

# The Categorical Imperative: *Romer* as the Groundwork for Challenging State “Defense of Marriage” Amendments

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*“The court finds [that Nebraska’s] Section 29 is a denial of access to one of our most fundamental sources of protection, the government. Such a broad exclusion . . . is ‘itself a denial of equal protection in the most literal sense.’”\*\* So said Judge Joseph Bataillon of the District of Nebraska in striking down Nebraska’s “defense of marriage” amendment on equal protection grounds. His disposition was short-lived, however—the Eighth Circuit reversed him on July 14, 2006. The Eighth Circuit’s decision, while generally correct as a judgment, nonetheless suffered from the same conclusory logic plaguing much modern legal analysis of whether “defense of marriage” amendments comply with the Equal Protection Clause. This Note seeks to transcend that over-generalized legal debate.*

*Twenty-seven states have passed “defense of marriage” amendments in the last decade. While those states have approximately the same goal in mind—namely, to restrict the possibility of the state legally recognizing certain same-sex relationships—the breadth of those amendments vary widely. Hawaii, for example, merely reserves recognition or non-recognition of same-sex marriage solely to the legislature. Alaska defines marriage as between a man and a woman but leaves the door open for alternative legal arrangements such as domestic partnerships. Nebraska prohibits same-sex marriage, civil unions, domestic partnerships, and other like legal statuses. Meanwhile, Louisiana and Oklahoma not only ban same-sex marriage, but forbid “the legal incidents” of marriage—assumedly the benefits and protections traditionally accompanying marital status—from being conferred on same-sex couples.*

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This Note is dedicated to the memory of my grandparents, Helen Butland and Robert Ritchie. Eternally supportive of me during their lifetimes, I can only hope that they have a chance in a better place to read their grandson’s first (and hopefully not last) attempt at legal academia.

\*\* *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1003 (D. Neb. 2005) (quoting *Romer v. Evans*, 571 U.S. 620, 633 (1996)).

*Such breadth defies any categorical statement of constitutional validity. However, groups of amendments can be analyzed based on their restrictiveness, and that is the approach this Note takes. First, it divides state “defense of marriage” amendments into four distinct categories based on the extent to which they forbid state and local recognition of same-sex relationships. Second, it creates an equal protection framework, based on current Supreme Court jurisprudence, to determine whether a state amendment violates equal protection. And finally, it opines on the constitutionality of the various categories of “defense of marriage” amendments based on this framework.*

## I. INTRODUCTION

Dissenting in *Goodridge v. Department of Public Health*, the 2003 Massachusetts Supreme Judicial Court decision mandating same-sex marriage, Justice Martha Sosman noted that the debate over same-sex marriage has become “a ‘perfect storm’ of a constitutional question.”<sup>1</sup> But the same-sex marriage debate—which has seemingly become a launching pad for pious pronouncements from pulpits and politicians<sup>2</sup>—was not always a white squall. Just as the assassination of a single archduke embroiled the developed world in a four-year conflict,<sup>3</sup> the first shot in the modern war

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<sup>1</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 982 (Mass. 2003) (Sosman, J., dissenting).

<sup>2</sup> See, e.g., Eric Pooley, *A Rudy Awakening*, TIME, Feb. 19, 2007, at 42, 43 (discussing former New York Mayor and presidential candidate Rudy Giuliani’s statement that “[m]arriage should be between a man and a woman[; that’s] exactly the position I’ve always had”); Neal Conan, *Talk of the Nation: New Mexico Gov. Richardson Eyes Presidency* (National Public Radio broadcast Feb. 13, 2007), available at <http://www.npr.org/transcripts/> (search for “New Mexico Gov. Richardson Eyes Presidency”) (Governor and Presidential candidate Bill Richardson stating that gay marriage “has to wait. I think let’s find ways to make sure that we have enough civil union protections, non-discriminatory protections. That’s what I would advocate.”); President George W. Bush, Remarks on a Proposed Constitutional Amendment to Protect Marriage (June 5, 2006), in 42 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1076, 1076, available at <http://www.access.gpo.gov/nara/nara003.html> (select “2006 Presidential Documents” and submit search term “marriage;” then select first result) (“[There is] a broad consensus in our country for protecting the institution of marriage. The people have spoken. Unfortunately, this consensus is being undermined by activist judges and local officials who have struck down State laws protecting marriage and made an aggressive attempt to redefine marriage.”); Carla Marinucci, *Kucinich Gives Spirited Defense of Gay Marriage*, S.F. CHRON., Dec. 17, 2003, at A2 (former Congressman and presidential candidate Dennis Kucinich stating “I can’t, for the life of me, understand why I’m the only one who’s taking this position [in support of same-sex marriage] with such emphasis . . . . We have to be courageous in protecting people’s rights . . . and I don’t think people should expect any less from a president”).

<sup>3</sup> World War I was catalyzed by the assassination of Archduke Franz Ferdinand.

over same-sex marriage was a (now generally forgotten) state supreme court decision.

On May 5, 1993, the Hawaii Supreme Court held that its marriage statute, which limited marriage to a union between one man and one woman, drew a classification on the basis of gender and thus was subject to strict scrutiny under Hawaii's Constitution<sup>4</sup>—a level of review that often spells doom for defenders of a law.<sup>5</sup> While the ultimate determination of the statute's fate was pending in the Hawaii lower courts, Congress passed the Defense of Marriage Act which, in part, allowed states to decline to recognize same-sex marriages or similar legal unions performed outside the state.<sup>6</sup> Empowered by the federal government's green light, and to avoid the inevitable fatality that often accompanies strict scrutiny review, the Hawaii voters amended their constitution in 1998 to reserve questions of same-sex marriage solely to the legislature.<sup>7</sup> Thus began the fervent same-sex marriage debate.

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<sup>4</sup> *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion). The Hawaii Supreme Court held that Hawaii's marriage law, HAW. REV. STAT. § 572-1 (1993), drew a classification on the basis of sex because an individual's choice of partner was limited, by the law's very terms, based on the sex of that individual. *Baehr*, 852 P.2d at 60. The case was thus remanded for consideration as to whether § 572-1 satisfied strict scrutiny. *Id.* at 67–68.

<sup>5</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (noting that strict scrutiny “has led some to wonder whether . . . [it is] strict in theory, but fatal in fact”); Brief of Plaintiffs-Appellants at 64, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (noting that the State “did not even attempt” to argue that the Massachusetts marriage statutes could survive strict scrutiny, instead opting for arguments based on differences between same- and opposite-sex couples). Very few laws have survived strict scrutiny review at the federal level. Notable (and rare) exceptions include the internment of Japanese-Americans in World War II (*Korematsu v. United States*, 323 U.S. 214, 218–224 (1944)) and narrow “plus-factor” affirmative action programs in higher education (*Grutter v. Bollinger*, 539 U.S. 306, 321 (2003)).

<sup>6</sup> Defense of Marriage Act, Pub. L. No. 104-199 (1996) (codified in relevant part at 28 U.S.C. § 1738C (2000)). Section 1738C states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

<sup>7</sup> HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”). In essence, the amendment removed the question of same-sex marriage from the ambit of equal protection violations under Hawaii's art. I, § 5. See *Baehr v. Miiike*, No. 20371, slip op. at 1–3 (Haw. Dec. 11, 1999), available at [http://www.courts.state.hi.us/page\\_server/LegalReferences/73DFB8859867A628EAE7A](http://www.courts.state.hi.us/page_server/LegalReferences/73DFB8859867A628EAE7A)

The same-sex marriage issue, simmering since Hawaii, came to a boil after the Massachusetts Supreme Judicial Court held in 2003 that the Massachusetts Constitution required that marriage be extended to same-sex couples.<sup>8</sup> A *kulturkampf* ensued, with eleven states passing constitutional amendments forbidding same-sex marriage in November 2004.<sup>9</sup> In November 2006, seven more states passed their own constitutional amendments,<sup>10</sup> bringing the total number of states with such amendments to twenty-six.<sup>11</sup>

Even proponents of same-sex marriage have generally conceded that, for the most part, these state constitutional amendments pass muster under the United States Constitution.<sup>12</sup> Perhaps that is why many were surprised when

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B3DC5.html (follow “December” of “1999” hyperlink; then follow “20371” hyperlink). The Hawaii legislature subsequently revised its marriage law to define marriage as only between a man and a woman. HAW. REV. STAT. § 572-1 (2004). For a brief timetable of Hawaii’s marriage law on this issue, see 150 CONG. REC. H7889 (daily ed. Sept. 30, 2004) (statement of Rep. McGovern).

<sup>8</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The court held that restricting marriage to opposite-sex couples did not even satisfy rational basis review under the Massachusetts Constitution. *Id.* at 961–65. The court was careful to note, however, that the Massachusetts Constitution often protects individual rights to a greater extent than the U.S. Constitution. *Id.* at 959.

<sup>9</sup> Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, <http://www.stateline.org> (follow “ARCHIVES” hyperlink; then follow “Stories from 2004” hyperlink; then follow “11/03/2004 – 50-state rundown on gay marriage laws”). See also *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 999 n.16 (D. Neb. 2005) (noting that eleven States passed state constitutional amendments banning same-sex marriage in the November 2004 elections). The states were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah.

<sup>10</sup> Vikas Bajaj et al., *The 2006 Elections: State by State*, N.Y. TIMES, Nov. 9, 2006, at P13. The states were Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin. Arizona voters rejected its proposed amendment, making it the only state to do so.

<sup>11</sup> See Human Rights Campaign, *Statewide Marriage Prohibitions*, [http://www.hrc.org/issues/state\\_laws.asp](http://www.hrc.org/issues/state_laws.asp) (select “Statewide Marriage Laws” link) (last visited Nov. 7, 2007). While Hawaii is often mistaken as being the twenty-seventh state with such an amendment, this is incorrect because the amendment merely reserves the definition of marriage to the legislature rather than actually defining marriage. See *supra* note 7. The twenty-six states with amendments restricting legal same-sex unions are Alabama, Alaska, Arkansas, Colorado, Georgia, Kansas, Kentucky, Idaho, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

<sup>12</sup> See, e.g., Mark Agrast, Sam Berger & Brodie Butland, *Remarks of President Bush on the Marriage Protection Amendment: Corrected and Annotated*, CENTER FOR

Judge Joseph Bataillon of the United States District Court for the District of Nebraska struck down a Nebraska constitutional provision, Section 29,<sup>13</sup> banning same-sex marriage, civil unions, domestic partnerships, and other like legal relationships. In *Citizens for Equal Protection, Inc. v. Bruning*,<sup>14</sup> Judge Bataillon held that Nebraska's amendment violated the First Amendment<sup>15</sup> and the Equal Protection Clause of the Fourteenth Amendment,<sup>16</sup> and was an unconstitutional bill of attainder.<sup>17</sup> In particular, Judge Bataillon relied on the Supreme Court decision *Romer v. Evans*,<sup>18</sup> drawing parallels between Section 29 and the deprivations directed at homosexuals in *Romer* to support his ruling. Judge Bataillon viewed Section 29 as going far beyond simply protecting the institution of marriage, possibly invalidating labor contracts;<sup>19</sup> health insurance, adoption, and inheritance rights;<sup>20</sup> and even lease agreements between roommates of the same sex.<sup>21</sup> Thus, he reasoned, like Colorado's Amendment 2 in *Romer*, Section 29 was "at once too broad and too narrow to satisfy its purported purpose of defining marriage, preserving marriage, or fostering procreation and family life."<sup>22</sup> Rather, Section 29 was a "status-based" law that impermissibly sought "to deny access to the legislative process by [homosexuals]."<sup>23</sup>

Section 29's language is not unlike that of thirteen other state constitutional amendments banning same-sex marriage, civil unions, domestic partnerships, and other like legal relationships.<sup>24</sup> This, coupled with the Supreme Court's unwillingness to enter the same-sex marriage

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AMERICAN PROGRESS 4 (2006), available at <http://www.americanprogress.org/kf/marriage%20fact%20sheet.pdf> ("[S]tate constitutional amendments [banning same-sex marriage] all over the country appear to be on firm ground."). This Note will be arguing against this position for some of the amendments. See *infra* Parts III and IV.

<sup>13</sup> NEB. CONST. art. I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

<sup>14</sup> 368 F. Supp. 2d 980 (D. Neb. 2005).

<sup>15</sup> *Id.* at 989–97.

<sup>16</sup> *Id.* at 997–1005.

<sup>17</sup> *Id.* at 1005–08.

<sup>18</sup> 517 U.S. 620 (1996).

<sup>19</sup> *Bruning*, 368 F. Supp. 2d at 1000 n.17.

<sup>20</sup> *Id.* at 987–88.

<sup>21</sup> *Id.* at 1005.

<sup>22</sup> *Id.* at 1002.

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* notes 48–53 and accompanying text (discussing a selection of amendments similarly worded to Nebraska's Section 29).

debate<sup>25</sup>—or even recognize rights for homosexuals beyond that of not being criminally punishable for private sexual conduct<sup>26</sup>—rendered Judge Bataillon’s courageous ruling akin to the fictional Octavia, a city suspended over a crevasse only by a web of ropes: “Suspended over the abyss, the life of Octavia’s inhabitants is less uncertain than in other cities. They know the net will last only so long.”<sup>27</sup> The ropes gave way on July 14, 2006 when the U.S. Court of Appeals for the Eighth Circuit reversed Judge Bataillon, holding that Section 29 need only be subject to rational basis review<sup>28</sup> and that there was a rational basis in encouraging heterosexual procreation and “ideal” opposite-sex parent child-rearing by limiting relationship recognition to opposite-sex couples.<sup>29</sup> The Eighth Circuit rejected a request for rehearing en banc in September 2006,<sup>30</sup> thus leaving Nebraska’s Section 29 constitutionally intact.

While the twenty-seven states with state constitutional amendments relating to same-sex marriage have approximately the same goal in mind, the breadth of those amendments vary widely. Hawaii’s, for example, is merely a court-stripping provision, reserving recognition or non-recognition of same-sex marriage to the legislature.<sup>31</sup> Alaska goes a bit further, defining marriage as between a man and a woman but leaving the door open for alternative legal arrangements such as domestic partnerships.<sup>32</sup> Nebraska prohibits same-sex marriages, civil unions, domestic partnerships, and other like legal statuses.<sup>33</sup> But then there are Louisiana and Oklahoma, which not only ban

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<sup>25</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (noting that the case invalidating anti-sodomy laws “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”). *See also* *Lofton v. Sec’y of Dep’t of Children and Family Serv.*, 358 F.3d 804, 817 (11th Cir. 2004) (holding that *Lawrence* was limited to criminalization of sodomy, and thus did not imply the unconstitutionality of a Florida law barring homosexuals from adopting children).

<sup>26</sup> *Lawrence*, 539 U.S. at 578.

<sup>27</sup> ITALO CALVINO, *INVISIBLE CITIES* 75 (William Weaver trans., Harvest Books 1974) (1972).

<sup>28</sup> *Citizens for Equal Prot., Inc. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006).

<sup>29</sup> *Id.* at 867–68.

<sup>30</sup> *See* G.M. Filisko, *The Rites Wrangle*, A.B.A. J., Nov. 2006, at 44, 47.

<sup>31</sup> *See supra* note 7.

<sup>32</sup> *See* ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”).

<sup>33</sup> NEB. CONST. art. I, § 29. There is speculation that Section 29 actually goes further than this. *See* *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980, 1002 (D. Neb. 2005) (suggesting that Section 29 extended to “many other legitimate associations, arrangements, contracts, benefits, and policies” unrelated to personal relationships). However, as there is no authoritative state law construction implying as much, this Note

same-sex marriage, but forbid “the legal incidents” of marriage—assumedly the benefits, obligations, and protections that accompany marital status—from being conferred on same-sex couples.<sup>34</sup>

This wide spectrum of amendments defies any categorical statement of constitutional validity. While seemingly only the most activist (and simultaneously unprincipled) judges would invalidate Hawaii’s relatively innocuous amendment, the fate of the other amendments is not so clear. The amendments lend themselves not to a single categorization of same-sex marriage bans, but rather a taxonomy based on their breadth.

This Note will examine whether the various types of state “defense of marriage” amendments<sup>35</sup> can withstand an equal protection challenge under the Federal Constitution. Part II, below, will propose four basic categories into which “defense of marriage” amendments can be placed. This categorization not only will help to conceptualize the twenty-seven separate amendments, but also could prove useful for precedential value should a court ultimately invalidate a “defense of marriage” amendment. Part III will discuss *Romer v. Evans*, along with some other equal protection cases of the Supreme Court, and propose a framework to analyze each of the four categories of amendments under equal protection based on those precedents. Finally, Part IV will apply that framework to each of the categories of amendments and opine as to whether those particular categories would satisfy equal protection under the United States Constitution.

## II. CATEGORIZATION OF STATE CONSTITUTIONAL AMENDMENTS

### A. *Purposes of Categorization*

This Part will divide the twenty-seven different “defense of marriage amendments” into four categories based on the breadth of domestic legal

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will assume that Section 29 simply halts at banning legal recognition of same-sex marriages, civil unions, and domestic partnerships.

<sup>34</sup> LA. CONST. art. XII, §15; OKLA. CONST. art. II, § 35.

<sup>35</sup> This Note uses the term “‘defense of marriage’ amendment” to refer to any state constitutional amendments that relate in some form to recognition of same-sex relationships. Admittedly this term is something of a misnomer. Many of these amendments go beyond banning same-sex marriage. *See infra* notes 48, 62–63 and accompanying text. Moreover, many people believe that allowing same-sex couples to marry would pose absolutely no threat to marriage, and in fact would be positive for the institution (a sympathy with which this author agrees). However, this Note uses the term because the “defense of marriage” amendments were generally passed in response to a perceived “threat” of same-sex marriage being imposed by activist judiciaries, and thus it seems like the most appropriate shorthand.

statutes for same-sex partners that they prohibit. There are two main reasons for this division.

First, categorization creates a more robust description of the amendments and allows for greater discussion of what a proposed amendment should cover. Very often, especially in mass media, debates over the propriety of “defense of marriage” amendments suffer from oversimplification.<sup>36</sup> To describe “defense of marriage” amendments solely in terms of banning same-sex marriage masks the complexity which different choices of language may occasion. For example, by its very terms, Alaska’s amendment—which stops at defining marriage as between a man and a woman<sup>37</sup>—has a far different import for the abilities of gay and lesbian advocacy groups to petition the

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<sup>36</sup> See *Defense of Marriage Act, Gay Marriage Amendment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of former Rep. Bob Barr, R-Ga), available at 2004 WL 630827 (F.D.C.H.) (lamenting the reduction of the same-sex marriage debate to “vague sound-bites and generalized talking points”). For popular media sources oversimplifying the extent of “defense of marriage” amendments, see Rose Arce, *New Jersey Court Recognizes Right to Same-Sex Unions*, CNN.COM, Oct. 26, 2006, <http://www.cnn.com/2006/US/10/25/gay.marriage/index.html> (“[O]n November 7 [2006] voters in eight states will decide whether to amend their constitutions to ban gay and lesbian couples from marrying.”); Pam Belluck, *Ban on Gay Marriage Moves Closer to Ballot*, HOUS. CHRON., Jan. 3, 2007, at A4 (“In November [2006], seven states approved gay-marriage bans, joining 20 that had done so in previous elections.”); Editorial, *Gay Marriage Opposed*, HERALD-SUN (Durham, N.C.), Nov. 17, 2006, at A8 (“The states that voted against gay marriage [in November 2006], most by large margins, included Virginia, Tennessee, South Carolina, Wisconsin, Colorado, South Dakota and Idaho.”). With only one or two exceptions, the “defense of marriage” laws and amendments referred to in the articles above went beyond same-sex marriage, banning civil unions, domestic partnerships, and, in Oklahoma, the “incidents” of marriage. *But see* Sonya Geis, *New Tactic in Fighting Marriage Initiatives: Opponents Cite Effects on Straight Couples*, WASH. POST, Nov. 20, 2006, at A3 (noting that of twenty-seven marriage initiatives, many “have included language outlawing domestic partnerships”).

Even the American Bar Association has fallen prey to the temptation to oversimplify the panoply of “defense of marriage” amendments. In its official quarterly family law publication, every state that had a “defense of marriage” law was listed simply as having “[a] law prohibiting marriage between two people of the same sex.” *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 397–402 (2004). The article prefaced its rundown of “defense of marriage acts” with: “The purpose of state DOMAs is to prohibit same-sex couples from marrying within the state and to provide that the state will refuse to recognize same-sex marriages . . . performed in other states.” *Id.* at 397. While certainly preventing same-sex marriages might be the *main* purpose of a “defense of marriage” amendment, and while these amendments certainly ban same-sex marriage, many reach into other types of same-sex unions, and sometimes even the extension of benefits associated with marriage to same-sex couples.

<sup>37</sup> See *supra* note 32.



state legislature than Louisiana's amendment—which forbids both marriage and “the legal incidents” thereof to same-sex couples.<sup>38</sup> Not only is a more precise description vital in a discussion of the legal ramifications of the amendments, but it is essential that other states contemplating passing their own amendments understand the myriad of options—and implications of those options—available to them.

Second, categorization of the amendments is better for establishing legal precedent. One of the main purposes of jurisprudence is predictability.<sup>39</sup> While every case should be analyzed on its facts, cases with similar facts should be resolved similarly. Thus, while each “defense of marriage” amendment should be individually analyzed in order to assess its constitutional validity, amendments with similar language and teleological impacts should, assumedly, be constitutionally adjudicated in a similar fashion. Likewise, should the judiciary determine that an amendment in a certain category is constitutional, those amendments in less restrictive categories should generally be deemed constitutional as well. For example, if the Supreme Court determined that Nebraska's Section 29 (which bans same-sex marriage, civil unions, domestic partnerships, and other like legal statuses) satisfies equal protection, then it should hold that Alaska's amendment (which only bans same-sex marriage) satisfies equal protection as well.

These advantages being established, the four proposed categories are set out below.

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<sup>38</sup> See *supra* note 34.

<sup>39</sup> See, e.g., *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (opinion of Stevens, J.) (noting that *stare decisis* “serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules”); *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (adhering to a prior, vilified decision exempting professional baseball from antitrust laws out of concern for consistency and predictability in future decisions); *Hope v. Pelzer*, 536 U.S. 730, 753 (2002) (Thomas, J., dissenting) (“[I]t is crucial to look at precedent applying the relevant legal rule in similar factual circumstances. Such cases give government officials the best indication of what conduct is unlawful in a given situation.”); MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 24 (2000) (quoting Oliver Wendell Holmes, Jr.: “[T]he prophecies of what the judges will do in fact, and nothing more pretentious, are what I mean by the law.”), *id.* (“[F]or all practical purposes the law on any given issue actually consists only in the best predictions that well-informed lawyers can make about the way in which a case will be decided.”).

## B. Categorization of State Constitutional Amendments

### 1. Category I: Court-Stripping Amendments

This type of “defense of marriage” amendment does not codify a position on same-sex marriage; it simply reserves the question exclusively to the state legislature. Hawaii is the only state, thus far, to have enacted a Category I amendment. Hawaii’s amendment reads: “The legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>40</sup> Hawaii subsequently amended its marriage laws to reserve marriage to opposite-sex couples only.<sup>41</sup> Category I amendments not only allow for the state legislature to establish same-sex marriage or alternative institutions for same-sex couples—such as civil unions and domestic partnerships<sup>42</sup>—but they even seem to preserve a state supreme court’s authority to demand that the benefits of marriage be accorded to same-sex couples, even if not the institution of marriage itself.<sup>43</sup> Category I amendments are by far the least burdensome restrictions for same-sex marriage advocates, for they still allow gay and lesbian advocacy groups to petition the legislature, and they allow a full range of options for legally recognizing same-sex relationships.

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<sup>40</sup> HAW. CONST. art. I, §23.

<sup>41</sup> HAW. REV. STAT. § 572-1 (Supp. 2005).

<sup>42</sup> Indeed, Hawaii has created a “reciprocal beneficiary relationship” for same-sex couples, which grants to them the traditionally marital benefits of inheritance without a will, the ability to sue for wrongful death of the reciprocal beneficiary, hospital visitation and health care decisions, consent to postmortem examinations, loan eligibility, property rights (including joint tenancy), tort liability, and protection under Hawaii’s domestic violence laws. HAW. REV. STAT. § 572C-1-C-7 (Supp. 2005); Human Rights Campaign, *Hawaii Marriage/Relationship Recognition Law*, <http://www.hrc.org/issues/898.htm> (listing benefits).

<sup>43</sup> Cf. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (mandating that same-sex couples be able to obtain the same “statutory benefits, protections, and security incident to marriage under Vermont law” under the Common Benefits Clause of the Vermont Constitution, although not mandating that the institution of marriage be extended to same-sex couples); *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006) (holding that denial of “financial and social benefits and privileges” of marriage to same-sex couples violated the New Jersey Constitution, but reserving to the legislature the means of giving same-sex couples those benefits and privileges); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 977–78 (Mass. 2003) (Spina, J., dissenting) (arguing that the *Goodridge* majority improperly equated the protections, benefits, and obligations of civil marriage with civil marriage itself). While it is true that none of these states had “defense of marriage” amendments when their respective cases were decided, it is difficult to see how an amendment worded as Hawaii’s—which reserves only marriage, but not its benefits and privileges, to the legislature—would be exempt from judicial review absent judicial construction indicating as much.

## 2. Category II: Marriage Definition Amendments

Amendments in this category define only marriage itself as being between one man and one woman. Some are worded very simply, such as Alaska's:

To be valid or recognized in this State, a marriage may exist only between one man and one woman.<sup>44</sup>

Other amendments are longer and more precise, but carry the exact same import. For example, Mississippi's Constitution reads:

Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.<sup>45</sup>

Regardless of the wording, these amendments, by their plain language, create an opposite-sex definition of marriage. Importantly, they leave open alternatives—legislative and judicial—that confer some or all marital benefits to same-sex couples, such as civil unions or domestic partnerships.<sup>46</sup> Category II amendments are the second most popular type of “defense of marriage” amendment, adopted by nine states.<sup>47</sup>

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<sup>44</sup> ALASKA CONST. art. I, § 25.

<sup>45</sup> MISS. CONST. art. 14 § 263A.

<sup>46</sup> There are no examples of a Category II state having civil unions, domestic partnerships, or some other alternative legal status for same-sex couples. However, Connecticut, which limits marriage to opposite-sex couples by statute, CONN. GEN. STAT. § 46b-38nn (2006), also has created civil unions for same-sex couples that confer the same benefits and privileges as marriage, CONN. GEN. STAT. §§ 46b-38aa–38pp (2006). There does not seem to be any particular reason why Connecticut could not have civil unions were section 46b-38nn in Connecticut's state constitution rather than its statute books.

<sup>47</sup> In addition to Alaska and Mississippi, the remaining states are Colorado (COLO. CONST. art. II, § 31), Kansas (KAN. CONST. art. 15, § 16), Missouri (MO. CONST. art. I, § 33), Montana (MONT. CONST. art. XIII, § 7), Nevada (NEV. CONST. art. I, § 21), Oregon (OR. CONST. art. XV, § 5a), and Tennessee (TENN. CONST. art. XI, § 18). The reach of the Kansas amendment is debatable. Indeed, some commentators have suggested that it forbids civil unions and domestic partnerships as well. See Human Rights Campaign, *State Prohibitions on Marriage for Same-Sex Couple*, *supra* note 11 (marking Kansas as having language “that does, or may, affect other legal relationships”). However, the Kansas amendment states in its fourth sentence that “[n]o relationship, other than a marriage, shall be *recognized by the state* as entitling the parties to the rights or incidents of marriage.” KAN. CONST. art. 15, § 16 (emphasis added). The use of the word

### 3. *Category III: Amendments that Ban Same-Sex Marriage and Comparable Statutes*

This category is by far the largest, containing fourteen states.<sup>48</sup> The language of Category III amendments widely varies, although none of the amendments are particularly verbose or convoluted. Idaho's is probably the simplest, totaling a mere twenty-three words:

A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.<sup>49</sup>

Category III is also the most diverse category because it is sometimes unclear how far Category III amendments actually extend. All Category III amendments ban civil unions, as civil unions are more or less marriage by another name.<sup>50</sup> However, while some Category III amendments clearly ban domestic partnerships and like legal statuses that grant some marital benefits,<sup>51</sup> it is not entirely clear that *all* of them do. For example, the Texas amendment states:

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"recognize," as opposed to "perform" or otherwise using a disjunctive with a word involving Kansas state action, implies more that Kansas was avoiding having to give recognition to civil unions, domestic partnerships, or some other type of same-sex union performed outside the jurisdiction rather than placing a limit on its own legislature. *Cf.* IDAHO CONST. art. III, § 28 (stating that marriage is the only "legal union that shall be *valid or recognized* in this state" (emphasis added)). As the Kansas state courts have not yet interpreted this provision, its placement in Category II or III is ultimately a matter of guesswork. For the above reason, however, I elected to place it in Category II.

<sup>48</sup> The states are Alabama (ALA. CONST. amend. 774), Arkansas (ARK. CONST. amend. 83), Georgia (GA. CONST. art. I, § IV), Idaho (IDAHO CONST. art. III, § 28), Kentucky (KY. CONST. § 233A), Michigan (MICH. CONST. art. 1, § 25), Nebraska (NEB. CONST. art. I, § 29), North Dakota (N.D. CONST. art. XI, § 28), Ohio (OHIO CONST. art. XV, § 11), South Dakota (S.D. CONST. art. XXI, § 9), Texas (TEX. CONST. art. I, § 32), Utah (UTAH CONST. art. I, § 29), Virginia (VA. CONST. art. I, § 15-A), and Wisconsin (WIS. CONST. art. XIII, § 13). For discussion on why Kansas has not been placed in Category III, see footnote 47, *supra*.

<sup>49</sup> IDAHO CONST. art. III, § 28.

<sup>50</sup> See, e.g., Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, 2006 CATO INST. 1, 15, available at <http://www.cato.org/pubs/pas/pa570.pdf> (arguing that civil unions are to civil marriage what a "navy" is to an "armada").

<sup>51</sup> Examples of amendments that clearly ban domestic partnerships and like legal statuses would include Nebraska (NEB. CONST. art. I, § 29), Georgia (GA. CONST. art. I, § IV), and Idaho (IDAHO CONST. art. III, § 28).

(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.<sup>52</sup>

Similarly, Kentucky's amendment states:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.<sup>53</sup>

It is questionable whether domestic partnerships are truly "similar to marriage," never mind "substantially similar to . . . marriage," because of their limited reach. While previous courts and commentators have cited a veritable laundry list of state benefits and protections that accompany marriage,<sup>54</sup> domestic partnerships and reciprocal beneficiaries have enjoyed only a limited number of these.<sup>55</sup> Thus, it remains unclear whether amendments phrased like those of Texas or Kentucky go so far as to prohibit legislatively created domestic partnerships or reciprocal beneficiaries.

This Note will assume that Category III amendments generally prohibit domestic partnerships, reciprocal beneficiaries, and similar legal statuses. There are three main reasons for this assumption. First, while some Category III amendments are murky as to whether they ban domestic partnerships and

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<sup>52</sup> TEX. CONST. art. I, § 32.

<sup>53</sup> KY. CONST. § 233A.

<sup>54</sup> See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003) (citing a lengthy list of benefits and protections accorded to married couples; some of the more important ones include joint state income tax filing, automatic inheritance rights under intestacy statutes, entitlement of wages owed to deceased employees, right to share the medical policy of one's spouse, access to veterans' spousal benefits and preferences, equitable division of marital property on divorce, right to bring claims for wrongful death, presumption of legitimacy of children, evidentiary rights such as not being required to testify against one's spouse, automatic "family member" preference to make medical decisions for an incompetent spouse, and predictable rules of child custody and visitation). See also *Hernandez v. Robles*, 855 N.E.2d 1, 6–7 (N.Y. 2006) (listing marriage benefits under New York law); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1167 (1992) (noting that marriage status imposes support obligations on the parties and also legally affects, among other things, workers' compensation, unemployment compensation, the right to bring tort actions for wrongful death or loss of consortium, legal presumptions in inheritance, and communications privileges).

<sup>55</sup> See *infra* note 153 (listing benefits associated with Maine's domestic partnerships).

the like, most of them clearly do. Thus, a general constitutional analysis of Category III is best served by an appraisal of what Category III amendments generally ban, rather than the exception.

Second, the assumption avoids a complicated interpretative analysis over whether domestic partnerships and the like are really “similar to” marriage.<sup>56</sup> That is properly an inquiry for state courts to resolve, and one which could constitute another legal academic article in and of itself. The reader here would be better served by a constitutional analysis of amendments banning domestic partnerships rather than a textual exegesis of numerous constitutional provisions.

Finally, the assumption is reasonable in and of itself. Many individuals see domestic partnerships as the state approving and providing assistance for same-sex relationships—approval and assistance which constitute the very goal of marriage in the opposite-sex context.<sup>57</sup> Moreover, the assumption

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<sup>56</sup> It is worthy to note, however, that the only Category III state court to pass on the question (a Michigan court of appeals) determined that *local* domestic partnership laws—which provide only health benefits to municipal employees rather than more wide-ranging benefits of state domestic partnership laws—violated the Michigan “defense of marriage” amendment because domestic partnerships were “similar” to marriage. *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 151 (Mich. Ct. App. 2007). *See id.* at 144 (noting that no other state court had occasion to determine whether a state amendment forbidding a “similar union” prohibited local domestic partnerships as well). The court of appeals found that the requirements to obtain a domestic partnership were almost identical to receiving a marriage, and local domestic partnership ordinances represented a legal recognition of a same-sex relationship entered into by both parties. Accordingly, the court determined that domestic partnerships were sufficiently similar to marriage, and Michigan’s amendment therefore prohibited it. *See id.* at 149–51. The Michigan Constitution states in part that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” MICH. CONST. art. 1, § 25 (emphasis added).

<sup>57</sup> *See, e.g.*, Terence P. Jeffrey, *Rudy’s a No-Go*, NAT’L REV. ONLINE, Feb. 6, 2007, <http://article.nationalreview.com/?q=MjUzZjU2NjE3ZjlmYzVjN2ExMDhkNDZkOWExODcyZDU=> (decrying “a climate where same-sex couples are given the same legal status as married couples, whether the resulting arrangements are candidly called ‘same-sex marriages,’ or are semantically papered-over with terms such as ‘civil unions’ or ‘domestic partnerships’”); Joel Connelly, *Let’s Keep Compassion in Partnership Debate*, SEATTLE POST-INTELLIGENCER, Feb. 5, 2007, at B1 (quoting Gary Randall of the Faith and Freedom Network as opposing domestic partnerships because they are aimed at “authenticating a lifestyle that is historically out-of-step with society and clearly in violation of biblical teaching”); Sean Cockerham, *Gay Couples May Get Legal Rights: Domestic Partner Bill Advances*, HERALD NEWS (Passaic County, N.J.), Feb. 13, 2007, at A14 (“[O]pponents of the domestic partnership bill argue that . . . the measure is a major step that would ultimately lead to the legalization of gay marriage.”); John Stamper, *Ban on Domestic Partner Benefits Fails*, LEXINGTON HERALD-LEADER, Mar. 8, 2007, at A1 (quoting a Kentucky citizen as saying that a proposed domestic partnership bill “is just a back door to the gay marriage thing”).

preserves a clear delineation between the categories. There is a strong argument that civil unions are really marriage by another name.<sup>58</sup> This being the case, refusing to assume that Category III amendments—which clearly ban more than simply same-sex marriage—extend beyond civil unions would have the effect of collapsing Categories II and III into an Über-Category that renders a general analysis improper at best and impossible at worst. This in turn would provide for little in the way of predictability, an important function of constitutional jurisprudence.<sup>59</sup>

Thus, for purposes of proposing an approach to constitutional analysis of the various categories, this Note will assume that Category III amendments ban same-sex marriage, civil unions, domestic partnerships, and like legal statuses.

#### 4. *Category IV: Amendments Banning Recognition and the Legal Incidents Thereof*

Category IV amendments, while only two in number,<sup>60</sup> are the most extreme amendments—and also generally the most horribly and ambiguously drafted.<sup>61</sup> They not only ban same-sex marriage, but forbid extension of “the legal incidents thereof” to same-sex couples. The relevant language from both amendments is worth quoting directly. Louisiana’s amendment declares in part:

No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.<sup>62</sup>

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<sup>58</sup> See *supra* note 50 and accompanying text.

<sup>59</sup> See *supra* note 39 and accompanying text.

<sup>60</sup> States with Category IV amendments are Louisiana (LA. CONST. art. XII, § 15) and Oklahoma (OKLA. CONST. art. II, § 35).

<sup>61</sup> See *infra* notes 62–63 and accompanying text (quoting Category IV amendments and explaining interpretative difficulties due to their textual language).

<sup>62</sup> LA. CONST. art. XII, § 15. One might argue that the quoted language, by forbidding the legal incidents to be conferred upon a member of a union (which assumedly means a union recognized by state law) entails that Louisiana’s amendment should really only be a Category III amendment. However, this type of a reading would not account for the sentence following the quoted language: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” *Id.* As per the rule against surplusage, the quoted language must be given meaning independent of this sentence. Thus, the more plausible reading is that the language quoted in the text above forbids the incidents of marriage—the benefits and

Similarly, Oklahoma's amendment states in part:

Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.<sup>63</sup>

Taking the statutory language at face value, Category IV amendments seem to ban domestic partnerships *and* conferral of individual benefits associated with marriage—such as the right to make medical decisions for one's incompetent partner or to receive health benefits as the partner of a government employee.<sup>64</sup>

In short, “defense of marriage” amendments can, as a general rule, be classified taxonomically into four categories based on their breadth. On a scale of severity in terms of what they prohibit, Category I amendments are relatively innocuous, whereas Category IV amendments are the most restrictive because they even foreclose conferring individual benefits to

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protections given to married couples—from being conferred on same-sex couples based on existing state law, whereas the following sentence quoted in this footnote forbids the legislature from creating an exception to that rule through forming domestic partnerships or other like legal statuses.

<sup>63</sup> OKLA. CONST. art. II, § 35. While one might argue that use of the word “construe” implies that this amendment merely restricts courts from interpreting law to require that same-sex couples be granted incidents of marriage, such an interpretation seems too narrow. In addition to the judiciary, executive officials, individual legislators, and local governments all “construe” laws in order to discern what is required of them and others. For Oklahoma to forbid the courts from interpreting a law as granting incidents of marriage to same-sex couples, but to allow mayors and local city councils to do so, is counterproductive and ignores the political realities against which the amendment was passed, such as the Mayor Gavin Newsom fiasco in San Francisco or the similar actions of commissioners in Benton County, Oregon. *See Lee Romney, Defiant San Francisco Marries Dozens of Same-Sex Couples*, L.A. TIMES, Feb. 13, 2004, at A1 (describing Mayor Newsom's issuance of marriage licenses to same-sex couples in contravention of California's marriage laws); *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055, 1069–1074 (2004) (same, but in greater detail); *Mark Larabee & Jeff Mapes, Benton Stops All Marriage Licensing*, OREGONIAN, Mar. 23, 2004, at A1 (describing how the Benton County, Oregon commissioners refused to issue *any* marriage licenses because they believed that Oregon's marriage statutes were unconstitutional). Louisiana's amendment, although using the “construe” language, avoids Oklahoma's potential linguistic problem by explicitly forbidding “official[s] or court[s]” from extending marriage or its legal incidents to same-sex couples. *See supra* note 62 and accompanying text.

<sup>64</sup> It is possible that this reading goes beyond the legislative intent in passing those amendments. However, such is not clear from the language of the amendments themselves. Any reigning in of the amendments' language must be done through an authoritative construction by state courts—construction that, to date, is lacking. Thus, this Note will assume the interpretation given in the text above.



same-sex couples. The remainder of this Note will refer to “defense of marriage” amendments by these category designations where appropriate. However, before analyzing whether amendments in each of Categories I–IV would survive an equal protection challenge, an equal protection framework must first be created. The next Part in this Note will attempt to do precisely that, focusing on *Romer v. Evans* and the Court’s political restructuring cases.

### III. ROMER V. EVANS: A VIABLE FRAMEWORK FOR ANALYZING EQUAL PROTECTION CHALLENGES TO “DEFENSE OF MARRIAGE” AMENDMENTS

In 1992, Colorado enacted an amendment to its state Constitution through referendum. That amendment, “Amendment 2,” stated, in relevant part:

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.<sup>65</sup>

The practical effect of the amendment was, at minimum, to repeal anti-discrimination ordinances in Colorado municipalities that forbade discrimination on the basis of sexual orientation.<sup>66</sup> Amendment 2 also forbade protective measures on the basis of sexual orientation by legislative, executive, or judicial action at any level of state or local government.<sup>67</sup> In a six-to-three decision, the Supreme Court invalidated Amendment 2 under the Equal Protection Clause of the Fourteenth Amendment, holding that it “lack[ed] a rational relationship to legitimate state interests.”<sup>68</sup>

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<sup>65</sup> *Romer v. Evans*, 517 U.S. 620, 624 (1996) (quoting COLO. CONST. art. II, § 30b).

<sup>66</sup> Indeed, the Court noted that the anti-discrimination ordinances in the cities of Aspen and Boulder and the County of Denver were, in large part, the “impetus” for Amendment 2. *Id.* at 623–24.

<sup>67</sup> *Id.* at 624. Although the *Romer* Court hypothesized that Amendment 2 could potentially deprive homosexuals of the protection of *generally applicable* laws and policies, rather than merely specific protections, it found such a determination unnecessary. The Court held that even a narrow construction of Amendment 2—the one given in the text above—failed to satisfy equal protection under the Fourteenth Amendment. *Id.* at 630.

<sup>68</sup> *Id.* at 632.

*Romer*'s broad language and elusive demeanor render it difficult to discern exactly what it means as a legal precedent.<sup>69</sup> Nonetheless, it represents the first major Supreme Court victory for gays and lesbians.<sup>70</sup> Moreover, the often broad language of the majority opinion may have important ramifications, offering many possibilities for future equal protection challenges in a variety of areas.<sup>71</sup>

This Part will argue that *Romer* represents the proper framework under which the various categories of "defense of marriage" amendments should be analyzed. Section A, below, will give a brief overview of the Court's majority opinion. Section B will argue that *Romer* should be given a "localist" reading, whereby the political restructuring effect of Colorado's Amendment 2 is dispositive in *Romer*'s holding. Finally, drawing on the previous analyses, Section C will provide a framework in which to analyze the constitutionality of "defense of marriage" amendments.

### A. *Inexplicable by Anything but Animus*—*Romer*'s Holding

The *Romer* Court began its opinion by describing the effects of Amendment 2. Amendment 2 repealed existing anti-discrimination ordinances adopted in various Colorado municipalities<sup>72</sup> and prohibited the adoption of similar protections for gays and lesbians by any legislative, executive, or judicial action at any level of government in Colorado.<sup>73</sup> Thus, homosexuals, but no others, were "forbidden the safeguards that others enjoy or may seek without constraint"; in order to secure protection for themselves,

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<sup>69</sup> Several commentators have expressed puzzlement over *Romer*'s reasoning. See, e.g., David J. Barron, *The Promise of Cooley's Cities: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 586–87 (1999) ("*Romer* is a notably obscure opinion, and it is therefore difficult to attribute a single rationale to it."); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 169 (2005) (noting that many commentators have found *Romer*'s reasoning "opaque" and evidencing "nothing more than a distaste for overt discrimination against homosexuals"); Louis M. Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 73 (1996) ("No one can write confidently about what *Romer* 'means' because its ultimate meaning is yet to be determined by future judges and litigants.").

<sup>70</sup> See, e.g., Seidman, *supra* note 69, at 67–68 (labeling *Romer* the "first major Supreme Court victory in the history of the republic" for gays and lesbians).

<sup>71</sup> *Id.* Indeed, Judge Bataillon relied almost exclusively on *Romer* in striking down Nebraska's Section 29 on equal protection grounds in *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005).

<sup>72</sup> *Romer*, 517 U.S. at 623–24.

<sup>73</sup> *Id.* at 624; see also *id.* at 629 ("Amendment 2 . . . operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.").

they were forced either to re-amend the state constitution again or lobby for generally applicable laws.<sup>74</sup>

Government being open on impartial terms to all citizens is “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection.”<sup>75</sup> Yet, the Court found, open government was denied to homosexuals, but no other groups, through Amendment 2’s imposition of a “broad and undifferentiated disability.”<sup>76</sup> Thus, Amendment 2 was “so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward[s] [homosexuals].”<sup>77</sup> A simple desire to harm a politically unpopular group—including by denying them access to the political process to gain legal protections available to all other individuals—is not a legitimate interest.<sup>78</sup> Accordingly, the Court struck down Amendment 2 under the Equal Protection Clause of the Fourteenth Amendment.

### B. *At Every Level of Government: Romer’s “Localist” Interpretation*

As noted earlier, *Romer*’s broad language makes any one reading of the case particularly difficult.<sup>79</sup> However, there appear to be two basic factors that account for *Romer*’s result: (1) Amendment 2 imposed a broad disability on a single group; and (2) Amendment 2 impermissibly restructured the political process in order to disadvantage homosexuals, including with respect to matters of local concern—that is, while other groups could petition their local governments or the state government for protective laws, homosexuals first had to repeal Amendment 2. The first factor is hardly disputable—the Court explicitly said it employed that factor.<sup>80</sup> The “localist” interpretation of *Romer* inherent in the second factor, however, is more controversial. The Supreme Court has ruled that a state cannot define the governmental decisionmaking structure solely on the basis of whether one

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<sup>74</sup> *Id.* at 631 (“They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps . . . by trying to pass helpful laws of general applicability.”).

<sup>75</sup> *Id.* at 633.

<sup>76</sup> *Id.* at 632.

<sup>77</sup> *Id.*

<sup>78</sup> *Romer*, 517 U.S. at 634; see also *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>79</sup> See *supra* note 69.

<sup>80</sup> See *Romer*, 517 U.S. at 632 (“[Amendment 2] impos[ed] a broad and undifferentiated disability on a single named group.”).

falls within a particular group in cases like *Hunter v. Erickson*<sup>81</sup> and *Washington v. Seattle School District*.<sup>82</sup> Because Amendment 2 reallocated anti-discrimination legislation to the state constitutional level for homosexuals, but no other groups, many believed that *Romer* would be decided under the Supreme Court's restructuring precedents—indeed, the parties briefed extensively about whether those precedents should decide *Romer*.<sup>83</sup> Yet nowhere in *Romer* did the Supreme Court cite any of its political restructuring cases. Some commentators have thus posited interpretations that ignore any localist dimensions of the opinion,<sup>84</sup> while

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<sup>81</sup> 393 U.S. 385 (1969). In *Hunter*, in response to the Akron, Ohio city council enacting a fair housing ordinance, Akron voters amended the city charter to prevent “any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the voters of Akron.” *Id.* at 386. Thus, those seeking to prohibit housing discrimination on the basis of race, religion, or ancestry had to amend the city charter, whereas those seeking to prohibit discrimination for any other reason needed only to appeal to the city council. The Court held this an impermissible political restructuring because the State was disadvantaging a particular group in the political process, *id.* at 393, which violated the principle of “providing a just framework within which the diverse political groups in our society may fairly compete,” *id.* at 393 (Harlan, J., concurring).

<sup>82</sup> 458 U.S. 457 (1982). In *Seattle School District*, Washington voters approved Initiative 350, which stated 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 . . . residence.” *Id.* at 462 (internal quotation marks omitted). Initiative 350 targeted desegregative busing, especially Seattle's busing program to remedy de facto segregation, but still allowed for “maximum flexibility” in school assignments for non-racial reasons. *Id.* at 462–63. The Court struck Initiative 350 down because, rather than “allocate governmental power on the basis of any general principle,” it “use[d] the racial nature of an issue to define the governmental decisionmaking structure.” *Id.* at 470 (internal citation and quotation marks omitted).

*Cf.* *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 540–42 (1982) (upholding Proposition I, which forbade state courts from enacting busing remedies unless the federal courts had jurisdiction to do so, on the grounds that the political decisionmaking structure was not altered on the basis of a particular group); *Gordon v. Lance*, 403 U.S. 1, 5 (1971) (upholding West Virginia's mandatory referendum requirements for bonded indebtedness on the grounds that the law “applie[d] equally to all bond issues” and did not single out the issue of bonded indebtedness with respect to an “independently identifiable group”).

<sup>83</sup> *See, e.g.*, Brief of Respondent at 16–23, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (arguing that the case should be decided on the basis of the Court's political restructuring cases, especially *Hunter* and *Seattle School District*).

<sup>84</sup> *See* Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 94 (1997) (stating that the decisional framework for *Romer* was that a law is invalid if it “targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationships to any legitimate governmental interest”); Richard F. Duncan, *The Narrow and Shallow Bite of*

others have argued that a localist interpretation of *Romer* is simply incorrect.<sup>85</sup> However, more commentators have signed on to the idea that *Romer* was decided in large part because of the political restructuring caused by Amendment 2—more specifically, that Amendment 2 subverted legislative choices traditionally left to local governments.<sup>86</sup> There are several reasons as to why this interpretation is the most plausible.

First, *Romer* itself contains numerous references to localism. Noting early in the *Romer* opinion that three municipalities had passed anti-discrimination ordinances,<sup>87</sup> the Court emphasized that Amendment 2 repealed those ordinances, forbade the enactment of others “by every level of Colorado government,”<sup>88</sup> and “prohibit[ed] all legislative, executive or judicial action *at any level of state or local government* designed to protect [homosexuals].”<sup>89</sup> It is difficult to see why the Court would repeatedly emphasize that localities could no longer protect their own interests with

*Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 147–48 (1997) (“Koppelman’s summary of the ‘rule of decision’ of *Romer* is absolutely correct.”); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 269 (1996) (stating that *Romer* was decided on the “pariah principle”—that is, “the government cannot brand any group as unworthy to participate in civil society. . . . [or deprive them] of civil equality based on immutable characteristics such as sexual orientation”). While these sources do not explicitly contradict a localist interpretation, and in fact may be entirely compatible with even a strong localist reading of *Romer*, they nonetheless do not consider localism an important dimension to the case.

<sup>85</sup> See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 219–220 (2005) (calling a localist interpretation of *Romer* “mistaken” and citing the practical difficulty of “ill-equipped” courts to “act as babysitters” to preserve local authority).

<sup>86</sup> See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2363 n.444 (2003) (arguing that *Romer* represents an example of the judiciary “deploy[ing] local power in the service of a broader civil rights policy agenda”); Barron, *The Promise of Cooley’s Cities*, *supra* note 69, at 586–94 (1999) (noting the local constitutionalism inherent in the *Romer* majority opinion); Kristen Boike, Note, *Rethinking Gender Opportunities: Nontraditional Sports Seasons and Local Preferences*, 39 U. MICH. J.L. REFORM 597, 601–603 (2006) (noting *Romer*’s localist framework in vindicating municipalities’ rights to enact laws protecting gays and lesbians); Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257, 262–68 (1999) (same); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1410–11 (1997) (emphasizing underlying localist importance of *Romer*); Schragger, *supra* note 69, at 168–72 (2005) (arguing that a localist interpretation is the most reasonable explanation of the Court’s standard of review).

<sup>87</sup> *Romer v. Evans*, 517 U.S. 620, 625 (1996).

<sup>88</sup> *Id.* at 629.

<sup>89</sup> *Id.* at 624 (emphasis added).

respect to gays and lesbians if political restructuring was unimportant to its decision. Moreover, the majority opinion contains several passages that nearly mimic political restructuring language from *Seattle School District* and *Hunter*, indicating that the Court was drawing on ideas in those cases to decide *Romer*.<sup>90</sup>

Second, during oral argument several Justices expressed concern over Amendment 2's political restructuring. Justice Kennedy was the most overt, saying to counsel for petitioners that the question was not simply one of reservation of power to state or local government, but the "discrimination in the reservation of the subject matter, or a discrimination in the . . . exercise of legislative power."<sup>91</sup> He thus framed the issue of the case as whether there was a "rational basis for determining that affirmative protection for homosexuals cannot be dealt with at a certain level, whereas affirmative protection for [other groups] can be."<sup>92</sup> Justice Stevens saw the case in a similar light, and he pushed counsel for petitioner to explain what the rational basis would be for people outside of Aspen telling Aspen residents that they could not pass certain protective measures.<sup>93</sup> Justice Ginsburg, meanwhile, saw local protections for homosexuals as akin to local laws allowing for female suffrage prior to adoption of the Nineteenth Amendment, and she expressed her discomfort with disabling gay and lesbian rights activists from initiating a local civil rights movement.<sup>94</sup> In short, as evidenced by the oral argument, many individual Justices seemed to view the case in localist terms, and it only seems reasonable that those viewpoints seeped into the *Romer* opinion.

Finally, the later case of *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* indicates that *Romer* should be given a political

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<sup>90</sup> For example, the *Romer* Court noted that "[c]entral [to equal protection] is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Id.* at 633. The Court also stated that "[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." *Id.* Cf. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) ("[T]he State may [not] disadvantage any particular group by making it more difficult to enact legislation in [sic] its behalf."); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) ("[T]he Fourteenth Amendment . . . reaches 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (internal citations omitted)).

<sup>91</sup> Transcript of Oral Argument at 11, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available at 1995 WL 605822.

<sup>92</sup> *Id.* at 21-23.

<sup>93</sup> *Id.* at 20.

<sup>94</sup> *Id.* at 14.

restructuring interpretation.<sup>95</sup> That case involved a challenge to an amendment, Article XII, to the Cincinnati City Charter. Article XII forbade the City and its boards and commissions from adopting “any ordinance, regulation, rule or policy which provides that [sexual orientation or conduct] provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.”<sup>96</sup> The charter amendment was passed as a reaction to two separate city ordinances that prohibited discrimination on the basis of sexual orientation in city hiring practices and in private employment, housing, and public accommodations.<sup>97</sup> In *Equality Foundation I*, the Sixth Circuit held that the initiative did not violate equal protection, and the decision was appealed to the Supreme Court.<sup>98</sup> The Supreme Court vacated the judgment and remanded for further consideration in light of *Romer*.<sup>99</sup> The Sixth Circuit affirmed its original decision the next year.<sup>100</sup>

In *Equality Foundation II*, the Sixth Circuit reaffirmed its earlier disposition based on a localist reading of *Romer*. In distinguishing Article XII from Colorado’s Amendment 2, the Sixth Circuit found it significant that the Cincinnati amendment reflected only a “direct expression of the local community will on a subject of direct consequences to the voters” rather than a political restructuring that “deprived a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, including within local jurisdictions having pro-gay rights majorities.”<sup>101</sup>

More importantly, in remanding *Equality Foundation I* to the Sixth Circuit for further consideration, the Supreme Court itself recognized *Romer*’s localist dimension. First, the three Justices dissenting from grant of certiorari—Chief Justice Rehnquist and Justices Scalia and Thomas—did so because of *Romer*’s localist dimension.<sup>102</sup> Moreover, if the remaining

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<sup>95</sup> For background of the case and the ultimate disposition at each stage of the appellate history, see *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (*Equality Foundation II*), cert. denied 525 U.S. 943 (1998).

<sup>96</sup> *Id.* at 291.

<sup>97</sup> *Id.* at 291–92.

<sup>98</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) (*Equality Foundation I*), vacated, 518 U.S. 1001 (1996).

<sup>99</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001, 1001 (1996); see also *Equality Foundation II*, 128 F.3d at 294.

<sup>100</sup> *Equality Foundation II*, 128 F.3d at 301.

<sup>101</sup> *Id.* at 297.

<sup>102</sup> See *Equality Foundation*, 518 U.S. at 1001 (1996) (Scalia, J., dissenting) (“*Romer* [held that] homosexuals in a city (or other electoral subunit) that *wishes* to accord them special protection cannot be compelled to achieve a state constitutional

Justices did not really believe that the political restructuring element of Amendment 2 was significant to their earlier *Romer* opinion, they probably would have reversed the Sixth Circuit in a minimalist per curium opinion referencing *Romer* rather than remand the case—just like the Court has done in other civil and political rights contexts.<sup>103</sup> After all, Cincinnati's amendment was worded nearly identically to and had the same practical effect as Amendment 2, the Sixth Circuit's interpretation notwithstanding<sup>104</sup>—the only difference was the scope of the impact of the amendments on the political process for gays and lesbians and their supporters. Instead, the Court remanded the case and then denied certiorari in 1998 after the Sixth Circuit affirmed itself.<sup>105</sup>

In short, the political restructuring precedents of the Supreme Court, the views of the Justices, the language of *Romer*'s majority opinion, the Sixth Circuit's *Equality Foundation II* opinion, the Supreme Court's actions in the *Equality Foundation* cases, and the writings of the majority of commentators indicate that a proper interpretation of *Romer* requires a political

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amendment . . . . [*Equality Foundation*] involves a determination by . . . the lowest electoral subunit that does *not* wish to accord homosexuals special protection.”).

<sup>103</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959) (noting a series of post-*Brown* per curium opinions, citing *Brown*, that held “that the fourteenth amendment forbids all racial lines in legislation”); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1215 (10th ed. 2006) (“After *Brown*, the Court, in summary per curium decisions citing *Brown*, consistently held invalid state imposed racial segregation in other public facilities . . . .”); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 204 (2d ed. 2003) (noting a series of per curium reversals of convictions for sale or exhibition of allegedly obscene materials after *Roth v. United States*, 354 U.S. 476 (1957)).

<sup>104</sup> Indeed, the operative language of the two provisions seems almost boilerplate. Amendment 2 forbade “homosexual, lesbian or bisexual orientation, conduct, practices or relationships” from forming the “basis of or entitl[ing] any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.” *Romer v. Evans*, 517 U.S. 620, 624 (1996). Article XII forbade “homosexual, lesbian, or bisexual orientation, status, conduct, or relationship[s]” from “provid[ing] a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.” *Equality Foundation II*, 128 F.3d at 296. While the “other preferential treatment” language in Article XII seems more innocuous than Amendment 2’s “claim of discrimination,” Article XII still nullified the anti-discrimination ordinances passed by the Cincinnati City Council, and thus had the same effect on the ability of gays and lesbians to seek legal protection. In short, there does not appear to be a substantial difference between the two provisions in their language or effect beyond that of the levels of government that they affect. Nonetheless, the Sixth Circuit inexplicably held that Article XII, in contrast to Amendment 2, merely prohibited special protections for homosexuals. See *id.* at 296–97.

<sup>105</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 943 (1998).



restructuring element. Thus, *Romer*'s holding is best understood as resting on both the broad and undifferentiated harm to homosexuals and Amendment 2's removal of decisionmaking authority from the local governments on a matter with which they were directly concerned.

### C. *A Romer Framework for Analyzing "Defense of Marriage" Amendments*

The foregoing analysis indicates that Colorado's Amendment 2 was unconstitutional for two reasons. First, Amendment 2 "inflict[ed] on [homosexuals] immediate, continuing, and real injuries"<sup>106</sup> in a broad and undifferentiated way. However, this alone does not explain why Amendment 2 was unconstitutional. As noted earlier, Cincinnati's Article XII inflicted similar harm on homosexuals; yet, the Supreme Court did not summarily reverse the Sixth Circuit, and the Sixth Circuit did not strike down Article XII after the case was remanded.<sup>107</sup> Hence, the second factor: Amendment 2 restructured the political process solely for homosexuals by interfering with local community preferences. These two factors, combined, seem to more fully explain the otherwise foggy language of *Romer*.

Equal protection challenges to state "defense of marriage" amendments should be similarly analyzed under these two factors. Thus, a state constitutional amendment will satisfy equal protection if it does not: (1) inflict an "immediate, continuing, and real" harm on homosexuals, or (2) restructure the political process in such a way as to interfere with local community preferences over traditionally local matters. Conversely, a state constitutional amendment will violate equal protection if it inflicts serious harm in an undifferentiated way *and* distorts the political process by interfering with local community preferences.

This framework will be used to analyze each of the categories of "defense of marriage" amendments laid out earlier in this Note,<sup>108</sup> and the analysis follows below.

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<sup>106</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>107</sup> See *supra* notes 98–104 and accompanying text.

<sup>108</sup> See Part II, *supra*.

#### IV. APPLYING THE FRAMEWORK: RESOLUTION OF EQUAL PROTECTION CHALLENGES TO “DEFENSE OF MARRIAGE” AMENDMENTS BY CATEGORY

Part III, *supra*, created a framework involving *Romer* to analyze state “defense of marriage” amendments. This Part will apply that framework to each of Categories I–IV in the four subsections below.

##### A. Category I Amendments

Category I amendments reserve the definition of marriage solely to the legislature. Thus, they merely strip courts of jurisdiction to hear cases regarding extension of marriage to same-sex couples—the legislative process remains intact. To many, Category I amendments are so obviously constitutional that Justice Potter Stewart’s famous (or notorious) “I know it when I see it” test seems germane.<sup>109</sup> And in fact, the *Romer* framework confirms that Category I amendments are constitutional, for they neither cause “immediate, continuing, and real injuries”<sup>110</sup> in a broad and undifferentiated way, nor do they restructure the political process or intrude upon local community preferences in matters properly left to municipal and city governments. Each of these points will be discussed in the paragraphs below.

First, Category I amendments do not inflict substantial harm on homosexuals. Because Category I amendments are merely court-stripping provisions, their only injury to homosexuals is a denial of a judicially-mandated extension of marriage to same-sex couples—assuming that the state court of last resort decided to rule that way in the first place. As the legal system has been their main source of victory, the practical effect of court-stripping amendments is to take the wind out of the sails of gay and lesbian advocates.<sup>111</sup> However, the legal effect of Category I amendments on

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<sup>109</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart’s line was in the context of an obscenity case. While conceding that he may not have been able “to define the kinds of material . . . embraced within [obscenity],” he said simply: “I know it when I see it, and the motion picture involved in this case is not [obscene].” *Id.*

<sup>110</sup> *Romer*, 517 U.S. at 635.

<sup>111</sup> No state has extended marriage to same-sex couples without a court order, and Connecticut is the only state that has created civil unions without being judicially required to do so. The only other two states with civil unions—Vermont and New Jersey—did so in response to court orders demanding that the benefits, obligations, and protections of marriage be extended to same-sex couples. See *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006). Massachusetts remains the only state to have same-sex marriage, a result of *Goodridge v. Dep’t of*

state recognition of same-sex marriage is minimal because they do not deny marriage to same-sex couples or even require the legislature to pass on the issue at the current time.<sup>112</sup> Thus, Category I amendments do not seem to inflict immediate, continuing, or real injury to homosexuals.

Additionally, Category I amendments do not impermissibly restructure the political process. Category I amendments are only court-stripping provisions; thus, they leave all channels of the political process open to the same degree as before.<sup>113</sup> A state legislature, acting pursuant to a Category I amendment, is equally free to accept or reject same-sex marriage, and advocates of same-sex marriage can appeal to the political branches on the same grounds as any other citizen. Simply put, Category I amendments do not “work[] [the] major reordering of the State’s [marriage] decisionmaking

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*Public Health*, 798 N.E.2d 941, 948 (Mass. 2003) (mandating that the benefits, protections, and obligations of marriage be conferred on same-sex couples) and *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (holding that civil unions were an impermissible substitute for same-sex marriage).

<sup>112</sup> In this sense, Category I amendments are like California’s Proposition I in *Crawford*, which was upheld by the Supreme Court against an equal protection challenge. *Crawford*, decided the same day as *Seattle School District*, rejected the idea “that once a State chooses to do ‘more’ than the Fourteenth Amendment requires, it may never recede.” *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 535 (1982). Thus, the Court upheld Proposition I, which banned state courts from creating desegregation remedies unless a federal court had jurisdiction to do the same under the Fourteenth Amendment. Currently, the Fourteenth Amendment does not require same-sex marriage. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declining to address the issue of “whether the government must give formal recognition to any relationship that homosexual persons seek to enter”); *id.* at 585 (O’Connor, J., concurring) (implying that same-sex marriage would probably not be required under the Equal Protection Clause by saying that “Texas cannot assert any legitimate state interest [for its law against same-sex sodomy], such as . . . preserving the traditional institution of marriage”); *Citizens for Equal Prot., Inc. v. Bruning*, 455 F.3d 859, 866–869 (8th Cir. 2006) (finding that the Equal Protection Clause does not require invalidation of a ban on marriage, civil unions, or domestic partnerships to same-sex couples); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305–09 (M.D. Fla. 2005) (holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment do not require that marriage be extended to same-sex couples); *In re Kandu*, 315 B.R. 123, 140–48 (Bankr. W.D. Wash. 2004) (same). Thus, if a state court were to require that marriage be extended to same-sex couples, it would be going further than the Fourteenth Amendment. *Crawford*, therefore, allows the state to recede its protections back to the Fourteenth Amendment baseline if it so desired.

<sup>113</sup> In this sense, Category I amendments have the same legal effect as California’s Proposition I at issue in *Crawford*. See *Crawford*, 458 U.S. at 535–36 (“The school districts themselves . . . remain free to adopt reassignment and busing plans to effectuate desegregation.”); *id.* at 547 (Blackmun, J., concurring) (“[T]hose political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I.”).

process”<sup>114</sup> that the Supreme Court has considered the hallmark of impermissible political restructuring.

In short, Category I amendments neither severely harm homosexuals nor impermissibly reorder the political process. Decisions on same-sex marriage are left to the political branches as before—the only difference is that the state courts can no longer enter the debate. Because neither of the two *Romer* factors are implicated, Category I amendments seem to comport with the Equal Protection Clause.

### B. *Category II Amendments*

Unlike Category I amendments, Category II amendments actually set in constitutional stone a state prohibition on same-sex marriage—one that can be negated only by re-amending the state constitution.<sup>115</sup> For this reason, Category II amendments are far more insidious to gay-rights proponents. But despite the hardship visited upon committed same-sex couples who would marry if given the chance, Category II amendments seem to comport with the Equal Protection Clause because (1) in a constitutional sense, they arguably do not inflict a broad and undifferentiated injury upon homosexual persons, and (2) they do not interfere with local community preferences and thereby impermissibly restructure the political process. Each of these points will be discussed in the paragraphs below.

First, Category II amendments do not severely harm homosexuals in a way contemplated by the *Romer* Court. Essential to the *Romer* Court’s invalidation of Amendment 2 was its “impos[ition] [of] a broad and undifferentiated disability on a single named group.”<sup>116</sup> Thus, while it is certainly important to consider whether an injury imposed on a group is real and lasting, it also must be sufficiently broad as to raise an inference of animus.<sup>117</sup> Category II amendments, while inflicting a real injury upon committed homosexual couples, do not inflict a substantial injury in a broad and undifferentiated way.

Category II amendments undoubtedly forbid a certain social standing for same-sex couples.<sup>118</sup> Nonetheless, Category II amendments do not impose a

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<sup>114</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 479 (1982).

<sup>115</sup> See *supra* notes 44–47 and accompanying text (quoting various Category II amendments and explaining their impact).

<sup>116</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>117</sup> See *id.* (stating that Amendment 2 “seems inexplicable by anything but animus toward [homosexuals]”).

<sup>118</sup> See Ronald Dworkin, *Three Questions for America*, N.Y. REV. OF BOOKS, Sept. 21, 2006, at 24, 30 (arguing that creating civil unions as an alternative to marriage “reduces the discrimination [against homosexuals], but falls far short of eliminating it.

severe harm like that contemplated in *Romer* because they leave adequate alternatives for homosexual couples. It is certainly true that marriage is, quite possibly, “the most important relation in life,”<sup>119</sup> and its intangible importance to committed homosexual couples cannot be understated.<sup>120</sup> In addition to the personal dimension of marriage, many gay rights advocates see same-sex marriage as the most important cornerstone in achieving full equality for homosexuals in general society.<sup>121</sup> But even recognizing all this, while Category II amendments prevent gays and lesbians from marrying, they do not prohibit the creation of civil unions or other legal same-sex partnerships, nor do they forbid extending individual marital benefits to committed same-sex couples. Therefore, gays and lesbians, while denied the institution of marriage, could still receive the full benefits of marriage as well as a state-conferred recognition of their relationship.

While there is much to be said for the argument that civil unions are not marriage even though they consist of the same marital benefits,<sup>122</sup> the fact remains that Category II amendments leave many other avenues open to same-sex couples. A denial of marriage is a far cry from the absurdly overbroad Amendment 2, which denied homosexuals even the most basic of legal protections.<sup>123</sup> Thus, Category II amendments do not appear to implicate the first *Romer* factor.

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The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning”); Brief of Appellants at 42, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-68-05) (“By denying [same-sex couples] access to marriage, the State . . . places individuals in same-sex relationships in a separate and inferior legal class.”); Brief of Plaintiffs-Appellants at 4, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (noting two of the plaintiffs’ desire “to be part of that larger community of married persons . . . so that their relationship is understood by the community as it is by them”); Brief of Plaintiffs-Appellants at 21, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 10343/04) (quoting a plaintiff as saying: “As long as we cannot marry, we are not full citizens. . . . Without the right to marriage itself, we are denied full respect and dignity for our families”).

<sup>119</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>120</sup> See *supra* note 118.

<sup>121</sup> See, e.g., ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 178–79 (1995).

<sup>122</sup> See *supra* note 118 (recognizing importance of marriage as a social institution for same-sex couples); CONN. GEN. STAT. § 46b-38nn (2006) (granting same marital benefits, protections, and obligations to parties to a civil union).

<sup>123</sup> Cf. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”).

In addition, Category II amendments do not interfere with decisions properly left to local government. Amendment 2 was struck down largely because it interfered with local community preferences.<sup>124</sup> Since Colorado allowed its municipalities to pass anti-discrimination legislation for all other groups, the Court was especially suspicious of Amendment 2 stripping that authority away from municipalities solely for one unpopular group of people. By contrast, marriage has never been delegated to municipalities; it is, and always has been, governed by the states.<sup>125</sup> That is not to say that states can never delegate marriage authority to municipalities—indeed, as states are given plenary authority to structure their governmental decisionmaking,<sup>126</sup> a state could give local governments a more substantive role in determining what qualified as a valid marriage.<sup>127</sup> However, it does not seem that any

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<sup>124</sup> See *supra* notes 87–105 and accompanying text.

<sup>125</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (“[M]arriage is a social relation subject to the State’s police power.”); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.”); *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 471 (Cal. 2004) (“[T]here can be no question but that marriage is a matter of ‘statewide concern,’ rather than a ‘municipal affair’ . . . .”); *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961) (“A state has the authority to declare what marriages of its citizens shall be recognized as valid . . . .”); *Lowe v. Broward County*, 766 So. 2d 1199, 1205 (Fla. Dist. Ct. App. 2000) (“The law of domestic relations is one matter reserved for the state alone.”); *Rothman v. Rothman*, 320 A.2d 496, 501 (N.J. 1974) (“It has long been well settled and now stands unchallenged that marriage is a social relationship subject in all respects to the state’s police power.”); *Gowin v. Gowin*, 292 S.W. 211, 211 (Tex. Comm’n App. 1927) (“[M]arriage . . . is governable by law of the state.”); *Agrast, Berger & Butland, supra* note 12 (“Marriage . . . has always been governed by state law . . . .”).

<sup>126</sup> See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982) (“States traditionally have been accorded the widest latitude in ordering their internal governmental processes.”); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation [is] created by a state for the better ordering of government . . . .”).

<sup>127</sup> While there do not seem to be any federal cases on point, the California Supreme Court had occasion to address the issue of state delegation of marriage authority when Mayor Gavin Newsom issued marriage licenses to same-sex couples in violation of California law. See *supra* note 63. The court held that Mayor Newsom’s actions could be restrained because California state law reserved the issue of marriage to the state government, with local officials only acting in a “ministerial” capacity—that is, if a couple satisfied the state requirements for a valid marriage, local officials were obligated to grant them a license. *Lockyer*, 95 P.3d at 472; see also *id.* at 468–71 (describing California marriage law, which reserves the definition to the state and ministerial execution of the law to local officials). The natural implication of the California opinion, of course, is that local officials could act in other than a “ministerial” capacity—such as a “discretionary” one—if the California legislature decided to delegate issues of marriage and divorce to local government.

state has. Given that marriage is solely of state concern, municipalities have no local interest in state marriage laws.<sup>128</sup> Therefore, the localist dimension of *Romer* is simply not implicated—Category II amendments do not infringe upon the proper concerns of local authorities.

In short, Category II amendments neither inflict a broad and undifferentiated harm, nor do they impermissibly restructure the political process. Civil marriage, while an important institution to both opposite- and same-sex couples, has approximate alternatives. Further, marriage is solely the province of the state, and, thus, Category II amendments cannot possibly implicate localist concerns. Thus, Category II amendments seem to satisfy *Romer*'s demands of equal protection.

### C. Category III Amendments

Category III amendments not only forbid legislative creation of same-sex marriage, but they also foreclose marriage-like alternatives, such as civil unions, domestic partnerships, and reciprocal beneficiaries.<sup>129</sup> However, "marriage-like alternatives" is a very broad spectrum. For example, civil unions provide identical state-level marital benefits, obligations, and responsibilities to same-sex couples who enter into them.<sup>130</sup> By contrast, state-level domestic partnerships and reciprocal beneficiaries only provide some of these benefits at the state level.<sup>131</sup> And then there are local domestic partnership ordinances, where the benefits can range anywhere from all local

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<sup>128</sup> One student author has suggested that municipal authorities should have the power to refuse to follow marriage laws if they perceive those laws to be unconstitutional. See Samuel P. Tepperman-Gelfant, Note, *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 HARV. C.R.-C.L. L. REV. 219 (2006). This naturally implies that local government actually does have some interest in marriage policy. While his proposal is intriguing, this Note will not address the merits or demerits of Tepperman-Gelfant's view because it has never been adopted by any federal or state court, and thus is outside the scope of this Note.

<sup>129</sup> See *supra* notes 48–53, 56–57 and accompanying text.

<sup>130</sup> See, e.g., CONN. GEN. STAT. § 46b-38nn (2006) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage, which is defined as the union of one man and one woman."). Naturally, civil unions, or even same-sex marriage, cannot confer federal benefits upon the parties to it. The Defense of Marriage Act defines "marriage" for federal legal purposes as being only between a man and a woman and "spouse" as only a person of the opposite sex who is a husband or wife. 1 U.S.C. § 7 (2000). Thus, any federal benefits associated with marriage only apply to opposite-sex marriages. Federal law does not confer benefits upon parties to a civil union or domestic partners.

<sup>131</sup> See, e.g., *supra* note 42 (listing benefits of Hawaii's reciprocal beneficiaries).

benefits given to married couples,<sup>132</sup> to only some of those benefits,<sup>133</sup> to merely a domestic partnership registry with no guaranteed benefits.<sup>134</sup> Thus, in order to evaluate the constitutionality of Category III amendments, effects on both state and local benefits must be analyzed. Accordingly, Subsection 1, below, will examine whether a “defense of marriage” amendment’s forbidding civil unions comports with equal protection under the *Romer* framework described in Part III.C, above. Subsection 2 will conduct the same inquiry with respect to domestic partnership laws, both state and local.

### 1. *Civil Unions*

As aforesaid, civil unions confer all state-level marital benefits on same-sex couples who qualify.<sup>135</sup> At present, three states—Vermont, Connecticut, and New Jersey—have civil unions for same-sex couples.<sup>136</sup> While the constitutionality of foreclosing civil unions to same-sex couples is slightly more suspect than foreclosing marriage (as in the Category II amendments), Category III amendments—as applied to civil unions—nonetheless do not implicate the *Romer* framework. While a state constitutional ban on civil unions inflicts immediate, continuing, and real injuries on homosexuals, the ban does not violate equal protection because it relates to a matter that is solely the province of the state. Thus, Category III amendments—as applied to civil unions—do not implicate the political restructuring issues necessary for a successful equal protection challenge under the *Romer* framework. Each of these points will be discussed below.

Category III amendments’ foreclosure of civil unions inflicts a significant harm on homosexuals. By their plain terms, Category III amendments eliminate the possibility of any parallel marital institution for same-sex couples. This substantially harms same-sex couples. The 2000 Census reported nearly 600,000 same-sex partner households in the United

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<sup>132</sup> See, e.g., ITHACA, N.Y., CODE § 215-27 (2000) (providing all benefits extended to spouses of city employees to domestic partners).

<sup>133</sup> See, e.g., LAGUNA BEACH, CAL., MUN. CODE §§ 1.12.070, 1.12.080 (1992) (hospital and jail visitation privileges for registered domestic partners); PHILA., PA., CITY CODE § 9-1103 (2004) (requiring employers to extend employee health benefits to “Life Partners” unless employer’s benefit plan is governed by ERISA).

<sup>134</sup> See, e.g., BOULDER, COLO., REV. CODE §§ 12-4-1-7 (2006) (providing for a domestic partnership registry but no benefits); DENVER, COLO., REV. MUN. CODE § 28-200 (2006) (same, except referring to the status as “committed partnerships”).

<sup>135</sup> See *supra* note 130 and accompanying text.

<sup>136</sup> See VT. STAT. ANN. tit. 15, § 1201-02 (2002); CONN. GEN. STAT. § 46b-38aa (2006); N.J. STAT. ANN. § 37:1-28 (West 2007).



States,<sup>137</sup> a number that topped 770,000 five years later.<sup>138</sup> The Census also reported that a third of female same-sex households and over a fifth of male same-sex households had children.<sup>139</sup> Further, same-sex couples live in every congressional district in the United States.<sup>140</sup>

These couples are as much in need of the benefits and protections associated with marriage as opposite-sex couples, and to deny those benefits constitutes a significant hardship for them.<sup>141</sup> Moreover, the hardship is uniquely visited upon the homosexual population. Opposite-sex couples can still receive benefits and protections by getting married—they do not need civil unions.<sup>142</sup> In short, prohibitions of civil unions inflict a severe harm on same-sex couples, but no other groups, thereby implicating the first prong of the *Romer* framework.

Although Category III amendments inflict a severe harm on homosexuals, a foreclosure on civil unions does not impermissibly restructure the political process. The law of domestic relations has

<sup>137</sup> See TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, CENSUS SPECIAL REPORTS 2 (2003), <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

<sup>138</sup> GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 1 (2006), <http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf> (publication by the Williams Institute of the UCLA school of law reporting data that the number of same-sex couples grew from nearly 600,000 couples in 2000 to almost 777,000 in 2005). The study attributes the increase to a decreasing “stigma associated with same-sex partnering and homosexuality in general.” *Id.*

<sup>139</sup> SIMMONS & O'CONNELL, *supra* note 137, at 10.

<sup>140</sup> GATES, *supra* note 138, at 2.

<sup>141</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (“No one disputes that the plaintiff couples are families . . . and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit.”); *id.* at 955 (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”); *Lewis v. Harris*, 908 A.2d 196, 202 (N.J. 2006) (describing the expensive and time-consuming practices in which same-sex couples have engaged because marital benefits were not readily available, as well as the hardships of partners being denied privileges while the other was hospitalized); *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting) (“Depriving . . . children [of same-sex couples] of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare . . .”).

<sup>142</sup> And, because marriage and its attendant benefits and protections are available to them, it seems that opposite-sex couples do not deserve civil unions anyway. See, e.g., *Goodridge*, 798 N.E.2d at 958 (“Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage.”).

traditionally been the exclusive priority of the state.<sup>143</sup> If a state wanted to ban marriage entirely, or eliminate civil marriage and only recognize civil unions, it could do so under its plenary authority.<sup>144</sup> That is not to say that a state could not delegate its authority to municipalities and allow them to create civil unions—indeed, just as in the case of marriage, the state’s plenary authority to structure governmental decisionmaking also allows it to give local government a substantive role in determining what qualifies as a valid civil union, or even whether civil unions could be granted.<sup>145</sup> However, to date no state has delegated such authority.<sup>146</sup> Indeed, the states that have civil unions reserve all discretionary decisions to state authorities, relegating local government to at most a ministerial role in granting civil union certificates.<sup>147</sup>

Because civil unions are not, and never have been, the domain of local government, and because they involve a state interest in domestic relations law, forbidding civil unions does not work an impermissible political restructuring. Category III amendments, by prohibiting civil unions, do not “repeal . . . laws or policies” of local governments,<sup>148</sup> nor do they “interfere[] with the expression of local community preferences”<sup>149</sup> since local communities never had a right to express that preference in the first place. In short, just as marriage is not a concern of local government unless the state explicitly delegates its authority, civil unions are likewise not of local concern. Thus, a state “defense of marriage” amendment that bans civil unions does not restructure the political process in a way forbidden by *Romer*.

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<sup>143</sup> See *supra* note 125 and accompanying text; Sanford N. Katz, *Emerging Models for Alternative Marriage*, 33 FAM. L.Q. 663, 669 (1999) (noting that “regulat[ing] marriage-like relationships [is] a power normally reserved to the states”).

<sup>144</sup> See, e.g., *Goodridge*, 798 N.E.2d at 957 n.14 (“[T]he State could, in theory, abolish all civil marriage . . .”); *Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 644 (Mass. 2006) (same).

<sup>145</sup> See *supra* notes 125, 143 and accompanying text.

<sup>146</sup> See *supra* note 125 and accompanying text; see also *supra* notes 127–28 and accompanying text.

<sup>147</sup> See VT. STAT. ANN. tit. 18, § 5160 (2000); CONN. GEN. STAT. § 46b-38aa-pp (2006); N.J. STAT. ANN. § 37:1-2 (West 2002 & Supp. 2007).

<sup>148</sup> *Romer v. Evans*, 517 U.S. 620, 629 (1996).

<sup>149</sup> *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997).

## 2. Domestic Partnerships

The domestic partnership, while frequently mentioned by major media sources in the same-sex relationship debate,<sup>150</sup> is also a very elusive concept uncharacterizable by a single, pithy definition. *Black's Law Dictionary* gives two definitions for “domestic partnership”:

1. A nonmarital relationship between two persons of the same or opposite sex who live together as a couple for a significant period of time.
2. A relationship that an employer or governmental entity recognizes as equivalent to marriage for the purpose of extending employee-partner benefits otherwise reserved for the spouses of employees.<sup>151</sup>

While perhaps illustrative, these definitions bear little resemblance to the actual state of domestic partnership laws in this country.<sup>152</sup> To begin, there

<sup>150</sup> See, e.g., Editorial, *Conserving that Compassion*, N.Y. TIMES, Oct. 28, 2006, at A14 (arguing that the New Jersey *Lewis v. Harris* decision “was hardly activist,” given that New Jersey “had given gay couples the ability to unite in domestic partnerships”); *Nation in Brief*, WASH. POST, Dec. 21, 2006, at A19 (stating that “California recognizes domestic partnerships, similar to civil unions in Vermont and Connecticut”); Ellen Barry, *A Same-Sex Marriage Setback: Lawmakers Allow an Initiative Banning the Unions to Go to Voters. But the Fight Isn't Over*, L.A. TIMES, Jan. 3, 2007, at A7 (noting that “Vermont, New Jersey and Connecticut allow civil unions, and California’s domestic partnership law guarantees many of the rights of marriage”).

<sup>151</sup> BLACK’S LAW DICTIONARY 522–23 (8th ed. 2004).

<sup>152</sup> The first definition is only partially correct because it does not mention that domestic partnerships are *legal* statuses granted by a *state or local* government. Further, legal domestic partnerships usually have a cohabitation requirement *in addition to* a large number of other requirements resembling the prerequisites for marriage. See Bowman & Cornish, *supra* note 54, at 1192 (noting that domestic partnership laws generally have requirements nearly identical to marriage for domestic partners, in addition to a cohabitation requirement); William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 969–74 (2001) (same, but in greater detail). See also, e.g., CAL. FAM. CODE § 297(b) (West 2004) (requiring individuals seeking a domestic partnership to be (1) cohabiting, (2) unmarried, (3) unrelated by blood to the same extent that the marriage statutes require, (4) at least eighteen years of age, (5) capable of consent, and (6) of the same sex *or* of different sexes and at least one of the individuals is over sixty-two years of age who meets eligibility criteria under certain provisions of the Social Security Act).

Meanwhile, the second definition is too narrow because it only takes local domestic partnership laws into account. Further, the second definition overgeneralizes: even local domestic partnership laws do not necessarily extend employee-partnership benefits to domestic partners—some merely create registries. See *infra* note 171 and accompanying text. Finally, for the states that have domestic partnership laws, their domestic partnerships are decidedly *not* recognized as “equivalent to marriage,” given that they neither confer full marital benefits nor are given the title of “marriage.”

are two types of domestic partnership laws—state and local. Currently four states and the District of Columbia have domestic partnership laws that provide some of the more important marital benefits to same-sex couples.<sup>153</sup> In addition, over seventy cities and counties have domestic partnership registries, some of which provide benefits for registered domestic partners.<sup>154</sup> State and local domestic partnership laws are very different in scope and meaning, and thus they must be analyzed separately under an equal protection framework. Therefore, subsections a and b, below, will analyze whether Category III amendments violate the *Romer* framework based on their impacts on state and local domestic partnership laws, respectively.

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<sup>153</sup> The states are California, *see* CAL. FAM. CODE § 297 (West 2004); Hawaii, *see* HAW. REV. STAT. §§ 572C-1–C-7 (Supp. 2005); Maine, *see* ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2006); and Washington, *see* WASH. REV. CODE §§ 26.60.010–26.60.070 (2007). Washington, D.C.’s domestic partnership laws are found at D.C. CODE ANN. § 32-702 (LexisNexis 2007). Note, however, that Hawaii refers to domestic partners as “reciprocal beneficiaries.” To illustrate the types of benefits under these laws, in Maine domestic partners are entitled to, among other things, inheritance without a will, ME. REV. STAT. ANN. tit. 18-A, § 2-102 (2004 & Supp. 2006); making funeral and burial arrangements, ME. REV. STAT. ANN. tit. 22, § 2843-A (2004 & Supp. 2006); entitlement to be named guardian or conservator if partner becomes incapacitated, ME. REV. STAT. ANN. tit. 18-A, §§ 5-309, 5-311 (Supp. 2004 & 2006); entitlement to make organ and tissue donation, ME. REV. STAT. ANN. tit. 22, § 2902 (2004 & Supp. 2006); and explicit protection in the state’s domestic violence laws, ME. REV. STAT. ANN. tit. 19-A, § 4002 (Supp. 2006). *See also supra* note 42 (listing benefits for reciprocal beneficiaries in Hawaii).

<sup>154</sup> CITY AND COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMM’N, STATE AND LOCAL DOMESTIC PARTNERSHIP REGISTRIES (2004), *available at* [http://www.sfgov.org/site/sfhumanrights\\_page.asp?id=6283](http://www.sfgov.org/site/sfhumanrights_page.asp?id=6283) (listing seventy-three local governments, including Washington, D.C., having domestic partnership registries as of December 2004). The localities that had domestic partnership registries in 2004 were Arcata, Berkeley, Cathedral City, Davis, Laguna Beach, Long Beach, Los Angeles County, Marin County, Oakland, Palm Springs, Palo Alto, Petaluma, Sacramento, San Francisco, City of Santa Barbara, Santa Barbara County, Santa Monica, and West Hollywood, California; Boulder and Denver, Colorado; Hartford, Connecticut; The District of Columbia (Washington, D.C.); Broward County, Key West, and Miami Beach, Florida; Atlanta and Fulton County, Georgia; Cook County and Oak Park, Illinois; Iowa City, Iowa; New Orleans, Louisiana; Portland, Maine; Takoma Park, Maryland; Boston, Brewster, Brookline, Cambridge, Nantucket, Provincetown, and Truro, Massachusetts; Ann Arbor, Michigan; Minneapolis, Minnesota; Jackson County, Kansas City, and St. Louis, Missouri; Albany, East Hampton, Village of Great Neck, Village of Great Neck Plaza, Huntington, Ithaca, New York City, North Hempstead, Village of North Hills, Rochester, Village of Roslyn Estates, Southampton, Southold, and Westchester County, New York; Carrboro and Chapel Hill, North Carolina; Cleveland Heights, Ohio; Ashland, Eugene, and Multnomah County, Oregon; Philadelphia, Pennsylvania; Travis County, Texas; Lacey, Olympia, Seattle, and Tumwater, Washington; and Madison and Milwaukee, Wisconsin.

### a. *State Domestic Partnership Laws*

This subsection will argue that Category III amendments are constitutional as applied to state domestic partnership laws because, despite their infliction of substantial harm on same-sex couples, they do not impermissibly restructure the political process. State domestic partnership laws, as well as the domestic partnership law of the District of Columbia, provide some marital benefits to qualified same-sex couples.<sup>155</sup> While not recognized as a marriage, state domestic partnerships have sometimes been called “marriage-like”<sup>156</sup> because they recognize a legal status for same-sex couples and provide some important marital benefits to those couples. As noted earlier, Category III amendments foreclose these partnerships because they are substantially similar to a marriage.<sup>157</sup> However, while this undoubtedly causes real harm to homosexuals, thereby satisfying the *Romer* framework’s first prong, it does not create an impermissible political restructuring as the second prong requires. Each of these points will be discussed in the paragraphs below.

Without question, the Category III ban on state domestic partnership laws causes a real and substantial harm to same-sex couples. Part IV.C.1, above, suggests that banning domestic arrangements that confer *all* marital benefits to same-sex couples is a severe harm; to ban all domestic arrangements that confer only *a limited number* of these benefits is even more harmful. Many marital benefits granted under state domestic partnerships are important to committed couples;<sup>158</sup> however, Category III amendments prohibit the state from granting these benefits and protections to same-sex couples and their families through a domestic partnership. Meanwhile, opposite-sex couples are free to attain a complete set of marital benefits by entering into marriage. Thus, Category III amendments, just like

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<sup>155</sup> For a description of some of the benefits under domestic partnership and reciprocal beneficiary laws, see *supra* notes 42, 153.

<sup>156</sup> See, e.g., M.V. Lee Badgett, Op-Ed., *The Wedding Economy*, N.Y. TIMES, Jan. 7, 2007, at 14NJ17 (referring to California’s domestic partnerships as “marriage-like relationships”); Dahlia Lithwick, *Please Say ‘I Don’t’*, WASH. POST, Nov. 5, 2006, at B2 (noting that Virginia did not have a “nothing-marriage-like” law—that is, a law forbidding civil unions and domestic partnerships). This perception apparently is shared outside of the United States as well. See, e.g., *Polls Drive Gay Law Review*, GOLD COAST BULL. (Australia), Mar. 9, 2007, 2007 WLNR 4484008 (discussing the Government’s rejection of legal recognition of “gay marriage-like relationships”).

<sup>157</sup> See *supra* notes 48–53 and accompanying text.

<sup>158</sup> See *supra* note 141 and accompanying text (discussing the importance of marital benefits for same-sex couples and their families).

Colorado's Amendment 2, "inflict[] on [homosexuals] immediate, continuing, and real injuries"<sup>159</sup> in a broad and undifferentiated way.

That being said, Category III amendments as applied to state domestic partnerships do not impermissibly restructure the political process. As discussed earlier, the state has plenary authority to determine its own domestic relations law.<sup>160</sup> This encompasses not only marriage or civil unions, but any secondary domestic relations status that the state wishes to endorse.<sup>161</sup> Simply put, absent state conferral of authority, local government has no interest in whether the state recognizes domestic partnerships or not. Since the state political processes remain intact and local authority is not implicated, no impermissible political restructuring within the *Romer* framework has occurred. Therefore, Category III amendments, as applied to state domestic partnerships, do not implicate the second factor of the *Romer* framework, and thus do not violate the Equal Protection Clause.

### b. *Local Domestic Partnership Laws*

This subsection will argue that Category III amendments are unconstitutional as applied to local domestic partnership laws because they impose an onerous burden on homosexuals and impermissibly interfere with local community preferences in a subject of proper local authority. The paragraphs below will discuss the history of local domestic partnerships and then show how Category III amendments, as applied to local domestic partnership laws, violate both prongs of the *Romer* framework.

Unlike civil unions, domestic partnerships *began* as a local solution to perceived problems with state domestic relations law.<sup>162</sup> During the mid- to late-twentieth century, while marriage remained a binary and relatively static institution, the structure of the American family had undergone a revolutionary change.<sup>163</sup> While state marriage law only recognized marriage

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<sup>159</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>160</sup> See, e.g., *supra* note 125; *infra* note 162.

<sup>161</sup> Indeed, domestic partnerships in California, Hawaii, and Maine were passed pursuant to their authority to regulate domestic relations law. See CAL. CONST. art. IV, § 1; HAW. CONST. art. III, § 1; ME. CONST. art. IV, § 1.

<sup>162</sup> Berkeley, California was the first city to enact a domestic partnership ordinance in 1984. See Duncan, *Domestic Partnership Laws in the United States*, *supra* note 152, at 965. By contrast, Hawaii was the first state to enact a domestic partnership ordinance in 1997. See HAW. REV. STAT. ANN. § 572C-4 (Supp. 2005) (noting in the annotation that the provision—which sets out the requirement for reciprocal beneficiaries—became law in 1997).

<sup>163</sup> See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (noting “the changing

as a domestic status entitled to any sort of financial protection, local governments recognized that “protecting economically dependent individuals and fostering happiness by recognizing relationships . . . [were] equally important to individuals in other [nonmarital] relationships.”<sup>164</sup> Accordingly, many local governments created domestic partnerships as “gap-filler” provisions to more equitably distribute “fringe benefits”—such as health care—given to married government employees.<sup>165</sup> In 1984, Berkeley, California was the first city to offer domestic partnership benefits;<sup>166</sup> by 1992 twelve local governments had enacted domestic partnership ordinances.<sup>167</sup> In 2004, at least seventy local governments had some type of domestic partnership ordinance—far more than the four states that currently have domestic partnership laws.<sup>168</sup> Thus, domestic partnership ordinances both began as and remain a local government phenomenon,<sup>169</sup> created to deal with perceived inequities and insufficiencies in state domestic relations law.

There are two types of local domestic partnership ordinances. The first type simply provides a legal means to register a partnership but creates no rights in the parties<sup>170</sup> (“registry” ordinances); the second type extends certain municipal or city employee benefits to the domestic partner of the

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realities of the American family” and how “Massachusetts has responded supportively to” it); *In re Rachel S.*, 766 N.Y.S.2d 307, 309 (Fam. Ct. 2003) (noting “the realities of the changing nature of the American family”).

<sup>164</sup> Bowman & Cornish, *supra* note 54, at 1185–86.

<sup>165</sup> *Id.* at 1194–95. See also Katz, *supra* note 143, at 669 (noting that domestic partnership ordinances “are perhaps the first successful attempt by municipalities or cities to regulate marriage-like relationships, a power normally reserved to the states”).

<sup>166</sup> See *supra* note 163 and accompanying text.

<sup>167</sup> Bowman & Cornish, *supra* note 54, at 1188–90. In 1992, the local governments having such ordinances were Berkeley, West Hollywood, Los Angeles, San Francisco, and Laguna Beach, California; Washington, D.C.; Takoma Park, Maryland; Ann Arbor, Michigan; Minneapolis, Minnesota; Ithaca, New York; Seattle, Washington; and Madison, Wisconsin. *Id.*

<sup>168</sup> See *supra* note 154 and accompanying text (noting that in 2004 at least seventy local governments had domestic partnership ordinances); *supra* note 153 and accompanying text (noting that four states and the District of Columbia have domestic partnership laws).

<sup>169</sup> See Bowman & Cornish, *supra* note 54, at 1198 (“[T]he majority of current activity in the area of domestic partnership is taking place at the local level.”).

<sup>170</sup> See Katz, *supra* note 143, at 670 (describing registry ordinances as “provid[ing] a legal method for registering a partnership”). See also Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 379 (2002) (“Some [domestic partnership] ordinances offer symbolic but no material benefits . . .”). For an example of this type of ordinance, see BOULDER, COLO., REV. CODE §§ 12-4-1-7 (2006) (providing for a domestic partnership registry but no attendant benefits).

employee<sup>171</sup> (“benefits” ordinances). Both types of ordinances are typically passed pursuant to a “home rule” provision found in nearly all state constitutions; those provisions grant local governments authority over “police power” matters that directly concern their citizens.<sup>172</sup>

Category III amendments generally invalidate local domestic partnership ordinances.<sup>173</sup> This proposition is supported not only by the language of

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<sup>171</sup> See Katz, *supra* note 143, at 670 (describing benefit ordinances as “extend[ing] employee-related benefits to partners of city employees”). It is important here to note, however, that the extent of the benefits given varies greatly between ordinances. See Strasser, *supra* note 171, at 379 (“Domestic partnerships vary greatly with respect to the benefits that they afford.”). For examples of benefits given to domestic partners by local domestic partnership laws, see *supra* notes 132–34 and accompanying text. For additional descriptions of the varying benefits accorded to domestic partners under city ordinances, see Duncan, *Domestic Partnership Laws in the United States*, *supra* note 152, at 974–75.

<sup>172</sup> For example, the Colorado Constitution gives cities and towns “all . . . powers necessary, requisite or proper for the government and administration of [their] local and municipal matters . . .” COLO. CONST. art. XX, § 6. Colorado’s provision is an example of an *imperium in imperio* home rule provision, whereby local governments are given full and exclusive police power with respect to local affairs. Thus, the local government can trump state laws if its proposed ordinance falls within the exclusive domain of authority delegated to it by the state constitution. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) (describing *imperium in imperio* home rule); Bowman & Cornish, *supra* note 54, at 1199–1200 (same); Gillette, *supra* note 86, at 1364 (describing a type of home rule that “carve[s] out areas in which localities have exclusive jurisdiction,” although not referring to it as *imperium in imperio*).

Another type of home rule is what Briffault called the “legislative model,” which conferred on localities police power with respect to local affairs, subject to restrictions and exceptions by the state legislature. Legislative model localities thus do not possess exclusive domains of authority, which is what contrasts them with *imperium in imperio* localities. See Briffault, *supra* (describing legislative model home rule); Bowman & Cornish, *supra* note 54, at 1199 (same); Gillette, *supra* note 86, at 1364 (describing a type of home rule where a “grant [of authority] is expressly limited to those areas in which local legislation does not conflict with state law,” although not referring to it as legislative model home rule).

<sup>173</sup> There are two possible exceptions: Georgia and Wisconsin. Georgia’s amendment reads in relevant part: “No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.” GA. CONST. art. I, § IV (emphasis added). By its terms, Georgia’s amendment seems only to forbid state domestic partnership laws but allows local ones. Indeed, Fulton County, which includes Atlanta, allows certification of a “Committed Relationship” that extends county health, dental, and vision insurance benefits to the partner of a county employee. See *Filing Instructions for Certified Committed Relationships*, Office of the Clerk to the Commission, [http://www.co.fulton.ga.us/Fulton\\_County/CR\\_Instructions.pdf](http://www.co.fulton.ga.us/Fulton_County/CR_Instructions.pdf) (last visited Oct. 9, 2007). However, the Georgia courts have not yet resolved the issue of whether



Category III amendments,<sup>174</sup> but also by the official opinions of state attorneys general.<sup>175</sup> Indeed, the only court in a Category III state to have ruled on the issue—a Michigan court of appeals—concluded that Michigan’s amendment invalidated Ann Arbor’s domestic partnership ordinance.<sup>176</sup>

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Georgia’s “defense of marriage” amendment nullifies local domestic partnership ordinances such as that of Fulton County.

Wisconsin’s amendment states in relevant part: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” WIS. CONST. art. XIII, § 13. While no Wisconsin court has thus construed the provision, the state Attorney General has opined that the amendment does not generally forbid local domestic partnership ordinances. Wis. Op. Att’y Gen. (2006), 2006 Wisc. AG LEXIS 24. While the Attorney General’s opinion is not controlling authority, it is certainly persuasive seeing that the Michigan appellate court and Attorney General came to the same conclusion regarding the reach of Michigan’s amendment.

<sup>174</sup> See, e.g., NEB. CONST. art. I, § 29 (“The uniting of two persons of the same sex in a . . . domestic partnership . . . shall not be valid or recognized in Nebraska.”); KY. CONST. § 233a (“A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”); IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”); TEX. CONST. art. I, §32 (“This state or a political subdivision of this state may not create or recognize any legal status . . . similar to marriage.”).

<sup>175</sup> See, e.g., 2005 Mich. Op. Att’y Gen. No. 7171 (2005), 2005 WL 639112 (Opinion of the Michigan Attorney General stating that Michigan’s “defense of marriage” amendment “prohibits state and local governmental entities from conferring benefits on their employees on the basis of a ‘domestic partnership’ agreement”). While Nebraska Attorney General Jon Bruning never had occasion to opine on the constitutionality of local domestic partnership ordinances in light of Nebraska’s amendment, his official opinion issued on March 10, 2003 is broad enough to infer a similar conclusion to that of Michigan’s Attorney General. See Neb. Op. Att’y Gen. No. 03004 (2003), 2003 WL 21207498 (stating that a state law giving a person rights to disposition of his domestic partner’s remains and the making of anatomical gifts would be invalid because it “would create new rights which spring from recognition of a domestic partnership, . . . [a]nd the rights being created are placed on the same plane as rights which arise as a consequence of a marital relationship[; t]his would be giving legal effect to a same sex relationship, thereby validating or recognizing it, which runs counter to art. 1, §29.”). But see Wis. Op. Att’y Gen., *supra* note 174 (Wisconsin Attorney General coming to a contrary conclusion for Wisconsin’s amendment).

<sup>176</sup> Nat’l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 151 (Mich. Ct. App. 2007). While *Citizens for Equal Protection, Inc. v. Bruning* challenged Nebraska’s Category III amendment on federal equal protection grounds, the district court noted that plaintiffs were challenging its application to *state* domestic partnership laws, not *local* ones. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 999 (D. Neb. 2005) (“Plaintiffs seek only ‘a level playing field’ that would permit them to access *the Nebraska Unicameral* to lobby for legal protections that have already been permitted in other states.” (emphasis added)). Thus, since plaintiffs did not challenge Nebraska’s

While invalidation of local domestic partnership ordinances may not seem significant, as many of them are merely registries,<sup>177</sup> it actually does inflict real and continuing harm on homosexuals. Many domestic partnership ordinances provide tangible, important benefits to same-sex couples,<sup>178</sup> benefits that would be forbidden under a Category III amendment. Category III amendments, however, foreclose even the possibility of such benefits being extended to same-sex couples in the future. Today, employee benefits constitute nearly one-fifth of total employment compensation packages, with roughly half of that being for health insurance.<sup>179</sup> To prohibit local governments from providing these important benefits imposes a severe harm on committed same-sex couples, especially those who have additional child dependents. This substantial harm implicates the first prong of the *Romer* framework.

Moreover, Category III amendments, as applied to local domestic partnership laws, impermissibly restructure the political process by interfering with local community preferences in a way almost identical to that condemned in *Romer*. In *Romer*, Amendment 2 subverted local community preferences on issues of direct concern to those communities, i.e. anti-discrimination ordinances.<sup>180</sup> Similarly, Category III amendments forbid localities from conferring benefits *on their own employees and citizens* or providing a means *for their own citizens* to register their relationships. Whether or not to confer benefits on local governmental employees and citizens, and whether or not to recognize relationships solely for purposes of the locality, are matters of purely local concern. They do not implicate state interests, just as municipal anti-discrimination ordinances did not implicate state interests in *Romer*. For the state to remove localities' power to pass laws concerning the welfare of their own citizens constitutes precisely the impermissible political restructuring struck down in *Romer*. Thus, because they interfere with local community preferences on issues of direct concern to the locality, as well as wreak hardship on same-sex couples and their children, it seems that Category III amendments, as applied to local domestic partnership laws, violate equal protection.<sup>181</sup>

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Section 29 as applied to localities, the Michigan case remains the only one to address the validity of local domestic partnership laws in the face of a Category III amendment.

<sup>177</sup> See *supra* note 134 and accompanying text.

<sup>178</sup> See *supra* notes 132–33 and accompanying text.

<sup>179</sup> See Human Rights Campaign, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2005–06*, at 3, <http://www.hrc.org/documents/SOTW20052006.pdf>.

<sup>180</sup> See *supra* notes 87–90 and accompanying text.

<sup>181</sup> One might (erroneously) argue here that since domestic partnership ordinances are passed pursuant to home rule provisions in state constitutions, the state can remove

#### D. *Category IV Amendments*

In addition to prohibiting same-sex relationship recognition, Category IV amendments forbid conferring individual marital benefits on same-sex couples *without* state or local legal recognition of same-sex relationships. Thus, whereas Category III amendments allow extending individual marital benefits to same-sex couples so long as doing so does not confer a legal status on those couples, a Category IV state cannot extend individual benefits to same-sex couples at all. Because the harm to same-sex couples is more profound than that experienced under Category III amendments, and because they impermissibly restructure the political process, Category IV amendments seem to violate both prongs of the *Romer* framework. The paragraphs below will discuss each of these claims.

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the authority to create those ordinances at will through amending the state constitution. As noted earlier, home rule is purely at the discretion of the state. *See supra* note 173; Duncan, *Domestic Partnership Laws in the United States*, *supra* note 152, at 981 (“Since localities are legally creatures of the state, a locality needs state authority to pass an ordinance.”); Katz, *supra* note 143, at 669 (noting that some domestic partnership ordinances have been struck down by state supreme courts because they “ran contrary to a general state policy”). Therefore, local ordinances can be invalidated if they contradict state law or policy. *See, e.g.*, Bowman & Cornish, *supra* note 54, at 1200–01; New York State Club Ass’n v. City of N.Y., 505 N.E.2d 915, 917 (N.Y. 1987) (“[L]ocal government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law.”); Pub. Serv. Co. v. Town of Hampton, 411 A.2d 164, 166 (N.H. 1980) (“Local regulation is repugnant to State law when it expressly contradicts a statute or is contrary to the legislative intent that underlies a statutory scheme.”); Auto-Rite Supply Co. v. Mayor of Woodbridge, 135 A.2d 515, 519 (N.J. 1957) (“The . . . ordinance conflicts with state policy and it is therefore void and of no effect.”). Similarly, the state has plenary power to grant as much or as little home rule power to localities as it so chooses. *See supra* note 173 and accompanying text. Since the state has passed a Category III amendment, the argument goes, local domestic partnership ordinances contradict state policy, and therefore must be invalidated.

However, this line of argumentation was already rejected in *Romer*. The Colorado Constitution grants localities an *imperium in imperio* home rule power. *See* COLO. CONST. art. XX, § 6; *supra* note 173 (describing *imperium in imperio* home rule power). Colorado then amended its constitution by adding Amendment 2, which removed localities’ home rule power to pass anti-discrimination legislation on the basis of sexual orientation. Local anti-discrimination ordinances therefore conflicted with the state constitution. Despite the fact that Colorado could have simply chosen not to grant any home rule to its localities in the first place, and despite the fact that the Colorado Constitution permitted home rule to be taken away through amendment, the *Romer* Court nonetheless invalidated Amendment 2 on equal protection grounds. As intimated in Part III.B, Amendment 2 was invalid in part because Colorado had chosen to give its localities control over matters directly impacting their citizenry, and therefore Colorado could not interfere with those local community preferences when they were of no concern to the state unless it completely revoked home rule.

First, Category IV amendments impose a severe and lasting harm on same-sex couples. Volumes of reporters are replete with cases of unmarried couples—including same-sex couples—seeking to partake in particular benefits associated with marriage even though their union is not legally recognized by the state.<sup>182</sup> Some states and localities have extended these individual benefits by law even while not recognizing a legal status for same-sex couples.<sup>183</sup> However, Category IV amendments deny gays and lesbians any chance of receiving these important benefits. In short, Category IV amendments impose a far more severe hardship on same-sex couples than even Category III amendments; thus, Category IV amendments implicate the first prong of the *Romer* framework.

Further, Category IV amendments effect an impermissible political restructuring far beyond that of all other amendments. First, Category IV amendments implicate at least the same localist concerns as Category III amendments. Given that Category III amendments are unconstitutional as applied to local domestic partnership laws,<sup>184</sup> surely Category IV amendments—which forbid local conferral of benefits—are unconstitutional for the same reason.<sup>185</sup> Put another way, if Category III amendments are

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<sup>182</sup> *Rovira v. AT&T*, 760 F. Supp. 376 (S.D.N.Y. 1991) (death benefits); *Doe v. Prudential Ins. Co.*, 744 F. Supp. 40 (D.R.I. 1990) (life insurance benefits); *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (suing for loss of consortium in partner's death); *Planck v. Hartung*, 159 Cal. Rptr. 673 (Ct. App. 1979) (creditors seeking to hold both partners liable for one partner's death); *In re Estate of Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993) (elective share); *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (application of domestic violence statute to unmarried couples). See also JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 66 (7th ed. 2005) (describing Professor Waggoner's proposed amendment to the Uniform Probate Code that would give an intestate share of an estate to the survivor of "committed partners").

<sup>183</sup> For example, Salt Lake City, Utah and the County of Athens-Clarke, Georgia—both in states with Category III amendments prohibiting legal recognition of same-sex partnerships—have recently allowed domestic partners of city and county employees to receive benefits. A total of 145 local jurisdictions confer benefits on city and county employees across the nation, some of which are also located in states having Category III amendments. See Human Rights Campaign, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2006–07*, at 21, [http://www.hrc.org/documents/State\\_of\\_the\\_Workplace.pdf](http://www.hrc.org/documents/State_of_the_Workplace.pdf).

Some state governments have also conferred individual benefits on a state employees' same-sex partner without formally recognizing the relationship. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1000 (D. Neb. 2005) (noting that Iowa provides health care to domestic partners of state employees; Iowa does not have a state domestic partnership law).

<sup>184</sup> See Part IV.C.2.b, *supra*.

<sup>185</sup> Louisiana's amendment concededly may not implicate localist concerns in the way that Oklahoma's amendment does. Louisiana's amendment reads in relevant part: "No official or court of the state of Louisiana shall construe . . . any *state law* to require

unconstitutional as applied to localities because they interfere with local community preferences, then Category IV amendments are unconstitutional under the same application.

However, whereas Category III amendments only appear to be unconstitutional as applied to localities,<sup>186</sup> Category IV amendments work an additional political restructuring that invalidates even their applications to *state* law. Thus, Category IV amendments, insofar as they have applications beyond Category III amendment prohibitions on relationship recognition, violate equal protection at both the state and local levels of government. In *Seattle School District* and *Hunter v. Erickson*, the Supreme Court struck down a restructuring of the political system when it disadvantaged a particular group.<sup>187</sup> Category IV amendments implicate this very restructuring. Category IV amendments forbid extending incidental marital benefits to same-sex couples.<sup>188</sup> This restructures the state political process by forcing homosexuals and their supporters to amend the state constitution before petitioning the legislature to extend any of those incidents.<sup>189</sup> Thus, unlike Categories I, II, and III, Category IV amendments restructure the political process for *ordinary political activism*, not simply for matters of relationship recognition.<sup>190</sup> Category IV amendments uniquely restructure

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that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.” LA. CONST. art. XII, § 15 (emphasis added). Cf. OKLA. CONST. art. II, § 35 (“[No] *provision of law* shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” (emphasis added)).

<sup>186</sup> See Part IV.C.2, *supra*.

<sup>187</sup> See *supra* notes 81–82.

<sup>188</sup> See *supra* notes 62–64 and accompanying text.

<sup>189</sup> See, e.g., LA. CONST. art. XII, § 15 (“No official or court . . . shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.”).

Ironically, it is possible that the Oklahoma amendment’s incredible overbreadth might save it from this impermissible political restructuring. Oklahoma’s Constitution forbids conferring incidents of marriage “upon unmarried couples or groups,” not simply same-sex couples. OKLA. CONST. art. II, § 35. However, this assumes that the Oklahoma Supreme Court will authoritatively construe it in this fashion. The remainder of the amendment is very clear in its purpose—to forbid same-sex relationships from receiving legal recognition—and thus an Oklahoma court might still interpret the Oklahoma amendment only to extend to same-sex couples. If this route is taken, then the Oklahoma amendment falls under the same line of argumentation given in the text above.

<sup>190</sup> Cf. Parts IV.A–C, *supra*. For example, under a Category III amendment, a homosexual activist group could petition the legislature to allow same-sex partners to collect an intestate share of a decedent’s estate if a court finds that the partnership was one of a certain mutual dependence (thus obviating the need for a legal “domestic

the general political process for one particular group, an action explicitly prohibited by *Hunter* and *Seattle School District*. Therefore, Category IV amendments violate equal protection.

In short, Category IV amendments are not only unconstitutional as applied to local government preferences, but also as applied to state law denial of individual incidents. Category IV amendments, in addition to being unconstitutional as applied to local domestic partnerships for the same reasons as Category III amendments, impermissibly restructure the political process for homosexuals in a way expressly prohibited by *Hunter* and *Seattle School District*. Thus, Category IV amendments violate equal protection.

## V. CONCLUSION

In his blistering dissents in the Supreme Court's two most prominent gay rights cases, Justice Antonin Scalia noted that we are in the midst of a "culture war."<sup>191</sup> While Justice Scalia's observation is clearly true, it is equally true that public discourse has generally lacked an understanding of how various states have responded to that culture war. State "defense of marriage" amendments are typically characterized as being concerned only with recognition of same-sex marriage,<sup>192</sup> yet, as the foregoing sections demonstrated,<sup>193</sup> many amendments go far beyond marriage, extending to any legal relationship recognition and even to the ordinary political process.

Further, even those who do understand some of the subtlety underlying "defense of marriage" amendments seldom appreciate the totality of it. Judge Bataillon, while recognizing that Nebraska's amendment forbade state domestic partnership legislation,<sup>194</sup> ignored its impact on local government. The Eighth Circuit fell into the same trap and summarily reversed Judge Bataillon without considering the question he overlooked: whether Nebraska's amendment *as applied to local government preferences* satisfied *Romer's* demand for equal protection. The question, of course, was crucial. While the Eighth Circuit correctly determined that Nebraska's amendment did not violate equal protection as applied to *state* domestic partnership

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partnership" status, which would violate a Category III amendment). See *DUKEMINIER ET AL.*, *supra* note 183, at 66 (noting a proposed law that would enact a policy like the one described). Such would not be permitted under a Category IV amendment because that would be extending an "incident" of marriage to same-sex partners.

<sup>191</sup> *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>192</sup> See *supra* note 36 and accompanying text.

<sup>193</sup> See Parts II and IV, *supra*.

<sup>194</sup> See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1002-03 (D. Neb. 2005) (invalidating Section 29 based on its implications for relationships "similar to" marriage at the state level).

laws,<sup>195</sup> it ignored Section 29's unconstitutional application to local domestic partnership ordinances.<sup>196</sup>

To help elucidate some of the nuance, this Note has attempted to place state "defense of marriage" amendments into comprehensible categories<sup>197</sup> based on the extent to which they restrict state and local recognition of same-sex relationships. Moreover, this Note has attempted to develop a viable framework, based on *Romer*, to evaluate in a principled way whether the various categories of "defense of marriage" amendments comply with the Equal Protection Clause of the Fourteenth Amendment.<sup>198</sup> In applying that framework, it appears that Category I and II amendments are constitutional,<sup>199</sup> Category III amendments are constitutional as applied to state domestic partnership laws but not as applied to local domestic partnership laws,<sup>200</sup> and Category IV amendments are unconstitutional to the extent they go beyond Category III amendments' constitutionally permissible scope.<sup>201</sup>

Developing a viable framework for categorizing state "defense of marriage" amendments and analyzing their constitutionality under that framework is critical for principled judicial resolution of future equal protection challenges to state "defense of marriage" amendments. But also, this framework will hopefully provide valuable insight to states considering their own "defense of marriage" amendments. While sixty-three percent of Americans oppose same-sex marriage,<sup>202</sup> a clear majority—fifty-seven percent—support some type of relationship recognition for same-sex couples.<sup>203</sup> Thus, it is very possible that a state's population, while uncomfortable with same-sex marriage, would be open to the idea of civil unions or domestic partnerships. Legislators need to be aware of the options

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<sup>195</sup> See Part IV.C.2.a, *supra*; *Citizens for Equal Prot., Inc. v. Bruning*, 455 F.3d 859, 867–68 (8th Cir. 2006) (finding a rational basis in "steering procreation into marriage"); *id.* at 868 (focusing the equal protection issue on whether "the many state laws limiting the persons who may marry are rationally related to a legitimate government interest").

<sup>196</sup> See Part IV.C.2.b, *supra*.

<sup>197</sup> For a description of the Categories and into which Categories the state amendments fall, see Part II, *supra*.

<sup>198</sup> See Part III, *supra*.

<sup>199</sup> See Parts IV.A and B, *supra*.

<sup>200</sup> See Part IV.C, *supra*.

<sup>201</sup> See Part IV.D, *supra*.

<sup>202</sup> CBS News/N.Y. Times Poll, Oct. 27–31, 2006, at 21, [http://graphics8.nytimes.com/packages/pdf/politics/20061031\\_poll.pdf](http://graphics8.nytimes.com/packages/pdf/politics/20061031_poll.pdf) (29% supported civil unions but not same-sex marriage; 38% opposed recognition of any same-sex relationships).

<sup>203</sup> *Id.*

available to them in drafting “defense of marriage” amendments in order to accommodate their constituencies.<sup>204</sup>

It is difficult to predict how federal courts will resolve future constitutional challenges to state “defense of marriage” amendments. Based on a proper reading of *Romer*, I have suggested that Category III and IV amendments have constitutional infirmities that must be addressed by federal courts in future challenges. Yet the states approving those amendments did so by large margins,<sup>205</sup> and federal courts generally have been unwilling to flout such clear public opinion.<sup>206</sup> But should federal courts be tempted to ignore *Romer*’s clear mandate in order to preserve a perceived legitimacy, to avoid possibly losing their souls to incantations of “activist judges,” they would do well to heed the Tale of the Alchemist:

“You can give me the secret of gold?” [the Alchemist] asked the charlatan.

....

“I will sell it to you!” the unknown visitor must have replied. . . .

“With the gold you will build a city . . . . It is the entire city’s soul that I want in exchange.”

“It’s a deal.”

....

[The Alchemist built the City of Gold.] At the gates of the City of Gold armed guards blocked the way to anyone who wished to enter, to prevent access to the Cloven-hooved Collector, no matter in what guise he might turn up. And even if a simple maiden . . . were to approach, the guards made her halt.

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<sup>204</sup> For example, if a state’s population opposed same-sex marriage but was open to the idea of civil unions or domestic partnerships, a legislator would not want to draft a Category III amendment. Alternatively, if a state’s population was opposed to civil unions, or to all same-sex relationship recognition generally, a legislator would not want to draft a Category I or II amendment.

<sup>205</sup> In 2006, Colorado’s amendment passed with about 56% of the vote, Idaho’s with 63%, South Carolina’s with 78%, South Dakota’s with 52%, Tennessee’s with 81%, Virginia’s with 57%, and Wisconsin’s with 59%. See NPR, Election 2006 Results, <http://www.npr.org/news/specials/election2006/results/> (click on individual states and follow “Ballot” links).

<sup>206</sup> See, e.g., Carpenter, *supra* note 50, at 9. See generally THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989).



“Are you afraid our souls will fall into the Devil’s hands?” those of the City must have asked.

“No, for you have no soul to give him.”<sup>207</sup>

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<sup>207</sup> ITALO CALVINO, *THE CASTLE OF CROSSED DESTINIES* 17–20 (William Weaver trans., Harvest Books 1976) (1969).

