When *Romer* Met *Feeney*: Why the Second Sentence of the Ohio Marriage Amendment Violates Equal Protection

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WHEN ROMER MET FEEONEY: WHY THE SECOND SENTENCE OF THE OHIO MARRIAGE AMENDMENT VIOLATES EQUAL PROTECTION

On November 2, 2004, Issue 1, known as the Ohio Marriage Amendment, passed with 62% of the popular vote. The Amendment reads:

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

In the wake of Goodridge v. Department of Public Health, which legalized same-sex marriage in Massachusetts, and Baker v. State, which mandated civil unions in Vermont, same-sex marriage opponents argued that the Ohio Marriage Amendment was necessary to prevent the march of same-sex marriage and civil unions into the Midwest. The passage of the Ohio Marriage Amendment achieved this goal. Unless the Amendment is either repealed or declared unconstitutional, couples in same-sex marriages and civil unions cannot receive legal recognition in Ohio.

2 OHIO CONST. art. XV, § 11.
4 744 A.2d 864 (Vt. 1999).
5 To date, no state that has adopted a constitutional marriage amendment has decided to repeal it. However, a district court recently held that California’s marriage amendment violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) (permanently enjoining the enforcement of Proposition 8, California’s marriage amendment). The Court of Appeals for the Ninth Circuit has stayed the district court’s opinion pending appeal. Perry v. Schwarzenegger, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).
Despite the certainty the Amendment brought to same-sex marriages and civil unions, the fate of Ohio’s domestic partnership registries and benefits programs is in legal limbo. David R. Langdon is the author of the Ohio Marriage Amendment and serves as counsel to Citizens for Community Values (“CCV”), the main sponsors of the Amendment. David R. Langdon has also represented the plaintiffs in all three cases challenging the constitutionality of Ohio’s domestic partnership programs. In *Brinkman v. Miami University*, former Ohio State Representative Tom Brinkman, a close associate of CCV President Phil Burress, claimed that Miami University’s same-sex domestic partnership benefits policy violated the second sentence of the Ohio Marriage Amendment. In *City of Cleveland Heights ex rel. Hicks v. City of Cleveland Heights*, former Cleveland Heights Councilman Jimmie Hicks challenged the constitutionality of Cleveland Heights’ domestic partner registry under the Ohio Home Rule Amendment. In *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, Langdon argued that Ohio’s Home Rule Amendment and the second sentence of the Marriage Amendment prohibited the City of Cleveland from maintaining its domestic


9 Id. at *1. Prior to suing Miami University over its same-sex domestic partnership program, former State Representative Brinkman also served as an intervening defendant in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997) (holding that a Cincinnati charter amendment prohibiting gays, lesbians, and bisexuals from receiving antidiscrimination protection did not violate the Equal Protection Clause of the Fourteenth Amendment). *Equal Rights, Not Special Rights* (“ERNSR”) was another intervening defendant in this case. *Id.* at 289. Phil Burress, the head of CCV, which sponsored Ohio’s Marriage Amendment, is also the head of ERNSR. See Glassman, *supra* note 6 (stating that Burress is the leader of both ERNSR and CCV).


partner registry. Although the courts in all three of these cases held in favor of the defendants, this area of Ohio law is not yet settled.

This Note asserts that the second sentence of the Ohio Marriage Amendment is a violation of the Equal Protection Clause of the Fourteenth Amendment. Instead of arguing that Ohio’s domestic partnership registries and benefits programs are compatible with the Ohio Marriage Amendment, which may very well be the case, this Note argues that the second sentence of the Marriage Amendment is a sophisticated form of discrimination specifically targeting gays and lesbians, and not, as the Amendment’s text states, “unmarried individuals.”

This Note proceeds as follows: Part I lays out the litigation inspired by the Ohio Marriage Amendment. Part II explains the differences between civil unions and domestic partnership programs across the country and in Ohio. Part III provides a brief survey of state marriage amendments. Part IV discusses United States Supreme Court precedent concerning LGBT rights and equal protection analysis in cases with facially neutral laws. In the first half of this section, this Note looks at the impact of Romer v. Evans and Lawrence v. Texas, two landmark cases that address LGBT legal issues. The second half of this section discusses Washington v. Davis, Village of Arlington Heights v. Metropolitan Housing

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12 See Cleveland Taxpayers, 2010 Ohio App. LEXIS 3981, at *16, 24 (holding that Cleveland’s domestic partner registry ordinance did not violate the Ohio Marriage Amendment); Brinkman, 2007 WL 2410390, at *13 (rejecting a challenge to Miami University’s policy of providing employee health benefits for same-sex partners because the party bringing the challenge lacked standing); Hicks, 832 N.E.2d at 1277–78 (upholding a domestic partner registry ordinance because it was within the municipality’s home rule powers to enact the ordinance).

13 See infra Part I (discussing case law arising from the enactment of the Ohio Marriage Amendment).

14 See Cleveland Taxpayers, 2010 Ohio App. LEXIS 3981, at *16 (“We find that Cleveland’s domestic partnership registry ordinance does not violate [Ohio’s] Marriage Amendment.” (citation omitted)); see also Mark Strasser, State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations, 25 LAW & INEQ. 59, 84 (2007) (“Just as [Ohio’s Marriage Amendment] does not preclude the state from treating an unmarried person like a spouse in any respect, the amendment does not preclude the state from treating an unmarried person like a spouse in any particular respect, e.g., from enjoying benefits traditionally associated with marriage.”).

15 517 U.S. 620, 635–36 (1996) (holding that Colorado’s Amendment 2, which prohibited gays and lesbians from receiving the protection of existing antidiscrimination laws or from creating new antidiscrimination laws, violated the Equal Protection Clause of the Fourteenth Amendment).


17 426 U.S. 229, 246 (1976) (holding that a police recruitment test that had a discriminatory impact against blacks was nevertheless constitutional because the test was not
Development Corp.,\textsuperscript{18} and Personnel Administrator v. Feeney,\textsuperscript{19} three cases where the Supreme Court analyzed facially neutral laws that had a disproportionate impact upon either racial minorities or women. In these cases, the Supreme Court held that a facially neutral law would be unconstitutional only if 1) the law had a disproportionate impact on an unnamed group and 2) the law was always intended to harm that unnamed group. Although the Supreme Court upheld the challenged laws in \textit{Davis}, \textit{Arlington Heights}, and \textit{Feeney}, these cases laid the groundwork for a finding that the second sentence of the Ohio Marriage Amendment is unconstitutional.

Part V argues that the removal of Ohio’s domestic partnership registries and benefits programs would have a disparate impact on gays and lesbians. This section establishes that same-sex couples make up the majority of the couples in Ohio’s domestic partnership registries and public health benefits programs.

Part VI argues that Ohio’s Marriage Amendment was always intended to disproportionately impact same-sex couples, and not just unmarried individuals. This conclusion is supported under three different theories. First, Section A argues that attacks against domestic partnership programs, even those that are gender-neutral, inherently target gays and lesbians. To accomplish this objective, this Note analyzes the history of domestic partnership programs in the United States and Ohio, and determines that the primary purpose of these programs is to benefit gays and lesbians who are prohibited from marrying. Therefore, campaigns against domestic partnership programs are necessarily campaigns against these programs’ intended beneficiaries: same-sex couples.

Second, Section B of Part VI contends that CCV and the Ohio Campaign to Protect Marriage (“OCPM”), a political action committee controlled by CCV, misled Ohio voters about the Amendment’s scope and abused Ohio’s ballot initiative process. Section B is comprised of three subsections. The first subsection chronicles the vulnerabilities and criticisms of the ballot initiative process, namely that

\textsuperscript{18} 429 U.S. 252, 270–71 (1977) (holding that a village did not unconstitutionally discriminate against minorities when it refused to rezone a parcel of land necessary for the development of a mostly minority housing project).

\textsuperscript{19} 442 U.S. 256, 279–81 (1979) (holding that a Massachusetts statute giving absolute preference to veterans in civil service jobs did not discriminate against women or violate the Fourteenth Amendment’s Equal Protection Clause).
1) the Founding Fathers disapproved of direct democracy because it facilitated a tyranny of the majority;

2) ballot initiatives, particularly when they concern the rights of minorities, are often created by special interest groups who wish to circumvent the checks and balances of representative democracy; and

3) ballot initiative proponents, who are not held politically accountable through elections, often try to confuse and manipulate voters into passing otherwise obtuse and ambiguous legislation.

The second subsection establishes that CCV bears animus towards gays and lesbians and openly advocates for state-sponsored discrimination against Ohio’s LGBT community. Although CCV claims it is not “against” same-sex couples, this Note shows that CCV advocated the same opinions against gays and lesbians as Colorado for Family Values (“CFV”), the sponsors of Colorado’s animus-driven Amendment 2.

The third subsection uses CCV’s own advertisements and statements to show that it confused and manipulated the public over Issue 1’s impact. Specifically, this Note demonstrates that CCV always intended to attack Ohio’s domestic partnership programs with the Marriage Amendment, but that CCV never divulged this intent in its advertisements. Moreover, CCV’s advertisements either confused voters about the fate of Ohio’s domestic partnership programs, or explicitly asserted that Issue 1 would not affect these institutions.

Finally, Section C of Part VI argues that if Ohio’s public domestic partnership programs are ever declared unconstitutional, then the effects of this decision would be so broad and harmful to Ohio’s LGBT community that the second sentence of the Marriage Amendment would automatically betray an intentional, and unconstitutional, antigay animus. If Ohio’s domestic partnership programs are invalidated under the second sentence of the Ohio Marriage Amendment, then all of Ohio’s public institutions would be prohibited from recognizing same-sex couples, even down to the municipal level. This end result would have significant consequences for same-sex couples, forcing the State to treat them as legal pariahs. This total prohibition of same-sex-couple recognition would prove that the Ohio Marriage Amendment contains antigay animus because 1) under Lawrence, gays and lesbians have a Fourteenth Amendment right to form same-sex couples, 2) same-sex couples can never leave
the “unmarried class” under Ohio law, and 3) under Romer, such broad and far reaching effects against gays and lesbians throughout the entire State of Ohio cannot be a legitimate governmental interest.

Part VII concludes that because the invalidation of Ohio’s domestic partnership programs would disproportionately impact same-sex couples, and because the purpose of the second sentence of the Ohio Marriage Amendment is to harm Ohio’s LGBT community, the second sentence of the Ohio Marriage Amendment must violate the Equal Protection Clause of the Fourteenth Amendment.

I. LITIGATION RESULTING FROM THE OHIO MARRIAGE AMENDMENT

Shortly after Ohio adopted its Marriage Amendment in 2004, the legality of Ohio’s domestic violence statute, 20 domestic partnership benefits programs, 21 and domestic partnership registries were thrown into doubt. 22 In 2005, a trial court in State v. Burk 23 declared that Ohio’s domestic violence law, which grants domestic violence protection to “a person living as a spouse,” 24 violated the second sentence of the Ohio Marriage Amendment. 25 Although this decision was later reversed at the appellate level, 26 it opened the floodgates for similar litigation and caused a split amongst Ohio’s appellate courts. 27

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21 See Brinkman v. Miami Univ., No. CA2006-12-313, 2007 WL 2410390 (Ohio Ct. App. Aug. 27, 2007) (determining whether Miami University, a public institution, had a same-sex domestic partner benefits program that violated the Ohio Marriage Amendment).


25 Burk, 2005 WL 786212, at *8 (holding that the Ohio domestic violence statute violated Ohio’s Marriage Amendment “insofar as it recognizes as a ‘family or household member’ a person who is not married to the offender but is ‘living as a spouse’”).


In July 2007, in *State v. Carswell*, the Supreme Court of Ohio resolved the split and held that Ohio’s domestic violence statute did not violate the second sentence of the Ohio Marriage Amendment. In coming to its conclusion, the Court announced that “the second sentence of the amendment means the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage—a marriage substitute.” Despite the boldness of this declaration, which appears to protect Ohio’s domestic partnership programs and limit the scope of the Amendment’s second sentence only to “marriage substitutes,” there is cause for concern among Ohio’s gay-rights activists.

First, in *Carswell*, the Court indicated in a footnote that Ohio’s domestic partnership benefits programs might violate the Marriage Amendment. Citing Ohio Revised Code Section 3101.01(C)(3), the Court noted, “regarding benefits for government employees . . . benefits for marriage partners should not be conferred upon individuals cohabiting out of wedlock, whatever their gender.”

Second, the Supreme Court of Ohio has the power to find that Ohio’s domestic partnership programs violate the Ohio Constitution. To that end, other state supreme courts have been valid under the laws of this state.

Ohio Rev. Code Ann. § 3101.01(C)(3)(a)–(b) (West 2010). There is no Ohio law stating that employer-provided health insurance is a right or benefit limited only to married couples.

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28 871 N.E.2d 547 (Ohio 2007).
29 Id. at 554.
30 Id. at 551.
31 See id. at 551 n.1 (describing the intent of the Ohio Marriage Amendment).
32 Id. at 551–52 n.1. However, this argument can be countered by carefully reading Ohio Revised Code Section 3101.01(C)(3)(a) and (b), which states:

Nothing in division (C)(3) of this section shall be construed to do either of the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code;

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

See *Carswell*, 871 N.E.2d at 549-50 (noting that although statutes are presumed to be constitutional, the Ohio Supreme Court has the authority to ultimately declare a statute unconstitutional).
ruling on the constitutionality of domestic partnership programs under their own state constitutions. For example, in 2008, the Supreme Court of Michigan in *National Pride at Work, Inc. v. Governor of Michigan*[^34] broadly interpreted the Michigan Marriage Amendment, which is very similar to the Ohio Marriage Amendment and was likewise adopted via ballot initiative in 2004.[^35] The Supreme Court of Michigan held that the state could not grant health insurance benefits to the same-sex partners of gay employees.[^36] Additionally, Wisconsin courts are currently hearing a challenge to the state’s domestic partnership registry. Wisconsin Family Action, the proponents of the Wisconsin Marriage Amendment and plaintiffs to the suit, claim that the registry violates the second sentence of the Wisconsin Marriage Amendment.[^37] Further, Wisconsin Governor Scott Walker has stated that he believes the domestic partnership registry is unconstitutional; on May 13, 2011 he filed a motion to stop the state’s defense of its registry.[^38]

Finally, as evidenced by the litigation in *Brinkman v. Miami University*,[^39] *City of Cleveland Heights ex rel. Hicks v. City of Cleveland Heights*,[^40] and *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*,[^41] Carswell has not stopped CCV, the main sponsors of the Ohio Marriage Amendment,[^42] and David R. Langdon—author of the Amendment and counsel to CCV[^43]—from

[^34]: 748 N.W.2d 524 (Mich. 2008).
[^35]: *Id.* at 529. Compare *OHIO CONST.* art. XV, § 11 (“This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”), with *MICH. CONST.* art I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).
[^36]: *Nat’l Pride at Work*, 748 N.W.2d at 543. However, public employers in Michigan have found a way around the Michigan Supreme Court’s ruling by augmenting their benefits policies. Instead of granting health benefits based upon the existence of a relationship between employees and their partners, certain public employers in Michigan now offer health benefits to any person who has resided with a public employee for at least one year. See Associated Press, *Michigan Commission OKs Domestic-Partner Benefits*, BLOOMBERG BUSINESSWEEK, Jan. 27, 2011, http://www.businessweek.com/ap/financialnews/D9L0NEBG0.htm.
[^42]: See *supra* note 7 and accompanying text.
[^43]: See *supra* note 6 and accompanying text.
challenging the constitutionality of Ohio’s domestic partnership registries and benefits programs.

In *Brinkman v. Miami University*, former Ohio State Representative Tom Brinkman, with Langdon as his attorney, challenged the constitutionality of Miami University’s same-sex domestic partnership benefits program under the Ohio Marriage Amendment.\(^{44}\) The Ohio Court of Appeals for the Twelfth District dismissed the case because Brinkman lacked standing;\(^ {45}\) the court did not rule on the merits of Brinkman’s claim or elaborate on the impact of *Carswell*, which the Supreme Court of Ohio had decided only one month prior.\(^ {46}\)

In *City of Cleveland Heights ex rel. Hicks v. City of Cleveland Heights*, Langdon again served as plaintiff’s counsel in the first case to challenge the constitutionality of an Ohio domestic partnership registry.\(^ {47}\) The Eighth District Court of Appeals held that Cleveland Heights’ registry fell under the protection of the Ohio Home Rule Amendment, which grants complete authority to Ohio municipalities in matters of local self-governance.\(^ {48}\)

Four years later, in *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, Langdon represented a new plaintiff, alleging that Cleveland’s domestic partner registry violated the Ohio Marriage and Home Rule Amendments.\(^ {49}\) Relying mainly on *Hicks*, the court dispatched with the Home Rule argument.\(^ {50}\) Applying *Carswell*, the Eighth District upheld the registry’s constitutionality under the second sentence of the Ohio Marriage Amendment.

According to a unanimous Eighth District Court of Appeals, *Carswell* had a simple holding: “any legally established relationship bearing less than all the attributes of marriage is constitutional.”\(^ {51}\) Since Cleveland’s domestic partner registry did not confer even the basic legal benefits or responsibilities of marriage, such as the right to

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\(^{44}\) *2007 WL* 2410390 at *1; see also supra note 9 (discussing Brinkman’s relationship with CCV founder Phil Burress).


\(^{46}\) *Carswell* was decided on July 25, 2007. Cleveland Heights, 871 N.E.2d 547 (Ohio 2007).


\(^{48}\) 832 N.E.2d at 1275–77. Although the Marriage Amendment had already been adopted by the time the Eighth District Court of Appeals ruled on *Hicks*, Langdon’s sole argument in *Hicks* was that Cleveland Heights’ domestic partnership registry violated the Home Rule Amendment of the Ohio Constitution. Id. at 1277.

\(^{49}\) Id. at 1278–79.

\(^{50}\) 2010 Ohio App. LEXIS 3981 at *4.

\(^{51}\) Id. at *18 (“Cleveland’s domestic partner registry ordinance is nearly identical to the domestic partner registry previously upheld by this court in *Hicks*. . . . Therefore, like *Hicks*, we find that Cleveland’s domestic partner registry is within Cleveland’s home rule authority.”).
inherit intestate or the procedural requirements of divorce, the registry was not only constitutional, but “in essence, simply a label.” In reaching this determination, the Eighth District did not limit its analysis solely to the legal aspects of marriage. According to the court, its holding also relied on the fact that “the term ‘domestic partner’ completely lacks the social and emotive resonance of ‘husband’ and ‘wife.’ Domestic partnerships are not given the same respect by society as a married couple, and they share none of marriage’s history and traditions.” Thus, without the legal or societal importance of marriage, the court upheld the constitutionality of Cleveland’s domestic partnership registry.

Although the future of Ohio’s domestic partnership registries and benefits programs remain uncertain, for the moment they may continue to exist.

II. WHAT’S THE DIFFERENCE?: CIVIL UNIONS V. DOMESTIC PARTNERSHIPS V. OHIO’S DOMESTIC PARTNERSHIP PROGRAMS

There are three kinds of state-created marriage-alternatives: civil unions, domestic partnerships, and beneficiary programs.

Civil unions are commonly considered “marriage substitutes” and have served as the predecessors to same-sex marriage in three states: Vermont, Connecticut, and New Hampshire. Only two states currently issue civil union certificates: New Jersey and Illinois. Hawaii and Delaware recently passed civil union legislation and will

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52 Id. at *9–12.
53 Id. at *12.
54 Id. at *11.
55 See Erin Cleary, Note, New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?, 60 RUTGERS L. REV. 519, 523 (2008) (“Civil unions are designed to be virtually identical to traditional marriages between a man and a woman, but are limited in scope to same-sex couples.”).
start granting civil unions on January 1, 2012.\textsuperscript{58} With the recent exceptions of Hawaii and Illinois, civil unions have traditionally been offered only to same-sex couples.\textsuperscript{59} Couples in civil unions typically enjoy all of the state-level benefits of marriage.\textsuperscript{60} But they are not able to receive the federal benefits of marriage,\textsuperscript{61} guaranteed relationship recognition in other jurisdictions,\textsuperscript{62} or considered legally “married” in any state.\textsuperscript{63}

In contrast with the relative nationwide consistency of civil unions, domestic partnerships vary greatly from state to state, both in terms of benefits offered and eligibility requirements.\textsuperscript{64} Washington,\textsuperscript{65}


\textsuperscript{59} In June 2011, Illinois became the first state to offer civil unions to both same-sex and opposite-sex couples. See Garcia, supra note 57. Hawaii will start offering civil unions to same-sex and opposite-sex couples in January 2012. See Reyes, supra note 58.

\textsuperscript{60} See Cleary, supra note 55, at 523.

\textsuperscript{61} According to the Defense of Marriage Act, 1 U.S.C. § 7 (2006), “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

\textsuperscript{62} See Defense of Marriage Act, 28 U.S.C. § 1738C (2006) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.”).

\textsuperscript{63} For example, although same-sex couples may enter into civil unions in New Jersey and receive all the benefits of marriage, New Jersey regards “marriage” as a union reserved for heterosexual couples. See N.J. STAT. ANN. § 37:1–28(f) (West Supp. 2010) (declaring that the purpose of civil unions is to provide “same-sex couples with the same rights and benefits as heterosexual couples who choose to marry”).

\textsuperscript{64} Regardless of how states define “domestic partnerships,” commentators generally employ similar definitions. The most common definition states that “[d]omestic partnerships are contracts between two parties asserting that their relationship exhibits the core characteristics of an intimate association like a marriage.” Ron-Christopher Stamps, Note, \textit{Domestic Partnership Legislation: Recognizing Non-Traditional Families}, 19 S.U. L. REV. 441, 451 (1992). The broadest definition of a domestic partnership “would include any two persons who reside together and who rely on each other for financial and emotional support . . . [and recognize that] a sexual relationship is not a requirement, although it may evidence emotional commitment between the partners.” Robert L. Eblin, Note, \textit{Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)}, 51 OHIO ST. L.J. 1067, 1069 n.11 (1990).

The larger debate among scholars does not concern itself with the technical definition of “domestic partnership,” but with the ultimate objective of these institutions. According to Paul R. Lynd:

A domestic partnership may be seen as (1) a permanent relationship that is an alternative to marriage and open to any couple, with some or all of the benefits that are consequent to a lawful marriage; (2) a temporary alternative to marriage for same-sex couples that fills a gap in marriage laws, but which would be superseded by lawful marriage if a state ever allows same-sex couples to marry legally; or (3) a permanent parallel institution existing only for same-sex couples that is essentially a
Oregon,\textsuperscript{66} and Nevada\textsuperscript{67} have state-wide domestic partnership schemes that are nearly identical to civil unions.\textsuperscript{58} Of these three states, however, only Oregon’s domestic partnership program is strictly limited to same-sex couples.\textsuperscript{69} Other states, such as California,\textsuperscript{70} Maine,\textsuperscript{71} Wisconsin,\textsuperscript{72} and Rhode Island,\textsuperscript{73} have a patchwork quilt of eligibility requirements for their domestic partnership programs. Further, the rights of domestic partners in these programs are not equal to the rights of married couples. Also, the rights these programs offer vary greatly from state to state. For de facto marriage with many or all of the benefits consequent to a lawful marriage, but without a marriage license or the designation “marriage” conferred by law.


\textsuperscript{65} WASH. REV. CODE § 26.60.015 (2009) ("The provisions of [this law] shall be liberally construed to achieve equal treatment . . . of state registered domestic partners and married spouses.").

\textsuperscript{66} OR. REV. STAT. § 106.305(5) (2009) (The Oregon Family Fairness Act extends “benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children by the laws of this state”).

\textsuperscript{67} NEV. REV. STAT. § 122A.200(1)(b) (2010) ("[D]omestic partners have the same rights, protections and benefits and are subject to the same responsibilities, obligations and duties under law . . . as are granted to and imposed upon . . . spouses.").


\textsuperscript{69} OR. REV. STAT. § 106.310 (2009). In Washington, domestic partnerships are open to all same-sex couples and to opposite-sex couples where at least one partner is age sixty-two or older. WASH. REV. CODE § 26.60.030 (West 2009). In Nevada, a couple may enter into a domestic partnership regardless of the age or gender of the partners. NEV. REV. STAT. § 122A.100 (2010).

\textsuperscript{70} CAL. FAM. CODE § 297 (West 2010). In California, domestic partnerships are available to all same-sex couples and to opposite-sex couples where at least one person is age sixty-two or older. Id.

\textsuperscript{71} ME. REV. STAT. ANN. tit. 22, § 2710 (2010). In Maine, all same-sex and opposite-sex couples may enter into a domestic partnership regardless of the ages of the partners. Id.

\textsuperscript{72} WIS. STAT. ANN. § 770.001 (West 2010). In Wisconsin, only same-sex couples may enter into a domestic partnership. WIS. STAT. ANN. § 770.05 (West 2010).

\textsuperscript{73} See R.I. GEN. LAWS § 5-33.2-24 (2010) (granting domestic partners the right to make funeral arrangements for one another); R.I. GEN. LAWS § 23-4-10 (2010) (granting domestic partners the right to receive each others’ bodies from state medical examiners).
example, California, Maine, and Wisconsin allow domestic partners to inherit intestate, but Rhode Island does not.

Finally, Hawaii and Colorado offer “beneficiary programs,” which are merely “domestic partnerships” operating under a different name. Hawaii has a “reciprocal beneficiaries” program, while Colorado offers a “designated beneficiaries” program. Both Hawaii and Colorado’s programs offer registrants a variety of benefits, but neither program offers all of the legal benefits of marriage. In Hawaii, two adults may become reciprocal beneficiaries so long as they are not parties to another reciprocal beneficiary relationship and are prohibited from marrying one another—such as same-sex couples or an unmarried mother and son. In Colorado, two people may become “designated beneficiaries” so long as both parties are competent, unmarried adults who are not already registered as another person’s “designated beneficiary.”

There are no state-wide civil unions, domestic partnerships, or beneficiary programs in Ohio. Instead, a variety of local, public institutions offer domestic partnership registries and benefits programs. There are only three domestic partnership registries in Ohio, which are respectively run by the City of Cleveland Heights, the City of Cleveland, and the City of Toledo. These domestic partnership registries were intended to show local acceptance of gay and lesbian couples who are prohibited from marrying. However,

74 CAL. FAM. CODE § 297.5 (West 2010); ME. REV. STAT. ANN. tit. 18-A, § 2-102 (2010); WIS. STAT. ANN. § 852.09 (West 2010).
75 R.I. GEN. LAWS § 33-10-1 (2010) (limiting the right of intestacy only to legally recognized husbands and wives).
76 HAW. REV. STAT. § 572C-2 (2010) (“[T]he legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.”).
77 HAW. REV. STAT. § 572C-4 (2010).
78 COLO. REV. STAT. § 15-22-104 (2009) (listing the requirements to become a “designated beneficiary”).
82 For example, according to City of Cleveland Councilman Joe Cimperman, the main sponsor of Cleveland’s domestic partnership registry, “[t]he passage of the Domestic Registry legislation . . . [is an] example[] of the City’s commitment to and support of [Cleveland’s LGBT] community.” Press Release, City of Cleveland, City Council and Cleveland LGBT Community Proudly Announce 1st Annual LGBT Heritage Day (Oct. 6, 2009), http://www.clevelandcitycouncil.org/Home/News/October62009/tabid/775/Default.aspx; see also Press Release, City of Cleveland, Domestic Partnership Registration Opens on May 7th (May 6, 2009), http://www.clevelandcitycouncil.org/Home/News/May62009/tabid/677/Default.aspx
these registries are mostly symbolic and do not grant registered partners any legal status, protections, or benefits.\(^8\)

Ohio’s domestic partner registries have nothing to do with Ohio’s public domestic partnership benefits programs. Simply joining the Cleveland, Cleveland Heights, or Toledo domestic partnership registry does not entitle a couple to domestic partnership benefits, even from a public employer with a partnership benefits program. Instead, employers in Ohio have complete control over whether to offer domestic partnership benefits, the extent of the benefits offered, and all eligibility criteria. Some public employers in Ohio limit benefits only to same-sex couples,\(^8\) and some grant equal benefits to same-sex and unmarried opposite-sex couples.\(^5\) Others grant same-sex couples a wider array of benefits than their unmarried, opposite-sex counterparts.\(^6\) Additionally, for some employers, the marital
status and sexual orientation of their employees are irrelevant for health insurance purposes. For example, the City of Columbus offers the same benefits to its married employees as it does to its unmarried (heterosexual and homosexual) employees in domestic partnerships. 87

III. THE TYPES OF MARRIAGE AMENDMENTS

Thirty states have amendments banning same-sex marriage. 88 These amendments fall into one of three categories: structure amendments, status amendments, and substance amendments. 89

Structure amendments are the narrowest and do not constitutionally define marriage. Instead, structure amendments give the state legislature permission to define marriage as being between
one man and one woman if it so chooses.\footnote{See id. at 237–38 (discussing the nature of structure amendments).} Hawaii is the only state with a structure marriage amendment.\footnote{See id. at 238 (noting that Hawaii is the only state with a structure amendment).} The Hawaii Marriage Amendment states: “The legislature shall have the power to reserve marriage to opposite-sex couples.”\footnote{HAW. CONST. art. I, § 23.}

Conversely, status amendments, which have been adopted by 10 states,\footnote{These states are: Alaska, Arizona, California, Colorado, Mississippi, Missouri, Montana, Nevada, Oregon, and Tennessee. See infra Appendix A (listing state marriage amendments).} constitutionally define marriage as a union between only one man and one woman.\footnote{See Baker, supra note 89, at 223.} Status amendments do not vary greatly between states, are often one sentence long, and leave open the possibility for marriage alternatives.\footnote{See id. at 223–29 (discussing the central features of status amendments). It is possible, however, for a status amendment to be longer than one sentence. An amendment is a status marriage amendment so long as it does nothing more than define marriage as an institution between one man and one woman. If this requirement is met, then the length of the amendment is immaterial. For example, both Mississippi and Tennessee have status marriage amendments significantly longer than one sentence:}

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

\footnote{MISS. CONST. art. XIV, § 263-A;}

The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.”\footnote{TENN. CONST. art. XI, § 18.}

\footnote{MONT. CONST. art. XIII, § 7.}
These first sentences make substance amendments somewhat similar to status amendments.

The uniqueness of substance amendments exists in their second sentences, which limit state recognition of nonmarital relationships. These second sentences contain significant textual variations, suggest widely differing legal effects, and often employ words and phrases that have never before been legally defined. For example, Nebraska’s substance amendment prohibits the state from recognizing same-sex marriages, same-sex civil unions, and same-sex domestic partnerships; but it does not prohibit the state from recognizing opposite-sex civil unions or opposite-sex domestic partnerships. To date, nineteen states have adopted substance marriage amendments, including Ohio.

Ohio’s Amendment does not differentiate between unmarried persons in opposite or same-sex relationships; it prohibits the state from recognizing “a legal status for relationships of unmarried individuals.” Several scholars believe that Ohio has one of the broadest substance amendments in the United States.

IV. SUPREME COURT PRECEDENT CONCERNING GAY RIGHTS AND EQUAL PROTECTION

This Part shows how the second sentence of Ohio’s Marriage Amendment violates the Equal Protection Clause of the Fourteenth Amendment. First, Section A explains the basics of equal protection analysis and rational basis review. Section B analyzes Romer v. Evans, where the Supreme Court invalidated Colorado’s...

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97 Although Idaho’s marriage amendment is only one sentence long, it still qualifies as a substance marriage amendment because it potentially limits state recognition of non-marital unions. “A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.” IDAHO CONST. art. III, § 28.

98 See Baker, supra note 89, at 230 (discussing substance amendments); see also Strasser, supra note 14, at 59 (arguing that substance amendments will have grave and unintended consequences if their vague language is broadly interpreted by the courts).

99 The Nebraska Marriage Amendment states: “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.” NEB. CONST. art. I, § 29.

100 These states are: Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. See infra Appendix A (listing state marriage amendments).

101 OHIO CONST. art. XV, § 11(emphasis added).

102 See, e.g., Baker, supra note 89, at 233–34 (discussing the Ohio amendment and other substance marriage amendments); Strasser, supra note 14, at 81–91 (discussing multiple possible interpretations of the Ohio amendment).

Amendment 2, a ballot initiative that prohibited the state from granting anti-discrimination protection to gays and lesbians.\textsuperscript{104} Section B also discusses \textit{Lawrence v. Texas},\textsuperscript{105} where the Supreme Court invalidated Texas’s criminal anti-sodomy law because it violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{106} Next, Section C discusses \textit{Washington v. Davis},\textsuperscript{107} \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.},\textsuperscript{108} and \textit{Personnel Administrator v. Feeney},\textsuperscript{109} three cases in which the Supreme Court analyzed the constitutionality of facially neutral policies and laws. Lastly, Section D concludes that the second sentence of the Ohio Marriage Amendment would be unconstitutional under \textit{Feeney} if 1) it disproportionately impacts same-sex couples and 2) the purpose behind the second sentence was to disproportionately impact same-sex couples.

\textbf{A. Introduction to Equal Protection Analysis}

The Equal Protection Clause of the Fourteenth Amendment states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{110} The Supreme Court explains this phrase as “essentially a direction that all persons similarly situated should be treated alike.”\textsuperscript{111} Assuming that a contested law does not burden a fundamental right, which would violate the Fourteenth Amendment’s Due Process Clause, the law is presumptively valid under the Equal Protection Clause and subject only to “rational basis review.” Under this standard, the law will be upheld if it is rationally related to a legitimate state interest.\textsuperscript{112} However, if the law makes a distinction against a “suspect class”—i.e. racial, religious, and ethnic groups—then the law is presumptively invalid under the Equal Protection Clause and subject to “strict scrutiny.” Under this standard, the law will be upheld only if it is narrowly tailored to serve a compelling state interest.\textsuperscript{113} In cases where the challenged law classifies on the

\textsuperscript{104} Id. at 623–24, 635–36.
\textsuperscript{105} 539 U.S. 558 (2003).
\textsuperscript{106} Id. at 578–79.
\textsuperscript{107} 426 U.S. 229 (1976).
\textsuperscript{109} 442 U.S. 256 (1979).
\textsuperscript{110} U.S. CONST. amend. XIV, § 1.
basis of sex or gender, the legislation is subject to "intermediate scrutiny." Under this standard, the law is most likely presumptively invalid, and will be upheld only if it is substantially related to the achievement of important governmental objectives.

Many legal experts—including President Barack Obama and Attorney General Eric Holder—have argued that gays and lesbians deserve heightened scrutiny in equal protection cases. Some commentators claim that gays and lesbians are a suspect class deserving of strict scrutiny. Others allege that laws targeting gays and lesbians constitute gender discrimination and should be subject to intermediate scrutiny. Despite these arguments, the Supreme Court has never explicitly determined the appropriate standard for LGBT equal protection claims or whether LGBT persons constitute a suspect class.

B. The Game Changers: Romer v. Evans and Lawrence v. Texas

1. Romer v. Evans

The most influential equal protection case concerning the rights of gays and lesbians is *Romer v. Evans.* In *Romer,* the Supreme Court...
declared that Colorado’s Amendment 2 violated the Fourteenth Amendment’s Equal Protection Clause. The citizens of Colorado had adopted Amendment 2 into their state constitution through a statewide ballot initiative.121 The new constitutional amendment prohibited all executive, judicial, and legislative action designed to protect Colorado’s gays and lesbians from sexual orientation discrimination.122 As a result of Amendment 2, ordinances in Aspen, Boulder, and the City and County of Denver outlawing sexual orientation discrimination were immediately rescinded.123 If any city or county wanted to offer protection to its gay and lesbian residents, it would first have to successfully petition for an amendment to the Colorado Constitution.124

The Supreme Court, in an opinion authored by Justice Kennedy, held that Colorado’s Amendment 2 was not only unconstitutional, but that it “confound[ed the] normal process of judicial review.”125 The Court started with the premise that “if a law neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold [a] legislative classification so long as it bears a rational relation to some legitimate end.”126 In the next sentence, however, the Court declared that “Amendment 2 fails, indeed defies, even this conventional inquiry” for two distinct reasons.127

First the very nature of Amendment 2—which ordered the denial of all governmental protections to persons based upon their status in a single group—constituted a per se violation of the Equal Protection Clause. The Court emphasized that “[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”128 The Court halted its analysis, however, because Amendment 2 was not “an ordinary case.”

121 Just like Colorado’s Amendment 2, Ohio’s Marriage Amendment was also adopted through a ballot initiative. The ballot initiative process is a form of direct democracy that allows individual citizens to propose, campaign for, and adopt state laws or constitutional amendments. See John Gildersleeve, Note, Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?, 107 COLUM. L. REV. 1437, 1441 n.21 (2007) (explaining the mechanics of direct democracy). For more information on ballot initiatives, see infra Part VI.B.1.
122 Romer, 517 U.S. at 626–28.
123 Id.
124 Id. at 631.
125 Id. at 633.
126 Id. at 633.
127 Id. at 631.
128 Id. (emphasis added).
Instead, Amendment 2 had “the peculiar property of imposing a broad and undifferentiated disability on a single named group.”129 According to the Court, Amendment 2 “identifies persons by a single trait and then denies them [governmental] protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.”130 The Court concluded this argument without conducting any further equal protection analysis. Solely because of Amendment’s 2 unique denial of governmental protection to gays and lesbians, the Court held: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”131

Second, the Court held Amendment 2 unconstitutional because, even if Romer were an “ordinary equal protection case calling for the most deferential of standards,”132 Amendment 2 failed rational basis review.

One of the most basic tenants of equal protection law is that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”133 According to the Court, Amendment 2’s sweeping discriminatory effect proved that “the disadvantage imposed is born of animosity toward the class of persons affected.”134 The Court came to this decision even though millions of Coloradans, each with their own unique reasons for supporting Amendment 2, had voted in favor of the law. Further, although the State of Colorado offered non-animus based reasons for the law—such as the conservation of resources to fight racial discrimination—the Court declared that “the breadth of [Amendment 2] is so far removed from these particular justifications that we find it impossible to credit them.”135 Armed with the determination that Amendment 2 was a hate-based ballot initiative, the Court stated “[w]e must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone

129 Id.
130 Id. at 633.
131 Id.
132 Id. at 632.
133 Id. at 634 (omission in original) (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
134 Id.
135 Id. at 635.
else. This Colorado cannot do... Amendment 2 violates the Equal Protection Clause...”136

2. Lawrence v. Texas

Several years after Romer, the Supreme Court, in another opinion written by Justice Kennedy, decided Lawrence v. Texas,137 which held Texas’s criminal sodomy law unconstitutional under the Due Process Clause of the Fourteenth Amendment.

The Supreme Court could have based its Lawrence decision on equal protection grounds because Texas’s sodomy law uniquely criminalized homosexual, not heterosexual, oral and anal sex.138 Indeed, Justice O’Connor’s concurrence was based solely on this equal protection analysis.139 The majority, however, declined to use equal protection because it feared that the states would simply rewrite their laws to prohibit oral and anal sex between all couples.140

Instead, the majority relied upon a Fourteenth Amendment substantive due process analysis to reach its conclusion. Through this process, the Court overruled Bowers v. Hardwick,141 a 1986 case upholding Georgia’s criminal anti-sodomy law, and declared that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”142

Holding that moral disapproval is not enough to uphold criminal sodomy laws143—an idea accentuated in O’Connor’s concurrence144—the Court found that consenting gay and lesbian

136 Id. In contrast to Justice Kennedy, Justice Scalia did not believe that Colorado’s animus or hostility towards its gay and lesbian citizens rendered Amendment 2 unconstitutional. In his dissent, Scalia even went so far as to find that that “Coloradans are... entitled to be hostile toward homosexual conduct.” Id. at 644 (Scalia, J., dissenting).
138 Id. at 563.
139 Id. at 579 (O’Connor, J., concurring in the judgment) (“Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.”).
140 Id. at 574–75 (majority opinion).
141 478 U.S. 186 (1986).
142 Lawrence, 539 U.S. at 567.
143 Id. at 571 (“The condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are... deep convictions... which thus determine the course of their lives. These considerations do not answer the question before us, however... ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’” (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992))).
144 Id. at 582 (O’Connor, J., concurring in the judgment) (“Moral disapproval of [gays and
adults “are entitled to respect for their private lives. The State cannot
demean their existence or control their destiny . . . . As the
Constitution endures, persons in every generation can invoke its
principles in their own search for greater freedom.”145

Although the majority opinion stated that Lawrence did not decide
the issue of same-sex marriage,146 Justice Scalia’s biting dissent
argued that the majority’s opinion mandated it. According to Scalia,
“[t]his case ‘does not involve’ the issue of homosexual marriage only
if one entertains the belief that principle and logic have nothing to do
with the decisions of this Court.”147

C. Embracing Washington v. Davis, Village of Arlington Heights
v. Metropolitan Housing Development Corp., and
Personnel Administrator v. Feeney

Despite the significance of both Romer and Lawrence for
proponents of LGBT rights, these cases are of limited use concerning
the Ohio Marriage Amendment. Both Romer and Lawrence dealt with
legislation that specifically targeted gays and lesbians. In contrast,
Ohio’s Amendment is facially neutral on the topic of sexual
orientation. Under the Amendment, Ohio and its political
subdivisions are forbidden from “creat[ing] or recogniz[ing] a legal
status for relationships of unmarried individuals that intends to
approximate the design, qualities, significance or effect of
marriage.”148 As such, the Ohio Marriage Amendment defies Romer-
style equal protection analysis because it applies to all unmarried
individuals, regardless of their sexual orientation.

However, an equal protection inquiry into Ohio’s Marriage
Amendment does not end simply because its text is facially neutral on
sexual orientation. The Supreme Court has used equal protection to
invalidate many facially neutral laws written to disadvantage
unpopular, unnamed groups. For example, in Yick Wo v. Hopkins,149
the Court invalidated a San Francisco ordinance that required all city

lesbians] . . . is an interest that is insufficient to satisfy rational basis review under the Equal
Protection Clause. Indeed, we have never held that moral disapproval, without any other
asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law
that discriminates . . . .”).

145 Id. at 578–79.
146 Id. at 578 (“The present case . . . does not involve whether the government must give
formal recognition to any relationship that homosexual persons seek to enter.”).
147 Id. at 605 (Scalia, J., dissenting).
148 OHIO CONST. art. XV, § 11 (emphasis added).
149 118 U.S. 356 (1886).
laundries, except those located in brick buildings, to obtain a special operating permit.

Although the San Francisco ordinance facially had nothing to do with race, its effect was dramatic. The law essentially closed all of San Francisco’s Chinese laundries, which were uniformly in wooden buildings, while allowing white laundries, which were typically in brick buildings, to remain open. Furthermore, among the white-owned laundries located in wooden buildings, all but one received the necessary permit. In contrast, San Francisco did not grant any permits to Chinese laundries located in wooden buildings.

Similarly, in *Gomillion v. Lightfoot*, the Supreme Court invalidated Alabama’s redrawing of Tuskegee’s city limits. Although the legislation did not mention race, the Court held the measure unconstitutional because it removed from Tuskegee “all save only four or five of its 400 Negro voters while not removing a single white voter or resident.”

In the 1970s, the Supreme Court decided three cases that heavily influenced the Court’s jurisprudence on facially neutral statutes: *Washington v. Davis*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, and *Personnel Administrator v. Feeney*. In these cases, each plaintiff alleged that a facially neutral law was actually a sophisticated form of racial or sex-based discrimination deserving heightened scrutiny.

*Davis* challenged the validity of an exam, Test 21, used by Washington, D.C.’s Police Department to accept new recruits. The plaintiffs alleged that Test 21 was racially discriminatory because whites passed the test in disproportionately greater numbers than blacks.

Similarly, in *Arlington Heights*, a real estate developer alleged that the Village of Arlington Heights’ refusal to reform its zoning codes was racially discriminatory. By refusing to change its zoning codes,
the Village effectively prohibited the construction of a low-income housing project with a disproportionately minority population. 161

Finally, in *Feeney*, a female civil servant fought a Massachusetts statute that gave an absolute hiring preference to veterans for civil service positions. 162 Since ninety-eight percent of all Massachusetts veterans at the time were male, “[t]he impact of the veterans’ preference law upon the public employment opportunities of women . . . [was] severe.” 163

The plaintiffs in *Davis*, *Arlington Heights*, and *Feeney* all ultimately lost before the Supreme Court. Although the Supreme Court recognized that these plaintiffs suffered disproportionately, 164 the Court refused to apply heightened scrutiny or declare the policies unconstitutional because none of the policies were adopted with a discriminatory intent.

In *Davis*, the Court did not find discriminatory intent because Test 21 was an exam commonly used in hiring practices throughout the federal service. 165 Additionally, the D.C. Police Department did not create Test 21; it was developed by the Civil Service Commission without regards to the race of the test-taker. 166 Furthermore, while using Test 21, the D.C. Police Department was also engaged in a significant campaign to recruit and hire black officers. 167

In *Arlington Heights*, the Court determined that the Village of Arlington Heights had not discriminated against racial minorities when it refused to reform its zoning laws because the Village of Arlington Heights had been undeniably committed to keeping the residential area zoned only for single-family homes since 1959; the rezoning request process did not waver from usual procedures; the Village had given the real estate developer extra opportunities to present his case during the public hearing process; and the statements at the rezoning hearings focused almost exclusively on the zoning—and not racial—aspects of the developer’s proposal. 168

Finally, in *Feeney*, the Supreme Court determined that the challenged law was constitutional because it was not intentionally designed to discriminate against women. Instead, Massachusetts’ civil
servant law was created to reward the commitment and sacrifice of all veterans.169 According to the Court, “[w]hen the totality of legislative actions establishing and extending the Massachusetts veterans’ preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.”170

Although this Note does not argue that same-sex couples deserve heightened scrutiny in challenging Ohio’s Marriage Amendment, this Note is dependent on the clear two-prong test set forth in Feeney. To determine if a facially neutral law violates the Equal Protection Clause it is necessary to ask: 1) Does the law disparately impact an unnamed group of persons?, and 2) Does the “totality of legislative actions establishing”171 the disparately affecting law reflect an invidious discriminatory purpose?172 According to Feeney, invidious discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”173 If both prongs are met, then the law violates Equal Protection.174

D. Conclusion

An equal protection challenge can be made against the second sentence of the Ohio Marriage Amendment by establishing: 1) that the removal of Ohio’s domestic partnership programs under the Ohio Marriage Amendment would disparately impact same-sex couples,

170 Id. at 280 (citation omitted).
171 Id.
172 Id. at 274 (“When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse . . . [it must be asked] whether the adverse effect reflects invidious gender-based discrimination.”); see also Washington v. Davis, 426 U.S. 229, 241–42 (1976) (“A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. . . . Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”); Arlington Heights, 429 U.S. at 264–65 (“Washington v. Davis made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” (citation omitted)).
173 Feeney, 442 U.S. at 279.
174 In certain rare instances, however, the Supreme Court inferred discriminatory intent and declared a violation of equal protection based upon disproportionate impact alone. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Since Yick Wo and Gomillion occurred before Davis, Arlington Heights, and Feeney, they should be seen more as the exception than the rule.
and 2) that the purpose behind the second sentence of the Ohio Marriage Amendment is to harm same-sex couples.

Parts V and VI establish that the second sentence of the Ohio Marriage Amendment satisfies both of Feeney’s prongs, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

V. DISPROPORTIONATE IMPACT IN OHIO’S DOMESTIC PARTNERSHIP REGISTRIES AND BENEFITS PROGRAMS

Part V establishes that Ohio’s domestic partnership programs overwhelmingly impact same-sex couples. Sections A and B provide background information on Ohio’s domestic partnership registries and show that same-sex couples make up the significant majority of couples enrolled in them. Section C explains how the data concerning Ohio’s domestic partnership benefits programs was gathered as well as the data’s limitations. Section D establishes that same-sex couples make up the majority of the couples receiving domestic partnership health insurance at Ohio’s public institutions. Section E concludes that the removal of Ohio’s domestic partnership programs would disproportionately impact Ohio’s LGBT community and not the general “unmarried” class.

A. Ohio’s Domestic Partner Registries

Three cities in Ohio have domestic partner registries: Cleveland Heights, Cleveland, and Toledo. The City of Cleveland Heights has the oldest domestic partner registry in Ohio. Cleveland Heights opened its domestic partner registry on January 26, 2004, after voters approved the initiative in a local referendum in November 2003. According to Heights Families for Equality, which placed the registry on the 2003 ballot, Cleveland Heights’ registry was the first piece of pro-gay-rights legislation ever approved in a voter ballot initiative. Almost four years later, the Toledo City Council approved the creation of its domestic partner registry, which went into effect on December 21, 2007. Less than one year later, on

179 Id.
181 Ignazio Messina, Dozens Sign Toledo’s Domestic Partner Registry, TOLEDO BLADE,
December 8, 2008, the Cleveland City Council adopted Cleveland’s domestic partner registry,\(^\text{182}\) the registry opened on May 7, 2009.\(^\text{183}\) Both Cleveland and Cleveland Heights’s domestic partner registries were challenged for allegedly violating the Ohio Constitution.\(^\text{184}\) To date, no one has challenged Toledo’s domestic partner registry.

All three registries are open to same-sex and opposite-sex couples.\(^\text{185}\) Prospective registrants must pay a registration fee and file a Declaration of Domestic Partnership. Additionally, eligible registrants must be 18 years or older, in a committed relationship, share a common residence, not be married or in a domestic partnership with someone else, and not be related by blood.\(^\text{186}\) None of these registries grant legal rights to registered couples. The City of Cleveland’s domestic partner registry ordinance even explicitly says that “[n]othing in this chapter shall be construed as recognizing or treating a Declaration of Domestic Partnership as a marriage or a legal status that intends to approximate the design, qualities, significance, or effect of marriage.”\(^\text{187}\)

While Ohio’s domestic partner registries may provide registered domestic partners with a sense of appreciation and respect, they are, in fact, little more than a city-sponsored list of names.

**B. Domestic Partner Registries, Data**

According to data collected in November 2009, Ohio’s domestic partner registries are overwhelmingly used by same-sex couples. In


\(^{184}\) See City of Cleveland Heights ex rel Hicks v. City of Cleveland Heights, 832 N.E.2d 1275 (Ohio Ct. App. 2007); Cleveland Taxpayers for Ohio Constitution v. City of Cleveland, No. 94327, 2010 Ohio App. LEXIS 3981 (Ohio Ct. App. Sept. 30, 2010).

\(^{185}\) See supra notes 175–77.


\(^{187}\) CLEVELAND, OHIO, CODIFIED ORDINANCES tit. 1, ch. 109.06 (2010).
Table 1, the couples participating in these registries are listed as “same-sex,” “opposite-sex,” or “unknown.” An “unknown” registered couple means that the couple registered either in the City of Cleveland or Toledo and that the sex of both partners could not be verified. The City of Cleveland Heights records the gender makeup of its registered domestic partnerships.

The City of Cleveland Heights has the largest domestic partner registry. There are 217 registered domestic partnerships; 156 couples are same-sex and 61 are opposite-sex. Thus, 72% of the couples in Cleveland Heights’ domestic partnership registry are same-sex.

In Toledo, there are 110 registered couples; 80 couples are same-sex, 24 are opposite-sex, and 6 are of unknown gender makeup. Therefore, in Toledo, same-sex couples make up 73% of registered partners while opposite-sex couples make up only 22%; “unknown” registered couples comprise 6% of the total.

Finally, the City of Cleveland has the greatest percentage of registered same-sex couples. There are 164 registered couples in Cleveland; 134 couples are same-sex—making up 82% of all registered couples, 24 are opposite-sex couples—making up only 15% of all registered couples, and only 6 couples (3%) are of unknown gender makeup.

On average, same-sex couples comprise 75% of all couples in Ohio’s domestic partner registries.

C. Ohio’s Domestic Partnership Benefits Programs

The data concerning Ohio’s domestic partnership benefits programs comes directly from the human resources departments of Ohio’s public school systems, municipalities, public universities, and community colleges. The data was collected primarily during the
winter and spring of 2010. However, mainly because some institutions only recently adopted domestic partnership benefits, some data was gathered in 2011. Data from other public institutions, such as Ohio’s state-run hospitals, is not included.

Since Ohio’s domestic partnerships benefits programs vary greatly from one another—for example, some packages offer life insurance whereas others do not—this Note focuses only on the number and make-up of domestic partnerships receiving health insurance.

D. Ohio’s Domestic Partnership Benefits Programs, Data

This section looks at the make-up of the couples receiving health insurance through Ohio’s public domestic partnership programs. Subsection 1 studies the make-up of couples receiving domestic partnership health insurance through Ohio’s public school systems. Subsection 2 looks at the couples receiving domestic partnership health insurance offered through Ohio’s counties and municipalities. Subsection 3 analyzes the couples who receive domestic partnership health insurance though Ohio’s public universities and community colleges. This Section concludes that, overall, same-sex couples make up the majority of couples who are receiving public domestic partnership health insurance, and that the removal of Ohio’s domestic partnership benefits programs would disparately impact Ohio’s LGBT community.

1. Public School Systems

Oberlin City Schools and Columbus City Schools are the only two public school systems in Ohio that offer health insurance to its employees and their domestic partners. Oberlin City Schools has the older program and offers coverage to both same-sex and opposite-sex domestic partners. In contrast, Columbus City Schools, which created its domestic partnership benefits program in June 2009, offers medical coverage only to same-sex domestic partners.

Although Oberlin City Schools offers health insurance to both same-sex and opposite-sex domestic partners, only one couple is currently taking advantage of the program. This couple is same-

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194 See infra Table 2.
195 See Simone Sebastian, Same-Sex Partners to Get Benefits, COLUMBUS DISPATCH, June 6, 2009, at B1 (discussing the extension of benefits in Ohio’s public school districts).
196 See id.
197 See id.
There are currently 27 same-sex couples receiving domestic partner health insurance through Columbus City Schools. Therefore, 100% of the couples receiving domestic partnership health insurance through Ohio’s public school systems are same-sex.

2. Cities and Counties

Both the City of Columbus and the City of Cleveland Heights offer domestic partnership benefits to their employees. The City of Columbus offers equal domestic partnership benefits to its unmarried same-sex and opposite-sex couples. In contrast, Cleveland Heights offers benefits only to same-sex domestic partners. Currently, there are 57 couples receiving domestic partnership health insurance through the City of Columbus. Forty of these couples (70%) are in opposite-sex relationships; seventeen couples (30%) are same-sex. In Cleveland Heights, there are no couples receiving domestic partnership health insurance. According to Bob Johnson, Cleveland Heights’ Human Resources Manager, gay and lesbian employees declined the insurance because of inequality in the federal tax code. Unlike the health insurance enjoyed by married couples, domestic partner health insurance constitutes taxable income for federal tax purposes.

Franklin County and Lucas County are the only counties in Ohio that offer domestic partnership benefits to their employees. In Franklin County, where domestic partnership benefits are open to

198 Telephone Interview with Diane Wolf, Treasurer, Oberlin City Sch. (Dec. 21, 2009).
199 Telephone Interview with Michael Straughter, Commc’ns Specialist, Columbus City Sch. (Feb. 19, 2010).
200 See infra Table 3
202 Telephone Interview with Bob Johnson, Human Res. Manager, City of Cleveland Heights (Feb. 23, 2010).
203 Telephone Interview with Midge Slemmer, supra note 87.
204 Id.
205 Telephone Interview with Bob Johnson, supra note 202.
206 Id.
207 According to Johnson, Cleveland Heights employees who wish to receive domestic partnership health insurance would need to record an additional $12,000 of taxable income in their federal income taxes. Id. Also, most of the human resource managers contacted for this Note agreed that the current tax code had dissuaded many unmarried couples from enrolling in their respective domestic partnership benefits programs.

The federal tax consequences of domestic partnership health insurance are felt nationwide in both the private and public sectors. As a result, some private employers, such as Google, have started to compensate their employees for the additional income taxes they pay on their domestic partnership health insurance. See Tara Siegel Bernard, To Cover Tax, Google to Add to Gays’ Pay, N.Y. TIMES, July 1, 2010, at B1.
both same-sex and opposite-sex couples, there are 74 couples receiving domestic partnership health insurance. Twenty-five of those couples (34%) are same-sex and 49 couples (66%) are opposite-sex. In contrast, Lucas County offers domestic partner benefits only to same-sex couples. There are five couples receiving domestic partnership health insurance through Lucas County.

Therefore, there are a total of 136 couples receiving domestic partnership health insurance through Ohio’s counties and municipalities. Forty-seven of these couples (35%) are in same-sex relationships and 89 of these couples (65%) are in opposite-sex relationships.

3. Public Universities and Community Colleges

According to the University System of Ohio, there are a total of 37 public universities and community colleges in Ohio. Eighteen of these institutions offer domestic partnership health benefits to their employees with seven offering domestic partnership health insurance only to same-sex couples and eleven offering these benefits to both same-sex and unmarried opposite-sex couples.

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208 E-mail from Scott Solsman, Benefits Adm’r, Franklin Cnty. Coop. Health Benefits Program, to author (Dec. 29, 2009, 09:43 EST) (on file with author).
209 E-mail from Scott Solsman, Benefits Adm’r, Franklin Cnty. Coop. Health Benefits Program, to author (Dec. 28, 2009, 14:03 EST) (on file with author).
211 Id.
212 See infra Table 3.
213 See infra Tables 4–7.
215 The thirteen public universities that offer domestic partnership benefits are: University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Northeastern Ohio Universities Colleges of Medicine and Pharmacy (“NEOUCOM”), The Ohio State University, Ohio University, University of Toledo, Wright State University, and Youngstown State University. See infra Tables 4–5.
216 These schools are: University of Akron, Bowling Green State University, Cleveland State University, Miami University, Youngstown State University, Cincinnati State Technical and Community College, and Lake Erie College.
217 These schools are: Central State University, University of Cincinnati, Kent State University, NEOUCOM, The Ohio University, Ohio University, University of Toledo, Wright State University, Central Ohio Technical College, Cuyahoga Community College, and Washington State Community College. See infra Tables 4, 7.
Nineteen of Ohio’s public universities and community colleges do not offer domestic partnership benefits.218 In total there are 510 couples receiving domestic partner health insurance from Ohio’s public universities and community colleges.219 Sixty-five percent of these couples (332) are in same-sex relationships.220 Only 25% of these couples (178) are in opposite-sex relationships.221

There are 47 couples receiving domestic partnership health insurance from the seven schools that offer same-sex only partnership policies.222 Bowling Green State University is the latest public university in Ohio to offer domestic partnership health insurance. On October 1, 2010, the Bowling Green State University Board of Trustees voted unanimously to adopt domestic partnership benefits.223 The benefits took effect on January 1, 2011;224 there are currently seven couples receiving domestic partnership health insurance.225

The University of Akron has nine same-sex couples currently receiving domestic partnership health insurance.226 At Cleveland State University, there are 12 couples.227 Miami University currently has 24 couples receiving health insurance through the university’s
domestic partnership program.228 At Youngstown State University, there is only one same-sex couple receiving health insurance through the university’s domestic partnership program.229

Similarly, Cincinnati State Technical & Community College has only one same-sex couple receiving domestic partner health insurance.230 Finally, Lakeland Community College, which created its domestic partner benefits program in August 2009, has three couples receiving partnership health insurance.231

Among the eleven public colleges and universities that offer domestic partnership benefits to both same-sex and opposite sex couples, there are 453 couples receiving domestic partnership health insurance.232 From this subgroup, 275 couples are same-sex (61%) and 178 couples are opposite-sex (39%).233 Furthermore, of these eleven institutions, two schools, Central State University and Northeastern Ohio Universities Colleges of Medicine and Pharmacy (“NEOUCOM”) have only same-sex couples receiving domestic partnership health insurance.234 And, at another two schools, The Ohio State University and Central Ohio Technical College, same-sex couples receive greater benefits packages than their opposite-sex counterparts.235 Furthermore, all same-sex couples at The Ohio State University and Central Ohio Technical College are eligible to receive domestic partnership benefits, but opposite-sex couples must meet.

228 Telephone Interview with Sherry Schilling, Benefits Generalist, Miami Univ. (Dec. 17, 2009). There are 34 total couples who have signed Miami University’s Affidavit of Domestic Partnership. However, since these 10 additional couples are not enrolled in the health insurance program, and instead only use their domestic partnership status for family sick days, they are not included in this Note’s results. Id.; see also infra Tables 5, 6.

229 E-mail from Steve Lucivjansky, Manager of Labor Relations, Youngstown State Univ., to author (Dec. 22, 2009, 12:48 EST) (on file with author); see also infra Tables 5, 6.

230 Telephone Interview with Davie Rainwater, Supervisor of Comp. & Benefits, Cincinnati State Technical & Cmty. Coll. (Dec. 22, 2009); see also infra Tables 5, 6.

231 Telephone Interview with Carol Mangino, Assistant Dir. for Human Res., Lakeland Cmty. Coll. (Dec. 22, 2009); see also infra Tables 5, 6.

232 See infra Table 7.

233 See infra Table 7.

234 Telephone Interview with Evelyn Adams, Human Res. Manager, Central State Univ. (Jan. 4, 2010); Telephone Interview with Kathy Korogi, Human Res. Coordinator, NEOUCOM (Jan 4, 2010); see also infra Table 7.

235 Central Ohio Technical College is an affiliate of The Ohio State University and, as a result, has the same domestic partnership benefits package. Telephone Interview with Sherry Abbott, Human Res. Generalist, Cent. Ohio Technical Coll. (Jan. 5, 2010); see also supra note 86 (discussing The Ohio State University’s two-tiered domestic partnership benefits system).
additional criteria to be eligible for domestic partnership health insurance.236

4. Summary of Data

The majority of couples receiving health insurance from Ohio’s domestic partnership programs are in same-sex relationships. In total there are 674 couples receiving domestic partnership health insurance through Ohio’s public domestic partnership programs.237 Of this total, 407 couples (60%) are same-sex and 267 (40%) are opposite-sex.238

D. Conclusion

The removal of Ohio’s domestic partnership registries and domestic partnership health insurance programs would disparately impact same-sex couples for two reasons. First, same-sex couples are overwhelmingly represented in Ohio’s domestic partnership programs. Same-sex couples make up, on average, 75% of the couples in Ohio’s domestic partnership registries239 and 60% of the couples in Ohio’s domestic partnership benefits programs.240 These numbers take on even greater significance when one notes that gays and lesbians make up only a small percentage of Ohio’s overall population.241 Second, unlike their opposite-sex counterparts, same-sex couples do not have the option of leaving Ohio’s “unmarried” class. If Ohio’s domestic partnership programs are removed, opposite-sex couples may keep their benefits packages and enhance their level of state recognition by getting married. Ohio’s same-sex couples do not have this option.

236 See supra note 86 (outlining the differences between same-sex and opposite-sex domestic partnership benefits at The Ohio State University).
237 See infra Table 8.
238 See infra Table 8.
239 See infra Table 1.
240 See infra Table 8.
VI. INTENT AND DOMESTIC PARTNERSHIP PROGRAMS

Since using Ohio’s Marriage Amendment to remove public domestic partnership registries and benefits programs would disparately impact Ohio’s LGBT community, the next step is determine whether the Ohio Marriage Amendment satisfies Feeney’s second prong. Does the “totality of actions” surrounding the second sentence of the Ohio Marriage Amendment reflect an invidious discriminatory purpose against gays and lesbians? The answer is “Yes” for three distinct reasons.

Section A asserts that, because domestic partnership programs across the United States and in Ohio are designed primarily to benefit same-sex couples, attacks on domestic partnership programs are inherently attacks against gays and lesbians. Section B contends that CCV and the OCPM abused Ohio’s ballot initiative process. Specifically, this section alleges that ballot initiatives are vulnerable to proponent manipulation, and that CCV took advantage of these weaknesses and lied to voters about the Amendment’s scope in order to pass hate-based legislation. Finally Section C argues that if the Ohio Marriage Amendment destroys all of Ohio’s domestic partnership programs, then the resulting consequences would be so broad and so severe against Ohio’s LGBT community that, per Romer and Lawrence, the second sentence would automatically betray an intentional and unconstitutional antigay animus.

See Pers. Adm’n v. Feeney, 442 U.S. 256, 274 (1979). Those who claim that Ohio’s Marriage Amendment affects only unmarried couples, and not just gays and lesbians, might point to the number of opposite-sex couples who would be impacted by the removal of Ohio’s domestic partnership programs. Further, Feeney does provide some support for this claim. In Feeney, the Court concluded that the Massachusetts law did not discriminate against women in part because of the large number of men who were denied the veterans’ absolute hiring preference. According to the Court, “[v]eteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage.” Id. at 275.

However, Feeney is easily distinguishable from the present scenario for several reasons. First, whereas “veteran status” was not uniquely “male” in Feeney, marriage in Ohio is uniquely reserved for opposite-sex couples. OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01(C) (West 2010). Second, the Massachusetts civil service was not created as a way to empower women. In contrast, domestic partnership programs have always been designed to grant rights and recognition to same-sex couples. See infra Part VI.A. Finally, the original purpose of the Massachusetts’ veterans’ preference law was to reward the patriotism of Civil War veterans and ease their transition to civil life. Feeney, 442 U.S. at 265. It had nothing to do with the discrimination of women. In contrast, the Ohio Marriage Amendment has everything to do with the moral disapproval of homosexuality and the delegitimation of same-sex couples. See infra Parts VI.B & C. Thus the factors that the Court used to uphold Massachusetts’ veterans preference are not present in the case against the Ohio Marriage Amendment.
Therefore, this Note concludes the second sentence of the Ohio Marriage Amendment contains an invidious discriminatory purpose in violation of the Equal Protection Clause of the Fourteenth Amendment.

A. Attacks Against Domestic Partnership Programs Are Attacks Against Same-Sex Couples

This Section looks at the purpose behind domestic partnership programs throughout the United States and specifically within Ohio. The legislative history of these programs establishes that all public domestic partnership programs—even those that are open to opposite-sex couples—are primarily designed to recognize and help same-sex couples who are prohibited from marrying. Therefore, any attempt to eradicate domestic partnership programs must necessarily be aimed at the people these programs are designed to protect—gay and lesbian couples—in violation of Feeney’s second prong.

1. The Purpose Behind Domestic Partnership Programs Throughout the United States

History shows that attacks against domestic partnerships are per se attacks against gays and lesbians, and not just “unmarried” couples. Domestic partnership programs in the United States were—and continue to be—developed at the behest of LGBT activists in the hope of providing protection for and legitimacy to same-sex couples.243 The first domestic partnership programs in the United

243 See generally Leland Traiman, A Brief History of Domestic Partnerships, GAY & LESBIAN REV., July–Aug. 2008, at 23 (chronicling the early history of domestic partnerships in the United States and the vital role gays and lesbians played in creating domestic partnerships); see also Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 COLUM. L. REV. 1164, 1164 (1992) (“Largely at the behest of gay-rights advocates, a number of municipalities are creating domestic partnership ordinances, conferring certain benefits on domestic partners that are within the authority of the local government to grant.” (footnotes omitted)); Heidi Eischen, Survey, For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation, 31 U. TOL. L. REV. 527, 530 (2000) (arguing that domestic partnership ordinances are the result of LGBT advocacy).

A particularly salient example of LGBT domestic partnership advocacy is currently unfolding in St. Louis, Missouri. On Christmas day in 2009, Missouri State Trooper Dennis Engelhard was killed on Highway I-44 in the line of duty. In honor of his sacrifice, the Missouri Legislature named the road on which he died the “Patrolman Corporal Dennis E. Engelhard Memorial Highway.” However, the State of Missouri is refusing to grant Kelly Glossip, Engelhard’s same-sex partner of nearly 15 years, over $28,000 in survivorship benefits. According to state law, only legally recognized spouses are entitled to survivorship rights. The Missouri Constitution prohibits same-sex marriage, however. Glossip is suing Missouri under equal protection for the creation of domestic partnership survivorship benefits. See Jake
States were created at the municipal level in the 1980s and early 1990s. Although these early programs were open to both same-sex and opposite-sex couples, and were enjoyed mainly by opposite-sex couples, they were created primarily to benefit the LGBT community. For example, San Francisco’s domestic partnership ordinance, which was approved by voters in a 1990 referendum, specifically states that its purpose “is to create a way to recognize intimate committed relationships, including those of same-sex couples who otherwise may be denied the right to marry under California law.”

As same-sex marriage, civil unions, and other domestic partnership programs have moved from the fringe to the mainstream, it has become even clearer that “marriage alternatives” are designed for same-sex couples who are prohibited from marrying. While many legal theorists have argued that domestic partnership benefits should and could be limited to same-sex couples, and several courts have agreed with these arguments, no commentator has ever


244 See Bowman & Cornish, supra note 243, at 1188–95 (discussing the first domestic partnership programs in the United States); Eblin, supra note 64, at 1072–77 (chronicling the early history of domestic partnership programs in the United States).

245 For example, in December 1984, Berkeley, California, became the first public employer in the United States to offer health insurance to domestic partners, and the city did not distinguish between same-sex and opposite-sex domestic partners. See Domestic Partnership Information, CITY OF BERKELEY, http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=4206 (last visited Mar. 26, 2011) (describing the city’s policy); Eblin, supra note 64, at 1072 (same).

246 See Eblin, supra note 64, at 1072–77 (explaining that the United States’ first public domestic partnership programs benefited more opposite-sex couples than same-sex couples).


248 See James M. Donovan, An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples, 8 LAW & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 649, 666–67 (1998) (arguing that because same-sex couples may not marry, “domestic partnership benefits should be exclusively tailored [for gays and lesbians]”); Kimberly Menashe Glassman, Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave to Protect Domestic Partners, 37 U. MICH. J.L. REFORM 837, 860–65 (2004) (explaining why it would not violate the Fourteenth Amendment if government entities chose to extend family and medical leave only to same-sex domestic partners). But see Terry S. Kogan, Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances, 2001 BYU L. REV. 1023, 1043 (2001) (“So long as domestic partnership schemes are the only alternative available to same-sex couples, fairness dictates that these rights be extended equally to opposite-sex, unmarried couples.”); Lynd, supra note 64, at 566 (concluding that domestic partnership programs limited to only same-sex couples discriminate on the basis of sex and violate Title VII of the Civil Rights Act of 1964).

249 See, e.g., Irizarry v. Bd. of Educ., 251 F.3d 604, 610–11 (7th Cir. 2001) (Posner, J.) (holding that it is not a violation of equal protection for a public employer to provide benefits only to same-sex domestic partners); Partners Healthcare Sys., Inc. v. Sullivan, 497 F. Supp. 2d...
recommended that domestic partnership programs be limited only to opposite-sex couples.\(^{250}\) Furthermore, the theory behind marriage alternatives has had a significant impact on the real world. While many public employers have chosen to limit their domestic partnership programs to same-sex couples, none offer domestic partnership benefits exclusively to opposite-sex couples.

At the federal level, there is no movement to provide domestic partnership rights to unmarried, opposite-sex couples. Instead, almost all federal action on this issue has been focused on same-sex couples. For example, on April 15, 2010, President Barack Obama directed the Department of Health and Human Services to promulgate new rules concerning hospital visitation and medical decision-making rights.\(^{251}\) The new rules, which went into effect on January 18, 2011,\(^{252}\) require all hospitals that receive Medicare and Medicaid funding to allow patients to choose their visitors and to follow patients’ advance directives, such as durable powers of attorney and health care proxies.\(^{253}\) Although the new rules affect both gay and straight

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42, 45–46 (D. Mass. 2007) (holding that an employer’s decision to provide domestic partnerships benefits only to same-sex couples did not violate Title VII of the Civil Rights Act of 1964). \(^{250}\) There are, however, commentators who argue that domestic partnerships should not be offered at all. See, e.g., Lynne Marie Kohm, \textit{How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?}, 4 J.L. & FAM. STUD. 105, 110 (2002) (arguing that domestic partnerships dilute the value of marriage, particularly because they attempt to elevate same-sex partnerships); Lynn D. Wardle, \textit{Deconstructing Family: A Critique of the American Law Institute’s ‘Domestic Partners’ Proposal}, 2001 BYU L. REV. 1189, 1222–27 (2001) (arguing that domestic partnerships would devalue marriage because it would simultaneously inspire same-sex couples to marry and encourage opposite-sex couples to forgo marriage). According to Terry Kogan, the belief that domestic partnerships should be abolished is inherently antihomosexual as it demonizes gays and lesbians and argues that same-sex relationships lack all societal value. Kogan, \textit{supra} note 248, at 1036–43.


\(^{253}\) 3 C.F.R. § 20511.
couples, the change occurred because hospitals were routinely denying gays and lesbians access to their partners.

Moreover, President Obama’s inspiration for the change was a lesbian couple—Janice Langbehn and Lisa Pond. While vacationing with their children in Florida in 2007, Pond suffered a brain aneurysm.\textsuperscript{254} Even though Pond and Langbehn had been partners for eighteen years and had executed advanced directives and medical powers of attorney for each other, the hospital refused to let Langbehn visit Pond or make medical decisions on her behalf.\textsuperscript{255} The hospital kept Langbehn in the waiting room for eight hours and let Langbehn see Pond only for five minutes while a priest administered last rights.\textsuperscript{256} When Pond died, Langbehn was not allowed to be at her side.\textsuperscript{257} President Obama called Langbehn from Air Force One on the day he ordered the new hospital rules.\textsuperscript{258}

Additionally, federal domestic partnership benefits—to the extent that they exist—are limited to federal employees in same-sex relationships. On June 17, 2009, President Obama signed a presidential memorandum granting long-term-care insurance and sick leave to the same-sex partners of federal employees.\textsuperscript{259} Although the 1996 Defense of Marriage Act prevents health insurance from being offered to the same-sex partners of federal employees, legislators have introduced bills in the House and Senate to overturn this prohibition. In 2009, Representative Tammy Baldwin, the first openly lesbian U.S. Representative,\textsuperscript{260} and Senator Joseph Lieberman sponsored the Domestic Partnership Benefits and Obligations Act, which would provide health insurance and other benefits to the same-sex partners of federal employees.\textsuperscript{261} President Barack Obama hailed this act as a necessary step towards equality for federal LGBT employees.\textsuperscript{262} There has been no discussion of providing these benefits to federal employees in opposite-sex relationships.

\textsuperscript{254} Tara Parker-Pope, \textit{Kept from a Dying Partner’s Bedside}, N.Y. TIMES, May 19, 2009, at D5.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Shear, \textit{supra} note 251.
\textsuperscript{261} H.R. 2517, 111th Cong. (2009); S. 1102, 111th Cong. (2009).
\textsuperscript{262} See Administration of Barack H. Obama, Remarks on Signing a Memorandum on
At the state level, there has been a consistent trend establishing that "marriage alternatives" are designed for LGBT couples: once a state adopts same-sex marriage, the state abolishes its "marriage alternative" programs. For example, Vermont, Connecticut, and New Hampshire started offering civil unions to its LGBT couples in 2000, 2005, and 2007, respectively. Same-sex marriage became legal in these states in 2008 and 2009. By the end of 2009, all three of these states had passed legislation abolishing their civil union programs. On October 1, 2010, all existing civil unions in Connecticut automatically converted into marriages. On January 1, 2011, all New Hampshire civil unions converted into marriages as well.

Similarly, in states where same-sex marriage is illegal, but where statewide "marriage alternative" programs still exist, it is clear that the purpose of these programs is to benefit and legitimize same-sex couples. For example, in Wisconsin and Oregon, only same-sex couples may enter into domestic partnerships. In Washington, all same-sex couples may join the state’s domestic partnership program; however, Washington allows opposite-sex couples into its domestic partnership program only when at least one partner is over sixty-two years old. Additionally, both Oregon’s and Washington’s domestic partnership statutes explicitly acknowledge that same-sex couples face discrimination in the United States.


*See David D. Meyer, Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships, 58 Am. J. Comp. L. 115, 130–31 (2010) (discussing how once states take intermediate steps towards recognizing same-sex couples, such as through civil unions, they eventually disavow these intermediate steps and embrace same-sex marriage).

*See supra note 56.

*See supra note 56.


*See CONN. GEN. STAT. ANN. § 46b-38rr (West Supp. 2010) (stating that all Connecticut civil unions will merge into marriages on October 1, 2010).

*See N.H. REV. STAT. ANN. § 457-46 (2010) (“Any civil union shall be dissolved by operation of law by any marriage of the same parties to each other . . . .”).

*See WIS. STAT. § 700.01 (2010); OR. REV. STAT. § 106.305 (2009).

*WASH. REV. CODE ANN § 26-60-010.

*Washington’s domestic partnership law states:

The legislature finds that same sex couples, because they cannot marry in this state, do not automatically have the same access that married couples have to certain
In California, all same-sex couples may join the state’s domestic partnership registry. Opposite-sex couples may also join California’s registry, but at least one partner must be sixty-two years old or older.\textsuperscript{272} When California first began offering domestic partnerships in 1999, partnership benefits were limited mainly to hospital visitation and medical-decision rights.\textsuperscript{273} As a direct result of significant LGBT-rights lobbying, California now offers its domestic partnership registrants almost full marital rights. For example, domestic partners in California did not have the right to inherit intestate until 2003.\textsuperscript{274} The law changed after public outcry following the death of Jeff Collman, a flight attendant on American Airlines Flight 11, which crashed into the World Trade Center on September 11, 2001.\textsuperscript{275} Because Collman had not executed a will, Keith Bradkowski, Collman’s partner for eleven years, was unable to inherit rights and benefits, such as those associated with hospital visitation, health care decision-making, organ donation decisions, and other issues related to illness, incapacity, and death. Although many of these rights and benefits may be secured by private agreement, doing so often is costly and complex.

\textit{Id.} Similarly, Oregon’s domestic partnership law states:

Many gay and lesbian Oregonians have formed lasting, committed, caring and faithful relationships with individuals of the same sex, despite long-standing social and economic discrimination. These couples live together, participate in their communities together and often raise children and care for family members together, just as do couples who are married under Oregon law. Without the ability to obtain some form of legal status for their relationships, same-sex couples face numerous obstacles and hardships in attempting to secure rights, benefits and responsibilities for themselves and their children. Many of the rights, benefits and responsibilities that the families of married couples take for granted cannot be obtained in any way other than through state recognition of committed same-sex partnerships.

\textbf{OR. REV. STAT. § 106.305(3) (2009).}


\textsuperscript{273} \textit{Assemb. B. 26, supra note 272.}

\textsuperscript{274} \textit{Assemb. B. 2216, 2001–02 Leg., Reg. Sess. (Cal. 2002) (codified as amended at CAL. PROB. CODE §§ 6401–6402 (West Supp. 2003) (effective July 1, 2003)); see also Callan, supra note 272, at 433–34 (discussing the history behind California’s domestic partners receiving the right to inherit intestate).}

from Collman’s estate, even though both men had joined California’s registry.

Bradkowski not only attended the signing of Assembly Bill 2216, which added intestacy to California’s Domestic Partnership Act, but served as the principal witness for the California Assembly and Senate during the bill’s debate.

Similarly, New Jersey’s “marriage alternative” programs were also designed mainly to benefit same-sex couples. From 2004 to 2007, New Jersey operated a two-tiered domestic partnership program. Under this program, all same-sex couples could register as domestic partners; opposite-sex couples could also join, but both partners had to be over sixty-two years old. Same-sex domestic partners also enjoyed more rights under New Jersey’s two-tiered program because they were prohibited from marrying. Additionally, an overwhelming majority of New Jersey’s registered domestic partnerships were between same-sex couples. In 2004, New Jersey registered 2,826 domestic partnerships: 98.4% of which were for same-sex couples. In 2005, New Jersey registered 1,059 domestic partnerships: 96% were between couples in same-sex relationships.

In 2007, New Jersey created civil unions, which are offered exclusively to same-sex couples and provide them with almost full marital rights. Although New Jersey did not abolish its more limited domestic partnership program, it significantly tightened the program’s eligibility requirements. Regardless of sexual orientation, only couples where both partners are older than sixty-two may now enter into a domestic partnership in New Jersey. Today, young and middle-aged same-sex couples are forbidden from becoming domestic partners or receiving marriage licenses; instead, they may only form civil unions.

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276 See id.
277 Id.
279 See id. (noting that the legislature sought to make certain benefits available to same-sex domestic partners who were unable to enjoy such benefits through marriage).
283 See N.J. STAT. ANN. § 26:8A-4.1 (West 2010); Recognition in N.J. of Same-Sex Marriages, Civil Unions, Domestic P’ships and Other Gov’t-Sanctioned, Same-Sex Relationships Established Pursuant to the Laws of Other States and Foreign Nations, 3-2007 Op.
Finally, it is clear that marriage alternatives are designed primarily for same-sex couples, even in states that do not impose age or gender restrictions on domestic partners. For example, Nevada’s domestic partnership law, which does not reference sexual orientation or gender, was sponsored by openly gay state senator David Parks. See Cy Ryan, With Veto Override, Domestic Partners Bill Becomes Law: Nevada Becomes 17th State to Recognize Gay Relationships, LAS VEGAS SUN (May 31, 2009), http://www.lasvegassun.com/news/2009/may/31/veto-override-domestic-partners-bill-becomes-law/. Similarly, Colorado’s designated beneficiary program, which also does not reference sexual orientation or gender, was introduced in the Colorado House and Senate by openly gay legislators (Colorado House Representative Jennifer Veiga and Colorado Senator Mark Ferrandino) and considered primarily as gay rights legislation.

Additionally, both gay rights advocates and opponents recognize that Rhode Island’s recent decision to grant domestic partners funeral arrangement rights was sparked by the story of Mark Goldberg. See Katherine Gregg, R.I. Lawmakers Override Governor’s Vetoes, PROVIDENCE JOURNAL (Jan. 5, 2010, 5:05 PM), http://newsblog.projo.com/2010/01/lawmakers-override-governors.html. Both pro- and antigay rights groups agree that the impetus for granting funeral rights to domestic partners began with Mark Goldberg. See Peter Sprigg, Funerals, Domestic Partners, and the Meaning of Marriage, FRCBLOG.COM (Jan. 11, 2010), http://www.frcblog.com/2010/01/funerals-domestic-partners-and-the-meaning-of-marriage/.

Because of Rhode Island law, Goldberg could not even place Hanby’s obituary in the local

N.J. Att’y. Gen. 4 (2007) ("[O]nce the law authorizing civil unions becomes effective, the only new domestic partnerships that will be authorized are for couples, either same-sex or mixed-gender, both of whom are over 62 years of age."); see also Meyer, supra note 263, at 131 (discussing the evolution of New Jersey’s marriage alternatives).
newspaper.\footnote{Id.} Rhode Island did not give Goldberg his husband’s body until over a month after his death, on November 6, 2008.\footnote{Id.}

Public outcry resulted in a bill expanding funeral and burial rights to domestic partners. When former-Governor Carcieri vetoed the legislation, he said it was because the domestic partnership law represented “the incremental erosion of the principles surrounding traditional marriage.”\footnote{Gregg, supra note 287.} The Rhode Island legislature overrode the governor’s veto on January 5, 2010.\footnote{Id.}

2. The Purpose Behind Ohio’s Domestic Partnership Programs

Just like all other domestic partnership programs in the United States, Ohio’s domestic partnership registries and benefits programs are designed primarily to benefit same-sex couples who may not marry. Although all three registries are open to same-sex and opposite-sex couples, they were intended to provide local, symbolic recognition to same-sex couples.

The City of Cleveland Heights’ domestic partnership registry was the result of a citizen initiative orchestrated by Heights Families for Equality, which describes itself as a “coalition of gay and non-gay voters working to promote access to basic rights for all.”\footnote{HEIGHTS FAMILIES FOR EQUALITY, http://www.heightsfamilies.org/ (last visited Mar. 12, 2010).} When Cleveland Heights City Hall passed the domestic partner registry ordinance, Council Member Nancy Dietrich likewise declared the registry to be “an expression of the justice and equal treatment, for all . . . .”\footnote{Minutes of the Council Meeting of January, 2004, CITY OF CLEVELAND HEIGHTS, 8 (Jan. 20, 2004), http://www.clevelandheights.com/upload/newsletter/minutes_012004.pdf.}

Similarly, Toledo City Councilman Joe McNamara, who sponsored Toledo’s domestic partnership registry, intended the registry to portray Toledo as a tolerant, diverse, and progressive city for businesses and same-sex families.\footnote{See Tom Troy, Domestic Partnership Registry OK’d by Toledo City Council: ‘Committed’ Couples May Gain Recognition of Relationship, TOLEDO BLADE (Nov. 14, 2007), available at http://webcache.googleusercontent.com/search?q=cache:CJhB8M66hwI.r.smartbrief.com/resp/IxQUhMcCCjilxfWhw=Domestic+Partnership+Registry+Ok%27d+by+Toledo+City+Council&cd=3&hl=en&ct=clnk&gl=us&client=firefox-a&source=www.google.com (accessed by searching for the title of the article in the Google search archive).} When former Toledo City Councilman Rob Ludeman voted against the registry, he claimed that
it was just an “attempt to tear down the institution of marriage between a man and a woman.”

Finally, Cleveland City Councilman Joe Cimperman, a longtime ally of Cleveland’s LGBT community, sponsored Cleveland’s domestic partner registry, which he openly hailed as a step towards LGBT equality and proof of Cleveland’s commitment to its gay and lesbian citizens. Furthermore, the Gay Games chose Cleveland as its 2014 host city in part because of its domestic partnership registry.

Ohio’s domestic partnership benefits programs are also primarily designed to benefit same-sex couples. In November 2004, when Ohio adopted the Marriage Amendment, five public institutions offered domestic partnership health benefits: the City of Cleveland Heights, Ohio University, Miami University, Cleveland State University, and Youngstown State University. At the time, all of these institutions reserved domestic partner health benefits exclusively for same-sex couples. Today there are 24 public institutions that offer domestic partnership health benefits. Ten of these institutions, representing

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297 Id.
299 City of Cleveland, City Council and Cleveland LGBT Community Proudly Announce 1st Annual LGBT Heritage Day, CLEVELAND CITY COUNCIL (Oct. 6, 2009), http://www.clevelandcitycouncil.org/Home/News/October62009/tabid/775/Default.aspx (“The passage of the Domestic Registry legislation and the effort put into securing the 2014 Gay Games are examples of the City’s commitment to and support of [Cleveland’s LGBT] community.”).
301 See Rachel Abbey, On the Path to Domestic Partner Benefits in Ohio, FUSION MAG., Spring 2008, at 26 (establishing that Miami University, Ohio University, Cleveland State University, and Youngstown State University all had domestic partnership benefits programs by November 2004); Telephone Interview with Bob Johnson, supra note 202 (stating that Cleveland Heights started offering domestic partnership health insurance in 2002).
303 See discussion supra Part V.D.
42% of all public employers that provide domestic partnership health insurance in Ohio, offer these benefits only to same-sex couples.\textsuperscript{304}

Of the fourteen institutions that offer domestic partnership health benefits to gay and straight employees, three of them—Central State University, NEOUCOM, and Oberlin City Schools—have only same-sex couples receiving benefits.\textsuperscript{305} Additionally, both The Ohio State University and Central Ohio Technical College make it easier for same-sex couples to receive domestic partnership benefits and offer these couples better benefits than their opposite-sex counterparts.\textsuperscript{306} Finally, although Ohio University now allows both same-sex and opposite-sex couples to receive domestic partnership health insurance, the program was originally limited to same-sex couples as a “matter of equity and fairness.”\textsuperscript{307} The program, which started in 2004, has been open to opposite-sex couples since only June 2009.\textsuperscript{308} Therefore, at 16 of the 24 (67\%) Ohio institutions that offer domestic partnership health insurance, same-sex couples have either a currently or historically preferred status.

There is also strong evidence that the domestic partnership programs at Ohio’s remaining eight institutions were designed primarily for same-sex couples. According to the American Association of University Professors (AAUP) University of Cincinnati Chapter, the only reason the organization bargained for domestic partnership benefits was to stop the university from discriminating on the basis of sexual orientation.\textsuperscript{309} Likewise, the AAUP Wright State University Chapter fought for domestic partnership benefits on behalf of LGBT faculty.\textsuperscript{310}

Although other institutions may not be so forthright in describing the purpose behind their domestic partnership policies, the desire to

\textsuperscript{304} See discussion supra Part V.D.
\textsuperscript{305} See discussion supra Part V.D.
\textsuperscript{306} See supra notes 86, 236 (discussing the two-tiered domestic partnership policy at the Ohio State University and Central Ohio Technical College).
\textsuperscript{307} OU Superceded Policy & Procedure, supra note 302.
\textsuperscript{308} OU Current Policy & Procedure, supra note 302.
\textsuperscript{310} See generally Charles Derry, A Short Essay on (the Lack of) Domestic Partnership Benefits at Wright State University: Two Arguments and Some Ironies, RIGHT FLIER (AAUP-Wright State University, Dayton, Ohio), Apr. 2005, available at http://www.wright.edu/admin/aaup/rightflier/vol5no5Apr2005.pdf (discussing the injustice LGBT faculty must face at Wright State University because they are not offered domestic partnership benefits); see also Anna Bellisari, The Power of Collective Action, RIGHT FLIER (AAUP-Wright State University, Dayton, Ohio), Feb. 2007, at 1, available at http://www.wright.edu/admin/aaup/rightflier/vol7no2feb2007.pdf (highlighting the role Charles Derry’s article played in convincing Wright State University to adopt a domestic partnership benefits program).
help same-sex couples is still present, couched in the rhetoric of “fairness” and “equality.” For example, at Kent State University, the purpose of the domestic partnership program is euphemistically described as a way to show an “appreciation and high regard for diversity.” Similarly, Franklin County’s domestic partnership benefits program was created to reflect the “diversity” of Franklin County’s workforce and to achieve the goals of “fairness” and “integrity.” Even the City of Columbus, the most recent public employer to offer domestic partnership benefits, acknowledges that the program is predicated upon the concepts of “fairness” and “equality.”

3. Conclusion

Domestic partnership programs in Ohio and across the United States are innately designed to protect and benefit same-sex couples, and not just the “unmarried.” Allowing opposite-sex couples access to “marriage alternatives” does not change this reality. Further, it is impossible to divorce domestic partnership programs from the LGBT rights movement. While there are many domestic partnership programs in the United States reserved exclusively for same-sex couples, there is not a single public domestic partnership program in the country open only to unmarried, opposite-sex couples. Therefore, attacks against Ohio’s domestic partnership registries and benefits programs intentionally and maliciously target same-sex couples.

Because the history of marriage alternatives shows that attacks on domestic partnerships must necessarily be targeted attacks against gays and lesbians, Feeney’s second prong is satisfied and the second sentence of the Ohio Marriage Amendment violates the equal protection.

312 See Franklin County Board of Commissioners Minutes of General Session, FRANKLIN COUNTY, 9 (Aug. 18, 2009), http://www.co.franklin.oh.us/commissioners/board/documents/August18GSMinutes.pdf (Comments by Franklin County Human Resources Director Maggie Snow stating that the new employee handbook, which includes domestic partner benefits, helps to reflect the diversity of Franklin County’s workforce).
314 Caruso, supra note 201.
B. The Proponents of the Ohio Marriage Amendment Bear Animus Towards Same-Sex Couples and Intentionally Misled Voters About the Amendment’s Scope

This section looks at what the sponsors of the Ohio Marriage Amendment advertised during the Issue 1 campaign and establishes that the second sentence of the Amendment intentionally targets same-sex couples, thereby meeting Feeney’s second prong.

First, this section establishes that ballot initiatives are vulnerable to manipulation and misinformation, particularly when those initiatives concern minority civil rights. Second, this section shows that Citizens for Community Values (“CCV”), which ran the Ohio Campaign to Protect Marriage (“OCPM”), bears a significant amount of animosity towards gays and lesbians. Furthermore, CCV’s animus is identical to the hate Colorado for Family Values (“CFV”) displayed during its campaign for Amendment 2, which the Supreme Court overturned in Romer v. Evans.315 Finally, this section shows that CCV always intended for the Ohio Marriage Amendment to prohibit all forms of recognition for same-sex couples, no matter how innocuous, and that they lied to or misled voters on this critical issue. This conclusion, which is based upon CCV’s misleading statements, obfuscating tactics, and animus towards gays and lesbians, establishes that the Ohio Marriage Amendment was designed to specifically target same-sex couples, and not just the “unmarried,” in violation of the Equal Protection Clause of the Fourteenth Amendment.

1. The Inherent Vulnerabilities of Ballot Initiatives

Ballot initiatives, particularly when they concern the rights of minorities, are inherently vulnerable to proponent abuse and manipulation. Ballot initiatives are a form of direct democracy in which private citizens “propose a law or constitutional amendment, place it on the ballot, and vote to adopt it into law, all without aid or interference by their legislature.”316 Although the Populist Movement adopted ballot initiatives at the turn of the twentieth century, the Founding Fathers explicitly rejected direct democracy and saw it as a facilitator of tyranny.

The Guarantee Clause of the United States Constitution states: “The United States shall guarantee to every State in this Union a

316 Gildersleeve, supra note 121, at 1438.
Republican Form of Government.”\textsuperscript{317} The Constitution promises the states a republic, not a direct democracy.\textsuperscript{318} Furthermore, the Founding Fathers made this choice because they feared that pure democracy would lead to mob rule. Indeed, the Founding Fathers put many provisions in the Constitution specifically to prevent direct democracy. For example, the Founding Fathers established the Electoral College, thereby preventing the people from directly voting for the President;\textsuperscript{319} originally required state legislatures, and not the people, to elect senators;\textsuperscript{320} and prohibited the people from directly amending the U.S. Constitution, leaving the amendment process to Congress, state legislatures, and conventions.\textsuperscript{321}

Moreover many of the Founders detailed the evils of democracy and the inherent value of republics in their writings.\textsuperscript{322} According to James Madison, one of the fathers of the Constitution, direct democracy was an unstable form of government and a palpable threat to minority rights.\textsuperscript{323} Furthermore, Madison believed that one of the

\textsuperscript{317} U.S. CONST. art. IV, § 4.
\textsuperscript{318} In \textit{In re Duncan}, 139 U.S. 449 (1891), the Supreme Court analyzed the meaning behind the Guarantee Clause of the United States Constitution. Its conclusion was against direct democracy. According to the Court:

By the constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

\textit{Id.} at 461 (emphasis added).
\textsuperscript{319} U.S. CONST. art. II, § 1, cl. 2.
\textsuperscript{320} U.S. CONST. art. I, § 3, amended by U.S. CONST. amend. XVII.
\textsuperscript{321} U.S. CONST. art. V.
\textsuperscript{323} In \textit{The Federalist Papers}, Madison stated:

[A] pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. . . .

A Republic, by which I mean a Government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.
greatest strengths of republicanism, which he defined as “the total exclusion of the people in their collective capacity,” was its ability to protect minority rights:

> It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

Other Founding Fathers, such as Federalists Alexander Hamilton and John Adams, also feared that direct democracy would result in tyranny. In a scathing commentary on the history of pure democracies, Hamilton noted, “[t]he ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure deformity. When they assembled, the field of debate presented an ungovernable mob.” According to Adams, the “simplicity of . . . a pure democracy will always have its charm with minds not kept awake to its susceptibility of abuse.”

Even the Anti-Federalists, the Founding Fathers who were more supportive of direct democracy, realized that it should not be applied at the state or federal level. As stated in the Brutus Essays, which contain some of the Founding Era’s most forceful Anti-Federalist arguments:

> In a pure democracy the people are the sovereign, and their will is declared by themselves; for this purpose they must all come together to deliberate, and decide. This kind of government cannot be exercised, therefore, over a country of any considerable extent; it must be confined to a single city, or at least limited to such bounds as that the people can conveniently assemble, be able to debate, understand the

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327 Id. at 1033 (quoting John Adams, Illness in Europe—Commercial Treaties—Mission to the Court of Great Britain, in 1 THE WORKS OF JOHN ADAMS 400, 428 (1856)).
subject submitted to them, and declare their opinion concerning it.328

Therefore, while ballot initiatives are currently fashionable—more state ballot initiatives have taken place since the 1990s than ever before in U.S. history329—the Founding Fathers abhorred direct democracy on a large scale and diligently worked to protect the United States from an institution that they believed threatened minority rights.330

The modern ballot initiatives process proves that the Founding Fathers were right to be afraid. Although originally created as a way to better serve the will of the people, modern ballot initiatives often represent little more than the purist agendas of special interest groups.

According to political scientist Richard J. Ellis, modern ballot initiatives suffer from voter drop-off, where voters show up at the polls, but then fail to vote on ballot initiatives, as well as “congested ballots and confused voters, deceptive titles and multiple subjects, paid signature gatherers, rich individuals bankrolling pet initiatives, and the pervasive influence of organized special interest groups.”331 To support Ellis’s conclusion, one need only look at the extralegal ballot initiative process.

By their very nature ballot initiatives operate outside of the traditional system of checks and balances—a much-lauded hallmark of representative democracy. Special interest groups get to draft their ballot initiatives in secret. Once the measure’s petition gets enough signatures in an ill-policed signature-gathering process,332 the initiative is placed on the ballot. If more than 50% of the people who vote on that one specific issue vote in favor of the initiative, then it

329 See Gildersleeve, supra note 121, at 1443.
330 Additionally, for the reasons set forth above, there are many scholars who argue that ballot initiatives violate the Guarantee Clause of the United States Constitution. See, e.g., Erwin Chemerinsky, CHALLENGING DIRECT DEMOCRACY, 2007 Mich. St. L. Rev. 293, 301–04 (arguing that direct democracy violates the Guarantee Clause); Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1539–45 (1990) (finding direct democracy constitutionally suspect and arguing that ballot initiatives should be subject to higher judicial scrutiny). But see Pac. States Tel. & Tel. Co v. Oregon, 223 U.S. 118 (1912) (upholding a tax measure enacted via ballot initiative).
332 See ANTI-GAY RIGHTS: ASSESSING VOTER INITIATIVES 3–4 (Stephanie L. Witt & Suzanne McCorkle eds., 1997) (“There are now consultants and corporations that virtually guarantee, for a price, that they can get your initiative on the ballot. . . . The experts for hire and the presence of relatively low signature thresholds in most states have contributed to the explosion in the number of initiatives put before voters in recent elections.”).
becomes law. There is no requirement that 50% of the people who show up to vote approve of or understand the measure.\textsuperscript{333} Furthermore, at no point in the life of a ballot initiative is there legislative or executive review.\textsuperscript{334} During the drafting process, deliberation, debate, and compromise across party lines are all notably absent. Elected legislators, professionals who are presumably more aware of the nuances and consequences of words, have no input in a potential law. Instead partisan citizens get to write and advertise almost whatever they want, and they may decide that “confusion, rather than clarity, better serves their interests.”\textsuperscript{335} According to one scholar of direct democracy, ballot initiatives “are not drafted in a way that inspires confidence in their care for and attentiveness to the problems they address. Written in secret by those who share a

\textsuperscript{333} According to scholar David B. Magleby, voter drop-off is a common problem. Magleby estimates that about 15–18% of those who show up at the polls fail to vote on ballot initiatives, and that voters are nearly twice as likely to drop-off on ballot propositions than on candidates. \textit{David B. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States} 100, 106 (1984) [hereinafter MAGLEBY, DIRECT LEGISLATION]. Moreover, those who drop-off tend to come from lower economic backgrounds, have lower education, and are racial minorities, thereby making ballot initiatives unrepresentative of the total population. \textit{Id.} at 103–05. Additionally, the role of voter drop-off can have a significant impact in an election. For example, one statewide initiative relating to civil service reform passed “despite getting the votes of fewer than 15 percent of those who showed up at the polls.” \textit{Ellis, supra} note 331, at 128.

Voter confusion—even at the most elemental levels—is also a significant problem. Unlike candidate races where voters cast their votes for specific politicians, ballot initiatives require people to vote “yes” or “no,” and voters often confused as to what “yes” or “no” votes actually mean. For example, in an analysis of a 1980 rent control initiative in California, “[o]ver three-fourths of California voters did not match their views on rent control with their vote on the proposition: twenty-three percent wanted to protect rent control but incorrectly voted ‘yes,’ and fifty-four percent were opposed to rent control but incorrectly voted ‘no.’” \textit{David B. Magleby, Let the Voters Decide?: An Assessment of the Initiative and Referendum Process, 66 U. Colo. L. Rev.} 13, 39 (1995) [hereinafter Magleby, \textit{Let the Voters Decide?}].

As an illustration of how unrepresentative ballot initiatives can be, suppose that there is a state of exactly 100 people, and that there is an election with a ballot initiative section. Only 63 people show up at the polls. \textit{See Voter Turnout Increases by 5 Million in 2008 Presidential Election, U.S. Census Bureau Reports, U.S. Census Bureau} (July 20, 2009), http://www.census.gov/newsroom/releases/archives/voting/cb09-110.html (finding that only 63% of eligible voters in the West, Northeast, and South voted in the 2008 Presidential election). Taking Professor Magleby’s 15% voter drop-off analysis into account, there are now only 53 people voting on the ballot initiative section. \textit{See Magleby, Direct Legislation, supra,} at 100. Thus, a ballot initiative will be enacted depending on the cumulative “yes” or “no” votes of 27 people in a state of 100. If the voter confusion rates are the same as in 1980 rent control study, however, \textit{Magleby, Let the Voters Decide?}, supra, at 39, then 39 of the 53 people who voted on the ballot initiative section would have accidentally voted for the wrong side.

\textsuperscript{334} See Abrams, \textit{supra} note 322, at 1035–36 (discussing the lack of executive or legislative review in the ballot initiative process).

\textsuperscript{335} \textit{Id.} at 1035.
common view of societal problems, ballot propositions eschew compromise and tend toward extremism with appalling frequency.”

Once the initiative is adopted, the executive branch has no authority to review, accept, or veto the law. Moreover, initiative proponents cannot be held politically accountable for their policies and agendas. Unlike members of the legislature, executive, or even judiciary, the private citizens who sponsor discriminatory ballot initiatives do not fear being voted out of office. Thus, while “judicial review serves as the last level of scrutiny” in representative democracy, it “provides the only substantive check on the enactment of discriminatory laws through direct legislation.” Also, when ballot initiatives are aimed at limiting minority civil rights they enjoy far greater success than other types of initiatives or referenda. As such, ballot initiatives are an exceptionally attractive way for antigay interest groups to push through agendas that would otherwise not pass in a representative democracy.

Finally, because ballot initiatives are not subject to executive or legislative review, initiative proponents enjoy almost complete control over drafting and advertising their measures. This lack of oversight often leads to voter manipulation and confusion.

Initiative proponents are free to prey upon voters’ sensibilities by giving their initiatives intentionally misleading and emotionally charged titles. For example, the Ku Klux Klan sponsored the “Compulsory Education Bill” in Oregon in 1922, which required all

337 Abrams, supra note 322, at 1054.

From 1972 to 2001, at least 122 cities, counties, and states held initiatives and referenda that in some way addressed the civil rights of lesbians and gays. Of these measures, 90 were antigay in their intent, mostly repealing existing laws or banning the passage of gay civil rights laws in the future. Over 71% of these initiatives and referenda have resulted in losses for supporters of lesbian and gay civil rights. Only 32 initiatives sought to enact laws to ensure the civil rights of lesbians and gays; almost 69% of these have failed. Donald P. Haider-Markel & Kenneth J. Meier, Legislative Victory, Electoral Uncertainty: Explaining Outcomes in the Battles over Lesbian and Gay Civil Rights, 20 REV. POL’Y RES. 671, 676 (2003).
school-aged children to attend public schools.\textsuperscript{339} At the time, however, Oregon \textit{already required} children between the ages of nine and fifteen to attend school, but gave them the option of receiving a public or private education.\textsuperscript{340} Belied by its name, the Compulsory Education Bill’s true purpose was to force the closing of Oregon’s private Catholic schools. The Compulsory Education Bill passed with 52.7\% of the vote\textsuperscript{341} and remained law until 1925, when the Supreme Court struck it down in \textit{Pierce v. Society of Sisters}.\textsuperscript{342} Similarly, in 2010, Oklahoma voters approved a ballot initiative prohibiting state courts from using or considering Sharia law.\textsuperscript{343} To date, however, no Oklahoma court has ever cited to Islamic law in its decisions.\textsuperscript{344} The ballot initiative, which was passed by 70\% of voters, was titled the “Save Our State Amendment.”\textsuperscript{345}

Proponents may also draft radical or discriminatory initiatives, but hide their true intent in a mass of facially neutral and ambiguous phrases. For example, in \textit{Reitman v. Mulkey}\textsuperscript{346} the Supreme Court struck down California’s Proposition 14,\textsuperscript{347} a statewide ballot initiative that had amended California’s constitution.\textsuperscript{348} Proposition 14 did not mention the words “race,” “religion,” “ethnicity,” or “discrimination” in its text, but the initiative’s immediate and intentional effects were clear.\textsuperscript{349} Once passed, Proposition 14 overturned California’s fair housing laws and enshrined a constitutional right to engage in private housing discrimination.\textsuperscript{350}

Similarly, in 1994, the Florida Supreme Court struck down a ballot initiative that would have prohibited the State of Florida from granting antidiscrimination protection to gays and lesbians.\textsuperscript{351}
However, the authors of the proposed amendment did not include the words “gay,” “lesbian,” “bisexual,” “homosexual,” or “sexual orientation” in the initiative’s text. Instead, for admittedly legal and political reasons, the initiative’s proponents drafted a law that would have prohibited Florida and its political subdivisions from extending antidiscrimination protections to anyone except on the basis of “race, color, religion, sex, national origin, age, handicap, ethnic background, marital status or familial status.” Although this laundry list of “acceptable” classes made the Florida initiative facially neutral, its target was abundantly clear. To obtain a copy of the initiative’s petition, one first had to call 1-800-GAY-LAWS.

In addition to intentionally drafting confusing and ambiguous laws, initiative proponents often use deceptive advertising to mislead voters about an initiative’s legal scope. As a direct result of voters’ inability to understand the impact of ambiguous ballot initiatives, the role of advertising, which guides voters’ beliefs about an initiative’s scope, is exceptionally important. According to scholar Jane S. Schacter:

> Ballot propositions are presented to voters largely in a legal vacuum, unconnected in any specific way to the surrounding legal context. Because of this lack of context, many of the interpretive issues that confront courts are outside the plausible realm of voter contemplation. A vote in favor of a ballot question will signify, at best, an electoral judgment on the salient and general policies in question, not on the rarefied points that often generate interpretive litigation.

In a 1984 study once called “the broadest and most extensive empirical analysis of direct democracy,” political scientist David Magleby analyzed how modern voters learn about the content of

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352 See Adams, Jr., Challenges, supra note 351, at 589–90 (discussing Florida’s antigay “stealth proposal”).

353 See id. at 590 n.19 and accompanying text.

354 Id. at 589 n.18.

355 Id. at 590 n.20.


357 Id. at 131 n.93 (referring to MAGLEBY, DIRECT LEGISLATION, supra note 333).
He concluded that not only are the majority of voters unable to understand proposition texts, but that most proposition voters “have only heard about the measure from a single source, and . . . are ignorant about the measure except at the highly emotional level of the television advertising, the most prevalent source of information for those who have heard of the proposition before voting.”

Furthermore, in later writings, Magleby declared that “[h]ow campaigns have defined issues before the voters is probably the most important explanation of voting behavior on ballot questions.” This argument is not only supported by other scholars and non-partisan governmental committees, but also by three separate state supreme courts.

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358 Magleby, Direct Legislation, supra note 333, at 130–41.
359 Id. at 198.
360 Magleby, Let the Voters Decide?, supra note 333, at 38. As further proof of Magleby’s assertion, one need only look at recent events in El Paso, Texas. In 2009, the City of El Paso extended domestic partnership benefits to both gay and straight employees. Nineteen people signed up for the program. In response, local Pastor Tom Brown wrote a proposed ballot initiative that would require El Paso to endorse “traditional family values” by limiting health benefits only to “city employees and their legal spouse and dependent children.” With proponents advertising that the measure concerned only “traditional family values,” the initiative passed with 55% of the vote. See Ana Campoy, Same-Sex Benefits Ban Roils El Paso, WALL ST. J., Dec. 8, 2010, at A4.

Because of the initiative’s wording, however, the new law not only removed domestic partnership benefits, but also prohibited El Paso from providing health insurance to retired city workers. Id. According to the President of El Paso’s police union, the ordinance could deny health insurance to as many as 10,000 retirees. Id.

A District Court judge recently granted a preliminary injunction against El Paso, noting that the ordinance most likely violates the U.S. Constitution’s Contract and Equal Protection Clauses. See Order Granting in Part Plaintiffs’ Application for a Preliminary Injunction at 18–20, Martin v. City of El Paso, Case No.3:10-cv-00468-FM.

361 See, e.g., Cal. Comm’n on Campaign Fin., Democracy by Initiative: Shaping California’s Fourth Branch of Government 198 (1992) (finding that most voters get their information from the mass media and paid political advertising), quoted in Schacter, supra note 356, at 131 (finding that most people get their ballot initiative information from thirty-to-sixty-second TV spots); see also id. at 131 n.94 (listing various studies that also show that voters get most of their ballot initiative information from the media). In the early 20th century, the Montana, Arkansas, and Oregon Supreme Courts all noted that voters received their ballot initiative information from few sources, relied heavily on the media, and often based their vote on an initiative’s easily manipulated title. According to these three state supreme courts:

The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured
The campaign for Colorado’s Amendment 2 shows just how powerful false advertising can be in a ballot initiative campaign. In 1993, 71% of Coloradans believed that it should be illegal to fire a person solely on the basis of his or her sexual orientation. In contrast, Robert K. Skolrood, one of the drafters of Colorado’s Amendment 2, specifically worded Amendment 2 to prevent gays and lesbians from having any cause of action for discrimination in “employment, education, housing, or status.” During their Amendment 2 campaign, CFV portrayed Amendment 2 as a necessary piece of legislation to stop deviant homosexuals from receiving “special rights.” Instead of saying that Amendment 2 would overturn local antidiscrimination laws, CFV framed Amendment 2 as a law prohibiting gay affirmative action programs, even though no such programs existed in Colorado. On November 3, 1992, 53% of Coloradans approved Amendment 2—thereby making it perfectly legal for employers to fire workers based upon their real or perceived sexual orientation.

Ballot initiatives suffer from significant vulnerabilities. They are prone to manipulation and dogmatism at all levels of the process. They circumvent the traditional checks and balances system and are subject only to judicial review. Even the Founding Fathers rejected ballot initiatives, regarding them as vehicles for majoritarian tyranny and palpable threats to minority rights. Overall, ballot initiatives represent an attractive alternative for special interest groups that wish to push through purist, anti-minority agendas that are not shared by the general population.

only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage.

Sawyer Stores, Inc. v. Mitchell, 62 P.2d 342, 348–49 (Mont. 1936); Westbrook v. McDonald, 43 S.W.2d 356, 360 (Ark. 1931); State ex rel. Gibson v. Richardson, 85 P. 225, 229 (Or. 1906).


365 See id. at 277–80 (discussing the “special rights” arguments made by Amendment 2’s sponsors); William N. Eskridge, Jr., No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review, 75 N.Y.U. L. REV. 1327, 1352–53 (2000) (stating that Amendment 2’s sponsors “emphasized that [Colorado’s] antidiscrimination ordinances not only gave assertedly overprivileged homosexuals ‘special rights’ but also invaded the rights and institutions of straight families”).

366 Debbage Alexander, supra note 364, at 279.

367 See O’Rourke & Dellinger, supra note 363, at 136.
This Note contends that CCV and the OCPM entered into and abused the ballot initiative process to unconstitutionally attack Ohio’s LGBT community.

2. CCV Bears Unconstitutional Animus Against Gays and Lesbians

In 2010, the Southern Poverty Law Center (“SPLC”), labeled eighteen organizations in the United States as antigay hate groups. According to SPLC, an antigay hate group is defined as an organization that engages in the propagation of known falsehoods about gays and lesbians—i.e. makes “claims about LGBT people that have been thoroughly discredited by scientific authorities”—and engages in “repeated, groundless name-calling.” An organization is not an antigay hate group simply because it views homosexuality as unbiblical. CCV is officially associated with two antigay hate groups, including the American Family Association, an organization that in May 2010 blamed gays and lesbians for carrying out the Holocaust.

Further, much like the proponents of Colorado’s unconstitutional Amendment 2, CCV itself bears an overriding animus against gays and lesbians. According to CCV’s website, gays and lesbians suffer from the “disease of homosexuality” and, like those who engage in rape, incest, pedophilia, and bestiality, are a “distortion of God’s intention for human sexuality.”


369 Id. at 35.

370 Id.


372 See Bryan Fischer, Homosexuality, Hitler, and ‘Don’t Ask, Don’t Tell’, RENEWAMERICA (May 28, 2010), http://www.renewamerica.com/columns/fischer/100528 (“Homosexuality gays us Adolph Hitler, and homosexuals in the military gave us the Brown Shirts, the Nazi war machine and six million dead Jews.”). Bryan Fischer is the American Family Association’s Director of Issue Analysis for Government and Public Policy. See also Schlatter, supra note 368, at 36 (noting that the American Family Association is an antigay hate group in part because of Fischer’s comments blaming gays and lesbians for the Holocaust).


374 Id.
elaborate and militant network of homosexual activists is targeting school children, some as young as elementary school, and encouraging them to engage in sodomy. 375 CCV predicts that this indoctrination could result in a rising number of homosexuals “in the next ten to fifteen years if concerned, informed citizens do not actively resist the organized effort to normalize homosexual behavior in our society, especially in our schools.” 376 According to CCV, gays and lesbians, who allegedly enjoy greater income and education levels than the rest of America, 377 should not enjoy the protection of antidiscrimination laws. 378 Instead, gays and lesbians are deserving of “legitimate discrimination” because “the militant agenda of homosexual activists represents the single greatest threat to . . . Judeo-Christian family values, and to societal stability as a whole, of this generation.” 379

In the mid-1990s the proponents of Colorado’s Amendment 2, which was struck down in Romer because of its inherent animus towards the LGBT community, 380 made nearly identical arguments in their initiative campaign. For example, CFV often portrayed gays and lesbians as elitists undeserving of discrimination protection and as deviants and pedophiles who preyed upon school children. 381 The

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375 Id. (“The purpose of [the Gay, Lesbian, Straight Education Network (GLSEN) and other gay-straight alliances] is to train gay and lesbian students for activism and to encourage ‘straight’ students to experiment with homosexual behavior . . . .”).

376 Id.

377 Id. The claim that gays and lesbians inherently have higher levels of income than their heterosexual counterparts, however, is false. In a recent USA Today report in comparing same-sex couples who identified as “married” and opposite-sex married couples, same-sex spousal couples enjoyed an average income of $91,558 while opposite-sex married couples enjoyed an average income of $95,075. Report: Gay Couples Similar to Straight Spouses in Age, Income, USA TODAY (Nov. 3, 2009, 3:09 AM), http://www.usatoday.com/news/nation/2009-11-02-census-gay-couples_N.htm. Similarly, in a study analyzing the economic impact of being gay or lesbian in the United States, the New York Times reported that, in the worst case scenario, a same-sex couple would pay $467,562 more than an identical opposite-sex couple over the course of their lifetime. Tara Siegel Bernard & Ron Lieber, The Costs of Being a Gay Couple Run Higher, N.Y. TIMES, Oct. 3, 2009, at A1. In the best case scenario, a same-sex couple would only pay $41,196 more than an identical opposite-sex couple. Id. Furthermore, since fringe benefits can make up a substantial percent of an employee’s income, the denial of domestic partnership benefits would only exacerbate the income disparities between same-sex and opposite-sex couples.

378 CITIZENS FOR COMMUNITY VALUES, supra note 373.

379 Id.

380 See discussion supra Part IV.B.1.

381 See, e.g., Debbage Alexander, supra note 364, at 276–77 & n.68, 278 (discussing how Amendment 2’s proponents characterized gays and lesbians as pedophiles who, because of their elitist economic status, did not need anti-discrimination protection); Eskridge, Jr., supra note 365, at 1352–53, 1382–83 n. 238 (discussing how CFV characterized gays and lesbians as undeserving of “special” rights because they were deviants who wanted to indoctrinate and molest school children). For an interesting account on the history and evolution of antigay
CFV also declared that gay men regularly molested children and ingested urine and feces.\textsuperscript{382}

Interestingly, proponents of Ohio’s Marriage Amendment shared similar bizarre and off-putting sentiments at a Columbus forum concerning Issue 1. At this event, Patrick Johnston, the vice chairman of the Constitution Party’s Ohio branch, represented the pro-Amendment side.\textsuperscript{383} Although Johnston was not officially affiliated with CCV, he actively worked alongside Phil Burress to place the initiative on the ballot.\textsuperscript{384} At the forum Johnston declared, “I support and endorse the criminalization of homosexuality.”\textsuperscript{385} He also stated that the imposition of the death penalty for homosexuality was not necessarily unreasonable.\textsuperscript{386} He said that the use of the death penalty for gays and lesbians should be subject to “in-house debate [because] [t]here were capital crimes in the Bible, and that would be something debated.”\textsuperscript{387}

3. CCV Intentionally Misled Voters About the Scope of Issue 1

According to Justice Kelly’s dissent in \textit{National Pride at Work, Inc. v. Governor of Michigan},\textsuperscript{388} where the Michigan Supreme Court declaring domestic partnership benefits unconstitutional under the Michigan Marriage Amendment,\textsuperscript{389} ballot initiative proponents should not be rewarded for intentionally misleading voters about an
amendment’s scope.390 If the sponsors of a marriage initiative tell voters that the proposed amendment will not harm state domestic partnership programs, then the courts should not declare those programs unconstitutional—even if, post-ratification, the amendment’s sponsors claim otherwise.391

During the campaign over Issue 1, CCV intentionally misled Ohio voters about the Amendment’s scope. In an effort to appeal to more moderate voters, the OCPM, CCV’s political action committee,392 created campaign materials that promoted the Amendment as a narrow law that would not hurt Ohio’s domestic partnerships. Indeed, OCPM even entitled the initiative the “Marriage Protection Amendment,” thereby insinuating that Issue 1 would only “protect marriage.” Once the Amendment passed, however, CCV performed a bait-and-switch, launching a campaign to end Ohio’s domestic partnership programs, institutions that enjoyed and continue to enjoy majority support throughout Ohio.394

In addition to harboring animus towards gays and lesbians, CCV always intended to use Issue 1 to remove Ohio’s public domestic partnership programs. When Barry Sheets, CCV’s current Director of Governmental Affairs and the former Columbus Director of OCPM, was challenged in a radio debate about the Amendment’s impact on domestic partnership benefits, he responded that “domestic partner benefits that are offered by a governmental entity would not be allowed under [the Ohio Marriage Amendment].”395 Likewise, in an article for Salon.com, Phil Burress, CCV’s founder, expressed his contempt for public domestic partnership programs and stated that public institutions are “using taxpayer money and giving out the benefits of marriage when they have no right to do so.”396

390 Id. at 545–49 (Kelly, J., dissenting).
391 See id at 548–49 (“[A] majority of likely voters favored an amendment that would bar same-sex marriage but would go no further. Therefore, this Court’s majority errs by holding that the amendment not only bars same-sex marriage but also prohibits the benefits at issue.”).
392 See Brief for Citizens for Community Values as Amicus Curiae Urging Reversal, supra note 7, at 1 (highlighting the control CCV had over OCPM).
393 For a partial reproduction of the Ohio Secretary of State’s 2004 Issue 1 Report, see infra Appendix G.
396 Goldberg, supra note 383.
Once the Amendment passed, CCV made good on its intentions. David R. Langdon, CCV’s attorney and the author of the Ohio Marriage Amendment, has served as plaintiff’s counsel in all three cases challenging the constitutionality of Ohio’s domestic partnership programs.\textsuperscript{397} In the most recent case, \textit{Cleveland Taxpayers for the Ohio Constitution v. City of Cleveland},\textsuperscript{398} Langdon argued that Cleveland’s domestic partnership registry, in which same-sex couples make up 82\% of all registrants,\textsuperscript{399} is illegal because:

The meaning of [the Ohio Marriage] Amendment is readily ascertainable from the words used. The first sentence is clear and unambiguous in defining marriage as ‘a union between one man and one woman.’ The second sentence, which is at issue in this case, is also clear and unambiguous. It prohibits the state and its political subdivisions from creating or recognizing a legal status for relationships that approximate marriage, such as ‘civil unions’ or ‘domestic partnerships.’\textsuperscript{400}

Despite Langdon’s claims of textual clarity, however, the sponsors of his amendment worked hard to convince Ohioans that the initiative would not impact the state’s domestic partnership programs.

Looking at the pro-Issue 1 TV, radio, and newspaper advertisements that are archived on OCPM’s website;\textsuperscript{401} the Ohio Secretary of State’s Issues Report,\textsuperscript{402} where the OCPM officially advertised the scope of the Marriage Amendment; and the general information available on OCPM’s webpage, one would get the distinct impression that Issue 1 would not adversely affect Ohio’s domestic partnership programs. On OCPM’s website, there are two newspaper ads, four radio ads, and one television advertisement in favor of the Amendment.\textsuperscript{403} None of the TV or radio ads directly mention the Amendment’s impact on Ohio’s domestic partnership

\textsuperscript{397} See supra Part I (discussing Landon’s representation of plaintiffs who have challenged Ohio’s domestic partnership registries and benefits programs).
\textsuperscript{398} No. 94327, 2010 Ohio App. LEXIS 3981 (Ohio Ct. App. Sept. 30, 2010).
\textsuperscript{399} See infra Table 1 (providing data on Ohio’s domestic partner registries).
\textsuperscript{400} Plaintiffs’ Motion for Preliminary and Permanent Injunctions, with Memorandum in Support at 5, \textit{Cleveland Taxpayers}, 2010 Ohio App. LEXIS 3981 (No. CV-09-701308) (citation omitted).
\textsuperscript{403} See infra Appendix G.
\textsuperscript{404} \textit{OHIO CAMPAIGN TO PROTECT MARRIAGE}, supra note 401. The two newspaper ads are reproduced \textit{infra} in Appendix C, D, E, and F. The television ad and four radio ads are transcribed \textit{infra} in Appendix B and are on file with author.
programs. Although one radio ad briefly states that the “benefits of marriage” should be given only to married couples, the ad does not define the “benefits of marriage” or the extent to which the “benefits of marriage” could or should be curtailed. Overall, the radio ads more explicitly discuss Ohio’s tax rates than the fate of Ohio’s domestic partnership programs. Additionally, the vast majority of these radio and television ads suggest that the Amendment is only about keeping marriage between one man and one woman, calling the entire campaign an issue of “respect for marriage” and “common sense.”

Furthermore, the two newspaper ads archived on OCPM’s website clearly state that Issue 1 would not remove Ohio’s domestic partnership programs. The first newspaper ad, “Private Life,” shows a photograph of two elderly women. Beneath them in bold and large font OCPM states “Don’t be confused about Issue 1. Protecting marriage won’t hurt unmarried citizens.” Underneath this declaration, the ad provides, in bold font, caps, and italics, a “question and answer” section about the Amendment’s scope. According to the ad, “Q: Will [Issue 1] still protect the benefits individuals and unmarried couples receive from their employers? A: YES It allows for no interference with contracts between private parties.” The ad finishes by urging people to ignore the “wild claims” against Issue 1 and by reassuring voters that Issue 1 is only about reserving marriage as an institution for one man and one woman. There is no other mention about the impact of Issue 1’s second sentence.

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404 See infra Appendix B.
405 “Both Ways” Radio Ad, infra Appendix B.
406 “Both Ways” Radio Ad, infra Appendix B.
407 See “What You Know” Radio Ad, infra Appendix B.
408 See, e.g., “Common Sense” Television Ad, infra Appendix B (arguing that it is “common sense” for marriage in Ohio to be between one man and one woman); “Common Sense” Radio Ad, infra Appendix B (“Voting ‘Yes’ on Issue 1, the Ohio Marriage Amendment, is just common sense.”); “Respect” Radio Ad, infra Appendix B (arguing that the Ohio Marriage Amendment is respectful towards gays and lesbians because it upholds God’s law and divine truth).
409 Infra Appendices C, D.
410 Infra Appendix C.
411 Infra Appendices C, D.
412 Infra Appendix D.
413 Infra Appendix D.
414 Infra Appendix D.
415 Infra Appendix D.
Similarly, in the newspaper ad “Common Sense,” there is a picture of a bride and groom holding hands. Below the picture is a text box asking in large and bold font “Will Issue 1 also protect unmarried Ohioans?” Underneath this heading is the question “Will [Issue 1] still protect the benefits individuals and unmarried couples receive from their employers?” Next to this question, in capital letters and in large, bold font is the answer “YES.” Surrounding this text box the ad urges Ohioans to vote for Issue 1 only “to keep marriage between one man and one woman.” There is no suggestion whatsoever in this ad that the Ohio Marriage Amendment would affect Ohio’s domestic partnership programs.

Additionally, the Ohio Secretary of State’s Issues Report, which does not vet for truth or accuracy, also failed to inform average voters about OCPM’s intentions. Under the heading “WHAT ISSUE 1 DOES,” OCPM states that “[i]ssue 1 restricts governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage.” However, immediately below this declaration under the heading “WHAT ISSUE 1 DOES NOT DO,” the report states that “[i]ssue 1 does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.” In addition to being contradictory, these declarations purposefully do not define “other deviant relationships,” “government benefits,” or a relationship that “seeks to imitate marriage.” It is also noteworthy that OCPM never once suggests that Issue 1 will affect, or is intended to affect, the rights and benefits of straight couples in nonmarital relationships; the only benefits programs that concern OCPM are those that are offered to “non-marital homosexual relationships.”
Finally, OCPM’s general website also sought to confuse voters about the scope of Issue 1’s second sentence. In one lengthy diatribe about the Marriage Amendment’s potential effects, OCPM states that Issue 1 would “strictly [limit] the benefits of marriage to those who are married and keep them from being given to unmarried heterosexual or homosexual individuals, if the intent was to copy the design of marriage, thereby circumventing marriage laws and accessing its benefits through a back door.”428 However, in an e-newsletter, also available on OCPM’s website, OCPM urged its supporters to tell undecided voters that “[i]n matters of health benefits . . . private companies and governments are not allowed to discriminate on the basis of marital status”429 and that “[t]he second sentence [of the Ohio Marriage Amendment] simply guarantees that the state and its political subdivisions will not . . . creat[e] ‘civil unions’ or some other relationship that imitates marriage in all but name.”430

Therefore, despite recent assertions that the Marriage Amendment clearly prohibits Ohio from recognizing domestic partnerships, OCPM and CCV wanted voters to believe that Issue 1 would not affect Ohio’s domestic partnership registries or health insurance programs.

4. Conclusion

CCV and the OCPM misled voters about the scope of Issue 1 and abused Ohio’s ballot initiative process.

The Founding Fathers feared that direct democracy could easily be manipulated to deny civil rights to minorities, and Ohio’s ballot initiative process proves that those fears were well-founded. Ohio’s ballot initiative process lacks meaningful checks and balances and, as such, is inherently vulnerable to manipulation.

Issue 1 proponents took advantage of these weaknesses and drafted an ambiguous piece of legislation designed to discriminate against gays and lesbians. They then played into discriminatory stereotypes about gays and lesbians while simultaneously advertising that Issue 1 would not affect Ohio’s domestic partnership programs. After Issue 1 passed, CCV launched a campaign against Ohio’s public domestic

430 Id.
partnership registries and health insurance programs, which are overwhelmingly used by same-sex couples, and claimed that the Amendment prohibited these institutions.

The entire history of Issue 1 is predicated upon ambiguity, obfuscation, and lies. CCV and OCPM always intended to harm Ohio’s gay and lesbian community, but never explained their agenda to the voters. Since Issue 1 passed via ballot initiative, the courts are the only check upon the Ohio Marriage Amendment. Considering the intentionally manipulative actions of the Amendment’s proponents, the second sentence of Ohio’s facially neutral Marriage Amendment should be found to target gays and lesbians, as prohibited under Feeney’s second prong, and to violate the Equal Protection Clause of the Fourteenth Amendment.

C. The Removal of Ohio’s Domestic Partnership Programs Would Prove an Intent to Harm Same-Sex Couples in Violation of Lawrence and Romer

Finally, this section contends that if the second sentence of the Ohio Marriage Amendment invalidates Ohio’s public domestic partnership programs, then the second sentence would result in almost limitless discriminatory consequences to Ohio’s LGBT community. Per Lawrence and Romer, these broad, statewide effects would necessarily betray an intentional, and unconstitutional, antigay animus that would satisfy Feeney’s second prong in violation of the Equal Protection Clause of the Fourteenth Amendment.

In Lawrence v. Texas, the Supreme Court held that states could not criminally punish gays and lesbians for engaging in intimate sexual conduct. Although the Court claimed that its opinion did not affect state recognition of same-sex couples, the majority’s reasoning clearly impacts the status of same-sex relationships. According to the Court, adult gays and lesbians not only have a protected right to engage in private, intimate relations, but to form

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431 For additional information on Lawrence and Romer, see supra Part IV.B.
433 Id. at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).
434 Id. (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).
435 Indeed the Court’s language so obviously affects state recognition of same-sex couples that Scalia’s dissent scathingly noted that “[t]his case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.” Id. at 605 (Scalia, J. dissenting).
436 Id. at 567 (majority opinion) (“[A]dults may choose to enter upon this relationship in
committed and loving same-sex couples.\textsuperscript{437} The Court noted that, although sex is undoubtedly important to same-sex couples, much like it is important to opposite-sex couples, “intimate conduct . . . can be but one element in a personal bond that is more enduring.”\textsuperscript{438} The Court also recognized that “personal decisions relating to marriage . . . [and] family relationships\textsuperscript{439} are afforded constitutional protection,\textsuperscript{440} and that “[t]hese matters, [which] involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”\textsuperscript{441} The Court finished its opinion with an invitation for future generations to end institutionalized hatreds, declaring that morality, history, and tradition alone are insufficient reasons to maintain discriminatory laws.\textsuperscript{442} According to the Court, “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”\textsuperscript{443}

The \textit{Lawrence} decision greatly impacts the status of same-sex couples. Under \textit{Lawrence}, gays and lesbians have a Fourteenth Amendment right to: 1) be gay, 2) engage in consensual sex, and 3) enter into same-sex relationships. If same-sex couples have a Fourteenth Amendment right to exist under \textit{Lawrence}, then what right do the states have in turning these relationships into pariah-like non-entities at every level of state government, even down to the most local municipal level? The answer, under \textit{Romer}, is “none.”

Under \textit{Romer v. Evans},\textsuperscript{444} the second sentence of the Ohio Marriage Amendment contains an unconstitutional animus against gays and lesbians. In \textit{Romer}, the Supreme Court invalidated Colorado’s Amendment 2, which “prohibit[ed] all legislative, executive or judicial action at any level of state or local government

\begin{itemize}
\item the confines of their homes and their own private lives and still retain their dignity as free persons.”\textsuperscript{437}
\item Id. at 574, 577–78 (finding that persons have a Fourteenth Amendment right to enter into same-sex relationships and engage in intimate sexual behavior).\textsuperscript{439}
\item Id. at 567.\textsuperscript{439}
\item Id. at 574.\textsuperscript{439}
\item Id.\textsuperscript{440}
\item Id. (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 US. 833, 851 (1992)).\textsuperscript{440}
\item Id. at 571–572.\textsuperscript{442}
\item Id. at 579.\textsuperscript{443}
\item 517 U.S. 620 (1996).\textsuperscript{444}
\end{itemize}
designed to protect [gays and lesbians] and “repealed” and forbade all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. To overcome Amendment 2 and its wealth of consequences, Colorado’s gay community would have needed to “enlist[] the citizenry of Colorado to amend the State Constitution . . . . This is so no matter how local or discrete the harm, no matter how public and widespread the injury.” According to the Court, Amendment 2’s “sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus,” and that Amendment 2 lacked “any identifiable legitimate purpose or discrete objective.”

Similarly, if Ohio’s domestic partnership programs were declared unconstitutional, then the State of Ohio would effectively prohibit any and all recognition for same-sex couples at every level of government. This prohibition would stand no matter how limited or local the recognition would be, and it would stand until a group of individuals successfully petitioned Ohio’s citizenry to amend the constitution. If Ohio’s domestic partnership programs are invalidated, then the resulting hardships imposed on Ohio’s LGBT community would prove that the Marriage Amendment’s second sentence is based on antigay animus and lacks a legitimate government interest.

445 Id. at 624.
446 Id. at 629.
447 See id. at 628–630 (noting that Amendment 2 would affect both private and public life in Colorado). The Supreme Court also recognized that Amendment 2 could possibly affect general antidiscrimination laws in Colorado, but the Court found that it did not need to decide this issue to rule against Amendment 2. Id. at 630–31.
448 Id. at 631.
449 Id. at 632.
450 Id. at 635.
451 Moreover, the fact that Ohio’s Marriage Amendment would impact every level of Ohio government is especially salient in the Sixth Circuit Court of Appeals. In Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998), the Sixth Circuit Court of Appeals upheld a Cincinnati Charter Amendment that prohibited anti-discrimination protection for gays and lesbians in large part because of the amendment’s local nature. According to the Court:

The low level of government at which Article XII becomes operative is significant because the opponents of that strictly local enactment need not undertake the monumental political task of procuring an amendment to the Ohio Constitution as a precondition to achievement of a desired change in the local law, but instead may either seek local repeal of the subject amendment through ordinary municipal political processes, or pursue relief from every higher level of Ohio government including but not limited to Hamilton County, state agencies, the Ohio legislature, or the voters themselves via a statewide initiative.
Admittedly, unlike Amendment 2, Ohio’s Marriage Amendment does not specifically single out gays and lesbians for unjust treatment. The neutrality of the Amendment’s text, however, does not change the fact that: 1) Ohio’s domestic partnership programs are overwhelmingly used by same-sex couples, 2) same-sex couples cannot legally leave Ohio’s “unmarried class,” regardless of the Amendment, 3) the author of the Marriage Amendment has served as plaintiff’s counsel in all three cases seeking to end Ohio’s domestic partnership programs, and 4) the Amendment’s sponsors intended to remove Ohio’s domestic partnership programs through the Amendment’s second sentence, but did not inform the public of their intent.

The second sentence of the Ohio Marriage Amendment states “[t]his state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” Neither the author of the Ohio Marriage amendment nor

Id. at 297.

452 Those who support CCV might further argue that CCV’s amicus brief in State v. Carswell, 871 N.E.2d 547 (Ohio 2007), shows that CCV did not intend for the Ohio Marriage Amendment to affect only gays and lesbians because Carswell involved an unmarried heterosexual couple. Brief for Citizens for Community Values as Amicus Curiae Urging Reversal, supra note 7, at 2. This argument, however, does not negate CCV’s misleading advertisements or the hatred that CCV bears against Ohio’s LGBT community. See discussion supra Part VI.B. Much like the Moralistic Position found in the writings of Lynn Wardle and Lynne Marie Kohm, CCV’s position against domestic partnerships, at its core, revolves around animus towards gays and lesbians. See supra note 250 (discussing the writings of Lynne Marie Kohm and Lynn Wardle); discussion supra Part VI.B.2 (detailing CCV’s animus towards gays and lesbians). Additionally, CCV’s position can be explained away by the circumstances surrounding Carswell.

Most likely, CCV’s position on Ohio’s domestic violence statute was formed well after the enactment of the Ohio Marriage Amendment. First, state marriage amendments are considered to be civil, not criminal, laws. Prior to State v. Burk, No. CR-462150, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), rev’d, 843 N.E.2d 1254 (Ohio Ct. App. 2005), no one had ever argued that a marriage amendment could invalidate state criminal code. Unlike Brinkman, Hicks, and Cleveland Taxpayers for Ohio Constitution, which were all argued by Amendment author David Langdon, Burk’s arguments were made by a defense attorney who had nothing to do with CCV. Id. Second, since Carswell was the first time the Supreme Court of Ohio addressed the Marriage Amendment, CCV was probably hesitant to advocate for a narrow reading. If CCV had done so, then they risked the Ohio Supreme Court limiting the second sentence to only civil unions, thereby weakening CCV’s campaign against Ohio’s domestic partnership programs. Thus, CCV’s amicus brief in Carswell does not negate their intent to target same-sex couples under the second sentence of the Ohio Marriage Amendment.

453 See supra Part V.

454 OHIO REV. CODE ANN. § 3101.01(C) (West 2010).

455 See supra Part I.

456 See supra Part VI.B.

457 OHIO CONST. art. XV, § 11.
any Ohio court has ever provided a definition for a “legal status” that “intends to approximate the design, qualities, significance or effect of marriage.” Additionally, no Ohio court has ever defined “the design, qualities, significance or effect of marriage.” For example, is the effect of marriage the spousal testimonial privilege, or is it the right to inherit intestate? Regardless of the answers to these questions, however, it is entirely within the purview of the Ohio judiciary to conclude that Ohio’s domestic partnership registries and benefits programs violate the Ohio Constitution.

If the Supreme Court of Ohio invalidates Ohio’s domestic partnership registries, then every public entity in Ohio would be prohibited from recognizing same-sex couples so long as the Amendment remains in effect. Ohio’s domestic partnership registries offer its registrants no legal benefits whatsoever. At most, these registries offer a token symbolism to its registrants, who are overwhelmingly same-sex couples. Therefore, if a registry that

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458 Id. It should be noted that the phrase “intends to approximate the design, qualities, significance or effect of marriage” does not modify the phrase “relationships of unmarried individuals,” but rather the “legal status” that Ohio is forbidden from creating or recognizing. The conjugation of “to intend” in this instance is for a subject in the third-person singular, “a legal status.” Thus the “legal status” itself must “intend” to “approximate the design, qualities, significance or effect of marriage.” If the phrase “intends to approximate the design, qualities, significance or effect of marriage” was to modify the phrase “relationships of unmarried individuals” then “to intend” would have had to be conjugated in the third-person plural, and the sentence would read “[t]his state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intend to approximate the design, qualities, significance or effect of marriage.”

A close reading of the Amendment’s text directly contradicts what the Ohio Campaign to Protect Marriage wrote in their statement for the Ohio Secretary of State’s Issues Report. See infra Appendix G. In its report, OCPM wrote that “Issue 1 does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.” Id. Although OCPM provides no definition for a relationship that “seeks to imitate marriage,” the subjective intent of those in a same-sex relationship may very well intend to “approximate the design, qualities, significance or effect of marriage.” However, if the State does not bestow upon this same-sex couple a “legal status” that “intends to approximate the design, qualities, significance or effect of marriage,” then it is perfectly legal under Ohio’s Marriage Amendment.

459 OHIO CONST. art. XV, § 11 (emphasis added).

460 See Strasser, supra note 14, at 82–83 (discussing the importance of the word “the” in Ohio’s Marriage Amendment and what could possibly be “the significance” or “the effect” of marriage).


462 See supra Part V.A.

463 See supra part V.A.

464 See supra Part V.B.
provides no benefits violates the Ohio Marriage Amendment, then any program that does offer tangible or legal benefits—such as health insurance or sick leave—must necessarily be unconstitutional as well. The consequences of such a decision would be catastrophic.

Imagine that there is a married, same-sex couple from Iowa driving through Ohio and they get into a car accident. What legal rights and remedies could that couple have if even symbolic recognition violates the Ohio Marriage Amendment? Barring a change in the Ohio Constitution, many causes of action, such as loss of consortium, would be out of their reach, and the judiciary would be prohibited from granting any exception. Additionally, if one of the partners were to die, how would the surviving spouse retrieve the other’s body? Although this couple could travel with their marriage license and various testamentary documents, there is no guarantee that Ohio would—or even could—honor them. For example, in Rhode Island, Mark Goldberg and his partner of seventeen years had married in Connecticut and executed wills, living wills, and powers of attorney for each other, but it still took Goldberg over a month to receive his partner’s body from the state.

Additionally, the situation would not necessarily be better if the Ohio Supreme Court condoned domestic partnership registries, but declared Ohio’s public domestic partnership benefits programs unconstitutional. The granting of health insurance to school and municipal employees in committed same-sex relationships hardly creates a “legal status” that approximates the significance of marriage. Health insurance is not a design, quality, significance or effect of marriage in Ohio or in any other state.

465 See Haas v. Lewis, 456 N.E.2d 512, 513 (Ohio Ct. App. 1982) (“The right of consortium, by its very definition, is a right which grows out of marriage, is incident to marriage, and cannot exist without marriage. Because it is a marital right, the right of consortium is not conferred upon partners to extramarital cohabitation.”).


467 See supra notes 287–91 and accompanying text.

468 In fact, thousands of married Ohioans go without health insurance every year. In
contrast, the ability for married couples to make medical decisions for one another is a positive right in Ohio. If the granting of health insurance, which is not a right guaranteed to married couples, somehow “create[s] or recognize[s] a legal status . . . that intends to approximate the design, qualities, significance or effect of marriage,” then allowing same-sex couples to make important life and death decisions for one another must inherently be prohibited by Ohio’s public institutions as well.

If the second sentence of the Ohio Marriage Amendment is found to prohibit all recognition of “unmarried” couples, then same-sex couples who are forbidden from marrying will be non-entities under Ohio law. Unlike opposite-sex couples who may freely choose to get married, Ohio’s same-sex couples will be forced into an almost pariah-like status, even at the municipal level. To receive health insurance, token recognition, or claim each other’s bodies from the state, same-sex couples would need to amend the Ohio Constitution. And this outcome is exactly what the sponsors of the Ohio Marriage Amendment hope will occur. Simply put, no reason short of sheer animus for gays and lesbians could explain an amendment of such broad and merciless scope.

If Ohio’s domestic partnership programs are ever invalidated under the second sentence of the Ohio Marriage Amendment, then that sentence must be unconstitutional. According to Lawrence and Romer, the effects of such a decision would be so broad as to render Ohio’s same-sex couples legal pariahs and betray the Amendment’s intentional antigay animus—thereby satisfying Feeney’s second prong and violating the Equal Protection Clause of the Fourteenth Amendment.

\[471\] OHIO CONST. art. XV, § 11.
\[472\] However, this possible state prohibition may be preempted by federal law. See supra notes 251–53 and accompanying text (discussing newly promulgated federal rules requiring hospitals to respect a patient’s choice of visitors and health care proxies).

\[473\] See supra Part VI.B.2–3.
VII. CONCLUSION

According to Feeney, a facially neutral law that disparately impacts an unnamed group violates equal protection if the “totality of actions” surrounding the law’s enactment reflects an intent to discriminate against that group. The removal of Ohio’s domestic partnership registries and health benefits programs would disparately impact same-sex couples. Further, the “totality of actions” surrounding the second sentence of the Ohio Marriage Amendment reflects an “invidious discriminatory purpose” against gays and lesbians. This purpose can be found in three ways.

First, by looking at the history and practice of domestic partnership programs throughout the United States and Ohio, it is obvious that domestic partnership programs are designed primarily to help same-sex couples. Therefore, any attack against Ohio’s domestic partnership programs is inherently an attack against Ohio’s LGBT community.

Second, CCV and OCPM launched an underhanded ballot initiative campaign in order to harm Ohio’s LGBT citizenry. CCV and OCPM always intended for the second sentence of the Marriage Amendment to prohibit all state recognition of same-sex couples, but advertised to voters that Issue 1 would not harm domestic partnership programs and was limited in its scope. Once Issue 1 passed, CCV advocated a broader interpretation of the Ohio Marriage Amendment. With the approval and cooperation of CCV, the Amendment’s author, David Langdon, launched a campaign against Ohio’s domestic partnership programs. As a result of CCV’s propaganda about the Amendment’s true impact and scope, the second sentence of the Ohio Marriage Amendment should be seen a discriminatory piece of legislation aimed at Ohio’s LGBT community.

Finally, if Ohio’s domestic partnership programs are ever invalidated under the second sentence of the Marriage Amendment, then the resulting effect on Ohio’s lesbian and gay citizens would be broad and merciless. These consequences would betray the second sentence of the Ohio Marriage Amendment as a law built on intentional antigay animus. This intentional hatred of same-sex couples would be impermissible under both Lawrence and Romer, and satisfy Feeney’s second prong.

Therefore, for all of above mentioned reasons, the federal judiciary should declare the second sentence of the Ohio Marriage Amendment unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

MELISSA A. YASINOW†

† J.D. Candidate, 2011, Case Western Reserve University School of Law.
| City of Cleveland | 134 | 24 | 6 | 164 | 82% | 15% | 3% |
| City of Cleveland Heights | 156 | 61 | 0 | 217 | 72% | 28% | 0% |
| City of Toledo | 80 | 24 | 6 | 110 | 73% | 22% | 5% |
| **TOTALS:** | 370 | 109 | 12 | 491 | 75% | 22% | 3% |

Table 1—Data on Couples in Ohio’s Domestic Partnership Registries

| Columbus City Schools | 27 | 0 | 27 | 100% | 0% | X |
| Oberlin City Schools | 1 | 0 | 1 | 100% | 0% |
| **TOTALS:** | 28 | 0 | 28 | 100% | 0% | 1 |

Table 2—Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Public School Systems

---

475 E-mail from Kim Roberson, *supra* note 192.
476 E-mail from Susanna Niermann O’Neil, *supra* note 190.
477 E-mail from Gerald Dendinger, *supra* note 191.
478 Telephone Interview with Michael Straughter, *supra* note 199.
479 Telephone Interview with Diane Wolf, *supra* note 198.
Table 3 — Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Cities and Counties

<table>
<thead>
<tr>
<th>City/County</th>
<th># Same-Sex Couples</th>
<th># Opposite-Sex Couples</th>
<th>Total # Couples</th>
<th>% Same-Sex Couples</th>
<th>% Opposite-Sex Couples</th>
<th>Same-Sex Only Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Cleveland Heights</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0%</td>
<td>0%</td>
<td>X</td>
</tr>
<tr>
<td>City of Columbus</td>
<td>17</td>
<td>40</td>
<td>57</td>
<td>30%</td>
<td>70%</td>
<td></td>
</tr>
<tr>
<td>Franklin County</td>
<td>25</td>
<td>49</td>
<td>74</td>
<td>34%</td>
<td>66%</td>
<td></td>
</tr>
<tr>
<td>Lucas County</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>100%</td>
<td>0%</td>
<td>X</td>
</tr>
<tr>
<td><strong>TOTALS:</strong></td>
<td><strong>47</strong></td>
<td><strong>89</strong></td>
<td><strong>136</strong></td>
<td><strong>35%</strong></td>
<td><strong>65%</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

Table 3 — Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Cities and Counties

<table>
<thead>
<tr>
<th>University</th>
<th>Same-Sex Only Domestic Partnership Policy</th>
<th>Neutral Domestic Partnership Policy</th>
<th>No Domestic Partnership Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bowling Green State University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central State University</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Cleveland State University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kent State University</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Miami University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northeastern Ohio Universities Colleges of Medicine and Pharmacy (“NEOUCOM”)</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Ohio State University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shawnee State University</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

480 Telephone Interview with Bob Johnson, supra note 202.
481 Telephone Interview with Midge Slemmer, supra note 87.
482 E-mail from Scott Solsman, supra note 209.
483 Telephone Interview with Colleen Abbott, supra note 210.
<table>
<thead>
<tr>
<th>University of Akron</th>
<th>X</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Cincinnati</td>
<td>X</td>
</tr>
<tr>
<td>University of Toledo</td>
<td>X</td>
</tr>
<tr>
<td>Wright State University</td>
<td>X</td>
</tr>
<tr>
<td>Youngstown State University</td>
<td>X</td>
</tr>
<tr>
<td>Belmont Technical College</td>
<td>X</td>
</tr>
<tr>
<td>Central Ohio Technical College</td>
<td>X</td>
</tr>
<tr>
<td>Cincinnati State Technical &amp; Community College</td>
<td>X</td>
</tr>
<tr>
<td>Clark State Community College</td>
<td>X</td>
</tr>
<tr>
<td>Columbus State Community College</td>
<td>X</td>
</tr>
<tr>
<td>Cuyahoga Community College</td>
<td>X</td>
</tr>
<tr>
<td>Eastern Gateway Community College</td>
<td>X</td>
</tr>
<tr>
<td>Edison Community College</td>
<td>X</td>
</tr>
<tr>
<td>Hocking College</td>
<td>X</td>
</tr>
<tr>
<td>James A. Rhodes State College</td>
<td>X</td>
</tr>
<tr>
<td>Lakeland Community College</td>
<td>X</td>
</tr>
<tr>
<td>Lorain County Community College</td>
<td>X</td>
</tr>
<tr>
<td>Marion Technical College</td>
<td>X</td>
</tr>
<tr>
<td>North Central State College</td>
<td>X</td>
</tr>
<tr>
<td>Northwest State Community College</td>
<td>X</td>
</tr>
<tr>
<td>Owens Community College</td>
<td>X</td>
</tr>
<tr>
<td>Rio Grande Community College</td>
<td>X</td>
</tr>
<tr>
<td>Sinclair Community College</td>
<td>X</td>
</tr>
<tr>
<td>Southern State Community College</td>
<td>X</td>
</tr>
<tr>
<td>Stark State College of Technology</td>
<td>X</td>
</tr>
</tbody>
</table>
Table 4—Types of Domestic Partnership Health Insurance Programs Available at Ohio’s Public Universities and Community Colleges

<table>
<thead>
<tr>
<th>College</th>
<th># of Same-Sex Couples</th>
<th># of Opposite-Sex Couples</th>
<th>Total # of Couples</th>
<th>% of Same-Sex Couples</th>
<th>% of Opposite-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Akron</td>
<td>9</td>
<td>0</td>
<td>9</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Bowling Green State University</td>
<td>7</td>
<td>0</td>
<td>7</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Central State University</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>University of Cincinnati</td>
<td>34</td>
<td>59</td>
<td>93</td>
<td>37%</td>
<td>63%</td>
</tr>
<tr>
<td>Cleveland State University</td>
<td>12</td>
<td>0</td>
<td>12</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Kent State University</td>
<td>24</td>
<td>21</td>
<td>45</td>
<td>53%</td>
<td>47%</td>
</tr>
<tr>
<td>Miami University</td>
<td>24</td>
<td>0</td>
<td>24</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Northeastern Ohio Universities Colleges</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
</tbody>
</table>

484 Telephone Interview with Kevin Turner, supra note 226.
485 Telephone Interview with Rebecca Ferguson, supra note 225. At Bowling Green State University, there are currently seven couples enrolled for domestic partnership health insurance and nine couples signed up for domestic partnership dental insurance. However, due to the limited focus of this Note, only the domestic partners receiving health insurance are included in the above table.
486 Telephone Interview with Evelyn Adams, supra note 234.
487 E-mail from Elizabeth Aumann, Dir. of Benefits, Univ. of Cincinnati, to author (Mar. 8, 2010, 12:25 EST) (on file with author).
488 Telephone Interview with Loretta Shields, Manager of Univ. Benefits, Kent State Univ. (Dec. 22, 2009).
489 Telephone Interview with Sherry Schilling, supra note 228.
<table>
<thead>
<tr>
<th>Pharmacy (“NEOUCOM”)</th>
<th>171</th>
<th>29</th>
<th>200</th>
<th>86%</th>
<th>14%</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Ohio State University</td>
<td>11</td>
<td>13</td>
<td>24</td>
<td>46%</td>
<td>54%</td>
</tr>
<tr>
<td>Ohio University</td>
<td>11</td>
<td>21</td>
<td>32</td>
<td>34%</td>
<td>66%</td>
</tr>
<tr>
<td>University of Toledo</td>
<td>14</td>
<td>9</td>
<td>23</td>
<td>61%</td>
<td>39%</td>
</tr>
<tr>
<td>Wright State University</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Central Ohio Technical College</td>
<td>3</td>
<td>2</td>
<td>5</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Cincinnati State Technical &amp; Community College</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Cuyahoga Community College</td>
<td>4</td>
<td>23</td>
<td>27</td>
<td>15%</td>
<td>85%</td>
</tr>
<tr>
<td>Lakeland Community College</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Washington State Community College</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>332</td>
<td>178</td>
<td>510</td>
<td>65%</td>
<td>35%</td>
</tr>
</tbody>
</table>

Table 5—Data on Couples Receiving Domestic Partnership Health Insurance from All of Ohio’s Public Universities and Community Colleges with Partnership Policies

491 Telephone Interview with Kathy Korogi, supra note 234.
492 E-mail from Katherine Shockley, Benefits Consultant, The Ohio State Univ., to author (Jan. 12, 2010, 14:06 EST) (on file with author).
493 E-mail from Greg Fialko, Dir. of Benefits, Ohio Univ., to author (Feb. 4, 2010, 14:20 EST) (on file with author).
494 E-mail from Denise Shordt, Benefits Manager, Univ. of Toledo, to author (Jan. 20, 2010, 18:21 EST) (on file with author).
495 E-mail from Lindsey Carfrey, Benefits Generalist, Wright State Univ., to author (October 7, 2010, 12:47 EST) (on file with author).
496 E-mail from Steve Lucivjansky, supra note 229.
497 Telephone Interview with Sherry Abbott, supra note 235.
498 Telephone Interview with Davie Rainwater, supra note 230.
499 Telephone Interview with Tanja Foster, Benefits Adm’r, Cuyahoga Cmty. Coll. (Mar. 10, 2010).
500 Telephone Interview with Carol Mangino, supra note 231.
### Table 6—Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Public Universities and Community Colleges with Same-Sex Only Partnership Policies

<table>
<thead>
<tr>
<th>University</th>
<th># of Same-Sex Couples</th>
<th># of Opposite-Sex Couples</th>
<th>Total # of Couples</th>
<th>% of Same-Sex Couples</th>
<th>% of Opposite-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Akron</td>
<td>9</td>
<td>0</td>
<td>9</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Bowling Green State University</td>
<td>7</td>
<td>0</td>
<td>7</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Cleveland State University</td>
<td>12</td>
<td>0</td>
<td>12</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Miami University</td>
<td>24</td>
<td>0</td>
<td>24</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Youngstown State University</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Cincinnati State Technical &amp; Community College</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Lakeland Community College</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>57</strong></td>
<td>0</td>
<td><strong>57</strong></td>
<td><strong>100%</strong></td>
<td><strong>0%</strong></td>
</tr>
</tbody>
</table>

Table 6—Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Public Universities and Community Colleges with Same-Sex Only Partnership Policies

<table>
<thead>
<tr>
<th>University</th>
<th># of Same-Sex Couples</th>
<th># of Opposite-Sex Couples</th>
<th>Total # of Couples</th>
<th>% of Same-Sex Couples</th>
<th>% of Opposite-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central State University</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>University of Cincinnati</td>
<td>34</td>
<td>59</td>
<td>93</td>
<td>37%</td>
<td>63%</td>
</tr>
<tr>
<td>Kent State University</td>
<td>24</td>
<td>21</td>
<td>45</td>
<td>53%</td>
<td>47%</td>
</tr>
<tr>
<td>Northeastern Ohio Universities Colleges of Medicine and Pharmacy (“NEOUCOM”)</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>100%</td>
<td>0%</td>
</tr>
</tbody>
</table>
Table 7—Data on Couples Receiving Domestic Partnership Health Insurance from Ohio’s Public Universities and Community Colleges with Gender Neutral Partnership Policies

<table>
<thead>
<tr>
<th>Organization</th>
<th># of Same-Sex Couples</th>
<th># of Opposite-Sex Couples</th>
<th>Total # of Couples</th>
<th>% of Same-Sex Couples</th>
<th>% of Opposite-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Ohio State University</td>
<td>171</td>
<td>29</td>
<td>200</td>
<td>86%</td>
<td>14%</td>
</tr>
<tr>
<td>Ohio University</td>
<td>11</td>
<td>13</td>
<td>24</td>
<td>46%</td>
<td>54%</td>
</tr>
<tr>
<td>University of Toledo</td>
<td>11</td>
<td>21</td>
<td>32</td>
<td>34%</td>
<td>66%</td>
</tr>
<tr>
<td>Wright State University</td>
<td>14</td>
<td>9</td>
<td>23</td>
<td>61%</td>
<td>39%</td>
</tr>
<tr>
<td>Central Ohio Technical College</td>
<td>3</td>
<td>2</td>
<td>5</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>Cuyahoga Community College</td>
<td>4</td>
<td>23</td>
<td>27</td>
<td>15%</td>
<td>85%</td>
</tr>
<tr>
<td>Washington State Community College</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>275</td>
<td>178</td>
<td>453</td>
<td>61%</td>
<td>39%</td>
</tr>
</tbody>
</table>

Table 1—Overall Data on Couples Receiving Domestic Partnership Benefits from Ohio’s Public Institutions

<table>
<thead>
<tr>
<th>Organization</th>
<th># of Same-Sex Couples</th>
<th># of Opposite-Sex Couples</th>
<th>Total # of Couples</th>
<th>% of Same-Sex Couples</th>
<th>% of Opposite-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio Public Secondary Schools&lt;sup&gt;502&lt;/sup&gt;</td>
<td>28</td>
<td>0</td>
<td>28</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Ohio Counties and Cities&lt;sup&gt;503&lt;/sup&gt;</td>
<td>47</td>
<td>89</td>
<td>136</td>
<td>35%</td>
<td>65%</td>
</tr>
<tr>
<td>Ohio Public Universities and Community Colleges&lt;sup&gt;504&lt;/sup&gt;</td>
<td>332</td>
<td>178</td>
<td>510</td>
<td>65%</td>
<td>35%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>407</td>
<td>267</td>
<td>674</td>
<td>60%</td>
<td>40%</td>
</tr>
</tbody>
</table>

<sup>502</sup> Supra Table 2.<br><sup>503</sup> Supra Table 3.<br><sup>504</sup> Supra Table 5.
## APPENDIX A:
### STATE MARRIAGE AMENDMENTS

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
<th>Text</th>
</tr>
</thead>
</table>
| Alabama | Article I, Section 36.03 | (a) This amendment shall be known and may be cited as the Sanctity of Marriage Amendment.  
(b) Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting this unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.  
(c) Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.  
(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.  
(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.  
(f) The State of Alabama shall not recognize as valid any common law marriage of parties of the same sex.  
(g) A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage. |
<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
<th>Description</th>
</tr>
</thead>
</table>
| Arkansas  | Amendment 83, Sections 1–3 | 1. **Marriage**
Marriage consists only of the union of one man and one woman.

2. **Marital status**
Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.

3. **Capacity, rights, obligations, privileges, and immunities**
The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage. |
| Florida   | Article I, Section 27      | Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized. |
| Georgia   | Article I, Section 4, Paragraph I | (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.
(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship. |
<p>| Kentucky  | Section 233A               | Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. |
| Idaho     | Article III, Section 28    | A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state. |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Article</th>
<th>Section</th>
<th>Law Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana</td>
<td>Article XII</td>
<td>Section 15</td>
<td>Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Article I</td>
<td>Section 29</td>
<td>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.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Article XI</td>
<td>Section 28</td>
<td>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.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Article XV</td>
<td>Section 11</td>
<td>Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Article II</td>
<td>Section 35</td>
<td>A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Article XVII</td>
<td>Section 15</td>
<td>A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any</td>
</tr>
<tr>
<td>State</td>
<td>Article</td>
<td>Section</td>
<td>Statute</td>
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<tr>
<td>South Dakota</td>
<td>Article XXI, Section 9</td>
<td>Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>Article I, Section 32</td>
<td>(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.</td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>Article I, Section 29</td>
<td>(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Article I, Section 15-A</td>
<td>That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Article XIII, Section 13</td>
<td>Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.</td>
<td></td>
</tr>
</tbody>
</table>
### Status Marriage Amendments

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>Article I, Section 25</td>
<td>To be valid or recognized in this State, a marriage may exist only between one man and one woman.</td>
</tr>
<tr>
<td>Arizona</td>
<td>Article XXX, Section 1</td>
<td>Only a union of one man and one woman shall be valid or recognized as a marriage in this state.</td>
</tr>
<tr>
<td>California</td>
<td>Article I, Section 7.5</td>
<td>Only marriage between a man and a woman is valid or recognized in California.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Article II, Section 31</td>
<td>Only a union of one man and one woman shall be valid or recognized as a marriage in this state.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Article XIV, Section 263A</td>
<td>Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Article I, Section 33</td>
<td>That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.</td>
</tr>
<tr>
<td>Montana</td>
<td>Article XIII, Section 7</td>
<td>Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Article I, Section 21</td>
<td>Only a marriage between a male and female person shall be recognized and given effect in this state.</td>
</tr>
<tr>
<td>Oregon</td>
<td>Article XV, Section 5a</td>
<td>It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Article XI, Section 18</td>
<td>The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.</td>
</tr>
</tbody>
</table>
### Structure Marriage Amendments

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Article 1, Section 23</td>
<td>The legislature shall have the power to reserve marriage to opposite-sex couples.</td>
</tr>
</tbody>
</table>
Transcript of “Common Sense” Television Ad:
It’s just common sense. Ohio families are stronger with a wife AND a husband. Our children do better with a mother AND a father. We won’t have a future unless moms and dads have children. That’s why governments have recognized and uniquely protected marriage for more than 2,000 years. Why change that? Voting “Yes” on Issue 1 KEEPS marriage between one man and one woman. That’s just common sense. Say “Yes” to marriage. Vote “Yes” on Issue 1. It’s just common sense.

Transcript of “What You Know” Radio Ad:
Ken Blackwell is a director of the National Taxpayers Union and has led efforts to repeal Ohio’s sales tax increase. This is Ohio Secretary of State Ken Blackwell. My mom and dad always taught me to “stick with what you know.” Voting “Yes” on Issue 1, the Ohio Marriage Amendment, does just that. Some people say Issue 1 will somehow hurt our state’s economy. But these same people set by quietly over the past ten years as Ohio government spending increased by more than 70%. And I didn’t hear a peep from them last summer while state government passed the largest tax increase in our state’s history. And now they want us to believe that marriage, the way we’ve always known it, will somehow hurt our economy. Here’s what I know. Bad politics hurts our economy, not marriage. Let’s stick with what we know to be right. I’m Ken Blackwell. For the future of Ohio, vote “Yes” on Issue 1, Ohio’s Marriage Amendment.

Transcript of “BothWays” Radio Ad:
This is Ohio Secretary of State Ken Blackwell. My mom and dad always taught me that you can’t have it both ways. Voting “Yes” on Issue 1, the Ohio Marriage Amendment, simply affirms that. Some folks have yet to learn that, especially politicians who say they’re opposed to same-sex marriage, but will not support Issue 1. Why? Because they want to have it both ways. Every major social science study tells us time and again: families are stronger with a wife and a husband; children do better with a mother and a father. That’s why marriage is the building block of society, and why government’s grant benefits based on that. We just can’t have it both ways. Marriage is between one man and one woman. And we should only give the benefits of marriage to those who are actually married. So vote “Yes”
on Issue 1, the Ohio Marriage Amendment. Let’s go with what we know is right. I’m Ken Blackwell. For the future of Ohio, vote “Yes” on Issue 1.

Transcript of “CommonSense” Radio Ad:
This is Ohio Secretary of State Ken Blackwell. My mother and father taught me many things. But one of the most important was to use common sense. Voting “Yes” on Issue 1, the Ohio Marriage Amendment, is just common sense. Ohio families are stronger with a wife and a husband. Our children do better with a mother and a father. That’s just common sense. It’s clear that we don’t have a future unless moms and dads have children. That’s why marriage is between a man and a woman. Just as God created it. And why governments have recognized it for thousands of years. So protecting marriage is really just common sense. So on November the second vote “Yes” on Issue 1, and protect marriage between one man and one woman. Some call Issue 1 the “Marriage Protection Act.” I like to call it the “Common Sense Protection Act.” Either way it’s a great idea. I’m Ken Blackwell. For the future of Ohio, vote “Yes” on Issue 1.

Transcript of “Respect” Radio Ad:
This is Ohio Secretary of State Ken Blackwell. My mom and dad taught me a great deal about respect. How each individual is one of God’s unique creations. How they deserve respect, even when you may disagree with them. Voting “Yes” on Issue 1, the Ohio Marriage Amendment, does just that. Voting “Yes” on Issue 1 keeps marriage as God created it, between one man and one woman. Some homosexual activists say that doesn’t respect them. I disagree. The Bible teaches me to love my neighbor, regardless of their lifestyle. But it also teaches me to never compromise the truth. If you respect others you’ll always tell them the truth. Ken Blackwell has twice been awarded the State Department Superior Honor Award for his human rights work. Please join him in voting “Yes” on Issue 1. Voting “Yes” on Issue 1 shows respect for marriage. This is Ken Blackwell. For the future of Ohio, vote “Yes” on Issue 1.

All of the radio and television transcripts can be found at:
APPENDIX C: PRIVATE LIFE NEWSPAPER ADVERTISEMENT

Don't be confused about Issue 1. Protecting marriage won't hurt unmarried citizens.

It's common sense to ask some simple questions before you vote.

How many of the following describe your private life?

1. Do you have a partner?
2. Do you plan to get married?
3. Do you want to get married?

If any of these are true, then voting for Issue 1 is a good decision. Voting for Issue 1 will protect the institution of marriage and uphold the values that make our society strong.

YES on Issue 1
COMMON SENSE. PUBLIC GOOD.

www.ohiomarriage.com
APPENDIX D:
PRIVATE LIFE NEWSPAPER ADVERTISEMENT TEXT

Don’t be confused about Issue 1.
Protecting marriage won’t hurt unmarried citizens.

It’s common sense to ask some simple questions before you vote.

Issue 1 – the Ohio Marriage Amendment – is not designed to deny anyone private legal rights. It’s only designed to protect marriage between a man and a woman. Don’t be fooled. Before you vote, ask what Issue 1 will do:

G: Will it allow unmarried couples to make contracts, like owning a home or a business interest or other joint property?
A: YES. Joint ownership isn’t subject to common marital status.

G: Will it allow unmarried Ohioans to make wills together?
A: YES. The nature of each relationship is not relevant to property distribution.

G: Will it allow powers of attorney between unmarried Ohioans?
A: YES. Marital status is irrelevant to a power of attorney relationship.

G: Will it protect the benefits individuals and married couples receive from their employers?
A: YES. It allows for no-inversion of civil common law private parties. Those are bills from Ohio law. Don’t be misled. No state law requires marital status to be considered when enforcing private contracts, wills, or benefits.

Marriage protects a common good. That’s just common sense. Marriage has always been uniquely protected in Ohio law. No other social structure provides a better foundation for a stable economy and for civilized communities than marriage between one man and one woman.

Why change that? Why deliberately weaken Ohio’s social fabric – as well as our economy – by weakening the institution of marriage?

Ohio families are stronger with a wife AND a husband.

Our children do better with a mother AND a father.

We can’t ignore every major social science study that shows children raised with a married mom and dad are simply better off physically, socially, and psychologically than in any other family structure. That’s why preserving marriage is just common sense. Don’t be overruled by wild claims. Governor Bob Taft, Jim Petro and others are relying on fear to defeat marriage between one man and one woman. Swallow your critical questions and rely on your common sense.

When you vote on Tuesday, cast your vote for common sense. Vote for the common good. Vote to keep marriage between one man and one woman.

Marriage: One Man One Woman

YES on Issue 1
COMMON SENSE. PUBLIC GOOD.

www.ohiomarriage.com
APPENDIX E:
COMMON SENSE NEWSPAPER ADVERTISEMENT

Strong Ohio families make a strong Ohio economy!
Every married couple knows that. No other social structure provides a better foundation to a stable economy and enriched communities than marriage between one man and one woman.

It's only common sense that Ohio's future depends on more and more having healthy, well-adjusted children.

In fact, many major social science studies declare that children raised with a married mom and dad are simply better off physically, mentally, and psychologically than those in any other family structure.

Even single parents, or blended families work to raise their kids, but often fail.

Will Issue 1 also protect unmarried Ohioans?

YES YES YES YES

If not, only married couples can protect their children, their homes, and their business interests.

We need a marriage amendment to protect our children, our families, and our future.

A healthy culture cares if it will be protected and God, marriage protects a healthy culture.

Will other powers of divorce undermine the marriage amendment?

NO YES YES YES

If you care about the health of Ohio’s future, and the health of Ohio’s families, vote YES for Issue 1.

YES on Issue 1
COMMON SENSE. PUBLIC GOOD.

www.ohiomarriage.com
APPENDIX F:
COMMON SENSE NEWSPAPER ADVERTISEMENT TEXT

**Strong Ohio families mean a stronger Ohio economy!**

*Every sensible Buckeye knows that No other social structure provides a better foundation for a stable economy and civilized communities than marriage between one man and one woman.*

It’s only common sense that Ohio’s future depends on men and dads having healthy, well-adjusted children.

In fact, every major social science study shows that children raised with a married mom and dad are simply better off physically, socially, and psychologically than in any other family structure.

For single parents, as hard as they work to raise their kids, understand that.

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**Will Issue I also protect unmarried Ohioans?**

**YES**

**Will it allow unmarried couples to make contracts that concern insurance or other joint property?**

**YES**

**Will it allow unmarried Ohioans to make wills together?**

**YES**

**Will it allow power of attorney between unmarried Ohio citizens?**

**YES**

**Will it prevent the benefits individuals and unmarried couples receive from their employers?**

**YES**

These are facts from Ohioans for Issue I. Don’t be misled. No Ohio law requires marital status to be considered when enrolling private contracts, wills, or benefits.

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A healthy culture cares if kids have a Mom AND Dad.

Marriage promotes a common good. That’s why it makes common sense that marriage has always been uniquely protected in Ohio law.

Why change that? Why deliberately weaken Ohio’s social fabric— as well as our economy— by watering down the institution of marriage? If two men or two women can be legally “married,” what’s to stop three, four, or more? Instead of inventing new forms of marriage, let’s protect the one that protects our future!

When you vote on Tuesday, cast your vote for common sense. Vote to keep marriage between one man and one woman. Vote YES on Issue I.

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**YES on Issue 1**

**COMMON SENSE. PUBLIC GOOD.**

www.ohiomarriage.com
APPENDIX G:
2004 OHIO ISSUE 1 REPORT

EXPLANATION AND ARGUMENT IN SUPPORT OF MARRIAGE PROTECTION AMENDMENT (ISSUE 1)

Vote YES on Issue 1 to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one woman, and to protect marriage against those who would alter and undermine it.

WHAT ISSUE 1 DOES:
• Issue 1 establishes in the Ohio Constitution the historic definition of marriage as exclusively between one man and one woman as husband and wife.

• Issue 1 excludes from the definition of marriage homosexual relationships and relationships of three or more persons.

• Issue 1 prohibits judges in Ohio from anti-democratic efforts to redefine marriage, such as was done by a bare majority of the judges of the Massachusetts Supreme Court, which ordered that same-sex “marriage” be recognized in that state.

• Issue 1 restricts governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage.

WHAT ISSUE 1 DOES NOT DO:
• Issue 1 does not interfere in any way with the individual choices of citizens as to the private relationships they desire to enter and maintain.

• Issue 1 does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.

The wisdom of the ages tells us that marriage between one man and one woman is critical to the well being of our children and to the maintenance of the fundamental social institution of the family. Please vote to preserve marriage on November 2, 2004.

Please Vote YES on Issue 1, the Marriage Protection Amendment.

Submitted by the Ohio Campaign to Protect Marriage:

Rev. K.Z. Smith
Lori Viars
Phil Burress