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The Coming Collision: *Romer* and State Defense of Marriage Acts

Patrick J. Borchers*

I. INTRODUCTION

Andrew Koppelman's book, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines*,¹ drove me to the realization that interstate choice of law questions involving same-sex marriage are entering a new and more subtle stage of debate.² The easier questions, such as whether one state can effectively dictate marriage policy to the rest of the United States, are gradually sorting themselves out. But as same-sex marriages—or their conceptual twin, same-sex civil unions—become a reality in a handful of states, the harder and more subtle questions of extending some incidents of marriage are increasingly likely to appear.

This Article addresses some of these questions and demonstrates that the debate regarding same-sex marriage may turn on whether the government will be compelled to extend equal protection rights to homosexuals on the basis that state defense of marriage acts potentially "impos[c] a broad and undifferentiated disability on a single named group."³ While Part II of this Article provides necessary background regarding the Full Faith and Credit Clause of the United States Constitution, Part III demonstrates the effects of federal and state defense of marriage acts. Part III also sets forth a guiding hypothetical relevant to the constitutionality of state defense of marriage acts. Part IV discusses the significant impact of recent Supreme Court precedent on defense of marriage laws. Finally, Part V posits that Supreme Court jurisprudence makes a conflict with state defense of marriage acts inevitable. Part V also demonstrates that the Supreme Court's gradual expansion of substantive

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1. ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

2. See generally Patrick J. Borchers, *Middle Ground?*, 24 CONST. COMMENT. 265 (2007) (book review).

3. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

constitutional rights to homosexuals is likely to continue if the Court can find a principled basis for not extending those rights to other sexual minorities.

II. FULL FAITH AND CREDIT AND SAME-SEX MARRIAGE PREDICTIONS

To begin, this Article addresses one of the easy questions: whether the Full Faith and Credit Clause would force states to recognize same-sex marriage. When same-sex marriage first emerged in the United States,⁴ the press and even some legal experts predicted that the Full Faith and Credit Clause would force every other state to treat same-sex couples as married as long as the couple married in a haven state.⁵ This was a thoroughly uninformed prediction fueled by a complete confusion of the “choice of law” and “judgment recognition” strands of full faith and credit jurisprudence.⁶ Of course, just because it was uninformed did not mean that it was not widely repeated.⁷

For the Full Faith and Credit Clause to have this effect, one must assume that the clause operates like a magician’s card trick in which one card is flipped over and the rest of the deck goes with it. Behind this false “card trick” assumption lies the truth that the Full Faith and Credit Clause and its implementing statute require a state to recognize, mostly without question, another state’s litigated

4. The apparent likelihood was the result of the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which appeared likely to create a state constitutional right to enter into a same-sex union. The Hawaii decision, however, was effectively reversed by a voter-approved amendment to the state constitution. A similar initiative also passed in Alaska in response to similar litigation. See Carey Goldberg, *Redefining a Marriage Made New in Vermont*, N.Y. TIMES, Dec. 26, 1999, at § 4, p. wk3.

5. See Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 353 (2005) (noting frequent assertions to this effect in the popular press).

6. See Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 164–67 (1998) (discussing student law review articles and professional articles advancing this view); see also Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 193 (1996); Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 325 (2007) (“[T]here is not the slightest doubt that under the Supreme Court’s interpretation of the Full Faith and Credit Clause, a state has no obligation to look to another state’s law to decide the validity of an out-of-state marriage contracted by its residents.”).

7. KOPPELMAN, *supra* note 1, at 117 (statement was “fecklessly” repeated in the popular press).

judgments, even if the judgment is demonstrably incorrect on a legal or factual issue.⁸ Courts treat divorces as litigated judgments; thus, assuming the rendering court has jurisdiction, a divorce must be recognized even if granted for reasons that the recognizing state would not allow.⁹ By analogizing to divorces, proponents of same-sex marriage argued that a state forbidding same-sex unions would not be able to refuse recognition to such a union as long as it was lawfully created in another state.¹⁰

Although there are multiple and obvious problems with this line of reasoning, this Article confines itself to just two of these problems. First, a marriage is not a litigated judgment. A marriage is unlike a divorce, or any other litigated judgment, in that there is no such thing as a “contested” marriage. Both parties have to agree in order to get married. Suppose that Pat wants to marry Jordan, but Jordan is not keen on the idea. Would the couple then head to the courthouse and appear in front of a judge who will decide whether they are to be married? Obviously not. As long as Jordan remains unwilling to marry, there will be no marriage. In divorces, on the other hand, a court may grant a divorce even if one party wants to get divorced and the other does not. In fact, even if both parties want to end the marital relationship, the court usually must make critical factual and legal findings of continuing significance to the parties.

Second, even if the notion of a judgment is stretched to encompass a marriage, the question remains as to who could be bound by it. It is a bedrock principle of judgments law, with just a couple of exceptions that are not even remotely applicable here, that a stranger to the proceedings cannot be bound adversely.¹¹ Thus, to allow a same-sex couple joined in one state to bind third parties

8. See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (Mississippi state courts are bound to accept mistaken interpretation of their state law by another state's courts). There are some modest exceptions to this general rule. See generally *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980) (successive workers' compensation awards do not necessarily violate full faith and credit); *Fall v. Eastin*, 215 U.S. 1 (1909) (full faith and credit need to be applied to decrees from a state court purporting to convey land in another state); William Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994). However, as the Supreme Court has explained, there is “no roving public policy exception” to the general requirement that states enforce each others' judgments. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (internal quotations omitted).

9. See, e.g., *Williams v. North Carolina*, 317 U.S. 287, 293–94 (1942).

10. Borchers, *supra* note 5, at 354.

11. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 759, 761 (1989).

(e.g., other state governments or individuals with whom they have dealings) to treat the couple as married would be to give the marriage an effect beyond even that of a fully litigated judgment.

III. THE EFFECTS OF THE FEDERAL AND STATE DEFENSE OF MARRIAGE ACTS

In addition to the persuasive arguments against applying full faith and credit to marriage, the federal Defense of Marriage Act ("DOMA")¹² amends the statute that implements the Full Faith and Credit Clause. DOMA makes clear that states need not (but may) give effect to same-sex unions from other states. Thus far, courts appear to be in agreement that states that do not recognize same-sex unions are not required to honor those unions consummated in states that do allow same-sex marriage or civil unions.¹³ So the nightmare or dream (depending on which side one is on) of same-sex couples flying off to California, Connecticut, or Massachusetts¹⁴ and returning home with an unassailable marital relationship remains just that: a nightmare or a dream.

Nevertheless, the corollary of DOMA is not necessarily that states are free to ignore all aspects of a same-sex marriage all of the time. A marriage affects the legal relationships of a couple in many

12. Pub. L. No. 104-199, 110 Stat. 2419 (codified in part at 28 U.S.C. § 1738C (1996)).

13. See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005) (federal DOMA constitutional); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (Massachusetts same-sex marriage not entitled to full faith and credit); *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (Vermont civil union between same-sex partners not a marriage for purposes of a Georgia child visitation order); *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476, 479-80 (N.Y. App. Div. 2005) (Vermont civil union does not give same-sex partner right to recover for wrongful death under New York law), *appeal dismissed*, 850 N.E.2d 672 (N.Y. 2006); cf. *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (treating adoption orders as judgments).

14. Massachusetts has, by decree of the Supreme Judicial Court, extended its marriage laws to include same-sex couples, but in *Cote-Whitacre v. Department of Public Health*, the Supreme Court of Massachusetts upheld the Massachusetts marriage evasion statute in application to out-of-state same-sex couples domiciled in states that prohibit same-sex marriage. 844 N.E.2d 623, 643 (Mass. 2006). Massachusetts, however, repealed that statute, thus allowing out-of-state same-sex couples to be married. MASS. GEN. LAWS ANN. ch. 207, § 10 (1994) (repealed 2008). California's Supreme Court recently ruled that marriage is a constitutional right, regardless of sexual orientation. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008). Even more recently, the Connecticut Supreme Court found such a right in its state constitution. See *Kerrigan v. Comm'r of Pub. Health*, No. SC 17716, 2008 WL 4530885, at *42-47 (Conn. 2008).

ways. Industrious studies reveal that marriage affords more than a thousand legal benefits to a marital couple.¹⁵ Some of these are rights and duties unique to marriage, but others could be replicated by non-marital couples.¹⁶ Obvious examples can be found in estate law. For instance, states generally prohibit the complete disinheritance of a spouse either by giving rights in community property or creating a forced share of the estate.¹⁷ Those rights and duties are unique to marriage. States also give a spouse some or all of the estate in the event that the other spouse dies intestate.¹⁸ An unmarried couple could, however, easily replicate intestate distribution by drafting wills consistent with the intestacy distribution scheme.

The following two hypothetical cases demonstrate benefits that are unique to marriage and that cannot be replicated by non-marital couples. First, suppose that Pat and Jordan are of the same sex, living in Massachusetts, and they decide to get married. Later they relocate to Nebraska where they live until Jordan dies. Jordan's estate consists of personal and real property located in Nebraska. Jordan's will completely disinherits Pat. Pat then goes to a Nebraska state court to contest the will and invoke the right of a spouse to elect a forced share against the will under Nebraska law.¹⁹

Second, suppose all the same facts except that Jordan dies without a will. Pat goes to a Nebraska state court to claim the intestate spousal share.²⁰

Except for the fact that Pat and Jordan are of the same sex, Pat would surely win both cases. However, Nebraska, like about forty other states, has a state defense of marriage act. In Nebraska, voters passed such an act through voter initiative, and the Eighth Circuit has upheld the law's constitutionality against facial attack.²¹

15. See GENERAL ACCOUNTING OFFICE, CATEGORIES OF LAWS INVOLVING MARITAL STATUS 2 (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf> (finding 1049 federal laws in which marital status is a factor).

16. See KOPPELMAN, *supra* note 1, at 102–13.

17. See Mary Ann Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21, 59–60 (1974).

18. See, e.g., *Florety v. Florey*, 325 N.W.2d 643 (Neb. 1982).

19. NEB. REV. STAT. § 30-2313 (2007) (right to take one-half of the augmented estate); cf. *In re Cooper*, 592 N.Y.S.2d 797, 799 (N.Y. App. Div. 1993) (dictum) (same-sex partner not entitled to forced share under New York law).

20. NEB. REV. STAT. § 30-2302 (2007) (entire estate in the absence of surviving issue); cf. *Vasquez v. Hawthorne*, 33 P.3d 735, 736 (Wash. 2001) (claim by same-sex partner to de facto intestate share cannot be resolved on summary judgment).

21. See *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006).

Nebraska's so-called Initiative 416 reads as follows: "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."²²

Any fair reading of this provision would demand that Pat lose both hypothetical cases. The provision clearly requires courts applying Nebraska's law²³ to treat same-sex couples united in any legal way (whether it be marriage, civil union, or similar device) as if they were unmarried. If Pat were merely the unmarried co-habitant of Jordan, Pat would have no claim either to the forced share in the first hypothetical or to the intestate share in the second hypothetical case.

To prevail on either theory, Pat would have to show that Nebraska's defense of marriage act is unconstitutional in application. Pat's best argument would be that Nebraska's Initiative 416, as applied, violates Pat's equal protection rights. What are Pat's equal protection rights? Answering this question requires one to grasp the reasoning of one of the most slippery of cases in the recent history of the United States Supreme Court, *Romer v. Evans*.²⁴

IV. THE IMPACT OF *ROMER* AND *LAWRENCE* ON STATE DEFENSE OF MARRIAGE ACTS

The Supreme Court's decision in *Romer v. Evans*²⁵ may have a substantial impact on whether state defense of marriage acts, like Initiative 416 in Nebraska, violate the equal protection rights of homosexual Americans. The Court's decision in *Lawrence v. Texas*²⁶ further suggests that state defense of marriage laws, which disadvantage discrete groups such as homosexuals, may be irrational and unconstitutional.

In *Romer*, the Court considered an equal protection challenge to a Colorado voter-adopted measure known as Amendment 2. That amendment read as follows:

22. NEB. CONST. art. I, § 29 (2000).

23. Nebraska law is the only law that conceivably could be applied given that the decedent died domiciled in Nebraska, and all the personal and real property was located there. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1109-17 (4th ed. 2004).

24. 517 U.S. 620 (1996).

25. *Id.*

26. 539 U.S. 558 (2003).

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.²⁷

Amendment 2 was challenged immediately and successfully. The Colorado Supreme Court struck it down applying the "strict scrutiny" test of constitutional review, finding that the measure impinged on the fundamental right of equal protection and that the measure could not survive the exacting requirement of advancing a compelling state interest by the least restrictive means.²⁸

A six-vote majority of the U.S. Supreme Court led by Justice Kennedy disagreed with the Colorado Supreme Court's rationale but affirmed the judgment striking down Amendment 2.²⁹ Rather than the demanding strict scrutiny test applied by the state courts, the majority purported to apply the much more deferential test under which the state law need only bear "a rational relation to some legitimate end."³⁰ Explaining how the majority reached the conclusion that Amendment 2 failed this test is challenging, to say the least.

In the past, the Court's invocation of the rational basis test has been little more than a shorthand way of saying that the Court was about to uphold the constitutionality of the state law. In many cases, the Court has refused to find that the state law in question was completely irrational or unconnected to a legitimate state end.³¹ Suppose, to take a light-hearted variant of Amendment 2, Colorado had adopted a measure forbidding special protection of left-handers. It seems likely that the Supreme Court would have said that, no

27. *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)).

28. *Evans v. Romer*, 882 P.2d 1335, 1357 (Colo. 1994), *aff'd on different grounds*, 517 U.S. 620 (1996).

29. *Romer*, 517 U.S. at 626.

30. *Id.* at 631.

31. *See, e.g., FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (rational basis review is a "paradigm of judicial restraint").

matter how odd the law might be, it constitutes a rational effort to keep righties and lefties on the same footing.

The *Romer* majority, however, took a different approach. The majority concluded that “Amendment 2 fails, indeed defies” the rational relation test.³² Its lack of a rational basis,³³ the Court reasoned, stemmed from its “peculiar property of imposing a broad and undifferentiated disability on a single named group.”³⁴ In one of its most instructive passages, the majority held:

[T]he amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds.³⁵

Despite this author’s great personal affection for the *Romer* majority’s author,³⁶ the opinion is reminiscent of M.C. Escher’s drawing *Ascending and Descending*. Escher’s drawing depicts monks walking along a closed staircase in which every step appears to lead upwards as one travels in a clockwise direction.³⁷ Despite most appearances to the contrary, however, the monks neither ascend nor descend as they move along the staircase.³⁸ As in the Escher drawing, each individual piece of *Romer* looks fine, yet the overall picture defies explanation.

Justice Scalia’s dissent thoroughly skewers the logic of the majority opinion. As he correctly points out, there are many rational reasons why voters might want to keep a group—whether they be redheads, lefties, or gays—from obtaining special protected status in

32. *Romer*, 517 U.S. at 632.

33. The Court appears to use the terms “rational relationship” and “rational basis” interchangeably to describe this test. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 543 (1989) (Blackmun, J., dissenting).

34. *Romer*, 517 U.S. at 632.

35. *Id.* at 631.

36. I was a clerk for Justice Kennedy when he was a judge of the United States Court of Appeals.

37. An image of the drawing can be found at: <http://www.worldofescher.com/gallery/AscendingDescendingLg.html>.

38. *Id.*

the law.³⁹ One of those reasons might, of course, be irrational hatred of the group, but there are certainly competing rational explanations.⁴⁰

But logical or not, the *Romer* majority opinion commanded six of the Court's nine votes.⁴¹ Now the question is what implications *Romer* will have on the future development of the law in relation to state defense of marriage acts. Although an infinite number of intermediate positions are possible, the possibilities lie between two poles. At one pole is the possibility that *Romer* is sui generis and driven entirely by the desire not to subject a minority to the will of the majority in a question of access to the political process. On that view, *Romer* would have few implications for state defense of marriage acts and would be limited to broad enactments like Colorado's Amendment 2. At the other pole is the possibility that *Romer*, despite its apparent reliance on the rational basis test, actually promotes homosexuals to the status of a suspect class (like racial classes)⁴² or at least a quasi-suspect class (like women).⁴³ On that view, *Romer* might be much like the early cases in which the Supreme Court purported to apply the rational basis test to strike down gender-based classifications⁴⁴ before then explicitly promoting those classifications to quasi-suspect status.⁴⁵ At this extreme, *Romer* would have broad implications for state defense of marriage acts. In fact, so understood, *Romer* may moot the entire question of interstate recognition by creating a federal constitutional right to same-sex marriage.⁴⁶

39. *Romer*, 517 U.S. at 644–45 (Scalia, J., dissenting).

40. *Id.*

41. *Romer*, 517 U.S. at 623, 636.

42. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2764 (2007) (reiterating that racial classifications must be reviewed under strict scrutiny).

43. See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53, 60–61 (2001) (applying equal protection scrutiny to gender-based classification).

44. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76–77 (1971) (striking down, on rational-basis grounds, a state statute preferring men to women as administrators of estates).

45. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that gender-based classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives”).

46. See *Lawrence v. Texas*, 539 U.S. 558, 590, 600–01 (2003) (Scalia, J., dissenting) (noting that classification is necessary to limit marriage to opposite-sex couples; “[t]his reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples”).

As is often the case, the truth likely lies somewhere between these two extremes. Perhaps the Court has no inclination to promote homosexuality to suspect or "quasi-suspect" status. Instead, the Court may be signaling that it skeptically views neutral explanations of state enactments that disadvantage homosexuals. Some support for an intermediate reading comes from the Court's decision in *Lawrence v. Texas*.⁴⁷ In *Lawrence*, the Supreme Court struck down a Texas statute criminalizing same-sex sodomy on substantive due process grounds.⁴⁸ In so doing, the Court expressly overruled its 1986 decision in *Bowers v. Hardwick*⁴⁹ that refused to strike down Georgia's anti-sodomy law.⁵⁰

Lawrence and *Bowers* involved arguably distinguishable statutes. The Texas statute challenged in *Lawrence* was limited to homosexual conduct, while the Georgia statute at issue in *Bowers* was not so limited, though it was challenged by a gay man who had been arrested under the statute.⁵¹ The Texas limitation to same-sex conduct opened the door to a possible *Romer*-based equal protection challenge, and the majority described such a challenge as "tenable."⁵² Moreover, Justice O'Connor—who concurred only in the judgment in *Lawrence*—would have struck down the Texas statute on equal protection grounds, relying heavily on *Romer* to reach that conclusion.⁵³

It is noteworthy, however, that both the majority opinion and O'Connor's concurrence purported to apply the same rational basis test that was set forth in *Romer*. The opinions simply differed on the constitutional vessel by which the test arrived; the majority favored a due process analysis while the concurrence favored equal protection.⁵⁴ But as Justice Scalia pointed out in his dissent⁵⁵—and as

47. 539 U.S. 558 (2003).

48. *Id.* at 578.

49. 478 U.S. 186, 196 (1986).

50. *Lawrence*, 539 U.S. at 578.

51. *Id.* at 566 ("One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same-sex, while the Texas statute, as we have seen, applies only to participants of the same sex.").

52. *Id.* at 574.

53. *Id.* at 579 (O'Connor, J., concurring).

54. *Id.* ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does here, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

55. *Id.* at 601 (Scalia, J., dissenting).

Justice O'Connor acknowledged in her concurrence⁵⁶—the rational basis test applied in *Lawrence* was quite different from the Court's traditional approach. At least where the issue of homosexuality is involved, a majority of the Justices are willing to declare some perceptions to be irrational, even if a considerable majority of the populace shared those perceptions.⁵⁷ Taken together, *Romer* and *Lawrence* suggest that state efforts to enforce, by way of punishment or disadvantage to persons or discrete groups, conventional sexual morality between adults are irrational and therefore unconstitutional.

V. THE IMMINENT CONFLICT BETWEEN *ROMER* AND STATE DEFENSE OF MARRIAGE ACTS

The foregoing readings of *Romer* and *Lawrence* demonstrate the tension between Supreme Court jurisprudence and state defense of marriage acts. To further illustrate the inevitable conflict, consider the two hypothetical cases involving Pat and Jordan.⁵⁸ In the first case, Jordan attempted to completely disinherit Pat, and Pat claimed the Nebraska forced share. In this scenario, Pat seems unlikely to win unless the Supreme Court adopts the most expansive reading of *Romer*. Although it is an admittedly blurry line between benefit and punishment, in this case, Nebraska is simply denying one of the unique benefits of marriage to Pat. If Nebraska violates equal protection by denying a unique benefit of marriage to a couple that Nebraska does not wish to treat as married, then it follows that Nebraska must allow them to be married. Of course, it may be that the law will eventually take this turn, but to do so would require the most far-reaching reading of *Romer*.

The second case, in which Pat claims the intestate share, is much closer. In this case at least, Pat and Jordan are arguably being singled out for worse treatment because they are homosexual. In this second case, neither Pat nor Jordan seek a truly unique benefit of marriage. Nebraska has no real animosity to Pat inheriting from Jordan because a will to that effect would certainly be upheld absent undue

56. *Id.* at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

57. *See id.* at 585 (finding that a state's moral disapproval is not sufficient to outlaw sodomy).

58. *See supra* Part III.

influence.⁵⁹ Moreover, no other group is subjected to a similar disability. It seems very likely that a marriage violating Nebraska's age or consanguinity laws, but valid when and where celebrated, would be treated as sufficient to allow Pat to take the intestate share.⁶⁰ Under the "intermediate" reading of *Romer*, Pat has—to borrow the Supreme Court's term from *Lawrence*—a "tenable" equal protection argument.

It is at the intersection of cases like this second hypothetical that *Romer* and state defense of marriage acts will likely first collide. The yet-to-be-answered question is which law will walk away from the collision: state defense of marriage acts or *Romer*? Based on the gradual evolution of substantive constitutional rights for homosexuals, it might seem that it will be *Romer* that survives unscathed. As recently as 1986, the Supreme Court emphatically denied a constitutional challenge to sodomy laws.⁶¹ But by the early and mid-1990's, equal protection challenges to statutes limiting marriage to opposite-sex couples were gaining traction in state courts.⁶² The next decade brought the first unambiguous victory for proponents of same-sex marriage when Massachusetts's high court struck down the opposite-sex limitation on its marriage statute.⁶³ By this time, the Supreme Court had reversed course on the constitutionality of sodomy laws in *Lawrence*. Judicial momentum is clearly on the side of *Romer*.

Part of this judicial momentum, however, has come from sliding down a slippery slope.⁶⁴ The fear of undesirable effects on heterosexuals has created the slippery nature of that slope. The *Lawrence* majority, for instance, worried aloud about the possibility that the Texas legislature might redraft the statute to cover heterosexual conduct if the Court rested its decision on equal protection grounds.⁶⁵

59. See, e.g., *In re Anonymous*, 347 N.Y.S.2d 263, 264 (Sur. Ct. 1973).

60. See, e.g., *In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953) (holding that, for purposes of determining the distribution of an estate, a valid marriage between an uncle and a niece of half blood was legal where celebrated but incestuous in their state of residence).

61. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

62. See *supra* note 3.

63. See *Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941, 968–70 (Mass. 2003).

64. *Borchers, supra* note 2, at 269.

65. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid

But the slipperiness that has helped to give the same-sex marriage movement judicial momentum may suddenly become its enemy. Homosexuality is, of course, one of many minority sexual practices. Two others are polygamy and adult incest. While not as common as homosexuality,⁶⁶ neither is unheard of,⁶⁷ and each is more unpopular than homosexuality.⁶⁸ It is here that *Romer* may skid as it approaches the intersection. One of the rationales of the

if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

66. The question of what percentage of adults is homosexual is a notoriously controversial matter. A good summary of the available data is contained in Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 89 n.402. Although the percentage of adults who have had at least one same-gender partner may be in the high single digits, slightly fewer than three percent of men and two percent of women identify themselves as homosexual or bisexual. *Id.*

67. Although less common than same-sex unions, such unions are not rare. *See, e.g.*, Aida Edemariam & Kate Conolly, *Blood Ties*, *GUARDIAN* (London), Feb. 28, 2007, at 12 (detailing relationship between German brother and sister that resulted in the birth of four children; discussing their efforts to challenge the provision in the German civil code criminalizing their sexual relationship; and noting that Sweden apparently allows marriages between half-siblings). Sexual attraction between adult siblings is apparently common if the siblings were raised apart. *See* Nigel Hawkes, *Taboo of Incest Explained by Relative Boredom*, *TIMES* (London), Apr. 3, 1995, at 1. In some states, polygamous unions are estimated to account for as much as two percent of the population. *See* Julie Cart, *Utah Paying a High Price for Polygamy*, *L.A. TIMES*, Sept. 9, 2001, at A1. The possibility for a constitutional challenge to laws prohibiting polygamous marriages is more than theoretical. In *State v. Holm*, the Utah Supreme Court, in a split decision, upheld against a *Lawrence* challenge a bigamy prosecution of a man who, after lawfully marrying his first wife, entered into a marriage-like ceremony with another woman and then later the sixteen-year-old sister of his first wife. 137 P.3d 726 (Utah 2006).

68. A recent poll showed that Californians are “almost evenly split” on whether to allow same-sex marriage. *See* Jesse Hamlin, *Ad Backs Right to Wed the One You Want*, *S.F. CHRON.*, Oct. 9, 2007, at A1. Nationally, support for same-sex marriage is lower than it is in California, with fifty-seven percent opposing it in a recent poll. *See* CNN.com, *Democratic Hopefuls Pressed on Gay Issues at Forum*, <http://www.cnn.com/2007/POLITICS/08/10/gay.forum/index.html>. Even though, however, a majority of adults oppose same-sex marriage, a sizeable fraction is supportive or at least not in opposition. *Id.* Reliable polling data on polygamous or incestuous unions is hard to find because neither has any mainstream political support. Only six percent of respondents to a 2005 poll thought that polygamy (actually technically “polygyny” because the question was apparently addressed to the one man, several women variety of polygamy) was morally acceptable. *See* Eugene Volokh, *Same-Sex Marriages and Slippery Slopes*, 33 *HOUSTON L. REV.* 1155, 1164 n.27 (2005). Indirect evidence of the lack of support for incestuous unions can be seen from the absence of any outcry from prosecutions and harsh sentences for adult incest. *See* Jeff Jacoby, *Hypocrisy on Adult Consent*, *BOSTON GLOBE*, Aug. 28, 2005, at C.11 (discussing case of brother and sister raised apart who met and bore four children and in which participants were sentenced to eight- and five-year terms respectively in maximum security facilities). The brother’s petition for habeas corpus was denied by *Muth v. Frank*, 412 F.3d 808 (7th Cir.), *cert. denied*, 546 U.S. 988 (2005).

Romer majority opinion is the political unpopularity of homosexuals and Amendment 2's "peculiar property of imposing a broad and undifferentiated disability on a single named group."⁶⁹ But as Justice Scalia pointed out in his dissent,⁷⁰ this logic would apply with even more force to polygamists. Justice Scalia cited the Supreme Court's 1890 opinion in *Davis v. Beason*,⁷¹ which upheld an Idaho territorial statute barring polygamists from holding public office.⁷² The majority's efforts at distinguishing *Davis* were (to be charitable) unconvincing given that the disability imposed on polygamists by the Idaho statute were more severe than those imposed on homosexuals by Colorado's Amendment 2.⁷³

VI. CONCLUSION

Thus, if the Court proceeds down the road it is now traveling, it will eventually face a choice: the Court must either extend *Romer* to other sexual minority groups or decide that homosexuals are entitled to special protection not available to other sexual minority groups. Either choice is fraught with peril. Advocates of same-sex marriage have, with good reason, resisted vigorously the comparison to polygamy and incest, realizing that many who are willing to accept same-sex unions would vigorously oppose polygamous or incestuous unions.⁷⁴ To state instead that homosexuals are entitled to special protection is probably more palatable but would almost certainly open the door wide to a federal constitutional right to same-sex marriage.⁷⁵ Even if a majority of the Court is willing to take this step (which is far from clear), that development might well breathe life

69. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

70. *Id.* at 649 (Scalia, J., dissenting) (citing *Davis v. Beason*, 133 U.S. 333 (1890)).

71. 133 U.S. 333 (1890).

72. *Id.* at 348.

73. *Romer*, 517 U.S. at 649 (Scalia, J., dissenting) (noting that Polygamists were denied the power to vote and consequently could not seek to amend the state constitution forbidding polygamy).

74. The slippery slope arguments and the political dynamics are discussed extensively in Volokh, *supra* note 68. For an extensive discussion of the possible extension of the sexual liberty arguments to incest, see Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 359 (2004) (concluding that extension likely to be limited to step-relatives and cousins but describing as "unseemly" the efforts of proponents of same-sex marriage to deny the analogy between homosexual conduct and incest).

75. *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

into what have been mostly dormant efforts to amend the United States Constitution to outlaw same-sex marriages.⁷⁶

On the other hand, the Court may hit the brakes and decide not to travel any further down the *Romer* road. The Court could achieve this halt by taking the most limited view of *Romer*, which would confine it to circumstances in which a group is excluded from the political process. On that view, *Romer* would impact neither hypothetical case involving Pat and Jordan and the collision would be avoided, at least for now.

Regardless, the issue will not disappear. Same-sex unions are likely to remain in place in at least a few states, and a large number of states have and will likely continue to have state defense of marriage acts. That reality, coupled with the Supreme Court's slippery opinion in *Romer*, together seem likely to lead to a collision between those state laws and equal protection principles.

76. Borchers, *supra* note 2, at 266 (discussing political support for constitutional amendment).

