

Washington Law Review

Volume 81 | Number 2

5-1-2006

Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws under the Equal Protection Clause

David W. Howenstine

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Law and Gender Commons](#)

Recommended Citation

David W. Howenstine, Notes and Comments, *Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws under the Equal Protection Clause*, 81 Wash. L. Rev. 417 (2006).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol81/iss2/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

BEYOND RATIONAL RELATIONS: THE CONSTITUTIONAL INFIRMITIES OF ANTI-GAY PARTNERSHIP LAWS UNDER THE EQUAL PROTECTION CLAUSE

David W. Howenstine

Abstract: Anti-gay partnership laws prevent state and local governments from granting rights, benefits, and obligations associated with marriage to same-sex couples. Fifteen states have anti-gay partnership laws that prohibit the creation of civil unions, domestic partnerships, or specific partnership rights for gay couples. Although enacted under legitimate state authority, these laws come into conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they isolate gay citizens for special disadvantages and burdens within the traditional political processes. Under equal protection analysis, a law that neither burdens a fundamental right nor targets a protected class will be presumed valid if it bears a rational relation to a legitimate governmental interest. However, the U.S. Supreme Court uses a more searching form of rational-basis review when examining laws that exhibit a desire to harm politically unpopular groups like gay citizens. In *Romer v. Evans*, the Court held that a constitutional amendment prohibiting special rights for gay citizens violated equal protection principles because its extensive breadth could not be rationally justified by legitimate state interests. This Comment argues that certain anti-gay partnership laws similarly violate equal protection principles because the sweeping harm they cause to gay citizens cannot be supported by legitimate state interests in marriage and the family. By contrast, other anti-gay partnership laws likely survive equal protection analysis because their more narrow prohibition of only comprehensive partnership rights corresponds more directly to the potentially legitimate state interests underlying the decision to bar same-sex couples from marrying. Ultimately, the Equal Protection Clause resists all laws that isolate gay citizens for special disadvantages, but requires only the invalidation of anti-gay partnership laws that cause broad and sweeping harm.

The contemporary political struggle over marriage equality in the United States has been fast and fierce.¹ As gay, lesbian, and bisexual citizens² gain new access to marriage, civil unions, and domestic partnership benefits across the nation,³ conservative groups seek to

1. See NAT'L CONFERENCE OF STATE LEGISLATURES, SAME SEX MARRIAGE (2006), <http://www.ncsl.org/programs/cyf/samesex.htm> (chronicling recent changes in state marriage laws); Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG (Nov. 3, 2004), <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576> (discussing the reaction against same-sex marriage in the 2004 elections, as well as legal challenges to restrictive marriage laws).

2. This Comment refers to gay, lesbian, and bisexual citizens as gay citizens.

3. See HUMAN RIGHTS CAMPAIGN, RELATIONSHIP RECOGNITION IN THE U.S. (2005), <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=26860&TEMPLATE=/Content>

solidify the status quo by passing restrictive marriage laws.⁴ Recently, fifteen states have used their authority over marriage laws to enact anti-gay partnership laws that prohibit for same-sex couples the establishment of civil unions, domestic partnerships, and other rights traditionally reserved to marriage.⁵

Anti-gay partnership laws prevent state and local governments from creating partnership rights for same-sex couples.⁶ Unlike laws that restrict marriage to a union between a man and a woman, anti-gay partnership laws bar governmental action with respect to a wide range of potential rights.⁷ This Comment distinguishes anti-gay partnership laws based on the scope of the laws and on the citizens targeted by the laws.⁸ The scope of anti-gay partnership laws ranges from Class I laws, which prohibit any and all same-sex partnership rights, to Class II laws, which ban only comprehensive same-sex partnership rights.⁹ Anti-gay partnership laws target either same-sex couples in particular or unmarried couples in general.¹⁰

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that no person shall be denied the equal

Management/ContentDisplay.cfm (reporting that Massachusetts permits same-sex marriage; Connecticut and Vermont permit same-sex civil unions; California provides almost all marital rights to unmarried couples; and Hawaii, Maine, and New Jersey provide limited rights to unmarried couples).

4. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1; Peterson, *supra* note 1.

5. See *infra* notes 57, 75 (listing sixteen laws of varying scope in fifteen states that bar the creation of partnership rights similar to marriage rights for same-sex couples and, in some cases, for all unmarried couples).

6. See, e.g., NEB. CONST. art. I, § 29 (prohibiting the "uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship"), *invalidated by* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 1009 (D. Neb. 2005), *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006); VA. CODE ANN. § 20-45.3 (2004) (prohibiting a "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage").

7. See, e.g., VA. CODE ANN. § 20-45.3 (2004) (prohibiting a "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage").

8. See *infra* Part II.

9. Compare, e.g., VA. CODE ANN. § 20-45.3 (prohibiting a "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage"), with ARK. CONST. amend. 83, § 2 (prohibiting a "[l]egal status for unmarried persons which is identical or substantially similar to marital status"). The Class I and Class II categories have been created by the author for the sake of clarity; they do not represent actual categories used by the states.

10. Compare, e.g., GA. CONST. art. I, § IV ¶ 1 ("persons of the same sex"), with ARK. CONST. amend. 83, § 2 ("unmarried persons").

protection of the laws.¹¹ Yet this command must co-exist with the practical necessity of legislative classifications.¹² Accordingly, the U.S. Supreme Court has fashioned a three-tiered system of equal protection analysis that defers to legislative judgment if a law bears a rational relation to a legitimate governmental interest, provided that the law does not burden a fundamental right or target a protected class.¹³ However, the Court has deviated from this system and applied a heightened form of rational-basis review in a line of cases involving laws that display a desire to harm politically unpopular groups, such as gay citizens.¹⁴ In *Romer v. Evans*,¹⁵ for example, the Court departed from traditional rational-basis review to overturn a state constitutional amendment that prohibited gay citizens from attaining special legal protections from all state and local governments.¹⁶ The Court invalidated the amendment because its scope exceeded all rational relation to the asserted legitimate state interests.¹⁷

This Comment argues that Class I anti-gay partnership laws violate the Equal Protection Clause in the same manner as the constitutional amendment at issue in *Romer* because their expansive scope exceeds any rational relation to legitimate governmental interests in marriage and the family.¹⁸ Specifically, anti-gay partnership laws demonstrate a desire to harm gay citizens and should therefore be analyzed under heightened rational-basis review.¹⁹ Class I laws violate equal protection principles because the state-wide prohibition of a broad range of same-sex partnership rights cannot be justified by legitimate governmental interests.²⁰ In contrast, Class II laws likely survive equal protection analysis because their more narrow prohibition of only comprehensive partnership benefits more closely approximates the disputed interests

11. U.S. CONST. amend. XIV, § 1.

12. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

13. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–41 (1985).

14. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (asserting that the Court has applied heightened rational-basis review in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), *Cleburne*, 473 U.S. 432, and *Romer*, 517 U.S. 620).

15. 517 U.S. 620 (1996).

16. See *id.* at 632–36.

17. See *id.* at 635–36.

18. See *infra* Part IV.

19. See *infra* Part IV.A.

20. See *infra* Part IV.B–C.

underlying the decision to bar same-sex couples from marrying.²¹

Part I of this Comment describes states' comprehensive control over marriage laws. Part II examines the different types of anti-gay partnership laws. Part III discusses the three-tiered system of equal protection analysis and explores the Court's use of heightened rational-basis review when laws target politically unpopular groups. Finally, Part IV argues that Class I laws violate equal protection principles because their broad scope cannot be supported by legitimate state interests, but cautions that Class II laws may survive equal protection analysis because their scope has been more narrowly tailored to serve potentially legitimate state interests in protecting marriage.

I. THE STATES POSSESS PRIMARY CONTROL OVER MARRIAGE

By tradition, states exercise primary control over the structure and regulation of marriage laws.²² States have used this power to reserve an extensive collection of rights, benefits, and obligations for married couples.²³ These marital rights include social, legal, and financial benefits that range from property rights to medical decisions to child custody.²⁴ Some state and local governments have established civil unions or domestic partnerships as a means to extend marital rights to same-sex couples.²⁵ Nonetheless, a majority of states prohibit same-sex couples from marrying.²⁶ Courts have disagreed over the constitutionality of state laws that bar same-sex couples from marrying, but some courts have concluded that such laws can be justified by state interests in marriage, the family, and child rearing.²⁷

21. See *infra* Part IV.D.

22. See *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

23. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954–57 & n.14 (Mass. 2003).

24. See *id.*

25. See, e.g., HUMAN RIGHTS CAMPAIGN, *supra* note 3 (reporting that six states offer partnership rights for same-sex couples).

26. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1; Peterson, *supra* note 1.

27. Compare, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005) (holding that a state prohibition of same-sex marriage possesses a rational relation to legitimate governmental interests), with *Goodridge*, 798 N.E.2d at 969 (holding that limiting civil marriage to opposite-sex couples violates state equal protection).

A. States Possess Complete Control over Marriage Laws Except as Limited by Specific Constitutional Provisions

States possess primary authority over marriage laws as part of their general police powers to regulate for the health, welfare, morals, and safety of their citizens.²⁸ This power is complete except as limited by specific provisions of the U.S. Constitution that secure certain fundamental rights against state regulation.²⁹ In 1996, Congress underscored state control over the decision to prohibit same-sex marriage by passing the Defense of Marriage Act, which defines marriage as a union between a man and a woman for purposes of federal law and permits states to refuse to recognize the marriages of same-sex couples from other states.³⁰

States have used their power over marriage laws to reserve a wide variety of rights, benefits, and obligations for married couples.³¹ Civil marriage bestows an extensive combination of social, legal, and financial benefits to married men and women.³² The benefits of civil marriage confer hundreds of state rights concerning inheritance, taxes, child custody and adoption, medical decisions, health care benefits, and property rights, among many others.³³

B. Some States and Local Governments Have Established Civil Unions or Domestic Partnerships for Same-Sex Couples

Some states and local governments have established civil unions or domestic partnerships for same-sex couples as alternatives to marriage.³⁴

28. See *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Goodridge*, 798 N.E.2d at 954.

29. See *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971) (Douglas, J., concurring).

30. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7; 28 U.S.C. § 1738C).

31. See *Goodridge*, 798 N.E.2d at 954–57.

32. See *id.*

33. See *id.*

34. See HUMAN RIGHTS CAMPAIGN, *supra* note 3 (reporting that California, Connecticut, Hawaii, Maine, New Jersey, and Vermont all offer partnership rights for same-sex couples); HUMAN RIGHTS CAMPAIGN, LAWS AND POLICIES AFFECTING STATE EMPLOYEES (2006), <http://hrc.org/Template.cfm?Section=Center&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16306> (reporting that eleven states have a law, policy, or union contract that provides domestic partner benefits for state employees); HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER EMPLOYEES 2004, at 22 fig.6 (2005), available at http://www.hrc.org/Content/ContentGroups/Publications1/State_of_the_Workplace/Workplace0603.pdf (reporting that 188 cities, counties, and government organizations offer health insurance

In general, civil unions and domestic partnerships confer many or all of the rights offered by civil marriage.³⁵ Although the designations vary between jurisdictions, this Comment uses the traditional legal definitions of civil unions and domestic partnerships.³⁶ Civil unions are marriage-like relationships, usually between members of the same sex, that entitle the parties to substantially all of the rights of civil marriage.³⁷ Domestic partnerships are relationships “that an employer or governmental entity recognizes as equivalent to marriage for the purpose of extending employee-partner benefits otherwise reserved for the spouses of employees.”³⁸

C. Some Courts Have Concluded that the State Interest in Marriage Entitles States to Prevent Same-Sex Couples from Marrying

States possess a compelling interest in the regulation and protection of civil marriage because marriage represents a basic foundation of the family and of society.³⁹ Traditionally, the U.S. Supreme Court has recognized marriage as creating “the most important relation in life” and as integrally linked to “the morals and civilization of a people.”⁴⁰ In order to safeguard marriage, states may impose reasonable regulations on the incidents of and prerequisites to marriage, provided that those regulations do not significantly interfere with the actual decision to enter into the marriage relationship.⁴¹ Similarly, a state may bar alternative types of marriage, such as polygamous marriage, that would undermine the monogamous nature of marriage.⁴²

coverage to public employees’ same-sex partners); *see also* Human Rights Campaign, Equal Benefits Ordinances (Mar. 1, 2006), <http://www.hrc.org/> (follow “Workplace” hyperlink; then follow “Domestic Partner Benefits” hyperlink; then follow “Equal Benefits Ordinances” hyperlink) (reporting that California and eleven cities and counties have equal benefits laws that require contractors with state or local government to offer equal benefits to all employees).

35. *See, e.g.*, HUMAN RIGHTS CAMPAIGN, *supra* note 3; HUMAN RIGHTS CAMPAIGN, LAWS AND POLICIES AFFECTING STATE EMPLOYEES, *supra* note 34; *see also, e.g.*, VT. STAT. ANN. tit. 15, § 1204(a) (2002) (stating that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities . . . as are granted to spouses in a marriage”).

36. *See* BLACK’S LAW DICTIONARY 264, 522–23 (8th ed. 1999).

37. *See id.* at 264.

38. *Id.* at 522–23.

39. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

40. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

41. *See Zablocki*, 434 U.S. at 386.

42. *See Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1332–34 (D. Utah 2005) (holding that, even in the wake of *Lawrence v. Texas*, 539 U.S. 558 (2003), states possess a compelling interest in

Courts disagree over whether the state interest in marriage entitles states to prohibit same-sex couples from marrying.⁴³ A majority of states have laws or constitutional amendments that define marriage as a union between a man and a woman.⁴⁴ States have claimed legitimate interests in both the fostering of relationships that are optimal for procreation and the encouragement of stable families that facilitate the rearing of children by both biological parents.⁴⁵ Additionally, Justice Sandra Day O'Connor has suggested that the mere preservation of the traditional institution of marriage may represent a legitimate state interest.⁴⁶

In recent years, states' justifications for barring gay couples from marrying have sustained serious criticism from some courts.⁴⁷ The general tenor of such criticism focuses on the inadequacy of purported causal links between the recognition of same-sex relationships and harm to state interests.⁴⁸ Some courts have even noted that prohibiting same-sex couples from marrying causes serious harm to the children and families of same-sex couples, in opposition to asserted state concerns for family stability and the welfare of children.⁴⁹ Nonetheless, in the view of

protecting monogamous marriage, which includes the decision to prohibit polygamous marriage).

43. Compare, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005) (holding that state prohibition of same-sex marriage possesses a rational relation to legitimate governmental interests), and *Standhardt v. Superior Court*, 77 P.3d 451, 464–65 (Ariz. Ct. App. 2003) (same), and *Lewis v. Harris*, 875 A.2d 259, 272 n.4 (N.J. Super. Ct. App. Div. 2005) (suggesting that the state could establish legitimate governmental interests served by the prohibition of same-sex marriage, even though unnecessary under state equal protection principles), with *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that limiting civil marriage to opposite-sex couples violates state equal protection), and *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (same). This Comment does not directly address the constitutionality of laws barring same-sex couples from marrying. Rather, this Comment uses the decisions of courts that have upheld such laws as a means to test anti-gay partnership laws under the most stringent standards. The arguments of Part IV are even stronger in the eyes of courts that have rejected the asserted state justifications for banning same-sex marriage.

44. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1 (reporting that forty-one states have statutes defining marriage as a union between a man and a woman, nineteen states have constitutional language defining marriage, and seven states have neither).

45. See *Wilson*, 354 F. Supp. 2d at 1308; *Standhardt*, 77 P.3d at 461.

46. See *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

47. See, e.g., *Goodridge*, 798 N.E.2d at 961–68 (rejecting the state's arguments that prohibiting same-sex couples from marrying provides a favorable setting for procreation, ensures the optimal setting for child rearing, or preserves scarce financial resources); see also *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1296–1301 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (eviscerating the asserted state interests in a statute prohibiting gay citizens from adopting).

48. See *Goodridge*, 798 N.E.2d at 961–68.

49. See, e.g., *id.* at 964 (noting that excluding same-sex couples from marriage deprives children

some courts, states possess legitimate interests that justify the decision to bar same-sex couples from marrying.⁵⁰

In sum, states have exercised their control over marriage by reserving specific rights and benefits for married couples. Some states and cities have established civil unions or domestic partnerships as a means of granting partnership rights to same-sex couples. However, most states have exercised their authority over marriage and the family by prohibiting same-sex couples from marrying. Courts disagree on whether asserted governmental interests entitle states to prohibit same-sex couples from marrying, but some courts have upheld the exclusion of same-sex couples from marriage as justified by legitimate governmental interests.

II. FIFTEEN STATES HAVE LAWS PROHIBITING PARTNERSHIP RIGHTS FOR SAME-SEX COUPLES

Fifteen states have passed anti-gay partnership laws that prohibit the creation of civil unions, domestic partnerships, and other rights incident to marriage either for same-sex couples or for all unmarried couples.⁵¹ These restrictions function in conjunction either with other language in the laws that bars same-sex couples from marrying or with other subsections that impose the same limitation.⁵² This Comment divides anti-gay partnership laws into two classes according to the breadth of the laws.⁵³ Class I laws broadly prohibit the establishment of any partnership rights for same-sex couples.⁵⁴ Class II laws prohibit the establishment of

of same-sex couples of immeasurable advantages).

50. See, e.g., *Wilson*, 354 F. Supp. 2d at 1308–09.

51. See *infra* notes 57, 75 (listing sixteen anti-gay partnership laws in fifteen states; Texas has two distinct anti-gay partnership laws, both a constitutional amendment and a statute).

52. Compare, e.g., N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”), with ARK. CONST. amend. 83, §§ 1–2 (defining marriage as “the union of one man and one woman” in § 1 and prohibiting “[l]egal status for unmarried persons which is identical or substantially similar to marital status” in § 2). See also NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 1 (reporting that forty-one states have statutes defining marriage as a union between a man and a woman, nineteen states have constitutional language defining marriage, and seven states have neither).

53. See *infra* Part II.A–B. This Comment groups anti-gay partnership laws into two general categories, but the imprecise language of such laws could result in different interpretations as to the exact scope of a law. As a result, some laws identified as Class I laws in this Comment may subsequently be interpreted by a court to be Class II laws, and vice versa.

54. See, e.g., VA. CODE ANN. § 20-45.3 (2004) (prohibiting a “civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or

same-sex partnership rights, but focus more narrowly on comprehensive rights.⁵⁵ Additionally, some anti-gay partnership laws apply only to same-sex couples, while other such laws apply to unmarried couples in general.⁵⁶

A. Class I Laws Prohibit the Establishment of Any Partnership Rights Similar to Marriage Rights for Same-Sex Couples

Class I laws prevent governments from establishing civil unions, domestic partnerships, and other relationships conferring rights traditionally reserved to married couples.⁵⁷ In total, nine states have enacted Class I legislation.⁵⁸ The full scope of a Class I law can be measured as the sum of two dimensions of harm: the types of prohibited same-sex partnership rights and of the levels of government restricted by the law.⁵⁹ Class I laws prohibit same-sex partnership rights ranging from

obligations of marriage”).

55. See, e.g., FLA. STAT. § 741.212(1) (2005) (prohibiting “relationships between persons of the same sex which are treated as marriages”), *interpreted by* *Lowe v. Broward County*, 766 So. 2d 1199, 1208 (Fla. Dist. Ct. App. 2000) (permitting domestic partnerships).

56. Compare, e.g., GA. CONST. art. I, § IV ¶ I (“persons of the same sex”), with ARK. CONST. amend. 83, § 2 (“unmarried persons”).

57. See GA. CONST. art. I, § IV ¶ I (“No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.”); KAN. CONST. art. XV, § 16, (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”); LA. CONST. art. XII, § 15 (providing that no state law shall be construed so as to “require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman”); NEB. CONST. art. I, § 29 (prohibiting the “uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship”), *invalidated by* *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1009 (D. Neb. 2005), *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006); N.D. CONST. art. XI, § 28 (providing that “[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect”); OKLA. CONST. art. II, § 35 (stating that no law shall be construed so as to “require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”); TEX. CONST. art. I, § 32 (prohibiting the creation or recognition of “any legal status identical or similar to marriage”); ALASKA STAT. § 25.05.013 (2004) (stating that “[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage”); TEX. FAM. CODE ANN. § 6.204(a)(2) (Vernon 2005) (prohibiting any relationship that “grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage”); VA. CODE ANN. § 20-45.3 (2004) (prohibiting a “civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage”).

58. See *supra* note 57. In May 2005, the *Bruning* court overturned Nebraska’s constitutional amendment as a violation of the U.S. Constitution. *Bruning*, 368 F. Supp. 2d at 1009, *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006). Nebraska has subsequently appealed that decision to the U.S. Court of Appeals for the Eighth Circuit. *Id.*

59. See *Bruning*, 368 F. Supp. 2d at 1003 (emphasizing that under Nebraska’s amendment gay

the comprehensive benefits of civil unions to the limited employment benefits of domestic partnerships to solitary partnership rights such as control over a deceased partner's remains.⁶⁰ However, the levels of state government bound by such laws vary between Class I constitutional amendments and Class I statutes.⁶¹ While both statutes and constitutional amendments restrict the actions of local governments, the executive branch, and the courts,⁶² only constitutional amendments bind the actions of the state legislature.⁶³

The key language of Class I laws forbids the creation of partnership rights similar to marriage for same-sex couples.⁶⁴ Attorneys general have interpreted the language of Class I legislation to bar the establishment of any rights that are placed on the same plane as rights that arise from marriage.⁶⁵ Partnership rights rise to the same plane as marital rights when they confer the same effect and status as a marital right.⁶⁶ Nebraska's Attorney General concluded that the state's Class I constitutional amendment barred the legislature from passing a law that would have granted control over burial and funeral decisions to the surviving partner of a same-sex relationship because such decisions were traditionally reserved to surviving spouses.⁶⁷ Thus, the Attorney General recognized that Class I legislation precludes the State from establishing

citizens have not only been denied any potential benefits premised on a same-sex relationship, but have also been prevented from seeking such rights through the normal political process).

60. See, e.g., Neb. Op. Att'y Gen. No. 03004, 2003 WL 21207498, at *1-2 (Mar. 10, 2003) (discussing rights related to disposition of remains).

61. Compare 16 AM. JUR. 2D *Constitutional Law* § 58 (1998) (recognizing state constitutions as the supreme will of the people, subject only to the U.S. Constitution, and noting that state constitutional provisions control the legislature, the executive, the judiciary, and all political subdivisions), with 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 111 (2000) (noting that, unless authorized, municipalities may not enact local laws or resolutions conflicting with general state laws), and 72 AM. JUR. 2D *States, Territories, and Dependencies* § 40 (2001) (noting that, in general, a state legislature has unlimited power to act in its sphere of legislation and to pass any law it sees fit, and that one legislature cannot restrict the power of the succeeding legislature), and 1A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* §§ 22:2, 23:3 (6th ed. 2002) (noting that, in general, legislatures have the power to amend or repeal statutes in order to enact new legislation).

62. See 56 AM. JUR. 2D, *supra* note 61; 72 AM. JUR. 2D, *supra* note 61; SINGER, *supra* note 61.

63. See 16 AM. JUR. 2D, *supra* note 61.

64. See, e.g., TEX. CONST. art. I, § 32 (prohibiting the creation or recognition of "any legal status identical or similar to marriage").

65. See, e.g., Neb. Op. Att'y Gen. No. 03004, at *2; see also Mich. Op. Att'y Gen. No. 7171, 2005 WL 639112, at *9 (Mar. 16, 2005).

66. See Neb. Op. Att'y Gen. No. 03004, at *1.

67. See *id.* at *1-2.

even solitary partnership rights for same-sex couples when those rights would approximate one of the many rights traditionally reserved to married couples.⁶⁸

Class I constitutional amendments remove power from all levels of state government to establish a wide range of same-sex partnership rights.⁶⁹ Nebraska's constitutional amendment represents a primary example: "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."⁷⁰ As with any constitutional amendment, Class I constitutional amendments can be modified or rescinded only by the passage of a new constitutional amendment.⁷¹

Class I statutes also remove power from local governments and political subdivisions of the state, the judiciary, and the executive branch to establish a wide range of same-sex partnership rights, but do not restrict the actions of state legislatures.⁷² Virginia's statute is a vivid example: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited."⁷³ Although Class I statutes restrict the actions of most levels of state government, they do not prevent state legislatures from amending or rescinding the laws.⁷⁴

B. Class II Laws Prohibit the Establishment of Comprehensive Partnership Rights for Same-Sex Couples

Class II laws restrict the same levels of government as Class I laws, but narrow the range of prohibited rights to comprehensive same-sex

68. *See id.*

69. *See* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 996–97 (D. Neb. 2005) (noting that any legislation seeking to extend any benefits once incident to or dependent on the marital relationship to a same-sex couple would violate the Nebraska constitution, thereby requiring proponents of such legislation to undertake the nigh impossible burden for a minority group of passing a new constitutional amendment), *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006); 16 AM. JUR. 2D, *supra* note 61.

70. NEB. CONST. art. I, § 29, *invalidated by Bruning*, 368 F. Supp. 2d at 1009.

71. *See Bruning*, 368 F. Supp. 2d at 997.

72. *See* 56 AM. JUR. 2D, *supra* note 61; 72 AM. JUR. 2D, *supra* note 61; SINGER, *supra* note 61.

73. VA. CODE ANN. § 20-45.3 (2004).

74. *See* SINGER, *supra* note 61.

partnership rights as opposed to any and all partnership rights.⁷⁵ Currently, six states have enacted Class II legislation.⁷⁶ Class II laws bar any legal status identical or substantially similar to marriage for gay couples.⁷⁷ In both *Lowe v. Broward County*⁷⁸ and *National Pride at Work, Inc. v. Granholm*,⁷⁹ state courts held that anti-gay partnership laws permitted the creation of limited domestic partnership benefits for same-sex couples because such benefits did not approximate the plethora of marital rights.⁸⁰ Thus, a city in a Class II state could not establish civil unions, but could likely create domestic partnership benefits for city employees.⁸¹

C. Anti-Gay Partnership Laws Target Either Same-Sex Couples Exclusively or Unmarried Couples in General

The operative language of anti-gay partnership laws targets the relationships of either gay citizens in particular or unmarried individuals in general.⁸² Six anti-gay partnership laws apply exclusively to the relationships of same-sex couples,⁸³ five laws apply with specific reference to unmarried couples,⁸⁴ and five laws apply by implication to

75. See ARK. CONST. amend. 83, § 2 (prohibiting a “[l]egal status for unmarried persons which is identical or substantially similar to marital status”); KY. CONST. § 233A (prohibiting “[a] legal status identical or substantially similar to that of marriage for unmarried individuals”); MICH. CONST. art. I, § 25 (limiting “marriage or [any] similar union” to “one man and one woman”), interpreted by *Nat’l Pride at Work, Inc. v. Granholm*, No. 05-368-CZ, 2005 WL 3048040, at *7 (Mich. Cir. Ct. Sept. 27, 2005) (permitting domestic partnerships); FLA. STAT. § 741.212(1) (2005) (prohibiting “relationships between persons of the same sex which are treated as marriages”), interpreted by *Lowe v. Broward County*, 766 So. 2d 1199, 1208 (Fla. Dist. Ct. App. 2000) (permitting domestic partnerships); OHIO REV. CODE ANN. § 3101.01(B)(3) (West 2005) (prohibiting the extension of the “specific statutory benefits of legal marriage to nonmarital relationships”); UTAH CODE ANN. § 30-1-4.1 (2004) (prohibiting “any legal status, rights, benefits, or duties that are substantially equivalent to those provided” to married couples).

76. See *supra* note 75.

77. See, e.g., ARK. CONST. amend. 83, § 2.

78. 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000).

79. No. 05-368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005).

80. See *Lowe*, 766 So. 2d at 1208; *Granholm*, No. 05-368-CZ, at *7.

81. See *Lowe*, 766 So. 2d at 1207-08.

82. Compare, e.g., GA. CONST. art. I, § IV ¶ 1 (“persons of the same sex”), with ARK. CONST. amend. 83, § 2 (“unmarried persons”).

83. GA. CONST. art. I, § IV ¶ 1; NEB. CONST. art. I, § 29, invalidated by *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1009 (D. Neb. 2005), argued, No. 05-2604 (8th Cir. Feb. 13, 2006); ALASKA STAT. § 25.05.013 (2004); FLA. STAT. § 741.212 (2005); TEX. FAM. CODE ANN. § 6.204 (Vernon 2005); VA. CODE ANN. § 20-45.3 (2004).

84. ARK. CONST. amend. 83, § 2; KY. CONST. § 233A; LA. CONST. art. XII, § 15; OKLA. CONST.

all unmarried couples without reference to either same-sex couples or unmarried couples.⁸⁵ Thus, while many states with anti-gay partnership laws have identified same-sex couples specifically, other states have framed their laws in more general terms.⁸⁶

D. The State Interests in Prohibiting Same-Sex Partnership Rights Parallel the State Interests in Banning Same-Sex Marriage

Asserted state interests in anti-gay partnership laws parallel the state interests in banning same-sex couples from marrying.⁸⁷ Some courts have upheld the limitation of marriage to a union between a man and a woman as a rational means of fostering relationships optimal for procreation and encouraging the rearing of children by both biological parents.⁸⁸ These interests apply with similar force to anti-gay partnership laws.⁸⁹ In order to satisfy the aforementioned reasoning, either the availability of same-sex partnership rights would need to diminish the incentives for heterosexual citizens to enter into the preferred relationships, or the prohibition of same-sex partnership rights would need to encourage homosexual citizens to enter into the preferred relationships.⁹⁰ However, multiple courts have rejected any alleged link between the availability or prohibition of same-sex partnership rights and these asserted state interests.⁹¹ States may also possess a legitimate

art. II, § 35; OHIO REV. CODE ANN. § 3101.01 (West 2005).

85. KAN. CONST. art. XV, § 16; MICH. CONST. art. I, § 25; N.D. CONST. art. XI, § 28; TEX. CONST. art. I, § 32; UTAH CODE ANN. § 30-1-4.1 (2004).

86. *Compare, e.g.*, GA. CONST. art. I, § IV ¶ I (“persons of the same sex”), with ARK. CONST. amend. 83, § 2 (“unmarried persons”), and N.D. CONST. art. XI, § 28 (prohibiting any domestic union, without reference to the sex of the partners, that is not a marriage between a man and a woman), and OKLA. CONST. art. II, § 35 (“unmarried couples or groups”), and OHIO REV. CODE ANN. § 3101.01 (West 2005) (“persons of the same sex or different sexes”).

87. *See supra* Part I.C.

88. *See, e.g.*, *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005).

89. *Cf. id.*

90. *Cf. id.*; *see also* *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *7–10 (Wash. Super. Ct. Aug. 4, 2004) (stating the question as whether not having marriage available to same-sex couples logically furthers the promotion of stable families or procreation, or, in other words, whether allowing same-sex couples to marry would injure those legitimate state interests).

91. *Cf. Andersen*, 2004 WL 1738447, at *9–10 (emphasizing that there is no reasonable expectation that were same-sex couples permitted to marry, married fathers and mothers would abdicate their parental responsibilities or young, would-be parents would defect from the ranks of heterosexuals); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (rejecting the contention that preventing same-sex couples from marrying will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children); *Baker v. State*,

interest in merely preserving the current status quo of marriage, which could encompass the decision to prevent same-sex partnerships.⁹²

Additionally, states may have a legitimate interest in withholding alternative partnership rights from couples that have the option to marry because the availability of alternative partnership rights could undermine the central role of marriage.⁹³ Nebraska asserted a version of this interest when it claimed that its Class I constitutional amendment prevented the piecemeal redefinition of marriage through the granting of benefits to same-sex relationships.⁹⁴ Yet at least one state court has rejected this interest when used to deny same-sex couples access to partnership rights if the state also prohibits same-sex couples from marrying because same-sex couples would have no method to access partnership rights.⁹⁵ Thus, states may have a legitimate interest in blocking alternative same-sex partnership rights in order to protect the important role of marriage, but that interest weakens when a state also prohibits same-sex couples from marrying.⁹⁶

In sum, fifteen states have passed laws that prohibit the creation of civil unions, domestic partnerships, or other relationships similar to marriage for same-sex couples. The breadth of these laws ranges from Class I laws, which prohibit all same-sex partnership rights, to Class II laws, which prohibit only comprehensive same-sex partnership rights. These laws apply either to same-sex couples exclusively or to unmarried couples in general. In support of these laws, states may be able to assert interests similar to those used to exclude same-sex couples from marrying, as well as an interest in preventing alternative types of partnership unions.

744 A.2d 864, 882 (Vt. 1999) (stating that preventing same-sex couples from marrying neither promotes goals of procreation nor protects children).

92. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). *But cf.* *Andersen*, 2004 WL 1738447, at *7-8 (rejecting the assertion that permitting same-sex couples to marry would threaten marriage and noting that such an assertion has no relevance in a proper, legal analysis).

93. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003); *see also* N.J. STAT. ANN. § 26.8A-2(e) (West 2005) (limiting domestic partnerships to same-sex couples because opposite-sex couples have the option to marry); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (noting that a state may impose reasonable regulations on the incidents of marriage so long as the state does not interfere with the right to marry).

94. *See Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1004 (D. Neb. 2005), *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006).

95. *See Goodridge*, 798 N.E.2d at 958.

96. *See id.*

III. THE U.S. CONSTITUTION REQUIRES THAT NO CITIZEN BE DENIED THE EQUAL PROTECTION OF THE LAWS

The U.S. Supreme Court has established a three-tiered system of equal protection analysis in order to enforce the U.S. Constitution's guarantee of equal protection under the laws.⁹⁷ Under this system, the Court uses strict or intermediate scrutiny when laws target suspect or quasi-suspect classes or burden a fundamental right, but uses the more deferential standard of rational-basis review when analyzing most social and economic legislation.⁹⁸ In general, rational-basis review presumes the validity of a law if it bears a rational relation to a legitimate governmental interest.⁹⁹ However, when laws display a desire to harm politically unpopular minorities, the Court deviates from the normal three-tiered system and applies a more searching form of rational-basis review involving a much closer examination of whether a law is rationally related to legitimate governmental interests.¹⁰⁰ While gay citizens do not represent a protected class, the Court analyzes laws that target gay citizens for special harm under the heightened form of rational-basis review.¹⁰¹ State laws that significantly burden the ability of gay citizens to attain so-called special protections from the government violate equal protection principles because they cannot be justified by any legitimate governmental interests.¹⁰²

A. Equal Protection Analysis Presumes the Validity of a Law that Bears a Rational Relation to Legitimate Governmental Interests Provided that the Law Does Not Target a Protected Class

The Equal Protection Clause of the Fourteenth Amendment promises that no person shall be denied the equal protection of the laws.¹⁰³ The Court interprets this bold command to require that all persons similarly situated be treated alike.¹⁰⁴ In the words of Justice John Marshall Harlan, the U.S. Constitution “neither knows nor tolerates classes among

97. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–42 (1985).

98. See *id.*

99. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

100. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

101. See *Romer*, 517 U.S. at 634–36.

102. See *id.*

103. U.S. CONST. amend. XIV, § 1.

104. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

citizens.”¹⁰⁵ Yet the Court recognizes that the principle of equal protection must coexist with the practical necessity of legislative classifications, with resulting advantages and disadvantages to various groups.¹⁰⁶ Accordingly, the Court has fashioned a system of equal protection analysis that defers to legislative judgment in most situations, but requires increased scrutiny when laws make classifications based on certain immutable characteristics that generally have no relevant legislative purpose.¹⁰⁷

Equal protection analysis examines laws under one of three tiers of scrutiny depending on whether a law targets either a protected class or burdens a fundamental right.¹⁰⁸ Laws that target a suspect class or burden a fundamental right are analyzed under the Court’s highest standard—strict scrutiny—which requires the invalidation of such laws unless they have been narrowly tailored to serve a compelling state interest.¹⁰⁹ Suspect classes include classes defined by race, alienage, and national origin, while fundamental rights include basic rights protected by the U.S. Constitution, such as the freedom of speech or religion.¹¹⁰ Laws that target a quasi-suspect class are analyzed under intermediate scrutiny, which requires that a court overturn a law unless the law is substantially related to a sufficiently important governmental interest.¹¹¹ Quasi-suspect classes include classes defined by gender or illegitimacy.¹¹² Finally, laws that neither target a suspect or quasi-suspect class nor burden a fundamental right are subject to the Court’s lowest level of scrutiny—rational-basis review—which presumes the validity of a law if it bears a rational relation to a legitimate governmental interest.¹¹³

Traditional rational-basis review does not entitle a court to judge the wisdom, logic, or fairness of legislative decisions.¹¹⁴ The Court has repeatedly emphasized that in areas of social and economic policy,

105. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), quoted in *Romer*, 517 U.S. at 623.

106. See *Romer*, 517 U.S. at 631.

107. See *Cleburne*, 473 U.S. at 439–42.

108. See *id.*

109. See *id.* at 440.

110. See *id.*

111. See *id.* at 440–41.

112. *Id.*

113. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

114. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

courts must uphold laws analyzed under rational-basis review if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.¹¹⁵ Although the Court has declared that, at a minimum, equal protection means that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,¹¹⁶ the Court will uphold seemingly unwise or improvident laws that advance a legitimate governmental interest,¹¹⁷ even if that interest was not the actual motivation for the law.¹¹⁸ One commentator has noted that rational-basis review represents such a deferential standard as to amount to little more than a “virtual rubber stamp.”¹¹⁹

B. The Court Analyzes Laws that Exhibit a Desire to Harm Gay Citizens and Other Politically Unpopular Minorities Under a More Searching Rational-Basis Review

The U.S. Supreme Court analyzes laws that exhibit a desire to harm politically unpopular minority groups under a heightened form of rational basis-review that does not defer to legislative judgment, but rather engages in a more searching inquiry as to whether a law rationally serves legitimate governmental interests.¹²⁰ The Court has not expressly identified its handiwork as heightened rational-basis review, but multiple U.S. Supreme Court Justices,¹²¹ federal courts,¹²² state courts,¹²³ and

115. *Id.* at 313–14.

116. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

117. *See Romer*, 517 U.S. at 632.

118. *See Beach Commc’ns, Inc.*, 508 U.S. at 313–15.

119. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997).

120. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring). Heightened rational-basis review has been called by other names, including rational-basis review with bite, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996), active rational-basis review, *Milner v. Apfel*, 148 F.3d 812, 816 (7th Cir. 1998), second order rational-basis review, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 458 (Marshall, J., with Brennan & Blackmun, JJ., concurring in part and dissenting in part), and more searching rational-basis review, *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring).

121. *See, e.g., Kelo v. City of New London*, ___ U.S. ___ (June 23, 2005), 125 S. Ct. 2655, 2669–70 (2005) (Kennedy, J., concurring) (“meaningful rational basis review”); *Lawrence*, 539 U.S. 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.”); *id.* at 604 (Scalia, J., with Rehnquist, C.J., & Thomas, J., dissenting) (stating that the *Lawrence* Court has “laid waste [to] the foundations of our rational-basis jurisprudence”); *Cleburne*, 473 U.S. at 451–55 (Stevens, J., with Burger, C.J., concurring) (arguing that the Court’s equal protection cases imply the existence of a continuum

scholars¹²⁴ have recognized the Court's use of a heightened form of rational-basis review, pointing to the Court's decisions in a line of equal protection cases that it could not have reached under traditional rational-basis review.¹²⁵ In *U.S. Department of Agriculture v. Moreno*,¹²⁶ *City of Cleburne v. Cleburne Living Center, Inc.*,¹²⁷ and *Romer*, the Court

between strict scrutiny and rational-basis review instead of a precise, three-tiered system); *id.* at 458 (Marshall, J., with Brennan & Blackmun, JJ., concurring in part and dissenting in part) ("To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must . . . be called 'second order' rational-basis review But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of [previous cases].").

122. See, e.g., *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998) (recognizing that the Court used heightened rational-basis review in *Romer* and *Cleburne*, but holding that the military context in the instant case foreclosed the normal application of heightened rational-basis review to laws targeting gay citizens when used to challenge the military's "Don't Ask, Don't Tell" policy); *Milner*, 148 F.3d at 816–17 (discussing the argument that the Court applied a form of heightened rational-basis review in *Cleburne* and *Romer*); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (recognizing the *Romer* Court's use of "extra-conventional" equal protection analysis); see also *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 377 F.3d 1275, 1292–96 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (arguing that Justice O'Connor's *Lawrence* concurrence correctly identifies the Court's use of heightened rational-basis review and applying that standard to the law at issue); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 959 (7th Cir. 2002) (Wood, J., dissenting) (arguing that the *Romer* Court recognized that gay citizens are protected as a class); *Philips v. Perry*, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting) (discussing the *Moreno-Cleburne-Romer* line of cases and arguing that governmental interests amounting to the accommodation of prejudice do not survive rational-basis review).

123. State courts have used heightened rational-basis review to reject state interests in laws that impose special burdens on or harm gay citizens. See, e.g., *State v. Limon*, 122 P.3d 22, 29–38 (Kan. 2005) (analyzing *Lawrence* in light of Justice O'Connor's concurrence, and holding that a statute punishing sodomy between opposite-sex adults and children less severely than between same-sex adults and children did not possess a rational relation to any governmental interest); *Marriage Cases*, No. 4365, 2005 WL 583129, at *2–3 (Cal. App. Dep't Super. Ct. Mar. 14, 2005) (holding that the limitation of marriage to opposite-sex couples is not rationally related to a legitimate state interest); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 960–65 (Mass. 2003) (same); *Baker v. State*, 744 A.2d 864, 872 n.5 (Vt. 1999) (same).

124. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16–3 (2d ed. 1988) (noting that the Court has covertly used a form of heightened scrutiny under the guise of rational-basis review in *Moreno* and *Cleburne*, among other cases); Sunstein, *supra* note 120, at 53–79 (noting that the rational-basis review in *Romer* functions more like intermediate scrutiny, and that *Romer* continues the *Moreno-Cleburne* line of case using rational-basis review "with bite"); see also Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 895 (2001); Jeremy B. Smith, Note, *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2794–800 (2005).

125. See Sunstein, *supra* note 120, at 59–64, 77–79.

126. 413 U.S. 528 (1973).

127. 473 U.S. 432 (1985).

confronted laws that demonstrated a desire to harm politically unpopular classes—“hippies,” mentally disabled citizens, and gay citizens, respectively—by imposing special burdens on the personal relationships of the identified minority group.¹²⁸ In all three cases, the Court overturned the challenged law despite the presence of conceivably rational justifications because each law displayed a strong animus against an unpopular, disliked, or feared group in relation to the tenuous interests asserted by the government.¹²⁹ As a result, the *Moreno-Cleburne-Romer* line of cases demonstrates that the Court applies heightened rational-basis review to laws that impose particular harm on the personal relationships of members of politically unpopular groups.¹³⁰

C. State Laws that Prevent the Government from Establishing a Wide Range of Rights for Gay Citizens Do Not Possess a Rational Relation to Legitimate Governmental Interests

State laws with a sweeping and comprehensive scope that prevent gay citizens from attaining a wide range of rights possessed by others through access to the traditional political processes violate equal protection principles.¹³¹ In *Romer*, the Court struck down Colorado’s Amendment 2, a state constitutional amendment that prevented all levels of state and local government from establishing any laws protecting gay

128. See *id.* at 435–37; *Romer*, 517 U.S. at 623–31; *Moreno*, 413 U.S. at 529–32; see also *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1292–95 (11th Cir. 2004) (Barkett, J., dissenting from the denial of rehearing en banc) (noting that the Court’s use of heightened rational-basis review involves scrutiny of laws that burden personal relationships, including living arrangements in *Moreno* and *Cleburne* and intimate same-sex relationships in *Romer*).

129. See *Romer*, 517 U.S. at 635–36 (holding that government interests in associational freedoms and the conservation of scarce resources could not rationally justify a state constitutional amendment that prohibited the passage of laws protecting gay citizens from discrimination); *Cleburne*, 473 U.S. at 447–50 (holding that a city zoning ordinance excluding homes for mentally retarded citizens could not be rationally justified by interests in safety, legal responsibility, neighborhood density, or congestion); *Moreno*, 413 U.S. at 535–38 (holding that a regulation excluding non-family members of a household from a food stamp program could not be rationally justified by the governmental interest in minimizing fraud).

130. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring); Sunstein, *supra* note 120, at 59–64, 77–79. Even critics of heightened rational-basis review cannot dispute the Court’s final disposition of *Moreno*, *Cleburne*, and *Romer*. See *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). This Comment subscribes to the theory that the Court uses heightened rational-basis review to analyze laws that target politically unpopular groups, but the conclusions of Part IV would be the same even if based exclusively on the Court’s holding in *Romer* because anti-gay partnership laws so closely approximate the law in *Romer*. See *infra* Part IV.

131. See *Romer*, 517 U.S. at 635.

citizens from discrimination unless the state constitution were first amended.¹³² In its analysis, the Court focused both on the wide range of laws that would be void under Amendment 2 and on the fact that all levels of state government were bound by the amendment.¹³³ Ultimately, the Court concluded that Amendment 2 failed rational-basis review because the extensive harm caused to gay citizens contradicted any rational relation to the alleged state interests.¹³⁴

The *Romer* Court examined Amendment 2 under “rational-basis review,” but declined to accept the legislative judgment of the State and engaged in its own evaluation of the asserted state interests in associational freedom and the conservation of scarce resources.¹³⁵ Despite the fact that both associational freedom and the conservation of resources represent legitimate governmental interests, the Court held that the sheer breadth of Amendment 2 contradicted all rational relation to those interests.¹³⁶ Accordingly, the Court concluded that Amendment 2 could only have been born and sustained through animus against gay citizens.¹³⁷ The Court overturned Amendment 2 as a violation of equal protection principles because the amendment could not be tied to any legitimate governmental interest.¹³⁸

By contrast, the mere fact that a law displays animus toward a politically unpopular class does not necessarily mandate its invalidation if the law also demonstrates a rational relation between its effects and legitimate governmental interests.¹³⁹ In *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,¹⁴⁰ the U.S. Court of Appeals for the Sixth Circuit distinguished *Romer* and upheld a city charter amendment that banned anti-discrimination laws protecting gay citizens because the local scope of the law could be seen as rationally related to legitimate governmental interests.¹⁴¹ The city charter amendment prohibited the same range of anti-discrimination laws as Amendment 2,

132. *Id.* at 627, 635–36.

133. *See id.* at 627–31.

134. *Id.* at 635.

135. *See id.* at 631–36.

136. *Id.* at 635.

137. *Id.* at 634–35.

138. *Id.* at 635–36.

139. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300–01 (6th Cir. 1997).

140. 128 F.3d 289 (6th Cir. 1997).

141. *Id.* at 301.

but only removed power from the city government as “local legislation of purely local scope.”¹⁴² In its analysis, the Sixth Circuit conceded that a state law preventing local governments from granting rights to gay citizens could not be justified by associational freedoms or cost saving, but held that a purely local law could possess a rational fit to those interests.¹⁴³ Thus, the *Equality Foundation* court distinguished *Romer* based primarily on the levels of government affected by the law.¹⁴⁴

In sum, equal protection analysis presumes the validity of laws if they bear a rational relation to legitimate governmental interests, provided that they do not target a protected class or burden a fundamental right. However, when a law exhibits a desire to harm a politically unpopular group, the Court applies a more searching form of rational-basis review that does not defer to legislative judgment, but rather requires a closer examination as to whether the law is rationally related to legitimate governmental interests or whether it is motivated solely by animus. Although gay citizens have not been recognized as a protected class, the Court analyzes laws that exhibit a desire to harm gay citizens under heightened rational-basis review. State laws that prohibit all potential for gay citizens to obtain protection from discrimination violate equal protection principles because their wide scope cannot be justified by legitimate governmental interests.

IV. CLASS I LAWS VIOLATE EQUAL PROTECTION, BUT CLASS II LAWS MAY SURVIVE JUDICIAL REVIEW

Established principles of equal protection analysis require invalidation of Class I anti-gay partnership laws because such laws inflict state-wide harm on gay citizens across a broad range of potential partnership rights in a manner that defies any rational relation to legitimate governmental interests.¹⁴⁵ Class I constitutional amendments violate equal protection principles in the same manner as the amendment

142. *Id.* at 300.

143. *See id.* But see *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. 94-3855, 1998 WL 101701, at *4-5 (6th Cir. Feb. 5, 1998) (Gilman, J., joined by five judges, dissenting from the denial of rehearing en banc) (criticizing the majority’s reasoning and arguing that the *Equality Foundation* court erred in holding that the local law could bear a rational relation to legitimate interests based on its direct effects on citizens because Amendment 2 also had similarly direct effects on citizens).

144. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997).

145. *Cf. Romer v. Evans*, 517 U.S. 620, 635 (1996).

at issue in *Romer*¹⁴⁶ because the sweeping harm caused to gay citizens cannot be justified by state interests in heterosexual family structures or child rearing. Class I statutes similarly violate equal protection principles.¹⁴⁷ Notably, the state-wide scope of such statutes much more closely approximates the amendment invalidated in *Romer*¹⁴⁸ than the municipal law upheld in *Equality Foundation*.¹⁴⁹ In contrast, Class II laws likely survive equal protection analysis because they more closely serve asserted state interests in promoting family structure, child rearing, and protecting the institution of marriage.¹⁵⁰

A. Anti-Gay Partnership Laws Should Be Analyzed Under Heightened Rational-Basis Review Because Such Laws Exhibit a Desire to Harm Gay Citizens

Anti-gay partnership laws should be analyzed under heightened rational-basis review because they exhibit a desire to harm gay citizens by imposing special burdens on the relationships of gay citizens.¹⁵¹ Many anti-gay partnership laws explicitly single out gay citizens by targeting same-sex couples, while other laws target unmarried couples in general.¹⁵² In either case, anti-gay partnership laws cause particular harm to the intimate relationships of gay citizens because same-sex couples do not have the option to access important rights, benefits, and obligations through marriage.¹⁵³ As a result, even though parts of some anti-gay partnership laws appear to apply neutrally to all unmarried couples, the laws as a whole exhibit a particular desire to harm gay citizens because they effectively foreclose all means of accessing marital rights for same-sex couples, but not for opposite-sex couples.¹⁵⁴

146. *Cf. id.*

147. *Cf. id.*

148. *Cf. id.* at 627.

149. *Equality Found.*, 128 F.3d at 301.

150. *See infra* Part IV.D.

151. *Cf. Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

152. *Compare, e.g., GA. CONST. art. I, § IV ¶ I* ("persons of the same sex"), *with ARK. CONST. amend. 83, § 2* ("unmarried persons").

153. *See N.J. STAT. ANN. § 26:8A-2(e)* (West 2005) (recognizing the heightened importance of domestic partnerships to same-sex couples because same-sex couples, unlike opposite-sex couples, do not have the option of accessing partnership rights through marriage).

154. *Cf. Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1002 (D. Neb. 2005) (concluding that because the Nebraska law goes so far beyond defining marriage the intent and purpose of the law can only be based on animus against gay citizens), *argued*, No. 05-2604 (8th Cir.

The strong implication of animus underlying anti-gay partnership laws corresponds to the implication of animus underlying Amendment 2 in *Romer*.¹⁵⁵ Just as Amendment 2 removed all power from the government to grant special rights for gay citizens, so too anti-gay partnership laws remove all power from governmental entities to establish certain same-sex partnership rights.¹⁵⁶ Furthermore, because anti-gay partnership restrictions function in conjunction with the prohibition of same-sex marriage,¹⁵⁷ the additional burdens imposed by anti-gay partnership laws raise an added inference of animus. The existence of provisions barring same-sex marriage undermines the justifications for anti-gay partnership laws because marriage has already been expressly “protected” from same-sex couples.¹⁵⁸ As a result, the additional measures of anti-gay partnership laws suggest a desire to harm same-sex couples and their families instead of a desire to protect important state interests.¹⁵⁹

B. Class I Constitutional Amendments Violate Equal Protection Because Their Broad Scope Cannot Be Rationally Justified by Legitimate Governmental Interests

Class I constitutional amendments violate equal protection principles because the breadth of the harm caused to gay citizens exceeds any rational relation to legitimate state interests.¹⁶⁰ The harm caused by Class I constitutional amendments directly parallels the harm caused by the constitutional amendment at issue in *Romer*.¹⁶¹ In *Romer*, the “sweeping and comprehensive” effects of the constitutional amendment arose both from the total powerlessness of state and local government and from the

Feb. 13, 2006); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (noting that a state possesses a legitimate interest in denying partnership rights to couples that could otherwise choose to marry, but emphasizing that this justification does not extend to denying partnership rights to same-sex couples if they have been forbidden to marry).

155. See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

156. See *supra* notes 57, 75; 16 AM. JUR. 2D, *supra* note 61; 56 AM. JUR. 2D, *supra* note 61; 72 AM. JUR. 2D, *supra* note 61.

157. See NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 1.

158. See *Bruning*, 368 F. Supp. 2d at 1004 (noting that the total prohibition of any establishment of civil unions or other same-sex partnerships does not advance a state’s interest in the preservation of marriage and may, in fact, undermine it).

159. See *supra* notes 93–96 and accompanying text.

160. Cf. *Romer*, 517 U.S. at 635.

161. See *Bruning*, 368 F. Supp. 2d at 1002.

wide range of laws prohibited by the amendment.¹⁶² Similarly, Class I constitutional amendments possess an expansive scope in both respects. Class I constitutional amendments remove power from all levels of state government in the same manner as the *Romer* constitutional amendment.¹⁶³ Moreover, this powerlessness extends across the full spectrum of potential same-sex partnership rights, from comprehensive civil unions to limited domestic partnerships to solitary rights.¹⁶⁴ Both dimensions of harm impose significant burdens on the ability of gay citizens to attain same-sex partnership rights.¹⁶⁵

The expansive negative effects of Class I constitutional amendments cannot be justified by state interests in marriage, family structure, or child rearing just as the broad scope of the constitutional amendment in *Romer* could not be justified by asserted state interests.¹⁶⁶ The *Romer* Court held that Colorado's interests in associational liberty and the conservation of resources could not rationally support the extensive harm caused by Amendment 2 because the scope of its effects so far overshadowed the minimal interests.¹⁶⁷ Likewise, the breadth of harm caused by Class I constitutional amendments cannot be rationalized as a means to further state interests in preserving marriage or preferred family structures.¹⁶⁸ First, the Class I prohibition of all partnership rights is not necessary to protect the traditional institution of marriage as a union between a man and a woman because same-sex couples have already been barred from marrying.¹⁶⁹ Second, Class I constitutional amendments likely do not alter the incentives for gay citizens to enter into heterosexual relationships or state-preferred child rearing structures.¹⁷⁰ Thus, Class I constitutional amendments possess only a

162. See *Romer*, 517 U.S. at 627.

163. See *Bruning*, 368 F. Supp. 2d at 997, 1002 (finding Nebraska's constitutional amendment indistinguishable from Amendment 2); 16 AM. JUR. 2D, *supra* note 61.

164. See *Bruning*, 368 F. Supp. 2d at 1004; see also Neb. Op. Att'y Gen. No. 03004, 2003 WL 21207498, at *1-2 (Mar. 10, 2003) (discussing rights related to disposition of remains).

165. See *supra* Part II.A.

166. See *Bruning*, 368 F. Supp. 2d at 1002.

167. See *Romer*, 517 U.S. at 635.

168. See *Bruning*, 368 F. Supp. 2d at 1002; cf. *Romer*, 517 U.S. at 635.

169. See *Bruning*, 368 F. Supp. 2d at 1004 (noting that the total prohibition of any establishment of civil unions or other same-sex partnerships does not advance a state's interest in the preservation of marriage and may, in fact, undermine it); cf. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *8 (Wash. Super. Ct. Aug. 4, 2004) (rejecting the basic assertion that permitting same-sex couples to marry would threaten marriage).

170. Cf. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003) (rejecting the

minimal connection to asserted legitimate governmental interest in contrast to the substantial harm they cause to gay citizens.¹⁷¹ This disparity mandates the invalidation of Class I constitutional amendments under equal protection analysis because the breadth of harm caused by the laws cannot be rationally supported by such a negligible relation to asserted state interests.¹⁷²

C. Class I Statutes Violate Equal Protection Principles Because Their Broad Scope Exceeds All Rational Relation to Legitimate Governmental Interests

Class I statutes cause less extensive harm to gay citizens than Class I constitutional amendments, but still violate equal protection principles because their effects are too broad to be rationally related to legitimate governmental interests.¹⁷³ The scope of Class I statutes mirrors the scope of Class I constitutional amendments with respect to the types of partnership rights prohibited, but differs with respect to the levels of government affected.¹⁷⁴ Whereas Class I constitutional amendments remove power from all levels of state government, Class I statutes bind the actions of local governments, state agencies, courts, and the executive branch, but do not restrict the actions of state legislatures to amend or rescind the laws.¹⁷⁵

The effects of Class I statutes on the political process more closely approximate the scope of the constitutional amendment struck down in *Romer* than the city charter amendment upheld in *Equality Foundation* because Class I statutes cause expansive, state-wide harm to gay

contention that preventing same-sex couples from marrying would increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children); *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999) (stating that preventing same-sex couples from marrying neither promotes goals of procreation nor protects children); *Andersen*, 2004 WL 1738447, at *9–10 (emphasizing that there is no reasonable expectation that were same-sex couples permitted to marry, married fathers and mothers would abdicate their parental responsibilities or that young, would-be parents would defect from the ranks of heterosexuals).

171. See *Bruning*, 368 F. Supp. 2d at 1004.

172. Cf. *Romer*, 517 U.S. at 635.

173. Cf. *id.*

174. Compare 16 AM. JUR. 2D, *supra* note 61 (noting that state constitutions bind all levels of state government), with 72 AM. JUR. 2D, *supra* note 61 (noting that state legislatures have plenary law-making power, except as limited by constitutional provisions, and that one legislature cannot restrict the power of the succeeding legislature).

175. See 16 AM. JUR. 2D, *supra* note 61; 56 AM. JUR. 2D, *supra* note 61; 72 AM. JUR. 2D, *supra* note 61; SINGER, *supra* note 61.

citizens.¹⁷⁶ The Sixth Circuit rested its decision in *Equality Foundation* on the fact that the charter amendment represented “local legislation of purely local scope,”¹⁷⁷ while Amendment 2 in *Romer* embodied state-wide legislation at the highest level.¹⁷⁸ Class I statutes more closely resemble Amendment 2 because they remove all power from local governments to pass any same-sex partnership rights, and also restrict the actions of state agencies, courts, and the executive branch.¹⁷⁹

The extent of harm caused by Class I statutes cannot be rationally justified by alleged state interests in the family, child rearing, or protecting the institution of marriage.¹⁸⁰ Although Class I statutes do not replicate the full harm of Class I constitutional amendments, Class I statutes violate equal protection principles in the same manner as Class I constitutional amendments because both Class I statutes and Class I constitutional amendments remove power from most levels of state and local government and prohibit the identical range of same-sex relationship rights.¹⁸¹ In *Equality Foundation*, the Sixth Circuit conceded that state laws removing power from all local governments to pass special rights for gay citizens could not be rationally justified by reference to associational freedoms or the conservation of resources.¹⁸² In similar fashion, Class I statutes that remove all power from local governments, state agencies, courts, and the executive branch to grant any same-sex partnership rights cannot be rationally supported by minimally-related interests.¹⁸³ As with Class I constitutional amendments, Class I statutes possess only a tenuous link to any asserted interests.¹⁸⁴ Thus, Class I statutes violate equal protection principles because their extensive scope cannot be rationally justified by any legitimate governmental interests.¹⁸⁵

176. Cf. *Romer*, 517 U.S. at 627; *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300–01 (6th Cir. 1997).

177. *Equality Found.*, 128 F.3d at 300.

178. See *Romer*, 517 U.S. at 623–24.

179. See *supra* Part II.A.

180. Cf. *Romer*, 517 U.S. at 635.

181. Cf. *id.*

182. See *Equality Found.*, 128 F.3d at 300.

183. Cf. *Romer*, 517 U.S. at 635; *Equality Found.*, 128 F.3d at 300.

184. Cf. *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1004 (D. Neb. 2005), *argued*, No. 05-2604 (8th Cir. Feb. 13, 2006).

185. Cf. *Romer*, 517 U.S. at 635.

D. Class II Laws May Survive Equal Protection Analysis Because Their Scope More Closely Serves the Asserted Interests Underlying the Decision to Prohibit Same-Sex Couples from Marrying

In contrast to Class I laws, Class II laws may be consistent with equal protection principles because the range of same-sex partnership rights prohibited more closely fits asserted state interests in protecting the traditional institution of marriage, even though such laws bind the actions of all or most levels of state government.¹⁸⁶ The key difference between Class I laws and Class II laws lies in the range of same-sex partnership rights prohibited by the laws rather than the levels of government affected by the laws.¹⁸⁷ Whereas Class I laws prohibit all partnership rights for same-sex couples, Class II laws prohibit only comprehensive partnership rights.¹⁸⁸ In both *Granholtm* and *Lowe*, state courts held that anti-gay partnership laws permitted cities to establish domestic partnerships because limited employment benefits did not approximate the extensive combination of rights associated with marriage.¹⁸⁹ Thus, state and local governments could establish laws granting many partnership rights for same-sex couples, even if they could not extend the full benefits of civil unions to same-sex couples.¹⁹⁰

Courts may view Class II laws as rationally related to legitimate governmental interests to a similar degree as laws barring same-sex couples from marrying.¹⁹¹ Some courts have concluded that the decision to exclude same-sex couples from marriage can be justified by interests in family structure and child rearing.¹⁹² These justifications correspond directly to Class II laws because civil unions represent marriage in all

186. See, e.g., FLA. STAT. § 741.212(1) (2005), interpreted by *Lowe v. Broward County*, 766 So. 2d 1199, 1208 (Fla. Dist. Ct. App. 2000) (permitting domestic partnerships); cf., e.g., *Equality Found.*, 128 F.3d at 300–01; *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308–09 (M.D. Fla. 2005).

187. Compare *Bruning*, 368 F. Supp. 2d at 995–97 (discussing the wide range of same-sex relationships called into question by the law at issue), with *Lowe*, 766 So. 2d at 1208 (holding that the statute at issue does not prohibit domestic partnerships).

188. See, e.g., *Bruning*, 368 F. Supp. 2d at 996–97 (noting that Nebraska's law prohibits any legislation seeking to extend any benefits once incident to or dependent on the marital relationship to a same-sex couple); *Lowe*, 766 So. 2d at 1208 (holding that the statute at issue does not prohibit domestic partnerships).

189. See *id.*; *Nat'l Pride at Work, Inc. v. Granholtm*, No. 05-368-CZ, 2005 WL 3048040, at *7 (Mich. Cir. Ct. Sept. 27, 2005).

190. See *Lowe*, 766 So. 2d at 1207–08.

191. Cf., e.g., *Wilson*, 354 F. Supp. 2d at 1308–09.

192. See, e.g., *id.*

but name.¹⁹³ As a result, the creation of civil unions for same-sex couples would cause a substantially similar effect on the underlying family and child rearing interests that states have used to justify prohibiting same-sex couples from marrying.¹⁹⁴ Courts that embrace these rationales in the context of banning same-sex marriage could extend them to uphold anti-gay partnership laws under equal protection analysis.¹⁹⁵

In the alternative, courts could potentially uphold Class II laws as supporting a state interest in maintaining civil marriage as the primary means of accessing marital rights.¹⁹⁶ States may possess a legitimate interest in withholding partnership rights to couples that could otherwise choose to marry.¹⁹⁷ However, the use of this rationale to justify anti-gay partnership laws would weaken a state's justifications for barring same-sex couples from marrying because same-sex couples would be denied all possible access to comprehensive marital rights.¹⁹⁸

Ultimately, Class II laws may survive equal protection analysis because the more limited range of same-sex relationships prohibited by such laws does not contradict all rational relation to potentially legitimate governmental interests.¹⁹⁹ Despite the fact that Class II laws operate at a state-wide level, their scope does not so totally eclipse alleged state interests as to contradict all rational relation.²⁰⁰ Although many courts reject the validity of these interests, courts that have upheld laws barring same-sex marriage could also conclude that Class II laws bear a rational relation to state interests in family structure, child rearing, or the protection of marriage as an institution.²⁰¹

193. See VT. STAT. ANN. tit. 15, § 1204 (2002) (stating that parties to a civil union shall have all the benefits, protections, and responsibilities under law as are granted to spouses in a marriage).

194. See *supra* Part II.D.

195. Cf., e.g., *Wilson*, 354 F. Supp. 2d at 1308–09.

196. Cf. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003) (noting that individuals who have the choice to marry, but who choose not to, may properly be denied the legal benefits of marriage).

197. See *id.*

198. See *id.*

199. Cf. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

200. See, e.g., FLA. STAT. § 741.212(1) (2005), interpreted by *Lowe v. Broward County*, 766 So. 2d 1199, 1208 (Fla. Dist. Ct. App. 2000) (permitting domestic partnerships); cf., e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300–01 (6th Cir. 1997); *Wilson*, 354 F. Supp. 2d at 1308–09.

201. Cf., e.g., *Wilson*, 354 F. Supp. 2d at 1308–09.

V. CONCLUSION

Anti-gay partnership laws prevent state legislatures and local governments from granting rights, benefits, and obligations associated with marriage to same-sex couples. In practical effect, these laws exclude gay citizens from the traditional political processes used to attain partnership rights, and expose same-sex relationships to particular harm. These laws come squarely into conflict with the Equal Protection Clause of the Fourteenth Amendment, which requires that no person be denied the equal protection of the laws. Although the Equal Protection Clause does not prevent all legislative classifications, it does require that such classifications demonstrate a rational relation to legitimate state interests. However, when a law exhibits a desire to harm a politically unpopular group like gay citizens, the Court turns a more searching and demanding gaze on the alleged justifications underlying the law. Courts analyze anti-gay partnership laws under heightened rational-basis review because such laws cause particular harm to gay citizens. Class I constitutional amendments and Class I statutes, which prohibit the creation of any and all same-sex partnership rights, violate equal protection analysis because their broad and sweeping scope contradicts any rational relation to state interests in marriage and family. In contrast, Class II laws, which prohibit the establishment of only comprehensive same-sex partnership rights, may survive equal protection analysis because the more narrow prohibition of civil unions more closely serves those same state interests. Ultimately, equal protection analysis resists the sweeping reach and implied malice of all anti-gay partnership laws, but only requires the invalidation of Class I laws as beyond all rational relation.

