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2005

# Ohio Issue 1 is Unconstitutional

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## OHIO ISSUE 1 IS UNCONSTITUTIONAL

Wilson Huhn\*

This article discusses the constitutionality of Ohio Issue 1, an amendment to the state constitution which was adopted in a referendum by the people of the State of Ohio in November, 2004. The article consists of two parts. Part I sets forth arguments in support of the proposition that Ohio Issue 1 is unconstitutional. Part II sets forth arguments that have been or may be raised in support of Ohio Issue 1, and responds to each of those arguments.

## I. ARGUMENTS AGAINST THE CONSTITUTIONALITY OF OHIO ISSUE 1

Ohio Issue 1 consists of two sentences. It says:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage.<sup>1</sup>

Both sentences of Ohio Issue 1 are unconstitutional. The first sentence is unconstitutional because it violates the fundamental right of marriage. The second sentence is unconstitutional because it establishes different rules for different people who are seeking the aid of the government.

Let's consider the first sentence, dealing with the right to marry.

The Supreme Court has recognized that marriage is a fundamental right in many cases involving heterosexual couples, including *Griswold v. Connecticut*,<sup>2</sup> *Zablocki v. Redhail*,<sup>3</sup> *Meyer v. Nebraska*,<sup>4</sup> and *Skinner v. Oklahoma*.<sup>5</sup> For example, in *Loving v.*

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<sup>1</sup> OHIO CONST., art. XV, § 11 (hereinafter Ohio Issue 1).

<sup>2</sup> 381 U.S. 479 (1965) (invalidating Connecticut statute prohibiting the use of contraceptives as applied to married couples).

<sup>3</sup> 434 U.S. 374 (1978) (invalidating Wisconsin statute prohibiting any person from marrying if he or she had an obligation to support children not in his or her custody, absent judicial finding that the children were not likely to become public charges).

<sup>4</sup> 292 U.S. 390 (1923) (invalidating Nebraska statute prohibiting the teaching of any modern language other than English in any public or private school).

<sup>5</sup> 316 U.S. 535 (1942) (invalidating Oklahoma statute that allowed the sterilization of felons convicted of three or more crimes of moral turpitude).

*Virginia*,<sup>6</sup> Chief Justice Earl Warren stated: “Marriage is one of the 'basic civil rights of man.’”<sup>7</sup>

Not only has the Court made it clear that marriage is a fundamental right, it has explicitly said *why* it is a fundamental right. The Court has explained that marriage is a fundamental right because it is an intensely personal decision that is critically important in the life of the individual. In *Griswold*, Justice William O. Douglas said:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred*. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as *noble* a purpose as any involved in our prior decisions.<sup>8</sup>

The supporters of Ohio Issue 1 are unquestionably in agreement with the Supreme Court on this point, and they would likely agree with the Court that marriage is “sacred” and “noble.” The opponents of Issue 1 also agree with this assessment. They, too, believe that marriage is a fundamental right, and they agree that it is a fundamental right for the very same reasons. They, too, perceive marriage to be a pillar of our society, the bedrock of the family, and a key to personal happiness. It is *because* of this that they wish to extend the benefits of marriage to those same-sex couples who desire it.

But the supporters of Issue 1 differ in one key respect from the opponents. The supporters of Issue 1, although believing marriage to be of fundamental importance in the lives of heterosexual couples, implicitly deny that marriage is important to same-sex couples. They consider marriage to be fundamentally important for *themselves*, but apparently unimportant and insignificant in the lives of *others*. They necessarily think that their own intimate relationships are sacred and noble, but that the intimate relationships of same-sex couples are not sacred, not noble. This belief is mistaken. If marriage is a fundamental right for heterosexuals because of its centrality in people’s lives, it is equally a fundamental right for same-sex couples who find that marriage has the same meaning for them.

The principal reason that was given for the adoption of Ohio Issue 1 is that same-sex marriage threatens “the institution of marriage,”<sup>9</sup> but one may fairly ask, what *is* “the institution of marriage?” Is it any particular marriage, or perhaps all marriages? No person has come forward to say that his or her own marriage will be harmed if gays and lesbians are allowed to wed, nor does it seem likely that this is what is meant by the assertion that gay marriage will harm “the institution of marriage.”

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<sup>6</sup> 388 U.S. 1 (1967) (invalidating Virginia statute prohibiting interracial marriage).

<sup>7</sup> *Id.* at 12 (Warren, C.J.).

<sup>8</sup> 381 U.S., at 486 (Douglas, J.) (emphasis added).

<sup>9</sup> See *Hernandez v. Robles*, \_\_\_ N.Y.S.2d \_\_\_, \_\_\_ (2005) (observing that the state had asserted its interest in “fostering the traditional institution of marriage.”).

Instead, what is meant by this argument is that gay marriage will do harm to its opponents' *conception* of marriage. It is their mindset, their ideas, their opinions, their attitudes that are threatened. So far as the supporters of Ohio Issue 1 are concerned, what is important here is their *beliefs*. It has not been suggested that any objective harm will befall any person if same sex couples are allowed to marry. Instead, it is asserted that if same-sex couples are allowed to marry, this will diminish the importance of marriage in *some* people's minds. In their opinion marriage will become less sacred, less noble, less valuable, less desirable a state, if gays and lesbians are admitted to the institution.

This argument quite clearly exposes the assumptions of the amendment's supporters. In their opinion, homosexual relationships are not sacred, they are not noble, they are not valuable, they are not desirable, and it therefore debases marriage to admit same sex couples to "the institution of marriage."

People are constitutionally permitted to hold this opinion. People have the constitutional right to express this opinion. What our Constitution does not permit, however, what is not consistent with constitutional right, is to enact this opinion into law through the adoption of legislation such as Ohio Issue 1.<sup>10</sup> According to myriad decisions of the Supreme Court of the United States, animosity, irrational fear, and mere disapproval are illegitimate reasons for the enactment of any law.<sup>11</sup>

As for the second sentence of Ohio Issue 1, it is clearly unconstitutional under a line of Supreme Court cases culminating in *Romer v. Evans*.<sup>12</sup> This series of cases establishes the principle that the government may not use one method of governmental decisionmaking for one class of persons to enforce rights or obtain benefits, and use another set of rules for another class of persons to enforce the same rights or to obtain the same benefits.<sup>13</sup>

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<sup>10</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (Burger, J.) (invalidating court order which had granted custody of child to father because mother had remarried to a man of a different race, and stating, "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

<sup>11</sup> See notes \_\_\_ - \_\_\_ *infra* and accompanying text.

<sup>12</sup> 517 U.S. 620 (1996) (invalidating Colorado state constitutional amendment prohibiting state and local governments from enacting antidiscrimination measures protecting homosexuals).

<sup>13</sup> This same strategy of amending the state constitution to prohibit the adoption of protective legislation was used by the proponents of slavery in the nineteenth century to thwart the efforts of antislavery organizations. Referring back to the time of the Revolution, Lincoln said, "In those days, Legislatures held the unquestioned power to abolish slavery in their respective States; but now it is becoming quite fashionable for State Constitutions to withhold that power from the Legislatures." Lincoln described the strategies that were employed to entrench slavery in these unforgettable words:

They have him in his prison house; they have searched his person, and left no prying instrument with him. One after another they have closed the heavy iron doors upon him, and now they have him, as it were, bolted in with a lock of a hundred keys, which can never be unlocked without the concurrence of every key; the keys in the hands of a hundred different men, and they scattered to a hundred different and distant places; and they stand musing as to what invention, in all the dominions of mind and matter, can be produced to make the impossibility of his escape more complete than it is.

The second sentence of Ohio Issue I violates this principle because it creates different rules for different people, and this is easily demonstrated by the following examples. Normally, laws governing who may marry, and what the benefits of marriage shall be, need merely gain approval from a state or local legislative body. In contrast, laws benefiting same sex couples are utterly barred from the legislative arena. Under Issue 1 this inequality extends to *policies* as well as *laws*. If heterosexual married couples desire to obtain benefits such as health insurance coverage for spouses from a public employer, all that need happen is for the public employer to agree to extend the benefits. A university, a county library system, or an agency of the state government may freely decide, and frequently does decide, to extend such benefits to the spouses of its employees. Prior to the adoption of Issue 1, same-sex couples enjoyed the same freedom of opportunity in soliciting these benefits from state agencies, subdivisions, and institutions. However, after the adoption of Issue 1, it is no longer possible for a same sex couple, or a group of them, to convince a public entity of the wisdom and fairness of extending health care benefits that are routinely extended to heterosexual couples.<sup>14</sup> Ohio Issue 1 makes the structure of governmental decisionmaking different for homosexuals than it is for heterosexuals.

The leading case on this subject is *Romer v. Evans*.<sup>15</sup> *Romer* determined the constitutionality of a ballot initiative called “Amendment 2,” which the people of the State of Colorado had adopted. Like Ohio Issue 1, Colorado Amendment 2 amended the state constitution and attempted to deny homosexuals equal access to the governmental process. Amendment 2 provided that neither the State of Colorado nor any of its subdivisions could adopt laws, regulations, or policies forbidding discrimination on the basis of sexual orientation.<sup>16</sup>

In *Romer* the Court articulated the following governing principle:

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ABRAHAM LINCOLN, II COLLECTED WORKS OF ABRAHAM LINCOLN 404 (excerpt from speech at Springfield, Illinois, June 26, 1857), available online at [www.hti.umich.edu/l/lincoln](http://www.hti.umich.edu/l/lincoln) [hereinafter COLLECTED WORKS].

<sup>14</sup> This argument assumes that the Ohio courts will find that granting health insurance benefits to domestic partners in same-sex unions constitutes the “creation or recognition” of a “legal status” that “approximates” the “design, qualities, significance, or effect of marriage” within the meaning of Ohio Issue 1.

<sup>15</sup> 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting state and local government from adopting laws banning discrimination based upon sexual orientation).

<sup>16</sup> *See id.* at 624 (Kennedy, J.) (setting forth the Colorado constitutional amendment that was struck down in *Romer*, which provided: “No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.”).

A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.<sup>17</sup>

This language from *Romer* is directly applicable to the question of the constitutionality of Ohio Issue 1. The second sentence of Ohio Issue 1 is “a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government.”<sup>18</sup> Accordingly, Ohio issue 1 “is itself a denial of equal protection of the laws in the most literal sense.”<sup>19</sup>

At the heart of this debate is a simple moral truth. Same-sex couples love each other and their children just as much as heterosexual couples do. There is no legitimate reason to deny them the right to obtain legal recognition of their partnerships and their families.

But this is not simply my opinion. In *Lawrence v. Texas*, the Supreme Court declared:

[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment....”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.<sup>20</sup>

The Court repeatedly emphasized that the fundamental right at stake in *Lawrence* was not simply the right to engage in certain sexual conduct, but rather the right to form intimate relationships,<sup>21</sup> and the Court explicitly drew the analogy between homosexual relationships and marriage:

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<sup>17</sup> *Id.* at 633 (Kennedy, J.).

<sup>18</sup> *Id.* (Kennedy, J.)

<sup>19</sup> *Id.* (Kennedy, J.).

<sup>20</sup> *Lawrence*, 539 U.S. at 574 (Kennedy, J.).

<sup>21</sup> The opening of the Court’s opinion signaled that it would focus on the more “transcendent” aspects of the fundamental right to privacy:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.<sup>22</sup>

The Court added: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>23</sup> In brushing aside the Texas law criminalizing “homosexual conduct” the Supreme Court in *Lawrence* used such sweeping language that the dissenting Justices led by Justice Scalia contended that although the majority and concurring opinions were careful to reserve judgment on the question of gay marriage,<sup>24</sup> under their reasoning the Constitution commands that same sex marriage must be allowed.<sup>25</sup> I agree with Justice

<sup>22</sup> *Id.* at 566-567 (Kennedy, J.) (*quoting Bowers*, (citation omitted)).

<sup>23</sup> *Id.* at 567 (Kennedy, J.).

<sup>24</sup> *See id.* at 578 (Kennedy, J.). Justice Kennedy stated:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

*Id.* at 578 (Kennedy, J.).

Justice O’Connor expressed a similar reservation, implying even more strongly that same sex marriage might constitutionally be prohibited:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

*Id.* at 585 (O’Connor, J., concurring).

<sup>25</sup> *See id.* at 601-601 (Scalia, J., dissenting). Justice Scalia stated:

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O’Connor seeks to preserve them by the conclusory statement that “preserving the traditional institution of marriage” is a legitimate state interest. But “preserving the traditional institution of marriage” is just a kinder way of describing the State’s *moral disapproval* of same-sex couples. Texas’s interest in [its law prohibiting sodomy] could be recast in similarly euphemistic terms: “preserving the traditional sexual mores of our society.” In the jurisprudence Justice O’Connor has seemingly created, judges can validate laws by characterizing them as “preserving the traditions of society” (good); or invalidate them by characterizing them as “expressing moral disapproval” (bad).

Justice Scalia also stated:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal

Scalia that the decision of the Court in *Lawrence* leaves the constitutional arguments against same sex marriage “on pretty shaky ground.”<sup>26</sup> The language and logic of the Court’s reasoning in *Lawrence* yields but one conclusion on this subject: gay men and women must be permitted to choose whom they wish to marry, just like everyone else.

## II. ARGUMENTS IN SUPPORT OF OHIO ISSUE 1 AND THE RESPONSES TO THEM

The supporters of Issue 1 have raised eleven arguments to support their position that Issue 1 is constitutional. These eleven arguments are not compelling, they are not persuasive, and some of them are not even legitimate, because they are contrary to the Constitution, they are based upon false assumptions of fact, and they are inconsistent with fundamental American values of fairness and tolerance. Each of these arguments is set forth and rebutted below.

### 1. Marriage Is Defined as the Union of a Man and a Woman

One opponent of same sex marriage contends that marriage is by definition between “one man and one woman,” and that it makes no sense to speak of same sex marriage. He implies that same sex marriage is a nonsensical concept, an impossible arrangement, one that is beyond the mind of man to comprehend; analogous, he says, to a “square circle.”<sup>27</sup>

This argument is itself circular in that it assumes its own conclusion, and it is purely semantic in that it is entirely based upon a traditional understanding of the meaning of the word “marriage,” which is an assumption that the opponents of Issue 1 do not share. This argument amounts to no more than the commonplace observation, “In the past, marriage has been understood to be the union of a man and a woman.” It is of course true that in this nation marriage has traditionally been officially recognized only between a man and a woman, but the argument set forth in the first portion of this article is that this traditional understanding is unconstitutional because there is no difference between heterosexual and homosexual unions that are based on love and commitment, and because gay and lesbian relationships must be accorded the same respect as heterosexual relationships.<sup>28</sup>

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bond that is more enduring,;’ what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

*Id.* at 604-605 (Scalia, J., dissenting) (internal citations omitted).

<sup>26</sup> See note 23 *supra*.

<sup>27</sup> See *ADF and Glaad Square Off in Marriage Debate* (“Advocating same-sex ‘marriage’ is like asking an architect to draw a square circle,” Ventrella said. “Nobody believes in their heart of hearts that it exists. It’s time to stop pretending that the law can draw them.”), [www.alliancedefensefund.org/news/](http://www.alliancedefensefund.org/news/) (Alliance Defense Fund website quoting Jeff Ventrella, Senior Vice President of ADF’s Office of Strategic Training) accessed April 12, 2005.

<sup>28</sup> See text accompanying note 20 *supra*.

## 2. The Recognition of Same Sex Marriage Will Lead to the Legalization of Practices Such as Polygamy and Prostitution.

Justice Antonin Scalia has argued that granting constitutional protection for homosexuality undermines all morals legislation,<sup>29</sup> and that specifically it will lead to constitutional protection for practices such as polygamy and prostitution.<sup>30</sup>

This argument is simply contrary to fact. A gay or lesbian person who wishes to marry does so for the same reason that a heterosexual person does – he or she is in love and is willing to commit to one special person. Same sex unions, like heterosexual unions, are the antithesis of plural marriage and prostitution. Constitutional arguments in support of same sex marriage do not detract from the constitutionality of laws prohibiting harmful practices such as polygamy and prostitution. Quite the contrary; same sex marriage is a refutation of promiscuous practices.

## 3. Same Sex Marriage Will Harm Families and Is Inconsistent with Family Values.

This argument is also contrary to fact. The recognition of same sex marriage will actually strengthen families, promote monogamy, affirm the importance of love in all relationships, and facilitate two-parent households. It will also reinforce the free exercise of religion, in that many same sex couples presently participate in religious weddings even though the government does not recognize the legal validity of their marriage, and the legal recognition of same-sex marriage will accommodate their religious beliefs.

## 4. Constitutional Rights Are Based Exclusively on Tradition.

Opponents of same sex marriage argue that fundamental rights are established solely by tradition. There is support for this argument in language from the opinions of Justice Antonin Scalia in *Michael H. v. Gerald D.*<sup>31</sup> and Chief Justice William Rehnquist in *Washington v. Glucksberg*.<sup>32</sup> Justice Scalia stated, “a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all,”<sup>33</sup> while Chief Justice Rehnquist stated that “the outlines of the ‘liberty’ specially protected by the Fourteenth Amendment ... have at least been carefully refined by concrete examples

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<sup>29</sup> See 539 U.S., at 599 (Scalia, J., dissenting) (“The Court embraces instead Justice Stevens’ declaration in his *Bowers* dissent, that ‘the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.’ This effectively decrees the end of all morals legislation.”) (internal citation omitted).

<sup>30</sup> See *id.* at 590 (Scalia, J., dissenting) (stating, “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.”). See also note 53 *infra* and accompanying text.

<sup>31</sup> 491 U.S. 505 (1989) (upholding California statute which conclusively presumed that a child born to a married woman living with her husband was the child of the husband).

<sup>32</sup> 521 U.S. 707 (1997) (upholding Washington statute forbidding assisted suicide).

<sup>33</sup> *Michael H.*, 491 U.S., at 127 fn 6 (Scalia, J.)

involving fundamental rights found to be deeply rooted in our legal tradition.”<sup>34</sup> If it were true that all constitutional rights must be “deeply rooted” in this nation’s history and tradition, Ohio Issue 1 would certainly be constitutional, because same sex marriage is not “deeply rooted” in tradition.

However, it is *not* true that our fundamental rights are defined solely by tradition. In both *Michael H.* and *Glucksberg* Justice O’Connor was careful to distance herself from the opinions of Justice Scalia and Chief Justice Rehnquist, thereby in each case depriving Justices Scalia and Rehnquist of a majority in support of their limited definition of fundamental right.<sup>35</sup> In *Lawrence v. Texas* the majority of the Supreme Court, led by Justices Kennedy and O’Connor, emphatically rejected the position of Justices Scalia and Rehnquist, instead adopting the standard for defining fundamental right that they had first articulated in their plurality opinion from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which extends protection to personal and intimate choices regardless of whether they have been traditionally protected.<sup>36</sup> Furthermore, in *Lawrence* the Court expressly adopted Justice Stevens’ test for measuring constitutionality of laws affecting such rights, which maintains that traditional notions of morality are not sufficient to justify laws affecting intimate personal choices. The Court stated:

In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions:

Our prior cases make two propositions abundantly clear.

First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends

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<sup>34</sup> *Glucksberg*, 521 U.S., at 722 (Rehnquist, C.J.).

<sup>35</sup> In *Michael H.*, Justice O’Connor wrote a four-sentence concurring opinion, in which Justice Kennedy joined, stating:

I concur in all but footnote 6 of Justice Scalia’s opinion. This footnote sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in this area. On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be “the most specific level” available. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.

491 U.S., at 132 (O’Connor, J., concurring) (citations omitted). In *Glucksberg*, Justice O’Connor concurred in the ruling of the Court that there is no general constitutional right to “commit suicide,” but reserved judgment regarding the “narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.” 521 U.S., at 736 (O’Connor, J., concurring).

<sup>36</sup> See text accompanying note 20 *supra*.

to intimate choices by unmarried as well as married persons.

Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here.<sup>37</sup>

Religious norms are equally insufficient to support secular legislation. Justice Blackmun, who also dissented with Justice Stevens in *Bowers*, observed that the State's invocation of religious authority against homosexuality actually *undermined* its legal argument.<sup>38</sup> Equating religious intolerance with racial animus,<sup>39</sup> Justice Blackmun concluded, "The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine." Under the foregoing "reality-based" analysis, which is now constitutionally mandated, laws must be justified by the harm that they seek to prevent. Appeals to traditional moral or religious beliefs are not enough.

Further support for the ideal of the "living" Constitution comes from our sixteenth President. Abraham Lincoln believed that the principle of equality is not a static notion. It is rather a dynamic concept, a moral imperative that constantly challenges us to question our assumptions about human potential. The Declaration of Independence was written by a slaveholder, but here is how Lincoln understood the phrase in the Declaration that "all men are created equal:"

I think the authors of that notable instrument intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in "certain inalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them.

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<sup>37</sup> 539 U.S. 577-578 (Kennedy, J.), *quoting* *Bowers v. Hardwick*, 478 U.S. 185, 216 (Stevens, J., dissenting) (footnotes and citations omitted). *See also* *Bowers*, 478 U.S., 199-200 (Blackmun, J., dissenting), stating;

Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." I believe we must analyze *Hardwick's* claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians."

*Id.* at 199-200 (Blackmun, J., dissenting) (citations omitted).

<sup>38</sup> *See id.* at 211 (Blackmun, J., dissenting) ("far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the Georgia sodomy statute] represents a legitimate use of secular coercive power.").

<sup>39</sup> *See id.* at 211-212 (Blackmun, J.) (stating, "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.").

In fact they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.<sup>40</sup>

We are constitutionally obligated to constantly look to and constantly labor for the principle of equality. As Justice Kennedy so eloquently stated in *Lawrence*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>41</sup>

In the words of James Russell Lowell, “New occasions teach new duties / time makes ancient good uncouth / they must upward still and onward / who would keep abreast of truth.”<sup>42</sup>

##### 5. There Is No “Emerging Awareness” in Favor of Same Sex Marriage

Opponents of same sex marriage contend that in contrast to the situation in *Lawrence v. Texas*, where most states other than Texas had already repealed laws criminalizing homosexual sodomy,<sup>43</sup> with respect to same sex marriage the trend is decidedly the other way.<sup>44</sup> Not only has no state legislatively recognized same sex marriage, many states have recently adopted state statutes and state constitutional

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<sup>40</sup> ABRAHAM LINCOLN, II COLLECTED WORKS 405-406, Speech at Springfield, Illinois, June 26, 1857, online at [www.hti.umich.edu/l/lincoln](http://www.hti.umich.edu/l/lincoln).

<sup>41</sup> 593 U.S., at 578-579 (Kennedy, J.).

<sup>42</sup> James Russell Lowell, *The Present Crisis*, online at [www.underthesun.cc/classics/Lowell/PoemsofJamesRussellLowell/](http://www.underthesun.cc/classics/Lowell/PoemsofJamesRussellLowell/)

<sup>43</sup> See *Lawrence*, 539 U.S., at 573 (Kennedy, J.) (stating, “In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.”).

<sup>44</sup> See statement of Jeff Ventrella, at 31:00 of *Same-Sex Marriage: Speak Now or Forever Hold Your Peace: Adam and Eve, Alice and Steve, A Debate of the Legal Issues Surrounding Same-Sex Marriage*, [hereinafter *Same-Sex Marriage*], held April 7, 2004, Duke Law School, video accessed from <http://realserver.law.duke.edu/ramgen/spring04/samesex.rm>

amendments to explicitly prohibit it.<sup>45</sup> According to this argument, there is no “emerging awareness” of tolerance for same sex marriage to counter the longstanding tradition of marriage being confined to heterosexual couples.

The force of this argument must be conceded. The movement towards societal and legal acceptance of homosexuality has made great progress, but it still has a long way to go. Laws making sodomy a criminal act have been invalidated, but gays and lesbians still face enormous social and legal discrimination. Furthermore, although some nations which share our commitment to liberty and equality have recognized same-sex marriage,<sup>46</sup> in the United States this question is just now coming to the fore.

However, despite the recent adoption of laws and state constitutional amendments prohibiting same sex marriage, it is not correct to say that there is no “emerging awareness” in favor of same sex unions. Legislative majorities in some states have voted to authorize “civil unions,” which invest homosexual unions with the benefits of marriage arising under state law.<sup>47</sup> In addition, a number of state courts have declared laws forbidding same sex marriage to be unconstitutional under the state or federal constitutions.<sup>48</sup> The social movement in favor of same sex marriage has made great strides in a short period of time. Perhaps the most powerful and moving image from the year 2004 was that of thousands of gay and lesbian couples eagerly seeking to be married in cities around the nation.<sup>49</sup> Ohio Issue 1 and similar legislation that has been enacted in

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<sup>45</sup> See *Marriage Laws: State by State (Updated April 2005)*, available at <http://www.frc.org/get.cfm?i=IF05D03>, website of Family Research Council, accessed April 16, 2005.

<sup>46</sup> See American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 348-349 (2004) (stating, “Presently, three countries allow same-sex couples to marry (Netherlands, Belgium, and several provinces in Canada). Canada is expected to extend such privileges to couples throughout the country some time in 2005. In addition to full marriage rights, many northern European countries allow same-sex couples to enter into legal relationships with most of the rights and responsibilities of marriage.”).

<sup>47</sup> See, e.g., California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Stat. 2586; Vt. Stat. Ann. tit. 15, Sec.s 1201-1207 (2002); Connecticut.

<sup>48</sup> See e.g., *Goodridge v. Department of Health*, 440 Mass. 309, 798 N.E.2d 941(2003) (invalidating state civil marriage law under state constitution insofar as it denied same sex marriage); *Coordination Proceeding, Special Title (Rule 1550(C))*, Superior Court of the State of California, County of San Francisco, March 14, 2005 (same); *Hernandez v. Robles*, \_\_\_ N.Y.S.2d \_\_\_ (2005) (invalidating denial of same sex marriage under Fourteenth Amendment).

<sup>49</sup> See Tom Mooney, *Across the Bay State, Same Sex Couples Say “I Do”*, Providence Journal Bulletin, May 18, 2004 (“History was sealed with kisses yesterday as across Massachusetts, from the Berkshires to crowded Cambridge City Hall, to the jubilant streets of Provincetown on Cape Cod, same-sex marriage arrived in America. Six months after the Massachusetts Supreme Judicial Court ruled that the state's Constitution forbids the creation of ‘second-class citizens,’ hundreds of people whom the court described as being victims of discrimination, turned out to reap what three years of court battles had sown. In Cambridge alone, more than 250 couples, joined by thousands of revelers, waited in line early yesterday morning for the first available marriage licenses. Many capped the momentous occasion with a quick City Hall wedding amid cheering supporters. For Emily Kay and Anita Saville, of Chelmsford, Mass., partners for 21 years, the moment brought on tears: ‘I guess it's kind of emotional when you win your civil rights,’ Kay said.”); April Umminger, *Marriage Put to a Legal Test*, U.S.A. Today, March 15, 2005 (reporting that almost 3000 marriage licenses were issued to same-sex couples in Multnomah County, Oregon, during March and April, 2004); *On the Marriage Crusade*, The Advocate, March 15, 2005 (reporting that Mayor

other states represents a backlash against this emerging awareness of the equality of homosexual unions.

Furthermore, the absence of a national consensus is not a barrier to finding a constitutional right for same sex couples to marry. The Constitution protects the rights of minorities not only in aberrant situations, where “outlier” governmental actions offend mainstream values, but also in cases where the overwhelming majority of the people desire to infringe the constitutional right. A large majority of Americans opposed interracial marriage, a large majority of Americans do not approve of flag burning, and a large majority of Americans favor government-led prayer in the public schools,<sup>50</sup> but the Supreme Court nevertheless acted to protect these rights under the Equal Protection Clause, freedom of speech, and the Establishment Clause.<sup>51</sup> To declare that same sex couples have a right to marry will not be a popular decision, but it is the correct decision.

#### 6. To Recognize Same Sex Marriage Would Violate the Rights of Persons Who Disapprove of Homosexuality

Opponents of gay marriage may believe that *their* rights would be violated if the government were to recognize same-sex unions, but in fact same sex marriage will not infringe the constitutional rights of any other person. People do not have a constitutional right to enact discriminatory laws.<sup>52</sup> People do have constitutional rights to freedom of

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Gavin Newsome of San Francisco and Mayor Jason West of New Paltz, New York “made national headlines” when they respectively married nearly 4000 and nearly two dozen same sex couples in February, 2004).

<sup>50</sup> See *Laws of the Land: A Brief History of Interracial Marriage and Race Classification in America*, at <http://www.pbs.org/weblab/lovestories/digdeeper/pressinfo6.shtml> (“The first Gallup poll conducted on the issue of interracial marriage was in 1958 and showed that 94% of whites opposed such unions”); <http://1stam.umn.edu/main/pubop/flag-burning.htm> accessed April 13, 2005 (listing a number of polls showing support for a constitutional amendment to prohibit burning the American flag); *The First Amendment in the Public Schools*, (“Nearly two-thirds of the public (65%) agree that ‘teachers or other public school officials should be allowed to lead prayers in school,’”), [www.freedomforum.org/templates/document.asp?documentID=13390](http://www.freedomforum.org/templates/document.asp?documentID=13390), accessed April 13, 2005. A similar majority favors the display of the Ten Commandments on government property. See Will Lester, *Justices to Rule on Commandments at the Courthouse*, Cleveland Plain Dealer, page A8, March 2, 2005 (“An Associated Press poll found 76 percent of Americans say such displays ought to be allowed.”). *But see Flag Burning Poll Results Show Americans Opposed to Amending Constitution*, <http://www.tcn.net/~opticom/Steve/recent.htm>, accessed April 13, 2005 (“The poll first asked 635 registered voters whether they favor or oppose a new amendment to prohibit the burning or other desecration of the American flag. Sixty-four percent said they were in favor of such an amendment, and another 30 percent opposed it. But when asked in a follow-up question if they would favor or oppose such an amendment if they knew that it would be the first in our country’s history to restrict freedom of speech and freedom of political protest, the results were significantly different—Americans opposed such an amendment by 52 to 38 percent.”).

<sup>51</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia statute forbidding interracial marriage); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidating Pennsylvania statute and Maryland school board rule requiring readings from the Bible in the public schools); *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating Texas statute forbidding desecration of the American flag).

<sup>52</sup> See *Goodridge*, 440 Mass., at 312, 341-342, 798 N.E.2d 941 (observing that “[m]any people hold deep-seated religious, moral, and ethical convictions that ... homosexual conduct is immoral,” but ruling that “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be

association, freedom of expression, and freedom of religion, however same sex marriage will not interfere with any of these rights. If same sex marriage were legalized, no person could be required to associate with same sex couples socially.<sup>53</sup> No private establishment that is not a place of public accommodation could be required to admit same sex couples to the premises.<sup>54</sup> No private organization one of whose purposes is to express opposition to homosexuality could be required to admit same-sex couples as members.<sup>55</sup> No religious body could be required to admit same sex couples to worship, nor could any cleric be required to administer the sacrament of marriage to same-sex couples.<sup>56</sup> Even hate speech is protected under the Constitution unless it rises to the level of incitement, fighting words, or true threats.<sup>57</sup> The First Amendment and the right to privacy fully protect the constitutional rights of persons who oppose gay marriage.

### 7. Ohio Issue 1 Is Not Directed Solely Against Same Sex Marriage, But Also Against Polygamy and Cohabitation

Ohio Issue 1 does not mention homosexuals or sexual orientation. Therefore the supporters of the measure may assert that it was not intended to single out homosexuals for differential treatment. The first sentence of Ohio Issue 1 defines marriage as “the union of one man and one woman,” and it may be asserted that the law is aimed at polygamists. However, this argument is not consistent with the overwhelming thrust of the campaign that was waged to obtain passage of this amendment. It was obvious to everyone in the State of Ohio that the proponents of Issue 1 were opposed to homosexuality in general and to gay marriage in particular. Believing the practice of

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outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>53</sup> See *Lawrence*, 539 U.S., at 574 (Kennedy, J.) (holding right to privacy protects “intimate and personal choices.”).

<sup>54</sup> See generally *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (holding professional golf tour to be a “public accommodation” within the meaning of the Americans with Disabilities Act).

<sup>55</sup> See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (invalidating New Jersey’s public accommodations law, on grounds of expressive association, as applied to action of Boy Scouts dismissing homosexual scoutmaster).

<sup>56</sup> See *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454 (3<sup>rd</sup> Cir. 1994) (affirming decision that action for declaratory judgment that New Jersey Law Against Discrimination on basis of sexual orientation was inapplicable to church was not ripe, quoting head of state agency, “the Division has not in the past prosecuted and has no intention to prosecute essentially exempt churches for sincerely-held religious belief or practice, or speech consistent with such belief, or for a refusal to engage in certain speech or for following their religious tenets.... Hence, the Division would not even attempt to enforce those provisions in the circumstances of sincerely-held religious reasons such as plaintiffs express here....”); see also *Jane Rutherford, Religion, Rationality, and Special Treatment*, 9 William & Mary Bill Rts.J. 303, 334-335 (equating religious organizations with political organizations in their right to expressive association); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 Geo Wash L. Rev. 841, 853 (1992) (arguing against finding churches to be public accommodations).

<sup>57</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating Ohio law as applied to speech by Ku Klux Klan leader as not rising to the level of incitement of imminent and likely serious unlawfulness); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding New Hampshire law punishing “fighting words”); *Virginia v. Black*, 538 U.S. 343 (2003) (upholding Virginia statute prohibiting cross burning with intent to intimidate); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating ordinance which prohibited cross burning and use of other symbols which person has reasonable grounds to know arouses anger, alarm, or resentment in others).

homosexuality to be immoral, their purpose was to prevent both the State of Ohio and any other state from extending either the status or benefits of marriage to gay and lesbian couples located within the state. Polygamists loom large in Justice Scalia's dissenting opinion in *Romer*,<sup>58</sup> but they were not an evident presence during the 2004 election.

The second sentence of Ohio Issue 1 prohibits the extension of marital rights and benefits to "unmarried individuals," and accordingly the supporters of Issue 1 may contend that the measure was directed against unmarried cohabitation generally, and not homosexuality. This argument is supported by a decision of the Common Pleas Court of Cuyahoga County in *State v. Burk*<sup>59</sup> striking down the Ohio Domestic Violence statute as applied to unmarried persons. The domestic violence statute prohibits any person from assaulting "a family or household member."<sup>60</sup> The statute expressly includes "a person living as a spouse" as "a family or household member,"<sup>61</sup> and defines "a person living as a spouse" as someone who "is cohabiting with the offender."<sup>62</sup> The Ohio Supreme Court has identified two attributes of cohabitation: "(1) sharing of familial or financial responsibilities and (2) consortium."<sup>63</sup> In *Burk*, the Common Pleas Court ruled that the domestic violence law created a legal status that approximates the design, qualities, significance, or effect of marriage, and that as applied to unmarried individuals, this law was in conflict with Ohio Issue 1 and therefore unconstitutional.<sup>64</sup>

The ruling of the court in *Burk* was based upon the text and plain meaning of Ohio Issue 1, however the court conceded that one could argue that it was not the intent of Issue 1 to strike down the domestic violence law as applied to unmarried individuals. The court stated, "It may be argued that the intent of the second sentence was simply to preclude recognition by the State of so-called 'domestic partnerships' or 'civil unions' as a back-door means of sanctioning same-sex relationships."<sup>65</sup> Consistent with this observation, the leading proponent of Ohio Issue 1 as well as an opponent of the law have both indicated that the constitutional amendment was not intended to prevent the State from prosecuting unmarried individuals for the crime of domestic violence.<sup>66</sup> Regardless

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<sup>58</sup> *Romer*, 517 U.S., 648-651 (Scalia, J., dissenting) (contending that it is inconsistent to protect homosexuality under the Constitution without also protecting polygamy).

<sup>59</sup> See *State v. Burk*, CR-O5-462510-A (March 23, 2005) (striking down Ohio domestic violence law as applied to unmarried individuals).

<sup>60</sup> Ohio Rev. Code 2919.25(A).

<sup>61</sup> Ohio Rev. Code 2919.25(F)(1)(a)(i).

<sup>62</sup> Ohio Rev. Code 2919.25(F)(2).

<sup>63</sup> *State v. Williams*, 79 Ohio St. 3d 459, 465 (1997).

<sup>64</sup> *Burk*, slip op. at 11.

<sup>65</sup> *Id.* at 4 (adding, "However, by its explicit terms Art. XV, § 11, is not so limited, but clearly is worded as broadly as possible, so as to encompass any quasi-marital relationships – whether they be same-sex or opposite sex.").

<sup>66</sup> See Connie Mabin, *Two Sides Spar Over Ohio's Gay Wedding Ban*, Concinnati Post, March 25, 2005 (quoting Phil Burress, President of Citizens for Community Values and chairman of the Ohio Campaign to Protect Marriage as saying "These (domestic violence) crimes should have the same penalty whether you're married or not," and Camilla Taylor, a lawyer for Lambda Legal, a gay-rights advocacy group, as saying, "The people of Ohio never intended to subject unmarried Ohioans to abuse in their own homes, and I'm sure the courts will recognize this.")

of what the text of Ohio Issue 1 says, the purpose of the law was directed entirely at restricting the rights of same-sex couples.

There is also a practical response to the argument that the second sentence of Issue 1 was directed against all unmarried individuals, not simply homosexuals. Heterosexual couples are free to marry. Under Issue 1, homosexual couples are not. If a man and a woman wish to undertake the obligations and secure the benefits of marriage, they are free to do so. Same sex couples may not. No heterosexual couple is burdened by this law. All same sex couples are. This law does not affect same-sex and opposite-sex couples equally.

#### 8. It Is an “Insult” to Characterize Gay Rights as a Civil Rights Movement

An argument which is being repeated against gay rights in general and same sex marriage in particular is that it is insulting or offensive to classify these as movements for “civil rights.”<sup>67</sup>

This is an argument which must be met forcefully, albeit with sensitivity. First of all, the language of our fundamental charters clearly includes the gay community. The Declaration of Independence says that “All men are created equal.”<sup>68</sup> The Constitution begins with the words, “We the *people*.”<sup>69</sup> The Fourteenth Amendment declares that “No *person* shall be deprived of life liberty or property ... nor shall any state deny to *any person* the equal protection of the laws.”<sup>70</sup> Liberty and equality are guaranteed to *all* people.

There is one aspect of this matter, however, that must be acknowledged. The indignities and inequalities that homosexuals have been and are being subjected to in our society cannot compare, either in scope or in magnitude, to the institution of slavery as it existed in our nation for ever so long.<sup>71</sup> The centuries of chattel slavery, segregation, and denial of basic civil rights endured by African-Americans in this country are simply not comparable to the history of discrimination on the basis of sexual orientation. On the other hand, no-one would pretend that constitutional protection extends only to race. The Constitution protects women<sup>72</sup> as well as blacks.<sup>73</sup> It protects the children of illegal aliens,<sup>74</sup> the mentally handicapped,<sup>75</sup> and the practices of minority groups such as

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<sup>67</sup> See statement of Jeff Ventrella, “A lot of people are offended by this comparison,” at 33:10 of *Same-Sex Marriage*, note 39 *supra*.

<sup>68</sup> DECLARATION OF INDEPENDENCE, second sentence.

<sup>69</sup> U.S. CONST., pmb1.

<sup>70</sup> U.S. CONST., 14<sup>th</sup> amend., § 1.

<sup>71</sup> See generally WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1956).

<sup>72</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating Idaho statute preferring males over females in the appointment of administrators of intestate estates).

<sup>73</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (invalidating West Virginia statute limiting jury service to whites).

<sup>74</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating Texas statute that authorized school districts to require undocumented children to pay tuition to attend public school).

Jehovah's Witnesses<sup>76</sup> and the Amish.<sup>77</sup> It even protects groups who have substantial political power such as men<sup>78</sup> and white Americans.<sup>79</sup> To say that gay rights is a movement for civil rights is not an insult to African-Americans or to any other group. It simply reflects the fact that the Equal Protection Clause protects all of us from unfair discrimination.

And speaking of insults, the gay and lesbian men and women who are now striving for equality know something of insults. They have had to endure this type of calumny and ridicule for a very long time and it is time for it to stop.<sup>80</sup> Do not let anyone tell you that it is an "insult" to be associated with homosexuals. This is bigotry, pure and simple. I am proud to be associated with the efforts of these brave gay and lesbian men and women.

An associated argument raised by the opponents of same sex marriage is that the *Loving* decision,<sup>81</sup> which struck down laws prohibiting interracial marriage, cannot be extended beyond the concept of race.<sup>82</sup> But this was not the understanding of Thurgood Marshall, who as the attorney for the NAACP won the *Loving* case and many other civil rights cases in the Supreme Court of the United States.<sup>83</sup> Later, as a Justice of the Supreme Court, Marshall said, "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all* individuals."<sup>84</sup> Most importantly, Marshall joined Justice William Brennan's dissent from the Court's denial of certiorari in a case

<sup>75</sup> See *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (invalidating municipal zoning ordinance requiring homes for the mentally retarded to obtain a special use permit).

<sup>76</sup> See, e.g., *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating West Virginia statute requiring all public school students to salute and pledge allegiance to the flag).

<sup>77</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating Wisconsin statute imposing compulsory school attendance to age 16 as applied to Amish).

<sup>78</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating Oklahoma statute establishing higher drinking age for males than for females).

<sup>79</sup> See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating affirmative action admissions policy of a public undergraduate college).

<sup>80</sup> For example, Justice Scalia implies that for constitutional purposes homosexuality is indistinguishable from "bestiality." See *Lawrence*, 539 U.S., at 590 (Scalia, J., dissenting) (stating, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."), and 599 ("The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable,' – the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.") (citation omitted). Justice Scalia's most offensive and morally obtuse comment on this matter is his use of the argument that "There are ... records of ... 4 executions [for sodomy] during the colonial period," without any condemnation of those events.

<sup>81</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia statute prohibiting intermarriage by whites with other races).

<sup>82</sup> See statement of Jeff Ventrella, "Don't buy that analogy," at 28:30 of *Same-Sex Marriage*, note \_\_\_ *supra*.

<sup>83</sup> See JUAN WILLIAMS, *THURGOOD MARSHALL, AMERICAN REVOLUTIONARY* (1998).

<sup>84</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (Marshall, J.) (invalidating Wisconsin statute prohibiting any person from marrying if he or she had an obligation to support children not in his or her custody, absent judicial finding that the children were not likely to become public charges) (emphasis added).

involving the dismissal of a public school teacher for disclosing her homosexuality to other teachers<sup>85</sup> and joined Justice Harry Blackmun's dissent in *Bowers v. Hardwick*.<sup>86</sup> Justice Marshall apparently did not feel "insulted" to recognize the civil rights of homosexuals.<sup>87</sup>

## 9. Sexual Orientation is Not Immutable

The Supreme Court subjects laws which distinguish people on the basis of race and gender to heightened judicial review in part because race and gender are "immutable" characteristics.<sup>88</sup> Racial classifications are said to be "suspect"<sup>89</sup> and are subjected to strict scrutiny,<sup>90</sup> while gender is considered to be a "quasi-suspect classification,"<sup>91</sup> and laws treating men and women differently are evaluated by the standard of "intermediate scrutiny."<sup>92</sup> A common argument against gay rights in general or same sex marriage in particular is that sexual orientation cannot be a "suspect classification" because sexual orientation is not immutable like race or gender, but rather is a matter of choice.<sup>93</sup> This argument has some force in that the Supreme Court has decided four cases on gay rights issues, two against gay rights and two in favor, but in

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<sup>85</sup> See *Rowland v. Mad River School District*, Montgomery County, Ohio, 470 U.S. 1009, 1014 (1985) (Brennan, J.) (dissenting from denial of certiorari in case involving public school teacher dismissed because of her homosexuality, stating, "discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.").

<sup>86</sup> See *Bowers*, 478 U.S., at 199 (Blackmun, J., dissenting).

<sup>87</sup> See Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 Okla.L. Rev. 93 (1994) (noting Marshall's dissenting position in *Bowers* and stating, "If Justice Marshall's realism can be linked persuasively and durably to moderate pragmatism, then perhaps there is reason for hope that such decisions as *Bowers v. Hardwick* are not the last word on one civil rights issue of the 1990s: Discrimination against the homosexual.").

<sup>88</sup> See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (stating, "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .') (citation omitted).

<sup>89</sup> See *Korematsu v. United States*, 323 U.S. 214, (1944) (stating, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

<sup>90</sup> See *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995) (stating, "Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

<sup>91</sup> See *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 325 (1976) (Marshall, J., dissenting) (stating, "Of course, the Court is quite right in suggesting that distinctions exist between the elderly and traditional suspect classes such as Negroes, and between the elderly and "quasi-suspect" classes such as women or illegitimates.").

<sup>92</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

<sup>93</sup> See, e.g., Eugene R. Milhizer, "Don't Ask, Don't Tell": A Qualified Defense, 21 Hofstra Lab. & Emp. L.J. 349, 398 fn 231 (2004) (stating, "Important differences between race, and sexual orientation and conduct, can be readily drawn. Race is an immutable characteristic; sexual orientation and action is a behavior and a choice, which can change over time.").

none of those cases has the Court declared that sexual orientation is a suspect or quasi-suspect classification.<sup>94</sup> However, there are several responses to this argument.

First, most people probably do not consider their *own* sexual orientation to have been a matter of choice, and therefore they may not accept the factual premise of this argument. If the Court were to find that sexual orientation is, for the most part, not a matter of choice, then the Court would be more inclined to hold that sexual orientation is a suspect or quasi-suspect classification, because sexual orientation meets the other criteria previously established for protected status: there has been a history of discrimination against homosexuals; they have suffered the legal disability that homosexual conduct was illegal; they are stigmatized and stereotyped; they are a discrete and insular minority; they are relatively politically powerless, as the recent election results prove; and sexual orientation bears little or no relationship to the ability to perform socially useful activity.<sup>95</sup> It is at least arguable that sexual orientation qualifies as a suspect classification.<sup>96</sup>

Furthermore, suspect class status is not a necessary qualification for constitutional protection, as shown by the fact that neither *Romer v. Evans* nor *Lawrence v. Texas* is premised upon such a judgment.<sup>97</sup> Similarly, the arguments that are set forth in the first part of this article do not depend upon a finding that homosexuals are a suspect class or that sexual orientation is a suspect classification. Instead, it is argued that neither the

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<sup>94</sup> See *Bowers*, 478 U.S. 186 (1986) (upholding Georgia statute criminalizing sodomy as applied to homosexuals); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (invalidating New Jersey public accommodations law as applied to Boy Scouts' exclusion of homosexual scoutmaster); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado constitutional amendment prohibiting state and local government from adopting nondiscrimination laws and policies protecting homosexuals); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas statute criminalizing homosexual conduct).

<sup>95</sup> See *Rowland*, 470 U.S., at 1014 (Brennan, J., dissenting from denial of certiorari) (stating, "First, homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality.' State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court.") (citation omitted). See generally *Cleburne*, 473 U.S., at 440-446 (discussing elements of suspectness as applied to the mentally retarded); *Frontiero*, 411 U.S., 685-688 (discussing elements of suspectness as applied to women).

<sup>96</sup> However, the Supreme Court has been reluctant to recognize any more protected classes. See *Cleburne*, 473 U.S., at 441-442, 446 (declining to find that the mentally retarded to be a suspect or quasi-suspect class, and noting that the Court had declined to extend suspect class status to the aged, stating, "The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.") (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)).

<sup>97</sup> See *Romer*, 517 U.S., at 635 (invalidating Colorado constitutional amendment under Equal Protection because it fails the rational basis test); *Lawrence*, 539 U.S., at 578 (invalidating Texas statute criminalizing homosexual conduct because it is unsupported by a legitimate state interest under the Due Process Clause).

right to marry nor the right to seek aid from the government may be arbitrarily denied.<sup>98</sup> If these rights are considered to be fundamental rights, then the government must justify laws restricting these rights under the strict scrutiny test. Even if strict scrutiny or intermediate scrutiny does not apply, under the rational basis test the government would still have to plausibly assert some legitimate reason for denying same sex couples the right to marry and the right to seek the legal benefits of marriage, and no such legitimate reason has ever been proposed. Suspect class analysis is not necessary to support constitutional protection for same sex marriage.

Finally, even if sexual orientation were a matter of choice, it would not detract from the validity of the constitutional argument in favor of same sex marriage, because choice is the essence of liberty. We are free to fall in love with any other consenting adult, and we are free to choose whom to marry, and the government may not tell us to make another choice.

#### 10. Romer v. Evans Can Be Distinguished from this Case.

The supporters of Issue 1 may attempt to argue that *Romer v. Evans* can be distinguished from a case considering the constitutionality of the second sentence of Ohio Issue 1. This argument will face an uphill battle. Both *Romer* and this case involve the constitutionality of a state constitutional amendment that makes it more difficult for homosexuals to obtain the adoption of favorable laws or policies. If there is *any* difference between the two cases, it must lie in the difference between Colorado Amendment 2 and Ohio Issue 1.

Colorado Amendment 2 prohibited the state and its political subdivisions from adopting nondiscrimination laws and policies, while the second sentence of Ohio Issue 1 prohibits the state and its political subdivisions from extending the benefits of marriage to homosexual couples.<sup>99</sup> The effect of the Colorado law was to *legalize* discrimination by public and private parties in the areas of housing, employment, education, and health and welfare services,<sup>100</sup> while the Ohio law *mandates* discrimination by state and local government against same sex couples with respect to marriage and marital benefits. If anything, the Ohio law cuts more deeply into the Constitution than the Colorado law does. The Ohio law *requires* discrimination by the government, whereas the Colorado law only *permitted* it. The Ohio law applies only to *government action*, while the Colorado law also applied to the acts of *private parties*, which are not constitutionally proscribed.<sup>101</sup> And the Ohio law infringes upon the right to *marry*, which is a

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<sup>98</sup> See notes \_\_\_-\_\_\_ *supra* and accompanying text.

<sup>99</sup> Compare Colorado Amendment 2, note 16 *supra*, with Ohio Issue 1, text accompanying note 1 *supra*.

<sup>100</sup> See *Romer*, at 623-624 (“The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.”)

<sup>101</sup> See *Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating Civil Rights Act of 1875 because Congress lacks authority under Section 5 of 14<sup>th</sup> Amendment to enact legislation regulating the actions of private individuals and organizations).

fundamental right,<sup>102</sup> whereas the Colorado law concerned housing, employment, education, and health and welfare services, which are not fundamental rights.<sup>103</sup> *Romer* cannot be distinguished in a manner that would support the constitutionality of Ohio Issue 1. Instead, it appears that there is an even stronger case for invalidating Ohio Issue 1 than there was for invalidating Colorado Amendment 2.

#### 11. *Romer v. Evans* Should Be Overruled.

Because *Romer* cannot be distinguished, the supporters of Issue 1 must necessarily argue that *Romer* was wrongly decided. However, *Romer* stands upon a solid legal foundation. There are two independent lines of cases that support the decision of the Supreme Court in *Romer*. The first line of cases establishes the unconstitutionality of laws that distort the structure of the governmental decisionmaking process to the detriment of an identifiable minority group.<sup>104</sup> The second line of cases forbids the government from taking action against an identifiable group purely because of dislike, disapproval, or irrational fear.<sup>105</sup>

The first line of cases begins with the 1967 decision in *Reitman v. Mulkey*,<sup>106</sup> and it condemns laws that result in a discriminatory structuring of the governmental process. In *Reitman* the Supreme Court considered a California constitutional amendment that prohibited the adoption of any law that would interfere with the absolute discretion of any person to sell or rent his property to another person.<sup>107</sup> The Court found that this

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<sup>102</sup> See notes 2-7 and accompanying text *supra*.

<sup>103</sup> See *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding Oregon Forcible Entry and Detainer Act, stating, ““We are unable to perceive [in the Constitution] any constitutional guarantee of access to dwellings ....”); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (upholding unequal funding of public schools, stating, “whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved ....”); *Dandridge v. Williams*, 398 U.S. 914 (1970) (upholding state regulation imposing a cap of \$275 per month upon AFDC payments regardless of family size and actual need, and stating, “here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights.”); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding state law restricting use of Medicaid funds to pay for abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal regulation restricting funding of abortions under Medicaid, and stating, “just because government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.”) The clearest judicial statement imposing an affirmative duty upon the government is contained within a dissenting opinion by Justice Thurgood Marshall, who wrote, “In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (Marshall, J., dissenting).

<sup>104</sup> See notes 101-115 *infra* and accompanying text.

<sup>105</sup> See notes 119-128 *infra* and accompanying text.

<sup>106</sup> 387 U.S. 369 (1967).

<sup>107</sup> See *id.* at 371 (quoting state constitutional amendment which provided: “Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.”).

amendment was intended to encourage private acts of racial discrimination, and for that reason it was struck down as unconstitutional under the Equal Protection Clause.<sup>108</sup>

A similar law was examined in *Hunter v. Erickson*,<sup>109</sup> where the voters of a municipality had adopted a charter amendment prohibiting the enactment of any fair housing law absent a referendum of the voters.<sup>110</sup> This charter amendment, like the constitutional amendment in *Reitman*, was not a mere repeal of a civil rights law – it did not simply return the city to the constitutional baseline – but it also made it harder to enact fair housing laws,<sup>111</sup> and for that reason it was struck down.<sup>112</sup>

This principle was extended from *laws* to *policies* in the case of *Washington v. Seattle School District No. 1*.<sup>113</sup> In that case a statewide initiative had been enacted prohibiting any local school district from adopting a voluntary program of busing students for integration, unless the busing was required under the Constitution of the United States.<sup>114</sup> The constitutionality of the law was challenged by the Seattle School

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<sup>108</sup> See *id.* at 381 (stating, “The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

<sup>109</sup> 393 U.S. 385 (1969) (invalidating Akron city charter amendment prohibiting the city council from enacting fair housing ordinances except with the concurrence of a referendum of voters).

<sup>110</sup> See *id.* at 387 (White, J.) (city charter amendment provided: “Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.”).

<sup>111</sup> See *id.* at 389-390 and 390 and fn 5 (White, J.) (stating, “the City of Akron ... not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect,” “Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.”).

<sup>112</sup> See *id.* at 392-393 (White, J.) (stating, “Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”).

<sup>113</sup> 458 U.S. 457 (1982) (invalidating Washington initiative prohibiting transportation of students for reasons other than special education, overcrowding, or lack of necessary physical facilities).

<sup>114</sup> See *id.* at 457 (Powell, J.) (stating that the opponents of busing for integration “drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration. This proposal, known as Initiative 350, provided that ‘no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence ... and which offers the course of study pursued by such student...’ The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he ‘requires special education, care or guidance,’ or if ‘there are health or safety hazards, either natural or man made, or physical barriers or obstacles ... between the student’s place of residence and the nearest or next nearest school,’ or if ‘the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.’ Initiative 350 also specifically proscribed use of seven enumerated methods of ‘indirect’ student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of ‘feeder’ schools – that are a part of the Seattle Plan. The initiative envisioned busing for racial purposes in

District, because the district had chosen to adopt a policy of affirmatively desegregating its schools.<sup>115</sup> The statewide initiative was declared unconstitutional because the state had committed virtually all other questions of educational policy to the discretion of local school boards; people who wanted to change educational policy with respect to other matters could appeal to their local school boards, but those who wanted a voluntary program of busing for integration were foreclosed from doing so.<sup>116</sup>

The essence of the constitutional violation in *Reitman, Hunter, and Seattle School District* was that there were different rules for different people. No good reason was advanced why it should be more difficult for one group to win the enactment of legislation or the adoption of policies than for another group to do so, and for this reason the law that distorted the process of governmental decisionmaking was struck down in each case.

There are obvious parallels between the Colorado constitutional amendment that was at stake in *Romer* and the state constitutional amendment, city charter amendment, and statewide initiative that were struck down in *Reitman, Hunter, and Seattle School District*. Colorado Amendment 2, like the laws that were considered in *Reitman, Hunter, and Seattle School District*, made it more difficult for a minority group to achieve the adoption of civil rights laws and policies. The Colorado amendment made it impossible for homosexuals to obtain the adoption of antidiscrimination laws and policies, while allowing other groups the opportunity to do so.<sup>117</sup> Relying in part upon *Reitman, Hunter, and Seattle School District*, the Colorado Supreme Court declared the Colorado constitutional amendment to be unconstitutional.<sup>118</sup>

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only one circumstance: it did not purport to ‘prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.’”) (citations omitted).

<sup>115</sup> See *id.* (Powell, J.) (stating, “in March 1978, the School Board enacted the so-called ‘Seattle Plan’ for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by ‘pairing’ and ‘triading’ predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race.”).

<sup>116</sup> See *id.* at 474 (Powell, J.) (stating, “We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem— and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350’s proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action.”).

<sup>117</sup> See *Romer*, 517 U.S., at 630 (Kennedy, J.) (stating, “Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”).

<sup>118</sup> See *id.* at 625 (Kennedy, J.) (stating, “the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. To reach this conclusion, the state court relied on our voting rights cases, and on our precedents involving discriminatory restructuring of governmental decisionmaking.”) (citing *Reitman, Hunter, and Seattle School District*, among other cases) (citations omitted).

On appeal, the United States Supreme Court affirmed the decision of the Colorado Supreme Court in *Romer*, but Justice Kennedy, speaking for the six members of the majority, stated that in declaring the Colorado law unconstitutional the Supreme Court was *not* invoking the same rationale used by the Colorado Supreme Court, which had found this case to be controlled by *Reitman*, *Hunter*, and *Seattle School District*.<sup>119</sup> The decision of the federal Supreme Court not to follow the reasoning of the state supreme court was made for a very good reason. *Reitman*, *Hunter*, and *Seattle School District* all concerned laws that made it more difficult for *racial* minorities to enact protective legislation. Since the Colorado amendment obviously did not discriminate on the basis of race, the United States Supreme Court declined to follow the reasoning of the Colorado Supreme Court, possibly because it was not ready to draw the analogy between racial discrimination and discrimination on the basis of sexual orientation. Instead, the Court in *Romer* invoked a different rule, far broader than the standard that had evolved in the earlier trio of cases. The Court held that the Colorado constitutional amendment lacked a legitimate purpose, and that it therefore failed examination under the lowest level of constitutional scrutiny, the rational basis test.<sup>120</sup>

A key requirement of the rational basis test is that the law must serve a legitimate governmental objective. In determining the purpose of Colorado Amendment 2, the Court in *Romer* found that the actual intent of the law was to discriminate against homosexuals, and did not accept the purported interests suggested by the State of Colorado that it was conserving prosecutorial resources for use in other discrimination cases or that it was protecting the privacy interests of Colorado residents who wished to discriminate on the basis of sexual orientation.<sup>121</sup> In this regard the decision of the Supreme Court in *Romer* mirrored the reasoning of the *Reitman* and *Seattle School District* decisions. Even though the laws that were considered in *Reitman* and *Seattle School District* were neutral on their face, the Court found that each law was motivated by an intent to deprive a minority group of the opportunity to achieve its political goals.<sup>122</sup> Similarly, in *Romer*, the state constitutional amendment did not on its face

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<sup>119</sup> See *id.* at 625-626 (Kennedy, J.) (stating, “We granted certiorari, and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.”).

<sup>120</sup> See *id.* at 635 (Kennedy, J.) (stating, “We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose. . . . We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective.”).

<sup>121</sup> See *id.* (Kennedy, J.) (stating, “The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. . . . We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.”).

<sup>122</sup> The California constitutional amendment evaluated in *Reitman* simply referred to persons choosing to sell or rent to other persons for any reason. See note \_\_ *supra*. Nevertheless, the Court ruled that, in light of the context in which the amendment was adopted, there was evidence that the amendment was intended to encourage private acts of racial discrimination. See *Reitman*, 387 U.S., at 378-379 (stating, “Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [the state constitutional amendment], and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.”).

express any negative opinion towards homosexuals, but the intent of the law was apparent from the circumstances surrounding its adoption, and it was this intent which made the law unconstitutional.<sup>123</sup>

The legitimacy of the government's intent is the determining factor in the second line of cases which supports the Court's decision in *Romer*. These cases forbid discrimination for its own sake, and stand for the proposition that it is unconstitutional for the government to treat one group differently from another because of animosity, irrational prejudice, irrational fear, moral disapproval, or a desire to harm the other group of people.

The first case of this type was *U.S. Department of Agriculture v. Moreno*,<sup>124</sup> in which the Court invalidated a provision of the Food Stamp Act that excluded people from eligibility if they resided with unrelated individuals.<sup>125</sup> Speaking for the Court, Justice Brennan noted that the legislative history indicated that the purpose of the law was to prevent "hippies" and "hippy communes" from receiving food stamps.<sup>126</sup> Justice Brennan stated:

[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.<sup>127</sup>

In *City of Cleburne v. Cleburne Living Center*,<sup>128</sup> the Court struck down a municipal zoning ordinance which required group homes for the mentally retarded, but

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The Washington State initiative considered in *Seattle School District* on its face merely prohibited transportation of students for reasons other than special education or overcrowding, without expressly mentioning bussing for integration, but the Court concluded that the racially discriminatory purpose of the legislation was apparent from the context. See *Seattle School District*, 458 U.S., at 471 (stating, "Noting that Initiative 350 nowhere mentions 'race' or 'integration,' appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing. ... It is beyond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration.").

In *Hunter*, the city charter amendment expressly mentioned race. See note \_\_\_ *supra*.

<sup>123</sup> See note 127 and accompanying text *infra*.

<sup>124</sup> 413 U.S. 528 (1973).

<sup>125</sup> See *id.* at 529 (Brennan, J.) (stating, "This case requires us to consider the constitutionality of s 3(e) of the Food Stamp Act of 1964, which, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.") (statutory citations omitted).

<sup>126</sup> See *id.* at 534 (Brennan, J.) (stating, "The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

<sup>127</sup> *Id.* (Brennan, J.)

<sup>128</sup> 473 U.S. 432 (1985).

not nursing homes for the infirm or the elderly, to annually obtain a special use permit.<sup>129</sup> Writing for the majority, Justice White found that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded,”<sup>130</sup> and Justice John Paul Stevens, in a concurring opinion, stated that “the record convinces me that this permit was required because of the irrational fears of neighboring property owners ....”<sup>131</sup>

The two Supreme Court decisions protecting the rights of homosexuals incorporated this reasoning. In *Romer*, Justice Kennedy noted that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of person affected.”<sup>132</sup> In *Lawrence*, Justice O’Connor, in her concurring opinion, extended the category of illegitimate governmental purposes to include “moral disapproval.” She explained why moral disapproval, by itself, is not a “legitimate” governmental interest in the following passage:

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating “a classification of persons undertaken for its own sake.” And because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior. The Texas sodomy law “raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>133</sup>

In summary, the Court’s decision in *Romer* is supported by two independent lines of authority: the *Reitman* line of cases which hold that it is unconstitutional to distort the governmental decisionmaking process to the detriment of a minority group, and the *Moreno* line of cases which hold that a bare desire to harm a group, or moral disapproval of it, is not a sufficient reason to support the constitutionality of a law. Neither rationale has been questioned by the Court. *Romer* is good law, and it makes the second sentence of Ohio Issue 1 unconstitutional.

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<sup>129</sup> See *id.* at 436, fn 3 (setting forth municipal ordinance permitting the following uses in the location of the proposed group home: “Apartment houses, or multiple dwellings; Boarding and lodging houses; Fraternity or sorority houses and dormitories; Apartment hotels; Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the insane or feeble-minded* or alcoholics or drug addicts; Private clubs or fraternal orders, except those whose chief activity is carried on as a business; Philanthropic or eleemosynary institutions, other than penal institutions.”) (emphasis in case, not in original ordinance) (numbering omitted).

<sup>130</sup> *Id.* at 450 (White, J.)

<sup>131</sup> *Id.* at 455 (Stevens, J.).

<sup>132</sup> 517 U.S., at 634 (Kennedy, J.).

<sup>133</sup> 539 U.S., at 583 (O’Connor, J., concurring) (citations omitted).

## CONCLUSION

On December 12, 1953, the justices of the Supreme Court of the United States met in conference to discuss the momentous case which was then before the Court: *Brown v. Board of Education*.<sup>134</sup> Earl Warren, the newly-appointed Chief Justice, presided over the conference. In presenting *Brown* to his fellow justices Warren framed the issue before the Court not solely in legal terms, but also in moral terms. He told his colleagues:

[T]he more I've read and heard and thought, the more I've come to conclude that the basis of segregation and "separate but equal" rests upon a concept of the inherent inferiority of the colored race. I don't see how *Plessy* and the cases following it can be sustained on any other theory. If we are to sustain segregation, we must do it upon that basis.<sup>135</sup>

In cases such as *Dred Scott v. Sandford*<sup>136</sup> and *Plessy v. Ferguson*<sup>137</sup> the Supreme Court had upheld racial segregation based on the intent of the framers, longstanding judicial precedent, and cultural traditions,<sup>138</sup> but these arguments failed in *Brown* because they were implicitly premised upon the supposed inequality of the races, a premise that the Court emphatically rejected in *Brown*.<sup>139</sup> Since the Court's decision in *Brown*, the interpretation of the Equal Protection Clause has not been controlled by tradition or precedent, but rather by a careful evaluation of whether the groups who are being treated differently by the law are different in fact.<sup>140</sup>

Same sex couples are not different in fact from heterosexual couples, and as a result they may not be treated differently by the law. Ohio Issue 1 is unconstitutional.

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<sup>134</sup> 347 U.S. 483 (1954).

<sup>135</sup> BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 292 (1995).

<sup>136</sup> 60 U.S. 393 (1857) (invalidating Missouri Compromise on the ground that it interfered with the property rights of slaveholders to bring slaves into the territories of the United States).

<sup>137</sup> 163 U.S. 537 (1896) (upholding Louisiana statute requiring the segregation of the races in railroad cars).

<sup>138</sup> See *Dred Scott* at 407 (Taney, C.J.) (justifying decision upholding extension of slavery into the territories of the United States by ascribing racist views to the framers of the Constitution); *Plessy*, 163 U.S., at 550 (Brown, J.) (upholding racial segregation in part because it was consistent with "the established usages, customs, and traditions of the people."); *Plessy*, 163 U.S., at 542-548 (Brown, J.) (citing judicial precedent upholding laws requiring the separation of the races).

<sup>139</sup> See *Brown*, 347 U.S., 489-490 (Warren, C.J.) (referring to the post-civil war period, stating, "In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world.").

<sup>140</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 545 (1996) (striking down century-old male-only admission policy of Virginia Military Institute, a public military college, on the ground that the State of Virginia had failed to offer an "exceedingly persuasive justification" for the discriminatory admissions policy.).