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## Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in Romer v. Evans

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## ARTICLES

# JUSTICE SCALIA AS A MODERN LORD DEVLIN: ANIMUS AND CIVIL BURDENS IN *ROMER V. EVANS*

S.I. STRONG\*

### I. INTRODUCTION

In the late 1950s and early 1960s, the legal world was captivated by an ongoing debate between two of England's most respected jurists regarding whether and to what extent morality should be reflected in the law. The debate was instigated by the publication of the Wolfenden Report, a study presented to Parliament as it considered whether to repeal certain antisodomy laws in Great Britain.<sup>1</sup> Lord Patrick Devlin, then a Lord of Appeal in Ordinary and later elevated to the House of Lords, Britain's highest court, opposed the conclusions contained in the Wolfenden Report

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1. The report, which was presented to Parliament in 1957 and published in 1959, was a product of Parliament's Committee on Homosexual Offenses and Prostitution. See H.L.A. HART, *LAW, LIBERTY AND MORALITY* 13 (1963). The report recommended that homosexual practices between consenting adults be decriminalized, basing its recommendation on the ground that even if such practices were held by society to be immoral, they were beyond the proper scope of the law. See *id.* at 13-15. See also Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of Making Men Moral*, 71 *NOTRE DAME L. REV.* 671, 673 (1996) (book review) (discussing the Wolfenden Report and the Hart-Devlin debate).

and supported the continuation of the antisodomy laws.<sup>2</sup> H.L.A. Hart, then Professor of Jurisprudence at Oxford University, believed that the use of the criminal law to enforce popular morality, in particular sexual morality, was inappropriate.<sup>3</sup> The two men led the public discussion in England and abroad for many years about the proper scope of the criminal law vis-à-vis the legal enforcement of morality.<sup>4</sup>

The controversy has come full circle with the U.S. Supreme Court's recent decision in *Romer v. Evans*.<sup>5</sup> In *Romer*, six Justices agreed that Colorado could not create a special class of citizens, that is, homosexuals, and "prohibit[ ] all legislative, executive or judicial action at any level of state or local government designed to protect the named class."<sup>6</sup> Three Justices, however, would have upheld the constitutionality of the provision, relying, in part, on the justifications proposed by Devlin over thirty years ago.

The purpose of this Article is to review the dissent in *Romer v. Evans* in the context of the continuing Hart-Devlin debate regarding the proper role of morality in law and analyze the legitimacy of Justice Scalia's ar-

2. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* vi-vii (1965). See also Bradley, *supra* note 1, at 673-74 (discussing Devlin's position). Many of the arguments made by Devlin were made 100 years earlier by Sir James Fitzjames Stephen, an eminent judge of the Victorian period and an opponent of John Stuart Mill's utilitarian approach to law. See HART, *supra* note 1, at 16.

3. See HART, *supra* note 1, *passim*.

4. The debate continues into the present day, often invoking the names of the principals themselves. See, e.g., SIMON LEE, *LAW AND MORALS* (1986); BASIL MITCHELL, *LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY* (1967); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487-88 (1989) [hereinafter Dworkin, *Community*] (attacking Devlin's premise that societies rely on moral outrage to survive); Stephen G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 345 n.67 (1995) (discussing Hart and Devlin in the context of a larger discussion on the proper role of morality in law); Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73 *passim* (1995) (discussing modern applications of Hart-Devlin debate); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 659-61 (1990) (discussing Devlin's position in conservative theory regarding the importance of traditional morality in law); Candace Groot Hill, Note, *Public Employees and Private Conduct: Cohabitation and the Vagueness of "Immorality,"* 23 J. FAM. L. 111 *passim* (1984/85) (discussing civil enforcement of popular morality); Bradley, *supra* note 1, at 673-77 (noting Robert George's revision of the conservative position enunciated by Devlin); Harlon L. Dalton, *"Disgust" and Punishment*, 96 YALE L.J. 881, 905-09 (1987) (book review) (reviewing Hart's and Devlin's arguments on "disgust" as a necessary predicate to enforcing morality).

5. 116 S. Ct. 1620 (1996). The majority opinion is discussed in Part II of this Article. Interestingly, in 1963, Professor Louis Henkin stated that Devlin's theory regarding morality legislation might one day be adopted by certain justices on the Supreme Court, who would subsequently find that the Constitution did not stand in their way. See Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 414 (1963). In many ways, that prophecy has now come true.

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

guments in favor of the enactment of morality legislation.<sup>7</sup> Although the law at issue in *Romer* will be used as a primary example of morality legislation, this Article will explore the legitimacy of such laws in other contexts as well.

The *Romer* dissent, which was authored by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, relies heavily on Devlin's argument that popular morality not only could, but should, form the basis

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7. Because the term "morality legislation" will be used throughout this Article, it is perhaps best to attempt a definition at this early stage. Morality laws, as used herein, consist of those laws that are specifically aimed at curing "immoral" behavior that violates a social norm or taboo. Virtually all such laws reflect a majority morality, since minorities are often unable to garner sufficient electoral support to impose their moral framework on others. See Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 303 n.11 (1984). The laws may operate within a larger moral framework, see JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW 354 n.29 (1988) (discussing the "seamless web" theory of morality), but their immediate goal is to limit certain behaviors rather than require the adoption of positive moral virtues. This negative, "thou shalt not" quality of morality legislation is due, in large part, to the law's preference for barring undesirable behaviors rather than setting forth affirmative duties. See LON L. FULLER, *THE MORALITY OF LAW* 42 (rev. ed. 1969).

Many persons who oppose morality legislation have as their actual or presumed goal the creation of a morally neutral society. This approach is often challenged by those who believe that neutrality is impossible and that pro-neutrality theorists are doing nothing more than imposing their own values on others. See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 313-16 (1990) (discussing the impossibility of true neutrality in law). In one sense, such claims are correct; in matters of morality, there is no such thing as an "anti-value" that can "hold the spot" of a missing value without influencing that empty space in some way. See *id.* However, advocates for neutrality in law argue that the morality that is imposed in a less restrictive society (that is, one that severely limits the number and types of morality laws enacted) is one that encourages and advances individual choice as the primary goal of society, rather than the creation of a conformist society. See *id.* at 311-12. Nevertheless, proponents of morality legislation point to the fact that morality has always had a strong influence on law, and vice versa, in order to justify their position. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958) [hereinafter Hart, *Positivism*].

This type of argument can be confusing, for once it is agreed that every law advances some vision of morality to some extent, virtually any law could be described as "morality legislation." Therefore, to again clarify this discussion, the term "morality legislation" is used here to refer to a narrow category of laws regulating conduct that not only violates established social norms, but poses no concrete or tangible harm to persons other than the actor, and possibly not even to the actor. See Henkin, *supra* note 5, at 407. See also FEINBERG, *supra*, at xix-xx (discussing categories of "liberty-limiting principles" or morality legislation); Michaelson, *supra*, at 303 n.11. The most commonly mentioned morality laws include prohibitions and burdens on homosexuality, abortion, suicide, euthanasia, and sexual expression (including pornography and prostitution). While I am not necessarily prepared to defend all such acts to their logical extremes (since there may be times when such acts begin to affect and harm others), I believe, for reasons that will be discussed *infra*, that laws concerning these acts are illegitimate to the extent that they are enacted to protect morality or morals rather than to avoid harm to others. See FULLER, *supra*, at 29 n.24 ("All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.") (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)).

of both criminal and civil law. This theory is firmly embedded in the conservative legal tradition embraced by Scalia,<sup>8</sup> but is radical in its express adoption of “animus” or “moral disapproval” as an appropriate basis for law.<sup>9</sup> Scalia’s dissent, which is discussed in Part III, focuses on two arguments, each of which will be examined in light of existing commentary, including that of Hart and Devlin, in Part IV. First, after presupposing that morality legislation is not only proper but effective, Scalia expressly approves of animus against a certain group or class of persons as a basis for civil and criminal legislation, thus raising the issue of whether animus or hostility toward a certain group can be considered an appropriate basis for law. Second, he argues that if an act can be made a crime, it can also be burdened at civil law, which leads to the question of whether and to what extent the civil and criminal law are interchangeable in the area of morality legislation.

Although the primary purpose of this Article is to review the *Romer* dissent in light of existing jurisprudence, some suggestions as to alternative justifications for morality-type legislation are included in the concluding remarks in Part V.

## II. THE ROMER MAJORITY

The six Justices who constituted the majority in *Romer* based their decision to overturn the Colorado enactment on an equal protection rationale, finding that, contrary to the state’s argument that the law in question “puts gays and lesbians in the same position as all other persons,” the provision actually created a special class of citizens and discriminated against them unlawfully.<sup>10</sup> The state had argued that “the measure does no

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8. See West, *supra* note 4, at 652-63 (discussing conservative theory and jurisprudence).

9. Robin West has argued that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the first Supreme Court case to adopt “an explicitly conservative jurisprudential account of the ‘natural’ right of the community to define and enforce the good in law.” West, *supra* note 4, at 663. The *Romer* dissent, however, has extended the *Bowers* reliance on popular morality to a new level by permitting mere hostility to provide a basis for law. See *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting).

10. *Romer*, 116 S. Ct. at 1623-25. The provision at issue took the form of an amendment to the Colorado Constitution that is commonly known as “Amendment 2.” The text of the amendment reads as follows:

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

COLO. CONST. art. II, § 30b (overturned by *Romer*).

more than deny homosexuals special rights,"<sup>11</sup> an argument which Scalia later supported. However, the majority found that "[t]he 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."<sup>12</sup> The majority found that Amendment 2 not only denied gays and lesbians the protection of specific antidiscrimination laws enacted for their benefit (of which there had been several),<sup>13</sup> but could also deny them the protection of general antidiscrimination laws.<sup>14</sup> Rather than putting homosexuals on the same footing as other groups, the majority found that Amendment 2 "impose[d] a special disability upon those persons alone,"<sup>15</sup> which not only affected current rights but the ability of homosexual rights advocates to reap any political gains in the future.<sup>16</sup> The protections that were denied to gays and lesbians were not considered by the majority to be "special" in any way; indeed, they were "taken for granted by most people either because they already had them or did not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>17</sup>

11. *Romer*, 116 S. Ct. at 1624.

12. *Id.* at 1625.

13. *See id.* at 1624 (citing COLO. REV. STAT. § 10-3-1104(1)(f)(VII) (1994); ASPEN, COLO. MUN. CODE § 13-98 (1977); BOULDER, COLO. REV. CODE § 12-1-1 (1987); DENVER, COLO. REV. MUN. CODE, art. IV, § 28-92 (1991); Exec. Order No. D0035 (Dec. 10, 1990)).

14. *See Romer*, 116 S. Ct. at 1626. These general provisions forbade "arbitrary and capricious" or "unfair" discrimination. *See, e.g.*, COLO. REV. STAT. § 24-4-106(7) (1988) (using "arbitrary or capricious" standard); COLO. REV. STAT. § 18-8-405 (1986) (using "arbitrary and capricious" standard); COLO. REV. STAT. § 10-3-1104(1)(f) (1994) (using "unfair" standard); 4 COLO. CODE REGS. § 801-1, Policy 11-1 (1993) (prohibiting discrimination in employment context based on any "other non-merit factor").

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

16. One of Scalia's main arguments was that the denial of a right at the state level merely made overturning the law more difficult, an event which may be unfortunate for the disadvantaged group, but which is perfectly legitimate in a democracy. *See id.* at 1630 (Scalia, J., dissenting). *But cf.* Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 433 (S.D. Ohio 1994) ("To single out a group of citizens and place upon them the added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly undermines the spirit of our constitution. . . . [A] state may not single out and disadvantage any *independently* identifiable group by making it more difficult for that group to enact legislation in its behalf; and so doing does not 'demonstrate [a] devotion to democracy,' but rather makes a mockery of it." (citations omitted)), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996). *See also id.* at 443 ("[W]e can conceive of no legitimate governmental purpose *rationaly related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated—and likely insurmountable—burden of amending the city charter. . . . The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective.").

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

The majority did not reach the question of whether to classify homosexuals as a suspect class or whether discrimination against them violated any fundamental rights. In making its decision, the majority relied on the least stringent equal protection analysis, that is, the rational relation test, stating that even under that most deferential standard, Amendment 2 failed to pass constitutional muster.<sup>18</sup>

The majority noted that in a democracy a single named group may be burdened if it is necessary in order to further a legitimate government interest.<sup>19</sup> However, the majority also found that the Constitution requires some sort of nexus between the classification of burdened individuals and the legislative end in order to avoid classifications being drawn for the sole purpose of disadvantaging the named group.<sup>20</sup>

The most important aspect of the majority decision, both in terms of the dissent's conclusions and this Article, is the majority's statement that mere animus cannot constitute a legitimate purpose for disfavoring certain groups.<sup>21</sup> In reaching this conclusion, the Court quoted *Department of Agriculture v. Moreno*, stating, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>22</sup>

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18. See *id.* The dissent interpreted the majority's use of the rational relation test as a sign that homosexuality should not be protected in the same way as race or religion. See *id.* at 1629, 1631 & n.1 (Scalia, J., dissenting). There is nothing in the majority opinion, however, to justify that conclusion; instead, the majority's actions represent classic constitutional procedure, namely, to avoid reaching issues that are not central to the case at bar.

19. See *Romer*, 116 S. Ct. at 1627.

20. See *id.* at 1627-28 (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.")). Because laws based on mere animosity have as their primary intent an adverse impact on the named class, they are suspect under *Fritz* and now, apparently, *Romer*. See also *Gey*, *supra* note 4, at 401-02 (suggesting a method by which courts could evaluate and strike laws based on mere moral disapproval).

21. See *Romer*, 116 S. Ct. at 1628 (citing *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

22. *Id.* (quoting *Moreno*, 413 U.S. at 534). *Moreno* also cited with apparent approval the district court's rejection of the government's contention that "the challenged classification might be justified as a means to foster 'morality.' In rejecting that contention, the District Court noted that 'interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions.'" *Moreno*, 413 U.S. at 535 n.7 (citation omitted). By the time *Moreno* reached the Supreme Court, the government had dropped its morality argument. See *id.* Interestingly, Scalia made much of the *Romer* majority's failure to cite *Bowers v. Hardwick*, 478 U.S. 186 (1986), see *Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting), yet himself failed to distinguish *Moreno* and that line of cases.

The majority acknowledged the state's enunciated rationale for Amendment 2, namely "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality,"<sup>23</sup> but found that these purposes were neither legitimate nor discrete. Instead, Amendment 2 was held to constitute a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."<sup>24</sup>

### III. THE *ROMER* DISSENT

Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas, supported the constitutionality of Amendment 2 as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."<sup>25</sup> The dissent claimed that "Coloradans are . . . *entitled* to be hostile toward homosexual conduct" and that it is perfectly legitimate to burden homosexuals in order to "prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans."<sup>26</sup> According to Scalia, the methods adopted by Amendment 2 were appropriate means by which the majority could combat advocates for homosexual rights who "devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality."<sup>27</sup> In addition, Scalia opposed the proposition that homosexual-

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23. *Romer*, 116 S. Ct. at 1629. The state also claimed the need to conserve its resources to fight discrimination against other groups. See *id.* It is unclear how the state justified discrimination against one group as the price that had to be paid in order to stop discrimination against another unrelated group.

24. *Id.*

25. *Id.* at 1629 (Scalia, J., dissenting). Throughout his dissent, Scalia argued that homosexuals could not be considered "politically disfavored" due to their "geographic concentration and . . . disproportionate political power." *Id.* at 1634 (Scalia, J., dissenting). His claim that he is uncritical of the legislative successes of gay rights activists was somewhat undermined by his later assertion that "[i]t is also nothing short of preposterous to call 'politically unpopular' a group which enjoys enormous influence in American media and politics." Compare *id.* at 1634 (Scalia, J., dissenting) with *id.* at 1637 (Scalia, J., dissenting). The unfortunate effect of these statements is to bring to mind those people who once claimed to condemn anti-Semitism while simultaneously railing against the allegedly disproportionate number of Jews in certain industries or professions. See NORMAN F. CANTOR, *THE SACRED CHAIN: THE HISTORY OF THE JEWS* 311-12 (1994) (noting common perception of Jews as corrupt schemers in higher levels of finance, commerce, and industry).

26. *Romer*, 116 S. Ct. at 1633, 1637 (Scalia, J., dissenting).

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



ity should be deemed similar to race or religion for equal protection purposes.<sup>28</sup>

Scalia's basic argument in *Romer* is that the political majority may use the civil law to protect certain societal customs and mores. The argument rests upon the initial premise that the law is not only permitted to shape popular morality but is effectively able to do so. This theory is illustrated by Scalia's comments that the majority can "preserve traditional American moral values" and "prevent" its "deterioration" through legislation.<sup>29</sup> This argument, though subtly made, is critical to Scalia's dissent, for if legislation cannot preserve or protect societal mores, the law loses its claim to legitimacy<sup>30</sup> and becomes little more than a cudgel for the strong to use against the weak in order to create a conformist society.

However, Scalia's major premise is that hostility and moral disapproval constitute a legitimate basis for enacting laws. This claim, which is discussed in Part IV.A, is based on Scalia's belief that morality is a mere political issue that is most appropriately resolved through the political and

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28. Although no one can doubt the sincerity of Scalia's belief that homosexuality is not akin to race or religion, the factual and legal basis of his position is unclear. Many experts now believe that there is little, if any, choice involved in a person's sexual orientation, just as there is little, if any, choice involved in determining a person's race. See William A. Henry III, *Born Gay?* TIME, July 26, 1993, at 36 (noting possible genetic origins of homosexuality but acknowledging complexity of issue); Larry Thompson, *Search for a Gay Gene*, TIME, June 12, 1995, at 60 (same). See also William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2419 (1997); Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 876 (1990). In addition, sexual orientation is as important to a person's self-identification as is religion, so that discrimination on the basis of sexuality can be highly damaging to a person's psyche. See Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101, 118 n.100 (1995) ("To the extent that degrading behavior affects a victim's psyche, altering both his attitudes and ambitions, it prevents him from implementing a virtuous life plan."); Eskridge, *supra*, at 2411. Obviously, there is at least as much animosity towards gays and lesbians as there once was (or arguably still is) towards persons of minority races or religious faiths. See Henry, *supra*. Therefore, it seems logical to conclude that because sexuality is a potentially immutable trait that is of vital importance to all persons, discrimination on the basis of sexual orientation (whether it be homosexual or heterosexual) is impermissible under current American constitutional law. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (denying constitutionality of "status" crimes which impose penalties based on traits "which may be contracted innocently or involuntarily"). See also J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323-24, 2366-67 (1997) (noting immutability is not a necessary or sufficient element to create a status group; also noting it is the attached social meaning that is relevant, not the trait itself).

29. *Romer*, 116 S. Ct. at 1636-37 (Scalia, J., dissenting).

30. This concept is described by Lon Fuller in his list of the eight ways in which the rule of law may fail. See FULLER, *supra* note 7, at 39. One "route[ ] to disaster" is the creation of laws requiring the impossible. See *id.* at 39, 70-79 (citing Lilburne's 1645 *England's Birth-Right Justified* as calling such provisions "lawless unlimited power"). In other words, if the law is unable to preserve or protect morality, it has set out to do the impossible and is therefore unlawful.

legislative process. According to Scalia, a decision that burdens a minority group based on that group's breach of the majority moral code does not violate human rights or basic democratic principles, but merely reflects the proper workings of the political system.<sup>31</sup> If, however, hostility is not, by itself, a legitimate purpose for legislation, then one of Scalia's express justifications in favor of Amendment 2 fails.

Scalia's second argument, which is discussed in Part IV.B, is that the state may use the civil law to burden whatever it may criminalize. Under this theory, Scalia felt that *Bowers v. Hardwick*<sup>32</sup> should have controlled the issue at bar.<sup>33</sup> However, if the criminal law and the civil law are found not to be interchangeable, but to have different goals and remedies, then Scalia cannot rely on *Bowers*'s precedential value.

#### IV. LOGIC AND LEGITIMACY: SCALIA'S JUSTIFICATIONS FOR AMENDMENT 2

##### A. "ANIMUS" AS AN APPROPRIATE BASIS FOR LAW

Scalia's major rationale for upholding Amendment 2 is that "moral disapproval" or "animus" constitutes a proper basis for law.<sup>34</sup> This claim is different than the argument that the state may legislate on matters of morality; that argument concerns the scope of legitimate state action based on both the purpose of the law at issue and its ability to actually bring about the desired result. Scalia's approval of hostility as a proper basis for law presupposes the legitimacy of state interference in matters of morality and instead focuses on the quantity and quality of popular sentiment needed by

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31. See *Romer*, 116 S. Ct. at 1621 (Scalia, J., dissenting). It bears noting that some courts have held that criminal or civil legislation that burdens individuals on the basis of their sexual orientation does in fact violate international human rights. See generally *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988) (holding Article 8(2) of European Convention, which permits some restrictions to privacy based on "protection of morals," could not be used to permit national governments to limit consensual homosexual acts); *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981) (same).

32. 478 U.S. 186 (1986) (upholding constitutionality of laws criminalizing sodomy).

33. See *Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting). As a threshold matter, however, Scalia may have made a mistake common to many lower courts that believe precedents set in privacy cases (that is, *Bowers*) control equal protection cases and vice versa. See *Gey*, *supra* note 4, at 398 n.295; D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 72 n.17 (1993). The *Bowers* Court expressly declined to consider equal protection claims against the Georgia statute, since no such claims had been raised by the parties. See *Bowers*, 478 U.S. at 196 & n.8. But cf. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 n.9 (9th Cir. 1990) (interpreting *Bowers* as foreclosing or discouraging equal protection claims); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) (same).

34. See *Romer*, 116 S. Ct. at 1633 (Scalia, J., dissenting). See also Balkin, *supra* note 28, at 2317 n.5 (noting Scalia's emphasis on animus and social stigma regarding homosexuality).

a state in order to enact morality legislation. However, allowing the state to act on the basis of animosity toward minority groups violates not only established jurisprudence but the Constitution as well.

### 1. *Jurisprudential Approaches to Moral Disapproval as a Basis for Law*

Few theorists explicitly permit legislation based on moral disapproval.<sup>35</sup> Devlin is one of the few who advocate such an approach, based on his belief that society may act to protect and perpetuate popular morality, not because the breach of a moral principle causes injury to any one individual, but because society as a whole suffers harm from such a breach.<sup>36</sup> Even in the face of scholarly criticism, Devlin refused to draw any "theoretical limits to legislation against immorality,"<sup>37</sup> a position he steadfastly defended despite his belief that "there must be toleration of the maximum individual freedom that is consistent with the integrity of society."<sup>38</sup>

For Devlin, the identification of the limits of toleration is closely linked to his belief that moral disapproval may, and in fact must, be given legal voice. In defining what acts may be legally restricted, "[i]t is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation."<sup>39</sup> In addition, Devlin stated, "I do not think one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society can do without intolerance, indignation and disgust . . . ."<sup>40</sup>

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35. Although many jurists offer various theories on the ability or disability of the law to act in the area of morality, few delve into the issue of what sentiments associated with immorality form a legitimate basis for law. Nevertheless, at least one commentator has argued that laws based on "disgust" or "animus" at the acts of others are actually "cultural offenses" that are more dangerous than the immoral behavior itself. See JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 47 (1985); Dalton, *supra* note 4, at 903-05; Henkin, *supra* note 5, at 399 (arguing that attempts to regulate morality may "aggravate the very evils at which these laws are directed" and citing Prohibition as an example). Others note that disputes over morality legislation often involve intrasocietal conflict over various groups' relative status. See Balkin, *supra* note 28, at 2331-32 & n.66, 2336. The competing groups may appropriate the language of moral approval or disapproval in their battle for supremacy. See *id.* at 2331.

36. See DEVLIN, *supra* note 2, at 8. See also HART, *supra* note 1, at 48-49 (discussing Devlin's theory).

37. DEVLIN, *supra* note 2, at 14.

38. *Id.* at viii.

39. *Id.* at 17.

40. *Id.* James Fitzjames Stephen, one of the few other jurists to support giving moral disapproval a legal voice, believed that there were some acts that were so inherently revolting as to be actionable despite the absence of harm to others. See FEINBERG, *supra* note 7, at 156. However, like Devlin, Stephen required a high degree of social consensus before adopting any particular morality

However, Devlin did not advocate legislation on the basis of hostility alone; he also required calm, dispassionate reason in order to limit the number of legal prohibitions to those that were absolutely necessary.<sup>41</sup> Under his “man in the jury box” approach, Devlin only permitted the state to enforce a matter of morality if it met three requirements: (i) unanimity; (ii) patient, reasoned deliberation; and (iii) direct effect.<sup>42</sup> Notably, this approach does not require any analysis as to whether the common morality is good or bad but merely whether such a morality exists.<sup>43</sup>

There are several problems with this approach, both in theory and in practice. For example, Devlin required unanimity within society prior to enacting morality legislation that banned or burdened an immoral act.<sup>44</sup> However, Devlin cannot mean that absolute unanimity must be obtained

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law and prohibited punishment where “public opinion as expressed in the common practice of society does not strenuously and unequivocally condemn . . . . To be able to punish a moral majority must be overwhelming.” JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 173-74 (1873), quoted in HART, *supra* note 1, at 62.

41. See DEVLIN, *supra* note 2, at ix, 90.

42. See *id.* at 90. These are the same requirements needed for a jury verdict. Devlin believed that this approach mitigated the possibility that the law would be used merely to enforce majority prejudices.

43. See *id.* at 89-90. Devlin believed that considerations of whether the common morality is good or bad, right or wrong, would already have been made by individuals within the society. See *id.* However, this type of system is at odds with modern notions of human rights, which recognize that there are certain disfavored groups who, because of their unique status, are sure to be discriminated against if the majority opinion were to prevail. See generally Dorothy V. Jones, *The Declaratory Tradition in Modern International Law*, in *TRADITIONS OF INTERNATIONAL ETHICS* 42, 48-50 (Terry Nardin & David R. Mapel eds., 1992); Welch, *supra* note 33, at 94. On the other hand, most human rights documents permit states to limit the enforcement of rights based on moral concerns. See *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, art. 29(2), at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*] (subjecting all rights to “just requirements of morality, public order and the general welfare in a democratic society”); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, arts. 12(3), 14(1), 19(3)(b), 21, 22(2), at 49, U.N. Doc. A/6136 (1966) [hereinafter *ICCPR*] (limiting various rights to protect public morals). See also BVerfGE 389 (1957), as cited in MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS* 208 n.37 (1990) (holding that although the German Constitution provided some protection for minority moralities, the state had the right to prohibit infringement of the moral code, and noting moral disapproval was the decisive element). But cf. *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988) (holding Article 8(2) of European Convention, which permits some restrictions to privacy based on “protection of morals,” could not be used to permit national governments to limit consensual homosexual acts); *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149 (1981) (same). See also *R. v. Butler*, [1992] S.C.R. 452, 466-67, 497 (Can.) (upholding obscenity law but refusing to rely on argument based on protection of morals as defined by majority moral code).

44. Devlin defined immorality “for the purpose of the law, [as] what every right-minded person is presumed to consider to be immoral.” DEVLIN, *supra* note 2, at 15. Devlin’s presumption that all “right-minded” persons would agree on a single moral code is itself problematic, for if history has taught us anything, it is that little can be presumed in matters of morality, especially since most people will presume that others believe exactly as they do. See Dalton, *supra* note 4, at 903.

prior to enacting morality laws, for if there were in fact true unanimity within a society, there would be either (i) no need to enact the law at issue, since moral behavior would be universally practiced on a voluntary basis, or (ii) no need to enforce such a law, since there would be no violations of it.<sup>45</sup> The problem therefore is how to decide what level of unanimity is necessary to enforce morality legislation.<sup>46</sup> Although he does not explicitly identify what numbers are necessary, Devlin seems to contemplate something much more than a simple majority, since he has modeled his theory on a jury verdict, and those Anglo-American courts that permit less than unanimous verdicts usually require at least a five-sixths (or tentwelfths) majority. Under this analysis, Amendment 2 would have failed to garner the support of a sufficiently large segment of the population.<sup>47</sup>

In addition to unanimity, Devlin required patient and deliberate decisionmaking prior to enacting morality legislation. However, animus is seldom inspired by calm, rational thought; it is more often based upon misunderstood half-truths, stereotypes, or fear.<sup>48</sup> Nowhere else in the law is emotion alone considered a sufficient basis for legislation.<sup>49</sup> As Ronald Dworkin says, "We distinguish moral positions from emotional reactions, not because moral positions are supposed to be unemotional or dispassionate—quite the reverse is true—but because the moral position is supposed to justify the emotional reaction, and not vice versa."<sup>50</sup>

Finally, Devlin required that morality legislation be directly effective. However, although Devlin does not say so, no scheme can be directly effective where there is a lack of consistent enforcement. In fact, consistency is impossible where the application of a law depends entirely upon the moral stance of the party applying the law and not on that of the person

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45. This hypothesis is based on the premise that people will not act in a manner they believe is immoral. Although there are plenty of examples of people behaving contrary to popularly accepted moral norms, most misbehavior is rationalized by the individual actor as not being *really* immoral. Few people can or will voluntarily act contrary to their own moral beliefs.

46. Another question is who should be included among the group of arbitrators. See FEINBERG, *supra* note 7, at 137 (discussing whether dissenters should be included among persons deciding what constitutes popular morality).

47. See *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (noting Amendment 2 passed with only 54% majority).

48. See Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 1000-01 (1966) [hereinafter Dworkin, *Lord Devlin*].

49. For example, juries are often explicitly admonished to avoid acting on mere emotion when deciding damage awards.

50. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 250 (1978); Dworkin, *Lord Devlin*, *supra* note 48, at 996.

to whom it is applied.<sup>51</sup> When the law imposes a burden on factors other than the burdened party's own acts and mental state, it lacks the consistency, predictability, and legitimacy that is required under the rule of law.<sup>52</sup>

Many commentators opposed Devlin's approach on the ground that the majority could not be trusted to legislate in areas of morality. Devlin disagreed, concluding that such are the dangers of a democracy, and unless society is willing to reject democracy for a different political model, such deficiencies must be accepted.<sup>53</sup> However, Devlin disregarded the argument that even if the majority is theoretically justified in legislating morality, that does not mean it should do so in every possible circumstance.<sup>54</sup> Other commentators have recognized that there are many instances where a moral duty may exist without any corresponding legal duty.<sup>55</sup>

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51. If a law imposes legal penalties based on the moral perspective of someone other than the person upon whom liability will fall, then the burdened party cannot control his legal fate solely by altering his own behavior. For example, Amendment 2 would allow a homosexual person to be treated differently by two different persons, one of whom is homophobic and the other of whom is not. Those who did not disapprove of homosexuality would not discriminate, while those who did, would. Critically, it is not the burdened party's homosexuality that triggers the legal liability, for if it were, then the discrimination would be mandatory in all cases. Instead, it is a third party's hostile or disapproving response to homosexuality that initiates the discrimination. This transformation of how liability is triggered is both anomalous and alarming, since the law has traditionally acted only in cases where the acts and mental state of the party on whom liability was imposed was at issue. This type of law can also be considered violative of the Due Process Clause in that the variation in enforcement and penalties result in a failure to give a homosexual person "fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty" that may ensue. *BMW of N. Am. Inc. v. Gore*, 116 S. Ct. 1589, 1598 & 1599 n.22 (1996) (noting that Due Process Clause grants basic protections against judgments without notice).

52. See FULLER, *supra* note 7, at 39. See also Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 955, 968 (1995).

53. See DEVLIN, *supra* note 2, at 91-93. However, there are many who believe that allowing the majority to impose its morality on others is a "misunderstanding of the democratic process," as it transforms the idea that political power in a democracy rests in the hands of the majority into the idea that the majority may do whatever it wishes with that power. See HART, *supra* note 1, at 77-81 (coining the phrase "moral populism" to describe such processes). See also Gey, *supra* note 4, at 403; Smith, *supra* note 7, at 327; Welch, *supra* note 33, at 101-02.

54. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALITY 313-14 (Hafner Publishing 1948) (1823). See also DEVLIN, *supra* note 2, at 14, 16 (noting no theoretical limits to morality legislation).

55. See, e.g., BENTHAM, *supra* note 54, at 313-14. For example, tort law recognizes that although there may be a moral duty to assist a person in distress, there is no legal duty to do so. See, e.g., *Tanja v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918, 921 (Cal. Ct. App. 1991) (holding moral but no legal duty for colleges to warn of or protect students from date rape); *Rhodes v. Illinois Cent. Gulf R.R.*, 665 N.E.2d 1260, 1270 (Ill. 1996) (holding moral but no legal duty to rescue stranger); *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976) (holding moral but no legal duty for garage operator to protect pedestrians from negligence of its patrons); *Brown Forman Corp. v. Brune*, 893 S.W.2d 640, 645 (Tx. Ct. App. 1995) (holding moral but no legal duty for alcohol manufacturer or distributor to warn consumers of dangers of excessive alcohol consumption). See also RESTATEMENT

Despite his analogy to “the man in the jury box,” Devlin, like Scalia, believed that the legislature, rather than the judiciary, was the natural enforcer of society’s moral code.<sup>56</sup> However, he also recognized that “in the legislative process the forces of inertia are considerable; and in matters of morals negative legislation is especially difficult, because relaxation is thought to imply approval.”<sup>57</sup> For this reason, Devlin believed that the common law had an important role to play in the reshaping of legal standards and thus did not rule out the possibility that change could come from the judiciary.<sup>58</sup>

In *Romer*, Scalia takes a more extreme position than does Devlin, denying that any sort of change in the laws reflecting legally enforceable mo-

(SECOND) OF TORTS § 314 (1965) (refusing to recognize legal duty to come to strangers’ aid even though there may be moral duty to do so). For a discussion of the differences and conflicts between moral and legal duties, see FULLER, *supra* note 7, at 5-15.

56. DEVLIN, *supra* note 2, at 95. However, Devlin based his opinion on the belief that “[l]egislation of that sort is not usually made an election issue.” *Id.* Today, by contrast, a candidate’s position on moral issues is often an election issue for both incumbents and their challengers. See Ann DeFrage, *Re-Elections Survive Scandals, Expert Says*, DAILY OKLAHOMAN, Sept. 15, 1996, at 1 (citing recent Gallup poll stating “many Americans care more about morality issues than economic issues in [1996] election”); Elyce Wakerman, *Alliance Seeks to Counter Religious Right Politics*, L.A. TIMES, June 29, 1996, at B4 (stating that issues of morality are expected to dominate 1996 election). In addition, Devlin’s belief that the legislature was the proper arbiter of legally enforceable mores may have been based on certain peculiarities of the English legislative process that do not exist in the American legislative system. See Sunstein, *supra* note 52, at 1005. For example, the method by which English statutes are written and revised make them much more reflective of popular will than American statutes are. See *id.* at 1005-06. Therefore, Scalia’s and others’ reliance on the ability of the legislature to enact popular morality, if based on British jurists’ opinions, may be misplaced.

57. DEVLIN, *supra* note 2, at 99.

58. See *id.* at 99-100. Devlin was strongly influenced by a then-recent case, *Shaw v. Director of Public Prosecutions*, in which the House of Lords (Britain’s highest court) rediscovered a latent judicial power to “conserve not only the safety and order but also the moral welfare of the State.” [1962] App. Cas. 220, 267 (appeal taken from C.C.A.), *quoted in* DEVLIN, *supra* note 2, at 88. The House of Lords justified its ability to act on the ground that the state must be able to determine what conduct was *contra bonos mores* and to rule accordingly. See *id.* Devlin argued that this power could not be used to implement a Platonic political model but would allow such decisions on the ground that “society may legislate to preserve itself.” *Id.* at 89. Hart opposed cases such as *Shaw* as either constituting gross violations of individual liberty or as disregarding rules requiring certainty in the law and/or prohibiting *ex post facto* laws. See HART, *supra* note 1, at 12 (citing John Stuart Mill and Jeremy Bentham). See also FULLER, *supra* note 7, at 38-39 (citing eight requirements for lawful legal system).

Scalia has also been faced with a case in which he ruled based on the state’s ability to dictate what was *contra bonos mores*. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring with plurality opinion) (upholding Indiana statute outlawing public nudity despite First Amendment challenge by exotic dancers who wanted to perform totally nude). In that case, he laid the groundwork for his opinion in *Romer* that moral disapproval constituted a sufficient and legitimate basis for law. See *id.* (permitting enforcement of “traditional moral belief that people should not expose their private parts indiscriminately”); *id.* at 580 (describing “moral opposition” as providing rational basis for law in *Bowers*).

rality can originate in the courts.<sup>59</sup> His belief is that the legislature is the proper arbiter of whether and to what extent morality should be reflected in the law.<sup>60</sup> However, Scalia's approach implicitly requires an abdication of judicial review in matters of morality.<sup>61</sup> Although this may comply

59. See *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

60. See *id.* (Scalia, J., dissenting). See also West, *supra* note 4, at 674 (describing conservative deference to legislature). Although Scalia makes this point several times in his dissent, he does not explain the basis for his conclusion. One possibility is that it is based on his interpretation of the political question doctrine. Under that doctrine, the judiciary must refrain from interfering with the acts of the political branches if there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962) (requiring such factors to be "[p]rominent on the surface of any case"). Typically, the political question doctrine applies in a limited category of cases involving, *inter alia*, foreign relations, dates of duration of hostilities, validity of enactments, status of Native American tribes, and definitions of the republican form of government. See *id.* at 211-18. The political question doctrine is further limited by the presumption that it does not apply to important individual rights. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.16, at 297 (2d ed. 1992); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 584 (1966). Because Amendment 2 implicated individual rights, or, at the very least, failed to raise the types of issues discussed in *Baker*, 369 U.S. at 217, the political question doctrine does not seem applicable.

Alternatively, Scalia could be relying on the separation of powers doctrine to support his opinion that the legislature should be the sole arbiter of whether and to what extent morality should be enforced by law. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 515 (1989) (stating "there is no one more fond of our system of separation of powers than I am"). However, commentators have noted that:

although a standard of review whose overriding value is deference to the legislative branch seems to support the principle of separation of powers . . . [there is] a powerful argument that the separation of powers principle can only be rightly understood in the context of protection of the liberty interests now referenced by the Due Process Clause, implying a more active review.

Welch, *supra* note 33, at 97 n.198 (citations omitted). Scalia's reliance on the will of the legislature is not greatly influenced by this formulation of the separation of powers doctrine, since he follows an interpretive approach that demands that the rational basis standard utilized in a substantive due process review "not act as a check on the community's morality but instead refer [ ] the Court to that morality." *Id.* at 96. However, *Romer* did not come to the Court as a privacy case but as an equal protection case. Under an equal protection analysis, the Court may not simply enforce the community standard of morality and therefore may not merely rely upon the legislature to identify and create the proper standard. See *id.* at 96, 100. See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (comparing a due process and an equal protection analysis). Therefore, Scalia's reliance on legislative interpretations of popular morality may be misplaced. See Welch, *supra* note 33, at 96-97. See also *supra* note 33.

61. See Welch, *supra* note 33, at 86-91, 96-97. See also Eskridge, *supra* note 28, at 2413 (arguing that Scalia's position in *Romer* requires judicial neutrality in culture clashes). Cf. *Bowers v. Hardwick*, 478 U.S. 186, 210 (1986) (Blackmun, J., dissenting) ("I cannot agree that either the length



with his general suspicions of the review powers of nine unelected judges,<sup>62</sup> it is the duty of the Court to decide whether legislation complies with constitutional principles.<sup>63</sup> The constitutional requirement that justices be unelected was established in order to allow them to act outside the political fray so that they may objectively determine whether legislation is constitutionally permissible.<sup>64</sup> In fact, judicial review demands the kind of calm, rational, deliberative analysis required by Devlin. Although in some situations judicial review will require the Court to side with one political group over another, it is not necessarily because the Court is making policy or because it is becoming politicized, but because the winning side has the constitutionally valid position.

Scalia's hesitation to apply judicial scrutiny to morality legislation can create several problems. First, it can transform judicial review into nothing more than a rubber stamp for popular morality. If the constitutional system of checks and balances (let alone constitutional rights) is to make any sense, that cannot occur. Second, it denies the common law a role in morality legislation, a role that Devlin at least believed useful and necessary to the proper workings of a democracy.<sup>65</sup>

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of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny.").

62. See George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1304-07 (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989). There is an alternative way to look at the situation, however.

A legislator [or judge] who . . . refuses to take popular indignation, intolerance and disgust as the moral conviction of his community, is not guilty of moral elitism. He is not simply setting his own educated views against those of a vast public which rejects them. He is doing his best to enforce a distinct, and fundamentally important, part of his community's morality, a consensus more essential to society's existence in the form we know it than the opinion Lord Devlin bids him follow.

Dworkin, *Lord Devlin*, *supra* note 48, at 1002.

63. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); 1 ROTUNDA & NOWAK, *supra* note 60, § 1.1-1.6, at 1-72; 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.5, at 53 (1994) ("[T]he independent judiciary was assigned the task of keeping the two politically accountable Branches within the boundaries established by the Constitution . . ."); Balkin, *supra* note 28, at 2367-68.

64. This could be seen as a limited check on the absence of any popular determination that any specific morality law is objectively good or bad. See Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 695-96, 702-03 (1996) (noting that narrow interpretive approaches tend to increase the number of constitutional amendments; also noting increase in the politicization of the Constitution should amendments become commonplace).

65. See DEVLIN, *supra* note 2, at 99. See also Sullivan, *supra* note 64, at 695-96, 702 (noting benefits of broad interpretation of judiciary's role in constitutional law). Cf. Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 368 (1994) (discussing ways in which the Supreme Court "can be a source of moral education, a force for questioning and revising beliefs, and an instigator of public

Interestingly, Devlin requires a higher level of negative emotions and communal consensus in order to justify the enforcement of morality than does Scalia. For example, whereas Devlin requires unanimity of opinion, accompanied by the hallmarks of "intolerance, indignation and disgust," Scalia holds that the animus, moral disapproval, or hostility of a simple majority can be a sufficient basis for morality legislation.<sup>66</sup>

One reason why Devlin was more exacting in his categorization of actionable emotions may be because they were his only guide for limiting the power of the state. Only when popular sentiment reached the level of "intolerance, indignation and disgust" could the state intervene. In contrast, Scalia claims to use the objective standard of tradition to identify those behaviors that may be regulated.<sup>67</sup> However, once certain conduct has been deemed immoral under this historical analysis, then it may be burdened or disfavored for perpetuity.<sup>68</sup>

Although neither approach is desirable, in many ways Devlin's theory, which requires both near unanimity and the existence of several extreme emotions, is the better of the two systems. First, it raises the legal

dialogue with deep, pervasive, and permanent effects on both the opinions and characters of the citizens at large").

66. See *Romer v. Evans*, 116 S. Ct. 1620, 1637 (1996) (Scalia, J., dissenting) (permitting animus of 54% of Coloradans to act as basis for Amendment 2).

67. See Jeffrey Rosen, *Antonin Scalia*, in 5 *THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS* 1714, 1715 (Leon Friedman & Fred L. Israel eds., 1997). *But cf.* *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."). See also Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1896-97) ("It is revolting to have no better reason for a rule of law than that it so was laid down in the time of Henry IV.").

68. One problem with Scalia's traditionalist approach has always been the absence of any discussion of when a law based on tradition would cease to be valid. Ostensibly, once a law is passed prohibiting a certain behavior, then even a change in the cultural or social atmosphere would not necessarily permit a change in the law, since the fact that such behavior has been burdened in the past is deemed controlling. As long as a certain segment of society wishes to retain the law on the books, it may do so, since legal tradition is on its side. However, this would allow one era's moral majority to limit future generations' ability to effectuate political change, something that is strongly disfavored at law. This approach is also inconsistent with those aspects of Scalia's dissent that claim that moral populism is the basis for Amendment 2. For example, if traditionalists were in the minority in a certain case, Scalia would have to choose between upholding popular morality, as reflected by the political will of the legislature, or upholding traditional values. See Gey, *supra* note 4, at 365-67 (noting despite Scalia's claimed reliance on popular will, his traditionalist approach is actually antidemocratic); West, *supra* note 4, at 672-73 (noting an arguable inconsistency between the idea that the Court should give effect to original intent and the idea that it should defer to popular will). See also Henkin, *supra* note 5, at 398-99, 401 ("Nor should it be assumed, without re-examination, that the morality of an older day remains a legitimate aim of government with social import outweighing growing claims of individual freedom.").

standard for enforcement of morality to a higher level, thus permitting conduct that is only slightly disfavored to continue unabated. This creates a more open, liberty-minded community. Second, it justifies judicial review as a means by which the prejudices of the quasi-majority can be curbed; if the legislature passes a certain bill that seems to infringe on fundamental rights, the courts may strike it, thus forcing the alleged majority to see if they have sufficient numbers to amend the Constitution.<sup>69</sup> If the Constitution is amended, then the courts were wrong and social disapproval or animus was at a sufficiently high level to prohibit the behavior in question.<sup>70</sup> However, because Scalia would permit any group larger than a simple majority to act on even the most common of social prejudices, he has (i) created a larger realm of immoral behavior that can be regulated and (ii) permitted a smaller number of voters to decide the level of moral regulation in a society.<sup>71</sup> In addition, his views regarding the immutability

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69. See Sullivan, *supra* note 64, at 702-03 (arguing against an increase in the number of constitutional amendments). This is not to argue that constitutional amendments should be common or easily obtained, or to support rampant judicial activism in order to force the public to deal with certain moral issues; it merely recognizes a method for correcting a glaring judicial error under a Devlinesque approach.

70. Significantly, the obverse of this argument does not necessarily hold true. Since Devlin's and Scalia's theories are based on moral disapproval, as opposed to moral approval or tolerance, a more restrictive law cannot be passed (or a more burdensome opinion handed down) with the edict that dissenters should overturn the law by amending the Constitution. To do so would force a politically weak or disfavored minority to obtain a supermajority in order to protect their rights from the acts of the very majority that burdened them in the first place, something that is patently unrealistic. See Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 433 (S.D. Ohio 1994) ("To single out a group of citizens and place upon them the added and virtually insurmountable burden in their pursuit of protection from majority discrimination thoroughly undermines the spirit of our constitution. . . . [A] state may not single out and disadvantage any *independently* identifiable group by making it more difficult for that group to enact legislation in its behalf; and so doing does not 'demonstrate [a] devotion to democracy,' but rather makes a mockery of it.") (citations omitted), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996). See also *id.* at 443 ("[W]e can conceive of no legitimate governmental purpose *rationaly related* to a law which prohibits a minority group from *ever* obtaining anti-discrimination legislation on its behalf, unless it undertakes the massive and unmitigated—and likely insurmountable—burden of amending the city charter. . . . The purpose not only to permit discrimination, but also to encourage it, is inherent in the very concept of such a law. As such it is constitutionally defective."). On the other hand, forcing those who would create laws based on hostility to obtain supermajorities actually protects the legitimacy of the legal system as a whole. Because it is so difficult to obtain a large enough majority to amend the Constitution, it is very unlikely that any amendment based merely on animus will ever be enacted because there are so few issues that can invoke a high enough level of hatred in 75% of the population. See U.S. CONST. art. V (requiring constitutional amendments to be ratified by three quarters of state legislatures). It is much more likely that any group that hopes to have an amendment based upon animus adopted would be forced to form a coalition with other segments of the electorate and create a law based, at least in part, on a more jurisprudentially sound proposition.

71. In the case of Amendment 2, it was 54% of the voting public. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting).

of constitutional law and judicial review tend to set in stone the values of these smaller groups.<sup>72</sup>

Scalia and Devlin are not in the majority, however. Many more commentators believe that it is inappropriate to allow “animus,” “moral disapproval,” or even Devlin’s tripartite “intolerance, indignation and disgust” to form the basis of law.<sup>73</sup> For example, Ronald Dworkin has provided a very interesting analysis of this issue in his discussion of the permissible bases for morality legislation, and he concludes that negative emotions, by themselves, cannot constitute a legitimate basis for law.<sup>74</sup> Other commentators have opposed animus as a justification for law based on its similarity to moral populism;<sup>75</sup> its violation of any external or critical morality, which tends to make a mockery of the entire legal system;<sup>76</sup> and its general denial of any protection for minority rights.<sup>77</sup> Each of these arguments resounds clearly in American constitutional law.

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72. See *supra* note 68.

73. See, e.g., HART, *supra* note 1, at 81; Dalton, *supra* note 4, at 902-04, 906-08; Dworkin, *Lord Devlin*, *supra* note 48, at 996-97, 1000-01 (discussing illegitimacy of personal feelings as basis for law); Welch, *supra* note 33, at 94. See also FULLER, *supra* note 7, at 132-33.

74. Dworkin, *Lord Devlin*, *supra* note 48, at 1001. Dworkin argues that a moral position could constitute a basis for law if that position is somehow defensible under a larger critical morality. See *id.* at 996. See also HART, *supra* note 1, at 73 (defining critical morality); Balkin, *supra* note 28, at 2313-14. Not every allegedly moral position can form a legitimate basis for law, however. See Dworkin, *Lord Devlin*, *supra* note 48, at 996. According to Dworkin, the three factors that cannot form a legitimate basis for a moral position, and thus for morality legislation, are prejudice, personal emotional reactions, and rationalizations. See *id.* at 996-97, 1001. See also Balkin, *supra* note 28, at 2368.

75. See *supra* note 53 and accompanying text.

76. See HART, *supra* note 1, at 73. For example, if animosity toward a group or class of persons becomes an appropriate means of shaping society, then the law will lose its legitimacy as people begin to perceive it as nothing more than a tool for those who have formed a sufficiently large voting bloc to force their beliefs on others. See FULLER, *supra* note 7, at 146-47 (“If law is simply a manifested fact of authority or social power, then, though we can still talk about the substantive justice or injustice of particular enactments, we can no longer talk about the degree to which a legal system as a whole achieves the ideal of legality . . .”). See also *supra* note 53 and accompanying text.

Interestingly, many of those who support morality legislation argue that without such legislation (be it based on animus or other sorts of moral disapproval), the legal system will become bereft of any moral values and society will be left defenseless against the sort of atrocities typified by Germany’s Nazi regime. Indeed, opponents of positivism have long pointed to the inhumanities practiced under the color of law in the Third Reich as evidence that morality legislation is as necessary to a well-ordered society as protection against forced confession and torture. Such persons ignore, however, the fact that many of the laws implemented during Hitler’s reign were based on hostility or animus towards certain groups of “undesirables,” namely, Jews, homosexuals, gypsies, Communists, and the mentally and physically handicapped. Therefore, Nazi Germany can be used as much as an example against morality legislation as it is in favor of such legislation.

77. See Jones, *supra* note 43, at 48-50; Welch, *supra* note 33, at 94.

## 2. *Constitutional Approaches to Moral Disapproval as a Basis for Law*

The notion that animus or hostility toward a certain disfavored group is an inappropriate basis for law is not solely one of jurisprudential theory; it is also widely recognized in American constitutional law.<sup>78</sup> As a preliminary matter, it should be recognized that judicial review has long been considered a necessary curb on the power and prejudice of the political branches of government.<sup>79</sup> To allow popular animosity to provide a basis

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78. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 438, 450 (1985) (holding that zoning ordinance, as applied to group home for mentally retarded, was based on "an irrational prejudice," and refusing to let such prejudice or "negative attitude" of nearby homeowners justify equal protection violation against mentally retarded); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (striking law that would allow Texas to deny public education to illegal aliens because "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979) (upholding restrictions against class despite equal protection claim because classification "does not circumscribe a class of persons characterized by some unpopular trait or affiliation"); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 535 n.7 (1973) (citing with approval district court's decision to reject government's argument that "challenged classification might be justified as a means to foster 'morality'"); *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (holding "constitutional rights may not be denied simply because of hostility to their assertion or exercise"); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (prohibiting discrimination when discrimination "to which the act relates is made an end in itself"); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that discriminatory application of local regulation of laundry facilities where all Chinese persons were denied operating permits was based on "hostility to the race and nationality to which the petitioners belong," and ruling that such discrimination violates Equal Protection Clause); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 443 (S.D. Ohio 1994) (holding that law claiming to give effect to city's "collective notion of morality . . . cannot simply be a surrogate for the majority's desire to discriminate against an unpopular minority group"), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996). See also *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (noting that classifications may not be "drawn for the purpose of disadvantaging the group burdened by the law"); *Bowers v. Hardwick*, 478 U.S. 186, 219 (1986) (Stevens, J., dissenting) ("A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group.").

79. One of Scalia's major concerns over the course of his tenure on the bench has been his perception that, without some external force to control them, judicial review will permit justices to follow their own personal agendas free of any legal constraints. See Kannar, *supra* note 62, at 1304. However, as Scalia himself has recognized, the common law puts stringent requirements on how justices are to treat precedent. See *id.* at 1307 (describing how Scalia's "original meaning" approach complies with rules of precedent). There is no reason for him to believe that other justices are less concerned about respecting precedent than he is. *But cf.* *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1610 (1996) (Scalia, J., dissenting) ("When, however, a constitutional doctrine adopted by the Court is not only mistaken but also unsusceptible of principled application, I do not feel bound to give it *stare decisis* effect . . ."). For example, Ronald Dworkin has discussed the common law's use of precedent at great length. See STEPHEN GUEST, RONALD DWORKIN 38, 46-78 (1991) (discussing Dworkin's theory of integrity). Unfortunately, Scalia's disagreement with other interpretive methods requires him to take the issue of morality out of the hands of the Supreme Court (and any court) altogether and place it wholesale into the hands of the legislature, something which can negatively affect constitutional law as a whole. See Sullivan, *supra* note 64, at 702 (noting a narrow interpretive approach (such as that

for state action would effectively emasculate this well-established system of checks and balances.<sup>80</sup>

For example, in *Marbury v. Madison*, the seminal case on judicial review and the interrelation between the different branches of government, Justice Marshall stated:

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may not alter the constitution by an ordinary act.<sup>81</sup>

Marshall goes on to state that

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. *It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.* It is prescribing limits, and declaring that those limits may be passed at pleasure.<sup>82</sup>

The question, of course, is whether laws based on mere hostility or

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practiced by Scalia) increases the need for constitutional amendments, which leads to an increasingly politicized and code-like constitution). See also Hart, *Positivism*, *supra* note 7, at 608, 610-12 (discussing problems with excessive formalism).

80. See *Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting).

81. 5 U.S. (1 Cranch) 137, 176-77 (1803).

82. *Id.* at 178 (emphasis added).

disapproval of minority moralities are “repugnant” to the Constitution and beyond the scope of legitimate state action.<sup>83</sup> Clearly, “[i]f society has no right to make judgements on morals, the law must find some special justification for entering the field of morality.”<sup>84</sup> However, those who would permit morality laws to be founded on animosity believe that such laws do not violate the Constitution because they are based on the legitimate exercise of state power.<sup>85</sup> As evidence of such ability on the part of the state, advocates for morality legislation point to the numerous cases that have expressly recognized the right of states to enforce laws that uphold public health, safety, and morals.<sup>86</sup> The problem is that while those

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83. Notably, the federal government, as a government of enumerated powers, has no general police power and so cannot enforce morality on that ground. See 1 ROTUNDA & NOWAK, *supra* note 60, at 307. However, there is some dispute as to whether state police powers still include protection of morals. Compare *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) (stating the “traditional police power of the States is defined as the authority to provide for the public health, safety, and morals”), with *Allied-General Nuclear Servs. v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988) (stating Supreme Court no longer formulates state police power as including protection of morals).

84. DEVLIN, *supra* note 2, at 11.

85. See *id.* (“[I]f society has the right to make a judgement and has it on the basis that a recognized morality is as necessary to society as, say, a recognized government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.”). See also *Romer v. Evans*, 116 S. Ct. 1620, 1633, 1637 (1996) (Scalia, J., dissenting); *Barnes*, 501 U.S. at 566-69 (plurality opinion).

86. See, e.g., *Barnes*, 501 U.S. at 560 (noting regulation of exotic dancing was permissible means of protecting morality); *United States v. Biocic*, 928 F.2d 112, 115 (4th Cir. 1991) (noting an “important government interest [in] protecting the moral sensibilities of that substantial segment of society that still does not want to be exposed willy-nilly to public displays of various portions of their fellow citizens’ anatomies that traditionally in this society have been regarded as erogenous zones,” and holding that such interest was infringed when woman walked topless in wildlife refuge); *United States v. Kobli*, 172 F.2d 919, 922 (3d Cir. 1949) (permitting trial judge to clear courtroom of spectators to protect public morals, though scope of exclusion was excessive); *Wreck Bar, Inc. v. Comolli*, 857 F. Supp. 182, 189 (D.R.I. 1994) (“[R]easons of morality properly may be the basis of legislation subject to rational basis analysis.”); *Basic Energy Corp. v. Hamilton County*, 652 So. 2d 1237, 1239 (Fla. Ct. App. 1995) (noting municipality has legitimate interest in legislating on issue of morals); *Vonderhaar v. Parish of St. Tammany*, 633 So. 2d 217 (La. Ct. App. 1991) (noting state obscenity statute was permissible means of protecting public morality); *Parkes v. Bartlett*, 210 N.W. 492, 495 (Mich. 1926) (barring gambling and newspaper reports of sporting events from which gambling arises, though noting that “[i]t is true that the Legislature is not exclusively the judge of what is necessary to protect the health, morals and welfare of the citizens. But concerning those matters, it inherently must have a very large discretion.”); *Zeman v. Minneapolis*, 552 N.W.2d 548 (Minn. 1996) (noting prohibition on use of property which is proper regulation for protection of morality is not a taking). See also *Universal Declaration*, *supra* note 43, art. 29(2) (subjecting rights to “just requirements of morality, public order and the general welfare in a democratic society”); *ICCPR*, *supra* note 43, arts. 12(3), 14(1), 19(3)(b), 21, 22(2) (limiting various rights to protect public morals); *Welch*, *supra* note 33, at 96-97 (noting judiciary generally defers to legislative standard of morality in due process cases, but not in equal protection cases). *But cf. Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (“It does not at all follow that every statute enacted ostensibly for the promotion of [the protection of public morals,

cases might be used to argue that the state may regulate (or at least protect) morality, they do not address the question of whether it can do so in order to give voice to popular hostility against a certain group.

In concluding that animosity and hostility were appropriate bases for law,<sup>87</sup> Scalia failed to identify any cases that expressly support this proposition. The most relevant case Scalia cites is *Barnes v. Glen Theatre, Inc.*, in which an Indiana statute prohibiting public nudity was permitted to stand despite a First Amendment challenge by exotic dancers who wanted to perform completely nude.<sup>88</sup> However, the plurality opinion written by Chief Justice Rehnquist did not provide Scalia with much help, since the Court simply held that “[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals.”<sup>89</sup> Significantly, the Court’s opinion failed to cite moral disapproval or animosity as a basis for the plurality opinion. On the other hand, Scalia’s concurring opinion in *Barnes* provided him with much more satisfactory material for *Romer*. In *Barnes*, Scalia stated that “[o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ i.e., immoral.”<sup>90</sup> In addition, Scalia wrote that “[t]he purpose of the Indiana statute . . . is to enforce the traditional moral belief that people should not expose their private parts indiscriminately.”<sup>91</sup> In the most telling line of his concurrence, and, perhaps, recent constitutional history,<sup>92</sup> Scalia concluded that “[m]oral opposition to nudity supplies a rational basis for its prohibition.”<sup>93</sup>

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the public health, or the public safety], is to be accepted as a legitimate exertion of the police powers of the State . . . . If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.”) (citations omitted); *Allied-General Nuclear Servs.*, 839 F.2d at 1576 (stating Supreme Court no longer formulates state police power as including protection of morals).

Henkin recognizes the existence of such laws, but questions their initial and continued legitimacy under a substantive due process analysis. See Henkin, *supra* note 5, at 402-07.

87. See *Romer*, 116 S. Ct. at 1634, 1637 (Scalia, J., dissenting).

88. 501 U.S. 560, 570-72 (1991) (plurality opinion).

89. *Id.* at 569. But cf. *Allied-General Nuclear Servs.*, 839 F.2d at 1576 (stating Supreme Court no longer formulates state police power as including protection of morals).

90. 501 U.S. at 575 (Scalia, J., concurring).

91. *Id.*

92. Robin West has argued that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was the first Supreme Court case to adopt “an explicitly conservative jurisprudential account of the ‘natural’ right of the community to define and enforce the good in law.” West, *supra* note 4, at 663. Scalia’s concurrence in *Barnes* seems to take that notion a step further and permit the majority not just to “define and enforce the good in law” but to affirmatively burden those acts of which it disapproves. *Id.* See also Welch, *supra* note 33, at 101-02 (noting that shift toward “constitutional populism,” an interpretive



Although *Barnes* provided Scalia with at least some arguable support for his dissent in *Romer*,<sup>94</sup> *Barnes* itself is somewhat suspect due to its constitutional novelty<sup>95</sup> and Scalia's possible mischaracterization of White's opinion in *Bowers v. Hardwick*. In *Barnes*, Scalia claimed that *Bowers* upheld the "prohibition of private homosexual sodomy enacted solely on the 'presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable.'"<sup>96</sup> However, the line partially quoted by Scalia was taken somewhat out of context. The full text reads:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.<sup>97</sup>

Although the text certainly does not negate the idea that the law may be influenced by popular morality, it does not specifically state that animus or hostility are a proper basis of law, either.<sup>98</sup> In fact, some commentators have noted that *Bowers's* central holding, that is, that "[t]he law . . . is constantly based on notions of morality," is contradicted by a long line of First Amendment cases in which the Supreme Court has held that "the law may not be based on the political majority's moral choices."<sup>99</sup> In addition,

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method that has been criticized as a "backward looking test" that accepts the "current moral fashion as a rational basis" for law, began with *Barnes* and *Bowers*).

93. *Barnes*, 501 U.S. at 580 (Scalia, J., concurring). See also West, *supra* note 4, at 664-65 (stating that in *Bowers* the Court permitted "moral opposition to homosexuality" to provide a rational basis for law at issue).

94. Obviously, as a mere concurrence, Scalia's opinion in *Barnes* does not constitute clear and controlling precedent.

95. See Welch, *supra* note 33, at 101-02.

96. 501 U.S. at 575 (Scalia, J., concurring).

97. *Bowers*, 478 U.S. at 196.

98. *But see Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting).

99. Gey, *supra* note 4, at 361. In deciding not to recognize a fundamental right to engage in homosexual conduct, the *Bowers* Court seemed to rely most on the belief that such acts were not "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." *Bowers*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26

although both Rehnquist's and Scalia's opinions in *Barnes* claim that legislating morality is a constitutionally permissible legislative end, between them they were only able to cite for that proposition two then-recent Supreme Court cases and one district court case,<sup>100</sup> none of which stated that animus or hostility is a permissible basis for law.

Of the cases cited in *Barnes*, *Bowers* is the most well-known and has the language that is most likely to provide support for those who would permit hostility or animus towards a certain group to act as a basis for law. Even there, however, such support is limited, since White's majority opinion contained no explicit reference to moral disapproval as a legitimate basis for law.<sup>101</sup> In fact, the only mention made by White of moral disapproval of homosexuality was in his enumeration of the history of antisodomy laws, which very carefully avoided expressing approval of the rationales inherent in such laws.<sup>102</sup> Therefore, it may be arguable but is in no way clear that the majority opinion in *Bowers* should be considered as providing support for those who would argue that animus and hostility are legitimate bases for law.

Burger's concurring opinion is also not helpful to Scalia, for it fails to explicitly state that hostility or moral disapproval is a permissible basis for law.<sup>103</sup> In fact, the only place in *Bowers* that explicitly discussed animus being used as the basis for legislation was in the Blackmun dissent, where it was roundly rejected.<sup>104</sup>

The second case cited by the *Barnes* Court to support the conclusion that morality may form a legitimate basis for law is *Paris Adult Theatre I v. Slaton*.<sup>105</sup> In that case, as in *Barnes*, the Court was faced with a First

(1937)). However, nothing in the *Palko* line of cases would seem to suggest that animosity or hostility toward a group was a permissible basis for law.

100. See *Barnes*, 501 U.S. at 575 (Scalia, J., concurring). See also *Bowers*, 478 U.S. at 196; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) (citing *Roth v. United States*, 354 U.S. 476 (1957) as "implicitly" accepting "that a legislature could legitimately act . . . to protect 'the social interest in order and morality'"); *Dronenburg v. Zech*, 741 F.2d 1388, 1397 & n.6 (D.C. Cir. 1984) (Bork, J.).

101. At the most, White stated that "[t]he law . . . is constantly based on notions of morality." *Bowers*, 478 U.S. at 196.

102. See *id.* at 192-94.

103. The farthest Burger went down this line of reasoning was to note that "[c]ondemnation of [sodomy] is firmly rooted in Judeo-Christian moral and ethical standards." *Id.* at 196 (Burger, C.J., concurring). Nothing was said about U.S. legal standards.

104. "No matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" *Id.* at 212 (Blackmun, J., dissenting) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

105. 413 U.S. 49 (1973).

Amendment challenge to a state obscenity law.<sup>106</sup> In refusing to strike the law as unconstitutional, the Court held that “[i]n deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion [that there was a connection between antisocial behavior and obscene material] to protect ‘the social interest in order and morality.’”<sup>107</sup> However, the Court was far from permitting animus and hostility to influence its decision; in fact, the majority opinion went on to state that

[t]he issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as “wrong” or “sinful.” The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren’s words, the States’ “right . . . to maintain a decent society.”<sup>108</sup>

Both *Paris Adult Theatre I* and *Roth*<sup>109</sup> rely on the same reasoning, namely that in the context of speech

[i]t has been well observed that such [lewd and obscene] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>110</sup>

This passage suggests that obscenity laws such as those that were at issue in *Paris Adult Theatre I*, *Roth*, and *Barnes* are not based on popular animus against immoral publications or acts but on the Court’s “rejection of obscenity as utterly without redeeming social importance.”<sup>111</sup> In fact, the Court in *Roth* went on to state that “[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”<sup>112</sup> Therefore, the Court was not concerned with morality per se or with regulating acts that were *contra bonos mores*; it was balancing the interest of the individual to speak versus the interest of society in hearing the individual speak in the prohibited

106. See *id.* at 51-52. *Paris Adult Theatre I* dealt with pornographic films, not live dancing as in *Barnes*.

107. *Id.* at 60-61 (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)).

108. *Id.* at 69 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1965) (Warren, C.J., dissenting)).

109. *Roth* concerned the regulation of allegedly obscene written materials. See *Roth*, 354 U.S. at 480-81.

110. *Paris Adult Theatre I*, 413 U.S. at 61 n.12 (quoting *Roth*, 354 U.S. at 485) (emphasis omitted).

111. *Roth*, 354 U.S. at 484.

112. *Id.*

manner. Because the type of speech in question had “such slight social value as a step to truth,”<sup>113</sup> society, given its interest in, inter alia, popular morality, was given the opportunity to prohibit that particular type of speech. The mere fact that ideas might be “hateful” to most persons was not enough to exclude an idea or opinion from the public sphere; there had to be a total lack of “redeeming social importance” to do so.<sup>114</sup>

However, in *Romer*, speech is not at issue. Instead, it is a person’s sexual orientation that is being burdened, something that “may well form part of the very fiber of an individual’s personality.”<sup>115</sup> Because there is no social value to allowing hatred or animosity toward a group of people to prevail, even when those people are ostensibly classified by their participation in an act “hateful to the prevailing climate of opinion,”<sup>116</sup> analyses which focus on the social value of certain types of speech cannot form the precedential basis for decisions burdening various aspects of personhood. Instead, the approach used in *Wisconsin v. Yoder* might be more appropriate: “There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”<sup>117</sup>

Although *Roth*, *Paris Adult Theatre I*, *Barnes*, and *Bowers* have all been used to justify the use of animus or hostility as a legitimate basis for law, it is a lower court decision, *Dronenburg v. Zech*,<sup>118</sup> that is most explicit about the permissibility of such actions and that is most on point in that it addresses acts, not speech. *Dronenburg* reviewed the constitutionality of the U.S. Navy’s policy of automatic discharge upon proof of homosexual activity.<sup>119</sup> The appellant, a sailor who had been discharged after engaging in homosexual conduct, claimed that the regulation in question could not be legitimately based on “the existence of moral disap-

113. *Id.* at 485 (emphasis omitted).

114. *Id.* at 484.

115. *Bowers v. Hardwick*, 478 U.S. 186, 202-03 n.2 (1986) (Blackmun, J., dissenting).

116. *Paris Adult Theatre I*, 413 U.S. at 98 n.14 (Brennan, J. dissenting) (quoting *Roth*, 354 U.S. at 484). However, because Scalia would permit homosexual orientation to act as a stand-in for homosexual conduct, there is little concern about the act requirement; instead, homosexual status alone seems to be the criterion for imposition of the legal burden.

117. *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972). See also *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting).

118. 741 F.2d 1388 (D.C. Cir. 1984). Notably, the opinion was written by Circuit Judge Bork and joined by then-Circuit Judge Scalia.

119. See *id.* at 1388-89.

proval.”<sup>120</sup> In upholding the Navy’s policy, the District of Columbia Circuit Court stated as a preliminary matter that “[w]e have said that legislation may implement morality,”<sup>121</sup> but gave no further citation. Instead, the court justified its action by claiming that striking the regulation in question would “render legislation about civil rights, worker safety, the preservation of the environment, and much more unconstitutional” because “in each of these areas, legislative majorities have made moral choices contrary to the desires of minorities.”<sup>122</sup> The circuit court went on to say that

[appellant’s] theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.<sup>123</sup>

However, the court explicitly stressed that “because the possibility of being misunderstood is so great . . . this deference to democratic choice does not apply where the Constitution removes the choice from majorities.”<sup>124</sup> This final line suggests that even those who support morality legislation recognize that there are instances when the legislature cannot act, including, possibly, cases where hostility forms the basis for law.

Scalia’s statement to the contrary notwithstanding,<sup>125</sup> there are a large number of cases that explicitly state that discrimination based on animus, hostility, or any sort of prejudice against a disfavored group is unconstitutional.<sup>126</sup> The vast majority of these cases are based on equal protection

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120. *Id.* at 1397. Although the circuit court refused to accept appellant’s argument that law should not be based on moral disapproval, it did not explicitly rule that moral disapproval of the majority was the basis for upholding the law in question; instead, the basis of the circuit court’s decision seems to be that the regulation in question was intended to further the discipline and morale that is necessary for a well-functioning navy. *See id.* at 1398.

121. *Id.* at 1398.

122. *Id.* at 1397.

123. *Id.*

124. *Id.*

125. *See Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting).

126. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (noting legislature is limited by principles and theory of government). *See also Romer*, 116 S. Ct. at 1627 (noting that classifications may not be “drawn for the purpose of disadvantaging the group burdened by the law”); *Bowers v. Hardwick*, 478 U.S. 186, 219 (1986) (Stevens, J., dissenting) (“A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group.”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448, 450 (1985) (holding that zoning ordinance, as applied to group home for mentally retarded, was based on “an irrational prejudice,” and refusing to let such prejudice or “negative attitude” of nearby homeowners justify equal protection violation against mentally retarded); *Plyler v.*

claims, which was the theory advanced by the plaintiff in *Romer*. Commentators have argued that equal protection analyses are generally much more rigorous than due process analyses, despite the fact that the two tests are at least facially similar.<sup>127</sup> In fact, due process cases are marked by an extremely high degree of deference to the legislative will.<sup>128</sup> This deference is due to the fact that these claims are judged by a communal standard of what process is due, a test that is very sensitive to popular views of morality. Because this test relies so heavily on community sentiment,<sup>129</sup> animus and hostility could arguably form the basis for law if courts refuse to exercise their independent judgment regarding what is a constitutionally legitimate basis for law.

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Doe, 457 U.S. 202, 217 n.14 (1982) (striking law that would allow Texas to deny public education to illegal aliens because “[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish”); *New York Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979) (upholding restrictions against class of methadone users despite equal protection claim because classification “does not circumscribe a class of persons characterized by some unpopular trait or affiliation”); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”); *Watson v. Memphis*, 373 U.S. 526, 535 (1963) (holding “constitutional rights may not be denied simply because of hostility to their assertion or exercise”); *Truax v. Raich*, 239 U.S. 33, 41 (1915) (prohibiting discrimination when the activity “to which the act relates is made an end in itself”); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that discriminatory application of regulation of laundry facilities where all Chinese persons were denied operating permit was based on “hostility to the race and nationality to which the petitioners belong,” and ruling such discrimination was in violation of the Equal Protection Clause); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 443 (S.D. Ohio 1994) (holding that law claiming to give effect to city’s “collective notion of morality . . . cannot simply be a surrogate for the majority’s desire to discriminate against an unpopular minority group”), *rev’d*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996).

127. See *Welch*, *supra* note 33, at 96. See also *Gey*, *supra* note 4, at 398 n.295.

128. See *Welch*, *supra* note 33, at 96-97 (“If, however, the content of the Due Process Clause is supplied by the community then, according to conventional wisdom, legislatures are in better positions than courts to interpret and give voice to that morality.”). However, there are certain fundamental norms that exist outside the scope of due process review that may not be “ignored or overridden by a majority vote in a legislative body.” *Id.* at 100. While advocates of morality legislation in general and of animosity-based laws in particular could argue that laws such as Amendment 2 do not violate these norms, their opponents would argue that they do.

129. See *id.* at 96 (listing what elements “give content to the due process requirement”). See also *Balkin*, *supra* note 28, at 2342 n.87. But see *Welch*, *supra* note 33, at 96-97 (arguing there are fundamental constitutional norms which courts cannot ignore even under a highly deferential standard of review). See also *Balkin*, *supra* note 28, at 2313-14 (arguing that democracy and the Constitution must be analyzed within a democratic culture). Although due process analyses have always been somewhat deferential to the legislature, with *Barnes and Bowers* the Court has become even more likely to permit legislatures to act virtually independently. See *Welch*, *supra* note 33, at 102. This form of “constitutional populism” is often marked by enforcement of popular morality as an end unto itself and a presumption in favor of governmental regulation over individual liberty. See *id.* at 96. See also *HART*, *supra* note 1, at 77-81.

Equal protection cases, however, are very different than due process cases. Instead of being based on a communal standard, equal protection claims are rooted in a counter-majoritarian philosophy that requires courts to look past the existing morality and even past legislative intent to see whether a constitutional violation has occurred.<sup>130</sup> The emphasis in equal protection analysis is on whether the law at issue consists of “invidious discrimination,” which, for many jurists, is defined by considerations other than those drawn by the state.<sup>131</sup> If this is true, then the Equal Protection Clause prohibits animosity or hostility from providing a basis for law, since such emotions are irrelevant to any legitimate legal classification.<sup>132</sup>

Even though *Romer* clearly benefited from the more stringent equal protection analysis that denies hostility or animus any role in the law, jurists should think carefully about whether such emotions should be permitted in the context of due process claims as well. As discussed above, some judges and justices have indicated a willingness to permit moral disapproval to act as a justification for restrictive morality laws on at least some level. However, it seems anomalous to permit these two lines of cases to exist simultaneously. On the one hand, courts have decided that they will not tolerate laws based on hostility toward a certain group because such laws result in an inequitable legal treatment of persons who are similarly situated in all pertinent respects. It seems strange therefore to argue that hostility toward these persons is, at the same time, “implicit in the concept of ordered liberty” and “so rooted in the traditions and conscience of our people as to be . . . fundamental.”<sup>133</sup> Instead, it would make more sense if courts struck those laws as inherently violative of fundamental constitutional principles.<sup>134</sup> To do otherwise would be the same as constitutional-

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130. See Welch, *supra* note 33, at 96 (“[S]imply enforcing the community’s morality is not a legitimate purpose for equal protection purposes.”). See also *id.* at 92 (noting legislative intent is less relevant to equal protection analysis). The differences between equal protection claims and due process analyses can be seen in the recent Supreme Court decisions on physician-assisted suicide, *Vacco v. Quill*, 117 S. Ct. 2293 (1997), and *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (comparing a due process and an equal protection analysis).

131. See Welch, *supra* note 33, at 92-93 (discussing Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1070-74 (1979)).

132. See *id.* at 94. See also Dworkin, *Lord Devlin*, *supra* note 48, at 1001; *supra* note 78 (citing cases supporting this theory).

133. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

134. Disallowing hostility toward a certain group to constitute a basis for law, even when that hostility is shared by an overwhelming majority of the population, would also help harmonize the discrepancy between equal protection and due process cases. Proponents of morality legislation might argue that, if constitutional consistency were the only goal, it would be equally appropriate to amend equal protection jurisprudence to conform to existing due process case law. However, as opponents of substantive due process have often argued, it is better to rely on explicit constitutional language whenever possible, and the Equal Protection Clause, as the more specific of the two provisions, should

izing hatred, something the Founders surely never contemplated, and something that, in any event, modern jurists should not tolerate.

To some extent, much of the confusion in this area of law has resulted from the inherent and perennial problems associated with a common law system. Although case-by-case analysis is a valuable component of the Anglo-American legal system, it can be troublesome in that it offers little time or opportunity to consider broader principles of law.<sup>135</sup> Conflicts may occur between lines of cases that were once distinct but that have, over the years, become intertwined. Such is the case with due process and equal protection jurisprudence. For example, there may be some due process cases in which the act at issue is not “fundamental to the American scheme of justice,”<sup>136</sup> but where the law is enacted in order to enforce popular animus or hostility toward a certain group or class of persons. Under current law, a court would have to deny constitutional protection to the affected persons because no right was conferred under a substantive due process analysis that focused either on the historical status of the act in question or on communal standards of behavior and belief.<sup>137</sup> Equal protection arguments will not necessarily protect such people, for a court that is persuaded to permit hostility to constitute a legitimate basis for law under a due process analysis is unlikely to find the burdened class similar to

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control. See *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.”). See also *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”).

135. In this regard, Scalia is to be commended for at least attempting to enunciate and implement a larger theory of jurisprudence during his tenure on the bench. See *Rosen*, *supra* note 67, at 1725. However, critics have argued that he sometimes places too much reliance on his interpretive principles and too little emphasis on the case in front of him. See *id.* at 1726.

136. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

137. However, it is in those areas of the law where rights have traditionally not been recognized that courts should be most cautious. As Justice Stevens noted:

the Court should be especially vigilant in examining any classification which involves [a traditionally disfavored trait]. For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made.

*Mathews v. Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting).



the unburdened class in all pertinent respects.<sup>138</sup> Yet it still seems wrong to permit the state to act on the basis of hostility toward minorities.

The solution may be found in the underlying principles of due process. Professor Henkin hypothesizes that due process of law "requires that the state deal with the area of the reasonable and deal with it reasonably."<sup>139</sup> Because morality and corruption of morals do not lie "in the realm of reason," they "cannot be judged by standards of reasonableness . . . [and] ought not, perhaps, to be in the domain of government."<sup>140</sup> Even if morality could be determined to be rational or reasonable, hostility and animus cannot.<sup>141</sup> The American legal system is presumably built on something more than mere likes and dislikes,<sup>142</sup> and thus laws based on hostility should not stand under either a due process or an equal protection analysis. If constitutional law is to retain some sense of coherence, these two lines of cases should be somehow resolved. Because the existing equal protection analysis offers the sounder approach, it should control.<sup>143</sup>

#### B. ENFORCING MORALITY AT CIVIL, AS OPPOSED TO CRIMINAL, LAW

Scalia's other argument in *Romer* is that the state may regulate civilly what it may penalize criminally.<sup>144</sup> Under this theory, Scalia believed that *Bowers v. Hardwick*<sup>145</sup> should have controlled the issue at bar.<sup>146</sup> In fact,

138. See, e.g., *Romer v. Evans*, 116 S. Ct. 1620, 1632-37 (1996) (Scalia, J., dissenting) (finding no denial of equal protection of the laws despite the existence of animus as a basis for law in question).

139. Henkin, *supra* note 5, at 406.

140. *Id.* at 407.

141. See Dworkin, *Lord Devlin*, *supra* note 48, at 1001.

142. *But cf.* Dalton, *supra* note 4, at 904-05 (noting under certain jurisprudential philosophies, the majority's response to minorities who claim they don't like certain aspects of majority morality is that "we do"). Simple majoritarianism, while perhaps effective when backed by the power of the state, lacks legitimacy in the eyes of both jurists and lay persons. See Gey, *supra* note 4, at 403; Smith, *supra* note 7, at 327.

143. Although the state may not always act affirmatively to end discrimination based on hostility toward disfavored groups, it can refuse to help perpetuate it. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). See also Dworkin, *Lord Devlin*, *supra* note 48, at 1001 (noting that prejudice is an illegitimate basis for law in a democratic state).

144. "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). However, it is more likely that the converse is true: If an act may not be made the subject of the criminal law because it is an illegitimate extension of the state's legislative powers into the realm of individual liberty, then the state may not utilize its civil powers to address the same behavior.

145. 478 U.S. 186 (1986).

146. See *Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting).

Scalia would go so far as to allow the state to impose civil burdens even in areas where it is no longer appropriate for the criminal law to act. To support this claim, Scalia states that “the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens.”<sup>147</sup>

There are several problems with Scalia’s argument, especially as he has formulated it. First, there is no guarantee that the same sort of “unseemly intrusions into the intimate lives of citizens” that were objectionable at criminal law will not take place under civil provisions such as Amendment 2; the mere fact that this intrusion will now be carried out by private citizens rather than by public entities does not eliminate the impropriety of such intrusions. In fact, under Amendment 2, the state would still be involved in these intrusions into citizens’ personal lives whenever a defendant justified a discriminatory act by alleging the plaintiff was homosexual.<sup>148</sup> For example, in a case of wrongful termination, a plaintiff may claim gender discrimination. The defendant would have a valid reason for termination if it could prove the termination was based on the plaintiff’s homosexuality. In such a case, the court not only must witness such arguments at trial, but must also assist the defendant during the pretrial proceedings by issuing subpoenas and forcing discovery into the plaintiff’s personal life to establish the presence or absence of homosexual orientation. Notably, under Scalia’s approach, homosexual *conduct* is not necessary, as homosexual orientation acts as a sufficient “stand-in” for homo-

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147. *Id.* at 1633 (Scalia, J., dissenting). See also DEVLIN, *supra* note 2, at 99.

148. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (“That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.”). Although *Shelley* is best known as the case that prohibited judicial enforcement of racially restrictive covenants, it also acts as an equally powerful argument against morality legislation. See *id.* at 22 (“The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals.”). In many ways, *Shelley* anticipated the type of private discrimination that arose under Amendment 2, that is, permitting private individuals to discriminate against homosexuals under color of law despite the fact that the trait at issue had no impact on the individual’s ability to perform a contract, lease, or job. Compare *id.* at 19 (“[T]hese are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.”), with *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (“We also conclude that sexual orientation, whether hetero-, homo-, or bisexual, bears no relation whatsoever to an individual’s ability to perform, or to participate in, or contribute to, society.”) (citations omitted), *rev’d*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996).

sexual acts.<sup>149</sup> In this regard, Scalia goes far beyond the scope of the criminal law, which requires some sort of act in order to successfully prosecute someone; instead, he would civilly burden people based on their thoughts alone and would allow the courts to delve not only into people's acts, but their most private and intimate personal feelings as well. If it is improper for the state to be involved in obtaining evidence of homosexual acts at criminal law,<sup>150</sup> it is equally improper for it to investigate homosexual acts or orientation in the civil context.

Second, under Amendment 2 and similar provisions, homosexuality could easily become a pretext for all sorts of discrimination.<sup>151</sup> This is similar to the concern enunciated by the *Romer* majority that upholding Amendment 2 would invalidate general protections against unfair or arbitrary discrimination.<sup>152</sup> In a society that permits legal discrimination against homosexuals, gays and lesbians have no guarantee that their legally recognized rights will or can be protected.

Third, provisions such as Amendment 2 risk creating the civil equivalent of a status crime. As stated previously, Scalia would permit the state of Colorado to impose civil burdens even on those who had performed no immoral acts but who had merely admitted to being of homosexual orientation.<sup>153</sup> Although Scalia attempts to minimize the size of the class,<sup>154</sup> the fact remains that there are a number of people who recognize their homosexual orientation but, for religious or other reasons, choose to remain celibate rather than engage in homosexual relations. Under Amendment 2, these persons would be penalized not because they have engaged in any prohibited behavior but because they are bearers of a disfavored personality trait. In fact, the only way for persons of homosexual orientation to avoid being burdened under Amendment 2 is to change their beliefs about their sexual orientation, despite the fact that virtually all

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149. See *Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting).

150. See *id.* at 1633 (Scalia, J., dissenting) ("To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution.") (citation omitted).

151. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994) (noting gender and race are overlapping qualities and that if a court permits peremptory strikes on basis of gender to stand, "gender can be used as a pretext for racial discrimination").

152. See *Romer*, 116 S. Ct. at 1626.

153. See *id.* at 1632-33 (Scalia, J., dissenting).

154. See *id.* at 1631-33 & n.2 (Scalia, J., dissenting) (arguing that persons of "homosexual orientation" do not constitute a distinct class).

modern jurists agree that coercion of belief is an illegitimate use of the law.<sup>155</sup>

There is an even greater problem with Scalia's premise that the civil law may address any behavior that the criminal law addresses; namely, the purposes, goals, and procedures of the criminal law are and should remain distinct from those of the civil law. Criminal procedure has always been different from civil procedure, based on the higher need for accuracy due to the potential loss of liberty and the stigmatizing effect of a criminal conviction. Nothing in Scalia's dissent directly threatens the distinction between criminal and civil procedure;<sup>156</sup> instead, it is the distinction between the permissible goals and uses of the criminal and civil law that is jeopardized by Scalia's analysis. Although some commentators perceive few, if any, fundamental differences between the purposes of the civil and criminal law, others believe not only that such differences exist, but that they should remain.<sup>157</sup> This latter group of persons argues that if the law is to maintain any internal consistency, it cannot push onto the civil law the duties and goals of the criminal law without the concomitant procedural protections given to a criminal defendant.<sup>158</sup>

There are numerous ways to explain or identify the differences between the purposes of the civil and criminal law.<sup>159</sup> Although both types

155. The other alternative is for them to lie about their orientation, something that is equally disfavored. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning.")

156. *But see infra* note 159.

157. See John C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 *YALE L.J.* 1875, 1875-76 (1992); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 *YALE L.J.* 1795, 1807-09 (1992). There are instances, of course, where both civil and criminal sanctions are imposed against a party, but that does not necessarily mean that such combined sanctions are appropriate in all circumstances or that the civil law may replace the criminal law.

158. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 *HASTINGS L.J.* 1325, 1345, 1355, 1360 (1991); Coffee, *supra* note 157, at 1877.

159. Scholarly literature on this subject identifies five factors that distinguish criminal law from civil law:

(1) the greater role of intent in the criminal law, with its emphasis on subjective awareness rather than objective reasonableness; (2) the criminal law's focus on risk creation, rather than actual harm; (3) its insistence on greater evidentiary certainty and its lesser tolerance for procedural informality; (4) its reliance on public enforcement, tempered by prosecutorial discretion; and (5) *its deliberate intent to inflict punishment in a manner that maximizes stigma and censure.*

Coffee, *supra* note 157, at 1878 (emphasis added). Under this formulation, Amendment 2 resembles the criminal law more than it does the civil law, since it intends to stigmatize homosexuals by demon-

of laws intend to deter certain behavior, the goals and methods used to accomplish that end are different.<sup>160</sup> Some theorists emphasize the ability of the criminal law to “focus censure and assign blame” with a “moral force” that is unavailable in civil law, while others point to the criminal law’s serving as a means of “moral education.”<sup>161</sup> In addition, the criminal law

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strating that the state considers homosexuals undeserving of any protection at law, despite the fact that antihomosexual discrimination does, in fact, occur. In the case of celibate homosexuals, the stigma attaches on the basis of a mere belief lacking any sort of overt act.

Sociologist Emile Durkheim, who identified two types of bonds in a society (that is, mechanical solidarity, which emphasizes the common elements between persons, and organic solidarity, which emphasizes complementary characteristics), believed that “[t]he criminal law, with its repressive sanctions, reflects mechanical solidarity; the civil law reflects organic solidarity, since it upholds the typical instruments of interdependence, e.g., the institution of contract, and generally provides not for repressive sanctions, but for restitution and compensation.” H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 6 (1967) [hereinafter Hart, *Social Solidarity*]. Durkheim also noted that the need for a high degree of mechanical solidarity decreases as a society becomes more complex. See *id.* Amendment 2, which seems to reflect mechanical solidarity in that it encourages social conformity through the use of repressive sanctions, seems to be more of a criminal than civil law.

The factors identified by scholars are similar to those enunciated by the Supreme Court in determining whether, for constitutional purposes, a punishment is criminal or civil. In order to discover whether a sanction is criminal or civil, the Supreme Court looks at

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy v. Mendez-Martinez, 372 U.S. 144, 168-69 (1963) (emphasis added). See also Cheh, *supra* note 158, at 1357-58. This analysis also suggests that Amendment 2 is more criminal than civil in its orientation. This conclusion is borne out by Scalia’s statement that Amendment 2 is intended to deter homosexual behavior (and possibly homosexual orientation) in order to “preserve” Coloradans’ traditional sexual morality. See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting). Under this formulation, if homosexuals do not change their beliefs about their sexuality (since merely changing their behavior would still permit others to discriminate against them as persons of homosexual orientation), then the community may pass moral judgment on them, in both a social and a legal sense, and may permit private individuals to dispense retribution in the form of legally condoned discrimination. Thus, under both a scholarly and a constitutional analysis, Amendment 2, like many other morality laws that stigmatize and punish immoral behavior, is more akin to criminal law than civil law.

160. See Coffee, *supra* note 157, at 1876, 1884-85. See also Cheh, *supra* note 158, at 1332-33 (identifying ways in which civil remedies complement the criminal law objectives of preventing crime and finding and punishing offenders); *id.* at 1355 n.166 (describing different types of deterrence). Commentators agree that not all disfavored acts should be criminalized. For example, “to maintain its moral force, the criminal law should address only seriously antisocial behavior and only behavior involving persons who are responsible for their actions.” *Id.* at 1346.

161. Coffee, *supra* note 157, at 1876. Some jurists have argued that the use of the criminal law reflects and shapes public perception of the severity of an offense and that, as a rule, the only acts that are criminalized are those that are considered more culpable than those that are civilly actionable. See *id.* at 1889. See also Cheh, *supra* note 158, at 1352 (noting criminal law’s emphasis on “judgment of community condemnation”); Reinig, *supra* note 28, at 898 (noting legitimization of “gay bashing” due to legally imposed stigma). Apparently, it is this perceived ability of the law to shape public perception that Scalia is relying on when he says that the law is capable of “preserving” traditional sexual

assigns costs or sanctions to different behaviors that are “intended to dissuade the actor from engaging in the activity at all.”<sup>162</sup> Essentially, the criminal law’s purpose is to eliminate completely those behaviors that it considers lacking in social utility.<sup>163</sup>

The civil law, on the other hand, does not intend to completely eliminate certain behaviors but merely requires “the actor to internalize costs that the actor’s conduct imposes on others.”<sup>164</sup> Because the civil law attempts to redress costs imposed on others by the actor,<sup>165</sup> civil defendants can choose whether to take the proper precautions and avoid these costs altogether, or to pay the requisite price to victims after the fact.<sup>166</sup> Little moral blame (if any) is attached to breaches of the civil law, especially since violations can occur through mere negligence or impaired action.<sup>167</sup> The cost that is subsequently imposed on the offending party is often monetary, but it may take other forms, such as the loss of government benefits or privileges, as was the case with Amendment 2.<sup>168</sup> Some have

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morality. See *Romer*, 116 S. Ct. at 1637 (Scalia, J., dissenting). However, laws that have as their sole purpose the shaping of citizens’ beliefs about the morality or immorality of a certain behavior are disfavored in American jurisprudence since they aim to coerce belief.

162. Coffee, *supra* note 157, at 1876. Some theorists claim that “[t]he decision that the benefits derived by the defendant are so perverse, immoral, or otherwise unacceptable as to be wholly disregarded by society (and thus ‘prohibited’ by a total deterrence policy) should require a greater communal consensus than a judicial or a jury decision represents” and should thus be made part of the criminal law, which is created primarily through legislation. *Id.* at 1884. This approach is reminiscent of Devlin’s and Scalia’s theory (i) that the legislature is the proper, or at least primary, means of enforcing popular morality and (ii) that morality legislation may be enacted according to majority wishes.

163. See Cheh, *supra* note 158, at 1352; Coffee, *supra* note 157, at 1876. For some people, the only appropriate grounds for punishment are “violations of minimal moral standards of decency respecting individual rights to integrity, security, and justice.” David A.J. Richards, *Punishment, Danger and Stigma: The Morality of Criminal Justice*, 49 U. CHI. L. REV. 235, 242 (1982) (book review).

164. Coffee, *supra* note 157, at 1876. This definition seems most appropriate in the context of tort or administrative actions, see *id.* at 1878, and does not seem to apply to laws such as Amendment 2. It is hard to identify any harm that homosexuals are doing to others that Amendment 2 is intended to cure; instead, Amendment 2 seems more akin to criminal provisions that intend to burden homosexuality to the point that it disappears or that intend to educate society about the alleged immorality of homosexuality.

165. See *id.* at 1882-83.

166. See *id.* at 1883. However, recompense does not seem to be the goal of laws such as Amendment 2; instead, such laws allegedly intend to preserve and protect certain social mores, which seems to be more of a purpose of the criminal law.

167. See Cheh, *supra* note 158, at 1336, 1346.

168. See *id.* at 1333 (discussing types of civil remedies available); *id.* at 1337-38 (discussing loss of government benefits and privileges). In a modern welfare state, people are highly dependent on government benefits and privileges, such as monetary awards, services, contracts, and licenses. See *id.* at 1331 & n.27 (describing scope of modern welfare state). Therefore, by permitting not just private actors but state actors to discriminate against homosexuals on the basis of their sexual orientation and by denying homosexuals the right to cure that problem through antidiscrimination legislation at

described the civil law as setting forth “aspirational” goals while the criminal law creates behavioral minimums.<sup>169</sup>

In attempting to identify whether a provision is criminal or civil, some commentators have advocated a pragmatic approach that is based on the intended effect of the law.<sup>170</sup> If the law attempts to deprive the defendant of any and all benefits derived from the act, then the law is more likely criminal than civil in nature.<sup>171</sup> If the law merely attempts to reduce the occurrence of a certain behavior, the law is more likely civil.<sup>172</sup> In addition, the level and amount of departures from society’s behavioral norms will influence whether civil or criminal law is and should be utilized.<sup>173</sup>

In *Romer*, Scalia assumed that the civil law may be used to invoke or reflect society’s disapproval of homosexuality. However, “[o]ne distinction between criminal and civil sanctions . . . lies in the criminal law’s ‘judgment of community condemnation’ on a transgressor. For some commentators, therefore, the ultimate difference between civil and criminal proceedings is that a criminal conviction, unlike civil judgment, carries with it the stigma, or brand, of societal condemnation.”<sup>174</sup> Although Amendment 2 did not contemplate a judicial process requiring a determination that approximated a criminal conviction,<sup>175</sup> its intent was to stigma-

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the local level, the proponents of Amendment 2 wielded a very powerful coercive tool against homosexual behavior.

169. See *Coffee*, *supra* note 157, at 1879. Lon Fuller would disagree with that analysis, since he identified the morality of aspiration not with legal duties but with legally unenforceable moral standards. See FULLER, *supra* note 7, at 5-15.

170. See *Coffee*, *supra* note 157, at 1885.

171. See *id.*

172. See *id.* at 1886.

173. See *id.* at 1886-87. The criminal law demands that a precise standard of behavior be identified and incorporates a societal desire to tolerate few departures from that standard. See *id.* The civil law, on the other hand, permits more and greater departures from the legally established behavioral norm and often creates a less-stringently defined standard in the first place. See *id.*

174. *Cheh*, *supra* note 158, at 1352 (quoting H.L.A. Hart, *The Aims of Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958)).

175. This, in itself, was arguably a constitutional violation. See *United States v. Briggs*, 514 F.2d 794, 806 (5th Cir. 1975) (holding, in a case where a grand jury named defendants as criminals but did not indict them, that “[t]here is at least a strong suspicion that the stigmatization of appellants was part of an overall governmental tactic directed against disfavored persons and groups. Visiting opprobrium on persons by officially charging them with crimes while denying them a forum to vindicate their names, undertaken as an extra-judicial punishment or to chill their expression and associations, is not a governmental interest that we can accept or consider”). Though not creating a criminal assumption, by permitting state and private actors to discriminate against homosexuals at will, Amendment 2 did deny homosexuals the right to clear their names of the negative stereotypes associated with homosexuality and, even more importantly, with the stigma associated with being denied state protection from discrimination. In addition, Amendment 2 chilled freedom of association, since

tize and condemn homosexuality.<sup>176</sup> Although this is an inappropriate use of the civil law in the first place, it is even more egregious in light of the absence of any individualized determination that the burdened individual deserves the opprobrium of society; Amendment 2, as a legislative device barring any suits stemming from discrimination based on sexual orientation or practices, effectively foreclosed any opportunity for individualized due process, something that is critically important in the criminal system's aim of allocating moral blame.<sup>177</sup> In fact, the sort of social condemnation that Scalia would permit in *Romer* is commonly believed to be within the exclusive power of the criminal law.<sup>178</sup>

Those who support the use of the criminal law to enforce popular morality defend their position by citing two well-known theoretical bases for

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it created an atmosphere in which people would be afraid to meet publicly to lobby for political change because they would feel that by doing so they were marking themselves as targets for discrimination. See Reinig, *supra* note 28, at 888 (noting how gays and lesbians are limited politically in a society where they are stigmatized). See also Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (noting homosexuals, "while not a wholly politically powerless group, do suffer significant political impediments"), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996); Gay Law Students Assoc. v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610-11 (Cal. 1979) (striking company policy of firing homosexuals as violative of California's labor code, which prohibited employers from limiting employees' participation in politics; holding that if homosexuals are to have political rights, they must be permitted to be open about their sexuality without fear of retribution by employers).

176. See *Romer v. Evans*, 116 S. Ct. 1620, 1633 (1996) (Scalia, J., dissenting) ("But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful . . .").

177. See *Cheh*, *supra* note 158, at 1353 ("The very act of labeling certain behavior as criminal clearly reflects the community's moral judgment that it is deviant, unacceptable, and, therefore, to be officially and publicly condemned. By affixing this label, society binds itself to the stringent procedures applicable to criminal proceedings; it does so both to protect individual rights and to give its final judgment much more certainty, power, and finality."). In *Romer*, Scalia would permit the community to cast a moral judgment that certain behavior is "deviant, unacceptable, and . . . publicly condemned" without allowing the individuals affected by such laws to defend themselves from either the tangible burdens or the moral condemnation placed upon them in any way short of amending the state constitution. See *Romer*, 116 S. Ct. at 1635 (Scalia, J., dissenting).

178. See *Cheh*, *supra* note 158, at 1355. In some nominally civil cases, "the punishment imposed so dramatically expresses societal disapproval that its imposition only can be legitimated through the ceremony of a criminal conviction . . . Included in this category of punishments are . . . a kind of banishment that represents the ultimate separation from society." *Id.* at 1363. Some would argue that there is no banishment more severe than a legal determination that others may discriminate against people on the basis of a characteristic that is totally unrelated to their ability to act as a contributing member of society. In addition, the withdrawing from a particular group the ability to effectuate political change at the local, state, or national level can also be considered a type of banishment. See *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (noting that in order to create society in which monogamy is the only legal sexual union, "no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment").



the criminal law: retribution and denunciation. However, neither justification is applicable to the civil law.

For example, in defending morality laws in Victorian England, James Fitzjames Stephen relied on a simple "form of retributive theory: that punishment of the criminal is justified because 'the feeling of hatred and the desire of vengeance are important elements in human nature which ought in such cases to be satisfied in a regular public and legal manner.'"<sup>179</sup> One hundred years later, Devlin condoned this approach, based on his assumption that society has a common morality and is deeply affronted by any deviation therefrom.<sup>180</sup> However, retribution, while an arguably valid goal for the criminal law, is not an appropriate end for the civil law.

One reason why the civil law has not and should not be used as a retributive tool is because criminal penalties should not be imposed unless an individual has committed some sort of crime<sup>181</sup> and has been proven guilty beyond a reasonable doubt.<sup>182</sup> Generally, society hesitates to impose retribution in the absence of some higher guarantee of culpability than a mere preponderance of the evidence. However, the type of civil retribution imposed by Amendment 2 can exist without any sort of trial establishing a level of guilt or culpability; individual employers and landlords, for example, are permitted to dispense society's retribution at will, possibly based on nothing more than patently inadmissible hearsay and hunches.

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179. HART, *supra* note 1, at 61 (quoting Stephen). However, there is little, if any, need for retribution in victimless crimes. See FEINBERG, *supra* note 7, at 158-65.

180. See DEVLIN, *supra* note 2, at 17. See also HART, *supra* note 1, at 62. Durkheim also supported this general concept, in that he believed that punishment of those who violate social norms was necessary in order to give symbolic expression to the outraged common morality. See Hart, *Social Solidarity*, *supra* note 159, at 7. According to Durkheim, punishment is required not to repress the immoral conduct but to sustain common morality by giving vent to the community's sense of outrage; if the vent were closed, the communal "conscience" would "lose its energy" and the morality which acted as a cohesive element in society would be weakened. See *id.* at 8. In this regard, Durkheim's justification for morality legislation is similar to Devlin's disintegration thesis.

181. Devlin would argue that immorality is a crime against society, in that society will disintegrate under the weight of unchecked immorality. See DEVLIN, *supra* note 2, at 10, 13. However, if society intends to adopt that theory of harm, it should use the criminal law to address it, for reasons that shall be discussed *infra*. In addition, provisions such as Amendment 2 impose burdens even in the absence of an overt act, something which is prohibited in Anglo-American criminal law. *But see Romer*, 116 S. Ct. at 1632-33 (Scalia, J., dissenting) (permitting homosexual orientation alone to be burdened).

182. Some commentators have argued that the increased use of the civil law to address what are essentially criminal problems may be an indirect but highly effective method of avoiding the higher standard of proof and more rigorous procedural burdens of the criminal law. See Cheh, *supra* note 158, at 1345, 1355, 1360; Coffee, *supra* note 157, at 1877.

Even if retribution were considered to be an appropriate aim of the civil law, Amendment 2 and similar provisions suffer from a failure to dispense retribution equally among like members of society, despite the legal requirement that similarly situated persons are to be treated in a similar manner.<sup>183</sup> It is clear that not all homosexuals would be treated equally under laws such as Amendment 2: Those who lived in liberal communities would experience little or no social retribution, while those who lived in more conservative communities would find discrimination much more common. In such circumstances, the retributive power of Amendment 2 is diminished, if not eliminated, as it becomes apparent that social condemnation of homosexuality is not universal but is limited to a small but vocal segment of the population. When viewed in this light, Amendment 2 looks less like a form of universal social retribution than permission for certain individuals to legally vent their spleen. The only way to correct this error so that societal retribution is distributed in a more evenhanded manner would be to make discrimination against homosexuals mandatory, something that even Scalia cannot in good conscience advocate.<sup>184</sup>

The second justification used by commentators to support the use of the criminal law to enforce popular morality is denunciation.<sup>185</sup> The idea here is to “ratify” the morality that has been violated by giving voice to the “hatred which is excited by the commission of the offence.”<sup>186</sup> Scalia ap-

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183. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216 (1982); Hart, *Positivism*, *supra* note 7, at 624. But cf. *Felice v. Rhode Island Bd of Elections*, 781 F. Supp. 100, 106 (D.R.I. 1991) (noting that perfection in the administration of laws is a goal, but lack of perfect administration is not necessarily a violation of the Constitution; but also noting that a selective enforcement claim will stand if a person is treated differently from other similarly situated persons and such selective treatment is based on “malicious bad faith intent to injure the claimant”).

184. Interestingly, one of the arguments used to combat the attempt by some liberals to create a morally neutral political climate is that removing morality from the law will create a horrific, amoral legal system similar to that of Nazi Germany. See Dworkin, *Community*, *supra* note 4, at 497. See also Hart, *Positivism*, *supra* note 7, at 616-21 (discussing similar conclusions made by German jurists who lived through the Nazi regime). However, the evolution of the Nazi totalitarian state is equally consistent with attempts by a hostile majority to transform the law into a tool for abusing politically powerless groups. For example, in pre-World War II Germany, shopkeepers and landlords were first permitted to discriminate against Jews (and, it should be noted, homosexuals and other disfavored groups), with mandatory discrimination and the genocidal “Final Solution” eventually following. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (“Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.”).

185. See HART, *supra* note 1, at 63.

186. *Id.* at 64 (quoting Stephen).

parently approved of this approach, in that he described using the law, both civil and criminal, to signify “moral disapproval” of homosexuality.<sup>187</sup>

All of the arguments used to oppose the civil law’s adoption of retribution as a justification for morality laws also apply to denunciation. For example, the lack of an overt act, the lower standard of proof, and the inequitable and inconsistent application of provisions such as Amendment 2 all suggest that the civil law should not be used as a means of denunciation. As Hart stated, “[t]he idea that we may punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship.”<sup>188</sup> Even if it were appropriate for society to express its moral condemnation of homosexuality by the imposition of certain civil or criminal laws,<sup>189</sup> Amendment 2 and similar provisions operate far more as legalized gay-bashing at the hands of discrete individuals than they do as a universal societal judgment on the morality of homosexuality.

Nevertheless, advocates of denunciation view it as “effective in instilling or strengthening in the offender and in others respect for the moral code which has been violated,”<sup>190</sup> a goal that, if attainable, would seem to apply equally to the civil and criminal law. However, it has not been proven that criminalizing (or burdening at civil law) certain actions leads the population to think of those actions as immoral (as opposed to merely illegal), for there are many instances where something is known to be illegal but is not necessarily considered immoral. Use of marijuana, for example, is illegal but is not universally considered immoral. Conversely, some people consider miscegenation immoral, although it is not illegal.<sup>191</sup> Therefore, it is misleading to argue that morality and legality always are or always should be linked.<sup>192</sup>

The punitive aspect of the law is not the only reason why commentators oppose morality legislation becoming a routine part of the civil law.

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187. See *Romer v. Evans*, 116 S. Ct. 1620, 1632-33 (1996) (Scalia, J., dissenting).

188. HART, *supra* note 1, at 66.

189. Notably, states cannot pass laws merely to reflect moral condemnation while simultaneously intending never to enforce those laws since such actions make a mockery of the law at issue as well as the legal system as a whole. See FULLER, *supra* note 7, at 153.

190. HART, *supra* note 1, at 66.

191. See WALTER H. CAPPS, *THE NEW RELIGIOUS RIGHT: PIETY, PATRIOTISM, AND POLITICS* 102-04 (1990). See also *Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1984) (Blackmun, J., dissenting) (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

192. See Cheh, *supra* note 158, at 1344-46 (noting instances in which the public merely wants to deter certain acts but does not intend to make a moral statement).

Hart believed that the coercive effect such laws have on those who may never actually break the laws was an evil unto itself, regardless of whether the law was civil or criminal.<sup>193</sup>

[W]here there is no harm to be prevented and no potential victim to be protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing . . . .<sup>194</sup>

Nevertheless, Scalia's attempt to equate civil and criminal law is consistent with modern trends to collapse the differences between civil and criminal law.<sup>195</sup> Although courts have often used civil remedies to address criminal acts,<sup>196</sup> various courts, including the Supreme Court, have begun to blur the lines between civil and criminal punishment by increasing the number of situations in which civil remedies are used to address quasi-criminal problems.<sup>197</sup> One of the areas which has been most prone to this jurisprudential shift is administrative law, which was once Scalia's specialty.<sup>198</sup> However, what is arguably appropriate in an administrative law setting is not necessarily appropriate vis-à-vis morality, where there is no reason to presume that the policymaker is always correct.<sup>199</sup>

193. See HART, *supra* note 1, at 21 ("The unimpeded exercise by individuals of free choice may be held a value in itself with which it is *prima facie* wrong to interfere . . . .").

194. *Id.* at 57.

195. See Cheh, *supra* note 158, at 1325 (noting that division between the two types of law has existed for centuries).

196. See *id.* at 1327. For example, a thief might simultaneously face a criminal prosecution brought on by the state and a civil action brought on by the victim for recompense. See *id.*

197. See Coffee, *supra* note 157, at 1892.

198. See *id.* at 1887-88 (noting collapsing of civil and criminal law in regulatory and administrative law contexts); Rosen, *supra* note 67, at 1716. Some of Scalia's interpretive idiosyncrasies, including this tendency to treat criminal and civil law as interchangeable, might be traced to his background in administrative law. For example, administrative agencies are often criticized as being "arbitrary, capricious, and irresponsible in their *ad hoc* policy making, enforcement, and decisional processes." 3 DAVIS & PIERCE, *supra* note 63 § 17.3, at 106-07 (noting widespread inconsistencies in decisions of federal courts reviewing agency actions and Supreme Court's move to reduce discretion of reviewing courts); 1 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 1.01[2], at 1-16 (1996). This has led many administrative law scholars to focus on determining "methods of controlling and checking the exercise of discretionary powers to avoid their abuse." 2 DAVIS & PIERCE, *supra* note 63, at xvi. Scalia's insistence on following a rigid interpretive model could very well be a backlash against this less rule-bound system. See Rosen, *supra* note 67, at 1715. Administrative courts are also highly deferential to congressional delegations of power, which again might explain Scalia's preference for deferring to legislative will. See 1 STEIN ET AL., *supra*, § 3.03[1], at 3-77 (discussing judiciary's almost uniform record for sustaining broad delegations of power to administrative agencies); *id.* § 3.03[5], at 3-109 (same).

199. See Coffee, *supra* note 157, at 1878, 1882 (noting importance of external costs to others in context of tort and regulatory law).

Alternatively, Scalia's statement that those behaviors that may be addressed by the criminal law may also be addressed by the civil law may mean that he considers burdens at civil law to be a type of "lesser included offence" to penalties imposed by the criminal law.<sup>200</sup> This position is similar to that of those who believe that the gradation of legal punishment, which is arguably based on differing levels of moral culpability,<sup>201</sup> demonstrates the permissibility of legal enforcement of morality.<sup>202</sup> However, gradation of crime can also be explained on the basis of differences in actual or potential harm to others<sup>203</sup> or on the grounds that correlating punishment to the popularly accepted degree of moral guilt serves the utilitarian purpose of supporting respect for the law in the minds of the people.<sup>204</sup> Ultimately, Hart argued that even if "in the course of punishing only harmful activities we think it right . . . to mark moral differences between different offenders, this does not show that we must also think it right to punish activities which are not harmful."<sup>205</sup>

## V. CONCLUSION

In many ways, Amendment 2, the law at issue in *Romer v. Evans*, is a typical piece of morality legislation, in that its intended purpose is to uphold or preserve one sort of moral code at the expense of a competing morality. However, in defending the alleged right of the majority to civilly burden or otherwise penalize any minority group it happens to dislike, Scalia has exceeded the bounds of jurisprudential propriety. Even accepting *arguendo* the need for and legitimacy of morality legislation in general (a premise that is not universally recognized), Scalia's assertion that animus toward disfavored groups can act as a permissible basis for law is not only contrary to established constitutional principles but to a number of

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200. See *Romer v. Evans*, 116 S. Ct. 1620, 1631-32 (1996) (Scalia, J., dissenting).

201. See HART, *supra* note 1, at 34-38 (discussing Stephen's theories). Stephen argues that the legal gradation of crimes demonstrated differing moral culpabilities, since if the law based its sentencing determinations solely on the issue of harm to others, the punishment in some cases (such as manslaughter and first-degree murder) would be the same since the outcome (death) was the same. See *id.* at 35.

202. See *id.* at 36-37 (noting Stephen's conclusion that gradation of crimes "showed that the object of such punishment was not merely to prevent acts 'dangerous to society' but 'to be a persecution of the grosser forms of vice'").

203. See *id.* at 36-38. For instance, in the example cited *supra* note 201, the different sentence gradations could be based on potential harm to others, in that society faces a greater danger from a cold-blooded, premeditated killer (first-degree murder) than from a negligent killer (involuntary manslaughter). See Coffee, *supra* note 157, at 1878 (noting "criminal law's focus on risk creation, rather than actual harm").

204. See HART, *supra* note 1, at 37.

205. *Id.* at 38.

jurisprudential norms. According to the rule of law, a nation must identify rational, dispassionate, and externally justifiable reasons for its laws if it is to hold the trust and respect of its citizens; since mere dislike of a certain group is neither rational nor dispassionate, it cannot provide a basis for law.<sup>206</sup>

Nor can the civil law act as an appropriate stand-in for the criminal law in the area of morality legislation. Typically, to the extent that the law has been used to make moral statements about certain behavior, it has done so through the criminal rather than the civil system. Tradition aside, many consider the civil law to be an inappropriate vehicle for morality legislation based on the absence of any social stigma associated with the violation of the civil law and the concomitant lack of procedural protections for those accused of breaking the civil law. Although some may applaud the circumvention of certain procedural protections for burdened individuals, it is a jurisprudentially questionable shift in the law, and one which is neither necessary nor desirable. If society wishes to assert its moral condemnation of a certain act, it can more appropriately do so through the criminal law in order to guarantee that only those who are deserving of societal disapprobation are affected. The haphazard application of Amendment 2 and the lack of universal condemnation of the act in question are prime examples of why the civil law should not be used as a vehicle for imposing social stigma and condemnation.

Certainly there are arguments to be made in support of Scalia's position in *Romer*, with the most notable being that the state has traditionally been permitted to safeguard the health, safety, and morals of its citizens.<sup>207</sup> Such precedents, however, are neither so numerous nor so theoretically justifiable as to require courts or legislatures to adopt Scalia's reasoning. Indeed, six Justices believed there was sufficient precedent against Scalia.

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206. As Hart noted, the greatest danger of democracy is not the mere oppression of a minority by the majority but the belief that such an action "might come to be thought unobjectionable." *Id.* at 77-78.

207. See *supra* note 86 and accompanying text. See also Henkin, *supra* note 5, at 413 ("It asks much of the Supreme Court to tell legislators, and communal groups behind them, that what has long been deemed the law's business is no longer, that even large majorities or a 'general consensus' cannot have their morality written into official law. And a reluctant Court can find support in history, and some among the philosophers."). *But cf. id.* at 414 (noting that at that time (1963), Supreme Court had not yet held that popular morality could be enforced by law). However, regardless of whether case law supports legislation of morality, there has been no indication that animus or hostility constitutes a permissible basis for law in the United States, aside from a handful of nonbinding opinions authored by Scalia and Bork. In addition, the fact that most commentators condemn the use of animus as a basis for law suggests it is unsound as a matter of legal theory.

Although some people might dismiss Scalia's dissent in *Romer* as a mere minority opinion in a discrete, fact-specific area of law, it should not be treated lightly. Scalia's basic premise, that hostility toward a minority group constitutes a legitimate basis for law, could be used to justify restrictive civil laws against other unpopular groups. The fact that the harmful language appears in a dissent offers little consolation, since dissents often constitute the first step in a novel shift in the law. *Romer v. Evans* has given U.S. jurists the unique opportunity of being able to choose whether morality legislation should continue, and on what bases—let us hope that liberty, rather than hostility, will prevail.