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## NOTHING AND EVERYTHING: RACE, ROMER, AND (GAY/LESBIAN/BISEXUAL) RIGHTS

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*In this Article, Professors Chang and Culp propose that the Supreme Court's decision in Romer v. Evans, viewed by some scholars as a progressive case about gay/lesbian/bisexual rights, has little to do with gay/lesbian/bisexual rights as such. They argue that whatever protection Romer provides to gays, lesbians, and bisexuals is provided not because of their sexuality but, rather, despite it. The authors demonstrate their thesis by examining the racial underpinnings of the Court's opinion, which begins with Justice Harlan's famous dissent in Plessy v. Ferguson and which relies on a specific vision of color-blindness. This submerged racial jurisprudence provides the basic architecture for the Court's sexuality-blind constitutionalism. The authors are critical of color-blindness and sexuality-blindness because they preclude the Court and this nation from dealing honestly with race and sex and leave intact deeply embedded racial and sexual structures of oppression.*

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\*\* Professor of Law, Duke University School of Law. I testified as an expert witness in *Evans v. Romer*, Civ. A. No. 92CV7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 13, 1993), the trial following the Colorado Supreme Court's decision in *Evans v. Romer*, 854 P.2d 1270 (1993), to uphold the preliminary injunction against Amendment 2 and to apply the strict scrutiny standard. I was the last witness in rebuttal for the plaintiffs. I also testified for the plaintiffs in *Equality Foundation v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994) (granting an injunction against the city charter prohibiting the granting of protection or preference to gays, lesbians, and bisexuals based on sexual orientation, status, conduct, or relationship).

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[Harlan's] words [of dissent in *Plessy*] now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.<sup>1</sup>

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.<sup>2</sup>

## I. INTRODUCTION

A question raised by the Supreme Court's opinion in *Romer v. Evans* is what do gay/lesbian/bisexual rights<sup>3</sup> have to do with equal protection for

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<sup>1</sup> *Romer v. Evans*, 116 S. Ct. 1620, 1623 (1996) (discussing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>2</sup> *Id.* at 1628-29.

<sup>3</sup> We bracket "gay/lesbian/bisexual" to emphasize the odd constitutional logic at work in *Romer*. Although *Romer* is in some ways the most progressive case involving civil rights for gays, lesbians, and bisexuals, the Court decided to protect the rights of these groups not because of their status as sexual minorities but, rather, despite it. The Court afforded them protection as persons who happen to be gay/lesbian/bisexual. "Gay/lesbian/bisexual-ness," although central to the case, was peripheral to the Court's constitutional logic. See *infra* text accompanying notes 98-100. Although the locution "gay/lesbian/bisexual" is an odd one, we use it instead of the word "queer" because of the language in Colorado's Amendment 2 and in *Romer*. On the use of "queer," see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 346-50 (1995). For excellent discussions of the politics of queer identity, see Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 193 (Michael Warner ed., 1993), and Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY*, *supra*, at 105.

racial minorities? Our answer is nothing and everything.

*Romer* is written by Justice Kennedy as if the rights of sexual minorities and the rights of racial minorities are distantly related cousins. Although both sets of rights implicate the Equal Protection Clause, they are only loosely connected because different levels of scrutiny apply.<sup>4</sup> For gays, lesbians, and bisexuals, rational basis is used, a test that generally has guaranteed the constitutionality of whatever is being scrutinized; for racial minorities, the strict scrutiny standard is used, which generally has guaranteed the unconstitutionality of whatever is being scrutinized.<sup>5</sup> Historically, this has meant that gays, lesbians, and bisexuals received very little constitutional protection, whereas racial minorities were "special favorites" of the law and were afforded "greater" constitutional protection against laws that targeted them for different treatment.<sup>6</sup> However, recent equal protection decisions reflect an inversion: the identity group most successful in making equal protection challenges based on strict scrutiny has been whites, perhaps earning them a designation as the new "special favorites" of the law.<sup>7</sup> And curiously, gays, lesbians, and bisexuals, notwithstanding *Bowers v. Hardwick*,<sup>8</sup> have managed under the rational basis test to challenge successfully Colorado's Amendment 2.<sup>9</sup> In this sense, *Romer* is a very interesting

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<sup>4</sup> Although the *Romer* majority is not explicit, Justice Scalia is correct in his dissent when he said, "The Court evidently agrees that 'rational basis'—the normal test for compliance with the Equal Protection Clause—is the governing standard." *Romer*, 116 S. Ct. at 1632 n.1 (Scalia, J., dissenting). For racial minorities and strict scrutiny, see *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . It is to say that courts must subject them to the most rigid scrutiny.").

<sup>5</sup> It is ironic that the decision establishing the application of the strict scrutiny standard when a racial group is targeted is one of the only decisions in which the particular governmental action passed constitutional muster. See generally *Korematsu*, 323 U.S. 214 (upholding the exclusions of persons of Japanese ancestry on the basis of military necessity).

<sup>6</sup> We have our doubts that racial minorities have ever really been "special favorites" of the law, notwithstanding Justice Bradley's pronouncement in the *Civil Rights Cases*. See *infra* text accompanying note 57 (quoting *The Civil Rights Cases*, 109 U.S. 3, 24-25 (1883)).

<sup>7</sup> Laws benefitting racial minorities are seen as harming whites according to the zero-sum logic of the Court's contemporary race jurisprudence.

<sup>8</sup> 478 U.S. 186 (1986).

<sup>9</sup> The Amendment reads:

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

application of the rational basis jurisprudence of the Court. According to some commentators, it may be an important new precedent protecting the right of groups to participate equally in the political process.<sup>10</sup> But none of these issues influence how we look at racial concerns because race is controlled by strict scrutiny. As such, it is not surprising that Justice Kennedy's discussion of equal protection on the basis of sexuality had little to say overtly about equal protection on the basis of race. In this sense, *Romer* has nothing to say about race.<sup>11</sup>

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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. The Amendment passed by a margin of 53.4% to 46.6%, or 813,966 to 710,151. It was ruled unconstitutional in *Romer*.

<sup>10</sup> See Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997). Professor Koppelman notes that the most eminent constitutional authorities do not agree on what *Romer* means:

Some think that the Court was *sub silentio* following the Colorado Supreme Court's theory that the Amendment impaired gays' "right to participate equally in the political process." Ronald Dworkin and Robert Bork, who rarely agree, both think that *Romer* holds that the law may not draw moral distinctions based on the sexual practices of consenting adults. Cass Sunstein similarly thinks "[t]he underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality or homosexual behavior." . . . [Akhil Amar and Lawrence Tribe] think that the law's problem is that it singles out a named class to suffer a disadvantage.

*Id.* at 90-91 (citations omitted).

<sup>11</sup> Constitutional scholars also have ignored the race issue at the heart of *Romer*. These scholars have been almost universal in their criticism of the reasoning in Justice Kennedy's opinion in *Romer*. They have questioned whether all the important questions posed by *Romer* were answered by the Court. See, e.g., Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997). The missing pages of this opinion for Professor Baker involved reconciling *Bowers* with the Court's decision in *Romer*.

Professor Alexander argues that the Court fails to say whether Amendment 2 violates the Equal Protection Clause because the Amendment singles out gay, lesbian, and bisexual people, not people who engage in same-sex sexual conduct, or because the Court restricted the Amendment to only the conduct of gays, lesbians, or bisexuals. See Larry Alexander, *Sometimes Better Boring and Correct: Romer v. Evans as an Exercise of Ordinary Equal Protection Analysis*, 68 U. COLO. L. REV. 335 (1997). Put differently, the Court fails to say whether the problem is that the category impacted by Amendment 2 is wrong for identity or "conduct" reasons. One problem with this formulation is that it loses its way in distinctions between equal protection and due process. When Alexander says, "The problem is that the state owes some explanation for why it has affirmatively exempted only those who engage in homosexual conduct from possible protection and not, for example, convicted (or suspected) murders, rapists, or thieves," he raises the question as to what is suspect about gay identity. *Id.* at 341. Most of us

would find it racist for someone to argue that because someone is black they are "suspected" of being murders, rapists, or thieves (or drug users, sexually unquenchable, or superior athletes), but it is perfectly appropriate in this debate to suggest that having a gay identity makes one suspected of particular same-sex acts. People understand the identity question is problematic. The point we would like to make is that the conduct issue is also problematic. Think for example of the opening scenes from the movie *Kiss Me Guido*. In one scene, two apparently gay men are kissing on the street causing an Italian American character to yell disapproving comments out the window of the automobile. This is immediately followed by this same character kissing his male Italian American relative on the lips. The law does not make kissing illegal--perhaps cannot make kissing between consenting adults illegal--because to do so would outlaw non-sexual and sexual forms of kissing. The effort to say that gay/lesbian/bisexual stands for conduct eludes this dilemma by not specifying the conduct that is at issue and by hiding behind assumptions that are socially known but never specified.

Janet Halley understands this point and finds that Justice Kennedy's *Romer* opinion is not as confused or incomplete as others suggest. See Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429 (1987). She notes that there are two separate gaps that concern constitutional scholars. She calls the first the "*Padula Gap*" after an appellate court decision of a District of Columbia panel that included then Judge Bork. The court said that if *Bowers* says it is all right to criminalize homosexual conduct, it must include the right to do lesser things to them. See *id.* at 430. The lesser oppression is included in the ability of the government to do the greater. The second gap is the "*Tribe Brief Gap*." This gap is caused by the Court's seeming acceptance in *Romer* of part of the argument deftly made in a brief authored by Professor Tribe and others. The essence of Tribe's argument was that the Court did not have to reach the interesting and complicated issues of suspectness, rationality, or fundamental rights (whether invasion of gay/lesbian/and bisexual rights is a violation of some fundamental right) because Amendment 2 violates some prior and more basic question. See *id.* at 432. The Court seems to accept this argument that Amendment 2 violates some prior basic right while at the same time basing its opinion on rationality. See *id.* at 430. Professor Halley argues persuasively that these gaps ultimately leave out gays, lesbians, and bisexuals. Professor Halley contends that Justice Kennedy focuses on the status of gays, lesbians, and bisexuals as the place for analysis and discrimination. See *id.* at 439-40. This focus on status is at the heart of the Court's ability to leave out gays and lesbians while protecting them. Halley argues that Farber and Sherry and Amar are wrong in reading a gap in unexplained constitutional doctrine and the need for a fundamental right because they focus on the identity/conduct distinction that the Court rejects. See *id.* at 441 (discussing Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996), and Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996)). Professor Halley concludes by arguing:

Justice Kennedy sets out analytic tools [by shifting the focus of analysis from intrinsic nature to status] that could be used to dismantle the speech act dynamics of *Hardwick*. Indeed, the same tools can and should be used to critique Justice Scalia's construal of Amendment 2: if the people of Colorado are guilty of eliminating for others protections that they "take[] for granted . . . because they already have them or do not need them," then so are the dissenters. But the majority wields these tools only against Amendment 2: *Hardwick's* textual structure remains intact, and the *Romer* dissenters are treated as the rational, objective, sex-

However, the simple truth is that *Romer* is always and everywhere a case about race as well as being about the rights of gays, lesbians, and bisexuals. Justice Kennedy begins his opinion with a cryptic reference to Justice Harlan's dissent in *Plessy*, but he quotes from the second most important race case in the first century of constitutional jurisprudence without making any reference to race.<sup>12</sup> The *Plessy* dissent, as understood by the majority in *Romer*, is about equal protection as neutrality of law and is not about race except to say that race should be irrelevant.<sup>13</sup> In this sense, race

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less speakers enacted by the majority.

*Id.* at 451-52.

What Professor Halley does not note is that this same standard is not applied in race cases either. From *Washington v. Davis*, 426 U.S. 229 (1976), to *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court is unwilling to see that its rhetorical tools take for granted a number of racial privileges that come with being white in America. In *Washington v. Davis*, the Court ignored the implication of privilege, created by a host of societal factors, that leaves blacks with less educational resources and less likelihood of passing a nonvalidated examination. Because the Court concluded the plaintiffs could not prove that there was intentional discrimination on the part of the largely black district government, and because the Court assumes that the government is disconnected from the results of the public educational system, there is no discrimination in the exclusion of a disproportionate number of black applicants from eligibility for employment with the District of Columbia police department. In *Wygant*, the Court ignored the economic circumstances of black teachers. In order to recruit black teachers to the Jackson School District, the School Board and the teachers' union had negotiated a contract that provided that black teachers could not be laid off if doing so would reduce the overall percentage of black teachers in the district. See *Wygant*, 476 U.S. at 270-71. Black teachers shared in the overall layoffs, but this contract prohibited their bearing a disproportionate share of those layoffs. The Court could not see that this claim was not asking for special privileges in an economically neutral and fair market, but instead was trying to respond to the economic circumstances that exist in the market based upon race. The Court should know that black teachers are more likely to be laid off and less likely to be able to find a job than are white teachers. Race matters in the job market, but because the Court concluded that discrimination was not caused directly by the government, it cannot be remedied through governmental race-conscious efforts. The Court's plurality opinion in *Wygant* assumes that blacks have had access to seniority in the same ways as whites and therefore that giving rights to black school teachers to deal with the societal backdrop created by our racial present is seen as granting something "special" to them.

Maybe the Court adopts this sexless and basically lifeless interpretation of sexual orientation in *Romer* precisely because it cannot see its racial existence either. Professor Halley dismantles the sexual rhetoric of Justice Scalia, but she does not see (or at least does not note) that this rhetoric is part and parcel of the rhetoric that creates the Court's current racial jurisprudence. Specialness in the American legal and constitutional context seems to always be partially about race.

<sup>12</sup> See *Romer*, 116 S. Ct. at 1623. Kennedy is consistent throughout. Although he cites to some "race" cases, there is never any explicit discussion of race. If race appears, it is in the parentheticals, closeted, as it were.

<sup>13</sup> This echoes the way that sexual minority status is peripheral in *Romer*. In the

becomes peripheral to the constitutional logic of Harlan's dissent because Harlan has successfully gotten beyond race: "Our constitution is color-blind."<sup>14</sup> The statute in question there was not color-blind: it made relevant that which cannot be relevant and therefore, according to Harlan, should have been constitutionally infirm.

Color-blind constitutionalism requires that race be irrelevant. What is odd, though, is that in order to maintain the irrelevancy of race—in order to know that race is irrelevant—it must first be recognized. Neil Gotanda calls this the technique of nonrecognition:

Nonrecognition has three elements. First, there must be something which is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the characteristic must not be considered in a decision. For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision.<sup>15</sup>

By invoking the *Plessy* dissent, the *Romer* majority sets up the architecture of a sexuality-blind constitutionalism, complete with the technique of nonrecognition as a way of testing whether decision making was tainted by improper consideration of sexuality. For the *Romer* majority, the constitutional infirmity of Colorado's Amendment 2 comes from the fact that minority sexual orientation was improperly considered or targeted, making relevant that which is not supposed to be relevant. One problem with the *Romer* majority's sexuality-blind constitutionalism is that the Court engaged in a willful blindness to sex, a willful forgetting of *Bowers v. Hardwick*, as Scalia in dissent<sup>16</sup> and other commentators have noted.<sup>17</sup> The result then is an empty sort of protection as Todd Hughes has noted: "[A]n equal protection gained only for status is not equal at all; it simply protects a name—homosexual, gay, lesbian—without protecting any content the life

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same way that color-blind constitutionalism requires that race be irrelevant, the Court's equal protection analysis in *Romer* requires that sexual minority status be irrelevant. Thus, when the Court found that Amendment 2 was infected by animus against gays, lesbians, and bisexuals, this was deemed offensive to the Equal Protection Clause because it made relevant that which cannot be relevant.

<sup>14</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>15</sup> Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 16-17 (1991).

<sup>16</sup> See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

<sup>17</sup> See, e.g., Todd Hughes, *Making Romer Work*, 33 CAL. W. L. REV. 169, 172 (1997) ("In *Hardwick* we are only the sex we have, while in *Romer* we don't appear to have sex at all.").

attached to that name may have."<sup>18</sup> What we have then is a move toward a sexuality-blind and color-blind constitutionalism that achieves its effect by erasing sexuality and race.

Evidence of the erasure of race can be seen in *Romer*. *Plessy* is invoked,<sup>19</sup> but race has dropped out of the discourse. This cryptic (non)reference to race is the product of the new race-less society. Anyone who speaks of race directly except to reject it has become a partner of Louis Farrakhan and David Duke.<sup>20</sup> The *Romer* majority avoids this pitfall by referring to the common misunderstanding of *Plessy*, i.e., that the *Plessy* dissent is a race-neutral decision that is modern in tone. However, as Professor Gabriel Chin points out, while this may be how the case is taught in law schools, this is an ahistorical interpretation of the opinion.<sup>21</sup> This ahistorical interpretation of the *Plessy* dissent repeats the ahistorical error committed by Harlan when he declared the color-blindness of the Constitution, a statement made possible by the Framers' careful use of language:

The framers['] . . . deliberate avoidance of the words "slave" and "slavery" (and "negro" and "African" and "white") is significant. Don Fehrenbacher minted a good figure of speech to describe the framers' doubleness, their specific reluctant provisions about slavery but their refusal to name it: "It is as though the Framers were half-consciously trying to frame two constitutions, one for their own time and the other for the ages, with slavery viewed bifocally—that is, plainly visible at their feet, but disappearing when they lifted their eyes."<sup>22</sup>

This doubleness of vision also plagued the first Justice Harlan. Following the Framers, Harlan, in *Plessy*, wrote two dissents. The one for the ages states:

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and

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<sup>18</sup> *Id.* at 173.

<sup>19</sup> See *Romer*, 116 S. Ct. at 1623.

<sup>20</sup> Cf. Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 14-16 (1995).

<sup>21</sup> See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

<sup>22</sup> WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS 21 (1995) (quoting DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 15 (1981)).

neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>23</sup>

But plainly visible at his feet are his white supremacist and anti-Asian views. His white supremacy is apparent in the words immediately preceding his dissent for the ages:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.<sup>24</sup>

We see then that given the natural dominance of the white race (made possible by the Founders' submerged constitution that enabled slavery<sup>25</sup>), it need

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<sup>23</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>24</sup> *Id.* (Harlan, J., dissenting).

<sup>25</sup> Derrick Bell's heroine Geneva Crenshaw tells the Founders at the Constitutional Convention, "Despite your resort to euphemisms like *persons* to keep out of the Constitution such words as *slave* and *slavery*, you cannot evade the consequences of the ten different provisions you have placed in the Constitution for the purpose of protecting property in slaves." DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 34-35 (1987). These ten provisions are:

1. Article I, Section 2: representatives in the House were apportioned among the states on the basis of population, computed by counting all free persons and three-fifths of the slaves (the "federal number," or "three-fifths," clause);
2. Article I, Section 2, and Article I, Section 9: two clauses requiring, redundantly, that direct taxes (including capitations) be apportioned among the states on the foregoing basis, the purpose being to prevent Congress from laying a head tax on slaves to encourage their emancipation;
3. Article I, Section 9: Congress was prohibited from abolishing the international slave trade to the United States before 1808;
4. Article IV, Section 2: the states were prohibited from emancipating fugitive slaves, who were to be returned on demand of the master;
5. Article I, Section 8: Congress empowered to provide for calling up the states' militias to suppress insurrections, including slave uprisings;
6. Article IV, Section 4: the federal government was obliged to protect the states against domestic violence, including slave insurrections;
7. Article V: the provisions of Article I, Section 9, clauses 1 and 4 (pertaining to the slave trade and direct taxes) were made unamendable;
8. Article I, Section 9, and Article I, Section 10: these two clauses prohibited

not resort to statutes such as the one in Louisiana that unnaturally (or unnecessarily) degrades or debases the negro race. This is especially the case when that same statute, through its silence, permits Chinese persons to sit with whites in railway cars. Harlan expressed his disapproval in a later part of the opinion:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana [cannot].<sup>26</sup>

That citizens of the black race cannot, while non-citizen Chinese can, seems absurd to Harlan, especially when some of these black citizens might have "risked their lives for the preservation of the Union"<sup>27</sup> and because if it were up to him, persons of Chinese ancestry born in the United States would be denied citizenship.<sup>28</sup>

The overtones of white supremacy and anti-Asian animus, which are clearly stated in a full reading of the opinion, are left out of most of the edited versions that we teach our law students.<sup>29</sup> This editing may explain why this generation of Justices and law clerks does not have a good handle on what the *Plessy* dissent means.

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the federal government and the states from taxing exports, one purpose being to prevent them from taxing slavery indirectly by taxing the exported products of slave labor.

*Id.* (quoting WILLIAM WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848*, at 62-63 (1977)).

<sup>26</sup> *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

<sup>27</sup> *Id.* (Harlan, J., dissenting).

<sup>28</sup> See *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, C.J., dissenting, joined by Harlan, J.) ("It is not to be admitted that the children of [Chinese] persons so situated become citizens by the accident of birth."). Despite what most commentators have stated, Harlan voted in a fairly consistent fashion against the rights of Chinese immigrants and Chinese Americans. See Chin, *supra* note 21. A notable exception was *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>29</sup> See Chin, *supra* note 21. Professor Chin notes that almost all casebooks exclude this language, one exception being a book that is not normally used in constitutional law classes. See *id.* (the notable exception being *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* (Leslie Bender & Daan Braveman eds., 1995)).

Similarly, a court has to be somewhat clueless<sup>30</sup> to cite, in an opinion like *Romer*, in an unselfconscious manner, the *Civil Rights Cases* for the proposition that "the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations."<sup>31</sup> A more accurate constitutional history would acknowledge that the Court's jurisprudence, particularly in *Heart of Atlanta v. United States*,<sup>32</sup> calls this understanding into question.<sup>33</sup>

However, the education of Supreme Court law clerks, who are almost always recent law school graduates from elite institutions, may explain why the *Romer* majority is able to accept the plaintiffs' description of themselves as gay and lesbian and reject the defendants' attribution of the plaintiffs as conduct-laden homosexuals.<sup>34</sup> Law teachers, partially in response to the demands of gay and lesbian students, have begun to speak of the unspeakable and help students and future law clerks understand issues like sodomy and gay/lesbian/bisexual rights. This has been true particularly at places like Yale, Columbia, Harvard, and Stanford where Janet Halley, Kendall Thomas, Harlon Dalton, and Ken Karst, among others, have helped to alter the nature of the assumptions students make about sexual orientation. While much work remains to be done in educating future practitioners, professors, judges, and justices with regard to sexual orientation, it remains an unfortunate failing of legal education that it has not taught a fuller and more accurate picture of race. The clearest way to understand the unfortunate consequences of this deficiency in what we teach about race is to understand the Court's use of race in the heart of its opinion about "special rights."

"Special rights" is always a code word for the racialization of equal protection. The *Romer* majority rejects the application of "special rights" as applying to the claims of gays, lesbians, and bisexuals, but the Court does not address or explain how its "special rights" discourse applies to racial issues, other than through a cryptic reference to the *Civil Rights Cases*. After all, the assumption of "special rights" is at the heart of the O'Connor Court,<sup>35</sup> and its misguided ahistorical path is what makes our racial juris-

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<sup>30</sup> A less generous reading is disingenuousness.

<sup>31</sup> *Romer*, 116 S. Ct. at 1625 (citing *The Civil Rights Cases*, 109 U.S. 3, 25 (1883)).

<sup>32</sup> 379 U.S. 241 (1964).

<sup>33</sup> See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 123-36 (1992).

<sup>34</sup> See generally Hughes, *supra* note 17. Hughes comments that in *Hardwick*, the legal identity of gays and lesbians, at least as articulated by the Court's opinion, included nothing but the ability to commit sodomy and eliminated any identity with family or community. . . . By linking identity with a sexual activity, the Court dehumanized and depersonalized gay men and lesbians by removing all other aspects of personal and social identity.

*Id.* at 171.

<sup>35</sup> For a discussion of O'Connor's influence on the Court, see Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or,*

prudence so nonsensical.<sup>36</sup> If the Court believes what it says in *Romer*, that antidiscrimination legislation protecting gays, lesbians, and bisexuals does not grant special rights (contrasted with the unstated special rights that minorities receive), then the majority ought to be able to say, "Proposition 209 classifies racial minorities not to further a proper legislative end but to continue to allow them to be unequal to everyone else." After all, if racial minorities do receive special rights and really are the "special favorites" of the law, then the Court should treat us as such. That the Court has not said this and is unlikely to say this in the near future suggests that the Court has bought into the notion that is at the heart of the special rights argument.

Those who advance a special rights argument seem to believe that the Equal Protection Clause provides special rights to racial minorities. An early form of these special rights took the form of strict scrutiny based on footnote 4 of *Carolene Products*,<sup>37</sup> which suggested that legislation affecting a discrete and insular minority may merit a more searching scrutiny.<sup>38</sup> Racial minorities, as discrete and insular minorities, are vulnerable to the tyranny of the majority and therefore required special protections. This more searching judicial inquiry took the form of strict scrutiny when racial classifications were used, although we find it ironic that this special protection was granted in *Korematsu v. United States*,<sup>39</sup> one of the cases that upheld the

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*How Not to Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994).

<sup>36</sup> Compare the different histories in O'Connor's plurality opinion with Marshall's dissent in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See also Peter C. Hoffer, "Blind to History": *The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 271 (1992); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

A similar sort of ahistoricity makes possible the *Hopwood* decision. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). The appellate court rejected the history contained in the district court opinion, *Hopwood v. Texas*, 861 F. Supp. 551, 554-57 (W.D. Tex. 1994), and substituted its own story of a law school that has not had de jure segregation since 1950 as a result of *Sweatt v. Painter*, 339 U.S. 629 (1950), and where "[a]ny other discrimination by the law school ended in the 1960s." *Hopwood*, 78 F.3d at 953. Within this narrow time frame, "there will never be any present-day effects of a law school's past discrimination on present-day minority applicants, especially as we move further, temporally, from de jure segregation." Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that Is America*, 23 HASTINGS CONST. L.Q. 1115, 1119 (1996).

<sup>37</sup> *Carolene Prods. v. United States*, 304 U.S. 144 (1938). The relevant portion of footnote 4 states that the Court had to decide "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 153 n.4.

<sup>38</sup> See *id.*

<sup>39</sup> 323 U.S. 214 (1944).

exclusion and internment of Japanese Americans.<sup>40</sup> Note, though, that “special protections” does not mean the same thing as “special rights.” Further, the special protection provided by strict scrutiny, like the Founders’ constitution and Harlan’s dissent in *Plessy*, was race-neutral.

This race neutrality is evident in recent Supreme Court decisions in which most of the successful plaintiffs who have benefitted from the special protection provided by strict scrutiny have been white.<sup>41</sup> This shows that the Court’s understanding of the Fourteenth Amendment has come a long way since Justice Miller’s pronouncement in the *Slaughter-House Cases*:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.<sup>42</sup>

The fact that the recent Supreme Court cases are so far afield from Justice Miller’s understanding of the Fourteenth Amendment can again be attributed to the doubleness of the Constitution, including that amendment. If the Fourteenth Amendment had been race-specific, it would have been an acknowledgment of what cannot be acknowledged. And that which is not acknowledged can eventually be forgotten or erased.<sup>43</sup>

As a result, even though the special protections provided by the Fourteenth Amendment are race-neutral, special rights in the imagination of white Americans are not. Special rights reside in the bodies of people of color and in this sense means rights that white Americans do not have. This contradicts the mythic idea of a color-blind constitution that knows no caste and makes no distinctions based on race. “Special rights,” then, such as may be found in affirmative action or provisions in the Voting Rights Act, must be constitutionally offensive. Under this view, whiteness has become a prop-

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<sup>40</sup> The other cases that upheld various measures enforcing exclusion and internment of Japanese Americans were *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Yasui v. United States*, 320 U.S. 115 (1943).

<sup>41</sup> See, e.g., *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>42</sup> The *Slaughter-House Cases*, 83 U.S. 36, 81 (1873).

<sup>43</sup> This may explain why the task of recovery is so important in critical race theory, whether it takes the form of narrativizing the experiences of persons of color or the form of critical legal historiography. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992).

erty right which is improperly trammled upon by all those special rights that minorities receive.<sup>44</sup> Constitutional benefit or remedy for racial minorities is reread as constitutional harm to whites. This ethnocentric assumption is now the dominant interpretation of the Fourteenth Amendment.<sup>45</sup> Examining the way that the Court in *Romer* does (not) deal with race will help us to understand what the Court did and did not do in *Romer* and what its implications are for racial and sexual minorities.

## II. NOTHING AND EVERYTHING

If we are correct and *Romer* is quintessentially always a race case, the first question that has to be answered is how the majority in *Romer* was able to ignore the racial implications. There are two ways that this is accomplished. First, the Court accepts in at least three places ahistorical interpretations of our constitutional history that helps to read race out of the discourse. The Court's interpretation of *Plessy*, the *Civil Rights Cases*, and public accommodations law sets up the principle of neutrality that allows for the recognition of race and sexuality but which ultimately erases them. Second, the majority does not understand—or cannot deal with—the fact that special rights is always and everywhere about race. That the religious right understands this can be seen in its attempt to persuade traditional civil rights communities that gays and lesbians sought special rights in a way that co-opted and demeaned traditional civil rights efforts.<sup>46</sup>

In *Romer*, Justice Kennedy begins his discussion of the interaction of antidiscrimination statutes and equal protection with this strange quote:

“At common law, innkeepers, smiths, and others who ‘made profession of a public employment,’ were prohibited from

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<sup>44</sup> See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

<sup>45</sup> See *supra* note 41 (citing *Croson*, *Adarand*, *Jenkins*, and *Shaw*).

<sup>46</sup> For an excellent discussion of the way “special rights” was used in the campaign in Colorado for Amendment 2, see Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and “The Civil Rights Agenda,”* 1 AFR.-AM. L. & POL’Y REP. 33, 45-52 (1994). The main premises of that campaign were:

(1) that declaring one’s minority sexual orientation, unlike acknowledging one’s minority race, was a conscious choice to behave in a stigmatized manner (after all, one “couldn’t do anything about” being African-American or Latino); (2) that the putative “civil right” protected by the inclusion of “sexual orientation” in antidiscrimination laws was actually the right to engage in “deviant” sexual relations; and (3) that such behavior constituted not an “equal right” in the sense in which traditional antidiscrimination laws had been crafted, but rather an unwarranted “special right” to “flaunt” an unconventional lifestyle.

*Id.* at 45-46.

refusing, without good reason, to serve a customer.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. [557], [570], 115 S. Ct. 2338, 2346, 132 L. Ed. 2d 487 (1995). The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations, [The] *Civil Rights Cases*, 109 U.S. 3, 25, 3 S. Ct. 18, 31-32, 27 L. Ed. 835 (1883).<sup>47</sup>

One might have thought that this was exactly the place to introduce and compare the racial circumstances or, at a minimum, to say how gay and lesbian issues are different in kind from those raised by race and gender. Instead, the *Romer* Court accepts the history of public accommodations accepted by the majority in the *Civil Rights Cases*. This view of the role of public accommodations has clearly been called into question by the Court’s opinion in *Heart of Atlanta Motel v. United States*.<sup>48</sup> In that case, the Court upheld Title II of the 1964 Civil Rights Act based upon Congress’s power under the Commerce Clause. However, Justice Clark noted that Congress had also based its power to enact this legislation on Section 5 of the Equal Protection Clause of the Fourteenth Amendment. Justice Clark said, “This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.”<sup>49</sup> Justice Clark went on to explain that the *Civil Rights Cases* were not implicated by this commerce power because the Commerce Clause had not been considered by the Court in the *Civil Rights Cases*. It is not clear, though, whether the basic point in the *Civil Rights Cases* that the Fourteenth Amendment does not give Congress the power to regulate private concerns is still good law. What is clear is that the history adopted by the Court in 1883 and acknowledged by the Court in *Romer* is wrong. As Joseph Singer has noted, a more accurate history of the pre-Fourteenth Amendment common law regarding public accommodations would have concluded that

[o]nly after the Civil War did the law in the United States clearly authorize most businesses to choose their customers at will. This occurred only after African-Americans were granted civil rights. Reversing the presumption of access and substituting a right to exclude served to limit these newfound

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<sup>47</sup> *Romer*, 116 S. Ct. at 1625.

<sup>48</sup> 379 U.S. 241 (1964).

<sup>49</sup> *Id.* at 250.

civil rights. Only after the issue of public access became thoroughly enmeshed in the issue of racial segregation did the current common-law rule obtain its present form.<sup>50</sup>

Although this history of public accommodations is buried within the Supreme Court's jurisprudence, the Court has the power to reject the racist development of the common law with regard to public accommodations. With respect to cases like the *Civil Rights Cases*, it is important for the Court to do so. If the *Romer* Court had rejected the racist development of the common law regarding public accommodations, the Court could have made the argument that the original common law rule, changed originally for racist reasons, should apply to gays, lesbians, and bisexuals. But because race has nothing to do with the rights created for gays and lesbians (or for women), the Court is lost in separate fields of analysis.<sup>51</sup> If the Court is to make the Fourteenth Amendment live up to its potential to be the harbinger of equality, it has the burden of understanding how race is involved when public accommodations are implicated.

Goaded by our two-hundred-year history of being unable to deal with race, contemporary America does not know when it can acknowledge race or racism. Charles Lawrence likens America's inability to deal with race to a dysfunctional family's denial of its secret shame:

In dysfunctional families, where there is alcoholism, abuse, or incest, children and other family members learn that they are not to speak of this behavior to others. Often the behavior is not even spoken of within the family. These taboos may be enforced by threat of further abuse, but they are also enforced by fear of loss of love, or guilt, or a diminished self-worth that leads the child to think he deserves the abuse, or to the child's participation in the denial. Analogous mechanisms serve to enforce the taboo against speaking candidly about what we see and know about racism.<sup>52</sup>

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<sup>50</sup> Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1344-45 (1996).

<sup>51</sup> Kimberle Crenshaw makes this point about the inability of courts to deal with race and gender simultaneously in *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Angela Harris makes this point in the context of feminist legal theory in *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>52</sup> Lawrence, *supra* note 20, at 9. The public debate surrounding the proposed official governmental apology for slavery presents just one more example of the feathers that get ruffled when accountability for slavery is raised. See Richard Matthews, Editorial, *Slavery Apology Dead: The Race Issue Is Still Too Big for Most of Us*, ATLANTA

It is clear that, for many, to document racism is to improperly raise the issue of race. Otherwise, it is hard to make sense of commentators criticizing Nike for pointing out in an advertisement that there are still golf courses that will not allow Tiger Woods to play because of his race,<sup>53</sup> or commentators who criticize John Hope Franklin, as chair of the Clinton advisory board on race, for stating that “[r]acism pervaded American life,”<sup>54</sup> and board member Angela Oh for stating that “the panel should not waste its time documenting the extent of discrimination because it was so widespread.”<sup>55</sup> The Supreme Court seems to suffer from this same inability to deal with race.

Race is the unseen presence in the understanding of public accommodations, and race is the unseen presence in the argument advanced by the defendants in *Romer*. The notion that the role of civil rights law is to create “special rights” is a product of our jurisprudence on race. The Burger and Rehnquist Courts have encouraged the general population to believe that civil rights for racial minorities are special rights and that laws like the 1964 Civil Rights Act somehow created something for black people and other people of color that does not exist for white people.<sup>56</sup> The most interesting aspect of this special rights discussion in *Romer* is the Court’s unreflective citation of the *Civil Rights Cases*. It is in the *Civil Rights Cases* that the Court for the first time makes a claim that black civil rights might make black people the special favorites of the law.

In the *Civil Rights Cases*, Justice Bradley suggests that the whole legal product of the Reconstruction Era created some special status for former slaves. He wrote:

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J. & ATLANTA CONST., Aug. 7, 1997, at A22.

<sup>53</sup> See Denise Gellene, *Five ‘30-Second Movies’ Rate Emmy Nods*, L.A. TIMES, July 25, 1997, at D3 (quoting Bob Garfield of *Advertising Age* who “accused Nike of ‘playing the race card’ to generate athletic-shoe sales from black customers”).

<sup>54</sup> Ronald Brownstein, *Clinton Seeks Dialogue on Race, But He Must Go Beyond Same Old Talk*, L.A. TIMES, July 21, 1997, at A5 (paraphrasing John Hope Franklin who said: “Our whole country, our whole practices are suffused with [racism]. Hardly an aspect of American life has escaped the baneful touch of this awful thing called racism. . . . Wherever you go, you are going to see this.”).

<sup>55</sup> *Id.* (paraphrasing Angela Oh who said: “I don’t need the data. I don’t think any of us need the data; we know it’s there.”).

<sup>56</sup> This understanding has permitted the creation of the discursive formation known as the “innocent white male” and has given force to charges of reverse racism. It allows whites to occupy a position of innocence. See DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* 14 (1994) (“The destructive term ‘reverse racism’ grows out of this assurance among whites that they have transcended race.”).

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. . . . *When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.*<sup>57</sup>

This interpretation of history is strange. None of the civil rights legislation had adopted the strategy of being just about black people. The civil rights legislation and constitutional amendments produced by the Civil War were, in the words of Andrew Kull,<sup>58</sup> race-blind. All of this legislation adopted the least intrusive method of invading the private concerns of government and private parties and limited those actions insofar as they were based upon the improper use of race or racial classifications. However, these race-conscious statutes and constitutional amendments were not race-specific—none of these laws or amendments were just about black people.<sup>59</sup> These laws provided protection for all people, including white people who have a race, notwithstanding Justice Miller's earlier pronouncement in the *Slaughter-House Cases*.<sup>60</sup> When Justice Bradley spoke of there having to

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<sup>57</sup> The Civil Rights Cases, 109 U.S. 3, 24-25 (1883) (emphasis added).

<sup>58</sup> ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

<sup>59</sup> These race-conscious but not race-specific statutes and constitutional amendments were a continuation of the double project begun by the Founders. The race-conscious but race-neutral language was meant for the ages. *See supra* text accompanying notes 22-24.

<sup>60</sup> *See supra* text accompanying note 42 (quoting Miller). The full logic of this is evident in the recent equal protection challenges brought by white plaintiffs against minority set-asides in government contracting, against minority voting districts, and against school desegregation plans. *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding the city's plan to require prime contractors awarded city contracts to subcontract at least 30% of the dollar amount to "Minority Business Enterprises" a violation of equal protection); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that any action taken by federal, local, or state government to advantage minority contractors will be analyzed under a strict scrutiny standard); Miller v. Johnson, 515 U.S. 900 (1995) (holding Georgia's minority redistricting plan a violation of equal protection); Shaw v. Hunt, 116 S. Ct. 1894 (1996) (holding North Carolina's minority redistricting plan a violation of equal protection); Missouri v. Jenkins, 515 U.S. 70 (1995) (holding a school desegregation plan unconstitutional); *see also* Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the*

be some point when former slaves cease being the special favorites of the law, it is hard to understand what he could have meant. The only interpretation that makes sense is that Justice Bradley believed that the majority of the country that sees itself as "white" does not have a race and therefore is not protected by the civil rights legislation. We believe that if Justice Bradley were to stand before us today, he might make the argument, not that he had no race, but rather a variant on the argument made by Justice Miller in 1873 and Justice Scalia today that these amendments were just about black people.<sup>61</sup> Neither argument makes much sense.<sup>62</sup> After all, even Justice Harlan in his famous dissent in *Plessy* spoke proudly of the power and future of the white race. Everyone who grew up in nineteenth-century America understood the power of race in America. President Theodore Roosevelt's invitation to Booker T. Washington a generation later could still produce a negative national response. White people did not believe that black people were their intellectual, social, or moral equals. Even progressive movements often demonstrated the indifference to people of color, reflected in their failure to include them.<sup>63</sup> Race mattered, and so the argument that somehow the Court could not see the consequences of its actions on the lives of the nonwhite citizens of the country seems particularly absurd.

Justice Bradley seems to be arguing that, because we freed black slaves from slavery, "what more can you ask of us." Black people for Justice Bradley were exactly like the gay/lesbian/bisexual people that the *Romer* Court found were simply seeking the rights held by others under our Constitution. In 1883 in the *Civil Rights Cases*, the Court was unwilling or

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*Reconstruction of Racial Reality*, 84 CAL. L. REV. 377 (1996).

<sup>61</sup> Scalia's views are consistent with Justice Miller's. *Compare* *The Slaughter-House Cases*, 83 U.S. 36 (1873), with *Adarand*, 515 U.S. 200 (1995).

<sup>62</sup> It is not just our modern view of this language. See Harlan's dissent in the *Civil Rights Cases*:

The terms of the thirteenth amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States. No race, as such, can be excluded from the benefits or rights thereby conferred. Yet it is historically true that that amendment was suggested by the condition, in this country, of that race which had been declared by this court to have had, according to the opinion entertained by the most civilized portion of the white race at the time of the adoption of the constitution, "no rights which the white man was bound to respect," none of the privileges or immunities secured by that instrument to citizens of the United States.

109 U.S. at 33 (Harlan, J., dissenting).

<sup>63</sup> For example, participants in the feminist movement refused to allow black women to participate in some suffrage efforts and tried to silence black women speakers at some gatherings. This frustration is expressed very powerfully in the anthology, *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* (Cherrie Moraga & Gloria Anzaldua eds., 2d ed., 1983).

unable to reject the white supremacy inherent in the formulation of rights. The *Romer* Court, to its credit, was able to see through the special rights argument. In wanting to be free from discrimination in public accommodations and employment, black people were not seeking special rights in 1883. Nor are blacks and other racial minorities seeking special rights in 1997. If the *Romer* Court had an appropriate understanding of constitutional history, it would have overruled the *Civil Rights Cases* on this very point and would have adopted the language of Justice Harlan's dissent in that case:

It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more. The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens.<sup>64</sup>

The power of the Court's opinion in *Romer* would have been enhanced if the Court had been willing to put the special rights debate into a better moral and political framework that acknowledged the power of race to distort the truth.

In this sense, being a sexual minority is very much like being a racial minority. It is another form of the Other that is excluded from constitutional discourse. This point is central to the Court's discourse on gays, lesbians, and bisexuals, but to use it out of context is to do a great disservice to this history. Race is nothing to the *Romer* Court precisely because to see race, the Court must acknowledge and reject some aspect of its racist past. But one cannot reject something that is not acknowledged.<sup>65</sup> Again, the doubleness of the Founders' constitution comes back to haunt us.

One cannot rely on the *Civil Rights Cases* and the *Plessy* dissent and reject the notion of special rights for racial minorities. The early racial history of the Court is built on exactly that foundation. If the Court were to reject the language of special rights introduced by the religious right into the debate about the rights of gays and lesbians, then race has to be nothing in our constitutional discourse about special rights.

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<sup>64</sup> The *Civil Rights Cases*, 109 U.S. at 61 (Harlan, J., dissenting).

<sup>65</sup> Cf. Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, in "RACE," WRITING, AND DIFFERENCE 317, 323 (Henry L. Gates, Jr. ed., 1986) ("Difference . . . must be represented in order to be erased.").

## III. EVERYTHING AND NOTHING

Identity is the unwanted guest at the constitutional dinner table. Somehow, more and more people kept coming to the constitutional door and demanding entrance. The Court's response has been to invite them in but set them at different tables. Racial groups have been put at the table for children in the other room with the stern, slightly deaf aunt keeping order with a simple paddle called strict scrutiny; gender has been placed at the young adult table in the main room but at a slightly lower elevation and without the grownup choices. People without identity concerns are allowed to sit with the grownups at the big table in the main dining room and to use all of the choices that are available to the real grownups. Unlike the teenagers or the children, they are allowed to abuse and satiate themselves with whatever strikes their fancy. If they want a congressional district which protects tobacco interests, that is "rational" and is permitted among grownups; but it is not permitted for those seated at the children's table to form such desires, and a watchful eye is kept on the gender table in the same room. If those at the children's table are to ever get to the grownup table, they have to leave their identity behind. Only if they come to the door without identity can they be allowed all the choices given other people. The Court has never said precisely what this might mean because it has no possible intelligible meaning. For gays, lesbians, and bisexuals, it was exactly this ambiguity that permitted them to get to the grownup table. *Romer* permitted rational basis because it treated the plaintiffs as persons whose sexual orientations were peripheral to their identity as persons. But what can this mean?

The problem for the Court with this constitutional picture is that it is a thin and nonsensical interpretation of identity even in terms that the Court wants to apply. What does Justice O'Connor mean when she suggests that the five white plaintiffs in *Shaw v. Reno* did not claim a racial identity:

In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally "diluted" white voting strength. *They did not even claim to be white.* Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a "color-blind" electoral process.<sup>66</sup>

Is Justice O'Connor claiming that these individuals do not have an identity, or that their claim transcends their identity? Justice O'Connor would like the

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<sup>66</sup> *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993) (emphasis added).

answer to be the latter, in line with the consistent trend to ignore the racial crimes that form the corpus of United States history by declaring victory and going home.<sup>67</sup> Unfortunately for the Court, it is hard to create a color-blind process without first acknowledging how to be blind to people's identities.<sup>68</sup> If the five white plaintiffs are able to shuck their racial identity and come to the Court racially naked, then nothing else needs to be done about race. Race by definition has been eliminated from their claim, and all that is left is to remove race from those who have kept their racial identity intact.

The problem with this formulation of racial identity is that it does not require any change in the status quo. The five white plaintiffs in *Shaw v. Reno* gave up nothing to be without racial identity, and the state political<sup>69</sup> and economic system has not been altered by their decision to forgo their race. The use of identity that permits these plaintiffs to come to the table and demand rights is their decision to leave the racial status quo unchanged by their denial of identity. What does identity mean to Justice O'Connor in this context? For her and a majority of the Court, it is simply an act of will and positioning with no real meaning. For the black citizens of North Carolina, being black is always and everywhere meaningful in how they are treated by public officials and what they will earn. The O'Connor Court has found that societal discrimination cannot produce race-based actions. Yet, for the black people of North Carolina, the societal discrimination that leaves them poorer and with less political power is very real. Constitutionally, they cannot afford to arrive racially naked at the equal protection banquet. If the Court were willing to look behind the rationale for the concern by the plaintiffs in the voting district cases, it would find that they are at least partially driven by concerns about being placed in districts that are seen as black.<sup>70</sup> A harder look might even reveal that the plaintiffs were

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<sup>67</sup> This trend simply repeats what Bradley did in the *Civil Rights Cases* when he declared victory (the slaves were freed!) and that nothing more need be done.

<sup>68</sup> In order to say that you did not take race into account, you must first acknowledge that a racial category is implicated before saying that it did not influence your decision. This is precisely Neil Gotanda's nonrecognition thesis. See Gotanda, *supra* note 15.

<sup>69</sup> George Will and a number of other conservative commentators have argued that the 1996 congressional elections vindicated the Supreme Court's jurisprudence regarding race because the black incumbents who ran for reelection in southern congressional districts reapportioned under the Court's opinions won. See George F. Will, *Good News? Don't Want to Hear About It*, WASH. POST, Nov. 28, 1996, at A31. This claim is off-base for three reasons. First, some of these incumbents would have lost if the top of the ticket had been closer in these districts. In fact, President Clinton's reelection as a quasi-Republican centrist helped protect some of these incumbents. Second, these congressmen and women were running as incumbents and not seeking open seats. Part of their ability to win reelection stemmed from the incumbency factor and because none of them were challenged by serious white opposition in primaries. Third, it has yet to be proved that the 1996 election results are sustainable over a long period of time.

<sup>70</sup> This is reminiscent of the fear of guilt by association that permitted tort claims to

concerned that they might be represented by a black person, someone who might not “represent” their (non-racialized) interests.<sup>71</sup> If the Court is going to find that someone has given up identity, it needs to inquire further.

Also, it might be said that the white plaintiffs, in not claiming any racial position, have not given up anything. Insofar as whiteness is the norm or universal position, it becomes invisible.<sup>72</sup> Thus, for racial minorities to give up a racial identity, we must accept the universal. We must become (virtually) normal—we must become white.

The point, in short, is that the Court has an unquenchable hankering for a world in which racial identity doesn’t exist. This cry for removing identity shows up in cases from *Wygant*<sup>73</sup> to *Adarand*,<sup>74</sup> but it has no depth or meaning because the Court does not have a working definition of identity. This is clear from the Court’s discussion of racial and gender identity in the *V.M.I.* case.<sup>75</sup> Justice Ginsburg said:

Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia*, 388 U.S. 1 (1967). Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” *Ballard v. United States*, 329 U.S. 187, 193 (1946). Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” *Califano v. Webster*, 430 U.S.

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be brought by white persons who were named in newspaper articles if the mention of their names was close to a picture of a black person. See Anthony Farley, Panel Presentation, 1995 Western Law Teachers of Color Conference, San Diego, California.

<sup>71</sup> That a white representative might not “represent” black constituents is simply the product of neutral majoritarian democracy and is not problematic under traditional constitutional analysis.

<sup>72</sup> See Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); see also STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (with contributions by Margalynne Armstrong, Adrienne D. Davis, & Trina Grillo).

<sup>73</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

<sup>74</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>75</sup> *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding that the exclusion of females by the Commonwealth from a citizen-soldier program at a Virginia military college was a violation of equal protection).

313, 320 (1977) (per curiam), to "promot[e] equal employment opportunity," see *California Federal Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987), to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, see *Goesaert*, 335 U.S., at 467, to create or perpetuate the legal, social, and economic inferiority of women.<sup>76</sup>

This is an extremely interesting description of racial and gender identity and the relationship between them. Justice Ginsburg starts by claiming that there are no inherent differences that are constitutionally cognizable among the races and cites to *Loving*, a case about the use of racial classifications to regulate marriage.<sup>77</sup> Racial identity from a constitutional perspective is not about differences.<sup>78</sup> Justice Ginsburg describes gender identity as being about differences that we appreciate.<sup>79</sup> From this, we might surmise that any differences that exist among the races are not the kind we are to appreciate.<sup>80</sup> This formulation makes racial and gender identity and classifications unrelated to each other.

We can appreciate that gender identity, as it has been constructed with appreciable differences, may create the need for classifications to promote equal employment opportunity for women, but the erasure of identity means that for blacks and other racial minorities, the appreciation stops. When a

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<sup>76</sup> *Id.* at 2276.

<sup>77</sup> *Loving v. Virginia*, 388 U.S. 1 (1967). It is interesting that the Court in *Romer* also cites to a miscegenation case, the precursor to *Loving*. See *Romer*, 116 S. Ct. at 1626 (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)). This citation to *McLaughlin* is an interesting one, given that there are earlier cases available for the proposition that race merits heightened scrutiny. *McLaughlin*, in addition to being about race, is also about sex. It is one of the few times that sex makes its way into the *Romer* majority opinion. See Hughes, *supra* note 17, at 172.

<sup>78</sup> By not recognizing differences, the Court essentially is legislating racial sameness. This is part of the classic dialectic of reaction to prejudice. Anthony Appiah notes: The thesis in this dialectic—which Du Bois reports as the American Negro's attempt to "minimize race distinctions"—is the denial of difference. Du Bois's antithesis is the acceptance of difference, along with a claim that each group has its part to play.

Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE, *supra* note 65, at 21, 25.

<sup>79</sup> Justice Ginsburg has accepted what Appiah terms the classic dialectic in feminism: "[O]n the one hand, a simple claim to equality, a denial of substantial difference; on the other, a claim to a special message, revaluing the feminine Other not as the helpmeet of sexism, but as the New Woman." *Id.* at 25.

<sup>80</sup> Does this appreciation of differences bode ill for the forthcoming constitutional challenge by gays and lesbians to marriage laws? One interpretation of it would suggest that it does.

Latina/o, Asian, or black person is stopped at the border and harassed differently than a white person, the lack of appreciation feels very real.<sup>81</sup>

The Court's formulation of identity, with racial identity as artificial and gender identity as real, is nonsensical from a theoretical and practical perspective.<sup>82</sup> The Court's acceptance of this formulation leaves race out of the picture. It is not real and therefore can be ignored. Sort of.

Courts like to have it both ways. Racial identity is both fixed and fluid. It is fixed when the court in *Podberesky v. Kirwan*<sup>83</sup> described Daniel Podberesky as Hispanic. *Podberesky* is a Fourth Circuit case involving the successful challenge of a scholarship program adopted by the University of Maryland to provide scholarships to African Americans. Because Hispanic is not a racial description<sup>84</sup> and because Podberesky's father is a non-Hispanic white Jewish lawyer with the Department of Transportation in Washington, D.C., and his mother was born in Ecuador,<sup>85</sup> one might ask what Hispanic means in this context. We do not mean to denigrate his Hispanic bona fides, but the court does not require anything and then makes a racial classification out of the claim to say that Maryland is excluding nonwhite persons such as Daniel Podberesky.<sup>86</sup> From the known facts, Podberesky is at least

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<sup>81</sup> See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination (Part I)*, 85 CAL. L. REV., 10 LA RAZA L.J. (forthcoming 1997); Ibrahim Gassama, et al., *Foreword: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. (forthcoming 1997); see generally Symposium, *Citizenship and Its Discontents*, 76 OR. L. REV. (forthcoming 1997).

<sup>82</sup> Although we disagree with the Court's treatment of race as artificial and therefore ignorable, we believe that race is socially constructed. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994). The fact that race is socially constructed does not in any way make it less "real."

<sup>83</sup> 46 F.3d 5 (4th Cir. 1994), cert. denied, 514 U.S. 1128 (1995).

<sup>84</sup> See Bureau of the Census, Official 1990 U.S. Census Form (1990). See generally Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Luis Angel Toro, "A People Distinct from Others": *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH. L. REV. 1219, 1225-26 (1995); Kenneth Payson, Comment, *Check One Box: Directive No. 15, and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1241 (1996).

<sup>85</sup> The opinion does not refer to the race of Daniel Podberesky's mother which, of course, could be white. Although it is possible that she is Black or Asian, this is unlikely; otherwise, the court would have described Daniel differently.

<sup>86</sup> Podberesky's ambiguous racial identity distinguishes this from traditional reverse racism claims brought by white plaintiffs as in the *Hopwood* case. In this sense, Podberesky's situation is similar to the Lowell High School controversy where a group of Chinese American plaintiffs challenged a desegregation consent decree at a selective public high school in San Francisco. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (N.D. Cal. 1997). For discussions of the legal and political ramifications of that controversy, see Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black*

half white and could be completely white depending on what definition of race we use. However, the court, for the purpose of questioning the University of Maryland and the state of Maryland's decision to continue funding the Banneker Scholarship, treats Podberesky simply as a Hispanic and uses that description to mean nonwhite.

However, when the court looked to see whether the actions of the program met the narrow tailoring of strict scrutiny, the court found that the district court erred in not taking account of the fact that African Americans outside Maryland and at least one Jamaican were given Banneker Scholarships. Racial identity does not extend outside the state boundaries presumably because the injuries caused by past discrimination by the University of Maryland do not.

This seems wrong. The racial discrimination by the University of Maryland clearly was not limited to people in the state. One suspects that the Fourth Circuit would have criticized the university if it did or did not admit people from outside the state. To the Fourth Circuit, race means what they say it does in these contexts. This is clearest in the court's discussion of the remedy it would provide for Mr. Podberesky. In the last footnote of the case the court said, "Podberesky, also, has not asked for relief against any other student who has been awarded a Banneker scholarship prior to this decision; therefore, this decision has no effect on such students."<sup>87</sup> In this footnote, the Fourth Circuit may have been attempting to assuage concerns of plaintiffs, but it seems an odd point to make. No one has ever thought of getting back scholarships or degrees from white students who were the beneficiaries of segregation before recent relief.<sup>88</sup> The court seems to suggest that race,

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*and White Anymore*, 47 STAN. L. REV. 957, 971-72 (1995); Selena Dong, Note, "Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action, 47 STAN. L. REV. 1027 (1995).

<sup>87</sup> *Podberesky*, 46 F.3d 5, 6 (4th Cir. 1994) (rewriting the footnote on page 162 of the original opinion to avoid possible ambiguity).

<sup>88</sup> This point applies more broadly to quite a number of beneficiaries of racial discrimination. For example, when white workers with seniority were laid off ahead of recently hired racial minorities, they successfully challenged the layoffs. Even though they had gotten the jobs and accrued seniority in part through the racial discrimination that prevented competition from racial minorities, this ill-gotten, undeserved benefit became part of their settled expectations that were off limits for affirmative action hirings and firings. See Harris, *Whiteness as Property*, *supra* note 44, at 1776.

This raises the broader question of what sort of reparations, if any, are ever appropriate for past discrimination. See Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993). The lack of reparations for blacks may be contrasted with the redress obtained by Japanese Americans for their internment during World War II. See generally LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* (1993). These questions have gained renewed prominence with the debate in Con-

when used for Banneker Scholarships, forever marks those recipients as the beneficiaries of this racialized system and that if Podberesky had asked, it would have withdrawn those rewards. From this, we see that race as identity is whatever the court wants it to be.

This confusion is also clear in the Supreme Court's opinion in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*.<sup>89</sup> In *Hurley*, the issue was whether Massachusetts public accommodations law required the parade organizers of the St. Patrick's Day parade to permit a gay, lesbian, and bisexual group to be included in the parade. The Court concluded that it cannot require this because the parade belongs to its organizers, and they have a right to control the expression included in the parade. This Article will not address whether that conclusion is a reasonable or accurate portrayal of what the St. Patrick's Day Parade is in Boston, but we will examine the use of identity by the Court.<sup>90</sup> In a unanimous decision, the Court concluded that the public accommodations statute was not implicated because gay, lesbian, and bisexual individuals were not excluded from the parade.

The petitioners disclaim any *intent to exclude homosexuals, as such, and no individual member* of GLIB claims to have been excluded from parading as a member of any group that the Council . . . has approved to march.<sup>91</sup>

The Court assumed that identity is individual and not associated with the right to be a member of a group. It is also assumed that the notion of identity is unchanged after the creation of gay, lesbian, and bisexual identities. The Court calls these individuals homosexuals, therefore transforming them into conduct-laden individuals.<sup>92</sup> The plaintiffs sued as a group of connected political beings. By ignoring their self/group description, the Court does not require us to face the hard question about the reach of the public accommodations statute. Identity in *Hurley* is this thin refusal to see the real identity that these gay/lesbian/bisexual individuals as a group claim. Simply put, gay/lesbian/bisexual rights, like the rights of racial minorities, can never be merely individualistic.<sup>93</sup> The groupness of race and gender and sexual orientation creates unresolved and perhaps unresolvable tensions for legal liber-

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gress over the appropriateness of an official apology for slavery.

<sup>89</sup> 515 U.S. 557 (1995), *rev'd* 513 U.S. 1071 (1995).

<sup>90</sup> The plaintiffs did not assert that there was no state action, though such a concession does not mean that the Court will not make an independent investigation of its own. *See id.*

<sup>91</sup> *Id.* at 572 (emphasis added).

<sup>92</sup> *See Hughes, supra* note 17, at 172.

<sup>93</sup> Remember, individuals must shed certain identity markers before they may sit at the grownup table.

alism which focuses on the rights of the autonomous individuated self. The question for the Constitution is whether it can pay attention to an identity that does not come as a filtered imitation of others but redefines our notion of ourselves. A deep understanding of the self requires everyone to recognize and acknowledge that they have a race and a gender and a sexual orientation, even if white heteropatriarchal privilege permits certain persons to never think of themselves as such. Such redefinitions may be required by inclusion of other cultures in our body politic as well.

The problem for the Court is the problem of America as it prepares to enter a new millennium. With the emergence of gays/lesbians/bisexuals from the prison that is called the closet,<sup>94</sup> the entry of numerous immigrants into this country,<sup>95</sup> and the increasing presence of women in positions of authority, this country is undergoing what might be termed a national identity crisis brought on by severe cultural anxiety.<sup>96</sup> If identity is open in America and undefined by previous religious or ethnic forces, then anyone can make a claim on that identity and old notions and definitions are inappropriate. It is in the midst of this, where nothing is everything and everything is nothing, that the Court must find its way.

#### IV. CONCLUSION: THE PROBLEM WITH BIFOCALS, OR, WHY THE COURT NEEDS A NEW PRESCRIPTION

A major stumbling block for the Court is the original sin contained in the original document. Inherent in the Court's attempts to grapple with identity is the notion of the two constitutions that has dominated our jurisprudence since the Constitution was written. The Court keeps wanting to capture a notion of identity that it has refused to apply consistently to our constitutional litigation. The Court continues to try to create a notion of identity for the ages that is a "pale" and limited vision of the use of identity by the legal participants. Every attempt by someone to join the identity conversation is met with the argument that true law does not worry about the things at our feet. Unfortunately, the Supreme Court tries to live in the great future without dealing with its bifocalism. The Court keeps forgetting that with bifocals, one can look far away or up close. In its desire to participate in the document for the ages, it ignores the misery at its feet, of those trodden by

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<sup>94</sup> See MARJORIE B. GARBER, *VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY* (1992); MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995).

<sup>95</sup> See *ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA* (Nicolaus Mills ed., 1994).

<sup>96</sup> One need only look at the headlines of newspapers to know this. For alarm cries in popular press books, see PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992).

a constitutional doctrine that is incapable of understanding identity.

This explains why the Court leaves race out of its discussion of rights and equal protection for gays and lesbians or homosexuals.<sup>97</sup> Because race is not a real identity and is not constitutionally cognizable by the Court (except to chastise those who improperly recognize and act upon it), the Court must leave race out of its decision in *Romer*, even though, as we have discussed, race is immanent in the opinion. If the Court were to understand the role of race in *Romer*, the rights of gays and lesbians would be lost. In order for gays, lesbians, and bisexuals to assert their rights, they have to lose their identity or, rather, leave their queerness in the closet, and come to the constitutional equal protection banquet without a real identity. It seems that the plaintiffs in the case understood this. It is important to note that they did not seek to be recognized as a discrete and insular minority deserving equal protection's strict scrutiny. Because of this choice made by the plaintiffs, the Court was able to formulate a constitutional response that left out their identity but that also enabled it to see the absurdity of the identity attributed to them by the defendants. Gays, lesbians, and bisexuals are really without identity and therefore can be included in this equal protection discourse. In *Romer*, the Court was able to see the reality of the claims used to defend this effort to extend oppression against gays, lesbians, and bisexuals for what it was, but in doing so the Court still tried to deny the reality of our racial past. Also, in deciding the case in this manner, the Court continues its romance with the perpetrator model for invidious discrimination identified by Alan Freeman:

In its core concept of the "violation," antidiscrimination law is hopelessly embedded in the perpetrator perspective. Its central tenet, the "antidiscrimination principle," is the prohibition of race-dependent decisions that disadvantage members of minority groups, and its principal task has been to select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their specific effects. Antidiscrimination law has thus been ultimately indifferent to the condition of the victim; its demands are satisfied if it can be said that the "violation" has been remedied.<sup>98</sup>

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<sup>97</sup> The Court is inconsistent in its treatment of the issues in *Romer*. It adopts both parties' stances. The Court alternatively called the plaintiffs "gays" and "lesbians" while also describing the defendants' attribution to the plaintiffs of a content-laden program. See *Romer*, 116 S. Ct. *passim*.

<sup>98</sup> Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978).

We see that if we operate within the perpetrator perspective, the identity of the victim in some ways becomes peripheral to the constitutional logic of antidiscrimination law. It does not really matter that the victims in this case were gays, lesbians, and bisexuals. This is why the case can be described as the most progressive case involving gays, lesbians, and bisexuals, and yet not have much to do with gay/lesbian/bisexual rights as such.

As part of ignoring (or erasing) the identity of the victim, the Court in *Romer* said:

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting *disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.*<sup>99</sup>

The notion that this kind of disqualification is not known to our jurisprudence and is unprecedented is wrong if the racial nature of the special rights and identity claims are recognized. Before the Civil War, but as a prelude to the debates that led to the battles that led to the Civil War, there was a very large and significant debate about whether Congress was required to accept petitions from women and "free" blacks that requested that Congress eliminate slavery from the District of Columbia.<sup>100</sup> The acrimony that led to the Civil War was clearly present in the debate about these petitions. The issue was whether the South and their Northern associates had to listen to the arguments and debate the issue of slavery in the District. The claim of the white Southerners was that it was an insult to them and their sacred honor to have to listen to such debates, that they would not take the petitions, and that the House was required to refuse to accept them. These arguments were outside the possible and were a threat to the lives and the honor of every white woman in the South.

Today, the argument about the rights of gays, lesbians, and bisexuals is outside the possible and constitutes a threat to every Man, Woman, Child, and the Family that is America. The *Romer* Court could not see that the argument about the rights of gays, lesbians, and bisexuals is exactly like the argument about slavery that the country had before the Civil War and continues to have today. *Romer* is about race precisely because it is about our inability to speak the unspeakable, whether it is sodomy, gays, lesbians, and bisexuals, or racial minorities. If we cannot see this, we and the Court are likely to create another one hundred years of nonsensical jurisprudence.

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<sup>99</sup> *Romer*, 116 S. Ct. at 1628 (emphasis added).

<sup>100</sup> See generally MILLER, *supra* note 22.

Everywhere the *Romer* Court looked, it saw race and was perfectly (color)blind. We think that America deserves a new prescription.

