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THE NARROW AND SHALLOW BITE OF *ROMER* AND THE EMINENT RATIONALITY OF DUAL-GENDER MARRIAGE: A (PARTIAL) RESPONSE TO PROFESSOR KOPPELMAN

Richard F. Duncan*

In this response to Professor Koppelman, Professor Duncan takes issue with the assertions Koppelman makes in Romer v. Evans and Invidious Intent. Though Duncan agrees with Koppelman's summary of the rule of Romer and the ongoing effects of Bowers v. Hardwick, he rejects Koppelman's claims that laws that discriminate against gays will always be constitutionally doubtful because they disadvantage an unpopular class.

Duncan claims that Koppelman has tried, without success or authority, to fill in the "missing pages" left in Romer by the Supreme Court. Finally, he argues that traditional marriage laws are valid and will survive under Romer and rational basis analysis.

* * *

I. INTRODUCTION

Professor Koppelman is surely correct when he points out that Justice Kennedy's opinion in *Romer v. Evans*¹ has at least a few missing pages.² I very much enjoyed Koppelman's clever attempt to fill those missing pages with his own interesting views of what the opinion ought to have said.

There are many points of agreement between my reading of *Romer*³ and Professor Koppelman's. Indeed, I agree with two of Koppelman's three major statements of the law in the wake of *Romer*.

First, I think Koppelman's summary of the "rule of decision" of *Romer* is absolutely correct:

* Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law. I wish to thank David Coolidge and Lynn Wardle for interesting and thoughtful insights on this and related topics. I also wish to thank my wife and better half, Kelly Duncan: "He who finds a wife finds a good thing, and obtains favor from the Lord." Prov. 18:22. This Essay is dedicated to the memory of Rich Mullins (October 21, 1955—September 19, 1997).

¹ 116 S. Ct. 1620 (1996).

² Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 92 (1997).

³ My views on *Romer* are set forth in Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345 (1997).

If a law targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest, then the court will infer that the law's purpose is simply to harm that group, and so will invalidate the law.⁴

The decision in *Romer* is at once both narrow and shallow.⁵ It is narrow in the sense that the Court decided only the case before it and avoided creating broad rules that courts might apply in other cases. The decision is shallow in the sense that the Court's reasoning was almost subrational—there is more reflex than reason in Justice Kennedy's opinion in *Romer*.⁶

Koppelman is also correct when he observes that under *Bowers v. Hardwick*⁷—which survives *Romer*⁸—typical laws that discourage homosexual practices or relationships are rationally related to legitimate state interests “because such laws will always further the state's legitimate moral objection” to homosexual conduct.⁹ *Romer* did not overrule *Hardwick*, nor did it hold that it is illegitimate or irrational for government to make distinctions designed to discourage immoral sexual behavior.¹⁰ So far, Koppelman and I are in accord; but not for long.

I strongly disagree with Koppelman when he asserts that under *Romer* “[l]aws that discriminate against gays will always be constitutionally doubtful, however, because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group.”¹¹ This last point, which is close to a direct contradiction of points one and two, is not supported by anything in Justice Kennedy's majority opinion. This point is a product solely of Koppelman's attempt to write the “missing pages” of *Romer* rather than to understand the pages that actually were written by the Court.

⁴ Koppelman, *supra* note 2, at 94. See Duncan, *supra* note 3, at 353 (noting that the *Romer* majority drew an inference of animus “from the conceivably unlimited reach” of Colorado's Amendment 2).

⁵ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 14-23 (1996).

⁶ *Id.* at 23. “The Supreme Court's decision in *Romer v. Evans* can be understood as very narrow, since it does not purport to touch other possible cases, and also as shallow, since its rationale need not be taken to extend much further than its holding.” *Id.* (citation omitted).

⁷ 478 U.S. 186 (1986).

⁸ See *infra* notes 41-44 and accompanying text.

⁹ Koppelman, *supra* note 2, at 89.

¹⁰ See *infra* notes 29-31, 41-44 and accompanying text.

¹¹ Koppelman, *supra* note 2, at 89-90.

In the remainder of this Essay, I hope to demonstrate that Koppelman's first two points are sound and that his third point is not. I hope to show that *Romer* is far more notable for what it did not do than for what it did do. Finally, I will apply *Romer* to a very important body of law—that defining and regulating the institution of marriage—and argue that the decision is no threat to our society's traditional understanding of marriage as a relationship between one man and one woman. Conventional marriage laws have a solid foundation and should easily pass muster under *Romer* and the rational basis test.

II. *ROMER* AND RATIONALITY

A. *What Romer Did and Did Not Decide*

Romer is a unique equal protection case. Usually, the focus in an equal protection case is on a class of persons affected by some line drawn by a law. The Court asks whether the law at issue discriminates against certain highly protected groups, such as those defined by race, ethnicity, or gender, and protects equality accordingly. In *Romer*, however, the Court seemed more concerned about suspect *laws* than suspect *classifications*. In other words, the Court's concern in *Romer* was with the broad—almost infinite—scope of Amendment 2, not with the class of persons adversely affected by the Amendment. The case would have come out exactly the same way had the Amendment denied any “narrowly defined”¹² group—homosexuals, smokers, convicted felons, prostitutes, insurance salesmen—protection “against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”¹³

Although I defended the constitutionality of Amendment 2 as an advocate,¹⁴ I was uncomfortable with its potentially infinite reach. The Amendment singled out a class of persons—homosexuals and bisexuals—and amended the Colorado state constitution to forbid all levels of state and local government from adopting any statute, ordinance, or policy designed to protect this particular group against discrimination. The extreme breadth of the Amendment made it possible to imagine instances in which it would bar policies designed to protect homosexuals from harms that all would acknowledge to be wrongful.

For example, suppose there was good reason to believe that certain members of the police force had refused to protect homosexuals from vio-

¹² *Id.* at 94.

¹³ *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996).

¹⁴ See Brief of Amici Curiae States of Alabama, California, Idaho, Nebraska, South Carolina, South Dakota, and Virginia in Support of Petitioner, *Romer* (No. 94-1039). I wrote the brief with Charles Cooper, who appeared as Counsel of Record.

lent criminal attacks.¹⁵ Suppose further that the police department, wishing to reassure the gay community that it would be served equally, adopted a policy stating that "police services are available to all without regard to race, gender, religion, or sexual orientation." This policy, to which no one could seriously object, would have violated the Colorado state constitution if Amendment 2 had been allowed to go into effect.¹⁶

It was the extreme overbreadth of Amendment 2—not the identity of the class of persons covered by the Amendment—that concerned Justice Kennedy and his colleagues in the *Romer* majority. At oral argument, Justice Kennedy described Amendment 2 as creating a classification "adopted to fence out . . . [a] class *for all purposes*."¹⁷ He then remarked, "I've never seen a statute like that."¹⁸ Justice O'Connor worried that "a public library could refuse to allow books to be borrowed by homosexuals and there would be no relief from that."¹⁹ Justice Ginsburg was concerned that the Amendment would allow no recourse if a public hospital were to deny homosexuals access to scarce resources such as "kidney dialysis machine[s]."²⁰

The concerns raised by the Justices during oral argument became the rationale for the Court's facial invalidation of Amendment 2. The *Romer* decision did not hold that homosexuals are a suspect or a quasi-suspect class under the Equal Protection Clause. It did not hold that moral disapproval of homosexual conduct is invidious or irrational. It did not hold that laws that discriminate against homosexuals are always "constitutionally doubtful . . . because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group."²¹ Amendment 2 failed the rational basis test because no legitimate state interest came close to justifying the Amendment's infinitely broad girth.

¹⁵ See Duncan, *supra* note 3, at 346-47; U.S. Supreme Court Official Transcript at *27-28, *Romer* (No. 94-1039), 1995 WL 605822.

¹⁶ Of course, the people of Colorado were not seeking to deny police protection to gays and lesbians when they ratified Amendment 2. Rather, they were primarily concerned about protecting the liberty and associational rights of employers and landlords against restrictive "gay rights" ordinances enacted by several Colorado municipalities. See *Romer*, 116 S. Ct. at 1629. The broad language of the Amendment, however, swept well beyond this eminently reasonable terrain and literally prohibited *all* attempts by *all* levels of government to protect individuals against discrimination on the basis of homosexual "orientation, conduct, practices or relationships." *Id.* at 1623; see Duncan, *supra* note 3, at 347.

¹⁷ U.S. Supreme Court Official Transcript, *supra* note 15, at *5 (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.* at *6; see Linda Greenhouse, *U.S. Justices Hear, and Also Debate, a Gay Rights Case*, N.Y. TIMES, Oct. 11, 1995, at A1.

²⁰ U.S. Supreme Court Official Transcript, *supra* note 15, at *26; see Greenhouse, *supra* note 19.

²¹ Koppelman, *supra* note 2, at 89-90.

As they did during oral argument, Justices Kennedy, O'Connor, Ginsburg, and the rest of the *Romer* majority excoriated Amendment 2's "sheer breadth."²² The "unprecedented" evil of the Amendment was that it identified persons by "a single trait"—any trait—and then "denie[d] them protection across the board."²³ The Amendment imposed "a broad and undifferentiated disability on a single named group" by denying "specific protection" against "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."²⁴

Romer is not a case in which the Court inferred an invidious intent based upon the identity of the group disadvantaged. Rather, the case is about a rare kind of law that cuts so wide a path of disadvantage that it "fails, indeed defies" even the Court's deferential rational basis test.²⁵

Let us analyze Amendment 2 as the Court understood it, as 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"²⁶ against any type of discrimination, no matter how wrongful or harmful. Imagine a world in which a particular group—any group—is denied access to common public services such as police and fire protection, library books, public education, and health care. Next, imagine a provision in a state constitution that disqualifies this class of persons—and only this class of persons—"from the right to seek specific [legal] protection"²⁷ against these onerous exclusions. Now apply the conventional rational basis test to this law. Is there a reasonable fit between this extremely broad disability and any conceivable governmental interest?

The liberty interests of private landlords and employers should easily justify a narrower version of Amendment 2,²⁸ but these legitimate interests

²² *Romer*, 116 S. Ct. at 1627.

²³ *Id.* at 1628.

²⁴ *Id.* at 1627. Rick Hills, one of the attorneys who represented the respondents in *Romer*, agrees that it was "the sheer breadth of Amendment 2 that [made] it constitutionally suspect." Roderick M. Hills, Jr., *Is Amendment 2 Really A Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L. REV. 236, 238 (1996).

²⁵ *Romer*, 116 S. Ct. at 1627. It is important to understand that I do not read *Romer* as applying some kind of "rational basis with teeth" rule, or any kind of heightened minimal scrutiny. I agree with Professors Farber and Sherry that *Romer* applied the traditional—and highly deferential—rational basis test to Amendment 2. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 259 (1997). The Court understood Amendment 2 as a rare kind of law that could not pass even this "toothless" standard.

²⁶ *Romer*, 116 S. Ct. at 1628.

²⁷ *Id.*

²⁸ The primary reasons advanced by Colorado in support of Amendment 2 were the liberty interests of employers and landlords, and the State's interest in "conserving resources to fight discrimination against other groups." *Id.* at 1629. These interests are

are completely unrelated to the infinite sweep of the Amendment. Similarly, moral disapproval of homosexual conduct is rationally related to laws restricting sodomy or homosexual relationships,²⁹ but seems completely unrelated to equal access to library books and police protection.³⁰ The state may outlaw homosexual *conduct*, but it may not “singl[e] out a certain class of citizens for disfavored legal status or general hardships.”³¹

Cass Sunstein has argued that a state constitutional amendment—he dubs it Amendment 3—providing “that no governmental body may allow cigarette smokers to claim minority status, quota preferences, or protected status for any claim of discrimination”³² is probably constitutional “because a state could legitimately decide that it wants to prevent itself and its subdivisions from giving special safeguards to smokers.”³³ Sunstein admits that Amendment 3 would impose a “unique disability” on the class of smokers, but argues that this burden would pass the rational basis test “because it is legitimate to think that smokers create serious risks to themselves and to others.”³⁴ Of course, it is *smoking*—not *smokers*—that causes health prob-

clearly legitimate. They failed to justify Amendment 2 only because the Court concluded that the infinite “breadth of the Amendment” was “so far removed from these particular justifications that we find it impossible to credit them.” *Id.* Having made this determination, the Court concluded that the Amendment “is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests.” *Id.*

²⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986), which thrives notwithstanding *Romer*, makes clear that “the presumed belief of a majority . . . that homosexual sodomy is immoral and unacceptable” is a rational basis for laws restricting homosexual sodomy. *Bowers*, 478 U.S. at 196.

³⁰ Ronald Dworkin simply is wrong when he reads *Romer* as “flatly” contradicting *Hardwick*’s holding regarding moral disapproval of homosexual conduct as a rational justification for laws criminalizing homosexual sodomy. His conclusion depends upon his assertion that “Colorado could certainly declare, in perfect good faith, that the amendment’s ‘sheer breath’ [sic] was justified by the depth of its citizens’ moral disapproval of homosexuality.” Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. REV. OF BOOKS, Aug. 8, 1996, at 49. Dworkin’s assertion is unpersuasive and unsupported by a careful reading of *Romer*. The *Romer* majority clearly understood that there is a critical distinction between prohibiting homosexual conduct and enacting a “status-based” disability denying homosexual persons equal access to a limitless number of public services and goods completely unrelated to homosexual conduct.

³¹ *Romer*, 116 S. Ct. at 1628; see Hills, *supra* note 24, at 250-54.

³² Sunstein, *supra* note 5, at 58. Amendment 3 tracks the language of Amendment 2 and merely substitutes cigarette smokers for homosexuals and bisexuals.

³³ *Id.*

³⁴ *Id.* Sunstein cites no evidence in support of this empirical claim. His assertion merely lumps all cigarette smokers—those who inhale and those who do not inhale; those who smoke a carton per day and those who smoke a carton per month; those who smoke in public and those who smoke alone and in a private room with a state-of-the-art air cleaning system—in a single class and assumes that a legitimate governmental

lems.³⁵ If Sunstein's argument about Amendment 3 is correct, must *Romer* be reversed if evidence demonstrates that homosexual sodomy can be hazardous to homosexuals and to others?³⁶

I submit that Sunstein's antismoker amendment, like Colorado's Amendment 2, "outrun[s] and belie[s] any legitimate justifications that may be claimed for it."³⁷ Moral disapproval of smoking is not a legitimate justification for disabling *smokers* from seeking "specific protection" against "exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."³⁸ Even if smoking is an immoral and unhealthy practice, no legitimate state interest is advanced by denying smokers an opportunity to protect themselves against discriminatory exclusion from police and fire protection, libraries, schools, hospitals, and other ordinary public goods.

Under the rational basis test, moral disapproval of smoking is a legitimate justification for laws that restrict or even prohibit smoking.³⁹ It is unreasonable, however, for society to express its disapproval of smoking by branding smokers as untouchable, as a caste of persons unworthy of equal access to "an almost limitless number" of public goods and services taken for granted by other citizens.⁴⁰

interest justifies an across-the-board exclusion of this narrowly defined class "from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 116 S. Ct. at 1627.

³⁵ Amendment 3 would not prohibit *smoking*; it would impose a broad disability on *smokers*.

³⁶ As Professor Thomas Schmidt observed, "It is important to understand that even if a cure for HIV/AIDS were discovered, male homosexuals would continue to pay a terrible physical price for their activities." THOMAS E. SCHMIDT, *STRAIGHT & NARROW? COMPASSION & CLARITY IN THE HOMOSEXUALITY DEBATE* 116 (1995). These non-AIDS-related health problems include physical trauma, nonviral infections, and viral infections and "[f]or some of these health problems, homosexual men make up at least 70 percent of the total reported cases." *Id.* The diseases associated with homosexual conduct include gonorrhea, syphilis, hepatitis A, hepatitis B, herpes, and condylomata. *Id.* at 119-21. Furthermore, approximately 70% (250,000) of the 350,000 deaths resulting from AIDS through the year 1994 were of men who had engaged in homosexual sex. *Id.* at 122-23. Health problems associated with homosexual conduct impose costs on all of society. Some of these diseases, most importantly including AIDS, can be transmitted to third parties by, for example, blood transfusions. They also require the expenditure of significant public funds for research and treatment. Like smokers, homosexuals engage in activities that "create serious risks to themselves and to others." See *supra* note 34 and accompanying text.

³⁷ *Romer*, 116 S. Ct. at 1629.

³⁸ *Id.* at 1627.

³⁹ Such a law is "narrow enough in scope and grounded in a sufficient factual context" to enable the Court "to ascertain that there exist[s] some relation between the classification and the purpose it serve[s]." *Id.*

⁴⁰ *Id.*; see Farber & Sherry, *supra* note 25, at 264 (reading *Romer* as drawing a

Similarly, nothing in *Romer* overrules or contradicts the Court's important holding in *Hardwick* that "the presumed belief of a majority . . . that homosexual sodomy is immoral and unacceptable" is an adequate basis for criminal prohibition of that conduct.⁴¹ Respondents in *Romer* did not ask the Court to overrule *Hardwick*;⁴² they argued instead that "Amendment 2 is far too broad to be a rational means of preserving traditional sexual morality."⁴³ Justice Scalia missed the point in his *Romer* dissent when he cited *Hardwick* and argued that "[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct."⁴⁴ To paraphrase Justice Scalia's simplistic argument, if it is rational to prohibit sodomy (or smoking), then it is rational to deny homosexuals (or smokers) equal access to police protection, library books, and other basic public services. Surely, a healthy deference to the reasonableness of the legislative branch does not require so great a leap of faith. The rational basis test is a test, not an applause meter stuck on "bravo."

Professor Koppelman, who reads *Romer* as being "a case about impermissible purpose,"⁴⁵ suggests that Amendment 2 was invalidated because

distinction "between the state's power to regulate conduct and its ability to designate groups as untouchable").

⁴¹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The majority in *Romer* found it unnecessary even to cite *Hardwick*. In any event, it is clear that inferior courts are required to follow *Hardwick* unless and until the Supreme Court explicitly overrules it. Indeed, earlier this year all nine Justices reaffirmed the following rule: "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 117 S. Ct. 1997, 2017 (1997) (5-4 decision) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); see *id.* at 2027 (Ginsburg, J., dissenting). For a recent Eleventh Circuit decision expressly acknowledging that *Hardwick* survives *Romer*, see *Shahar v. Bowers*, 114 F.3d 1097, 1110 n.25 (11th Cir. 1997) (en banc).

⁴² During oral argument, the Court specifically asked counsel for Respondents, Jean Dubofsky, whether she was asking the Court to overrule *Hardwick*. Dubofsky answered, "No, I am not." U.S. Supreme Court Official Transcript, *supra* note 15, at *53.

⁴³ Respondent's Brief at 45-46, *Romer* (No. 94-1039). Respondents explained this conclusion as follows:

Amendment 2 insulates discrimination on the basis of gay, lesbian, and bisexual orientation from "any" remedy under "any" law, even if such discrimination is unrelated to sexual conduct or sexual mores. It defies even the lenient standards of the "rational basis" test to argue that traditional sexual morality is protected by barring remedies for discrimination by police officers and insurers.

Id. at 46.

⁴⁴ *Romer*, 116 S. Ct. at 1632 (Scalia, J., dissenting).

⁴⁵ Koppelman, *supra* note 2, at 93.

the Court implicitly recognized that the "widespread animus against gays"⁴⁶ undermined innocent justifications for the law.⁴⁷ Nowhere in the *Romer* decision, however, does the Court say anything that supports such an inference.

As I have said more than once, the problem with Amendment 2 was its purposeless breadth, not the identity of the group it adversely affected. The Court did not presume that the law was tainted by an impermissible dislike for gays. Rather, the Court applied a conventional rational basis test, found that *no legitimate purpose* reasonably fit the infinitely broad sweep of the law's coverage, and only then concluded that this extreme overbreadth "seems inexplicable by anything but animus toward the class that it affects."⁴⁸ It was the "sheer breadth"⁴⁹ of Amendment 2, not any perceived "widespread animus against gays,"⁵⁰ that undermined the state's attempt to provide an innocent explanation in support of the law.⁵¹ *Romer* is not a "gay rights" case; it is a case about a purposeless and unlimited legal disability. Koppelman's argument to the contrary is based upon his imaginative draft of *Romer*'s "missing pages,"⁵² not upon the opinion as it was issued by the Court. Koppelman's analysis, although thoughtful and well-done, is more a personal wish list than a description of reality.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Romer*, 116 S. Ct. at 1627. Koppelman is correct in concluding that *Romer* does not adopt a *per se* rule. See Koppelman, *supra* note 2, at 119 n.153. *Romer* simply applied the rational basis test to an extremely broad initiative and found that no legitimate state interest came close to fitting such a limitless denial of equality.

⁴⁹ *Romer*, 116 S. Ct. at 1627.

⁵⁰ Koppelman, *supra* note 2, at 93.

⁵¹ The Court drew an inference of animus from the extreme breadth of Amendment 2, which outran and belied "any legitimate justifications that may be claimed for it." *Romer*, 116 S. Ct. at 1628-29.

⁵² See *supra* note 2 and accompanying text. Koppelman argues that my analysis "ignores the fact that the passages [in *Romer*] emphasizing the Amendment's breadth were only steps in the argument leading to the conclusion that the law's purpose was impermissible." Koppelman, *supra* note 2, at 92 n.16. This misses completely what I have said clearly and repeatedly about the holding of *Romer*. In *Romer*, the Court drew an inference of animus from the unlimited breadth of the disability created by Amendment 2 and from the fact that no legitimate state interest reasonably fit the infinitely broad sweep of the law's coverage, not from the identity of the group subjected to the disability. This is the central point of my analysis of *Romer*—that Amendment 2 would have failed the rational basis test without regard to whether it covered gays, smokers, insurance salesmen, or any other group. *Romer* is not a gay rights case; it is a purposeless disability case.

B. *Romer Applied: The Same-Sex Marriage Issue*

Under *Romer*, laws that make distinctions on the basis of sexual orientation are presumptively constitutional. Such laws will be reviewed under the rational basis test, and, under *Hardwick*, the state's legitimate interest in protecting and promoting public morality will normally be a sufficient basis to uphold them.⁵³ Unlike Amendment 2, most laws taking sexual orientation into account focus on a specific issue—specified homosexual acts, the meaning of marriage, gays in the military—and impose no across-the-board disability on a particular group. *Romer* explicitly said that such laws are valid so long as they are “narrow enough in scope and grounded in a sufficient factual context for [the Court] to ascertain that there exist[s] some relation between the classification and the purpose it serve[s].”⁵⁴

The most important issue flowing from *Romer* concerns the impact of that decision on the law of marriage. Some proponents of same-sex “marriage” argue that the refusal to recognize homosexual “marriages” cannot withstand rationality review because “[a]fter all, one can also trace that refusal to ‘bare animus’ against a group of people.”⁵⁵ A more sophisticated version of this argument takes the position that nonrecognition of same-sex “marriage” singles out homosexual couples and denies them access to an extensive list of tax, welfare, and other benefits that the state makes available to married couples.⁵⁶

If *Romer* governs the constitutionality of laws defining marriage as a relationship between one man and one woman, these laws certainly will be upheld because they are sufficiently narrow and focused to enable the Court to ascertain their eminent reasonableness.⁵⁷ At present, no country or state in the world recognizes homosexual relationships as marriages.⁵⁸ This

⁵³ See Koppelman, *supra* note 2, at 89, 93.

⁵⁴ *Romer*, 116 S. Ct. at 1627.

⁵⁵ *Getting a Read on Romer v. Evans*, LEGAL TIMES, May 27, 1996, at 8 (quoting David Sobelsohn, former legislative counsel for a homosexual advocacy group). Professor William Eskridge, an articulate academic advocate of homosexual marriage, made the same point in an essay written shortly after *Romer* was decided. William Eskridge, *Credit Is Due*, NEW REPUBLIC, June 11, 1996, at 11.

⁵⁶ Cf. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. (forthcoming 1997). For a partial list of the rights and benefits of marriage, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 66-67 (1996).

⁵⁷ See *Romer*, 116 S. Ct. at 1627.

⁵⁸ See Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L.Q. 497, 500 (1995). Although Sweden, Denmark, and Norway have legalized “domestic partnerships” for same-sex couples, lawmakers in these nations carefully distinguish domestic partnerships from marriage. See *id.*

unanimous international consensus is based upon the widespread understanding of the nature of marriage and its importance to "our very existence and survival."⁵⁹

Professor Eskridge argues that "[i]n today's society the importance of marriage is relational and not procreational"⁶⁰ and that therefore it is "uncivilized"⁶¹ for society to withhold recognition from homosexual marriages. Certainly, the companionate model of marriage is one reasonable conception of what marriage ought to mean in modern society. It is not, however, the only reasonable or "civilized" ideal of the institution of marriage. The conventional understanding of marriage as a complementary relationship between one man and one woman is also reasonable. Indeed, it is remarkable that Eskridge believes that he alone is right and that the rest of the world is not just wrong, but "uncivilized."

Those who wish to use *Romer* and the rational basis test to overturn conventional marriage laws are tilting at windmills. Laws defining marriage as a relationship between one man and one woman do not target a class of persons and deny that class the opportunity to protect itself politically against a limitless number of discriminatory harms and exclusions. Marriage laws define and regulate the institution of marriage, but they do not forbid any individual or group from seeking the law's protection against *any kind* of public or private discrimination.

As Eskridge has observed, it is true that marriage is a preferred relationship and many "ongoing rights and privileges" are associated with marriage.⁶² Marriage laws, however, do not prohibit those ineligible to marry from seeking to amend tax, immigration, welfare, and other laws privileging marriage in order to acquire these benefits. For that matter, gays and others ineligible to marry⁶³ are not forbidden from using the political process to

⁵⁹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁶⁰ ESKRIDGE, *supra* note 56, at 11. Eskridge argues that "[m]arriage in an urbanized society serves companionate, economic, and interpersonal goals that are independent of procreation" *Id.* at 12. He also asserts that "an earth that struggles to feed its existing population is not an earth that should overemphasize procreation." *Id.* at 98.

⁶¹ *Id.* at 111.

⁶² *Id.* at 67.

⁶³ Homosexuals are not the only class excluded by the conventional definition of marriage. Children below a certain age may not marry and, even in the case of consenting adults, plural "marriages" and incestuous "marriages" are not allowed. *See id.* at 144. Moreover, many committed and loving relationships that lack a sexual-romantic character—such as friendships, family relationships, and religious fellowships—are also denied many benefits and privileges granted under law to marriage relationships. *See* David L. Chambers, *What If? The Legal Consequences of Marriage and The Legal Needs Of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 489-90 (1996). If the relationship between committed same-sex partners deserves the rights and privileges of marriage, why not the relationship between an adult son and his mother? What is so special about non-procreative sexual acts that justifies privileging the former over the

change the marriage laws. Everyone remains free to use the democratic process to right any perceived wrong or to acquire any desirable benefit. In short, conventional marriage laws are completely unlike Colorado's Amendment 2 in all respects material to the reasoning of the Court in *Romer*. Perhaps some of the privileges and benefits of marriage should be made available to same-sex partners and persons committed to other kinds of loving relationships. As Judge Richard Posner has suggested, however, these questions are best faced "one by one rather than . . . in a lump" by changing the definition of marriage.⁶⁴

Thus, under *Romer* conventional marriage laws are sufficiently narrow to enable a court to apply the traditional rational basis test.⁶⁵ Under this test, social legislation is presumptively valid and the states are allowed "wide latitude" to create classifications designed to carry out ordinary legislative purposes.⁶⁶ As the Court clearly stated in *F.C.C. v. Beach Communications, Inc.*,⁶⁷ "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."⁶⁸ The Equal Protection Clause is not a license for courts "to judge the wisdom, fairness, or logic of legislative choices."⁶⁹

If you came with me this far, it should be difficult for you to escape the conclusion that conventional marriage laws must be upheld under *Romer* and the rational basis test. Conventional marriage laws reasonably advance many legitimate governmental interests.

1. *Public Morality*

Hardwick is still law, and under *Hardwick* public morality standing alone should be a sufficient basis for limiting marriage to heterosexual couples. Although *Hardwick* does not directly control because not all same-sex couples engage in sodomitic activities,⁷⁰ the case is a close analogy. In

latter type of loving and committed relationship?

⁶⁴ RICHARD A. POSNER, *SEX AND REASON* 313 (1992). Judge Posner is a pragmatist without peer and one of the major legal scholars of his generation.

⁶⁵ See *Romer*, 116 S. Ct. at 1627.

⁶⁶ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Under this test, "the Equal Protection Clause requires only a rational means to serve a legitimate end." *Id.* at 442.

⁶⁷ 508 U.S. 307 (1993).

⁶⁸ *Id.* at 313.

⁶⁹ *Id.*

⁷⁰ Both lesbian and gay male unions can be consummated by a variety of activities other than oral or anal intercourse. See ESKRIDGE, *supra* note 56, at 136.

Hardwick, the majority's presumed belief that homosexual sodomy is immoral and unacceptable justified a criminal prohibition of those acts.⁷¹ Conventional marriage laws are not nearly so harsh. These laws do not enact a criminal prohibition of homosexual relationships. Rather, they express a moral preference for heterosexual unions. Marriage is a preferred kind of relationship, one which is singled out for special approval, protection, and encouragement.⁷² Our society has acted upon a longstanding moral consensus that conceives of marriage as a unique two-person "community defined by sexual complementarity."⁷³ To say that other kinds of relationships are not within society's concept of marriage is not an expression of intolerance or animosity. One kind of relationship gets the benefit of a moral preference, and all others receive tolerance. Rationality—not moral neutrality—is what *Hardwick* requires. Conventional marriage laws easily clear this hurdle. In any case, there are many concrete and clearly legitimate reasons supporting the conventional definition of civil marriage as intrinsically heterosexual.

2. *Encouraging Childbirth Within Marriage*

Homosexual unions are inherently non-procreative.⁷⁴ It is legitimate and eminently reasonable for society to exclude from marriage a class of relationships that are antithetical to procreation. Professor Eskridge misses the point when he asserts that "an earth that struggles to feed its existing population is not an earth that should overemphasize procreation."⁷⁵ No one claims that conventional marriage laws are designed to maximize procreation. Instead, traditional marriage laws are designed to license procreative sexual acts and direct them into stable, committed, and (hopefully) loving relationships. Society has a far greater stake in procreative sexuality than it does in other kinds of sexual behavior, because procreative sexual acts can result in new human lives. Of course, there is no "necessary link between marriage and procreation."⁷⁶ Procreation can and (all too frequently) does take place outside of marriage;⁷⁷ but isn't that precisely the point? Surely it

⁷¹ See *Hardwick*, 478 U.S. at 196.

⁷² See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims For Same-Sex Marriage*, 1996 BYU L. REV. 1, 60-61.

⁷³ David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and The Meaning of Marriage*, 38 S. TEX. L. REV. 1, 29 (1997).

⁷⁴ As Eskridge puts it so well: "Because same-sex couples cannot have children through their own efforts, a third party must be involved." ESKRIDGE, *supra* note 56, at 81.

⁷⁵ *Id.* at 98.

⁷⁶ *Id.* at 96.

⁷⁷ One commentator has called the birth of children outside marriage "the biggest problem in our nation today—and for our future." Lee Anderson, *Maybe Our Biggest*

is not irrational to think that procreation within marriage is preferable to procreation outside marriage.⁷⁸ The privileges and benefits of civil marriage serve the legitimate—some would say compelling—goal of encouraging heterosexual unions (and therefore sexual acts of the procreative type) to take place within a stable and protective institution. This is wisdom, not animus.

Proponents of same-sex “marriage” counter the procreation justification by arguing that conventional marriage laws are overinclusive because they do not exclude sterile heterosexual couples and those who use contraceptives.⁷⁹ Of course, the rational basis test requires only a reasonable fit between ends and means, so overinclusiveness is not a problem.⁸⁰ There is certainly a reasonable relationship between the heterosexual paradigm and

Problem, CHATTANOOGA FREE PRESS, June 22, 1996, at A4. With nearly one-third of all children being born outside marriage, illegitimacy is certainly one of our society’s greatest challenges. See STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 79 (1996) (stating that in the year 1993, 31% of all births were out of wedlock; for African-Americans, 68.7% of births were out of wedlock). We should be trying to strengthen—not cut—the critical link between childbirth and marriage.

⁷⁸ Cf. *Harris v. McRae*, 448 U.S. 297, 325 (1980) (sustaining the Hyde Amendment, which subsidized medical expenses for childbirth but not abortion, and holding that encouraging childbirth over abortion “is rationally related to the legitimate governmental objective of protecting potential life”). Society’s preference for legitimate over illegitimate childbirth is rationally related to the conventional definition of marriage and is a persuasive answer to Eskridge’s assertion that there is nothing special about “male-penis-in-female-vagina intercourse.” ESKRIDGE, *supra* note 56, at 97. The sexual complementarity of men and women is self-evident. As David Coolidge put it: “[M]en and women are ‘different from, yet designed for’ one another Sexual intercourse in marriage is the preeminent expression of complementarity, as a man and a woman become ‘one flesh.’” Coolidge, *supra* note 73, at 29.

⁷⁹ See, e.g., ESKRIDGE, *supra* note 56, at 96; Richard D. Mohr, *The Case For Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 223 (1995).

⁸⁰ This is textbook constitutional law. See, e.g., DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 444-45 (3d ed. 1996). The best Supreme Court statement of the rule is in *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315-16 (1993) (quoting *United States R.R. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)):

Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—“inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

The bottom line is that the legislature is allowed nearly total discretion when drawing the “precise coordinates” of classifications and “must be allowed leeway to approach a perceived problem incrementally.” *Beach Communications*, 508 U.S. at 316. The Court explicitly stated that such legislative judgments are “virtually unreviewable.” *Id.*; see also *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) (holding that “reform may take one step at a time”).

the legitimate state interest in encouraging a link between childbirth and marriage. The class of persons engaged in heterosexual intercourse is a class with a close relationship to this vital state interest. The Constitution does not require government to further refine the class by locating and excluding non-procreative heterosexual couples. Moreover, important differences between homosexual couples and infertile heterosexual couples bear directly on the reasonableness of excluding the one class from marriage but not the other. The state could not exclude infertile heterosexual couples from marriage without imposing onerous invasions of privacy. The state would need to ask grossly intrusive questions—Has your doctor ever tested you for infertility? Have you ever had a hysterectomy or tubal ligation? Do you plan to use contraceptives?—or require medical examinations to identify sterile couples and those who intend to artificially avoid procreation.⁸¹ Same-sex relationships, on the other hand, are inherently non-procreative and can be excluded without intrusive questions, examinations, or other invasions of privacy.

3. *The Advantages of Dual-Gender Parenting*

Conventional marriage laws also advance the widely shared belief that it is in the best interest of children to be raised in a home that includes both a mother and a father. As Professor Lynn Wardle put it so well in his important article⁸² on the potential impact of homosexual parenting on children:

Children raised by homosexual couples do not have both a father and a mother. If Heather is being raised by two mommies only, she is being deprived of the experience of being raised by a daddy. Both the common experience of humanity

⁸¹ Moreover, the state would periodically need to recertify couples as fertile and open to procreation, and invalidate the marriages of those who fail. See Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 597 (1996).

⁸² Lynn D. Wardle, *The Potential Impact of Homosexual Parenting On Children*, 1997 U. ILL. L. REV. 833. This article critically examines the social science literature cited in support of the claim that homosexual parenting is not significantly harmful to children and concludes that this body of data is unreliable. "Methodological defects and analytical flaws abound in the studies. The research is colored significantly by bias in favor of homosexual parenting. Despite the favorable gloss put on the data, some of the research suggests that there are some serious potential harms to children raised by homosexual parents." *Id.* at 897. Professor Wardle also analyzes an impressive body of data that demonstrates that the optimal environment in which to raise children is the one recognized and encouraged by conventional marriage laws—the dual-gender unit of husband and wife. *Id.* at 857-64. Wardle's seminal research is critically important to legislative and judicial issues regarding same-sex marriage and parenting.

and recent research suggest that a daddy and a mommy together provide by far the best environment in which a child may be reared.⁸³

Wardle argues persuasively that heterosexual parenting is best for children because "there are gender-linked differences in child-rearing skills; men and women contribute different (gender-connected) strengths and attributes to their children's development."⁸⁴ He analyzes an impressive body of data supporting the conclusion that "children generally develop best, and develop most completely, when raised by both a mother and a father and experience regular family interaction with both genders' parenting skills during their years of childhood."⁸⁵ Wardle's point is not that homosexuals are incapable of being good and loving parents. Rather, it is that conventional marriages provide children with "the advantages of dual-gender parenting" and that these benefits "for children and for society" provide an ample justification for conventional marriage laws.⁸⁶ Society has a legitimate—perhaps even a compelling—interest in encouraging dual-gender marriages as the foundation of family and child-rearing. Many children have overcome the disadvantages of being reared in a home without a mother and/or a father, "[b]ut the significance of the disadvantage of growing up without both father and mother in the home should not be trivialized . . . especially in this difficult time of our social history."⁸⁷

4. *Educative Effects*

Still another legitimate argument against recognition of same-sex marriage is what Eskridge calls the "stamp-of-approval" objection.⁸⁸ As Judge Posner has observed, "permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality."⁸⁹ Eskridge ridicules this argument and asserts that "[b]y issuing marriage licenses, the state is not conveying a stamp of approval to particular couples."⁹⁰ Even rapists, child abusers, and murderers are issued marriage licenses, he argues,

⁸³ *Id.* at 857.

⁸⁴ *Id.*

⁸⁵ *Id.* at 860. Wardle concludes that the presence of both a mother and a father is essential to the emotional, social, and physical development of children. *See id.* at 860-62. He cites an impressive body of data that examines the absence of fathers from their children and concludes that a paternal presence in the family is essential to the secure, healthy, and complete development of children. *See id.* at 860-61.

⁸⁶ *Id.* at 864.

⁸⁷ *Id.* at 863.

⁸⁸ ESKRIDGE, *supra* note 56, at 104.

⁸⁹ POSNER, *supra* note 64, at 311.

⁹⁰ ESKRIDGE, *supra* note 56, at 105.

and no one thinks this places the state's imprimatur on rape, child abuse, or murder.⁹¹ This argument, however, misses the point completely. The "stamp-of-approval" argument is concerned with the legal definition of marriage, not with "state endorsement of particular marriages."⁹² Conventional marriage laws endorse a heterosexual paradigm for marriage, not a rape, child abuse, or murder paradigm. Proponents of same-sex "marriage" attack this heterosexual paradigm and wish to legislate a competing conception of the marital good. For example, Eskridge argues that traditional marriage laws are "uncivilized"⁹³ and asserts that gay marriage will have "civilizing effects" on society and will "undermine social homophobia."⁹⁴ In other words, the educative effects of same-sex "marriage" laws will produce greater acceptance of homosexuality and will serve to undermine and marginalize traditional moral and religious beliefs (what Eskridge calls "social homophobia") about homosexuality and the meaning of marriage. Eskridge has persuasively rebutted himself. Marriage is a specially preferred type of relationship and "[l]egalizing same-sex marriage would ignore the distinction between tolerance and preference by extending the highest legal preferences to relationships which our society historically has condemned and which, even now, the most sympathetic states have chosen only to tolerate."⁹⁵ It is perfectly reasonable to resist the revolutionary social meaning that will certainly flow from state recognition of same-sex "marriage."

5. *Slippery Slope*

The list of legitimate reasons to oppose so fundamental a revision of the law of marriage is practically endless. At present, however, I wish to discuss only one more argument in favor of the status quo. Once the "deeply entrenched paradigm" of the "two-person romantic unit of husband and wife"⁹⁶ is cast onto the trash heap of history, a chain reaction of consequences—some intended, some unintended—is likely to follow. As a leading academic advocate for same-sex "marriage" candidly acknowledges, if the law of marriage can be seen as facilitating gay and lesbian couples "to live an emotional life that they find satisfying—rather than as imposing a view of proper relationships—the law ought to be able to achieve the same for units of more than two."⁹⁷ If Ricky and Fred can marry, why not

⁹¹ *Id.* at 105-07.

⁹² *Id.* at 106.

⁹³ *Id.* at 111.

⁹⁴ *Id.* at 82.

⁹⁵ Wardle, *supra* note 72, at 61.

⁹⁶ Chambers, *supra* note 63, at 490.

⁹⁷ *Id.* at 490-91; *see also* Wardle, *supra* note 72, at 47 ("If same-sex marriage must be legalized to accommodate the subjective, identity-defining sexual-intimacy prefer-

Ricky, Fred, Lucy, and Ethel? Although there are legitimate reasons to oppose "marriages" composed of three, four, or more persons,⁹⁸ these reasons are far weaker than those advanced in support of traditional dual-gender marriage.⁹⁹ Thus, as Professor Chambers suggests, by ceasing to conceive of marriage as a relationship between one man and one woman, "the state may become more receptive to units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone."¹⁰⁰ Once marriage opens up to include any number of people and any kind of relationship, it will cease to have any special significance or particular meaning. It is both legitimate and reasonable to resist any attempt to dilute the importance and meaning of traditional marriage as the most fundamental building block of human community.

A full defense of the constitutionality of the heterosexual paradigm for marriage is beyond the scope of this Essay.¹⁰¹ I have tried to demonstrate only that *Romer* is no threat to typical laws governing civil marriage. Many legitimate governmental interests are reasonably advanced by our society's traditional understanding of marriage. Under *Romer*, any one of these many legitimate justifications is sufficient to satisfy the rational basis test. Right or wrong, the decision is neither a landmark victory for gay rights nor does it

ences of gays and lesbians, it would be very difficult to refuse to recognize consanguineous marriage, polygamy, and other prohibited marriages on a principled basis.").

⁹⁸ Eskridge argues that polygamy is different because when a husband has two wives there will "often be rivalry between the two wives for his affection, time, and even spousal benefits." ESKRIDGE, *supra* note 56, at 149. Moreover, "allowing a man to take two wives might create or exacerbate hierarchical structures within the marriage. As the center of competition, the husband would be able to play one wife against the other." *Id.* Eskridge cites no data supporting these conclusory assertions. Moreover, he seems to think that only males will have multiple spouses and that women are incapable of making intelligent choices about whether a polygamous marriage is in their own best interests. Although he asserts that he opposes plural marriage to advance women's equality, one well might ask how denying women the right to choose to participate in a plural marriage advances their equality or autonomy interests.

⁹⁹ Professor Chambers argues that most of the reasons advanced against plural marriage "are logistical and soluble." Chambers, *supra* note 63, at 490.

¹⁰⁰ *Id.* at 491. Richard Mohr, also an advocate of same-sex marriage, concurs. He suggests that gay marriages can be models of a more progressive kind of family life, one in which monogamy and sexual fidelity are not seen as "essential component[s] of love and marriage." Mohr, *supra* note 79, at 233; see also ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202 (1995) (noting that in gay male unions "there is more likely to be greater understanding of the need for extramarital outlets"). If this is one of the potential "benefits" of legal recognition of same-sex marriage, it certainly seems reasonable to resist this dangerous social experiment.

¹⁰¹ For a brilliant defense of the constitutionality of traditional marriage laws, see Wardle, *supra* note 72.

portend "the end of democracy."¹⁰² Rather, *Romer* will be remembered, if at all, only as an insignificant skirmish in what Justice Scalia was pleased to call the Kulturkampf.¹⁰³

III. CONCLUSION

The Supreme Court's opinion in *Romer* has a very narrow and shallow bite. It does not hold that homosexuals are a suspect or quasi-suspect class under the Equal Protection Clause. It does not overrule or undermine the Court's landmark decision in *Bowers v. Hardwick*.¹⁰⁴ It does not hold that moral disapproval of homosexual conduct is invidious or irrational, nor does it in any way state or imply—as Professor Koppelman asserts—that laws that discriminate against homosexuals are always "constitutionally doubtful . . . because they will always arouse suspicion that they rest on a bare desire to harm a politically unpopular group."¹⁰⁵

The constitutional flaw in Amendment 2 was its extreme overbreadth, not the identity of the group it adversely affected. The Court did not presume that the Amendment was tainted by an impermissible dislike for gays. The *Romer* majority applied the lowest standard of review—the rational basis test—and found that no legitimate purpose reasonably fit the infinitely broad sweep of the disability imposed by the Amendment. It was the "sheer breadth"¹⁰⁶ of Amendment 2, not any presumed animus against homosexuals, that resulted in the law's facial invalidation. The case would have been decided in exactly the same way if Amendment 2 had affected smokers, insurance salesmen, or any other "narrowly defined" group instead of homosexuals. Professor Koppelman's attempt to write the "missing pages"¹⁰⁷ of *Romer* in order to suggest that, in effect, the case treats homosexuals as some kind of a suspect class does not reflect the reality of the majority opinion as it was issued by the Court.

In addition to responding to Professor Koppelman's arguments, I have attempted to analyze *Romer*'s potential impact on one of the most controversial issues of our time—the constitutionality of traditional laws defining marriage as a relationship between one man and one woman. Traditional marriage laws serve many legitimate interests, any one of which by itself is sufficient to support these laws under *Romer* and the rational basis test. If the Court is ever so foolish as to declare the dual-gender definition of mar-

¹⁰² See Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 18-42; Symposium, *The End of Democracy? A Discussion Continued*, FIRST THINGS, Jan. 1997, at 19-28.

¹⁰³ See *Romer*, 116 S. Ct. at 1629 (Scalia, J., dissenting).

¹⁰⁴ 478 U.S. 186 (1986).

¹⁰⁵ Koppelman, *supra* note 2, at 89-90.

¹⁰⁶ *Romer*, 116 S. Ct. at 1627.

¹⁰⁷ Koppelman, *supra* note 2, at 92.

riage unconstitutional, it will need much more than *Romer* to explain this sad conclusion.