Brief

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ISSUE ONE: Whether Section 411 is constitutional under *Lawrence v. Texas*?

Section 411 is not constitutional under *Lawrencev. Texas*[2] because the Supreme Court made clear that certain individual decisions are purely autonomous and not within the realm of government authority. These decisions fall within the definition of liberty protected by the Due Process Clause of the Fourteenth Amendment[3] and are, therefore, immune from government action. In addition, Justice O'Connor's concurring opinion provides advocates of homosexual marriage an important tool. Her opinion states that moral disapproval of homosexuals is not a legitimate interest under the Equal Protections Clause.[4] If moral disapproval is not a legitimate interest, then laws banning homosexual marriage cannot pass rational basis review and will be held as unconstitutional under the Equal Protections Clause.

In *Lawrence*, the Supreme Court wrote that there are spheres of personal existence, outside the home, where the State cannot be a dominant presence.[5] The rights that exist in those constitutionally-protected areas include the right to marriage, procreation, contraception, family relationships, child rearing, and education.[6] The U.S. Constitution demands respect for the autonomy of the individual when making these choices.[7] The Constitution requires respect for the individual regarding these choices because these matters—involving the most intimate and personal choices a person may make in a lifetime, choices central to personal autonomy and dignity—are central to the liberty protected by the Fourteenth Amendment.[8] After listing marriage as among the rights that exist in constitutionally protected bubbles, the Court concluded by saying that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[9]

The majority of the Court is taking a rigid position that some areas of an individual's life cannot be restricted by government action because they fall within the "liberty" protected by the Due Process Clause. This "liberty" protects certain rights from government intrusion. And the majority lists marriage as one of rights protected by an individual's liberty interest.[10]

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[2] 123 S. Ct. 2472 (2003).
[3] U.S. CONST. amend. XIV, § 1.
[4] *Lawrence,* 123 S. Ct. at 2486.
[5] *Lawrence,* 123 S. Ct. at 2475.
[6] *Id.* at 2481 (citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
[7] *Lawrence*, 123 S. Ct. at 2481.
[8] *Id.* (quoting *Casey*, 505 U.S. at 851).
[9] *Lawrence*, 123 S. Ct. at 2482.
[10] *Id.* at 2481.

The Court's opinion stresses repeatedly that marriage is a right central to the liberty protected by the Due Process Clause. If a majority of the current Supreme Court views marriage as "central" to the liberty protected by the Due Process Clause, and past precedent has held that marriage is a fundamental right under the Due Process Clause,[11] there is a good argument that laws aimed at homosexual marriage will be analyzed under strict scrutiny.

If the Court uses strict scrutiny, it will be nearly impossible for the law to stand. The Court would have to hold that restricting marriage to heterosexuals is a compelling state interest. That seems unlikely. Marriage can be a stabilizing and rewarding experience for adults and families, and *extending* such a beneficial arrangement should be compelling for all States. Restricting marriage to heterosexuals restricts the benefits of marriage to heterosexuals and their families. That is not a compelling state interest.

Assuming, *arguendo*, the Court holds that there is a compelling state interest in denying marriage rights to homosexuals. And that compelling interest is protecting heterosexual marriage. The Court would also have to hold that the law denying marriage rights to homosexuals is narrowly tailored to achieve the goal of protecting heterosexual marriage.

The advocates of homosexual marriage could argue that there are other means of protecting heterosexual marriage (such as enforcing laws against adultery and prostitution, or holding marriage counseling classes at local schools) that would be less restrictive than denying marriage to all homosexuals. It would not be very difficult to convince a majority of the Court that there are less restrictive means of protecting heterosexual marriage than banning homosexual marriage. If there are less restrictive means of protecting heterosexual marriage, then the law is not narrowly tailored enough to satisfy the second prong of strict scrutiny analysis. If the advocates of homosexual marriage are able to convince the Court that there are less restrictive means of protecting heterosexual marriage than banning homosexual marriage, the Court will hold that the State failed to use narrowly tailored means, which would be fatal to the State's case.

Justice Kennedy's majority opinion in *Lawrence* focused on the liberty protected by the Due Process Clause. Contrary to the majority opinion, Justice O'Connor's concurring opinion in *Lawrence* concerned the Equal Protection Clause. Justice O'Connor wrote that under the Equal Protection Clause, rational basis review was the appropriate standard to use.[12] Rational basis review presumes a law is valid, and the law "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[13] But Justice O'Connor goes further, and argues that a "searching" rational basis review is necessary concerning homosexuals because laws aimed at homosexuals "exhibit… a desire to harm a politically unpopular group."[14]

[11] *E.g.,* Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
[12] *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring).
[13] *Id.* at 2484.
[14] *Id.* at 2485.

A more "searching" rational basis review greatly increases the chances that the Equal Protection Clause will be used to strike down Section 411. Justice O'Connor wrote that "[w]e [the Supreme Court] have been most likely to apply rational basis review to hold a law unconstitutional under the *Equal Protection Clause* where, as here, the challenged legislation inhibits personal relationships."[15] Laws banning homosexual marriage clearly inhibit personal relationships. Therefore, if a state wants to burden a personal relationship, it will need to show a legitimate state interest strong enough to withstand a "searching" review.

A state could argue that promoting morality is a legitimate state interest. Texas did just that in *Lawrence.*[16] Justice O'Connor viewed this as arguing that moral disproval of homosexual marriage is a legitimate state interest.[17] But, while analyzing the constitutionality of banning homosexual sodomy, Justice O'Connor wrote that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest insufficient to satisfy rational basis review under the *Equal Protection Clause*."[18] Justice O'Connor makes clear that moral disapproval is not a legitimate state interest under the Equal Protection Clause. She wrote that the Supreme Court has never held that moral disapproval, absent any other asserted state interest, is a sufficient rationale under the Equal Protections Clause to justify a law that discriminates among classes of people.[19] Therefore, a law banning homosexual marriage will not satisfy a searching rational basis review if the only state interest is promoting morality.

Section 411 is not constitutional after *Lawrence*. The Supreme Court found that, under the Due Process Clause, there are realms of personal autonomy where certain rights exist and the government cannot interfere with those rights.[20] Justice Kennedy's majority opinion listed marriage as one of those protected rights.[21] And the opinion went on to state that homosexuals are free to enjoy those rights just like heterosexuals.[22] Justice O'Connor's concurring opinion created an Equal Protections argument that was lacking before *Lawrence*.[23] After *Lawrence*, a State cannot use moral disapproval of homosexual marriage alone as a legitimate state interest. If moral disapproval is not a legitimate state interest, then laws banning homosexual marriage cannot pass rational basis review. If laws banning homosexual marriage cannot pass rational basis review, the Court will hold that those laws are unconstitutional.

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[15] *Id.*
[16] *Id.* at 2486.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 2481.
[21] *Id.*
[22] *Id.* at 2482.
[23] *See id.* at 2484-88.

ISSUE TWO: Whether the right to marry is a fundamental right, protected by the Fourteenth Amendment, that must be extended to all persons regardless of sexual orientation?

The right to marry is a fundamental right for all citizens protected by the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment protects certain rights because they are rights necessary for human liberty. Among those rights is the right to marriage. In order for a law regulating a fundamental right like marriage to be constitutional, the law must pass strict scrutiny review. Laws banning homosexual marriage cannot pass strict scrutiny review and, therefore, those laws are unconstitutional.

Substantive Due Process under the Fourteenth Amendment limits the power of the States to regulate certain areas of people's lives.[24] When States have attempted to regulate those areas of personal autonomy, the United States Supreme Court has held these laws were unconstitutional because the restrictions constituted a denial of liberty.[25]

In determining whether or not a law unconstitutionally interferes with a person's liberty, the Court must determine if the law regulates a fundamental or a non-fundamental right.[26] The placement of a right into the fundamental or non-fundamental category is crucial. If the right in question is determined to be a fundamental right, the Court must use strict scrutiny review to determine the constitutionality of the law.[27] Strict scrutiny review is the toughest scrutiny a law can face.[28] Strict scrutiny requires the government to show a compelling state interest with narrowly tailored means to achieve that compelling state interest.[29] When a law is subjected to strict scrutiny review, it is almost always struck down.[30]

On the other hand, if a law limits a non-fundamental right, it is subject to rational basis review.[31] Rational basis review is a very easy test for a law to pass.[32] Rational basis review presumes that a law is valid,[33] and the law will be upheld if the government shows a legitimate state interest with a rationally related means to achieving that legitimate state interest.[34] A law subjected to rational basis review will likely be upheld because of the high level of deference the

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[24] *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (holding that Washington's ban on assisted suicide did not violate the Due Process Clause of the Fourteenth Amendment.)

[25] *See, e.g.,* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); Griswold v. Connecticut 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967).

[26] *Glucksberg,* 521 U.S. at 720-21.

[27] Reno v. Flores, 507 U.S. 292, 301-302 (1993) (Immigration and Naturalization Service's policy of treating alien minors being held for deportation hearings differently from alien minors being held for exclusion proceedings was constitutional).

[28] *See generally,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997).

[29] *Reno*, 507 U.S. at 301-02.

[30] CHEMERINSKY, *supra* note 28, at 529.

[31] Romer v. Evans, 517 U.S. 620, 631 (1996).

[32] *See Lawrence*, 123 S. Ct. at 2484-85. (O'Connor, J., concurring).

[33] *Id.* at 2484.

[34] *Romer*, 517 U.S. at 631.

Court gives to the legislative process when non-fundamental rights are at issue.[35] Consequently, in most cases, the determination of whether or not a law limits a fundamental right determines the constitutionality of the law in question.

The United States Supreme Court has held that a right is fundamental if the right is "deeply rooted in this Nation's history."[36] The right has to be "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [the right] were sacrificed."[37]

The Supreme Court has held that the right to marry is a fundamental right inherent to the right to privacy protected by the Fourteenth Amendment's Due Process Clause.[38] In *Zablocki v. Redhail*,[39] the Court held that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[40] The classification of marriage as a fundamental right is also supported by *Skinner v. Oklahoma*[41] and *Loving v. Virginia*.[42] Therefore, the right to marry must be considered a fundamental right. Consequently, under the Court's Substantive Due Process analysis, a law that infringes on the right to marry must be subjected to strict scrutiny review.

Subjected to strict scrutiny review, section 411 cannot stand. Denying homosexuals the right to marry serves no compelling state interest. Some argue that by allowing homosexuals to marry, the Court would be weakening, or destroying, the institution of marriage. And when marriage is destroyed, all the positives and benefits of marriage, including stability of family, and the subsequent benefits for children, would also be destroyed. Therefore, the State has a compelling interest in preserving heterosexual marriage because the State's action would preserve the benefits produced by marriage.

But that conclusion is backwards. If marriage is a stabilizing, rewarding experience for families and children, denying that status to homosexuals and their families denies stability to those families, and the consequential benefits of that stability to society. Restricting the right of individuals to marry decreases the benefits produced by marriage, and lessens the benefits bestowed on the society that forbids that marriage. In denying homosexuals the right to marry, the State is stifling the production of marital benefits and, therefore, destroying a compelling state interest.

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[35] *Lawrence*, 123 S. Ct. at 2484-85.
[36] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (striking down a city ordinance that forbid certain family members from living together, "because the institution of the family is deeply rooted in this Nation's history and tradition.") *Contra Lawrence*, 123 S. Ct. at 2480 ("History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).
[37] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).
[38] *See Griswold*, 381 U.S. at 485-86.
[39] 434 U.S. 374 (1978).
[40] *Id.* at 384.
[41] 316 U.S. at 541.
[42] 388 U.S. at 12.

There is also a challenge to section 411 under the Equal Protections Clause of the Fourteenth Amendment. Under the Court's Equal Protections jurisprudence, there are also strict scrutiny and rational basis standards. But the determination of what standard a law must face is different than a substantive due process analysis. For Equal Protection grounds, only suspect classes[43] and fundamental rights[44] are evaluated with strict scrutiny.

The two most common suspect classes are race[45] and national origin.[46] The Rehnquist Court has never listed the attributes of a suspect class, but the Court has suggested that if a class is subject to discrimination; possesses an obvious, immutable, or distinguishing characteristic that defines it as a discrete group; and/or it is a minority or politically powerless, the Court will be more likely to call the class a suspect and use strict scrutiny to evaluate the government action aimed at that group.[47]

Fundamental rights, under an Equal Protections analysis, are rights that are found in the Constitution independent of the Equal Protections Clause,[48] or rights that are protected by the Equal Protections clause itself.[49] Two fundamental rights are the right to vote[50] and the right to interstate travel.[51]

The Supreme Court has never held that the right to marry qualifies as a fundamental right under the Equal Protections Clause. The right to marriage is not enumerated in the Constitution. The Supreme Court has held marriage is a fundamental right under Substantive Due Process,[52] but has yet to hold marriage is a fundamental right for Equal Protections Clause purposes. Therefore, laws aimed at regulating marriage are not subject to strict scrutiny review for Equal Protections Clause challenges.

A cogent and convincing argument can be made that homosexuals meet at least one of the requirements to be considered a suspect class. As a class, they are subject to discrimination, a minority, and politically powerless. The Supreme Court, however, has declined to hold that homosexuals are a suspect class.[53] By refusing to hold that homosexuals are a suspect class, the Court has determined that laws aimed at homosexuals are not subject to strict scrutiny review for

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[43] Harris v. McRae, 448 U.S. 297, 322 (1980) (finding no suspect classification, the Court refused to use strict scrutiny and upheld the Hyde Amendment, which denied federal funds for abortion).
[44] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that voting is a fundamental right, and therefore a poll tax is subject to strict scrutiny).
[45] Gratz v. Bollinger, 539 U.S. 244, 270 (2003).
[46] *See* Hernandez v. Texas, 347 U.S. 475, 478-79 (1954).
[47] Lyng v. Castillo, 477 U.S. 635, 638 (1986).
[48] *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (finding that interstate travel is a fundamental right guaranteed by the Constitution).
[49] Anderson v. Celebrezze, 460 U.S. 780, 788 n. 7 (1983) (considering state restrictions on the fundamental right to vote that run afoul of the Equal Protections Clause.)
[50] *Harper*, 383 U.S. at 670.
[51] *Shapiro*, 394 U.S. at 638.
[52] *Zablocki*, 434 U.S. at 384; *Griswold*, 381 U.S. at 485-86.
[53] *See Romer*, 517 U.S. 620; *Lawrence*, 123 S. Ct. 2472.

Equal Protections Clause challenges.[54]

Instead, the Court has analyzed laws aimed at homosexuals with a rational based review. In *Romer v. Evans*,[55] the Court struck down Amendment 2 of the Colorado state constitution that forbid any legislative, executive, or judicial action that was designed to protect homosexuals.[56]

The Court struck down the law for two reasons. First, the law was "born of animosity toward the class of persons affected."[57] In other words, a desire to harm an unpopular minority can never be a legitimate state interest.[58] Second, even if the Court accepted Colorado's rationale that the State wanted to protect the religious and association rights of landlords and employers, Amendment 2's breadth was so far removed from these two justifications that the Court found it impossible to give those justifications any credit.[59] In order for a law aimed at homosexuals to pass constitutional review, the law cannot be born of an animus toward homosexuals as a class of people, and the law must have some legitimate interest other than blatant discrimination against a class of citizens.

Section 411 most likely will not withstand an Equal Protections rational based review. If the Court accepts the argument above that denying marriage to homosexual couples weakens society and denies society the benefits that follow from homosexual marriage, then not allowing homosexual marriage harms society. There is no legitimate interest in harming society.

In addition, denying marriage to homosexuals because of animus towards homosexuals is not a legitimate interest. The government would have to argue that there is some other legitimate state interest that justifies denying society the benefits of homosexual marriage, or it is faced with the untenable position of arguing for legalized discrimination for its own sake. The Court will not, and should not, validate that argument.

Some may argue that homosexual marriage is harmful to society and children. While it may be true that some children, and some adults, will be hurt by failed homosexual marriages, that is also true of heterosexual marriages. Heterosexual marriage does produce unfortunate consequences at times. Adultery and divorce are two negative results. But no one is arguing for the prevention of heterosexual marriage. Homosexual marriage would also produce bad results, such as adultery. But those bad results alone are not enough to deny homosexual marriage if they are not enough to deny heterosexual marriage.

The government would have to prove that homosexual marriage is dangerous to society precisely because it is homosexual marriage. The State would have to prove that there is something inherent about homosexuals, or homosexual marriage, that causes their marriages to

[54] *See Romer*, 517 U.S. 620; *Lawrence*, 123 S. Ct. 2472.
[55] 517 U.S. 620 (1996).
[56] *Romer,* 517 U.S. at 624.
[57] *Id.* at 634.
[58] *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
[59] *Romer,* 517 U.S. at 635.

be more damaging to society than heterosexual marriages. This would force the State to walk a tightrope, not falling into the constitutionally infirm argument that homosexuals are inherently unequal to heterosexuals. Otherwise, the State is back to arguing that an animus against homosexuals is a legitimate interest. Until the State can prove, objectively and without animus, that homosexual marriage carries a special and unique risk that heterosexual marriage does not carry, the Equal Protections clause of the Fourteenth Amendment invalidates Section 411.

Marriage is a fundamental right for all citizens protected by the Due Process of the Fourteenth Amendment. The Supreme Court has held that marriage is a fundamental right and part of the liberty interest protected by the Due Process Clause. In order to ban homosexual marriage, a State would have to find a compelling interest in denying homosexuals the right to marry. Animus toward homosexuals is not a compelling interest. And because marriage is beneficial to society, denying marriage to homosexuals is detrimental to society.

The Equal Protections Clause also invalidates laws banning homosexual marriage. Marriage is not a fundamental right under the Equal Protections Clause, so laws banning homosexual marriage do not receive strict scrutiny review. Also, homosexuals are not a suspect class, so laws aimed at homosexuals receive rational basis review. Laws banning homosexual marriage cannot pass rational basis review. As the Court stated in *Lawrence,* moral disapproval is not a legitimate state interest.[60] Unless a State can prove that homosexual marriage is damaging in a way that heterosexual marriage is not, laws banning homosexual marriage will not pass rational basis review under the Equal Protections Clause and courts will hold those laws unconstitutional.

[60] *Lawrence,* 123 S. Ct. at 2486. *See supra* text accompanying note 4.