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IS AMENDMENT 2 *REALLY* A BILL OF ATTAINDER? SOME QUESTIONS ABOUT PROFESSOR AMAR'S ANALYSIS OF *ROMER*

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As I first discovered as a law student in Professor Amar's classes on legal history and federal courts, it is generally an intellectual treat to listen to Professor Amar's legal analysis, even when he is attacking one's own arguments. So my pleasure at reading Professor Amar's analysis of the Court's decision in *Romer v. Evans* was only partly dampened by his disapproval of the respondents' brief that I and other plaintiffs' counsel filed with the Court. According to Amar, this respondents' brief provided the Court with "so little help" that it had to rely on an entirely different and much sounder argument — an argument rooted in the U.S. Constitution's prohibition on attainder,[1] contained in Article I, sections 9 and 10.

Amar maintains that (1) contrary to Justice Scalia's vituperative dissent, the attainder argument provides an intellectually compelling basis for believing that Amendment 2 is unconstitutional, and (2) the *Romer* decision, correctly interpreted, adopted precisely this argument. Amar's revival of the Attainder Clauses is classically Amaresque: it takes constitutional text and structure seriously and it provides an original and sensitive reading of specific constitutional clauses and a careful understanding of their structural relationships.

However, as much as I appreciate his elegant and astute reading of the Attainder Clauses, I think in the end that his application of these clauses to Amendment 2 and his reading of *Romer* are unconvincing. The difficulty with his argument is that, as Amar notes, the Attainder Clauses prohibit state and federal legislation from "*naming* persons and singling them out for distinctive treatment."[2] As explained below, a law "names" persons only if it defines a closed class of persons with some fixed characteristic — a class the entire membership of which could be

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1. Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 222 (1996).

2. *Id.* at 213 (emphasis added).

known (at least in theory) by the legislators at the moment when the law is enacted.

Amar provides no persuasive argument that the term "homosexual, lesbian, or bisexual orientation" denotes such a closed class. To make such an argument, he would have to show that sexual orientation is not merely a status, but also an *irreversible* status, a characteristic that does not change over time and that thereby defines a closed class from which members cannot exit and nonmembers cannot enter. Rather than attempt such an argument, Amar argues that Amendment 2 discriminates on the basis of "status" rather than "conduct" and thus "targets persons for who they are, not what they have done."[3] But this status-conduct distinction is irrelevant to the issue raised by the Attainder Clauses — the issue of whether Amendment 2 *names* persons by designating them as a closed class, the entire membership of which could be known by the legislature.

Amar's emphasis on the status-conduct decision is mischievous not merely because it misconstrues the Attainder Clauses but also because the distinction is, in a larger sense, deeply misguided: although the distinction repeatedly surfaces in gay rights litigation,[4] it is practically trivial and intellectually incoherent. Indeed, this is why neither the respondents' brief, nor Professor Tribe's amicus brief, nor — as I shall explain below — the *Romer* Court relied on such a distinction. Amendment 2 would be a deprivation of equal protection — although not an attaint — even if the term "orientation" were omitted from its text. For, as *Romer* and respondent's brief repeatedly state (and as Amar curiously ignores), the central flaw in Amendment 2 is not its ambiguous and probably severable mention of "orientation" but rather its *breadth,* its imposition of a "broad and undifferentiated disability on a single named group,"[5]

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3. *Id.* at 217.

4. *See, e.g.*, Steffan v. Aspin, 8 F.3d 57, 64-67 (D.C. Cir. 1993), *revd. en banc,* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (holding that the Department of Defense's regulations imputing persons on homosexual status, not conduct, were repugnant to common law and constitutional principles); Watkins v. United States Army, 837 F.2d 1428, 1434-35, 1451, *different result reached on rehg.*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied,* 111 S. Ct. 384 (1990) (holding that the Army's regulations, under which "homosexuality" — not sexual conduct — was the operative trait for disqualification, were unconstitutional because they discriminated against persons of homosexual orientation, a suspect class); *Jantz v. Muci,* 759 F. Supp. 1543, 1546-47, 1551 (D. Kan. 1991) *revd.,* 976 F.2d 623 (10th Cir. 1992) (finding that a governmental classification based on an individual's sexual orientation is inherently suspect, while noting that most courts have found that persons engaging in homosexual *conduct* do not constitute a suspect class). As these examples suggest, the status-conduct distinction has not fared well as a way of vindicating gay rights: at best, it is accepted by lower courts or appellate panels only to be rejected on appeal or en banc.

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

regardless of whether the group is defined by conduct or orientation. It is the sheer breadth of Amendment 2 that makes it constitutionally suspect, and not some burden on "orientation" as opposed to "conduct."

In the following pages, I will first attempt to explain the scope and purposes underlying the Constitution's clauses forbidding bills of attainder. Then I will show that the distinction between "orientation" and "conduct" — or "status" and "conduct" — really has nothing whatsoever to do with this principle. Finally, I will try to show that, like respondent's brief, *Romer* depends crucially on the *breadth* of Amendment 2 — the wide category of antidiscrimination laws that Amendment 2 preempted. It is this breadth, and not any use of the term "orientation" that led the Court to invalidate Amendment 2.

I.

First, let me start where I think that Amar and I agree: What is attainder, and why is it suspicious?

As Amar notes, at the core of the rules against attainder is the notion that "[a] law *naming* persons and singling them out for distinctive treatment is suspicious."[6] The fundamental principle underlying the rule is that the state and federal legislatures must make policy by "generally applicable rule[s]"[7] rather than by laws that single out groups or persons by *name* — what the Court calls "specifically designated persons or groups."[8] Thus, the most obvious violation of the rule against attainder is a statute that literally designates individuals by their proper names — for instance, a law stating, "Akhil Amar is barred from holding public office." Amar is surely correct that the Attainder Clauses would also bar the Congress from using definite descriptions for the same purpose as a proper name: it would equally be unconstitutional for Congress to declare that "all persons who wrote an article entitled *Of Sovereignty and Federalism* will be barred from public office," for the definite description obviously serves the purpose of singling out a specific individual and no one else. Moreover, Amar must also be correct that a law can be a bill of attainder if it designates a specific *group* of persons: so, for instance, a law barring "all members of the Amar family" from holding public office would be an attainder just as much as if each member of the family were individually listed in the text of the statute.

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6. Amar, *supra* note 1, at 213 (emphasis added).
7. United States v. Brown, 381 U.S. 437, 450 (1965).
8. 381 U.S. at 447.

From these uncontroversial propositions, Amar makes the insightful observation that the rule against attainder is actually "a prototype of the Equal Protection Clause:"[9] the rule limits the ability of the legislature to single out disfavored groups and thereby prevents deprivation of equal legal protections. As Amar notes, a law barring "all persons of East Indian descent" from holding public office would be just as much of an attainder as a law barring "the Amar family" from holding public office. For such a law would "specifically designate[]" a group of persons and no one else for disfavored treatment just as much as a law penalizing an entire family.[10] Indeed, the analogy between racial and familial classifications is extraordinarily close: both are legal relationships defined by lineal descent, ancestry, or blood line.

But Amar's astute analogy between the rule against attainder and the rule against deprivations of equal protection is not just an insight but a warning: there is a danger that the concept of attainder can become just as murky and incoherent as concepts of equal protection, bogged down in " 'free-form' constitutionalism" which Amar rightly disparages but that has notoriously plagued equal protection law. The problem is that, while the rule against attainder prohibits laws that impose punishment on "specifically designated persons or groups,"[11] we do not really have a clear notion of what it means to "specifically" designate something or someone. Of course, proper names are the easiest case.[12] But, as we have seen, they are not the only sort of "specificity" that the anti-attainder rule prohibits. Laws that burden "members of the Communist Party" or "former rebels against the United States government" are also too "specific." But then what exactly is *not* "too specific"? What passes muster as a "generally applicable rule"? As Professor Tribe has noted, "the concept of legislative 'specification' . . . cannot be so broad as to swallow up all laws that impose some disabling limitation upon an ascertainable group."[13] Could a law impose regulatory burdens on "the catfood industry"? "Fly fishermen"? "Persons under six feet in height"?

Unfortunately, Amar does not provide a criterion for defining illegal legislative specification — illegal "naming" — beyond stating that laws cannot "target[] persons for who they are" on the basis of their

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9. Amar, *supra* note 1, at 215.

10. *See Brown,* 381 U.S. at 447.

11. 381 U.S. at 447.

12. *See* United States v. Lovett, 328 U.S. 303 (1946).

13. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-4, at 644 (2d ed. 1988).

"status."[14] This is a little vague: what does it mean exactly to target persons "for who they are?" All laws, after all, distinguish between persons based on their characteristics — frequently including characteristics like age and handicap that are involuntary, personal traits. And these characteristics seem to be a part of what identifies persons as "who they are."

I think that one can provide a more precise account of what it means to "name" a person or group. The essence of such "naming" — such illegal legislative specification — is that the legislation defines a *closed class,* a class with a membership that is permanently fixed when the class is defined, from which members can never exit and into which nonmembers can never enter, as a matter of law. Logic, precedent, and policy suggest that the Attainder Clauses forbid such closed classes and nothing else.

Consider, first, the logic of proper names. The essence of naming is to designate a unique person or group of persons to which anyone not so designated can never belong. Unlike a general term, a name functions like a telephone number or address in that it designates one item or set of items and no others, without attempting to say anything more about the items.[15] When I use the name "Akhil Amar," I intend to refer to a specific person and to no one else (not even to other people who might, by coincidence, have the same name). Likewise, if I refer to "all persons who aided the Confederacy during the Civil War," I name a closed class of persons that can, by definition, never include another member aside from the members denoted when the term is used.

Note that legal classifications defined by birth or parentage — legitimacy, alienage, or race — are a special type of closed class. As a matter of law, one's race does not change, for the law generally defines race by one's parentage: burdens on racially defined classes will, by definition, never fall upon persons outside such classes because parentage, like other past events, is unchangeable as a matter of law.[16] But, what is worse, racial classifications, being legally hereditary conditions,

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14. Amar, *supra* note 1, at 217.

15. This assertion about names hides a great deal of semantic complexity, which is explored by a field of philosophy sometimes termed "reference theory." In my argument, I use the term "name" in roughly the same way that Saul Kripke uses the term "rigid designator." For some seminal accounts of proper names and general terms, see SAUL A. KRIPKE, NAMING AND NECESSITY (1977) and HILARY PUTNAM, *The Meaning of 'Meaning,' in* 2 MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215 (1975).

16. Note that this unchangeability has nothing to do with whether race is somehow "immutable" in any biological sense: race is considered here only as a legal concept, not a biological fact.

target not merely specific groups of presently existing individuals but also specific groups of *families* and *lines of familial descent.* It is as if the law contained a list of proper *familial* names rather than individual names. Such a legal burden will be transmitted lineally from parent to child, insuring that the descendants of the legislators' enemies will be burdened and the children of the legislators' friends will be exempt. Thus, the prohibition against racial discrimination contained implicitly in the Fourteenth Amendment, as Amar notes, has deep antecedents in Article I's prohibitions on attainder and titles of nobility and Article III, section 3's prohibition on corruption of blood.

Consider also judicial precedent. In determining whether the members of a legislative class are "easily ascertainable" and therefore illegally specified or "named," the Court asks whether the class's membership is irreversibly fixed on enactment or whether exit and entry into the class is possible after the law's enactment. For instance, in *Selective Service System v. Minnesota Public Interest Research Group,*[17] the Court held that a federal statute denying educational assistance to students who failed to register for the draft, did not attaint such students because such students could escape the law's burdening simply by registering in accordance with the law. By contrast, the Court noted that the laws at issue in *Cummings* [18] and *Garland,* [19] barring former Confederate sympathizers from being licensed for various professions, were bills of attainder because they created "absolute barriers" to exit from the class: "no one who had served the Confederacy could possibl[y] comply [with the licensing requirement], *for his status was irreversible.*"[20] In short, the Attainder Clauses do not necessarily bar legal burdens based on status *per se*, but rather classifications based on "irreversible" status — that is, on legally closed classifications with a membership that is, therefore, permanently fixed upon enactment.

What policy might be served by such a rule against closed classes? Amar provides us with the answer: closed classes tear away the "veil of ignorance" that should normally accompany legislation and thus invite corrupt legislative purposes to infect lawmaking.[21] Closed classes pierce this veil of ignorance by insuring that the legislators will know the identities of everyone who will ever be burdened by legislation. By using these closed classes, a legislator can ensure that a legislative burden will be imposed only on persons that she dislikes and no one else —

17. 468 U.S. 841 (1984).
18. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).
19. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).
20. 468 U.S. at 850-51 (emphasis added).
21. *See* Amar, *supra* note 1, at 210.

that the classification will never inadvertently "spill over," as it were, on to political allies. Therefore, legislation containing closed classes enables legislatures to launch "surgical strikes" against unpopular groups, confident that such burdens will not affect favored constituents upon whom the legislator depends.[22]

But why require such a veil of ignorance at all? Why must the legislature be forced through the use of open classes to be minimally impartial? There is a deep constitutional tradition that governmental decisions cannot rest on a mere desire to impose costs on one person or group for the benefit of another person or group; the identity of the burdened persons ought to be irrelevant to the purpose of the burden.[23] This tradition of minimal impartiality is enforced in some contexts, such as adjudication, through institutional design. For instance, judges have life tenure, are bound by precedent, and are conditioned to limit their own discretion by various forms of professional indoctrination; likewise, ex parte contacts are forbidden; reasons for decisions must be provided on a record; evidence must be presented in a controlled setting; and so forth.

In the legislative context, however, these sorts of institutional constraints are necessarily missing. The Attainder Clause's prohibition on closed classes preserves a minimal degree of impartiality that is otherwise impossible to guarantee in the legislative context through institutional design. The veil of ignorance in the legislative chambers, in effect, replaces the blindfold on the face of Justice in the courtroom, and creates a different sort of blindness that accomplishes the same sort of effect — a minimal degree of impartiality.

II.

In light of this summary of Attainder Clause jurisprudence, it is easy to see why Amar's argument against Amendment 2 based on the Attainder Clause faces some serious obstacles. Quite simply, it is at

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22. Note that open classes preserve the veil of ignorance in that, at least in theory, the legislator using such classes can never predict whether or not she or her favored constituents will end up being burdened by the law: legislators who vote for a law requiring the imprisonment of "embezzlers" or the constituents who support such legislators cannot know for sure whether they themselves might not some day end up being indicted under the law. (Impossible? Ask Dan Rostenkowski.) The membership of the class "embezzlers" is not logically fixed by a finite number of names of individuals or family lines when it is enacted into law. Thus, if legislators are forced to forego closed classes, they will have an incentive to moderate their partiality toward themselves and their particular constituent coalition.

23. For a general discussion of this tradition, see CASS SUNSTEIN, THE PARTIAL CONSTITUTION 17-39 (1993).

least unclear that the class contained in Amendment 2 — persons with "homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships" — is a closed class that pierces the legislative veil of ignorance.

Amar emphasizes that Amendment 2 specifically does not cover persons of heterosexual orientation.[24] This is true, but, depending on how homosexual, lesbian, or bisexual orientation is defined, it is irrelevant. For it might be the case that the phrase "homosexual orientation" refers to an inclination, desire, urge, and so on, that anyone in Colorado can have or cease to have at any time, much like a desire to hunt elk, drive red sports cars, smoke, eat junk food, forge checks, cheat on one's spouse, or marry more than one person. That is, "being a gay person" might be like "being a pedestrian" — something that each person becomes some of the time but that no one is all of the time. If homosexual orientation designates a mutable mental state that might potentially affect any and all persons from time to time — analogous to "adulterous orientation" or "polygamous orientation" — then the membership of the class covered by Amendment 2 was not fixed when the law was enacted. In theory, the proponents of Amendment 2 *themselves* could be burdened by Amendment 2, if and when they experienced homosexual orientation.

Perhaps sensing that his interpretation of the term "orientation" in Amendment 2 is tendentious, Amar offers some occasional statements of empirical fact about the nature of sexual orientation. He asserts that "desires, fantasies, thoughts, urges, and drives" are "often" impossible to "prevent or control,"[25] and he asserts that "we are not all equally likely tomorrow to wake up and feel gay."[26] At least the second of these statements[27] seems to suggest that "homosexual orientation" must denote a closed class; Amar seems to be asserting that, as an empirical matter, one subset of the population has a gay or lesbian orientation and the rest of the population does not. Thus, like the class of persons with blood type A or left-handedness,[28] homosexual orientation denotes a

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24. *See* Amar, *supra* note 1, at 207.

25. *Id.* at 218.

26. *Id.* at 234.

27. It is important to see that these statements make very different claims. The first statement is irrelevant to whether Amendment 2 contains a closed class, for it asserts only that homosexual orientation is involuntary. Perhaps it is. But if all persons are *equally* prone to involuntary feelings of same-sex attraction, then the involuntary nature of sexual orientation would not suggest that Amendment 2 creates any closed class. We are all prone to involuntary aging, but age classifications are not closed, for their membership shifts constantly.

28. *See* Amar, *supra* note 1, at 226.

class smaller than the entire population of Colorado, the membership of which is fixed when Amendment 2 was enacted.

One can concede the obvious: not all persons *are* equally likely to have a desire to engage in "homosexual, lesbian, or bisexual . . . conduct, practices, or relationships."[29] But this empirical fact cannot convert Amendment 2's reference to "orientation" into a closed class: not all of us are likely to wake up in the morning wanting to be investment bankers or to evade the draft. Nevertheless, laws burdening "investment bankers" or "draft evaders" do not thereby become attaints on the burdened persons. The issue is whether Amendment 2 contains a term that functions as a proper name — a term denoting some characteristic that, by definition, only an identified subset of the population can potentially possess.

If one looks to the intent of a law's proponents to discern whether a term in a law designates specific groups or persons with a closed class, then it is not obvious that Amendment 2 contains a closed class. Judging from the statements of the proponents of Amendment 2, the term "homosexual orientation" was not intended to serve as a closed class. Rather, Colorado for Family Values and the State of Colorado both repeatedly asserted that homosexual orientation was a fluid rather than an immutable characteristic: "gay persons" could lose it[30] and there was always the danger that heterosexuals could be seduced into deserting their spouses and becoming gay or lesbian by the example of openly homosexual conduct. That was, indeed, why they so feared "gay rights:" the State argued that such rights would encourage more people to "become gay."[31]

Note that this legislative intent distinguishes homosexual orientation from, say, racial classifications. Racial classifications are understood *by legislators who enact them* to be legally hereditary characteristics fixed at birth and unchanging thereafter *as a matter of law.* By contrast, the ratifiers of Amendment 2 apparently regarded the category

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

30. *See, e.g.,* Affidavit of Charles W. Socarides, M.D., Evans v. Romer, Civ. A. No. 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct., Dec. 14, 1993) (order granting preliminary injunction) (expert testimony regarding the possibility of ridding individuals of homosexual inclination through psychiatric treatment); Testimony of James Nicolosi, *Evans,* 1993 WL 518586 (preliminary injunction hearing) (expert testimony regarding the success in ridding formerly homosexual persons of homosexual desire through counseling); COLORADO FOR FAMILY VALUES, VOTE YES ON AMENDMENT 2! (1992) (pamphlet urging passage of amendment 2).

31. *See* Petitioners' Opening Brief at 40 n.59, Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (Nos. 945A48, 945A128) (arguing that Amendment 2 is necessary to preserve heterosexual marriages from the "specter of sexual competition" presented by the possibility of homosexual relationships).

of "homosexual, lesbian or bisexual persons" as more like the category of alcoholics or habitual smokers: anyone could fall into, or be redeemed out of, the class.

Given the overwhelming evidence to the contrary, one easily might regard this view of Amendment 2's proponents as empirically groundless.[32] However, if bills of attainder are forbidden because they target specific persons, then one arguably should look to the intentions of the ratifiers of Amendment 2 and not some empirical fact about sexual orientation to determine whether Amendment 2 illegally names any specific group. If the ratifiers of Amendment 2 believed that anyone — including themselves — could become gay or lesbian, then such a belief might suggest that they did not have any improper purpose to target a discrete subpart of the population.[33]

In any case, even if one resolved the issue by reference to empirical evidence concerning human sexuality, it is not obvious that sexual orientation is a fixed trait like, for example, blood type. Quite apart from the proponents of Amendment 2, many advocates of gay and lesbian rights maintain that human sexual desire is more fluid than immutable.[34] Moreover, the trial court in *Romer* had been equivocal on the is-

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32. For the official positions of the American Psychological Association and the American Psychiatric Association concerning the origins of sexual orientation, see FACT SHEET: GAY AND LESBIAN ISSUES, AMERICAN PSYCHIATRIC ASSOCIATION (1993) and *Proceedings of the American Psychological Association, Inc., for the Year 1974*, 30 AM. PSYCHOLOGIST 620, 633 (1975). For summaries of the literature suggesting that sexual orientation is generally established at an early age and is highly resistant to change, see RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 62-86 (1992) and Judd Marmor, *Overview: The Multiple Roots of Homosexual Behavior, in* HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 3 (Judd Marmor ed., 1980). Examples of literature suggesting a physiological or genetic root to sexual orientation include Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (July 16, 1993) and Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991). Drs. Green, Hamer, and Marmor all testified at trial as expert witnesses for the plaintiffs in the *Romer* case.

33. It is a debatable question whether the ratifiers actually had such a belief: despite their assertions that sexual orientation was mutable, the proponents of Amendment 2 may well have believed that persons with heterosexual inclinations could *never* have homosexual inclinations. However, to establish that the phrase "homosexual . . . orientation" contained in Amendment 2 constituted a closed class, one would have to analyze what Amendment 2's proponents and ratifiers meant by this phrase. Such analysis would require some discussion of the assumptions, values, and purposes of Amendment 2's proponents and ratifiers — *their* understanding of sexuality. Amar attempts no such analysis; in this respect, his argument based on the Attainder Clauses is seriously incomplete.

34. *See, e.g.*, John D'Emilio, *Capitalism and Gay Identity, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 100, 109 (Ann Snitnow et al. eds., 1983) ("Claims made by gays and nongays that sexual orientation is fixed at an early age, that

sue: after listening to hours of testimony, the court refused to make findings on the causation or persistence of sexual orientation.[35]

One central weakness of Amar's argument based on attaint is that he ignores such difficulties with the conclusory assertion that Amendment 2 burdens persons "for who they are." Amendment 2 "attaints" persons only if the ratifiers of Amendment 2 knew the identity of all persons burdened by Amendment 2. But Colorado voters could have such knowledge only if the "status" of homosexual orientation were "irreversible,"[36] such that it defined a group with fixed and unchanging membership. Amar offers no reason to believe that the phrase "homosexual . . . orientation," contained in Amendment 2 pierces the veil of legislative ignorance by denoting such a group.

Instead, Amar relies on a different theory to explain how Amendment 2 is an attaint: he invokes the distinction between "status" and "conduct." According to Amar, the Attainder Clauses forbid distinctions based on status while allowing distinctions based on conduct. Thus, a racial classification that burdens racial groups constitutes an illegal attainder because race is a sort of status rather than a sort of conduct: "[a racial classification] targets specific persons for who they are — it penalizes them for their status, not their conduct."[37] Likewise, laws depriving persons of protection from discrimination on the basis of gay or lesbian "orientation" also are attaints because they burden persons based on their propensities or inclinations — again, a type of status — and, therefore, "target[] persons for who they are, not for what they have done."[38]

There are, however, two problems with using the status-conduct distinction to explain the scope of the Attainder Clauses. First, the distinction between status and conduct is simply irrelevant to the Attainder Clauses' meaning. Second, if Amar considers desires and propensities to be a sort of "status," then the distinction between status and conduct is simply a normatively implausible line to draw.

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large numbers of visible gay men and lesbians in society, the media, and the schools, will have no influence on the sexual identity of the young, are wrong."); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 529-46 (1994).

35. *See* Evans v. Romer, Civ. A. No. 92 CV 7223, 1993 WL 518586, at 11 (Colo. Dist. Ct. Dec. 14, 1993), *affd.*, 882 P.2d 1335 (Colo. 1994), *affd.*, 116 S. Ct. 1620 (1996).

36. *Cf.* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 851 (1984).

37. Amar, *supra* note 1, at 215; *see id.* at 223.

38. *Id.* at 217.

Consider the meaning of the Attainder Clauses. The status-conduct distinction is simply irrelevant to these clauses' prohibition on the legislative specification of persons by name: the clauses forbid conduct-based distinctions that specifically designate persons or groups, and they permit status-based distinctions that do not specifically designate persons or groups. So, for instance, even conduct-based distinctions are forbidden when they designate specific persons based on those persons' *past conduct* such as their support for the Confederacy during the Civil War[39] or for their joining the Communist Party of the United States.[40] Likewise, status-based distinctions are *not* attaints if they do not designate any closed class with an easily ascertainable membership. For instance, although age is a sort of "status" or personal trait, age-based classifications are not attaints because the membership of age-based classes continually changes.[41]

Much of Amar's reliance on the status-conduct distinction seems to be rooted in a concern that government not criminalize mental states or propensities alone, a concern that Amar finds reflected in *Robinson v. California*[42] and the "bedrock tenet" that "punishment can occur only after offending conduct: it cannot be a crime simply to be, or merely to think or feel."[43] But *Robinson* is a precedent interpreting the Eighth Amendment's prohibition on "cruel and unusual punishments," not Article I's prohibition on attainder. Unless the concept of attaints is coterminous with the concept of "cruel and unusual punishments," this argument is a non sequitur.

Put more generally, however cruel and unusual it might be to punish people based on their thoughts alone, why would one think that the Attainder Clauses address this particular evil? So long as the government metes out such punishment impartially, without specifically designating groups or persons by name or the equivalent, there is no attaint — that is, no piercing of the legislative veil of ignorance. If homosexuality is an inclination to which any person is prone — as the proponents of Amendment 2 seemed to maintain — then the cruelty of Amendment 2 is an impartial cruelty that does not violate Article I's attainder clauses.

Moreover, why should one assume that the government cannot discourage inclinations through civil burdens just because the Eighth

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39. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

40. *See* United States v. Brown, 381 U.S. 437 (1965).

41. Amar admits this point. *See* Amar, *supra* note 1, at 233.

42. 370 U.S. 660 (1962).

43. Amar, *supra* note 1, at 218.

Amendment prohibits the government from criminalizing them? It is commonplace for Anglo-American law to place obstacles in the way of criminal prosecutions (grand jury indictment and extraordinary burdens of proof, for example) that it waives for even punitive civil proceedings (civil forfeiture, for example). Why is *Robinson v. California*'s requirement of an *actus reus* not precisely such an obstacle? While *Robinson* forbids the government from criminalizing drug addiction, it certainly does not bar the state from, say, refusing to hire drug addicts to drive subway trains.[44] It might be the case that the King cannot try me for treason if I privately wish him to drop dead, but surely the King can refuse to hire me as a bodyguard if he discovers through reading my diary that I harbor such a sentiment — even if such refusal has the purpose and effect of stigmatizing assassins for their murderous thoughts.

Aside from the formal objection that a status-conduct distinction seems to have nothing whatsoever to do with the Attainder Clauses, there is the further practical objection that the distinction seems normatively groundless — indeed, trivial. Propensities are closely related to intentional conduct: if one wants to affect intentional conduct, then one generally tries to affect propensities. And one way that the government uses to change propensities is to stigmatize them. As Judge Silberman explained in the recent *Steffan*[45] en banc opinion for the D.C. Circuit, if the state legitimately may proscribe same-sex sexual contact as immoral or antisocial or otherwise undesirable, it is not obvious why the government cannot also take measures to stigmatize propensities that tend to lead to the undesirable conduct.[46]

Thus, the law routinely imposes stigmatic burdens on persons based on their "character" — another term for propensity. Innumerable state statutes, for instance, require that applicants for occupational licenses for virtually every licensed occupation prove that they have "good moral character."[47] And, like any other employer, the government cares deeply about the propensities of its prospective employees.

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44. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 592-93 (1979). Of course, one might argue that such status-based discrimination might survive strict scrutiny. But why should it have to undergo such scrutiny in the first place? Neither text nor precedent suggests that the Eighth Amendment even presumptively prohibits the government from considering persons' temperament or inclinations — their "status" — in drawing distinctions in civil contexts like public employment.

45. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).

46. *See* 41 F.3d at 685-90.

47. *See, e.g.*, COLO. REV. STAT. § 12-5-116.2(c) (1991) (law student intern must have "good moral character"); COLO. REV. STAT. § 12-7-102(2)(c) (1991) (bail bondsman must show that he is a person of "good moral character"); COLO. REV. STAT. § 12-9-107(21) (1991) (caller or assistant at bingo parlor must be "of good moral character"); COLO. REV. STAT. § 12-39-106(1) (1991) (applicant for license as nursing

For instance, the faculty at any public law school would be predictably interested in the temperament, predilections, and general character of any candidate for a teaching position. If such a candidate sincerely announced that she hated to write law review articles, then this revelation of her propensities would surely count against her — regardless of her otherwise stellar prior conduct.

This is not to deny that it might be more precise for the laws to operate on the basis of specifically described conduct rather than status. So, for instance, if a state were to adopt an employment policy docking the pay of public employees who are "smokers" and requiring them to attend seminars on the dangers of tobacco, one might reasonably complain that the state should instead dock the pay and impose the classes on "people who routinely smoke" — that is, to burden some pattern of smoking "conduct" rather than the "status" of being a smoker. But this is surely a distinction without much normative significance because the status of being a smoker manifests itself solely through visible behavior like smoking: the status is just a shorthand for the conduct.

If the Attainder Clauses simply require that the government express "status" terms ("smoker" or "gay person") as "conduct" terms ("person who regularly smokes" or "person who regularly engages in homosexual conduct, relationships, or practices"), then the clauses are unusually trivial in their effects. Under this view of the attainder provisions, Colorado could save Amendment 2 simply by dropping the term "orientation," or construing it to mean "*manifest* orientation," and continue to forbid the state from providing protection from discrimination on the basis of "homosexual, lesbian, or bisexual conduct, practices, or relationships." It is difficult to see why this would accomplish anything of significance, however, especially given that the Colorado Supreme Court construed the terms "orientation" and "conduct" to "provide[] nothing more than a different way of identifying the same class of persons."[48]

At bottom, it is the triviality of the status-conduct distinction that is the strongest objection to the distinction's continuing use in litigation and debate over the rights of gays and lesbians. For gays and lesbians are not interested in merely "being gay" (whatever that means): they are interested in engaging in conduct: making love, forming relationships, dating, displaying photos of partners in the workplace, wearing wedding rings, living together in rental units, holding hands in public,

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home administrator must "submit evidence of good moral character"); COLO. REV. STAT. § 12-61-103(3) (1991) (real estate broker must have "good moral character").

48. Evans v. Romer, 882 P.2d 1335, 1349-50 (Colo. 1994), *affd.*, 116 S. Ct. 1620 (1996).

and otherwise expressing desire, affection, and commitment. Likewise, the proponents of Amendment 2 and other opponents of what they term "the gay life-style" are not simply interested in persecuting persons for their inner thoughts and desires; they are interested in suppressing any public manifestations of homosexuality through public and private action. To bar the state from burdening gay or lesbian "orientation" while allowing the state to burden gay or lesbian "conduct, practices, and relationships" is to accomplish nothing of practical significance: it is to give gay and lesbian persons the right to stay silent in the closet — a "right" they already have, as a practical matter.

III.

In sum, neither the Attainder Clauses nor the status-conduct distinction justify the holding of the *Romer* Court. Indeed, throughout the entire text of the *Romer* opinion, there is not a single mention of the distinction between status and conduct. Is there a better argument against the constitutionality of Amendment 2?

I believe that there is, based not on the *target* of the law but the *breadth* of the law. Moreover, I believe that this is the argument upon which the *Romer* Court actually relied. Amendment 2 is such a sweeping burden that one can attribute to it only a purpose of inflicting harm for harm's sake, of *gratuitously* branding persons with a status of inferiority.

First, consider the language of *Romer.* The Court's opinion is focused intensely on the *breadth* of the measure — Amendment 2's "[s]weeping and comprehensive" removal of legal protections.[49] According to the Court, Amendment 2 "impos[es] a *broad and undifferentiated disability* on a single named group" and "its *sheer breadth* is so discontinuous with the [legitimate] reasons offered for it" that it must violate equal protection principles.[50] While other laws have burdened persons, the Court distinguishes such cases by noting that the laws in such cases "were *narrow enough in scope* and grounded in a sufficient factual context" to serve a legitimate purpose.[51] By contrast, Amendment 2 is unconstitutional because, after identifying persons by a single trait, it "denies them protection *across the board,*" by "declaring that *in general* it shall be more difficult for one group of citizens . . . to seek aid from the government."[52] The *Romer* Court concludes that:

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49. *Romer*, 116 S. Ct. at 1625.
50. 116 S. Ct. at 1627 (emphasis added).
51. 116 S. Ct. at 1627 (emphasis added).
52. 116 S. Ct. at 1628 (emphasis added).

> Amendment 2, however, in making a *general* announcement that gays and lesbians shall not have *any* particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. . . . The *breadth of [Amendment 2]* is so far removed from . . . particular [legitimate] justifications that we find it impossible to credit them.[53]

In other words, the *breadth* of the disabilities imposed by Amendment 2 is at the core of the Court's opinion.

Amar's analysis based on the concept of attaint ignores this pervasive language concerning Amendment 2's breadth, for the narrowest attaint is still unconstitutional. A law barring "Akhil Amar" from holding the post of town dog catcher would still violate the Attainder Clauses. Under Amar's analysis, the breadth of Amendment 2 is simply irrelevant, but it was obviously crucial to the *Romer* Court's analysis.

Contrary to Amar, I think that the Court's discussion of "status-based enactment" is best understood as referring not to Amendment 2's reference to "orientation" but rather to this extraordinary breadth. Amendment 2 was a status-based enactment because the disabilities imposed by it were so broad that they can only be understood as an effort to impose "disfavored legal status." Indeed, the Court uses the terms "disfavored legal status" and "general hardships" interchangeably when it states that "laws singling out a certain class of citizens for disfavored legal status *or general hardships* are rare."[54] In short, *Romer* is centrally concerned with Amendment 2's "indiscriminate imposition of inequalities,"[55] and not its imposition of burdens based on sexual orientation as opposed to conduct.

Why might the breadth of Amendment 2 render it unconstitutional? Amendment 2 was a rather extraordinary law — "unprecedented," in the Court's phrase. To paraphrase Amendment 2's text: neither the state of Colorado nor any of its departments or subdivisions can create any law or policy "whereby homosexual, lesbian, or bisexual orientation, conduct, relationships, or practices shall constitute or otherwise be the basis of . . . any claim of discrimination."[56] It was undisputed by the State of Colorado that this amendment barred state and local policies and rules that specifically protected gay and lesbian persons even from discrimination by state actors or by otherwise pervasively regulated persons — for example, lawyers, utilities, insurers. So, for in-

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53. 116 S. Ct. at 1628-29 (emphasis added).

54. 116 S. Ct. at 1628 (emphasis added).

55. 116 S. Ct. at 1628 (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948))).

56. COLO. CONST., art. II, § 30(b).

stance, there was no dispute that Amendment 2 preempted a one-sentence executive order promulgated by Governor Romer forbidding discrimination against state employees on the basis of their sexual orientation.

Therefore, at the very least, Amendment 2 must have barred state and local governments from promulgating policies or regulations expressly declaring that sexual orientation is a forbidden ground for drawing distinctions, *even when discrimination on the basis of sexual orientation really would be arbitrary and illegal discrimination under state law.* One can assume, with the *Romer* Court and Justice Scalia's dissent, that Amendment 2 would not have barred the state from enforcing a general policy against "arbitrary" governmental discrimination by forbidding specific acts of discrimination based on gay or lesbian sexual orientation where such acts were, in fact, "arbitrary" under state law. But Amendment 2 must have meant that, if some subdivision or branch of the government wished *specifically* to declare in a general rule, regulation, or policy that discrimination specifically on the basis of sexual orientation were arbitrary in some specific context, such a declaration of policy would be forbidden by Amendment 2 — even where such discrimination would, in fact, be arbitrary.

So, for instance, suppose that state law forbids police officers from generally acting arbitrarily in the execution of their duties. If the police chief of Denver were to issue a written "policy" stating that police officers could not refuse to provide back-up assistance to lesbian and gay police officers on the basis of their sexual orientation, then Amendment 2 would have barred that promulgation of such a policy. This is not to say that Amendment 2 would have prevented the police chief from ordering a specific officer to quit harassing gay and lesbian fellow officers, but, like the Governor of Colorado, the police chief could not expressly declare to the entire force *in a general rule* that discrimination on the basis of sexual orientation was, in fact, arbitrary.[57]

What could possibly be the legitimate purpose of such a limit on the state's rulemaking capacity? To encourage police officers, govern-

57. Lest one argue that this construction of Amendment 2 is tendentious, keep in mind that, according to the Colorado Supreme Court, the voter education pamphlet, the proponents of Amendment 2, and the state of Colorado, Amendment 2 would have overruled the Governor's Executive Order forbidding discrimination against state employees on the basis of sexual orientation. State employees are covered by the state's general rules against arbitrary discrimination: they can be fired only for just cause. If Amendment 2 trumped the Governor's executive order, then *mutatis mutandis* it trumped any policy that would make specific any general prohibition against arbitrary discrimination by declaring that discrimination against gay and lesbian persons is, in fact, arbitrary.

ment supervisors, or building inspectors to violate state law? To keep gay and lesbian persons ignorant of the state-law rights that the state admits gay and lesbian persons retain? If discrimination against gay and lesbian persons is really illegal under state law — because it is deemed to be arbitrary state action by the state civil service commission, for instance — then surely the state ought to be able to say so.

It seems to me that the *Romer* Court simply held that such a blanket prohibition on protective policies can only be motivated by animosity toward the persons stripped of protection and not any legitimate governmental purpose. Remember the minimal duty of impartiality: no law can impose burdens on persons based solely on those persons' identity — on the fact that the burden of a law is felt by *A* rather than *B*. Put another way, a legislative classification must do more than define the group that is burdened: it must also *justify* the burden imposed.

The breadth of Amendment 2's burdens defies justification except as an expression of generalized hostility toward gay and lesbian persons. By the State's own admission, discrimination on the basis of homosexual, lesbian, or bisexual orientation or conduct might be arbitrary *some* of the time. Amendment 2, however, inexplicably precluded rules and policies that specifically remedies such discrimination *all* of the time — even in contexts where sexual orientation was completely irrelevant to the State's own legitimate interests.

Perhaps such a broad exclusion of rules and policies might have been justified as a prophylactic rule if there were some indication that a narrower policy might not accomplish the aims of the State. But the State never offered the Court any such prophylactic justification for why Amendment 2 should paint with such a broad brush, and it is hard to imagine such a rationale. As the *Romer* Court noted, the remarkable aspect of Amendment 2 was its imposition of "general hardships" on persons. Whether those persons are defined by conduct or status, imposition of such "undifferentiated" disabilities "is not within our constitutional tradition": such "indiscriminate imposition of inequalities"[58] seems so gratuitous that it can only be explained as "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[59]

Such a theory of *Romer* based on the breadth of Amendment 2's burdens requires more explanation than space permits in this forum. In particular, it requires one to answer Justice Scalia's charge that, under *Salerno,* one cannot strike down Amendment 2 based on its unconstitu-

58. *Romer,* 116 S. Ct. at 1628.
59. 116 S. Ct. at 1628.

tional breadth in the context of a facial challenge.[60] However, such a breadth-based theory better explains both the *Romer* Court's decision and the unconstitutionality of Amendment 2 than the theory proposed by Professor Amar based on the Attainder Clauses. And, incidentally, it is precisely such a "rational basis" based on the breadth of Amendment 2's burdens that plaintiff-respondents pressed in their brief filed with the Court.

60. *See* 116 S. Ct. at 1632.