OHIO'S 2004 SUPER-DOMA: POPULAR CONSTITUTIONALISM AND NORMALIZATION IN THE MARRIAGE EQUALITY DEBATE

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I. INTRODUCTION

Born on a farm in Hamilton County Ohio in 1944, Phil Burress is a towering man (six feet two inches) with a gentle fleshy face and a sociable smile that belies a tough-as-nails will.[1] Together with a calm demeanor in the face of conflict, these features made him a successful union negotiator on behalf of truck drivers in the Brotherhood of Railway & Airline Clerks.[2] For twenty-five years, by his account, Phil was living what he calls a "double life," because he was addicted to hard-core pornography.[3] At age fourteen, he picked up a pornographic magazine from the side of the road and became hooked on those fantasies.[4] He would drive into Cincinnati at every opportunity to buy, borrow, or steal smutty magazines and videos; it consumed his waking hours.[5] The obsession destroyed two marriages (his first was entered at age eighteen) and left him psychologically estranged from his four Christian daughters and spiritually estranged from his Evangelical roots.[6]

Phil's life changed on September 6, 1980.[7] As a courtesy, Phil had come to hear his new son-in-law preach at the Church of God in Loveland Ohio.[8] He didn't expect to stay for the entire service, so he sat in a back pew.[9] But he stayed. At the end of the service, when the preacher asked

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[1] James Dao, *After Victory, Crusader Against Same-Sex Marriage Thinks Big,* N.Y. TIMES (Nov. 26, 2004), https://www.nytimes.com/2004/11/26/us/after-victory-crusader-against-samesex-marriage-thinks-big.html [https://perma.cc/GQX8-BREG].

[2] *Id. See also* Samual Smith, *Speaker: Citizens Must Spearhead Battle Against Pornography*, BAPTIST PRESS (Dec. 13, 2006), http://www.bpnews.net/24595/speaker-citizens-must-spearhead-battle-against-pornography [https://perma.cc/B5RL-7UTB].

[3] Dao, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] The account in text is drawn from William Eskridge's telephone and in-person interviews with Phil Burress (and, on one occasion, his wife, Vickie, and daughter, Stephanie) between February and November 2017 [hereinafter Interviews with Burress].

[7] *See* Dao, *supra* note 1.

[8] *Id.*

[9] *See id.*

the congregation to join him in prayer, he obediently bowed his head and closed his eyes.[10] Phil felt overwhelmed with God's presence and felt a transcendent spiritual joy.[11] Time stood still. When he opened his eyes, the preacher was standing right in front of him, asking Phil Burress to come forward and accept the Lord as his Savior.[12] He did, and he shed purgative tears for half an hour.[13] This was his Road to Damascus experience and after September 6, Phil Burress dedicated his life to opposing pornography and the unbridled carnality that it stimulated.[14] He made peace with his neglected family.

With all the zeal of a convert, Phil wanted to prevent kids like him from being exposed to sexually arousing pornography in Cincinnati, the home of Larry Flynt's *Hustler* magazine, and of dozens of strip clubs and porn shops.[15] Tipped off by his pastor, he found a crusading home in the Cincinnati-based Citizens for Community Values (CCV).[16] With his self-confidence now anchored to a firm spiritual foundation, he revived and channeled his organizing abilities into the robust family values network.[17] He has always been a doer—not a talker—so he was not interested in making speeches about pornography; he was only interested in shutting down sex-based businesses in Cincinnati, store by store, item by item.[18] He did that by alerting police, prodding prosecutors, and organizing neighborhoods to close down or head off strip clubs, lewd bookstores, and other sex businesses.[19] Phil knew how to run a meeting: he set forth clear goals that everyone agreed upon, let people talk, decided on a plan of action, and then saw who would do what for that plan.[20] When meetings became heated and tempers flared, Phil employed a unique trick: standing up—all six feet two inches of him—he would announce, "Don't you just hate it when people talk over you?" Calm would descend upon the room in the wake of his booming proclamation.[21]

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See* Linda Vaccariello, *Our Man Flynt*, CINCINNATI MAG. (June 2002), at 86, 90; *see also* PAUL A. DJUPE & LAURA R. OLSON, RELIGIOUS INTS. IN CMTY. CONFLICT: BEYOND THE CULTURE WARS 75 (2007).
[16] Dao, *supra* note 1.
[17] *Id.*
[18] DJUPE & OLSON, *supra* note 15.
[19] *Id.*
[20] *See* Interviews with Burress, *supra* note 6.
[21] *Id.*

Like sexual purity crusaders as far back as Anthony Comstock, Burress and CCV considered homosexual pornography alarming, as it was a stark celebration of sex purely for pleasure, with no connection to conjugality of any sort, much less the Evangelical gold standard of conjugal marriage.[22] Hence, in 1990, CCV led the campaign to shut down the local municipal art gallery's plans to display the photographs of Robert Mapplethorpe, some of which depicted homosexual acts and others eroticized minors.[23] In 1991, Burress retired from the businesses he had been running and became the president of CCV.[24] In that same year, the Cincinnati City Council enacted an ordinance barring sexual orientation discrimination by the municipal government,[25] and in November 1992 the council adopted a much broader ordinance[26] making it illegal for employers, landlords, and public accommodations to discriminate against any person because of his or her sexual orientation.[27]

Some faith traditions reject pornography and sex-for-pleasure, but also believe that homosexuals should not be discriminated against because of who they are.[28] Some clerics and theologians understood the Roman Catholic position to be something along these lines. Like many Catholics and most other Evangelicals, Burress had a different perspective: open homosexuals should be treated with respect but should not be encouraged to act on their sexual preferences nor flaunt their sexual and gender choices.[29] A sexually active homosexual rejects his God-bestowed gender role and the proper channel for sexual expression, namely, conjugal marriage. For twenty-five years, he—Phil Burress—had chosen to be a consumer of pornography. He was no better, nor any worse, than a homosexual who had chosen to have sex with other men, and he prayed for

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[22] DANIEL AVILA, MARRIAGE AS A CONJUGAL REALITY 209–10 (2018).

[23] DJUPE & OLSON, *supra* note 18; *see also* Ellen Uzelac, *Ohio jury acquits museum of obscenity Mapplethorpe show nets no convictions*, BALTIMORE SUN (Oct. 6, 1990), https://www.baltimoresun.com/news/bs-xpm-1990-10-06-1990279001-story.html [https://perma.cc/8WBQ-XVCS].

[24] DJUPE & OLSON, *supra* note 18 (Also, in the 1990s, Burress designed golf courses).

[25] Ordinance No. 79–1991.

[26] Ordinance No. 490–1992.

[27] Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 291–92 (6th Cir. 1997) (affirming the constitutionality of Issue 3).

[28] *See* James Martin, S.J., *What is the Official Church Teaching on Homosexuality? Responding to a Commonly Asked Question*, AMERICA MAG. (Apr. 6, 2018), https://www.americamagazine.org/faith/2018/04/06/what-official-church-teaching-homosexuality-responding-commonly-asked-question [https://perma.cc/T8NF-ER6K].

[29] *Id. See also* Interviews with Burress, *supra* note 6.

them to make better choices, as he had on September 6, 1980.[30] But for the same reason government should not tell employers or hotels they cannot discriminate against people addicted to porn, drugs, and alcohol, Burress believed that the government should not dictate to employers, landlords, and hotels that they cannot discriminate against open homosexuals who continue to make bad choices.[31]

Accordingly, in the midst of his rapidly advancing anti-porn crusade, Burress created another front in CCV's project of reviving traditional family values. In 1992, Cincinnati adopted a human rights ordinance prohibiting sexual orientation discrimination by employers and public accommodations.[32] This struck Burress as morally upside down and CCV's lawyer, David Langdon, agreed that their local group could nullify the ordinance by amending the Cincinnati Charter through a popular initiative written along the same lines as a 1992 Colorado constitutional initiative.[33] Burress mobilized his network to create Equal Rights Not Special Rights (ERNSR), and the organization gathered enough signatures to place an initiative, Issue 3, on the ballot in November 1993.[34] Issue 3 would amend the municipal constitution to bar the city or its agencies from adopting any "rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment."[35]

To clinch the special rights argument, Burress sought support from Cincinnati's Black Baptist Ministers Association—Evangelicals who shared his views about the importance of conjugal marriage and the threat posed by "special rights" for homosexuals. He approached Reverend Kazava (K.Z.) Smith, pastor of the Corinthian Baptist Church in Cincinnati and president of the ministers association.[36] We need your support, to "Take Back Cincinnati" (the ERNSR slogan).[37] A charismatic and learned

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[30] *See* Interviews with Burress, *supra* note 6.

[31] Today, though not necessarily in the 1980s, Phil would use the terms gay men and lesbians rather than homosexuals.

[32] *See Equality Found. of Greater Cincinnati*, 128 F.3d at 292.

[33] *See id.* at 291, 294.

[34] Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 422 (S.D. Ohio, August 9, 1994).

[35] *Id.*

[36] Kimberly B. Dugan, *Just Like You: The Dimensions of Identity Presentations in an Antigay Contested Context*, *in* IDENTITY WORK IN SOCIAL MOVEMENT 21, 27 (Jo Reger et al. eds., 2008).

[37] *See id.*

preacher with an incandescent smile, Reverend Smith demurred at first, for he realized that he and his association were being enlisted because their racial identity would lend credibility to the effort to discredit another group's claim to anti-discrimination protections. But as a matter of principle, he actually did agree with Burress and his allies. As Reverend Smith put it to my research assistant and me, gay people were a group defined by their violation of God's Word as regards sexuality. Christians should have compassion for gay people, notwithstanding their flaws, but compassion does not justify extra protections under the city's anti-discrimination law, any more than liars should be protected as a class. Indeed, Reverend Smith found it "insulting" that gay people were appropriating the rhetoric and terms of the civil rights struggle. The objects of hatred and slavery for centuries, African Americans were the classic minority group for whom *civil rights* measures (like the Reconstruction Amendments) were properly designed. But for gay people, who were already privileged and could avoid disadvantages so long as they did not flaunt their homosexuality, anti-discrimination laws represented *special rights*. They were special because the need for the law's protection was not as urgent and the history of oppression not as compelling. "I have never met a black person who believes gays have suffered anything like the way blacks have," Reverend Smith affirmed.[38]

The dedicated pastor and the born-again union negotiator made a dynamite political alliance. Their well-funded message resonated with the citizenry. Distributing a special rights video to supporters and drawing images from the film in its advertisements, ERNSR waged a campaign that was pretty hard-hitting: Christians stand for genuine equality, while gay people (in contrast to blacks) are a rich and powerful group who do not need discrimination protections.[39] Conversely, Equality Cincinnati, opposing Issue 3, depicted its membership as truly diverse and its mission as advancing equal treatment for an unfairly treated minority. In

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[38] *See* Edward Walsh, *Challenge to Gay Rights*, WASH. POST (Oct. 30, 1993), https://www.washingtonpost.com/archive/politics/1993/10/30/challenge-to-gay-rights/754f5bb4-3f62-4851-b38e-d1279db87a0b/?utm_term=.617e42c4f239 [https://perma.cc/EC2V-DL8Z].

Our account of Reverend Smith and his role in Issue 3 is drawn from the William Eskridge & Daniel Strunk Telephone Interview of Reverend K.Z. Smith, (Feb. 22, 2017), as well as an in-person interview by Eskridge & Strunk with Reverend K.Z. and Mrs. Connie Smith in Cincinnati on March 18, 2017, which is the source of all the quotations in the text.

[39] *See* Walsh, *supra* note 38.

November 1993, Cincinnati voters ratified Issue 3 by a 62-38% margin.[40] Reverend Smith went back to the mission of saving souls and ministering to his flock, but Phil Burress started to look beyond Cincinnati.[41]

The ERNSR campaign made Burress a mini-celebrity in the Evangelical network of family values activists; he was a guy who could get things done. On his part, Phil enjoyed "leading from behind," and he loved the networking—sharing information with other activists, comparing different local and state initiatives, and figuring out what issues would be coming down the road next. One of the activists he met was Mike Gabbard, who represented the Alliance for Traditional Marriage, an Evangelical-Krishna coalition in Hawaii.[42] In December 1995, Mike would place a phone call to Phil that would set in motion a process that would revolutionize American public law. The remainder of this article will tell that story, and the central role that Ohio played in the marriage equality debate.

The conceptual theme of this article is that the marriage debate, which got its start in the Issue 3 special rights campaign, was less about marriage than it was about social status. Burress and traditional family value advocates supported the status quo, where homosexuals were analogous to alcoholics—but not as good, because they were not fit for the sacred institution of marriage. Homosexuals should be tolerated but not encouraged. Many lesbians, gay, bisexual, and transgender (LGBT) persons considered these views insulting. Gay is good, and not just tolerable. The connotation of gay is good is that LGBT people are normal—and like any normal citizens should not suffer any serious discrimination, including marriage exclusions. But Burress and his allies realized that normalizing gay people and their relationships—and according them equal marriage rights—would over time counter-normalize traditionalists who believed, as a matter of religious faith, that homosexual

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[40] On the Issue 3 campaign, *see* Dugan, *supra* note 36, at 36–38. Issue 3 was upheld against constitutional attack in Equality Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *see also* Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F. Supp. 417, 422 (S.D. Ohio, August 9, 1994).

[41] *See* Angelina Spencer, *Pushing a Swing State toward a Presidency: How the Citizens for Community Values (CCV) Played Ohio with the "Defense of Marriage Act"* (Apr. 14, 2011) (unpublished B.A. thesis, George Washington University) (on file at http://empowermentpr.com/pdf/CCV-PR-Analysis.pdf [https://perma.cc/2ATY-GLVY]).

[42] *See* Ronna Bolante, *Who is Mike Gabbard?*, HONOLULU MAG. (Aug. 1, 2004), http://www.honolulumagazine.com/core/pagetools.php?pageid=5223&url=%2FHonolulu-Magazine%2FAugust-2004%2FWho-is-Mike-Gabbard%2F&mode=print [https://perma.cc/CTD4-VYV6].

marriage was an abomination. Ohio is central to the playing out of this meta-normative drama—one that survives the end of their marriage exclusion.

II. BACKGROUND FOR ISSUE 1: SAME-SEX MARRIAGE AND DOMA

In *Baehr v. Lewin*, decided in May 1993, the Hawaii Supreme Court startled the nation when it ruled that the exclusion of same-sex couples from civil marriage is discrimination because of sex, which under the Hawaii Constitution requires strict scrutiny.[43] The court remanded the case for trial, so that the state could present evidence that the exclusion was needed to advance a compelling public interest.[44] For the next four years, the state legislative, executive, and judicial branches deliberated, often contentiously, about what to do about "homosexual marriage." Confident of victory, the attorneys for Lambda Legal Education and Defense Fund, plaintiffs' co-counsel under Dan Foley, predicted that when Hawaii started issuing marriage licenses, lesbian and gay couples from all over the country could fly to the Aloha State, get married, and then fly back to their home states—where the Full Faith and Credit Clause of the Constitution would require judges to recognize their Hawaii marriages.[45]

Lambda's constitutional theory was probably wrong as a matter of constitutional law, but it gained wide currency and in December 1995, Mike Gabbard called his friend Phil Burress of CCV in Ohio to alert him: if Hawaii goes for homosexual marriage, Ohio couples can get married there and courts might force Ohio to recognize their marriages. Burress was dumbfounded by this news and sounded the alarm among his traditional family values network. On January 18, 1996, Burress convened a meeting of around twenty policy leaders within the established family values network in the basement of a Memphis Baptist church.[46] Among the organizations represented were CCV, the Family Research Council (FRC), Concerned Women of America, the Association for the American

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[43] Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993), *modified on reconsideration*, 852 P.2d 74 (Haw. 1993).

[44] *Id.*

[45] *See* Memorandum from Evan Wolfson, Director of Marriage Project, Lambda Legal, to H. Comm. on the Judiciary, 104th Cong. on Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr v. Lewin*? 3–7 (Nov. 7, 1994); *accord* Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 NYU REV. L. & SOC. CHANGE 567, 612 n.196 (1994-95).

[46] The details of the Memphis meeting are taken from William Eskridge & Daniel Strunk Interview of Phil Burress (March 2017); *see also* DANIEL R. PINELLO, AMERICA'S WAR ON SAME-SEX COUPLES AND THEIR FAMILIES 29 (2017).

Family, Traditional Values Coalition, and Colorado for Family Values. After about nine hours of discussion, there was agreement on a three-pronged plan of action. First, Mike Gabbard and his allies would fight for a constitutional amendment in Hawaii, to nullify any judicial effort in that state. Second, FRC would take the lead in drafting federal legislation that would protect states against ever having to recognize Hawaii or other homosexual marriages. Third, FRC and CCV would work with their allied family policy councils (existing in no fewer than thirty-eight states) to develop state laws defining marriage as one man, one woman, and barring recognition of homosexual marriages entered elsewhere. The goal was to defend traditional marriage against a new liberalizing threat, to reaffirm the nation's moral commitment to traditional marriage, and to energize a network of local activists who could remake American politics.

An immediate product of this collaboration was the Defense of Marriage Act of 1996 (DOMA), which was drafted by the FRC's Robert Knight and allied lawyers, handed off to Republican allies in Congress, revised by Representative Charles Canady and his staff, and pushed through the legislative process in time for President Clinton to sign it in September, just a few months before the November elections.[47] In talking points promulgated shortly after DOMA was introduced in Congress, the Memphis group argued that marriage is a special institution, descriptively reflecting the "appreciable differences" between men and women and prescriptively "bringing together the two sexes to form families."[48] This has been a valuable institution, honored by all faith traditions and all cultures in human history. Marriage has already been "cheapened and devalued" by no-fault divorce, but homosexual marriages would be a more fundamental devaluation.[49] Because such marriages would rest only upon the hedonic value of a companionate relationship, and not upon the generative joy of procreative intercourse nor upon the virtues of tradition, homosexual marriage would change the fundamental meaning of marriage and "there would be no stopping point": once the meaning of marriage is

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[47] On DOMA generally, and on constitutional problems with its wholesale rule excluding lesbian and gay couples from civil marriage, s*ee* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 127–40 (2002).

[48] *Id.* at 56–7 (discussing the differences between men and women).

[49] *See* Darren Spedale & William Eskridge, *"The Hitch"*, WALL ST. J. (Oct. 26, 2006), https://www.wsj.com/articles/SB116191428485605594 [https://perma.cc/ELS3-C5N8]; The Offices of the Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, VATICAN.VA, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html [https://perma.cc/27JS-8N6H].

reduced to "what makes each spouse happy," then why not recognize incestuous or polygamous marriages?[50]

At the same time traditional family value organizations and their political allies were pressing for DOMA in Congress, they were pressing for junior-DOMAs in almost every state legislature.[51] Appendix 1 at the end of this article provides an account of the state legislation actually enacted between 1994 and 2004, an impressive achievement. Some of the junior-DOMAs are owed more to Mormon or Catholic influence, but most of them were the result of Evangelical activism and lobbying by local family research councils, connected to and supplied with research and talking points from FRC and CCV, but tailoring junior-DOMAs to local political conditions. Ironically, one of the last states to adopt a junior-DOMA was Ohio, where Phil Burress and CCV were thwarted for almost a decade by Republican governors and legislators who just did not see the issue as an urgent one, especially after Gabbard and his allies in Hawaii closed the door on same-sex marriage with a state constitutional amendment adopted by the voters in 1998.[52]

In November 2003, however, another bombshell dropped, this one less surprising than the 1993 bombshell in Hawaii. In *Goodridge v. Department of Public Health,* a divided Massachusetts Supreme Court ruled that the state constitution required marriage equality for lesbian and gay couples.[53] Although the court's mandate was stayed for six months, this decision was important not only because Massachusetts would become a marriage equality beachhead in this country, but also because it served notice on traditional family values advocates and organizations that state supreme courts were sometimes going to impose homosexual marriage under state constitutional guarantees of equality.[54] The map below shows

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[50] Sean Cahill, *The Anti-Gay Marriage Movement*, *in* THE POLITICS OF SAME-SEX MARRIAGE 155, 185 n. 33 (Craig A. Rimmerman et al. eds., 2007).

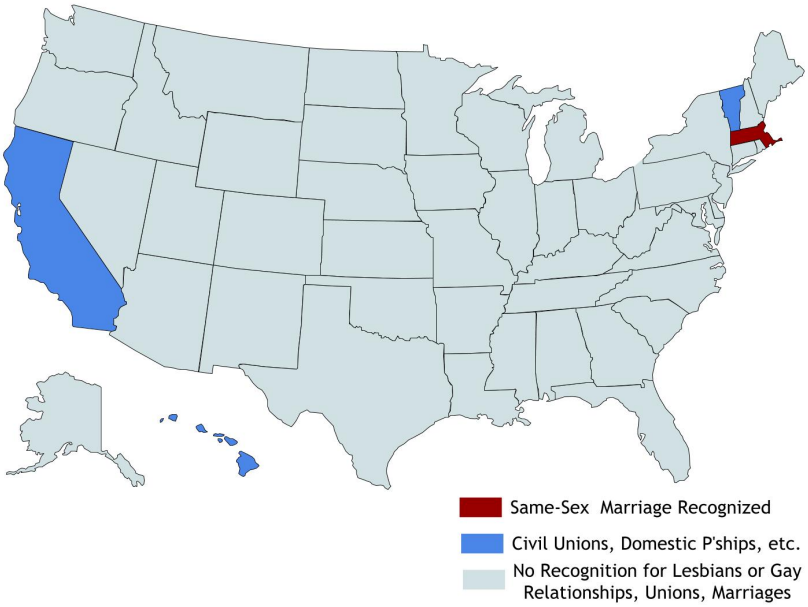
[51] For an excellent table of state junior-DOMA deliberation from 1994-2000*, see* Donald P. Haider-Markel, *Lesbian and Gay Politics in the States: Interest Groups, Electoral Politics, and Policy*, *in* THE POLITICS OF GAY RIGHTS 290, 307–11, 324–46 (Craig A. Rimmerman et al. eds., 2000).

[52] iSee *Hawaii Court Rules Against Same Sex Marriage*, WASH. POST (Feb. 4, 2019), https://www.washingtonpost.com/archive/politics/1999/12/11/hawaii-court-rules-against-same-sex-marriage/5eaa8cbc-438d-4933-8de1-01e7ba08b6c6/?noredirect=on&utm_term=.20d46f3d898c [https://perma.cc/QBM5-LGZ7].

[53] Goodridge et al. v. Department of Public Health, 798 N.E.2d 941, 969 (Mass. 2003).

[54] *Id.* at 970.

that there were three other states which in 2004 provided formal recognition of these relationships, but without calling them marriages.[55]



III. OHIO'S SUPER-DOMA: ISSUE 1

Goodridge provided a stronger sense of urgency for Ohio Republicans to go along with demands by Burress and CCV for a junior-DOMA that would preclude recognition of Massachusetts marriages in Ohio. Governor Robert Taft signed the Ohio junior-DOMA into law February 4, 2004.[56] Twenty days later, President Bush announced his support for the Federal Marriage Amendment, a proposal which would entrench one man, one woman marriage into the U.S. Constitution.[57] Burress was a founding

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[55] Cathleen G. Bowman, *Legal Treatment of Cohabitation in the United States*, 26 J. L. & POL'Y 119, 133 (2004).

[56] James Dao, *Ohio Legislature Votes To Ban Same-Sex Unions*, N.Y. TIMES (Feb. 4, 2004), https://www.nytimes.com/2004/02/04/us/ohio-legislature-votes-to-ban-same-sex-unions.html [https://perma.cc/9342-22WQ].

[57] *See* David Stout, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES (Feb. 24, 2004), https://www.nytimes.com/2004/02/24/politics/bush-backs-ban-in-constitution-on-gay-marriage.html [https://perma.cc/W2PY-FCUS].

member of the Arlington Group, a Washington D.C. powerhouse coalition of traditional family organizations, led by Dr. James Dobson of Focus on the Family and Dr. Richard Land of the Southern Baptist Convention.[58] Although the Arlington Group supported the FMA and made it a priority, the odds of securing two-thirds votes in both the House and the Senate were low.

On May 17, 2004, Massachusetts started issuing marriage licenses to lesbian and gay couples.[59] Lawyers told Burress that the Ohio Junior-DOMA might not be sufficient to prevent state judges from recognizing those marriages in Ohio because they can rely on the state constitution to trump the state statute. Financed by Mormon contributions, traditional family activists had already secured state constitutional amendments entrenching the one man, one woman understanding of marriage in Alaska (1998), Nebraska (2000), and Nevada (2000). Why shouldn't Ohio do the same thing? Always a man of action rather than rhetoric, Burress saddled up: Paul Revere rides again. His Arlington network pressed for and helped finance constitutional initiatives in thirteen states in 2004, and one of those states was Ohio.[60]

CCV's lawyer, David Langdon, drafted text that could be added to Article XV of the Ohio Constitution:

> *Section 11.* 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.[61]

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[58] DAN GILGOFF, THE JESUS MACHINE 137–41, 156–60 (St. Martin's Press 2007) (describing the formation of the Arlington Group and its early meetings).

[59] *See* Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES (May 17, 2004), https://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html [https://perma.cc/K8M3-SUGQ].

[60] The account of the Issue 1 campaign draws from a two-part video: CCVCincinnatiOH, *168 Days: A Miracle (Part One)*, YOUTUBE (June 16, 2010), https://www.youtube.com/watch?v=LVO-A8bwjHQ; CCVCincinnatiOH, *168 Days: A Miracle (Part Two)*, YOUTUBE (June 16, 2010), https://www.youtube.com/watch?v=a0sOnLq9ffg.

[61] Secretary of State, *State Issue 1: Certified Ballot Language*, https://www.sos.state.oh.us/elections/election-results-and-data/2004-elections-results/state-issue-1-november-2-2004/state-issue-1-certified-ballot-language/ [https://perma.cc/ZJ86-S GJL].

Notice that the proposed constitutional amendment not only barred Ohio recognition of same-sex marriages—but also other institutional forms of gay relationship recognition, certainly including Vermont civil unions (2000) and California domestic partnerships (1999-2003), both measures that afforded lesbian and gay couples almost all the legal rights and duties of marriage but not the name.[62] The broad language also might preempt municipal and university policies giving domestic partnership insurance and other benefits to partners of their employees. The goal of Issue 1 was *not* to deny lesbian and gay couples their freedom to form relationships, to create families, to recognize loved ones through powers of attorney and wills, or to make medical decisions and have hospital access for incapacitated loved ones.[63] Nor did Issue 1 seek to preempt reciprocal beneficiary laws, such as the ones adopted in Hawaii (1997) and Vermont (2000), which vested decision making power in loved ones, regardless of sex or blood relationship.[64] The point of Issue 1 was to draw a sharp line between state-approved sexualized relationships, i.e., marriages as traditionally understood, and sexualized relationships that the state tolerated but did not approve.[65]

To get the proposed amendment onto the ballot, CCV needed 316,888 valid voter signatures—a seemingly impossible task given its late start in spring 2004.[66] As Langdon advised, the task was even harder because as many as half of the signatures in such an effort might be invalidated by the Secretary of State—so CCV would need at least 400,000 and maybe as many as 500,000 signatures to survive the review process. Burress assembled a team from persons associated with CCV and allied groups,

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[62] *See id.*

[63] *See* OHIO REV. CODE §3101.01(C)(3) (2018).

> 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.

[64] *See, e.g.*, *id.*

[65] *See Ohio Definition of Marriage Act, Amendment 1 (2004)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Definition_of_Marriage,_Amendment_1_(2004) [https://perma.cc/P4DM-P74A].

[66] *See* CCVCincinnatiOH, *supra* note 60.

especially pro-life groups. Jerry Lyon, the CCV Director of Operations, called CCV's trusted printer, who worked night and day to print up tens of thousands of petitions. Today, most popular constitutional amendments secure signatures through firms paid to collect them—but this was not Phil Burress's style: He was thrifty with other people's money, and he believed that a grass-roots process of gathering signatures would be an important foundation for the political campaign that would follow.

To spearhead the signature drive, Burress called upon his political ally Lori Viars. A gregarious and charismatic pro-life activist, Viars had extensive experience collecting signatures for abortion initiatives and called upon dozens of friends and family to help.[67] Viars, Burress, and CCV mobilized their extensive networks to make sure that petitions would be circulated widely in all 88 Ohio counties:

> ● Focus on the Family distributed the petition to 86,000 or more people on its mailing list and publicized the effort tirelessly.
>
> ● Churches distributed the petitions all over the state, especially Evangelical churches but also Catholic and some mainline Protestant churches. Many ministers announced the petition during church services, and some pastors endorsed or spoke warmly about Issue 1.
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> ● Lori Viars and other right-to-life advocates mobilized dozens and perhaps hundreds of volunteers, most of them married women with families (like Viars). This army of mothers—often with children in tow—drove all around the state to deliver petitions to churches, civic associations, and local volunteers.

Viars told us that Issue 1 excited more citizens than she and her colleagues had ever seen about an issue.[68] "People would rip the clipboard out of your hand to sign—they were so eager to sign!"[69]

On August 3, 2004, the Ohio Campaign to Protect Marriage delivered more than 575,000 signatures petitioning the Secretary of State, CCV ally Kenneth Blackwell, to place Issue 1 on the ballot.[70] Marriage equality attorneys filed lawsuits challenging the signatures and/or the validity of

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[67] *See* William Eskridge & Daniel Strunk Interview with Lori Viars (Mar. 18, 2017).
[68] *See id.*
[69] *Id.*
[70] CCVCincinnatiOH, *supra* note 60.

Issue 1 (mainly as a violation of the Ohio Constitution's single-subject requirement) in as many as forty-two lawsuits challenging signatures in forty different counties.[71] David Langdon and other attorneys affiliated with the Alliance Defending Freedom supported Issue 1 and its signatures across the board and won a favorable judicial decisions, ensuring that Issue 1 would be on the ballot. Secretary of State Blackwell certified Issue 1 for the ballot on September 29.

The lead proponents of Issue 1 were Phil Burress, Lori Viars, and Reverend K.Z. Smith. As expressed in the Yes on Issue 1 ballot materials, their fundamental point was that history "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."[72] Issue 1, therefore, sought to entrench this definition into the Ohio Constitution. That would "prohibit[] 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."[73]

In spring 2004, Phil Burress commissioned a poll by Market Strategies, which reported that large majorities of Ohio voters were opposed to state recognition of same-sex marriages. His strategy was to build on the enthusiastic grass-roots network that had been created by the signature-gathering process. Make sure that church-going Evangelicals, Catholics, Amish, and other fundamentalists were aware that they needed to vote "yes" on Issue 1 if they wanted to defend marriage against further erosion. Then make sure that they were registered to vote; tens of thousands of religious citizens first registered to vote so that they could sign the petitions to get Issue 1 on the ballot. Finally, make certain that all of these supporters actually showed up to vote. CCV coordinated the Yes on Issue 1 campaign and secured funding from the Arlington Group, a coalition of religious family values institutions (including CCV) assembled to plan super-DOMAs at the federal and state levels. Yes on Issue 1 spent as much as $2 million, most of which came from the Arlington Group.[74]

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[71] *Id.*

[72] *State Issue 1: Argument in Support of,* OHIO SECRETARY OF STATE, https://www.sos.state.oh.us/elections/election-results-and-data/2004-elections-results/state-issue-1-november-2-2004/state-issue-1-argument-in-support-of/ [https://perma.cc/AY2H-L24C].

[73] *Id.*

[74] *See* Sue O'Connell, *The Money Behind the 2004 Marriage Amendments*, FOLLOW THE MONEY (Jan. 27, 2006), https://www.followthemoney.org/research/institute-reports/the-money-behind-the-2004-marriage-amendments [https://perma.cc/RP8P-L8GF].

In contrast to the Yes on Issue 1 campaign, the opponents were vastly less energized, less organized, and less well-funded. There was no statewide gay rights group in Ohio before Ohio Freedom to Marry was formed by "two dykes and an iMac," as the founders put it.[75] Freedom to Marry had no paid staff and was operated by volunteers without experience in civil rights campaigns of any sort. Lesbian and gay Ohioans did not mobilize for No on Issue 1 in the great numbers that Yes on issue 1 generated from church-goers. Indeed, most lesbian and gay Ohioans either did not know about Issue 1 or were indifferent to its fate, as they were in the closet and would not have dared take a public act such as fly to Massachusetts, get married, and try to have such a marriage recognized in Ohio.

The Human Rights Campaign contributed $100,000 to get the Ohio No on Issue 1 campaign off the ground, but the campaign managers made a series of (understandable) decisions that probably lowered their (already low) odds of prevailing. The main decision was to run a top-down campaign that marginalized the role of volunteers and grass-roots efforts. Said Lynne Bowman, the executive director of Equality Ohio (2005-10):

> There was no knocking on doors that I was aware of. There was no voter identification. We did a literature drop in one neighborhood on one weekend here in Columbus that I organized. Yet, as far as I know, it was the only lit drop in central Ohio. There were no bumper stickers. * * * Even the campaign's website wasn't very good.[76]

The overall strategy was, first, to challenge the validity of voter signatures and then, to challenge the constitutional amendment as a violation of the state's single-subject requirement. The first strategy was a poor one because the Lori Viars-led campaign to gather signatures was unusually scrupulous; its volunteers were well-trained and honest, and Viars herself would resubmit petitions where there was any question about the signatures. The second strategy was little better, for Issue 1 easily met the single-subject requirement: it was all about protecting marriage. The legal challenges all failed—and drained the No on Issue 1 of valuable resources, without impacting CCV, which had the legal services of ADF without cost.

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[75] DANIEL R. PINELLO, AMERICA'S WAR ON SAME-SEX COUPLES AND THEIR FAMILIES 27 (2017) (author's interview with Helen and Lee, the "dykes" quoted in text).

[76] *Id.* at 27–28 (quoting Lynne Bowman from author's interview).

The third strategy was to persuade voters that Issue 1 was bad for Ohio. As the ballot materials argued, opponents claimed that Issue 1 was so broadly worded that it would deny needed rights to: seniors living together to protect pension benefits; unmarried couples seeking to jointly own property; people who receive health benefits from domestic partner plans; unmarried women seeking maternity leave; and adopted children of unmarried couples. "Leading economic and legal experts agree that Issue 1 would have a negative impact on our struggling economy."[77] Most of the state's leading newspapers, such as the *Cleveland Plain Dealer,* made these arguments in editorials and op-eds opposing Issue 1. Surprisingly, almost all of the top Republican officeholders came out against Issue 1: Governor Bob Taft, Senators George Voinovich and Mike DeWine, and Attorney General Jim Petro.[78] Only Secretary of State Ken Blackwell, a Burress ally, supported Issue 1,[79] but he did so in a much bigger way. The other state officials wrote an op-ed, politely suggesting that Issue 1 was not needed and might hurt the state economy. In contrast, as the state's highest-ranking black official, Blackwell recorded a hard-hitting, End-of-Days Yes on one message that was robocalled to 850,000 Ohio households in the days before the election.[80]

In November 2004, Issue 1 prevailed by a whopping 62-38% margin.[81] Burress believes that this Super-DOMA provided President Bush's small cushion of 118,000 votes in Ohio, and then some, because the Campaign to Protect Marriage registered tens of thousands more "values" voters, which energized a bigger turnout in rural counties than anyone expected, and pumped up the President's black vote from 8% in 2000 to 16% in 2004.[82] Few political scientists agree with Burress's assessment, and the Bush

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[77] Ohioans Protecting the Constitution, *State Issue 1: Arguments Against*, OHIO SECRETARY OF STATE, https://www.sos.state.oh.us/elections/election-results-and-data/2004-elections-results/state-issue-1-november-2-2004/state-issue-1-arguments-against/ [https://perma.cc/MB7B-FVQV].

[78] PINELLO, *supra* note 75, at 6.

[79] *See* Sam Howe Verhovek, *Gay Marriage Ban Faces Some Unlikely Foes*, L.A. TIMES (Oct. 31, 2004), http://articles.latimes.com/2004/oct/31/nation/na-gay31 [https://perma.cc/FU3M-FSE4].

[80] PINELLO, *supra* note 75, at 32.

[81] *Id.*

[82] Clarence Page, *Bush's 'Values' Got More Black Voters in his Camp Than in 2000, But All is Not Lost for Democrats*, CHI. TRIB. (Nov. 7, 2004), https://www.chicagotribune.com/news/ct-xpm-2004-11-07-0411070383-story.html [https://perma.cc/5DWC-5KR4]. Overall, President Bush won 11% of the black vote nationwide in 2004, up from 9% in 2000. *See How Groups Voted in 2000,* ROPER CTR. FOR PUB. OPINION RESEARCH, https://ropercenter.cornell.edu/how-groups-voted-2000 [https://perma.cc/59K6-ETWJ].

campaign sharply disputes it; they believe that national security was the key issue propelling their narrow victory. Consistent with the Bush campaign's viewpoint, Dr. Kenneth Sherrill points out that the President increased his national vote by 2.8% between 2000 and 2004, while increasing his vote share in the states voting on Super-DOMAs by 2.5%, and increasing his vote share in Ohio by only 1%.[83] Whether Issue 1 was as decisive as Burress and his allies think it was, no one disputes that it energized a lot of Ohio voters and helped President Bush in that state.

IV. ISSUE 1: POPULAR CONSTITUTIONALISM AND NORMALIZATION

On November 4, 2004, when Ohio voters resoundingly endorsed Issue 1, voters in ten other states provided similar margins in support of similar Super-DOMAs; in 2006,[84] another seven states voted Super-DOMAs into their state constitutions.[85] The precise wording of the different constitutional initiatives varied, but their point was the same: the citizens in about half the states of the country overwhelmingly rejected state recognition of same-sex (homosexual) marriages and seemingly accepted the Burress/DOMA argument that expanding marriage to lesbian and gay couples would "devalue" the institution for everyone. Lori Viars, Dave Langdon, Phil and Vickie Burress, and thousands of other Ohioans who were actively engaged in Issue 1 believe that the normative engagement of the citizenry and their resounding verdict ought to be dispositive—not only as a matter of public policy, but also as a matter of constitutional law.

If you had asked Phil Burress in 2004 whether Issue 1 violated the Fourteenth Amendment, he would not have considered that a serious question. Say what? Isn't the Fourteenth Amendment mainly about race? Reverend K.Z. Smith, the co-sponsor of Issue 1, assured us that people of color do not consider sexual orientation analogous to race, so why is the Fourteenth Amendment even relevant? From their point of view,

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[83] Dr. Kenneth Sherrill, *Same-Sex Marriage, Civil Unions, and the 2004 Presidential Election*, NATIONAL GAY & LESBIAN TASK FORCE (2005), https://web.archive.org/web/20160804092311/http://www.thetaskforce.org:80/static_html/downloads/reports/reports/2004ElectionAndMarriage.pdf [https://perma.cc/Q27D-F2UP]. *See also* Simon Jackman, *Same-Sex Marriage Initiatives and Conservative Mobilization in the 2004 Election*, STAN. UNIV. (Nov. 9, 2004), https://web.archive.org/web/20041221125156/http://jackman.stanford.edu/papers/download.php?i=3 [https://perma.cc/EBZ2-TQY6].

[84] PINELLO, *supra* note 75, at 32–33.

[85] JASON PIERCESON, SAME-SEX MARRIAGE IN THE UNITED STATES: THE ROAD TO THE SUPREME COURT 153 (2013).

homosexual marriages, like sexual orientation anti-discrimination laws, are "special rights," not "equal rights."

A lawyer might explain to these activists that the Supreme Court has applied the Fourteenth Amendment well beyond the confines of race discrimination. Thus, the Court has interpreted the Due Process Clause to protect the rights of interracial couples, deadbeat dads, and prisoners to get married; why not lesbian and gay couples? That's easy, Burress would have responded: A fundamental right to "marriage" entails procreative unions, which unfortunately cannot include lesbian and gay couples. But how about the Equal Protection Clause? It requires the state to justify discrimination against minority groups. Sure, but Burress would respond that discrimination means treating similarly situated people differently. That's why interracial marriage bans were wrong: black-white couples could join in a loving procreative union just as well as black-black and white-white couples, so those laws were blatant violations of the state's equal protection guarantee. But gay and lesbian couples are not "similar" to straight couples with respect to the fundamental point of marriage: procreation. Hence, defining marriage to fit with its purpose necessarily does not include lesbian and gay couples, but it does not "discriminate" against them. Indeed, because they are different, including them in marriage would be a questionable violation of the equality ideal, for the state would be treating different unions the same.

Virtually all LGBT people would object to Burress's application of the Fourteenth Amendment, mainly because we have a broader understanding of marriage and a belief that lesbian and gay families are worthy of the institution. We also have narrow legal arguments, grounded upon precedent. For example, in *Turner v. Safley*,[86] the Supreme Court overturned a state bar to marriage for prisoners, some of whom were in prison for life and would, according to state policy, never be able to consummate their marriages with procreative intercourse.[87] Rejecting the state's argument that the fundamental right to marry had no traction in the prison context, the Court, without recorded dissent, held that the purposes of marriage were relevant to prisoners, to wit: public commitment, religious and emotional significance, government benefits flowing from marriage, and (for most but not all prisoners) the possibility of consummation after release.[88] The Court's judgment included all

[86] 482 U.S. 78, 81–82, 96 (1987).
[87] *See id.*
[88] *Id.* at 95–96.

prisoners, including those with life sentences and no possibility of parole.[89] Shouldn't lesbian and gay couples enjoy at least as many rights as convicted murderers and rapists?

In 1996, the Supreme Court ruled, in *Evans v. Romer*,[90] that lesbian and gay people could not be excluded from generally available rights and benefits without a public-regarding justification that could reasonably be advanced by their exclusion.[91]

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.
>
> Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.[92]

The Court applied that constitutional principle to a 1992 Colorado constitutional initiative that preempted laws and policies protecting against sexual orientation discrimination and found that the neutral reasons advanced by the state were not really advanced by excluding gay people from the same legal protections everyone else took for granted.[93] "[I]ts sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[94]

Supporters of Issue 1 had plenty of precedent-based arguments of their own. For example, the Supreme Court, in *Baker v. Nelson,*[95] had summarily dismissed the appeal of an early same-sex marriage case, on the ground that it did not present a "substantial federal question."[96] Although a summary disposition, *Baker v. Nelson* was, technically, binding on federal and state courts evaluating constitutional challenges to state marriage exclusions. Additionally, Burress's ADF lawyers assured him that there were plenty of Fourteenth Amendment precedents supporting the authority of states to draw lines and make debatable policy judgments, without

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[89] *Id.* at 96.
[90] 517 U.S. 620 (1996).
[91] *Id.* at 635.
[92] *Id.* at 633 (quoting Sweatt v. Painter, 339 U.S. 629, 635 (1950)).
[93] *Id.* at 635.
[94] *Id.* at 632.
[95] 409 U.S. 810 (1972) (dismissing an appeal of a state rejection of Fourteenth Amendment arguments for same-sex marriage, because the appeal did not present a "substantial federal question").
[96] *Id.*

searching judicial scrutiny, so long as the states were not excluding people from a fundamental right or deploying suspect classifications such as race and ethnicity.[97]

The Issue 1 Team also believed that, however strong the constitutional arguments might be if a legislature had passed the Ohio Super-DOMA, the presumption of constitutionality ought to be much stronger because it was adopted directly by "We the People," after full opportunity for debate and mobilization. Ohio's citizens had voted overwhelmingly for this measure: Ought that not be decisive? Perhaps surprisingly, liberal and progressive law professors have argued for the same kind of deference to what is called "popular constitutionalism,"[98] and some professors (such as Georgetown's Mark Tushnet) had in 1999 argued that the Constitution ought to be taken away from the courts altogether and returned to We the People.[99]

Although I'd be most reluctant to say that popular constitutionalism ought to displace judicial review entirely (or even substantially), Issue 1 did have a strong claim to constitutional deference. As a matter of robust democracy, constitutional initiatives such as Issue 1 have the capacity to excite citizen debate and participation in the democratic process. In Ohio, the definition-of-marriage debate engaged large numbers of otherwise disengaged citizens in big normative issues that were of deep interest to them. The Super-DOMA was an opportunity to set or reset the normative baseline of public culture, through a process that was democratically accountable as well as engaging:

> ● Petition-signing process engaged and educated hundreds of thousands of citizens, who put a fundamental issue on the agenda.
>
> ● LGBT and TFV voters were able to express the intensity of their views by level of participation. Intense normative discussions.

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[97] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 315 (1999) (applying rational basis scrutiny to uphold a state law imposing burdens on people with disabilities, even though the law was broad and poorly drawn).

[98] *See, e.g.*, LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 6–7 (2004) (urging drastic curtailment of judicial review).

[99] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS ix–x (1999); *cf.* JEREMY WALDRON, LAW AND DISAGREEMENT 288 (1999) (arguing that legislators ought to be free of judicial review, as they once were in Great Britain).

> ● Ohio debate tied into national debate—votes in other states and in presidential election. Bush supported FMA, Kerry did not.

Critics of popular constitutionalism respond that fundamental rights ought not be subjected to a popular vote, especially when the rights of a minority might easily be trammeled by an unsympathetic majority.[100] Popular constitutionalism would have ratified the apartheid regime, for example, and in earlier decades it would have sustained discriminations against minority religions, people with disabilities, women, and other groups that have received valuable protection from the Supreme Court. For Issue 1, lesbian and gay Ohioans believed they were at a disadvantage because almost all of them remained in the closet, for they would have feared losing their jobs if they had publicized their relationships and campaigned against Issue 1.

Notwithstanding the lopsided nature of the electoral contest, there is another feature of Issue 1 that reveals its intimate connection to deep constitutionalism. Issue 1 was about something more than redefining marriage or defending marriage.[101] From a lesbian and gay point of view, it was about claiming their equal citizenship.[102] In 2004, no other productive social group was excluded from civil marriage the way that the lesbian and gay community was.[103] Other unpopular minorities—such as Jehovah's Witnesses, undocumented immigrants, Mormons, and even prisoners—were allowed to marry the persons of their choice. In some states, people with severe disabilities, including mental and emotional disabilities, could marry the person of their choice.[104] Even pedophiles (or,

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[100] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that courts should be deferential to the political process, except where political "insiders" are excluding "outsiders" or where minorities are penalized based upon "prejudice"); Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1553–54 (1990).

[101] *Issue 1, Proposed Constitutional Amendment, State of Ohio*, SMART VOTER (Dec. 15, 2004), http://www.smartvoter.org/2004/11/02/oh/state/issue/1/ [https://perma.cc/TN5B-TLZ7].

[102] On the importance of equal citizenship to the Fourteenth Amendment, *see* KENNETH L. KARST, BELONGING TO AMERICA: FEDERAL EQUAL CITIZENSHIP AND THE CONSTITUTION 2–3 (1989).

[103] To say that lesbians are perfectly free to marry gay, or straight men is to insult the audience's intelligence.

[104] *See, e.g.*, Patrice Gaines-Carter, *Retarded District Couple Awaits Birth of 1st Child*, WASH. POST (July 1, 1986), https://www.washingtonpost.com/archive/local/1986/07/01/retarded-district-couple-awaits-birth-of-1st-child/abd7d094-acaf-4a83-9288-fb8f98b4e4db/?utm_term=.7ea8792a6af1 [https://perma.cc/LHW4-ZQCX].

more accurately, hebephiles) could marry fourteen or sixteen-year-olds in many states.[105] Convicted rapists and murderers had a constitutional right to marry.[106] But law-abiding lesbian couples raising children were denied marriage.

But more was at stake for gay people than just equal citizenship. The marriage movement had seized the imaginations of the gayocracy because the marriage exclusion was a legal bastion for the negative stereotypes that generated distaste, prejudice, and even hatred for lesbians, gay men, and bisexuals, and transgender persons. The fundamental stereotype about gay people is that because they are sterile and biologically childless (they do not procreate inter se), they are selfish, hedonistic, and ultimately predatory. Social psychologists have found strong evidence that anti-gay prejudice is driven by unfounded beliefs that gay people are "promiscuous recruiters and corrupters of children, who cannot have committed relationships."[107] As early as 1985, Tom Stoddard, having just been selected to be Executive Director of Lambda Legal, opined: "The general public seems to feel that being gay is an individual existence that precludes family life. In fact, it often involves being part of a family in every possible sense: as a spouse, as a parent, as a child. Society needs to foster greater stability in gay relationships."[108]

In other words, LGBT rights supporters believed that marriage equality would help *normalize* gay people. If gay people were viewed through the lens of marriage, commitment, and family, rather than through the lens of sexual and gender role deviation, more Americans may see common ground with them and view them more positively. Traditional values supporters like Phil Burress completely understood that the stakes of marriage equality or redefinition completely involved *normalization*. The Family Research Council (FRC), which funded Issue 1 and provided a lot of the research and argumentation for its leaders, published a pamphlet on "*The Slippery Slope of Same-Sex 'Marriage'*" a few months before the

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[105] *See State-by-State Marriage "Age of Consent" Laws*, FINDLAW, https://family.findlaw.com/marriage/state-by-state-marriage-age-of-consent-laws.html [https://perma.cc/QHB8-D7QN].

[106] *See* Turner v. Safley, 482 U.S. 78, 99–100 (1987).

[107] Angela Simon, *The Relationship Between Stereotypes and Attitudes Toward Lesbians and Gays, in* STIGMA AND SEXUAL ORIENTATION 62, 63 (Gregory M. Herek ed., 1998); *accord*, Gregory M. Herek, *Sexual Prejudice*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 441, 448 (Todd D. Nelson ed., 2009).

[108] Carlos A. Ball, *Introduction, Symposium: Updating the LGBT Intracommunity Debate Over Same-Sex Marriage*, 61 RUTGERS L. REV. 493, 498 (2009).

election.[109] The pamphlet debunked the idea that "homosexuals" were not at all normal. Few of them enjoyed normal committed relationships; most of them adhered to a "frat house with revolving bedroom doors" understanding of family.[110] Specifically, the FRC claimed, albeit with no systematic evidence, that homosexual relationships do not last long, are marked by promiscuity and violence, do not produce children, and provide terrible homes for the children who fall into their dysfunctional households.[111]

Burress and his coalition also understood that normalization of homosexual marriages would threaten the liberties of traditional value parents, churches, and businesses. A video promulgated by CCV and FRC in connection with DOMA and the state junior-DOMAs in the 1990s illustrates this fear. A message of "*The Ultimate Target of the Gay Agenda*" involved the power of normalization: a culture accepting only conjugal marriage normalizes mom/dad/kid families; a culture expanding marriage to gay and lesbian couples normalizes nonprocreative unions and marriage for spousal pleasure.[112] The flip side of this normalization is that churches celebrating only conjugal marriages are "normal" under the traditional regime, but "discriminatory" or even "bigoted" under the "modern family" regime.

In the video, Jim Woodall, the vice-president of the Concerned Women of America, provided an example of the fallout from normalization.[113] He described the January 18, 1996 episode of the popular situation comedy, *Friends.* Carol and Susan, two beautiful blond lesbians, are planning a wedding, which causes anguish for Carol's former husband, Ross, a mopey, straight paleontologist.[114] Carol's blood family plans to stay away because they do not approve of homosexual marriages, which of course were not then legally recognized anywhere in the world.[115] Saddened, Carol wonders whether she should proceed with the marriage—

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[109] TIMOTHY J. DAILEY, FAMILY RESEARCH COUNCIL PAMPHLET, THE SLIPPERY SLOPE OF SAME-SEX "MARRIAGE" (2004), https://downloads.frc.org/EF/EF04C51.pdf [https://perma.cc/9LS8-F8ZD].

[110] *See id.* at 2.

[111] *Id.* at 3; *accord*, FAMILY RESEARCH COUNCIL, TALKING POINTS: HOW HOMOSEXUAL "CIVIL UNIONS" HARM MARRIAGE (Jan. 24, 2001) (making similar argumentation and adding that allowing homosexual marriage would open up a "Pandora's box of illicit sexual behavior").

[112] The National Campaign to Protect Marriage, *The Ultimate Target of the Gay Agenda: Same-Sex Marriage* (1996).

[113] *Id.*

[114] *Id.*

[115] *Id.*

and Ross ends up encouraging her to do so.[116] Notwithstanding his earlier reservations, Ross feels increasing sympathy for the idea and agrees to fill in for her father as the family member who "gives her away" to her new spouse.[117] As Woodall astutely told the story, he made clear that its lesson was not just that lesbian marriages are good and normal (Susan is a much better romantic match for Carol than her sad-sack husband was), but also that the attitude of Carol's family was bad and abnormal.[118] To rub in the moral lesson, the producers of the show arranged for the minister officiating the lesbian wedding to be Candace Gingrich, the lesbian-activist sister of thrice-married House Speaker Newt Gingrich, a DOMA supporter who had compared homosexuality to alcoholism.[119] The implication was that lesbian Candace was the nice, normal, Christian Gingrich, while the adulterous Newt was the Gingrich who stole Christmas.[120]

One rejoinder that LGBT rights advocates have to Jim Woodall's twist on the normalization point is that lesbian and gay families do not resemble the lurid stereotypes depicted in the FRC materials promulgated in the first few years of the century. Many lesbian and gay couples are committed to one another, lead productive lives as partners or (now) spouses, and are raising children quite capably. Just as lesbian and gay families have increasingly moved toward the marital ideal, straight families have moved away from it. Most straight couples are not married, many of them are raising children in cohabiting relationships, and those who do marry often divorce and then remarry.

This convergence can be illustrated by a current television hit show, *Modern Family.* The ABC series depicts three related families.[121] Jay, the wealthy patriarch, has two adult children by his first marriage, Claire and Mitch, and a stepson and biological son by his second marriage, to Gloria. Claire is married to Phil, and they have three biological children.[122] Mitch is married to Cameron, and they have an adopted daughter, Lily.[123] By the way, none of these twelve people bears any resemblance to any of the

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* (Jim Woodall's normalization analysis and his description of the lesbian wedding episode of *Friends* are taken from the "*The Ultimate Target of the Gay Agenda: Same-Sex Marriage"* video).
[121] *See About Modern Family*, ABC, https://abc.go.com/shows/modern-family/about-the-show [https://perma.cc/Z4BT-F7HC].
[122] *Id.*
[123] *Id.*

others; the photo below suggests that the closest match is between Lily and Mitch, who are not biologically related.[124]

What lessons might be derived from *Modern Family*? It is Jim Woodall's nightmare: The gay couple is super-normalized, in the sense that Mitch and Cam are treated exactly the same as the straight couples—not only as a real family where the spouses are committed to one another and super-devoted to their daughter, but also as objects of comedic idiosyncrasies, dysfunctions, and misunderstandings. The only character who displays anxiety about Mitch and Cam's gay relationship is Jay, the paterfamilias, and his anxiety is treated as his problem, which all the other characters help him get beyond. Finally, the show suggests a pattern of evolution that tracks America's changing family profile. The older generation (Jay and his first wife) approached marriage in the traditional way: a man and a woman commit to one another for life, consummate the union with procreative intercourse, and raise children together. Something went wrong with their marriage, and they divorced some years before the series commences. Jay remarried a much younger woman and acquired a stepson. His gay son grew up in a culture where he could aspire to marry another man, adopt a daughter, and create a relationship much like that his father enjoyed with his second wife.

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[124] *Id.*

The punch line is this. In a world of the 1950s, where almost all families looked like the Cleavers—Dad, Mom, and their two biological children—Cam and Mitch's relationship would have been queer and out of place; if sexually consummated, it would have been a felony in forty-nine states and a misdemeanor in the fiftyth state. Marriage was more closely linked to procreation, mothers stayed at home to raise their biological children, and marriage was for life. In the new millennium, Cam and Mitch's relationship is not only legal, but is much more like the typical straight relationship, where the partners cohabited before getting married, where both spouses work outside the home, and where children are often not biologically related to both parents (because they are adopted, are borne through ART, or are step-children).

V. ISSUE 1'S FAILURE TO EXPLORE THE DEEP NORMS OFFERED BY EACH SIDE

The Ohio marriage debate in 2004 involved deep public values, and Issue 1 was an opportunity for We the People of Ohio to deliberate seriously about those values. Unfortunately, the great public debate did not actually occur. The Issue 1 campaign was, largely, a missed opportunity for popular constitutionalism. As a matter of process, it was a triumph for Ken Blackwell, Phil Burress, Lori Viars, K.Z. Smith, David Langdon, and their allies. They tapped into a great reserve of popular frustration regarding marriage equality and easily outhustled and outspent their opponents. Reflecting the classic frontrunner's strategy, Phil Burress refused to debate supporters of marriage equality, and the campaign for Issue 1 was long on slogans and short on reasoned argumentation.

The gentle reader might respond: How is that not like any other political campaign? American politics is notoriously long on rhetoric, stirring the base, getting out the vote—and short on substance and debating core issues. Well, that is a problem for popular constitutionalism; to the extent it is just like a political campaign, it loses much of its normative appeal. Additionally, the public debate over Issue 1 was a lot less substantive than other high-salience political campaigns in 2004. The 2004 Bush-Kerry presidential race—the one that was basically decided in Ohio—was quite substantive.[125] The Bush Administration had a four-year record that it zestfully defended, and Senator Kerry attacked that record

[125] *See* Michael Levy, *United States Presidential Election of 2004*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-2004 [https://perma.cc/49SG-3URG].

relentlessly.[126] The two candidates met, face to face, in three presidential debates, where they pretty much answered the tough substantive questions that serious political journalists posed to them.[127]

Both the Kerry and the Bush campaigns had access to constant and aggressive issue polling, and both campaigns focused their attention on issues of national security and the economy—and not on value issues such as marriage equality.[128] Issues of marriage equality and/or redefinition were, strangely, too primordial—too deeply normative to be decided by a political campaign.

Here is what surprises me the most about the Issue 1 campaign: Although it was billed as a campaign all about values, both sides did a lousy job articulating their norms and values. Start with Yes on Issue 1. It took the position that traditional marriage ought not be changed[129]—but everyone knew that there was no such thing as a "traditional marriage." Marriage was constantly evolving—not because of gay people, but because of straight people. They wanted to end marriage's monopoly of sexual intercourse, and so Ohio and other states made sexual cohabitation legal.[130] They wanted to get out of unhappy marriages, and so Ohio and other states adopted no-fault divorce.[131] Straight people changed their minds about children born out of wedlock, and so Ohio and other states removed disabilities placed upon illegitimate kids.[132] Straight couples wanted to limit their procreation, and so Ohio and other states made contraceptives legal and followed the Supreme Court's abortion jurisprudence.[133] And so on. Almost all the changes in marriage between 1965 and 2015 reflected a

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[126] *See* Dan Glaister, *Bush and Kerry Clash on Domestic Policy*, THE GUARDIAN (Oct. 14, 2004), https://www.theguardian.com/world/2004/oct/14/uselections2004.usa3 [https://perma.cc/6XK7-BPSP].

[127] *See id.*

[128] Thomas E. Mann, *Campaigning and Governing: The 2004 Election and Their Aftermath*, BROOKINGS (Sept. 13, 2004), https://www.brookings.edu/on-the-record/campaigning-and-governing-the-2004-elections-and-their-aftermath/ [https://perma.cc/CLG8-7RJQ]. Indeed, there was not a lot of space between the parties: Senators Kerry and Edwards and Vice-President Cheney all supported civil unions, and President Bush did not seem opposed to that compromise position. *See* Associated Press, *Cheneys Blast Kerry's remarks on daughter*, NBC NEWS (Oct. 14, 2004), http://www.nbcnews.com/id/6245927/ns/politics/t/cheneys-blast-kerrys-remarks-daughter/#.XFy4BBlKhBw [https://perma.cc/ZG3P-HETR].

[129] *See State Issue 1: November 2, 2004*, OHIO SECRETARY OF STATE, https://www.sos.state.oh.us/elections/election-results-and-data/2004-elections-results/state-issue-1-november-2-2004/#gref [https://perma.cc/64JU-J42J].

[130] *See* OHIO REV. CODE § 3105.12 (2018).

[131] *See* OHIO REV. CODE § 3105.01.

[132] *See* OHIO REV. CODE § 2105.17.

[133] *See* OHIO REV. CODE §. 2919.12.

liberal understanding of marriage as a companionate union of two people, based increasingly on their happiness and not upon their eagerness to procreate.

The key issue, completely ignored in the ballot materials and apparently neglected in the pulpits and other fora for messaging, was this: In a modern, industrial economy, what is so central about procreative intercourse? Why does that still form the essential center of marriage, such that homosexual marriage becomes a major redefinition that no-fault divorce is not? The proponents of Issue 1 had answers to these questions, but by and large there is no evidence that they promulgated those answers in the public debate. The answer dominating private conversations and discussions within churches is that procreation is central because the Bible tells us it is.[134] Genesis depicts Adam and Eve as the model for all families; a man should leave his parents' household and "shall cleave unto his wife: and they shall be one flesh."[135] Although the Bible depicts a wide range of relationships (polygamy and bachelor bromances dominate "traditional marriages"),[136] its assumption is that "one flesh" marriage means a union sealed by procreative intercourse. Ministers and priests made this argument from the pulpit, and the Genesis argument surely played a large, perhaps commanding, role in the overwhelming support Issue 1 garnered from Ohio voters.

There is a deeper theology undergirding this reading of Genesis, and it goes back to St. Augustine, the father of Catholic theology on the topic of sexuality and marriage. In his *Confessions* (ca. 397), Augustine recounted his personal history of promiscuity and his long-term cohabitation with a female lover.[137] He never considered marrying her, citing the significant difference "between the sanctioned scope of marriage, a bond contracted for the purpose of producing children, and a deal arising from lustful infatuation."[138] After he became a Christian, Augustine interpreted his carnal, hard-to-control urges as the product of the original sin of Adam and Eve, what he classically dubbed concupiscence.[139] Echoing St. Paul, Augustine considered the natural and hard-to-control urges of sexuality to

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[134] *Genesis* 2:24.

[135] *Id.*

[136] *See 2 Chronicles* 13:21; *1 Samuel* 18:1.

[137] SAINT AUGUSTINE, THE CONFESSIONS OF SAINT AUGUSTINE, Book II (Edward Pusey trans. 2010) (circa 400 AD).

[138] *See* Stephen Greenblatt, *How St. Augustine Invented Sex*, NEW YORKER (June 17, 2017) https://www.newyorker.com/magazine/2017/06/19/how-st-augustine-invented-sex [https://perma.cc/RTM6-JZMQ] (drawing from St. Augustine's *Confessions*).

[139] *See* AUGUSTINE, *supra* note 137.

be saturated with evil as well as pleasure.[140] Like Paul, Augustine renounced sex after he became a follower of Christ—but, also like Paul, he realized that was not a path that every man could take, and of course if everyone followed them the human race would wither away.[141] As he later argued in *Of the Good of Marriage* (circa 410 A.D.), sacramental marriage was the solution: sex, tainted with the evil of original sin, could be justified if it were procreative intercourse sealing a God-sanctioned marriage.[142] Accordingly, Augustine's theory of marriage—the theory that dominates Roman Catholic doctrine and has influenced Evangelicals such as Reverend K.Z. Smith, Lori Viars, and Phil Burress—is one that is necessarily man-woman. Note the connection between Augustine's theory of sexuality as dangerous and Phil Burress's and CCV's campaign against pornography in Cincinnati.

But FRC and the Arlington Group admonished CCV and other groups to shy away from open reliance on the Bible as a reason to support Super-DOMAs, for they believed that openly sectarian arguments would drive away moderate voters and might render Super-DOMAs constitutionally suspect. Moreover, if supporters made the Augustinian arguments undergirding their reading of Genesis, they would be telling Ohioans that sex itself is evil and is the mark of our downfall from grace. That is not the kind of message that wins political campaigns, and one might doubt that many of the Evangelicals or even the Catholics quite agreed with it or understood it. In my opinion, this kind of argument helps explain why biblical literalists pretty much ignore the words of Christ in Mathew 19:9, which treat most remarriages as forbidden adultery (see the Seventh Commandment).[143] If all sex is sinful, except that cleansed through sacramental procreative marriage, then adultery is no worse than fornication, and the second marriage can be understood as a fresh start. I don't see how a literal reading of the Bible can support such an understanding, but it is one that must undergird the marriage morality followed by Evangelicals. For example, Reverend Smith has been divorced and has remarried; Phil Burress has twice divorced and is on his third marriage.[144] DOMA sponsors Representative Bob Barr and Senator

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[140] *See* Greenblatt, *supra* note 138.

[141] *Id.*

[142] SAINT AUGUSTINE, OF THE GOOD OF MARRIAGE (410 AD).

[143] *Matthew* 19:9; *see also Exodus* 20:14 (Seventh Commandment states "Thou shall not commit adultery").

[144] JUDITH LYNNE HANNA, NAKED TRUTH: STRIP CLUBS, DEMOCRACY, AND A CHRISTIAN RIGHT 66 (2012).

Bob Dole have been divorced and remarried twice and once, respectively.[145] Speaker Gingrich was on his third marriage, and President Clinton, DOMA's most prominent cheerleader, was in the midst of his umpteenth adulterous relationship during 1996.[146]

Yet another problem with relying on the Scriptural reasons for limiting marriage to one man, one woman was that its understanding of sexuality and gender was at odds with the U.S. Constitution and with Ohio law. The law allowed sexually active couples to cohabit and permitted married couples to avoid procreation, through contraception or abortion, and to create families without procreation, through adoption and artificial reproductive techniques. For straight couples, Ohio already delinked marriage and procreation: Why draw the line at gay couples? The ballot materials said this: "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."[147] Is it the idea that you need a mother and a father to create children? And raise them properly? Weren't there tens of thousands of lesbian and gay couples successfully raising children in a healthy family environment? What is special about procreative intercourse? Phil Burress declined to debate opponents who would have raised these questions; as far as I can tell, the campaign for traditional marriage never addressed them either.

I have spoken to a handful of women, such as Lori Viars and Vickie Burress (as well as others), who strongly supported Issue 1 and who did have answers to these questions—answers that were persuasive to them and to their families. From their point of view, there is a human, psychological truth to the Scriptural notion that the combination of the marital vows of lifetime commitment *plus* consummation by procreative intercourse *plus* the creation of children through that marital intercourse

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[145] Howard Kurtz, *Flynt Calls Rep. Barr a Hypocrite for Divorce Case Answers*, WASH. POST (Jan. 12, 1999), https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/flynt011299.htm?noredirect=on [https://perma.cc/9NSL-PFLM]; Kevin Merida, *Dole's Ex-Wife Still Puzzled by Divorce*, WASH. POST (Aug. 7, 1996), https://www.washingtonpost.com/wp-srv/national/longterm/campaign/dole/exwife.htm [https://perma.cc/ZQ4H-SJEG].

[146] Paul Farhi, *Aspects of Gingrich Divorce Story Distorted*, WASH. POST (Nov. 20, 2011), *available at* https://www.washingtonpost.com/lifestyle/style/aspects-of-gingrich-divorce-story-distorted/2011/11/17/gIQA8iY4YN_story.html?utm_term=.80f0d6a54c86; Eric Bradner, *Bill Clinton's Alleged Sexual Misconduct: Who you Need to Know*, CNN (Oct. 9, 2016), https://www.cnn.com/2016/01/07/politics/bill-clinton-history-2016-election/ [https://perma.cc/5M8R-76VF].

[147] *Ohio Definition of Marriage, Amendment 1 (2004)*, BALLOTPEDIA, https://ballotpedia.org/Ohio_Definition_of_Marriage,_Amendment_1_(2004) [https://perma .cc/39LL-LCFC].

generates uniquely powerful forms of interpersonal bonding and altruism. These women feel more connected to their husbands and believe that the husbands feel more connected to them, their children, and the overall family unit because of this traditional, time-tested norm. Moreover, they believe that parenting by a child's biological mother and father is best for children—partly because both the father and mother enjoy greater altruism because of the marital union, but also because the biological connection reinforces the altruism and because moms and dads bring different contributions to parenting. Indeed, social scientists have found that the combination of a mother's nurturing approach and a father's more challenging attitude creates synergy for children that neither style would produce on its own.[148]

Lesbian and gay families in Ohio did not agree with the foregoing account in the least. From their point of view, the Augustinian understanding of sexuality, gender, and marriage had been overtaken by modern times. They consider it barbaric to treat sexuality an evil impulse, and incredibly mysterious to think that marital procreation absolves the couple from original sin. Increasing numbers of Catholics and Protestants do not understand the Bible in this way, and the Establishment Clause of the Constitution bars the state from legislating norms supported only by sectarian religious belief and not by the overall public interest.[149] From their point of view, Ohio had already abandoned the Augustinian understanding of sexuality, gender, and marriage in favor of that documented and advocated by Dr. Alfred Kinsey: sexuality is a pleasure that all human beings seek, and it is natural for all of them; the state needs to regulate sexuality by insisting on consent, preventing disease, and encouraging committed relationships.[150] In a world with too many people already, marriage is not primarily about procreation between the spouses; who in Ohio could avoid pregnancies when they had procreative sex, could have children through adoption of ART, and could leave their families when they got tired of it all? Finally, no one could deny that a significant

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[148] *See, e.g.*, KYLE PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE (2000); KYLE PRUETT & MARSHA PRUETT, PARTNERSHIP PARENTING: HOW MEN AND WOMEN PARENT DIFFERENTLY (2009).

[149] Cty. of Allegheny v. Am. Civ. Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 590–91(1989).

[150] *See* Theodore M. Brown & Elizabeth Fee, *Alfred C. Kinsey: A Pioneer of Sex Research*, 93 AM. J. PUB. HEALTH 896 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447862/ [https://perma.cc/9AMM-ALFZ].

percentage of lesbian and gay couples were raising children,[151] and there was a lot of evidence (still provisional in 2004) that they were doing as good a job as straight couples.[152]

These are great arguments, but they did not get made in the public debate over Issue 1. A major reason, of course, is that the LGBT community remained largely in the closet. While Evangelical and Catholic Ohioans openly talked about their fear of homosexual marriage and their dim views of homosexuality, very few gay or lesbian Ohioans spoke publicly about their lives and relationships. The campaign against Issue 1 did not have the resources to present this perspective through extensive television and radio ads, and it was too disorganized to mobilize grass-roots volunteers to get out the message. But even if they had more resources and better organization, it is clear that the campaign would *not* have made these arguments in 2004.

Look at the ballot materials for No on Issue 1. They made two points: Issue 1 swept too broadly and would affect some straight couples as well as gay couples, and Issue 1 would hurt Ohio's economy.[153] These arguments were lamentable, in my view. On the one hand, both were highly speculative—maybe true, but likely not. Drawing from the plain language, the ballot materials, and the public statements of Phil Burress and CCV, one can easily limit Issue 1 to barring same-sex marriage and any similar institution such as civil unions. In my view, it was unlikely that Issue 1 would bar an institution such as Hawaii's reciprocal beneficiaries, which Burress's friend Mike Gabbard would have told him was not considered anything close to homosexual marriage. Nor would it have prohibited employers from providing domestic partnership benefits to partners of lesbian and gay employees. It was 100% false that Issue 1 would bar wills and contracts devolving property to a lesbian or gay partner. The Yes on Issue 1 ballot materials explicitly disclaimed such an effect, and the constitutional text provides no support for it. As to an effect on Ohio's economy, that would depend on whether neighboring states like

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[151] *See* Gary J. Gates & M.V. Lee Badgett, *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, WILLIAMS INSTITUTE (Mar. 2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf [https://perma.cc/T87G-64YQ].

[152] *See* Cornell University, *What Does Scholarly Research Say About the Well-being of Children With Gay or Lesbian Parents?,* https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/ [https://perma.cc/W22N-RJJB].

[153] *Ohio Definition of Marriage, Amendment 1, supra* note 147.

Michigan passed their Super-DOMAs. All thirteen Super-DOMAs passed easily,[154] and Ohio probably felt no negative economic effects.

On the other hand, opponents of Issue 1 had much better arguments than the ones they emphasized—arguments that were truthful and that reflected the pain imposed by Issue 1. The main argument against Issue 1 is that it unfairly denigrated lesbian and gay families and imposed genuine hardships on them, based on a highly abstract theory of sexuality and marriage that straight people no longer accepted for their own relationships.[155] Why should the law treat a lesbian couple raising children any different from a straight couple raising children? What did the Issue 1 supporters have to say to a family where the biological mother dies, and the children raised with her female partner are taken away by the blood relatives?[156] The opponents of Issue 1 should have publicized the fact that there were thousands of real families, that they were good families, and that there was no tangible reason to exclude them from Ohio family law.

Although a terrible one, the strategy followed by the opponents of Issue 1 was not a stupid or ill-informed strategy. Given their limited resources, No on Issue 1 could not have generated much of an information-based campaign. But even with more resources, they would not have made such arguments, because local leaders as well as the national gayocracy rationally feared that moderate voters would be repelled by any campaign that reminded them how pervasive lesbian and gay families actually were.[157] The campaign I am outlining—and that I did outline before 2004—is one that would have lost (big) in 2004, but it was the only way forward for LGBT people on this issue.[158] The long-term goal needed to be equality practice, namely, small equalizing steps, followed by good public reactions once people realized that rights for lesbian and gay persons and families did not have bad effects for them and did help persons and couples who were their friends, neighbors, and family members.

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[154] *See* SEAN R. CAHILL, SAME-SEX MARRIAGE IN THE UNITED STATES: FOCUS ON THE FACTS 9 (2004).

[155] *See* Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 147 (2005).

[156] Married couples can usually achieve joint parental rights to the biological children of one spouse.

[157] Feldblum, *supra* note 155.

[158] *See generally* William N. Eskridge Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward Recognizing Gay Unions*, 31 MCGEO L.J. 641 (2000) (discussing the criticisms of same-sex marriage will not hold true in the long run).

VI. AN APPRECIATION AND CRITIQUE OF THE SIXTH CIRCUIT DECISION UPHOLDING ISSUE 1

Thirteen states voted for Super-DOMAs in 2004, two more did so in 2005, and another seven in 2006.[159] The Arizona Super-DOMA failed at the polls in 2006, and a more modest constitutional DOMA passed in 2008, along with constitutional DOMAs in California (Proposition 8) and Florida.[160] All four states in the Sixth Circuit adopted broad Super-DOMAs: Ohio, Michigan, and Kentucky in 2004 and Tennessee in 2006.[161] Although the proposed Federal Marriage Amendment languished in Congress where it never achieved anything close to the two-thirds majorities needed to send it to the states, traditional marriage continued to do well at the ballot box.[162]

There were no immediate constitutional challenges to the Sixth Circuit Super-DOMAs because the national gayocracy in 2004-06 discouraged any kind of federal constitutional litigation upon the belief that the Supreme Court would not require marriage equality so long as only one state (Massachusetts) was issuing marriage licenses.[163] There were lawsuits asserting state constitutional claims in some jurisdictions without state constitutional DOMAs. In 2008, court decisions in Connecticut and (briefly) California followed Massachusetts to require marriage equality, and in 2009 legislatures in Vermont, New Hampshire, and (briefly) Maine followed.[164] At that point, GLAD and the ACLU filed federal

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[159] DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME SEX MARRIAGE 102 (2006); *Same-Sex Marriage, State by State*, PEW RESEARCH CENTER (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ [https://perma.cc/3ZWC-UVGM].

[160] Nancy Kubasek et al., *Amending The Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959, 964 (2011) (discussing the passage of DOMA's in Arizona, California and Florida).

[161] Alison M. Smith, *Same-Sex Marriages: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE (Sept. 24, 2004), http://digitalcommons.ilr.cornell.edu/crs/13/ [https://perma.cc/VW5T-PYYE].

[162] *See* Associated Press, *Gay marriage ban defeated in Senate vote*, NBC NEWS (June 7, 2006), http://www.nbcnews.com/id/13181735/ns/politics/t/gay-marriage-ban-defeated-senate-vote/#.XE44si2ZP6Y [https://perma.cc/985Y-3NLB]. The 2006 Arizona loss and the narrow 2008 California victory were signals that the tide was turning somewhat.

[163] *See* Joshua Baker & William C. Duncan, *As Goes DOMA . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1, 10–16 (2011).

[164] Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 262 (2008); In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008); Edith Honan, *Factbox: List of states that legalized gay marriage*, REUTERS (June 26, 2013), https://www.reuters.com/article/us-usa-court-gaymarriage-states-idUSBRE95P07A20130626 [https://perma.cc/K88P-P6RG].

constitutional lawsuits challenging DOMA, while private attorneys filed a federal constitutional challenge to California's Proposition 8 in 2010.[165] Both challenges reached the Supreme Court in the 2012 Term.[166] With the critical support of the Obama Administration, the Supreme Court dismissed the appeal taken by private defenders of traditional marriage in *Hollingsworth v. Perry*[167] and invalidated DOMA in *United States v. Windsor*.[168]

Writing for the Court, Justice Kennedy treated Edie Windsor's Canadian marriage to her life partner, Thea Spyer, as a serious interpersonal commitment that the federal government presumptively ought to honor.[169] He then rejected the various governmental interests that might justify excluding legal same-sex marriages and spouses from more than 1100 federal duties and benefits.[170] Although a devout Catholic, Justice Kennedy did not even mention the Augustinian and other religion-based or natural law arguments for traditional marriage, even though they had been ably pressed in an amicus brief by Professor Robby George and his colleagues.[171] Nor did he find persuasive the argument that children had a right to be raised by a mother and a father.[172] Indeed, Justice Kennedy recognized that the role of children in marital families cut strongly against, rather than in favor of, the exclusion of lesbian and gay couples.[173] "[DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their

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[165] *See* Baker & Duncan, *supra* note 163, at 17 (discussing lawsuits filed in Federal Court challenging the constitutionality of DOMA and Proposition 8).

[166] Ariane De Vogue, *Supreme Court Hearing Anti-Gay Marriage Proposition 8 Case This Week*, ABC NEWS (Mar. 25, 2013), https://abcnews.go.com/Politics/OTUS/supreme-court-hearing-anti-gay-marriage-proposition-case/story?id=18774196 [https://perma.cc/YAU6-UYR4].

[167] 570 U.S. 693, 715 (2013). *See also* Jonathan Capehart, *No surprise in Obama's gay marriage brief*, WASH. POST (Mar. 1, 2013), https://www.washingtonpost.com/blogs/post-partisan/wp/2013/03/01/no-surprise-in-obamas-gay-marriage-brief/?utm_term=.05616cebe697 [https://perma.cc/RA2N-SE8N] (discussing the amicus brief the Obama administration filed with the Supreme Court urging the Court to strike down Proposition 8).

[168] 570 U.S 744, 775 (2013).

[169] *Id.* at 769.

[170] *Id.* at 768–70.

[171] *See* JACK FRIEDMAN, RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 117 (Timothy Samuel Shah et al. eds., 2016).

[172] *Windsor*, 570 U.S. at 772.

[173] *Id.*

own family and its concord with other families in their community and in their daily lives."[174]

Four Justices would have upheld DOMA as a rational (plausible) administrative response to the expected flux in state family law regimes.[175] In an over-the-top dissenting opinion, Justice Scalia lambasted the Court for subjecting DOMA to something that was clearly more scrutinizing than rational basis review (administrative convenience has traditionally been considered plenty rational).[176] Always playing Cassandra in gay rights cases, Justice Scalia sarcastically predicted that the same reasoning the majority applied to strike down DOMA would be easily and logically applicable to strike down state marriage exclusions.[177]

> [T]he real rationale of today's opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by "'bare . . . desire to harm'" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples' marital status.[178]

Complementing the Court's sweeping opinion invalidating DOMA, Justice Scalia's cassandric prediction was, in part, a self-fulfilling prophecy. Lower court judges and advocates noticed that Scalia had been right when he predicted in *Romer* that the Court would have to overrule *Bowers v. Hardwick*.[179] When the Court overruled *Bowers* in *Lawrence v. Texas,* Justice Scalia was right, again, when he predicted that same-sex marriage bars would be the next to fall to the Court's politically correct analysis.[180] *Windsor* proved him right, again, and so advocates and judges took seriously his claim that state bars would fall as well.[181] LGBT rights groups read the Scalia dissent as a fire alarm: race to the courthouse for a sweeping ruling, while the Kennedy-Ginsburg-Breyer-Sotomayor-Kagan

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[174] *Id.*

[175] *Id.* at 775–76 (Roberts, C.J., dissenting).

[176] *Id.* at 793 (Scalia, J., dissenting).

[177] *Id.* at 817 (Alito, J. dissenting).

[178] *Id.* at 799 (Scalia, J., dissenting) (internal citations omitted).

[179] Romer v. Evans, 116 S. Ct. 1620, 1631 (1996). *See also* Dylan Matthews, *Justice Scalia lost on same-sex marriage. But at least he can say, "I told you so."*, VOX (June 25, 2015), https://www.vox.com/2015/4/28/8508937/scalia-same-sex-marriage [https://perma.cc/8J6K-XUCZ].

[180] 123 S. Ct. 2472, 2488 (2003).

[181] *See* Matthews, *supra* note 179.

majority was in place. Dozens of federal lawsuits followed—and virtually every federal judge to hear the issue ruled that state same-sex marriage bars violated the Fourteenth Amendment; most of the judges cited the Scalia dissent.[182] In 2014, the Tenth, Fourth, and Seventh Circuit Courts of Appeals ruled that the marriage bars in Utah, Oklahoma, Virginia, Wisconsin, and Indiana violated the Fourteenth Amendment.[183]

The Supreme Court has unreviewable discretion whether to take cases on review—but almost everyone expected that the Court would exercise that discretion to take one or more of the lower court decisions when the Justices went through the first "cert list" of the new 2014 Term. To their surprise, the Court denied review in all four appeals on October 6, 2014.[184] The Court usually provides no reasons for its action, and there was no public dissent. The Court's action meant that the roster of marriage equality states skyrocketed from nineteen to thirty virtually overnight. The five states that had appealed their losses had no choice but to issue marriage licenses, now that there was a final judgment against them. And the federal district judges in other states of the Fourth (North Carolina, South Carolina, West Virginia) and Tenth (Colorado, Kansas, and Wyoming) Circuits were bound by these circuit court rulings and were expected to bring those states into alignment. The next day, the Ninth Circuit struck down the exclusions in Idaho and Nevada,[185] bringing the new total to thirty-five states, once Alaska, Arizona, and Montana were added to the roster as well.[186]

Apparently, the Supreme Court was waiting for a "split in the circuits" before it would take a marriage case—and the Justices and litigants did not have long to wait. Representing Jim Obergefell (a widower who wanted Ohio to recognize him as the surviving spouse on his partner's death certificate), as well as several lesbian and gay couples, Al Gerhardstein and the ACLU challenged Ohio's Issue 1 and secured a district court decision declaring it a violation of the Fourteenth Amendment, much to the surprise

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[182] *Id.*

[183] *See* Kitchen v. Herbert, 755 F.3d 1193, 1213 (10th Cir. 2014) (Utah); Bishop v. Smith, 7860 F.3d 1070, 1081 (10th Cir. 2014) (Oklahoma); Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014) (Virginia); Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014) (Wisconsin and Indiana).

[184] Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Oct. 6, 2014), https://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html [https://perma.cc/4NZR-3Q4S].

[185] *See* Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014).

[186] The Supreme Court declined to review the Idaho decision, and Nevada did not appeal.

of CCV and its allies.[187] Indeed, district courts in all the states of the Sixth Circuit followed Justice Scalia's prophecy, and the Sixth Circuit consolidated the appeals.[188] There were thirteen couples, as well as two widowers, one child, and a funeral director.[189] Nine of the couples and a tenth couple where one partner was deceased were raising children within their relationships.[190]

Writing for two of the three judges, Judge Jeffrey Sutton's majority opinion in *DeBoer v. Snyder* reversed all the lower court judgments granting relief to the plaintiff couples.[191] Although he believed that the Supreme Court's summary disposition in *Baker v. Nelson* was binding on his Court, Judge Sutton nevertheless examined the plaintiffs' constitutional claims on their merits.[192] Because the Supreme Court had never explicitly extended the right to marry to lesbian and gay couples *and* had never ruled that sexual orientation is a suspect classification, Judge Sutton applied ordinary rational basis review.[193] So, Issue 1 and the other Super-DOMAs only had to advance a permissible policy that was in the public interest. Judge Sutton found rationality in this way:

> [G]overnments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children.[194]

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[187] Michael S. Rosenwald, *How Jim Obergefell became the face of the Supreme Court gay marriage case*, WASH. POST (Apr. 6, 2015), *available at* https://www.washingtonpost.com/local/how-jim-obergefell-became-the-face-of-the-supreme-court-gay-marriage-case/2015/04/06/3740433c-d958-11e4-b3f2-607bd612aeac_story.html.

[188] *See* Katherine Wensink, *Sixth Circuit Court of Appeals upholds ban on same-sex marriage: what does that mean for couples?,* MCDONALD HOPKINS (Nov. 11, 2014), https://mcdonaldhopkins.com/Insights/Blog/Estate-Planning-Techniques/2014/11/11/6th-circuit-court-of-appeals-upholds-ban-on-same-sex-marriage-what-does-that-mean-for-couples [https://perma.cc/NB29-QP47].

[189] *See* Amanda Terkel et al., *Meet The Couples Fighting To Make Marriage Equality The Law Of The Land*, HUFF. POST (June 17, 2015), https://www.huffingtonpost.com/2015/06/17/supreme-court-marriage-_n_7604396.html [https://perma.cc/EZ5E-BJVS].

[190] Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015).

[191] 772 F.3d 388, 421 (6th Cir. 2014).

[192] *Id.* at 400.

[193] *Id.* at 413.

[194] *Id.* at 404.

This was a version of the famous "irresponsible procreation" argument that lawyers and professors had come up with to explain or justify the exclusion of lesbian and gay couples in a nice, non-homophobic way: Marriage exists to discourage the promiscuity and channel the sexual energy of rascally heterosexuals and to protect children resulting from their sexual acts.[195] Based on this narrow purpose, traditional (one man, one woman) marriage only incidentally excludes gay people and so it is not motivated by prejudice.

There is much that is excellent about Judge Sutton's opinion. Like the *Windsor* dissenters, including his mentor and former boss, the late Antonin Scalia, Judge Sutton appreciated the power of popular constitutionalism and the limits of judicial authority to trump the will of the people.[196] By 2014, many states had normalized gay marriage, further entrenching the love and commitment model—but after open constitutional debate Ohio and the other states had reaffirmed their normalization of traditional, conjugal marriage. Popular constitutionalism offered many advantages that judges ought not cavalierly dismiss. First, for important constitutive issues such as the definition of marriage and the normalization (or not) of LGBT people and their relationships, unelected federal judges need to be really certain that the rule of law requires a declaration that a constitutional initiative like Issue 1 violates the Constitution. Second, Ohio voters had chosen the traditional, conjugal understanding of marriage, but the voters in Maryland, Maine, and Washington had in 2012 chosen the liberal companionate understanding when they accepted marriage equality for LGBT people. A core value of federalism is that each state can adopt a different legal regime, and then the people can see for themselves what works and what is dysfunctional. Third, what Ohio voters chose in 2004 could be reversed by a simple majority in 2016 or later. By 2014, public opinion had turned sharply in favor of marriage equality for LGBT couples, and by 2016 a constitutional initiative revoking Issue 1 would have been a possible winner in Ohio.[197] Why should judges exercise counter-majoritarian power when We the People can reconsider what some thought was an unwise marriage-protective Super-DOMA?

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[195] *Id.* at 422. *See also* J.Q. WILSON, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.").

[196] *See DeBoer*, 772 F.3d at 436.

[197] Because young people overwhelmingly supported marriage equality, every year after that would be even more favorable.

Another admirable feature of Judge Sutton's opinion is that it honed in on the kind of argument that best reflected the normative agenda of the campaign for Issue 1, but without adopting the sectarian approach reflected in the Augustinian theory of sexuality, gender, and marriage. In my view, the best judicial guidance came from Justice Alito's dissenting opinion in *Windsor.* Distilling the philosophical stance developed by prominent traditionalist intellectuals, Justice Alito maintained that there are, broadly speaking, two understandings of marriage: the *conjugal* view sees it as an institution defined by the possibility of procreation and family formation between the spouses; and the newer *consent* view sees it as an institution of mutual commitment for the happiness of the spouses.[198] States, he argued, can rationally choose either one of these approaches.[199] Judge Sutton took this argument one step further, to say that marriage can rationally be understood as an institution founded upon consummation through procreative intercourse and maintained as a special institution because of its traditional link among the loving spouses, the consummating act, and the propagation of the human race through children raised in households the state considers optimal.[200] That LGBT households do not fit into this traditional understanding is not an intended consequence of that definition. *Windsor* is distinguishable because the Court emphasized the responsibility of each state to define families according to its values and experience and the novelty of DOMA's sweeping reach.[201]

A model of judicial restraint and careful reasoning, Judge Sutton's opinion made the most sensible case that could have been made for Issue 1. His opinion failed to address a number of legal problems with its conclusion, however. For example, Judge Sutton assumed that he should apply traditional rational basis review to the Super-DOMAs that discriminated against gay people.[202] Rational basis review normally asks whether there is some plausible reason why people might have voted for Issue 1 and traditionally requires only some plausible connection between the discrimination/exclusion and the principle or policy advanced by the statute or constitutional amendment; such review tolerates discriminations that exclude many people who would advance the government principle or

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[198] United States v. Windsor, 133 S. Ct. 2675, 2718 (2013).

[199] *Id.* at 2719.

[200] *See DeBoer*, 772 F.3d at 429.

[201] *Windsor,* 133 S. Ct. at 2692. *See also* Romer v. Evans, 517 U.S. 620, 633 (1996) (emphasizing the unprecedented nature of Amendment 2).

[202] *See DeBoer*, 772 F.3d at 413.

policy (overinclusion) and that fails to exclude some people who also undermine the governmental principle or policy (under inclusion).[203]

But the Supreme Court's deployment of rational basis review in earlier gay rights cases—*Romer, Lawrence,* and *Windsor*—was anything but traditional, as Justice Scalia had charged in each case. To begin with, the Court refused in those cases to accept plausible reasons for excluding lesbian and gay people from anti-discrimination laws (*Romer*),[204] for penalizing their sexual activities as the crime against nature (*Lawrence*),[205] and for barring them from being considered married for purposes of federal law (*Windsor*).[206] In all three cases, the state expressed a preference for heterosexual unions and families over homosexual unions and families, yet the Court treated that expression as an insufficient justification.[207]

Additionally, the Supreme Court in *Windsor* held that the irresponsible procreation argument could not save DOMA, and it requires some explanation for the jurist to conclude that it should have been a rational basis in *DeBoer*.[208] Ohio gave marriage licenses to straight couples who were elderly, who did not want to have children, who preferred to adopt children, who were more likely to have children through ART, and so forth. Most of the *DeBoer* families had children raised in lesbian and gay relationships: They actually better fit Judge Sutton's announced goal (children) than an increasing number of straight couples did—a point hammered home in Judge Martha Daughtery's hard-hitting dissenting opinion.[209]

Relatedly, Judge Sutton's opinion did not seem to recognize the degree of exclusion Ohio and the other states imposed upon lesbian and gay families. Recall the wording of Issue 1:

> *Section 11.* 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

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[203] For examples of traditional rational basis review where the Court bent over backwards to uphold discriminatory laws, *see* Heller v. Doe, 113 S. Ct. 2637, 319–20 (1993).

[204] *Romer*, 517 U.S. at 651–52 (Scalia, J., dissenting).

[205] Lawrence v. Texas, 539 U.S. 558, 603–05 (1993) (Scalia, J., dissenting).

[206] *Windsor,* 133 S. Ct. at 2707–09 (Scalia, J., dissenting).

[207] *See Windsor,* 133 S. Ct. at 2693–96; *Lawrence,* 539 U.S. at 575–78; *Romer,* 517 U.S. at 633–35.

[208] *Windsor,* 133 S. Ct. at 2694; DeBoer v. Snyder, 772 F.3d 388, 413 (6th Cir. 2014).

[209] *DeBoer,* 772 F.3d at 422–27 (Daughtery, J., dissenting).

> intends to approximate the design, qualities, significance or effect of marriage.[210]

Judge Sutton mischaracterized Issue 1, as his opinion only quoted part of the first sentence.[211] Ohio was not just reaffirming the exclusion of same-sex couples from traditional marriage, it was going out of its way to exclude them from future non-marriage institutions that would dignify their relationships and protect their children. The novelty of this Super-DOMA and its sweeping exclusion of lesbian and gay families from state family law brought Issue 1 within the searching review announced in *Romer v. Evans* and *United States v. Windsor*.[212] As an "inferior court,"[213] the Sixth Circuit was required to follow the Supreme Court's precedents and to read them with an appreciation of their deep structure as well as their narrow holdings.

Finally, there is an analytical quandary at the center of the irresponsible procreation argument for excluding lesbian and gay unions from marriage. An equal protection challenge requires the state to demonstrate that a classification excluding people from a government institution is either reasonably required by or plausibly advances state policy. Even if a central goal of marriage in Ohio was to channel rascally heterosexuals into committed relationships so that their progeny would be raised in a marital union, that does not answer the question: how does excluding lesbian couples raising children incentivize straights to get married? In *Romer,* the Court did not even consider as plausible an argument, raised in Amendment 2's ballot materials, that anti-discrimination laws were aimed at protecting racial minorities from the legacy of slavery and deep prejudices and that homosexuals did not fit within that traditional purpose.[214] The state did not even make that argument but did claim that excluding homosexuals would conserve scarce enforcement resources, traditionally a rational state interest, but the Court

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[210] OHIO CONST. ART. XV, § 11.

[211] *See DeBoer,* 772 F.3d at 398.

[212] *See generally Windsor*, 133 S. Ct. 2675; *Romer*, 517 U.S. 620.

[213] *See* U.S. CONST. ART. III, § 1 (Lower federal courts are "inferior courts").

[214] On the Amendment 2 campaign's contrast between traditionally protected groups and unworthy homosexuals*, see* STEPHEN BRANSFORD, GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2 228–29 (1994) (account by a supporter of Amendment 2); *cf.* SUZANNE GOLDBERG & LISA KEEN, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 182–83 (2000) (account by one of the Lambda lawyers challenging Amendment 2).

rejected that argument.[215] This recalls my earlier point that none of the Supreme Court's recent gay rights cases applied traditional rational basis review. By ignoring this critical feature of the higher court's binding precedents, Judge Sutton left a big hole in his majority opinion.

VII. AN APPRECIATION AND CRITIQUE OF THE SUPREME COURT'S DECISION INVALIDATING ISSUE 1

Judge Sutton's opinion had "On Its Way to the Supreme Court" stamped under its caption: the lesbian and gay couples and widowers were certain to seek review, and the Supreme Court was very likely to grant it. The Court granted review in all six of the appeals;[216] because the Ohio petitioners filed first, the lead petitioner was Jim Obergefell, the widower from Phil Burress's Cincinnati.[217] Few Court-watchers were surprised when the Court overturned Issue 1 and the other Super-DOMAs and ruled that the Fourteenth Amendment required the states to recognize same-sex marriages.[218] Joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan (his majority in *Windsor*), Justice Kennedy's opinion for the Court in *Obergefell v. Hodges* held that Issue 1 and the other Super-DOMAs violated the Due Process Clause because they denied gay people's fundamental right to marry without offering a compelling justification.[219] "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[220] When Justice Kennedy read that passage to those assembled the morning of June 26, 2015[221] (exactly two years after *Windsor* and twelve years after *Lawrence*), there were quiet cheers and not a few tears.

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[215] Brief for Petitioners, at 21, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (No. 95-1039), 1995 WL 17008429.

[216] *DeBoer v. Snyder Case Files*, SCOTUSBLOG (Jan. 21, 2019, 6:00 PM), https://www.scotusblog.com/case-files/cases/deboer-v-snyder/ [https://perma.cc/EW9E-AAQ4].

[217] Obergefell v. Hodges, 135 S. Ct. 2584, 2594–95 (2015).

[218] *See* David L. Franklin, *Origin Story: How the 1942 case of a one-footed chicken thief laid the foundation for marriage equality*, SLATE (June 29, 2015), https://slate.com/news-and-politics/2015/06/gay-marriage-supreme-court-ruling-how-skinner-v-oklahoma-laid-the-foundation-for-obergefell-v-hodges.html [https://perma.cc/96GG-3LGK].

[219] *Obergefell*, 135 S. Ct. at 2591.

[220] *Id.* at 2593.

[221] *See* Mark Walsh, *A "view" from the Courtroom: A marriage celebration*, SCOTUSBLOG (June 26, 2015), https://www.scotusblog.com/2015/06/a-view-from-the-courtroom-a-marriage-celebration/ [https://perma.cc/YPU3-JXXF].

The liberty to make important life choices that are respected by the state is the same for these lesbian and gay couples as for Richard and Mildred Loving almost half a century ago.[222] The centerpiece of Justice Kennedy's opinion was an extended analysis of the Court's right to marry precedents, demonstrating how their logic extended precisely and completely to the families petitioning the Court. The precedents protected Americans' "right to personal choice regarding marriage" that is "inherent in the concept of individual autonomy," and indeed is "unlike any other in its importance to the committed individuals,"[223] that "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education[,]"[224] and that is "the foundation of the family and of society, without which there would be neither civilization nor progress."[225] The Court held that all of these dimensions of the right to marry were fully applicable to LGBT persons and their partners.[226]

As Justice Thomas pointed out in dissent, traditional understandings of Fourteenth Amendment "liberty" focused on freedom from government coercion, not entitlement to government programs.[227] Justice Kennedy's response was that the modern understanding of liberty includes the government's legal structure for people's lives.[228] And the Fourteenth Amendment's liberty guarantee is paired with an assurance of "equal protection of the laws."[229] Thus, the Court held:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.

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[222] *See generally* Loving v. Virginia, 388 U.S. 1 (1967).
[223] *Obergefell*, 135 S. Ct. at 2599.
[224] *Id.* at 2600–01.
[225] *Id.* at 2601 (quoting a nineteenth century precedent).
[226] *Id.*
[227] *Id.* at 2631 (Thomas, J., dissenting).
[228] *Id.* at 2602.
[229] *Id.* at 2604.

> And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.[230]

The Solicitor General and most law professors expected the Supreme Court to rest its holding on the Equal Protection Clause,[231] and so the substantive due process foundation for *Obergefell* came as something of a surprise. Its primary virtue was that the opinion was an appeal to liberty, which has resonance with conservatives as well as liberals. Because the marriage liberty is a fundamental right, the state Super-DOMAs were subject to strict scrutiny—and Justice Kennedy did not have to cast aspersions of the motivations of supporters of traditional marriage. Had Justice Kennedy applied rational basis review, even with the extra "bite" he gave it in *Windsor* and *Romer,* the opinion would inevitably have cast a negative light on the motivations underlying the four Super-DOMAs. Rejecting proposed rational grounds for the exclusion, the opinion would either have explicitly ruled that the measures must have been motivated by "animus" (the term used in *Romer*) or would have implicitly suggested as much. But strict scrutiny meant that well-motivated but vague or excessively broad state laws or constitutional amendments would be invalidated. For example, when the Court in *Zablocki v. Redhail* applied strict scrutiny to invalidate a law barring deadbeat dads from remarrying, no one thought that the goals of the legislators were anything but beneficent.[232] Hence, the *Obergefell* opinion was upbeat and positive—emphasizing the virtues and needs of lesbian and gay families without denigrating families devoted to traditional marriage for state law as well as their own lives.

Another virtue of Justice Kennedy's opinion was that it better reflected the deep norms undergirding the freedom to marry movement than the campaigns actually waged by LGBT advocates in Ohio, Michigan, Kentucky, and Tennessee. Ignoring the claims made by opponents that Issue 1 would harm straight families and the Ohio economy, Justice Kennedy's opinion focused on the dignity of lesbian and gay couples and families, with special mention of the children being reared by the couples

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[230] *Id.* at 2603.

[231] *See* Brief for United States as Amicus Curiae Supporting Petitioners, at 13, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). *See also* Stacey L. Sobel, *When Windsor isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493, 529 (2014).

[232] 434 U.S. 374, 388 (1978).

now free to marry.[233] Although LGBT rights advocates sought a ruling that sexual orientation is a suspect classification, like race, Justice Kennedy's opinion served notice that exclusion of LGBT persons and families from basic legal rights and institutions would not enjoy the normal presumption of constitutionality. By articulating the right in play as a liberty interest, with equality overtones (as he had done in *Lawrence*), Justice Kennedy was able to assert that religious and parental liberties were not directly threatened by gay people's right to marry.[234]

On the other hand, resting the Court's opinion upon a fundamental right to marry carried with it a number of analytical difficulties. Justice Kennedy conceded that most of the right to marry cases cited in the opinion assumed or rested upon the conjugality understanding of marriage.[235] For example, the whole point of the anti-miscegenation laws invalidated in *Loving v. Virginia*[236] was to head off conjugality between men and women of different races; Virginia's racial purity law explicitly rested upon the social policy of protecting the integrity of the "white race" and preventing the generation of "mongrel races."[237] Arguably the leading case for a substantive due process liberty interest in family, and one invoked repeatedly by Justice Kennedy, was *Meyer v. Nebraska*,[238] which protected the interests of parents in the upbringing of their children. The assumption in 1923 would have been biological or blood-related children. Announcing a fundamental interest in procreation and expressly linking it to marriage, *Skinner v Oklahoma*[239] struck down a state compulsory sterilization law, whose main defect was that it would defeat the purpose of marriage. "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[240]

For his concluding point that marriage is a foundation of civil society, Justice Kennedy cited and quoted *Maynard v. Hill*,[241] where the Court in 1888 upheld the authority of a state legislature to grant a divorce by a special bill. About marriage, the *Maynard* Court said this: "It is an

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[233] *Obergefell*, 135 S. Ct. at 2600.

[234] For reasons discussed above, these assurances were not persuasive to the core supporters of Issue 1.

[235] *Obergefell*, 135 S. Ct. at 2598.

[236] 388 U.S. 1, 2 (1967).

[237] *Id.* at 5.

[238] 262 U.S. 390 (1923).

[239] 316 U.S. 535, 536 (1942).

[240] *Id.* at 541.

[241] 125 U.S. 190 (1888) (invoked as a key authority in *Obergefell*, 135 S. Ct. at 2601).

institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[242] The reason marriage was considered the "foundation of the family and of society" was the conjugal understanding, whereby romance between a man and a woman combined has traditionally been channeled into civil marriages celebrated in religious ceremonies and consummated by procreative intercourse.[243]

Justice Kennedy was recharacterizing these old cases, updating them by reading them to support a more general set of principles and norms. From the perspective of the religious supporters of Issue 1, however, the Supreme Court was engaged in the same "redefinition of marriage" exercise as the LGBT opponents of Issue 1. In other words, the Court was retrofitting the precedents to justify the outcome the majority considered just and right—rather than applying the precedents in a neutral way. From an academic perspective, there is no way to apply the precedents without some normative characterization of their constitutional principle or policy. My own view is an appreciation of Justice Kennedy's broad inquiry: Why has marriage been a fundamental right? What civic and constitutional purposes does it serve? And I think he makes a good case for the proposition that the autonomy-enhancing and social purposes of marriage fit the needs and contributions of lesbian and gay families—but the Ohio Issue 1 debate suggests that this is a debatable conclusion. For the same reasons that the supporters of Yes on Issue 1 maintained that the conjugal understanding of marriage is what makes the institution special, so they would have read Justice Kennedy's precedents *not* to support his expansion of marriage to include same-sex couples.

If the cases can be read the way Lori Viars and Phil Burress and David Langdon would read them, then under what authority does the Supreme

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[242] *Id.* at 211–14 (discussing state cases to the same effect).

[243] The Court explained how marriage centrally depended upon the procreative intercourse that was in 1888 a universal requirement for valid marriages. Thus, marriage

> cannot be dissolved by the parties *when consummated*, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires *certain acts of the parties to constitute marriage* independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.

Id. at 213.

Court veto Ohio's conjugality-based understanding of marriage? In my view, *Turner v. Safley* is the closest authority on point because the Court recognized a right to marry for lifetime-prisoners who would probably never consummate their marriages, and emphasized the broader social purposes of civil marriage, namely, its values of interpersonal commitment, spiritual union, and unitive benefits and spousal rights.[244] Reading that broadly, Viars and her colleagues would surely say that *Turner* (the Court's most recent freedom to marry precedent) was wrongly decided and they would maintain that the older precedents ought to be followed instead.

This brings us to the second lesson suggested by the Issue 1 debate: The Supreme Court needed a more conclusive, more widely persuasive legal argument to veto a fundamental social policy that Ohio had not only followed as a matter of tradition, but had twice reaffirmed and expanded through an engaged democratic process—first, in the 2004 junior-DOMA adopted by the Ohio Legislature and, then, in the 2004 Super-DOMA overwhelmingly adopted by the Ohio voters.[245] Echoing Judge Sutton's opinion for the Sixth Circuit, Chief Justice John Roberts raised these arguments in his *Obergefell* dissenting opinion. "Just who do we think we are?"[246] Is it legitimate for us to substitute our judgment for that of the people of Ohio?[247] The Chief Justice thought not.[248] Although he did not seem to be familiar with the Issue 1 or other state Super-DOMA campaigns, Chief Justice Roberts valorized that process and admonished the majority for not respecting it.[249]

His basic point was legitimacy, the willingness of everyone to accept legal rules that they did not create or even support.

> When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result

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[244] Turner v. Safley, 482 U.S. 78, 95–96 (1987); *accord* Zablocki v. Redhail, 434 U.S. 374, 390–91 (1978) (recognizing a right to marry for deadbeat dads, whom the state required to pay back child support before they could remarry).

[245] *See* H.B. 272, 125th Gen. Assembly, Reg. Sess. (Oh. 2004); *see also* OHIO CONST. art. XV, § 11.

[246] *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

[247] *Id.*

[248] *See id.*

[249] *Id.*

> of a fair and honest debate. In addition, they can gear up to raise the issue later, hoping to persuade enough on the winning side to think again.[250]

This was Judge Sutton's mantra and Ohio is a good example. LGBT people and their friends, families, and supporters were disappointed in their poor performance in the 2004 Issue 1 campaign. They were disorganized, underfunded, and offered a poor set of arguments against Issue 1; they did not stand up for themselves. Traditionalists, in contrast, were energized, stood up for themselves, and did a much better job of getting out their message. So, they won, fair and square—but if the gay community really wanted marriage rights, the democratic process in Ohio makes it easy for them to seek a new mandate from the voters at such point as they felt they could make a persuasive case to most Ohioans.

The Chief Justice continued:

> But today the Court puts a stop to all that. By deciding this question under the Constitution, the Court removes it from the realm of democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. . . . Indeed, however heartened the proponents of same-sex marriage might be on this day, it is worth acknowledging what they have lost, and lost forever: the opportunity to win the true acceptance that comes from persuading their fellow citizens of the justice of their cause. And they lose this just when the winds of change were freshening at their backs.[251]

Was the Chief Justice right to suggest that lesbian and gay marriages would, today, be more acceptable in Ohio had they been ratified by a new constitutional initiative rather than by a Supreme Court mandate? I leave this question to gentle readers of all orientations in the state of Ohio.

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[250] *Id.* at 2625; *accord* Sherif Girgis, *Windsor: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971, 1004–05 (2014).

[251] *Id.* (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

The larger (and equally unanswerable) quandary raised by the Chief Justice relates to the legitimacy of the Supreme Court itself. Do big splashy opinions such as *Obergefell* (and *Roe v. Wade*) undermine the legitimacy of the Supreme Court in our democracy? In fairness, the question entails an appreciation of judicial activism on the right as well as the left. In the same term as *Obergefell*, the Chief Justice wrote for a 5-4 majority of the Court to nullify that part of the Voting Rights Act that requires approval for voting changes in states with track records of racial exclusions.[252] Read together, these decisions may undermine the Court's legitimacy—or they may strengthen it, if progressives value decisions like *Obergefell* more than they hate decisions like *Shelby County,* and if religious conservatives value decisions like *Hosanna-Tabor* more than they hate decisions like *Obergefell*. On balance, I am inclined to say that constitutional logrolling along these lines probably does undermine the Court's legitimacy—but its big effect is to politicize the judiciary and the appointments process. Ironically, in the short term, the politicization has had a conservative valence. Specifically in the 2016 election, a lot of Evangelical voters, in particular, cast their votes based upon promised appointments to the federal courts, an inclination that helped elect the notably unreligious Donald Trump to be President. Evangelicals were critical to his electoral success in battleground states such as Michigan and Ohio,[253] two of the states in the *DeBoer/Obergefell* case, as well as Wisconsin and Pennsylvania, two states where judges imposed marriage equality shortly before *Obergefell*.

A final lesson suggested by the Issue 1 campaign involves the process of normalization—a process that belies Justice Kennedy's assurance that religious liberty was not threatened by marriage equality.[254] In his dissenting opinion, Justice Alito explained the burden that might be imposed by normalization.[255] He feared that *Obergefell*:

> [W]ill be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited

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[252] Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 2631 (2013).

[253] *See* Philip Gorski, *Why evangelicals voted for Trump: A critical cultural sociology*, *in* POLITICS OF MEANING/ MEANING OF POLITICS 165, 166–67 (2018).

[254] *Obergefell,* 135 S. Ct. at 2606–07.

[255] *Id.* at 2642–43.

> by those who are determined to stamp out every vestige of dissent.[256]

While the majority claimed that churches will not be penalized and families can continue to espouse traditional marriage to their children, Justice Alito worried that public discourse will be chilled. "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[257]

These are reasonable fears. If I am right to expect that marriage equality will not yield obviously terrible consequences and will, instead, every year recognize tens of thousands lesbian and gay families, many with children raised capably within those households, then the next generation of American citizens will conclude that exclusions of LGBT persons and couples is, indeed, "discrimination" based upon "prejudice" and "stereotypes," much the way Americans of all ages believe that race-based exclusions are discrimination based upon prejudice. This process is already afoot and if it continues normalization of Gay is Good, it will put pressure on religious doctrine and practices much the same way the normalization of racial variation did a few generations ago.[258]

Normalization, however, is not a process that either the Supreme Court or the government imposes upon the population. Instead, it is a process by which We the People respond to new circumstances—sometimes reaffirming old norms (as Issue 1 did) and sometimes adjusting those norms (as is now occurring with marriage). As the supporters of Issue 1 realized even in 2004, the process of normalization means that the marriage equality debate is part of a larger discussion about the public law balance between different visions of family. Once Massachusetts started issuing marriage licenses, the inevitable question would be how anti-discrimination rules applicable to governments as well as private institutions and persons would be applied to persons and institutions of faith. The same Supreme Court that recognized rights for sexual minorities can be expected to do something similar for persons of faith who now find themselves in the minority. How that will draw from and affect constitutional doctrine is beyond the scope of this article, but scholars are

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[256] *Id.* at 2642 (internal citations omitted).

[257] *Id.* at 2642–43.

[258] *See* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 684–85 (2011).

already generating excellent analyses worth considering, whatever one's normative priors might be.[259]

[259] *Compare*, for example, the different analyses *with* Sherif Girgis, *Nervous Victors, Illiberal Measures*, 125 YALE L.J. F. 399, 403 (2016) *and* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 621–22, 630–38 (2015); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 848–51 (2014) *and* Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1182 (2012) *and* Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach Us About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 717–23 (2014).

APPENDIX 1: JUNIOR-DOMAS, 1994-2004

State	Bill and Date	Text
Guam	Department of Public Health Law; 1994	(h) Marriage means the legal union of persons of opposite sex. The legality of the union may be established by civil or religious regulations, as recognized by the laws of Guam.
Hawaii	H.B. 2312; June 22, 1994	The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary.
Utah	H.B. 366; Mar. 1, 1995	A marriage solemnized in any other country, state, or territory, if valid where solemnized, are valid here, unless it is a marriage: (1) that would be prohibited and declared void in this state, under Subsection 30–1–2(1), (3), or (5); or (2) between parties who are related to each other within and including three degrees of consanguinity.
Idaho	H.B. 176; Mar. 13, 1995	Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary.
South Dakota	H.B. 1143; Feb. 21, 1996	Marriage is a personal relation, between a man and a woman, arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone does not constitute a marriage; it must be followed by a solemnization.
Idaho	H.B. 658; Mar. 18, 1996	All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of

		this state include, but are not limited to, same-sex marriages . . . .
Georgia	H.B. 1580; April 2, 1996	(a) . . . Marriages between persons of the same sex are prohibited in this state. (b) . . . Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state.
Kansas	S.B. 515; April 10, 1996	The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex . . . 23–115. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.
Oklahoma	S.B. 73; April 29, 1996	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.
Arizona	S.B. 1038; May 1, 1996	Marriage between persons of the same sex is void and prohibited. . . . Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101.
Tennessee	S.B. 2305; May 15, 1996	[I]t is further the public policy of this state that 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 in order to provide the unique and exclusive rights and privileges to marriage . . . . If another state or foreign jurisdiction issues a license for persons to marry which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

South Carolina	H.B. 4502; May 20, 1996	A marriage between persons of the same sex is void and against the public policy of this state.
Illinois	S.B. 1140; May 24, 1996	§ 212. Prohibited Marriages. (a) The following marriages are prohibited: . . . (5) a marriage between 2 individuals of the same sex.
North Carolina	S.B. 1487; June 20, 1996	Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.
Delaware	H.B. 503; June 21, 1996	Section 1. Amend §101(a), Chapter 1, Title 13, Delaware Code, by striking the word "or" as it appears after the word "nephew" and before the word "first" and by adding after the word "cousin" the following: "or between persons of the same gender". . . . (d) A marriage obtained or recognized outside the State of Delaware between persons prohibited by subsection (a) of this Section shall not constitute a legal or valid marriage within the State of Delaware."
Michigan	H.B. 5662; June 36, 1996	This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state . . . . This state recognizes marriage as inherently a unique relationship between a man and a woman . . . . And therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.
Missouri	S.B. 768; July 3, 1996	It is the public policy of this state to recognize marriage only between a man and a woman. Any purported marriage not between a man and a woman is invalid. No recorder shall issue a marriage license, except to a man and a woman.

Pennsylvania	S.B. 434; Oct. 16, 1996	It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex, which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.
Mississippi	S.B. 2053; Feb. 12, 1997	Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.
Arkansas	S.B. 5; Feb. 13, 1997	Marriages between persons of the same sex are prohibited in this state. Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas . . . .
Virginia	S.B. 884; Mar. 15, 1997	A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.
North Dakota	S.B. 2230; Mar. 25, 1997	Marriage is a personal relation arising out of a civil contract between a male and a female to which the consent of the parties is essential.
Maine	(I.B. 1) (L.D. 1017); Mar. 28, 1997	Persons of the same sex may not contract marriage. . . . Any marriage performed in another state that would violate any provision of section 1 31 to 34 if performed in this State is not recognized in this State and is considered void if the parties take up residence in this State.

Texas	S.B. 334; April 17, 1997	§ 2.001. MARRIAGE LICENSE. (a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. (b) A license may not be issued for the marriage of persons of the same sex.
Montana	H.B. 323; April 29, 1997	(1) The following marriages are prohibited: . . . (d) a marriage between persons of the same sex
Indiana	H.E.A. 1265; May 13, 1997	A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized
Florida	H.B. 147; June 5, 1997	Marriages between persons of the same sex entered into in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within, or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state. . . . [T]he term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union
Kentucky	H.B. 13; April 2, 1998	(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky . . . (1) Marriage is prohibited and void: . . . (d) Between members of the same sex.
Iowa	H.F. 382; April 15, 1998	Only a marriage between a male and a female . . . is valid . . . . A marriage which is solemnized in any other state, territory, country, or any foreign jurisdiction which is valid in that state, territory, country, or

		other foreign jurisdiction, is valid in this state if the parties meet the requirements for validity pursuant to section 595.2, subsection 1, and if the marriage would not otherwise be declared void.
Alabama	H.B. 152; May 1, 1998	Marriage is inherently a unique relationship between a man and a woman. . . . A marriage contracted between individuals of the same sex is invalid in this state.
Puerto Rico	H.B. 1013; Mar. 19, 1999	Marriage is a civil institution, originating in a civil contract whereby a man and a woman mutually agree to become husband and wife and to discharge toward each other the duties imposed by law. It is valid only when contracted and solemnized in accordance with the provisions of law, and it may be dissolved before the death of either spouse only in the cases expressly provided for in this title. Any marriage between persons of the same sex or transsexuals contracted in other jurisdictions shall not be valid or given juridical recognition in Puerto Rico.
Louisiana	H.B. 1450; July 2, 1999	Persons of the same sex may not contract marriage with each other. . . . A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose.
California	Proposition 22; March 7, 2000	308.5 Only marriage between a man and a woman is valid or recognized in California.
West Virginia	S.B. 146; April 4, 2000	(a) The application for a marriage license must contain a statement of the full names of both female and male parties . . . (1) Except as otherwise provided in subsection (3) of this section, a marriage between a man and a woman licensed, solemnized, and registered as provided in this part 1 is

		valid in this state if (a) It is licensed, solemnized, and registered as provided in this part 1; and (b) It is only between one man and one woman.
Colorado	H.B. 00-1249; May 26, 2000	(1) Except as otherwise provided in subsection (3) of this section, a marriage between a man and a woman licensed, solemnized, and registered as provided in this part 1 is valid in this state if: (a) It is licensed, solemnized, and registered as provided in this part 1; and (b) It is only between one man and one woman.
Ohio	H.B. 272; Feb. 6, 2004	(C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state. (2) Any marriage entered into by persons of the same sex 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.
Virginia	H.B. 751; April 21, 2004	A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.