of the laws and redress for injury to those interests than is available generally. But does this understanding of the Equal Protection Clause, however old its articulation, actually apply to the provision at issue in *Romer v. Evans*?

In answering this question, it is crucial to understand the legal effect of Amendment 2, and this creates an initial difficulty, for the exact scope of Amendment 2 was uncertain.⁵⁸ Justice Kennedy was inclined to read it as depriving "gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings," an interpretation of the provision's scope that he reasonably suggested would have rendered it even more problematic.⁵⁹ As Justice Kennedy conceded, however, the state supreme court had not decided whether Amendment 2 would have that effect.⁶⁰ Instead, the state court went only as far as determining that Amendment 2 would "repeal existing statutes, regulations, ordinances, and policies of

57. *Ex parte Virginia*, 100 U.S. 339, 347 (1879).

58. For the text of Amendment 2, see *supra* note 7.

59. *Romer*, 517 U.S. at 630.

60. *See id.*

state and local entities that barred discrimination based on sexual orientation . . . [and] prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.’ ”⁶¹

Even this more modest reading of the full legal effect of Amendment 2, however, falls clearly within the scope of the principle I have outlined. The constitutionally-significant effect of Amendment 2 would not have been felt in circumstances in which a substantive rule of state law denied gay and lesbian persons a particular legal interest. If, for example, state law forbade the employment of sexually-active gays and lesbians as police officers, the police commissioner would not have invoked Amendment 2 when firing such an individual from the force, nor would a state court have cited Amendment 2 as the legal justification for the discharge.⁶² Where Amendment 2 would have made the most crucial difference was in those circumstances where gays and lesbians argued that because of their membership in this “class,” legal interests that state law accords them were injured or in peril. The situations we should think of are ones in which gays and lesbians correctly assert that they are being denied benefits open by law to all (the services of common carriers, for example, or of municipal utilities), or being subjected to harms against which the laws protect all (physical assault, for example) simply *because* they are gay or lesbian. In similar circumstances, any other group—blue-eyed people, tall people, short people, men with long hair, women with short hair—could demand, or the state authorities could decide to adopt, rules or policies specifically addressing the group’s injuries and protecting it against such discriminatory harm. Any group whatsoever—except, under Amendment 2, gays and lesbians.

To put it another way, Amendment 2 was a determination that no public entity in Colorado—short of the sovereign people itself—could respond to a claim for legal protection or redress for legal injury by the class of individuals identified in the amendment by adopting laws or policies specifically protecting them against harm based on their membership in the class—no matter how arbitrary the discrimination or egregious the mistreatment. Amendment 2 thus

61. *Id.* at 626-27 (quoting *Evans v. Romer*, 854 P.2d 1270, 1284-85 (Colo. 1993)).

62. The legal justification for the discharge would be the state statute; the only role of Amendment 2 in the litigation would be in evaluating the validity of the law under the state constitution. I am not, of course, addressing the issue of whether such a law would violate other principles of the state or federal constitution.

placed the members of the group it singled out in a uniquely disfavored legal position: they alone were required, in seeking the protection of the laws, to forego remedies specifically protecting them as a group when addressing any agency or agent of the state other than the electorate as a whole.

Amendment 2 effectively imposed inaction on the officials of the state in any circumstance in which the most meaningful response to a claim for legal protection would involve the adoption of a rule or policy against discrimination based on sexual orientation. In contrast, Amendment 2 left all other classes free to seek such protection of the law through legislation, administrative rules, or official policies tailored to their needs. With respect to all other classes, all agencies and agents of the state remained free to respond to claims for legal protection by whatever class-based remedies lay within their affirmative authority. The distinction Amendment 2 thus drew was by no means insubstantial. The history of antidiscrimination legislation and of the Equal Protection Clause itself amply demonstrate that the remedy afforded for past injury or the protection provided against future harm must often be tailored to the threatened group in order to be effective. The problem with the *Civil Rights Cases* was the Court's cynical failure to recognize that the general common law principles requiring common carriers and innkeepers to accommodate all well-disposed and paying customers did not *in fact* protect African-Americans from the denial of those services.⁶³ In such circumstances, group-specific remedies are necessary to give substance to the legal interests the victimized group nominally shares with the rest of the public.⁶⁴ And such remedies are

63. The Reconstruction-era understanding of the Equal Protection Clause was that the Clause's central function was to guarantee the availability of whatever legal redress is necessary to give substance to the legal rights individuals and groups otherwise possess. This is clear, I believe, not only from the cases I discuss but from the congressional debates as well. See, e.g., 2 CONG. REC. 412 (Jan. 6, 1874) (statement of Rep. Lawrence) ("The fourteenth amendment declares, in effect, that no State 'shall deny to any person within its jurisdiction the equal protection of the laws;' that is, the equal benefit of these principles of common law shared by and existing for the protection of citizens generally.").

64. Where general rules that proscribe arbitrary conduct or guarantee the general availability of some interest or service do not *in fact* protect a particular group, remedies specifically tailored to do so are not properly viewed as giving the group some sort of special privilege. Instead, a central function of the group-specific remedy is to render substantial the group's claim to interests it already possesses. To be sure, anti-discrimination principles often go beyond this to forbid the denial to specified groups of substantive interests, but this latter function should not be allowed to obscure their role in ensuring that members of a protected group actually may vindicate whatever interests they have in common with everyone else.

precisely what Amendment 2 forbade any of the state's instrumentalities to afford to a specified class of persons.

In his dissent, Justice Scalia argued that the Court's decision was subject to disproof by *reductio ad absurdum*:

To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.⁶⁵

But Justice Scalia's example is not in fact analogous to the type of situations that Amendment 2 would have created and that violate the equal protection principle I have described. In the Justice's example, the state legislature has enacted a substantive rule of law under which the relatives of city officers cannot be awarded municipal contracts. Unless this statutory rule violates some other principle of the federal or state constitution, a member of this group denied a municipal contract has not received a legally cognizable injury. She has not been denied the equal protection of the laws because the laws do not give her a legal interest in the award of municipal contracts.

Amendment 2 did not affect the universe of substantive legal interests enjoyed by gay and lesbian persons in Colorado.⁶⁶ What it did do was deny them, and them alone, certain modes of legal protection and redress for their interests that are potentially available to all other groups. In doing so, it "lessen[ed] the security of their enjoyment of the rights which others enjoy"⁶⁷ and thus transgressed the command of the Equal Protection Clause that "no . . . class of persons shall be denied the same protection of the laws which is enjoyed by . . . other classes."⁶⁸

III.

A couple of loose ends need to be tied up. Like this essay, Justice Scalia's dissent relied in part on prior case law—in his case,

65. *Romer*, 517 U.S. at 639 (Scalia, J., dissenting).

66. This is a point Justice Scalia made repeatedly in his dissent. See *id.* at 638 (Scalia, J., dissenting) (citing state pensions and auto-collision insurance as rights not affected by Amendment 2).

67. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

68. *Missouri v. Lewis*, 101 U.S. 22, 31 (1879).

*Bowers v. Hardwick*⁶⁹ for the argument that Amendment 2 is constitutional. Under *Bowers*, he pointed out, a state may make homosexual sodomy a criminal offense without violating substantive due process.⁷⁰ “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.”⁷¹ As an initial matter, it is not clear that the state involved in *Romer* could invoke such an argument; private, consensual homosexual sodomy is not illegal in Colorado, and, as Justice Scalia himself noted, the state defendants argued that Colorado’s general laws prohibiting arbitrary discrimination by public and private actors would continue to protect gays and lesbians.⁷² The state defendants’ (and Justice Scalia’s) description of Amendment 2 as a mere ban on special treatment fits poorly with the argument that the Amendment is justifiable as an attempted deterrent to the commission of acts themselves legal under state law.⁷³ For the sake of argument, however, let us assume this problem can be surmounted.

Greater-includes-lesser arguments are by no means universally valid in law, and the *Romer* dissent’s is, I think, plainly erroneous. Greater-includes-lesser arguments are persuasive only insofar as the “lesser” exercise of power is genuinely a subset of or parallel to the “greater,” and even when that is the case, the lesser action may be forbidden by some constitutional norm not applicable to the greater.⁷⁴ But what *Bowers* permits a state to do, and what Amendment 2 sought to do, are not parallel. Under *Bowers*, a state may adopt a policy of disfavoring homosexual sodomy and enforce that policy through the imposition of criminal penalties. But before the state can inflict harm on someone under the sort of statute upheld

69. 478 U.S. 186 (1986).

70. See *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

71. *Id.* at 641 (Scalia, J., dissenting).

72. See *id.* at 637 (Scalia, J., dissenting).

73. See *id.* at 653 (Scalia, J., dissenting) (noting that Amendment 2 “does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment”).

74. The point is easily illustrated and well recognized in Supreme Court opinions. Assuming it is reasonable to view the power to inflict significant, nonfatal physical pain as a “lesser” power to the “greater” authority to inflict death (an assumption that itself might well be questioned), the established rule of federal constitutional law that government may at times impose the death penalty does not establish the government’s authority to inflict torture. Most and perhaps all deliberate infliction of physical pain as a punishment is forbidden by the Eighth and Fourteenth Amendments. For examples on the limited persuasiveness of greater-includes-lesser reasoning, see 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510-11 (1996) (plurality opinion); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-63 (1988).

in *Bowers*, the state must prove the individual's commission of the relevant conduct through the rigors of criminal due process, and the harm that may be inflicted is limited by the constitutional prohibition on cruel and unusual punishment.

Assuming its continuing vitality,⁷⁵ *Bowers* would have a logical role to play in an argument defending the constitutionality of a state statute denying persons who engage in homosexual sodomy, and possibly other homosexual conduct, a specific legal interest, such as the right to bid on and receive municipal contracts.⁷⁶ But Amendment 2, it will be remembered, forbade state officials from providing gay and lesbian persons at least some forms of generally available legal protection against injuries to legal interests those persons enjoy under state law. Nothing in *Bowers* permits, or conceivably can be read to permit, state officials to deprive an individual of legal interests held by all merely upon suspicion that the individual engages in certain conduct, or merely upon the belief that he or she would like to do so.⁷⁷ Nor can *Bowers* be read to permit a state to refuse to vindicate an otherwise correct claim that private action has infringed a commonly held legal interest because the private actor suspected the individual of committing (or wishing to commit) homosexual sodomy. Simply put, *Bowers* was irrelevant to the decision in *Romer*.

Given the tendency of both admirers and critics to draw large conclusions from *Romer*, I should note the relatively limited scope of the principle that I believe justifies the Court's decision. At least as far as this line of reasoning is concerned, states may arrange their political structures, including the institutions they provide for responding to individual claims for legal protection, however they wish. They may, for example, vest the power to adopt antidiscrimination rules solely in the legislature or indeed restrict the

75. *Bowers* seems to me difficult to reconcile with *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and indeed with the pre-*Bowers* privacy decisions. Given *Casey's* emphatic reaffirmation of the Court's commitment to the basic approach taken in those decisions, the stability of *Bowers* as precedent is questionable. But as of this writing, *Bowers* remains the law of the Court.

76. Even then, *Bowers* would not conclusively establish the state's "lesser" exercise of power. It is unclear to me, for example, that the statute hypothesized in the text would satisfy standard rational-basis scrutiny under the Equal Protection Clause.

77. To state the most obvious reason: where a state in some fashion has articulated a policy disfavoring homosexual conduct, state action depriving an individual of a governmental benefit or refusing to accord him or her the ordinary protection of the laws because of the imputation to the individual of such conduct would trigger the requirements of procedural due process. See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980); *Mitchell v. Glover*, 996 F.2d 164, 167-68 (7th Cir. 1993).

enactment of such rules to the state's processes of constitutional amendment. Again, under this line of reasoning, a state is free to decline to adopt particular prohibitions on discrimination and may repeal existing ones.⁷⁸ *Romer* does not ensure gays and lesbians (or any other group) success in seeking the protection of the laws, but it does forbid a state from deciding in advance of a claim for redress that there are modes of redress that the members of a particular group can never receive.

IV.

The opinion of the Court in *Romer v. Evans* states at one point:

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.⁷⁹

The Court is correct: a law like Amendment 2 violates an understanding of government's duty to those it governs that predates the Fourteenth Amendment and that the Court long ago identified as central to the meaning of the Equal Protection Clause. It is the dissent's claim that "[t]oday's opinion has no foundation in American constitutional law"⁸⁰ that is groundless, not the Court's decision. The judgment in *Romer v. Evans* is justifiable on the most orthodox of legal grounds—consistency with existing legal doctrine.

The refusal of the decision's critics to acknowledge its solid rooting in the Court's own jurisprudence is not due solely to whatever deficiencies one might find in the Court's opinion.⁸¹ For some of the most distinguished of the critics, Justice Scalia certainly deserving pride of place, the underlying problem with *Romer* is the fact that it *is* consistent with "American constitutional law" as that law has developed over the past two centuries. The decision in *Romer* is characteristic of the tradition: instead of limiting itself to the historically-oriented textualism Justice Scalia advocates, the

78. See *Crawford v. Board of Educ.*, 458 U.S. 527, 538-39 (1982).

79. *Romer*, 517 U.S. at 633.

80. *Id.* at 653 (Scalia, J., dissenting).

81. To borrow Professor Black's comment about criticism of the *Brown* opinion, "I do not mean here to join the hue and cry against the [*Romer*] opinion." Black, *supra* note 3, at 421. That I think the doctrinal basis for the decision in *Romer* could have been more fully articulated is shown by the existence of this essay. The Court's failure to do so is regrettable, but at most a "venial fault." *Id.* The Court's critics, it should be remembered, have equal access to the case law and, one would suppose, as great an obligation to consult that case law.

Court's historical practice has been to use the tools of common-law argument as the means for bringing the law of the Constitution to bear on the disputes brought before the Court.⁸² This approach is not without its risks, as Justice Scalia has recently argued in an interesting lecture.⁸³ The legal methods of the common law allow for change and evolution in the law, and their application to the Constitution poses the danger that judicial decisions will lose their moorings in the historical context that gave rise to the Constitution's commands.⁸⁴ But the decision in *Romer* poses no such danger; the cases on which I drew were themselves explicit, sensible, near-contemporaneous attempts by the Court to articulate the constitutional principle prohibiting the paradigm evil, the black codes, against which the Equal Protection Clause was directed.

Romer, to be sure, applies this principle to a situation far removed from and perhaps unimaginable to the framers and ratifiers of the Fourteenth Amendment, but that is an everyday feature of legal doctrine and is a ground for objection in itself only for radical critics of our constitutional tradition.⁸⁵ Furthermore, the decision in *Romer* does not follow as a matter of syllogistic proof from the principle on which I believe it is based. It required the exercise of "reasoned judgment,"⁸⁶ and such judgments are seldom incontestable, although I think that in this case the great weight of reason supports the Court's judgment. But the fact of the judgment's contestability, like the novelty of its application of doctrine, is a common feature of constitutional decisions and provides no reason for denying the legitimacy of the Court's action. *Romer v. Evans* was not an act of judicial policymaking, desirable or not; it was, instead, a decision according to law.

82. See PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 5 (1991) (noting that the Constitution has been interpreted through "the forms of common law argument").

83. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 13 (1997).

84. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.* 1119, 1169-71 (1995) (noting that constitutional provisions should be read in light of the historical "evils or abuses felt to be intolerable at the time of enactment").

85. Justice Scalia is a radical critic of the constitutional tradition and has been for a long time. In addition to his *A Matter of Interpretation*, see the extraordinary debate over the legitimacy of doctrinal evolution between then-Judge Scalia and Judge Robert Bork in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc). Compare *id.* at 993-1010 (Bork, J., concurring) (maintaining that the deliberate evolution of doctrine by courts is consistent with judicial restraint), with *id.* at 1036 (Scalia, J., dissenting) (asserting that doctrinal evolution is illegitimate). Radical criticism is an honorable activity, but it should not be confused with debate within a tradition.

86. *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter).