

# State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations

By Mark Strasser\*

## Introduction

Over the past decade, several states have amended their respective constitutions to limit marriage to unions between one man and one woman, and more states are expected to consider similar amendments in coming years.<sup>1</sup> While all of these amendments remove possible protections in the state constitutions for same-sex marriages, they differ in important ways. The amendments have the potential to cause far-reaching and unforeseen effects because the language in the amendments is open to broad construction. The amendments have the potential to put a variety of groups and their families at risk in ways that fairness and good public policy cannot justify.

Part I of this Article discusses how the various marriage amendments might affect particular groups. Part II discusses the federal constitutional implications of broadly construing these amendments. This article concludes that courts should construe these amendments narrowly to mitigate the harm they undoubtedly will cause. Not only do the amendments conflict with the principles of fairness, statutory construction, and good public

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1. See generally *New Group Will Push for Gay-Marriage Referendum*, RICHMOND TIMES-DISPATCH, June 22, 2005, at B9, available at 2005 WLNR 9901690.

A grassroots organization has been formed to push for an amendment to the Virginia Constitution that would ban same-sex marriages. The 2005 General Assembly easily approved the proposed amendment. If it passes again in next year's legislative session, it can be submitted to the voters in a referendum in November 2006.

*Id.*; see also Amy Fagan, *Gay 'marriage' may affect Hillary*, WASH. TIMES, July 11, 2006, A12, available at WLNR 11948324 ("Twenty states have enacted amendments protecting traditional marriage, and at least five more states will vote on amendments in November.").

policy, a broad reading exposes their vulnerability to constitutional attack.

## I. The Language of the Amendments

The language of the amendments varies in important ways. While it is difficult to speculate as to their respective legal effects before state courts have an opportunity to construe them, it is plausible to believe that some courts interpreting these amendments will construe them quite broadly.

### A. State Marriage Amendments Vary Greatly in Text

All of the amendments remove the possibility of state constitutional protection for same-sex marriages, and almost all go a step further by precluding state legislatures from recognizing same-sex marriages. Where the amendments differ significantly from one another is in the additional measures they take to preclude same-sex couples from marrying.

Hawaii is the only state with a marriage amendment that gives the state legislature the power to determine whether same-sex marriages are recognizable.<sup>2</sup> Several state marriage amendments do not permit the recognition of marriages not composed of one man and one woman.<sup>3</sup> Some of these constitutional provisions also ban recognition of other kinds of relationships substantially similar to marriage.<sup>4</sup> Other

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2. See HAW. CONST. art. I, § 23 (1998) ("The Legislature shall have the power to reserve marriage to opposite-sex couples.").

3. See e.g., ALASKA CONST. art. I, § 25 (1998) ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); MISS. CONST. § 263-A (2004);

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

*Id.*; MO. CONST. art. I, § 33 (2004) ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); MONT. CONST. art. XIII, § 7 (2004) ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."); NEV. CONST. art. I, § 21 (2001) ("Only a marriage between a male and female person shall be recognized and given effect in this state."); OR. CONST. art. XV, § 5(a) (2004) ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

4. ARK. CONST. amdt. 83, §§ 2-3 (2004).

(2) Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common-law marriage from

amendments seem to impose further limitations depending upon how they are construed.<sup>5</sup> However, even an amendment that on

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another state between a man and a woman.

(3) The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

*Id*; Ky. CONST. § 233A (2004) ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); NEB. CONST. art. I, § 29 (1999) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."); N.D. CONST. art. XI, § 28 (2004) ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); S.D. CONST. art. XXI, § 9 (2005) ("Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."); TEX. CONST. art. I, § 32 (2005) ("(a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); UTAH CONST. art. I, § 29 (2004) ("(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.").

5. GA. CONST. art. I, § 4, para. 1 (2004).

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

*Id*; Kan. CONST. art. XV, § 16 (2005).

(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

*Id*; La. CONST. art. XII, § 15 (2004).

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is

its face seems only to preclude the recognition of same-sex marriages or civil unions might be construed much more broadly.<sup>6</sup> Thus, while all of the amendments preclude a challenge to a state's same-sex marriage ban on state constitutional grounds, some inevitably impose yet-to-be determined burdens on a variety of individuals or relationships.

*B. The Opportunity Costs Associated with the Passage of the Different Amendments*

There are a number of ways to analyze the degree to which these amendments impose burdens on same-sex and different-sex couples. One method is to evaluate the range of benefits that may

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not the union of one man and one woman.

*Id.*; MICH. CONST. art. I, § 25 (2004) ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); OHIO CONST. art. XV, § 11 (2004).

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.

*Id.*; OKLA. CONST. art. II, § 35 (2004).

(a) Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

(b) A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

(c) Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

*Id.*; VA. CONST. art. I, §15-A (2005) (proposed).

(a) That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

(b) This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

*Id.*

6. See *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (2005) (striking down broadly construed Nebraska amendment which, on its face, only precludes the recognition of same-sex marriages and marriage-like unions.), *rev'd*, 455 F.3d 859 (2006), *reh'g and reh'g en banc denied* (2006); NEB. CONST. art. I, § 29 (1999) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

no longer be awarded by the state legislature to unmarried individuals or couples. Another method is to investigate which groups are affected by the state constitution's prohibition on awarding the benefits at issue. A third is to examine which symbolic or tangible benefits would have been afforded but for the amendment. The degree to which the various amendments are viewed as burdensome will vary greatly depending upon which of the above is the method of the analysis.

In many, but not all states, opponents of the amendments have argued that same-sex marriage was already precluded by law, so the constitutional amendments were unnecessary.<sup>7</sup> Such an argument assumed that: (1) the amendment did not add anything to the existing law, and (2) existing same-sex marriage bans would neither be repealed by the legislature nor struck down on state constitutional grounds by the courts.<sup>8</sup>

Yet, in some states, these assumptions were not warranted because the text of the amendment was broader than existing law.<sup>9</sup> Indeed, ironically, some courts pointed to existing statutes that precluded same-sex marriage as a reason to interpret the marriage amendment more broadly, arguing that any other interpretation would make the amendment superfluous.<sup>10</sup>

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7. See e.g., *Leave It at the Altar*, FT. WORTH STAR-TELEGRAM, October 16, 2005, at E2, available at 2005 WLNR 16742877.

The very first sentence of the Texas Legislative Council's background information on Proposition 2 states why this constitutional amendment is unnecessary: "Current state law prohibits the issuance of a marriage license for the marriage of persons of the same sex."

The Legislature passed the Defense of Marriage Act in 2003. Voters should not ignore the redundancy of this proposed amendment, although many of its supporters do.

*Id.*; see also *Gay Marriage Ban on Table for Today*, TOPEKA CAP. J., May 3, 2004, at A, available at WLNR 11334945 ("A common theme among opponents is that the constitutional amendment is unnecessary, as gay marriage is illegal in Kansas under a state statute.").

8. Cf. *Wood v. Comm'r. ex rel. Grayson*, 2005 WL 1258921, at \*1 (Ky. Cir. Ct. May 26, 2005), *rev'd*, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006).

The Attorney General states that the amendment was proposed to the electorate because of fear from social and religious conservatives that the Kentucky Constitution might someday be liberally construed by an activist court so as to establish a state constitutional right of same-sex couples to marry or that civil unions between same-sex couples might be mandated.

*Id.*

9. See *Citizens for Equal Prot.*, 368 F. Supp. 2d at 995 (noting the "expansive reading" given to the Nebraska amendment, which went far beyond merely refusing to recognize same-sex marriage or civil unions), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

10. See *City of Cleveland v. Voies*, 2005 WL 1940135, at \*4 (Ohio Mun. Ct. Mar. 23, 2005), *rev'd*, 2006 WL 440341 (Ohio App. Feb. 23, 2006).

In other states, the statute precluding same-sex marriage might well have been struck down on state constitutional grounds. Consider, for example, the context in which Hawaii's marriage amendment was adopted. The Hawaii Supreme Court had recently held that the state's same-sex marriage ban required strict-scrutiny examination.<sup>11</sup> Without the adoption of the amendment, the Hawaii Supreme Court probably would not have upheld the constitutionality of the same-sex marriage ban<sup>12</sup> because strict scrutiny imposes an extremely heavy burden on the government.<sup>13</sup> Therefore, it is at least plausible to argue that

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In the matter before this court, there are several factors to suggest that the Amendment is not just about eliminating gay marriage. First, this Amendment is superfluous since Governor Taft signed House Bill 272 (Defense of Marriage Act aka DOMA), which was enacted February 6, 2004 and already nullifies the concept of gay marriage. Under this Act, homosexuals are not allowed to marry and their relationships are not recognized as marriages by the state.

*Id.*

11. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998).

Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution (footnote omitted) and that HRS § 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights.

*Baehr*, 852 P.2d at 67.

12. Cf. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (finding that the statute was not constitutional). However, the constitutional amendment was passed in 1998 before the Hawaii Supreme Court made clear in 1999 that both sex and sexual orientation are suspect classes under the Hawaii Constitution. *Baehr v. Miike*, 1999 Haw. LEXIS 391, at \*6 n.1 (Haw. Dec. 11, 1999).

[A]ssuming arguendo that Justice Ramil is correct that the touchstone of the statute is sexual orientation, rather than sex, it would still have been necessary, prior to the ratification of the marriage amendment, to subject HRS § 572-1 to strict scrutiny in order to assess its constitutionality for purposes of the equal protection clause of article I, section 5 of the Hawaii Constitution. This is so because the framers of the 1978 Hawaii Constitution, sitting as a committee of the whole, expressly declared their intention that a proscription against discrimination based on sexual orientation be subsumed within the clause's prohibition against discrimination based on sex.

*Id.*

13. *State v. Mallan*, 950 P.2d 178, 227 (Haw. 1998) (citing *McCloskey v. Honolulu Police Dept.*, 799 P.2d 953, 957 (Haw. 1990)).

The strict scrutiny standard of review means that the government action is not entitled to the usual presumption of validity, that the government must carry a heavy burden of justification, that the government must demonstrate that its program has been structured with precision and is tailored narrowly to serve legitimate objectives[,] and that it has selected

Hawaii would have recognized same-sex marriages but for the constitutional amendment.

When Alaska adopted its constitutional amendment, a lower court had already held that the state's same-sex marriage ban required a strict-scrutiny examination.<sup>14</sup> While the Alaska Supreme Court has sometimes been supportive of rights for same-sex couples—recently holding that the state's refusal to accord certain employee benefits to same-sex partners of state employees was unconstitutional<sup>15</sup>—it is difficult to speculate with certainty that the court would have held that the state constitution protected a right for same-sex partners to wed.

Suppose that the high courts of Alaska and Hawaii would indeed have held that their respective state constitutions protected the right to marry someone of the same sex. In that event, the adoption of those constitutional amendments imposed a heavy burden on same-sex couples, since those couples would thereby have been denied all of the symbolic and tangible benefits that otherwise could have been accrued through marriage.

Contrast the above hypothetical (in which the state constitutions have been held to protect same-sex marriage) with a hypothetical in which the constitution of Mississippi (Mississippi chosen at random) would never have been held to protect same-sex marriage and that the state legislature would never have enacted legislation permitting same-sex couples to marry. As a practical matter, it might be that Mississippi's having enshrined the prohibition within the state constitution would not have imposed as much of an opportunity cost as would have been imposed by a similar amendment in Alaska or Hawaii.<sup>16</sup> Thus, *ex hypothesi*, because same-sex marriage would have been recognized in Hawaii or Alaska but for the amendments to those state constitutions, but

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the least drastic means for effectuating its objectives.

*Id.*

14. See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at \*6 (Ala. Sup. Feb. 27, 1998), *superseded by constitutional amendment as recognized in*, *Anderson v. King County*, 138 P.3d 963 (Wash. 2006) ("The court, having found the decision to choose one's life partner to be a fundamental right, has concluded that the strict scrutiny test applicable to fundamental rights applies to its review of the State's prohibition of same-sex marriages.").

15. See *Ala. Civil Liberties Union v. Municipality of Anchorage*, 122 P.3d 781 (Ala. 2005).

16. This point is assuming that the Federal Constitution will not be found to protect the right to marry a same-sex partner. For some of the bases upon which a court might find that the United States Constitution does protect the right to marry a same-sex partner, see *infra* notes 216-80 and accompanying text.

would not have been recognized in Mississippi whether or not that refusal was incorporated with the state constitution,<sup>17</sup> the opportunity costs imposed by the adoption of marriage amendments in Hawaii and Alaska might be thought to be much greater than those imposed by the adoption of the constitutional amendment in Mississippi.

Of course, the opportunity-cost analysis should not end there. The Hawaii amendment removes constitutional protection for same-sex marriage but does not incorporate a ban within the state constitution<sup>18</sup>—the Hawaii Legislature has the power to recognize same-sex marriage, and it is not inconceivable that it might decide to do so.<sup>19</sup> In contrast, in both Alaska and Mississippi, the amendments not only removed possible state constitutional protections for same-sex marriage but precluded the legislatures from recognizing such unions.<sup>20</sup> Basically, in both Alaska and Mississippi, but not in Hawaii, the state constitution will have to be amended if same-sex marriages are to be recognized in those states.<sup>21</sup>

### *C. Varying Breadths of the Amendments*

The amendments to the constitutions of Mississippi, Hawaii and Alaska, like the amendments to some other state

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17. For example, it would be unlikely that the refusal to permit same-sex couples to marry could be successfully challenged as an equal protection violation under the Mississippi Constitution, since that constitution does not incorporate equal protection guarantees as such. See Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 329 (1986) (concluding "the Mississippi Constitution contains no equality of treatment or equal protection guarantees like those found in other state constitutions and in the fourteenth amendment"); see also Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1018 n.26 (2003) ("Only in Delaware and Mississippi have the courts failed to find that their constitutions contain a provision guaranteeing equality.").

18. HAW. CONST. art. I, § 23 (1998), *supra* note 2.

19. Cf. Jill Duman and Pam Smith, *Gov's Signature Wouldn't End Marriage Fight*, 129 THE RECORDER-SF, September 8, 2005, at 1 ("AB 849 - the third attempt by Assemblyman Mark Leno, D-San Francisco, to pass a bill legalizing gay marriage - is the first such bill to be initiated and passed by a state legislature, supporters say.").

20. ALASKA CONST. art. I, § 25 (1998); MISS. CONST. § 263-A (2004), *supra* note 3.

21. This assumes that same-sex marriage bans will not be found to violate federal constitutional guarantees. For a discussion of some of the bases upon which such bans might be found unconstitutional, see *infra* notes 216-78 and accompanying text.



constitutions,<sup>22</sup> preclude recognition of same-sex marriages but do not facially ban the recognition of other same-sex relationships, e.g., civil unions<sup>23</sup> or domestic partnerships.<sup>24</sup> However, other states' amendments do preclude the recognition of same-sex marriage and any other kind of relationship that approximates marriage.<sup>25</sup> Finally, some amendments fail to recognize same-sex marriages, other marriage-like relationships, *and* do not allow the extension of benefits or incidents of marriage to unmarried individuals or couples.<sup>26</sup>

An amendment prohibiting same-sex couples from marrying does not necessarily preclude same-sex couples from receiving a variety of important benefits. For example, Vermont is careful to articulate that civil unions are not marriages,<sup>27</sup> even though individuals in civil unions have all of the rights and obligations of spouses.<sup>28</sup> Even if Vermont were to incorporate a constitutional provision specifying that civil unions were not marriages and that marriage was reserved for different-sex couples, the state could still recognize civil unions, thereby affording to same-sex couples a number of tangible benefits.<sup>29</sup> By the same token, Oregon, which has an amendment reserving marriage for different-sex couples, might still come to recognize civil unions.<sup>30</sup>

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22. See *supra* note 3 and accompanying text.

23. 205 Conn. Acts 16 (2005).

Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.

*Id.*; Vt. STAT. ANN. tit. 15, § 1204(a) (2005) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

24. See CAL. FAM. CODE § 297 (2004) (detailing qualifications of domestic partnership).

25. See *supra* note 4 and accompanying text.

26. See *supra* note 5 and accompanying text.

27. See VT. STAT. ANN. tit. 15, § 1201(4) (2005) ("Marriage means the legally recognized union of one man and one woman.").

28. *Id.* at § 1201(2) ("Civil union means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.").

29. See *supra* note 23 and accompanying text.

30. Cf. *Gay Rights Groups Target Speaker of Oregon House*, REC. N. N.J., Oct. 27, 2005, at A22, available at 2005 WLNR 17448351 ("Over the summer, the Republican [House Speaker] enraged gay rights supporters when she refused to let the House vote on a civil unions bill that had been passed by the state Senate with the blessing of the Democratic governor.").

Even if a state constitution precludes the recognition of civil unions, that would not preclude the state from according specific benefits to same-sex couples.<sup>31</sup> It can hardly be said, for example, that a state extending health insurance benefits to the domestic partner of a state employee amounts to the state according that couple the full benefits of marriage.<sup>32</sup> Thus, because civil unions include *all* of the rights and obligations of marriage,<sup>33</sup> a state being constitutionally precluded from recognizing civil unions would not similarly preclude the state from according particular benefits to unmarried individuals or couples.<sup>34</sup> Similarly, an amendment specifying that relationships substantially similar to marriage cannot be recognized would not thereby preclude awarding a few benefits to non-marital couples. This is because a relationship accorded a few benefits can hardly be thought of as substantially similar to marriage.

#### *D. Amendments Regulating the "Incidents of Marriage"*

The amendments specifying that the rights or incidents of marriage cannot be accorded to unmarried individuals<sup>35</sup> appear to have the broadest reach.<sup>36</sup> Nonetheless, the breadth of these amendments greatly depends upon how they are interpreted, since it is unclear which specific benefits are addressed when one discusses the benefits or incidents of marriage, or even the rights or obligations that "flow" from marriage.<sup>37</sup>

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31. See *Nat'l Pride at Work, Inc. v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005) (holding that the Michigan constitutional amendment did not preclude employers from awarding domestic partner benefits to individuals in same-sex relationships).

32. *Cf. id.*, at \*4.

Health care benefits are not among the statutory rights or benefits of marriage. An individual does not receive health care benefits for his or her spouse as a matter of legal right upon getting married. If a spouse receives health care benefits, it is as a result of a contractual provision or policy directive of the employer. Likewise, health care benefits are not limited to those who are married. Within the confines of what the health insurance provider offers, an employer may choose to offer coverage to any person who bears an employer-defined relationship to the employee. Health care benefits for a spouse are benefits of employment, not benefits of marriage.

*Id.*

33. See *supra* note 23 and accompanying text.

34. *Id.*

35. But see *infra* notes 43-47 and accompanying text (comparing the Nebraska and Louisiana marriage amendments).

36. See *supra* note 5 and accompanying text.

37. Barbara J. Cox, *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions,*

### 1. The Meaning of "Incidents of Marriage" May Change Over Time

On one interpretation, the incidents or benefits of marriage are those that are exclusively reserved for married couples, and thus, a benefit accorded both to married and unmarried individuals cannot be classified as an "incident of marriage."<sup>38</sup> Because the benefits exclusively reserved for married couples change over time,<sup>39</sup> however, what might qualify as an "incident of marriage" in 1960 might not qualify as an "incident of marriage" in 1990. It is thus important to know whether an amendment precluding unmarried individuals from being awarded any of the incidents of marriage includes a date, either implicitly or explicitly.

It would have been easy for the drafters to have included language in the amendment itself specifying that the "incidents of marriage" refer to those benefits exclusively reserved for married couples at the time of the amendment's adoption. Their failure to do so may indicate that they did not intend to define the "incidents of marriage" in reference to a particular date, but rather to reflect the practices in effect at the time the issue concerning the "incidents of marriage" is litigated. Thus, in the year 2006 a particular benefit would be considered an incident of marriage solely reserved for married individuals, but in the year 2010 that same benefit would no longer be considered an incident of marriage because the legislature in 2008 had passed a law extending that benefit to unmarried individuals as well.

On this understanding of the amendment, the term "incidents of marriage" refers to the benefits the legislature has exclusively reserved for married couples. Any benefit the legislature awards to both married and unmarried individuals is not an incident of marriage because it is not exclusively received by married individuals.<sup>40</sup>

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*And Domestic Partnerships*, 13 WIDENER L.J. 699, 718-19 (2004) ("Incidents of marriage refer to each of the specific benefits, rights, or responsibilities flowing to a married couple based on their marital status.").

38. Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 189, 214 (2004) (describing the incidents of marriage as the "benefits, duties, privileges of the married state").

39. *Cf.* Cox, *supra* note 37, at 707-08 (arguing that states will have to redefine the benefits of marriage so they apply to civil unions).

40. Bradley, *supra* note 38, at 215.

*Nothing* is an incident of marriage unless extant state law makes it so. There are no "state-less" incidents of marriage. "Marital incidents" are not goods floating free of the positive law. They do not form a brooding

If this is the correct interpretation, then a marriage amendment reserving the “incidents of marriage” for married couples serves as a check on the courts. In a state with such an amendment, the courts cannot hold that the state constitution requires non-marital couples to be eligible for benefits normally reserved for married couples, because the state constitution would itself immunize from state constitutional attack<sup>41</sup> the state’s reserving particular benefits for married couples.

Yet, the legislature has the power to extend a particular benefit to non-marital couples, thereby (1) removing that benefit from the category of “incidents of marriage,” and (2) making a decision by the legislature to accord that benefit to some, but not other, unmarried individuals subject to constitutional analysis. Thus, the amendment operates to quell the court’s ability to say that the equal protection guarantees of the state constitution require that non-marital couples be accorded incidents of marriage,<sup>42</sup> but the amendment does not inhibit them from saying that the equal protection guarantees of the state constitution prohibit the state from awarding certain benefits to some, but not other, unmarried individuals.

When offering his take on Louisiana’s marriage amendment, Chief Justice Calogero noted that nothing “would prohibit an unmarried couple from contracting to be co-owners of property, from designating each other agents authorized to make critical end of life decisions, or from leaving property to each other through wills.”<sup>43</sup> He suggested that the amendment “does not

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omnipresence in the sky. State law makes this or that benefit a marital incident by, and only by, *saying* that it is . . . . A legislature which wants to give unmarried people some benefit previously reserved to the married (something hitherto an “incident of marriage”) may do so under the FMA. Legislators so inclined would have to identify the benefit, and then define the beneficiary class *without* using terms such as “marriage” and “spouse.” These lawmakers accomplish two things: they *abolish* an “incident of marriage,” and they pass a new law, or social welfare measure, or rule of evidence, or tax provision. These two things may happen at once and are intended to be in tandem.

*Id.*

41. See *Ala. Civil Liberties Union v. State*, 122 P.3d 781 (Ala. 2005) (holding that a public employer’s spousal limitations violate Alaska’s equal protection clause). *But cf.* *Forum for Equality PAC v. McKeithen*, 893 So.2d 715, 734 (La. 2005) (explaining that the Senate Committee on Judiciary had received testimony “that noted a potential ‘threat under Louisiana Constitution Article 1, sec 2, our due process clause,’ exists, which place[s] our traditional marriage statutes at risk.”).

42. See *infra* notes 253-55 and accompanying text (noting some of the possible implications of this immunization).

43. *McKeithen*, 893 So.2d at 737 (Calogero, C.J., concurring).

disturb or impair the fundamental contract and property rights possessed by all individuals, be they homosexual or heterosexual, married or unmarried.”<sup>44</sup> Ironically, the Louisiana amendment—when so construed—is narrower than the Nebraska amendment,<sup>45</sup> even though the Louisiana amendment expressly precludes conferring the “incidents of marriage” on unmarried individuals,<sup>46</sup> and the Nebraska amendment does not even refer to the “incidents of marriage.”<sup>47</sup>

## 2. Broader Interpretations of the “Incidents of Marriage” Language

A different interpretation of the “incidents of marriage” is much more encompassing than the one described above.<sup>48</sup> It might be argued that whatever benefits accrue by virtue of getting or being married is an “incident of marriage.” This means that any benefit one receives by virtue of marrying, however mundane, will not be accorded to unmarried individuals. For example, suppose that John and June are members of a state-run health club. They live in separate residences, each paying \$400 in dues annually. Suppose that they marry and can now continue their memberships by each paying \$250 annually. Arguably, their ability to pay less in annual dues is a benefit of their marriage, which the club cannot offer to unmarried individuals who are living in the same household because that would involve extending a marital benefit to unmarried individuals. Under this interpretation, any benefit accorded to an individual by virtue of his or her marrying cannot be accorded to an unmarried individual.

Consider a widower who, by virtue of having been married to

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44. *Id.*

45. For a discussion of the Nebraska amendment, *see infra* notes 213-31 and accompanying text.

46. *See* LA. CONST. art. XII, § 15 (2004).

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.

*Id.*

47. *See* NEB. CONST. art. I, § 29 (1999) (“Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”).

48. *See supra* notes 38-42 and accompanying text.

the deceased, has the right to inherit when his spouse dies intestate.<sup>49</sup> A marriage amendment might be thought to preclude a legislature from passing a statute permitting a longtime non-marital partner to be among those inheriting when an individual dies intestate, because that would extend an incident of marriage to a non-marital partner. Yet, it might also be interpreted to mean that *no one* other than an individual's former spouse is permitted to inherit when an individual dies intestate,<sup>50</sup> not even other family members.

Another interpretation of the "incidents" language suggests that there are *certain* benefits that are traditionally viewed as marital benefits,<sup>51</sup> and that a marriage amendment prohibiting the extension of such benefits to unmarried individuals prevents the state from according any of these benefits to an unmarried individual or couple.<sup>52</sup> According to this interpretation, the legislature has the ability to say that *some* benefits reserved for

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49. See, e.g., OHIO REV. CODE ANN. § 2105.06 (specifying who will inherit when an individual dies intestate).

50. *Id.* Ohio law specifies who may inherit when an individual dies intestate.

When a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;

(C) If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;

(D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes.

*Id.*

51. See Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137, 152 (2004) (discussing "marital benefits—such as preference in custody and adoption, marital testimonial privilege, property interests, claims for support, etc.").

52. See *State v. McIntosh*, 2005 WL 1940099, at \*3 (Ohio Ct. Com. Pl. Apr. 18, 2005) (explaining that a statute defining both spouses and people living as spouses as family members does not violate Definition of Marriage Amendment).

married individuals may be extended to unmarried individuals. For example, a state legislature could make insurance benefits available to non-marital partners<sup>53</sup> while continuing to restrict the right to elect against a will.<sup>54</sup>

### 3. Parental Rights at Risk?

One difficulty with the position that only *some* rights can be extended to unmarried individuals is that it is simply unclear which benefits meet this criterion. Courts interpreting the same text might come up with very different conclusions regarding whether a particular benefit qualifies as an “incident of marriage” and thus should not be accorded to someone who is not married.<sup>55</sup> Consider, for example, the following discussion of the Ohio marriage amendment:

Legal rights and obligations exclusive to marriage like parental rights, medical benefits, and support obligations have traditionally belonged to married couples exclusively. Therefore, if the state of Ohio recognized or created a legal status for unmarried couples that gave them parental rights, medical benefits, support obligations, or any other legal right or obligation traditionally granted exclusively to married couples, a serious question as to the constitutionality of such grants under Art. XV, § 11 would arise.<sup>56</sup>

Suppose that the Ohio amendment does not refer to the “incidents of marriage” or to those rights and obligations which have traditionally belonged to married couples exclusively and, thus, that this interpretation of the amendment has no basis in the text.<sup>57</sup> Is it accurate to say that parental rights, medical benefits, and support obligations have traditionally belonged to married couples exclusively?

Parental rights and obligations as well as child support obligations have long been recognized outside of marital status.<sup>58</sup> The paradigmatic paternity suit often involves a woman claiming

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53. *Cf. Nat'l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005) (suggesting that partner health care benefits were not an incident of marriage).

54. *Cf. Matter of Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993) (holding that the domestic partner of the deceased did not have a right to elect against his will).

55. *Cf. Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980, 995 (D. Neb. 2005) (noting that incidents of marriage vary).

56. *See McIntosh*, at \*3.

57. *See infra* notes 94-145 and accompanying text for a discussion of the Ohio amendments.

58. *See infra* notes 185-208 and accompanying text for a discussion of support obligations to a non-marital partner.

that an unmarried man fathered a child.<sup>59</sup> While parenthood is often believed to be an incident of marriage, it is often a trait of unmarried individuals as well. Thus, parenthood—and even more limited parenting privileges—cannot be considered an incident of marriage.

Historically, the only person who could adopt a marital partner's child, without the marital partner being required to surrender his or her own rights, was a stepparent.<sup>60</sup> Thus, suppose that a widower with children remarries, and his new wife wishes to adopt his children. She can do so, assuming that (1) the adoption will promote the best interests of the children and (2) the children's father approves of his wife's adopting them.<sup>61</sup> However, if the couple was not married, he would have to surrender his own parental rights in order for her to be able to adopt the children.<sup>62</sup>

A state law requiring an individual to surrender his parental rights before his long-term partner could adopt his children would seem ludicrous on its face. After all, the two adults will be raising the children together. Furthermore, the stability and security of both the children and the adults is promoted when the relationships between the children and each parent are legally recognized.<sup>63</sup>

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59. See BLACK'S LAW DICTIONARY 1126 (6th ed. 1990) (defining a paternity suit or action as a "court action to determine whether a person is the father of a child born out of wedlock for the purpose, commonly, of enforcing support obligations").

60. Mark Strasser, *Marriage, Parental Rights, and Public Policy: On the FMA, Its Purported Justification, and Its Likely Effects on Families*, 2 U. ST. THOMAS L.J. 118, 128 (2004).

Traditionally, whenever a child was adopted, the parental rights of the biological parents were terminated. That may have made sense when the child was going into a new family. However, when the child is going to remain with her parent, it obviously would not make sense to require that the biological parent surrender her parental rights so that the parent's new spouse could be legally recognized as the child's (other) parent. Through either statute or case law, states recognized the absurdity of such a result and created an exception to the general rule that the biological parents' rights would have to be terminated before an adoption could take place. By making this exception, states made it possible for stepparents to adopt without their spouses having to surrender their parental rights.

*Id.*

61. See Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1024 (1999) ("Courts will not allow the adoption by the stepparent unless the adoption promotes the child's best interests and the biological parent consents.").

62. See *infra* notes 65-67 and accompanying text.

63. Cf. Adoption of Tammy, 619 N.E.2d 315, 317 (Mass. 1993) (noting "the emotional security and current practical ramifications which legal recognition of the reality of her parental relationships [with the two adults raising her] will



The state law described above<sup>64</sup> is easier to understand after a little background is offered. At one time, a typical adoption involved placing a child with new parents where that child would cease to have any connection to her biological parents. The biological parents surrendered their parental rights so that the child was part of a new nuclear family.<sup>65</sup> On some level,<sup>66</sup> it makes sense to require biological parents to surrender their parental rights—if only to clarify who has the ultimate decision-making authority.<sup>67</sup> The situation involving a stepparent adopting a spouse's child was viewed as an exception,<sup>68</sup> and there was some reluctance in extending it to situations in which the would-be adoptive parent was a cohabiting non-marital partner of a parent.<sup>69</sup>

Yet, even before the marriage amendments were adopted, some states were already permitting non-marital partners to adopt their partner's children without forcing the latter parent to surrender his or her parental rights.<sup>70</sup> Thus, even if June was

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provide Tammy”).

64. See *infra* notes 65-67 and accompanying text.

65. Strasser, *supra* note 61, at 1020-21.

In what many believe to be the paradigmatic adoption, the child is placed in a new family that has no connection to the child's biological family. When the adoption is finalized, all legal ties to the biological family are severed and the child is treated as the biological child of the adoptive parents.

*Id.*

66. A separate issue is whether a state should permit open adoptions where the biological parent continues to have contact with the child. See generally Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents under Uniform Adoption Act § 4-113*, 51 FLA. L. REV. 89 (1999).

67. See Strasser, *supra* note 61, at 1020-21 (“Allowing the biological parent to retain rights would create potential conflicts and power struggles.”).

68. That view does not reflect the current reality. See Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 201 (1990) (“Stepparent adoption has become the most frequent type of adoption in the United States.”).

69. See *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999) (holding that same-sex cohabitant of legal mother does not meet statutory adoption requirements); *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (holding that adoption by mother's female cohabitant was prohibited by Wisconsin statute); *In re Adoption of T.K.J. and K.A.K.*, 931 P.2d 488 (Colo. Ct. App. 1996) (holding that children of lesbian couple did not have property interest in care from potential adoptive mothers).

70. See *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (permitting two women in a committed relationship each to have parental rights to the same child); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (same); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (recognizing second parent adoption for both same-sex and different sex couples).

cohabiting with—but not married to—widower John, she might be allowed to adopt his children without John being forced to surrender parental rights.

Most states permit single individuals to adopt.<sup>71</sup> Given that parent-child relationships can be established outside of the marriage context, it is not at all clear that custody and adoption are interests that qualify as “incidents of marriage.”

Just as times have changed with respect to whether unmarried individuals can adopt, they also have with respect to who may be covered under insurance plans. For example, a large number of Fortune 500 companies now extend benefits to non-marital partners.<sup>72</sup> This willingness to award insurance benefits beyond the traditional family is of fairly recent vintage,<sup>73</sup> further underscoring the importance of determining whether those supporting the marriage amendments are seeking to return to a bygone era, are seeking to limit which benefits currently reserved for married individuals might be extended by the courts to unmarried individuals, or have other purposes in mind. Some individuals who support a marriage amendment which contains “incidents of marriage” language might have particular benefits in mind, whereas other supporters might merely wish to prevent the extension of benefits currently exclusively reserved for married individuals to unmarried individuals. The difference between these two positions is potentially quite large, and courts attempting to interpret their amendments and their respective constitutions would be helped greatly were they to know what was intended.

The interpretation of amendments that contain “incidents of marriage” language will keep the courts busy for the foreseeable future.<sup>74</sup> It is important to note that voters who approved marriage amendments “protecting” the “incidents of marriage” did

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71. See Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*, 5 J. L. & FAM. STUD. 297, 298 (2003) (“As a general matter, singles can adopt.”).

72. See René M. Scire & Christopher A. Raimondi, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 HOFSTRA LAB. & EMP. L.J. 357, 374 (2000) (“there is a large number of Fortune 500 Companies which have joined the trend of extending employment benefits to domestic partners”).

73. Erin Stefanec, *Mimicking Marriage: As the Evolution of the Legal Recognition of Same-Sex Marriage Progresses, Civil Unions Currently Represent the Best Alternative to Marriage*, 30 U. DAYTON L. REV. 119, 133 (2004) (“In 1982, the first domestic partnership was created by a private entity, the Village Voice newspaper.”).

74. See *supra* notes 35-73 and accompanying text.

so without knowing which benefits would be affected. When they cast their votes, the amendments did not include enough information for anyone to know which benefits would be affected. Some of those supporting these amendments might have been voting to preclude same-sex couples from having access to benefits to which these voters believed same-sex couples should have access.<sup>75</sup> Further, not only did some voters not appreciate which benefits were at issue, but it also seems clear that many voted for the marriage amendments without considering or understanding who would be affected by these amendments.

#### *E. The Surprisingly Broad Reach of Some Amendments*

All of the amendments target same-sex couples in that all preclude the recognition of same-sex marriages in particular or same-sex relationships in general. That said, some amendments are written more broadly than others, and are more likely to affect a whole range of individuals—including different-sex couples and their children. For example, most of the state marriage amendments precluding the recognition of marriage-like relationships do not differentiate between same-sex and different-sex relationships.<sup>76</sup> This means that whatever limitations are placed on the recognition of non-marital relationships apply with equal force regardless of whether those relationships involve same-sex or different-sex individuals.

This point about the breadth of application of the various amendments is not merely of theoretical interest for at least two distinct reasons. First, both same-sex and different-sex couples can become domestic partners under California's statute.<sup>77</sup> By the

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75. See Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2209 (2005) ("Interestingly, polls have shown that while a substantial majority of the public rejects the idea of same-sex marriage, a narrow majority also believes that same-sex couples should receive equal treatment with respect to economic rights.").

76. Nebraska only refuses to recognize quasi-marital status for same-sex couples. See NEB. CONST. art. I, § 29 (1999) ("The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

77. See CAL. FAMILY CODE § 297(b) (2004).

A domestic partnership shall be established in California when all of the following requirements are met:

....

(6) Either of the following:

(A) Both persons are members of the same sex.

(B) One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for

same token, Hawaii's reciprocal beneficiary status, while not as robust as California's domestic partnership status and, thus, perhaps not qualifying as quasi-marital,<sup>78</sup> permits both same-sex and different-sex couples to register.<sup>79</sup> At least facially, those constitutional amendments precluding the state from recognizing quasi-marital relationships apply whether or not the members of the couples are of the same sex.<sup>80</sup> Domestic partners, whether of

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old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.

*Id.*

78. See HAW. STAT. § 572C-6 (2005).

Upon the issuance of a certificate of reciprocal beneficiary relationship, the parties named in the certificate shall be entitled to those rights and obligations provided by the law to reciprocal beneficiaries. Unless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage under chapter 572.

*Id.*; see also M. V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience to the United States*, 17 YALE J.L. & FEMINISM 71, 81 (2005).

Vermont, Connecticut, and California offer a civil union or domestic partnership status to same-sex couples that comes with all (Vermont and Connecticut) or almost all (California) of the state-granted rights and responsibilities of marriage. Three other states offer more limited packages of rights for same-sex couples who register with the state as "reciprocal beneficiaries" (Hawaii) or domestic partners (New Jersey and Maine).

*Id.*

79. See HAW. STAT. § 572C-2 (2005).

The legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

*Id.*

80. Several Ohio courts have noted that the Ohio marriage amendment is not limited to same-sex couples. See *State v. Steinman*, 2005 WL 1940104, at \*2 (Ohio Ct. Com. Pl. Apr. 26, 2005).

Therefore, by reading the plain language of the second sentence of this Amendment it appears to this Court that there is no restriction based upon gender in regard to the legal status for relationships of unmarried individuals. Therefore, this Amendment can apply to unmarried individuals of the same gender, or unmarried individuals of the opposite gender.

*Id.*; see also *State v. Burk*, 2005 WL 786212, at \*3 (Ohio Ct. Com. Pl. Mar. 23, 2005).

It may be argued that the intent of the second sentence was simply to

the same sex or of different sexes, who move to or travel through a state with such an amendment risk non-recognition of their relationship.<sup>81</sup> For example, were a couple in a traffic accident while vacationing in a state with such a law, it might be important to establish the relationship for purposes of medical decisionmaking<sup>82</sup> or tort.<sup>83</sup>

Second, the fact that these amendments apply to same-sex and different-sex relationships is also important for a somewhat subtler reason—namely, it has induced courts to interpret their state marriage amendment overbroadly in an attempt to accommodate the apparent intention to impact both same- and different-sex non-marital couples.<sup>84</sup> Thus, some courts have recognized the fact that their state constitutional amendment is sex-neutral, but have failed to appreciate that some of the marriage-like relationships are also open to different-sex couples. These courts then reasoned that because the amendment was not limited to same-sex couples, it must have been designed to do more than preclude the recognition of marriage-like relationships. For example, in *State v. Steinman*,<sup>85</sup> an Ohio court noted that the Ohio amendment “can apply to unmarried individuals of the same gender, or unmarried individuals of the opposite gender.”<sup>86</sup> Because the amendment was not solely intended to prevent same-sex couples from marrying or entering into civil unions,<sup>87</sup> the court

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preclude recognition by the State of so-called “domestic partnerships” or “civil unions” as a back-door means of sanctioning same-sex relationships. However, by its explicit terms Art. XV, § 11, is not so limited, but clearly is worded as broadly as possible, so as to encompass any quasi-marital relationships—whether they be same-sex or opposite-sex.

*Id.*

81. See, e.g., KAN. CONST. art 15, § 16(b) (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”).

82. The Nebraska amendment was interpreted as precluding *inter alia* giving to a non-spouse the medical decision-making powers that a spouse would have. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 999-1000 (D. Neb. 2005).

83. See *infra* notes 130-33 and accompanying text for a discussion on Ohio law respecting bystander negligent infliction of emotional distress.

84. A separate issue is whether that in fact was the intention, since it may be that the amendments were worded this way to avoid facial orientation discrimination. See *infra* note 235 and accompanying text.

85. *Steinman*, 2005 WL 1940104.

86. *Id.* at \*2.

87. See *id.* (“Had the framers of the Amendment chosen to specifically limit the interpretation of the second sentence to the issue clearly identified in the first sentence of this Amendment, this could have been done by limiting the definition of unmarried individuals to those of the same gender.”).

concluded that the amendment precluded application of the domestic violence statute to individuals who were cohabiting but unmarried.<sup>88</sup>

The *Steineman* court was not alone in its holding. In fact, courts throughout Ohio have heard the issue and are divided about whether the amendment actually does preclude application of the domestic violence statute in such contexts. Several courts have concluded that the second sentence of the amendment<sup>89</sup> precludes the state from extending to non-marital, cohabiting partners the protections that would be extended to a spouse,<sup>90</sup> while others have concluded that the amendment does not preclude the extension of such benefits.<sup>91</sup>

Some of the amendments precluding the recognition of quasi-marital relationships are more clearly written than others. For example, the Kentucky Constitution states that a "status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized,"<sup>92</sup> and the North

88. *Id.* at \*4. *Cf.* *State v. Burk*, 843 N.E.2d 1254, 1256 (2005) (noting that the amendment applied to both same-sex and different-sex couples by construing the amendment broadly).

89. The second sentence of the amendment reads: "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." OHIO CONST. art. XV, § 11 (2004).

90. *See State v. Ward*, 849 N.E.2d 1076 (Ohio App. 2006); *City of Cleveland v. Voies*, 2005 WL 1940135 (Ohio Mun. Mar. 23, 2005), *rev'd* by *City of Cleveland v. Voies*, 2006 WL 440341 (Ohio App. Feb. 23, 2006); *State v. Burk*, 2005 WL 786212 (Ohio Ct. Com Pl. Mar. 23, 2005), *rev'd* 843 N.E.2d 1254 (Ohio App. 2005); *State v. Peterson*, 2005 WL 1940114 (Ohio Ct. Com. Pl. Apr. 18, 2005); *State v. Dixon*, 2005 WL 1940110 (Ohio Ct. Com Pl. Apr. 26, 2005); *Steineman*, 2005 WL 1940104.

91. *See Burk*, 843 N.E.2d 1254; *State v. Adams*, 2005 WL 3196850 (Ohio App. Nov. 28, 2005); *City of Cleveland v. Knipp*, 2005 WL 1017620 (Ohio Mun. Mar. 10, 2005); *State v. Rodgers*, 827 N.E.2d 872 (Ohio Misc. 2005); *State v. McIntosh*, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005); *State v. Newell*, 2005 WL 1364937 (Ohio App. May 31, 2005).

92. KY. CONST. § 233A (2004). While the Kentucky amendment seems clear on its face, it may nonetheless be construed overbroadly. *Cf. Wood v. Commonwealth ex rel. Grayson*, 2005 WL 1258921, at \*3 (Ky. Cir. Ct. May 26, 2005).

[T]he Plaintiffs charge that the electorate was unable to discern from the language of the amendment, the impact upon: (1) suits for wrongful death, (2) intestate inheritance, (3) hospital visitation, (4) medical decisions, (5) decision making capacity for burial and funeral arrangements, (6) protection under Kentucky's domestic violence statutes for spouse abuse, (7) the ability of businesses and local governments to provide health insurance or bereavement leave to domestic partners, and (8) the legal status of existing contractual agreements between unmarried individuals such as durable powers of attorney, health surrogate designations, designations of guardianship, and adoption agreements. This Court agrees with the Plaintiffs' contention that the above enumerated relational

Dakota Constitution specifies, "No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."<sup>93</sup> Some of the amendments, however, are less clear. For example, the purpose behind the Ohio and Michigan amendments is presumably to preclude the recognition of quasi-marital status for same-sex and different-sex couples. However, at least in part because neither of the amendments was particularly well drafted, confident predictions about how they will be authoritatively construed are especially difficult to make.

### 1. Multiple Interpretations of the Ohio Amendment

Consider the Ohio amendment, which reads:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.<sup>94</sup>

When interpreting this amendment, it might be helpful to consider what some of the other state amendments say. Not only do some states' amendments reserve marriage for different-sex couples, but they make clear that no other status identical or substantially similar to marriage will be recognized. Presumably, such amendments intend to cover civil unions, which are identical to marriage,<sup>95</sup> and domestic partnerships, which are substantially similar but not identical to marriage.<sup>96</sup>

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and legal rights and responsibilities may be affected by the passage of the Marriage Amendment. This Court is not particularly persuaded by the generalized response to these issues, as exemplified, "[t]he amendment does not prohibit employers from giving domestic partner benefits, if that is what they feel is in their best interest."

*Id.*; see Attorney General's Memorandum of Law in Support of Motion to Dismiss and Judgment on the Pleadings, pp. 3-4.

93. N.D. CONST. art. XI, § 28 (1998).

94. OHIO CONST. art. XV, § 11.

95. See VT. STAT. ANN. tit. 15, § 1204(a) (2006) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

96. See William C. Duncan, *Survey of Interstate Recognition of Quasi-Marital Statutes*, 3 AVE MARIA L. REV. 617, 630-31 (2005) (discussing the differences between the statuses of marriage and [California] domestic partnership: (1) domestic partners cannot file jointly on their income tax returns, (2) the laws provide different entry and exit (before five years or children involved) procedures, (3) domestic partnerships are not guaranteed interstate recognition, (4) the law does not secure federal benefits for domestic partners, and (5) the law does not

Ohio chose to constitutionally preclude recognition of same-sex marriages, which are performed in Massachusetts,<sup>97</sup> as well as those unions which “approximate” marriage, such as California’s domestic partnerships.<sup>98</sup> Yet, if Ohio’s usage of “approximate” performs the same function as Kentucky’s “substantially similar,” then Ohio’s amendment would not preclude the recognition of Vermont civil unions, which are not merely intended to approximate marriage, but to emulate it.<sup>99</sup>

When interpreting the amendment, Ohio courts have not focused on the possible ambiguity created by Ohio’s failure to preclude recognition of unions that are intended to mirror marriage. Rather, at least some have offered a reading which seems to ignore the plain meaning of the statute, such as suggesting that the statute precludes enforcement of the state’s domestic violence statute against non-marital cohabitants.

The Ohio amendment precludes recognition of any legal status that “intends to approximate the design, qualities, significance or effect of marriage.”<sup>100</sup> Regrettably, many courts have failed to appreciate this focus on *the* design, qualities, significance, or effect of marriage, which presumably means the sum total of the consequences of marriage.<sup>101</sup> If it were said, for

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secure access to benefits controlled specifically by state constitutional provisions).

97. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding the Massachusetts Commonwealth may not deny civil marriage to same sex couples).

98. See *State v. McIntosh*, 2005 WL 1940099, at \*5 (Ohio Ct. Com. Pl. Apr. 18, 2005), *overruled by* *State v. McIntosh*, 2006 WL 925179 (Ohio App. Apr. 7, 2006) (“California’s Domestic Partners Act, enacted Mar. 22, 2005, is a clear example of state legislation that creates a legal status that intends to approximate marriage for unmarried individuals.”); see also CAL. FAM. CODE § 297.5(a) (2005).

Domestic partners are given the following legal status under the Act: “... domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

*Id.*

99. *But see* *State v. Rodgers*, 827 N.E.2d 872, 878 (Ohio Ct. Com. Pl. 2005) (“The second sentence limits legislative authority to redefine marriage, with a term like ‘civil union,’ to approximate a traditional, heterosexual marriage.”).

100. See *State v. Ward*, 849 N.E.2d 1076, 1077 (Ohio App. 2006) (holding domestic violence protections do not extend to “a person living as a spouse”); *City of Cleveland v. Voies*, 2005 WL 1940135, at \*12 (Ohio Mun. Mar. 23, 2005), *rev’d by* 2006 WL 440341 (Ohio App. Feb. 23, 2006); *State v. Burk*, 2005 WL 786212, at \*8 (Ohio Ct. Com. Pl. Mar. 23, 2005) *rev’d by* 843 N.E.2d 1254 (Ohio App. 2005) (“the adoption of the Amendment makes charging unmarried cohabitants with domestic violence a legal impossibility”).

101. *Ward*, 849 N.E.2d at 1077; *Voies*, 2005 WL 1940135 at \*12; *Burk*, 2005 WL



example, that *the* effect of marriage is to give an individual the legal power not to be forced to testify against her spouse,<sup>102</sup> then other consequences, such as the right to elect against a will,<sup>103</sup> would presumably not count as *the* effect of marriage. While both can be *an* effect of marriage, both cannot be *the* effect of marriage. By the same token, if it is thought that *the* significance of marriage is that it allows one to inherit when one's spouse dies intestate,<sup>104</sup> then it cannot also be thought that *the* significance of marriage is that it allows one to consent to the withdrawal or withholding of treatment where (1) there is no guardian and (2) one's spouse is in a terminal condition and no longer able to make informed decisions regarding her own medical care.<sup>105</sup> It simply cannot be maintained that *the* design, quality, significance or effect of marriage is to make one subject to a domestic violence charge.

When considering whether the amendment precludes applying the domestic violence statute in cases involving a non-marital partner, some Ohio courts have sought to determine whether that statute treats a non-marital partner as a spouse in a particular respect, as if the amendment had precluded recognizing a legal status that approximated the design, qualities, significance or effect of marriage in *any* respect.<sup>106</sup> Indeed, one court suggested

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786212 at \*8. The amendment would also apply to a status which accorded almost all of the benefits of marriage since that status would approximate, though not mirror, marriage.

102. OHIO R. EVID. 601 (2005-06).

Every person is competent to be a witness except:

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(1) a crime against the testifying spouse or a child of either spouse is charged;

(2) the testifying spouse elects to testify.

*Id.*

103. After the initial appointment of an administrator or executor of the estate, the probate court shall issue a citation to the surviving spouse, if any is living at the time of the issuance of the citation, to elect whether to exercise the surviving spouse's rights under Chapter 2106 of the Revised Code, including, after the probate of a will, the right to elect to take under the will or under section 2105.06 of the Revised Code. See OHIO REV. CODE ANN. § 2106.01 (2002).

104. See OHIO REV. CODE ANN. § 2105.06 (2002) (specifying who will inherit when an individual dies intestate).

105. See OHIO REV. CODE ANN. § 2133.08 (2002) (specifying who may consent to the withholding or withdrawal of life-sustaining treatment).

106. There are at least two possible interpretations of the words in the second sentence of the 2004 amendment. One, given by Judge Friedman, would hold that the wording clearly invalidates any statute that touches on "marriage" or that for

that the amendment precludes statutes' incorporation of the phrase "as a spouse."<sup>107</sup> This analysis is incorrect for two distinct reasons.

First, the amendment does not preclude treating an unmarried person like a spouse in *any* respect, but instead, precludes the states from recognizing a status that approximates marriage. Second, if the amendment precluded the state from treating an unmarried individual as a spouse in any respect, then merely using a different term, e.g., lifelong romantic partner, or a functional definition,<sup>108</sup> does not avoid the amendment's prohibition—the state is then according a benefit of marriage, even if not using a term like "spouse," and, thus, falls afoul of the amendment.

Some Ohio courts have suggested that the amendment precludes permitting non-marital couples from enjoying *certain* benefits traditionally associated with marriage.<sup>109</sup> For example, one court suggested that the amendment prohibits two individuals from changing their last names so that they might have the same last name.<sup>110</sup> This analysis is also incorrect. Just as the amendment does not preclude the state from treating an unmarried person like a spouse in *any* respect, the amendment does not preclude the state from treating an unmarried person like a spouse in any *particular* respect, e.g., from enjoying benefits traditionally associated with marriage.<sup>111</sup>

An additional reason to reject the "incidents of marriage" interpretation of the Ohio amendment is that the Ohio Supreme

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any purpose whatsoever, recognizes a relationship not strictly confined to one man and one woman who are formally married. *State v. Burk*, 2005 WL 786212. *Cf. State v. Rodgers*, 827 N.E.2d 872, 879 (Ohio Ct. Com.Pl. 2005).

107. *See State v. Peterson*, 2005 WL 1940114, at \*2 (Ohio Ct. Com. Pl. Apr. 18, 2005) ("If it is the intention of the legislature to cover individuals living together who are not formally married, then language other than 'person living as a spouse' needs to be crafted in order to cover that circumstance.").

108. *See infra* note 135 and accompanying text (discussing how the term "cohabitant" is defined).

109. If the state of Ohio recognized or created a legal status for unmarried couples that gave them parental rights, medical benefits, support obligations, or any other legal right or obligation traditionally granted exclusively to married couples, a serious question as to the constitutionality of such grants under Art. XV, § 11 would arise. *See State v. McIntosh* 2005 WL 1940099, at \*3 (Ohio Ct. Com. Pl. Apr. 18, 2005), *rev'd* 852 N.E.2d 185 (Ohio 2006).

110. *Id.* at \*6. ("Likewise, the Supreme Court of Ohio's decision in *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002), involved the grant of a right to an unmarried couple that, arguably, approximated the effect of marriage.").

111. *See supra* notes 48-75 and accompanying text (discussing amendments which preclude extension of the incidents of marriage to non-marital couples).

Court had already interpreted the state law regarding name changes fairly broadly.<sup>112</sup> Indeed, in a case in which two women wanted to change their last names to a common last name, the Ohio Supreme Court recognized that the appellants wanted “to demonstrate their level of commitment to each other and to the children that they planned to have.”<sup>113</sup> The court allowed the name change because the appellants had no criminal or fraudulent purposes.<sup>114</sup>

Some Ohio courts *seem* to have recognized that the amendment is merely trying to prohibit relationships that approximate marriage. For example, in *State v. McIntosh*, an Ohio court recognized that the “issue is whether the legal status recognized or created by the statute approximates marriage, not whether the factual relationship of the covered persons approximates marriage.”<sup>115</sup> However, that same court suggested that if the legislature awarded any “legal right or obligation traditionally granted exclusively to married couples, a serious question as to the constitutionality of such grants under Art. XV, § 11 would arise.”<sup>116</sup> Yet, the legislature could award one of the legal rights traditionally associated with marriage without creating a status that even remotely approximated marriage.<sup>117</sup>

Some courts have suggested that the Ohio amendment constitutionally inhibits the state from recognizing common-law

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112. See *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002) (holding lack of criminal or fraudulent purpose means name change applications are reasonable and proper).

113. *Id.* at 849.

114. *Id.*

It is clear that appellants have no criminal or fraudulent purpose for wanting to change their names. They are not attempting to evade creditors or to create the appearance of a state-sanctioned marriage. Accordingly, we hold that appellants' name change applications are reasonable and proper under R.C. 2717.01(A) and, therefore, reverse the judgment of the court of appeals.

*Id.*

115. *McIntosh*, 2005 WL 1940099, at \*2.

116. *Id.* at \*3.

117. See Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 233-34 (2004).

The Ohio text clearly bars the creation of any new legal status patterned after marriage, including not only civil unions but also domestic partnerships and other marriage-like relationships. It says nothing, however, with respect to specific benefits, ostensibly allowing the legislature to allocate benefits on the basis of household or other relevant characteristics.

*Id.*

marriage.<sup>118</sup> This is incorrect for a few reasons. The first sentence of the amendment does not prohibit the recognition of common-law marriage—assuming that the individuals are not of the same sex.<sup>119</sup> Furthermore, the amendment's second sentence also does not preclude common-law marriage because common-law marriage is neither an approximation of marriage<sup>120</sup> nor a separate status that mirrors marriage. Rather, common-law marriage describes a different way by which one might become married. Whether one has a common-law marriage or a ceremonial marriage,<sup>121</sup> the rights and responsibilities are the same, and the only way to dissolve the union is through legal proceedings or the death of one of the parties.<sup>122</sup>

Ohio no longer permits the creation of common-law marriages in the state.<sup>123</sup> However, the state will recognize a common-law marriage if it came into being within the state before October 10, 1991, or was created after that date in a state

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118. See *City of Cleveland v. Voies*, 2005 WL 1940135, at \*6 (Ohio Mun. Ct. Mar. 23, 2005), *rev'd* 2006 WL 440341 (Ohio App. Feb. 23, 2006) ("As presently worded, the Amendment would also refuse to recognize common law marriages.").

119. *Cf. De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. 1984) (holding that two individuals of the same sex could not establish a common-law marriage).

120. See *Sulfridge v. Kindle*, 2005 WL 1806482, at \*2 (Ohio App. July 28, 2005) (discussing the elements of a common-law marriage which are "(1) an agreement of marriage in praesenti; (2) cohabitation as husband and wife; and (3) a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community." (citing *Nestor v. Nestor*, 472 N.E. 2d 1091, 1093 (1984))); OHIO REV. CODE ANN. § 3101.08 (2002).

An ordained or licensed minister of any religious society or congregation within this state who is licensed to solemnize marriages, a judge of a county court in accordance with section 1907.18 of the Revised Code, a judge of a municipal court in accordance with section 1901.14 of the Revised Code, a probate judge in accordance with section 2101.27 of the Revised Code, the mayor of a municipal corporation in any county in which such municipal corporation wholly or partly lies, the superintendent of the state school for the deaf, or any religious society in conformity with the rules of its church, may join together as husband and wife any persons who are not prohibited by law from being joined in marriage.

*Id.*

122. See *Poland Twp. Bd. of Trustees v. Swesey* 2003 WL 22946148, at \*7 (Ohio App. Dec. 12, 2003) ("Common-law marriages can only be terminated through legal proceedings.") (citing *Lyon v. Lyon*, 621 N.E.2d 718 (Ohio App. 1993)). See also OHIO REV. CODE ANN. § 3105.12(B)(2) (2002) ("Common law marriages that occurred in this state prior to October 10, 1991, and that have not been terminated by death, divorce, dissolution of marriage, or annulment remain valid on and after [October 10, 1991].").

123. See *Sulfridge*, 2005 WL 1806482 at \*2 ("Our analysis begins from the premise that Ohio law prohibits the creation of common law marriages after October 10, 1991. R.C. 3105.12(B)(1).").

recognizing common-law marriages.<sup>124</sup> While the amendment might have expressly stated that common-law marriages validly celebrated elsewhere would still be recognized,<sup>125</sup> the point nonetheless remains that neither of the sentences of the amendment even speaks to common-law marriage.

Clearly, the Ohio courts do not wholly understand the implications of interpreting the amendment broadly. Consider, for example, the view that the Ohio amendment precludes treating an unmarried individual “as a spouse.”<sup>126</sup> Yet, this would seem to enshrine within the constitution a provision authorizing discrimination on the basis of marital status, existing laws to the contrary notwithstanding.<sup>127</sup>

Currently, there are a variety of laws designed to prevent conflicts of interest,<sup>128</sup> like precluding an individual from sitting on a board if that board contracts with a business owned by a member of the individual’s family.<sup>129</sup> The amendment would seem to preclude treating a longtime non-marital companion as a spouse for these purposes, notwithstanding that the purpose behind such conflict-of-interest laws would also be served were these same safeguards in place so that an individual could not steer contracts to a business owned by a longtime companion.

In cases involving bystander negligent infliction of emotional distress, Ohio considers the following factors:

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124. See OHIO REV. CODE ANN. § 3105.12 B(3)(a) (“They came into existence prior to October 10, 1991, or come into existence on or after that date, in another state or nation that recognizes the validity of common law marriages in accordance with all relevant aspects of the law of that state or nation.”).

125. See, e.g., ARK. CONST. amend. 83 (2004) (“Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.”).

126. See *State v. Peterson*, 2005 WL 1940114, at \*2 (Ohio Ct. Com. Pl. Apr. 18, 2005) (“If it is the intention of the legislature to cover individuals living together who are not formally married, then language other than ‘person living as a spouse’ needs to be crafted in order to cover that circumstance.”).

127. See, e.g., OHIO REV. CODE ANN. § 4112.021(1)(a) (2002) (making it illegal to discriminate against any applicant for credit on the basis of marital status).

128. OHIO REV. CODE ANN. § 340.02 (2002) (precluding an individual from serving as a member of the board of alcohol, drug addiction and mental health services if that individual has a *family member* contracting with the board for goods or services); OHIO REV. CODE ANN. § 1181.05 (2002) (precluding employees (including the superintendent) of the division of financial institutions *and their family members* from having an interest in any bank, savings and loan association, savings bank credit union, or consumer finance company which is under the supervision of the superintendent of financial institutions).

129. OHIO REV. CODE ANN. § 340.02.

(1) how close the plaintiff was located to the scene of the accident; and

(2) if any ensuing shock was the result of the plaintiff observing the accident first hand as opposed to being informed that the accident occurred; and

(3) whether or not the plaintiff was closely related to the victim.<sup>130</sup>

When discussing the third factor, the Supreme Court of Ohio has clearly stated that "a strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required."<sup>131</sup> Elaborating on this point, the court suggested that "a plaintiff who is affianced with the victim could very well be described as a close relation,"<sup>132</sup> thereby making clear that an individual who is neither a blood nor legal relation to the victim could still satisfy the third criterion.<sup>133</sup> However, a broad interpretation of the Ohio amendment might preclude a fiancée or a long-term, non-marital partner from meeting the third criterion.

In Ohio, divorce agreements may include a provision stipulating that an ex-spouse will receive spousal support payments only until that individual remarries or begins cohabitating with someone else.<sup>134</sup> By permitting the termination of spousal support in the event of remarriage or cohabitation, the state removes the incentive for a support-receiving individual to move in with a paramour instead of marrying him or her. Ironically, a broad reading of the Ohio marriage amendment has the potential to negate the enforcement of such a provision, and, in effect, create a disincentive to marriage in certain circumstances.

When the Ohio Supreme Court defined cohabitation as involving (1) the sharing of family and financial responsibilities,

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130. *Paugh v. Hanks*, 451 N.E.2d 759, 766 (Ohio 1983) (citing *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968)).

131. *Id.*

132. *Id.* at 767.

133. It should not be thought that by refusing to limit recovery to family members Ohio therefore permits almost anyone to recover in an action involving negligent infliction of emotional distress to a bystander. *Cf. Smith v. Kings Entm't Co.*, 649 N.E.2d 1252, 1253 (Ohio App. 1994) (noting that the "record reveals that Smith and Haithcoat were friends, that the two had known each other for approximately one and one-half years, that they had never been romantically involved, and that they had contact with each other, by telephone or otherwise, quite frequently," and finding that the third criterion had not been met).

134. *See, e.g., Kunkle v. Kunkle*, 554 N.E.2d 83, 85 (Ohio 1990) ("Said payments shall continue during the life of the payee, Nancy R. Kunkle, so long as she does not remarry or cohabit with a person of the opposite sex for more than six (6) months continuously with the happening of either of the latter subjecting said award to modification by the Court.").

and (2) consortium,<sup>135</sup> it did so in the context of explaining the state's domestic violence statute.<sup>136</sup> The court noted that the legislature "believed that an assault involving a family or household member deserves further protection than an assault on a stranger,"<sup>137</sup> in part because in "contrast to 'stranger' violence, domestic violence arises out of the *relationship* between the perpetrator and the victim."<sup>138</sup> Courts striking the domestic violence statute in light of the state marriage amendment seemed to believe that "the legislature intended to bestow upon unmarried couples living together a status that paralleled marriage so those unmarried individuals would be recognized under the ambit of Ohio Revised Code Section 2919.25(A)."<sup>139</sup> Yet, if such an interpretation renders the domestic violence statute unconstitutional, it also renders the enforcement of the cohabitation clause in divorce agreements unconstitutional, especially because the *Williams* factors used to determine "cohabitation" for purposes of the domestic violence statute are the same factors used to determine when the cohabitation clause in divorce agreements is triggered.<sup>140</sup>

The clear intent behind a divorce agreement provision that permits cessation of spousal support upon successive cohabitation

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135. See *State v. Williams*, 683 N.E.2d 1126, 1130 (Ohio 1997) ("[T]he essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium.").

136. *Id.* at 1127 (stating that the sole issue before the court was interpreting statute R.C. 2919.25).

137. *Id.* at 1129.

138. *Id.* at 1128.

139. *State v. Steineman*, 2005 WL 1940104, \*3 (Ohio Ct. Com. Pl. Mar. 23, 2005). See also *State v. Burk*, 2005 WL 786212, \*3 (Ohio Ct. Com. Pl. Apr. 26, 2005) (noting that the cohabitation factors clearly exclude other arrangements under which people may share living quarters: college roommates or mere friends may share a house, or even a bedroom, but share none of the other attributes of "cohabitation" under the *Williams* analysis. Short term flings or other casual relationships do not entail the degree of commitment and shared familial or financial responsibilities). See also *City of Cleveland v. Knipp*, 2005 WL 1017620, at \*7 (Ohio Mun. Mar. 10, 2005) (noting that the legislature was treating cohabiting couples like married couples, although it reasoned that the amendment did not preclude application of the domestic violence statute to non-marital couples because "the actual nature of the individual relationship, which is a much broader concept than its legal status, controls the court's determination of whether an allegation of domestic violence has been appropriately brought.").

140. See, e.g., *Coe v. Coe*, 2004 WL 1620787, at \*1 (Ohio App. July 21, 2004) ("the explicit language of the divorce decree in the present case must control the result, and that language requires that the *Williams* definition of cohabitation is dispositive.") *overruled by* *Cleveland v. Voies*, 2006 WL 440341 (Ohio App. Feb. 23, 2006).

is to treat the cohabitation as a marital equivalent—at least for certain purposes (e.g., determining if the support-receiving ex-spouse is still in need of support).<sup>141</sup> If the domestic violence statute elevates the status of the term “cohabitant”—thus violating the marriage amendment—then divorce agreements that treat “cohabitation” and “remarriage” as being equivalent are unenforceable because they improperly elevate the status of “cohabitation.” Yet, it would be most surprising if proponents of the marriage amendment intended a provision designed to remove a disincentive to marriage was rendered unconstitutional by the marriage amendment itself. Even if the goal of the amendment’s proponents was to “discourage cohabitation in any form—homosexual, heterosexual or otherwise,”<sup>142</sup> this amendment would not have been the way to achieve that goal.

The Ohio amendment was not particularly well drafted. However, it does not facially preclude the extension of any particular benefit. Thus, it would be permissible for the state to award insurance benefits,<sup>143</sup> parenting benefits,<sup>144</sup> or domestic abuse protections.<sup>145</sup> A separate question—one which must be worked out at a later date in the courts—involves the point at which the collection of benefits awarded is large enough to approximate the benefits of marriage and thus is precluded.

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141. See *Moell v. Moell*, 649 N.E.2d 880, 883 (Ohio App. 1994) (“The purpose of spousal support is to provide for the financial needs of the ex-spouse. If the ex-spouse is living with another person, and that person provides financial support or is supported, then the underlying need for spousal support is reduced or does not exist.”) (citing *Thomas v. Thomas*, 602 N.E.2d 385, 387 (Ohio App. 1991)).

142. *City of Cleveland v. Voies*, 2005 WL 1940135, at \*7 (Ohio Mun. Mar. 23, 2005), *rev’d by* 2006 WL 440341 (Ohio App. Feb. 23, 2006).

143. *Cf. Nat’l Pride at Work v. Granholm*, 2005 WL 3048040, at \*7 (Mich. Cir. Ct. Sept. 27, 2005) (holding that health care benefits are not an incident of marriage).

144. See *State v. Rodgers*, 827 N.E.2d 872, 880-81 (Ohio Ct. Com. Pl. 2005) (“Likewise, couples may have adoption rights without approximating the effect of marriage respecting children.”) Indeed, the Ohio Supreme Court has recognized that cohabiting, non-marital individuals can grant each other custodial rights, assuming that doing so would be in the children’s best interests. See *In re Bonfield*, 780 N.E.2d 241, 249 (Ohio 2002) (“The parents’ agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child.”).

145. *Cf. State v. Burk*, 843 N.E.2d 1254 (Ohio App. 2005); *State v. Adams*, 2005 WL 3196850 (Ohio App. Nov. 28, 2005); *City of Cleveland v. Knipp*, 2005 WL 1017620 (Ohio Mun. Mar. 10, 2005); *State v. Rodgers*, 827 N.E.2d 872 (Ohio Misc. 2005); *State v. McIntosh*, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005); *State v. Newell*, 2005 WL 1364937 (Ohio App. May 31, 2005) (listing courts holding the amendment and the statute compatible).



However, that difficult question is not implicated when there is only one benefit or, perhaps, a few benefits at issue. The fact that courts tend to be divided over a seemingly easy to answer textual question does not bode well for interpretations or applications of the Ohio amendment, in particular, or marriage amendments in general.

## 2. Michigan's Amendment Clarified

The Michigan amendment also might have been written more felicitously. The amendment reads: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."<sup>146</sup> The amendment seems to suggest that a marriage can only exist between one man and one woman and that Michigan may not recognize a marriage or similar union between members of the same sex.<sup>147</sup> Furthermore, where a particular benefit is conditioned on an individual being married, then that benefit cannot be accorded.

Notwithstanding the contrary claims of commentators,<sup>148</sup> the Michigan amendment does not preclude the extension of domestic partnership benefits.<sup>149</sup> Those who seek such benefits may neither claim nor wish to be married. Further, it goes without saying that marriage involves a great deal more than the possibility of being covered on a partner's insurance plan.<sup>150</sup>

It may be that the Michigan amendment was attempting to preclude the awarding of the incidents of marriage to same-sex couples, although that could have been more clearly stated.<sup>151</sup> However, such an interpretation can only plausibly account for the

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146. MICH. CONST. art. I, § 25 (2004).

147. See Baker, *supra* note 117, at 234 ("The Michigan text simply states that no relationship (other than marriage) is to be recognized as a "marriage or similar union" for any purposes of state law.").

148. But see *id.* ("Both proponents and opponents of the Michigan measure agree that 'similar union' precludes not only civil unions, but also domestic partnership recognition by state and local governments.").

149. See *Nat'l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005) (holding that the amendment did not preclude awarding such benefits).

150. See *id.* at \*4.

<sup>151</sup> See, e.g., La. Const. art. XII, § 15 (2004) ("No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.").

language of the amendment if the incidents language itself is understood in a particular way.<sup>152</sup>

One way to understand an amendment that incorporates a restriction on the extension of the incidents of marriage is as not referring to particular benefits at all, but to those rights which are *reserved* for married couples. For example, if the ability of one partner to adopt the child of the other without either being forced to surrender their parental rights is a right afforded to both unmarried and married individuals,<sup>153</sup> then such a right is not appropriately considered an incident of marriage. However, if (1) there is a right that is only extended to a married individual (e.g., the right to elect against a will); and (2) if the state's recognition of that individual's right also requires the state to recognize that individual's married or married-like status, then the Michigan amendment would seem to preclude recognition of that right.

Basically, the Michigan amendment seems to preclude the courts from extending a right to an unmarried individual if that right has been reserved by the legislature for married individuals.<sup>154</sup> However, the amendment does not bar the Michigan Legislature from extending a right to married and unmarried individuals alike.<sup>155</sup> Where a particular benefit is awarded to the married and unmarried alike (e.g., the possibility of two individuals sharing parenting responsibilities or the possibility that an individual could receive insurance coverage through a non-marital partner as part of a benefit plan), there is no need to recognize the relationship between the individuals as a marriage or even as being marriage-like, thus failing to trigger the amendment's strictures.

Legislatures can recognize a variety of relationships, making clear the respects in which they are similar and the respects in which they are not. For example, Vermont recognizes marriages,

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152. For a discussion of some of the different ways that the incidents language might be read, see *supra* notes 38, 40, 53-55, 61, 65 and accompanying text.

153. See *supra* note 70 and accompanying text.

154. Cf. *Nat'l Pride at Work*, 2005 WL 3048040 at \*4.

Health care benefits are not among the statutory rights or benefits of marriage. An individual does not receive health care benefits for his or her spouse as a matter of legal right upon getting married. If a spouse receives health care benefits, it is as a result of a contractual provision or policy directive of the employer. Likewise, health care benefits are not limited to those who are married.

*Id.*

155. See *id.*

civil unions, and reciprocal beneficiary status.<sup>156</sup> Marriages and civil unions are to be distinguished in terms of their symbolic rather than their practical implications, since civil unions are not marriages, but nonetheless implicate all of the rights and responsibilities of marriage.<sup>157</sup> Reciprocal beneficiary status, on the other hand, should not be considered the equivalent of marriage or civil union, either in terms of its symbolism or in terms of its practical effects, because its purposes are so limited.<sup>158</sup> Precisely because its purposes and effects are so limited, a legislature might recognize reciprocal beneficiary status without violating an amendment limiting the recognition of marital or marriage-like relationships.

#### *F. The Role of Intent When Interpreting Amendments*

When looking at any law which is not clear on its face, the court has the difficult task of trying to discern the intent behind it.<sup>159</sup> That is a task which is much easier said than done when seeking to determine the intent behind an amendment.

First, it is not clear whose intent is dispositive—that of the

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156. See 15 VT. STAT. ANN. § 8 (2006) ("Marriage is the legally recognized union of one man and one woman."); 15 VT. STAT. ANN. § 1201 (2) (2006) ("Civil union means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses."); 15 VT. STAT. ANN. § 1301 (2006).

(a) The purpose of this chapter is to provide two persons who are blood-relatives or related by adoption the opportunity to establish a consensual reciprocal beneficiaries relationship so they may receive the benefits and protections and be subject to the responsibilities that are granted to spouses in the following specific areas:

(1) Hospital visitation and medical decision-making under 18 V.S.A. § 1853;

(2) Decision-making relating to anatomical gifts under 18 V.S.A. § 5240;

(3) Decision-making relating to disposition of remains under 18 V.S.A. § 5220;

(4) Advance directives under chapter 111 of Title 18;

(5) Patient's bill of rights under 18 V.S.A. chapter 42;

(6) Nursing home patient's bill of rights under 33 V.S.A. chapter 73;

(7) Abuse prevention under 15 V.S.A. chapter 21.

(b) This chapter shall not be construed to create any spousal benefits, protections or responsibilities for reciprocal beneficiaries not specifically enumerated herein.

*Id.*

157. See *id.*

158. See *id.*

159. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

framers or those voting for it.<sup>160</sup> Even if one decided whose intent was dispositive, it is difficult to determine the content of that intent.

Ohio courts struggled with this issue. For example, one court noted the following:

In the official exit poll on election night, 27 percent of the voters said they supported full marriage rights [for same-sex couples], 35 percent supported civil unions, and only 27 percent opposed any legal rights for same-sex couples. In other words, the voters approved a measure opposed substantively by 62 percent of the very same voters.<sup>161</sup>

The court noted that CNN exit polling nationally “revealed the same kind of severely conflicted results . . . .”<sup>162</sup> However, rather than use that information to help inform the meaning of the amendment (e.g., by suggesting that the amendment must be construed very narrowly), the court simply suggested that “many, if not a majority, lacked an understanding of the Amendment’s full content and import when casting their ballots.”<sup>163</sup>

That same court quoted some of the campaign material which suggested, *inter alia*, that the amendment “does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons specifically for the reason that the relationship is one that seeks to imitate marriage.”<sup>164</sup> Of course, were this an accurate characterization of the amendment, the government could grant a variety of benefits to individuals in non-marital relationships as long as it was doing so for some reason other than that the relationship was marriage-like. For example, the government could offer domestic partner benefits if it felt that doing so was important when competing to hire and retain the most talented people.<sup>165</sup> Parental rights for non-marital

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160. See *State v. Rodgers*, 827 N.E.2d 872, 877 (Ohio Ct. Com. Pl. 2005).

161. *City of Cleveland v. Knipp*, 2005 WL 1017620, \*5 (Ohio Mun. Mar. 10, 2005) (citing Thomas Oliphant, *The Gay Marriage Deception*, THE BOSTON GLOBE, November 7, 2004.), *abrogated by State v. Burk*, 2005 WL 786212, \*5 (Ohio Ct. Com. Pl. Mar. 23, 2005) (The court held that “no person in an unmarried relationship could ever be subject to domestic violence for acts against their partner.”).

162. *Id.*

163. *Id.*

164. *Id.* at \*4.

165. Cf. William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 968 (noting that “Montgomery County’s provision [regarding domestic partnership benefits] says: ‘Providing domestic partner benefits will significantly enhance the County’s ability to recruit

partners could be recognized because that could promote the interests of children in a variety of tangible and non-tangible ways.<sup>166</sup> Indeed, even recognizing a duty of support for a non-marital partner or requiring an equal division of property acquired during a non-marital relationship<sup>167</sup> might be justified by appealing to the protection of the public fisc that might thereby occur.<sup>168</sup>

Both the polling and the campaign literature of those supporting the amendment counseled in favor of a narrow construction of the amendment.<sup>169</sup> Of course, if one were to emphasize some of the material opposing the amendment, then one might construe it broadly.<sup>170</sup> To some extent, Ohio courts differed from Michigan courts with respect to the reach of the amendment because they disagreed about (1) whether the

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and retain highly qualified employees and will promote employee loyalty and workplace diversity.”).

166. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315, 320 (Mass. 1993).

Adoption will not result in any tangible change in Tammy's daily life; it will, however, serve to provide her with a significant legal relationship which may be important in her future. At the most practical level, adoption will entitle Tammy to inherit from Helen's family trusts and from Helen and her family under the law of intestate succession (G.L. c. 210, § 6), to receive support from Helen, who will be legally obligated to provide such support (G.L. c. 209C, § 9; G.L. c. 273, § 1 [1992 ed.]), to be eligible for coverage under Helen's health insurance policies, and to be eligible for social security benefits in the event of Helen's disability or death (42 U.S.C. § 402[d] [1988]).

Of equal, if not greater significance, adoption will enable Tammy to preserve her unique filial ties to Helen in the event that Helen and Susan separate, or Susan predeceases Helen.

*Id.*

167. See *infra* notes 194-96196, 199-201, 202 and accompanying text for a discussion of the ALI domestic partnership recommendations.

168. Cf. Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 17 (2003) (“having one spouse as the first line of recourse to provide financial support for the other protects the public fisc”).

169. See *infra* note 171 and accompanying text.

170. See *City of Cleveland v. Voies*, 2005 WL 1940135, \*5 (Ohio Mun. Mar. 23, 2005), *rev'd* by 2006 WL 440341 (Ohio App. Feb. 23, 2006).

The League of Women Voters of the Cincinnati area also distributed literature which listed as one of its “cons”: “The amendment would invalidate locally approved decisions (for example, in Cleveland Heights and at The Ohio State University) to extend recognition and benefits to same-sex couples; moreover, the amendment would likely jeopardize adoptions, custody orders, wills, powers of attorney, and other legal arrangements that ‘approximate the effect’ of marriage for either same-sex or unmarried opposite-sex couples.”

*Id.* (citing LEAGUE OF WOMEN VOTERS, BROCHURE; ISSUE 1 GENERAL ELECTION (Nov. 2, 2004)).

proponents' versus the opponents' stated views accurately characterized the amendment's reach, and (2) whether only the official descriptions of the amendment should be considered.<sup>171</sup>

When attempting to interpret the Michigan amendment, the *National Pride at Work* court explained:

The words should be given their plain meaning at the time of ratification. The meaning must be that which realizes the intent of the people who ratified the Constitution. Where the text is plain and unambiguous, further construction is unnecessary. However, to clarify the meaning when necessary to determine the intent of the people, consideration must be given to the circumstances surrounding the provision's adoption and the purpose sought to be accomplished.<sup>172</sup>

Regrettably, it seems that very few of the amendments are viewed as being unambiguous. The Kentucky amendment, which reads a "status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized,"<sup>173</sup> is thought to be sufficiently ambiguous so as to

171. Compare *Nat'l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005) with *State v. Rodgers*, 827 N.E.2d 872, 877 (Ohio Ct. Com. Pl. 2005).

The official ballot argument written by Issue 1 proponents specifically stated, "Issue 1 does not interfere in any way with the individual choices of citizens as to private relationships they desire to enter and maintain." The court notes that while these statements are the opinions of the proponents who used the initiative process, they help the court interpret what would otherwise be unclear. In contrast, the court does not believe that statements of those who opposed Issue One (as this amendment appeared on the ballot) have value in a situation like this. Opponents' views are not necessarily motivated by concerns of legal accuracy as opposed to preelection hyperbole.

*Rodgers*, 827 N.E.2d at 877.

172. *Nat'l Pride at Work*, 2005 WL 3048040 at \*3.

173. KY. CONST. § 233A (2004). While the Kentucky amendment seems clear on its face, it may nonetheless be construed overbroadly. Cf. *Wood v. Comm'r. ex rel. Grayson*, 2005 WL 1258921, \*3 (Ky. Cir. Ct. May 26, 2005), *rev'd*, 2006 WL 440341.

[T]he Plaintiffs charge that the electorate was unable to discern from the language of the amendment, the impact upon: (1) suits for wrongful death, (2) intestate inheritance, (3) hospital visitation, (4) medical decisions, (5) decision making capacity for burial and funeral arrangements, (6) protection under Kentucky's domestic violence statutes for spouse abuse, (7) the ability of businesses and local governments to provide health insurance or bereavement leave to domestic partners, and (8) the legal status of existing contractual agreements between unmarried individuals such as durable powers of attorney, health surrogate designations, designations of guardianship, and adoption agreements . . . . This Court agrees with the Plaintiffs' contention that the above enumerated relational and legal rights and responsibilities may be affected by the passage of the Marriage Amendment. This Court is not particularly persuaded by the generalized response to these issues, as exemplified, "[t]he amendment

preclude the legislature from according hospital visitation rights to non-marital partners.<sup>174</sup> Further, the Nebraska amendment, which reads, “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska,”<sup>175</sup> is thought to be sufficiently ambiguous that it may preclude the legislature from giving a non-marital partner the right to dispose of a deceased partner’s remains.<sup>176</sup> If these amendments contain ambiguity sufficient to allow such broad interpretations, then almost any of the amendments can be construed in a very broad manner.

To make matters even more confusing, the background for these amendments is capable of being interpreted in vastly differing ways. Some courts considered the national context in which the amendment was adopted, e.g., that the *Goodridge*<sup>177</sup> decision had been recently decided,<sup>178</sup> which might mean that state marriage amendments should be narrowly construed to preclude the recognition of same-sex marriage.<sup>179</sup> Other courts pointed to the emergence of a national movement to strengthen marriage<sup>180</sup> and then concluded that the amendment’s purpose

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does not prohibit employers from giving domestic partner benefits, if that is what they feel is in their best interest.” See Attorney General’s Memorandum of Law in Support of Motion to Dismiss and Judgment on the Pleadings, pp. 3-4.

*Id.*

174. *Wood*, 2005 WL 1258921 at \*3.

175. NEB. CONST. art. I, § 29 (1999).

176. See *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 987 (D. Neb. 2005).

177. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the state’s same-sex marriage ban violated state constitutional guarantees).

178. *State v. Newell*, 2005 WL 1364937, \*5 (Ohio Ct. App. May 31, 2005).

We concur with appellee that the intent of the Defense of Marriage Amendment was to prohibit same sex marriage. The Defense of Marriage Amendment was specifically adopted in response to the decision of the Massachusetts’ Supreme Court in *Goodridge v. Department of Public Health* (2003), 440 Mass. 309, 798 N.E.2d 941[,] that the Massachusetts’ law limiting the protections, benefits and obligations of civil marriage to individuals of opposite sexes lacked a rational basis and violated state constitutional equal protection principles.

*Id.*

179. *City of Cleveland v. Voies*, 2005 WL 1940135, at \*7 (Ohio Mun. Mar. 23, 2005), *rev’d* by 2006 WL 440341 (Ohio App. Feb. 23, 2006) (noting “the growing cultural trend of promoting traditional marriage”).

180. *Id.*

was to discourage all forms of non-marital cohabitation.<sup>181</sup> As a separate matter, some courts noted that the voters supported the amendment after being warned that it was ambiguous and capable of a broad interpretation, as if those voters had thereby assumed the risk of a broad interpretation.<sup>182</sup>

The marriage amendments have created an intolerable situation, both because of the utter uncertainty regarding their reach and because of the fundamental nature of the rights which hang in the balance. Both plain meaning and public policy are being ignored in order to offer broad constructions.<sup>183</sup> While courts may eventually limit the damage caused by these amendments, the harm potentially caused to innocent individuals in the meantime simply cannot be justified.

#### G. A Veiled Attack on the American Law Institute?

It is quite clear that many of the marriage amendments, whether broadly or narrowly construed, preclude the recognition of same-sex marriages or civil unions. What is not sufficiently appreciated, however, is that a broad construction of these amendments may preclude legislatures from adopting many of the recommendations of the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations*.<sup>184</sup> Indeed, such a reading may impede states from adopting or enforcing their own version of *Marvin v. Marvin*.<sup>185</sup>

In *Marvin*, the California Supreme Court explained that:  
Adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to

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181. See *id.* at \*8 ("the fact that there is a political climate which disparages gay marriage and any non-traditional marital structures, suggests strongly that the intent of the Amendment was to eliminate any state-sanctioned relationships that are not traditional marriages").

182. See *id.* at \*4-5 (noting that the Governor had warned that the amendment was an ambiguous invitation to litigation that will result in unintended consequences for senior citizens and for any two persons who share living accommodations. There will be as many interpretations of the words, "[I]ntends to approximate the design, qualities, significance or effect of marriage," as there are judges in the state of Ohio (citing Governor Bob Taft News Release of October 13, 2004)).

183. See, e.g., *State v. Burk*, 2005 WL 3475812 (Ohio Ct. App. Mar. 23, 2005) (suggesting that domestic violence statutes can be applied to non-marital cohabitants without violating the state's marriage amendment); *State v. Adams*, 2005 WL 3196859 (Ohio Ct. App. Nov. 28, 2005).

<sup>184</sup> 184. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2003) [hereinafter "PRINCIPLES"].

185. 557 P.2d 106 (Cal. 1976).



contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property . . . . So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.<sup>186</sup>

Basically, the California Supreme Court suggested that non-marital partners can agree—as a matter of contract—to divide property or provide partner support if their relationship dissolves.<sup>187</sup> As long as the agreement is not based upon meretricious considerations (e.g., the provision of sexual services), the agreement is enforceable even if made outside of the context of marriage.<sup>188</sup> Some states have followed California's lead.<sup>189</sup> However, the fact that broadly construing the marriage amendments might preclude enforcement of *Marvin* agreements has not received enough attention.

The claim that the enforceability of *Marvin* agreements is put into jeopardy by the marriage amendments might seem surprising. After all, *Marvin* was decided thirty years ago<sup>190</sup> and is not likely viewed as a new threat requiring the passage of a state constitutional amendment to prevent its implementation. Nonetheless, a more recent proposal by the American Law Institute ("ALI"), which goes beyond *Marvin* palimony suits<sup>191</sup> in several respects,<sup>192</sup> might well have motivated some to press for marriage amendments.<sup>193</sup> Further, if the amendments are

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186. *Id.* at 116.

187. *See id.*

188. *See id.*

189. *Compare Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002) (permitting case involving alleged contract to divide property between domestic partners to proceed), *with Estate of Reaves v. Owen*, 744 So.2d 799, 802 (Miss. Ct. App. 1999) ("palimony is not recognized in Mississippi since it is void as against public policy" (citations omitted)).

190. *Marvin v. Marvin* 557 P.2d 106 (Cal. 1976).

191. *See* BLACK'S LAW DICTIONARY 1110 (6th ed. 1990) (defining palimony as a term that "has meaning similar to 'alimony' except that award, settlement or agreement arises out of nonmarital relationship of parties (i.e., nonmarital partners)"); *see also Estate of Reaves*, 744 So.2d at 802 ("Palimony gives unmarried persons a right to enforce a property division when the relationship dissolves.").

192. *See infra* notes 194-96, 199-201 and accompanying text for a discussion of the ALI proposal.

193. For secondary literature critical of the ALI proposal, *see*, for example, Lynn

interpreted to preclude adoption of the ALI proposal, they might also be interpreted to preclude the enforcement of *Marvin* agreements.

The ALI suggests that individuals who are domestic partners<sup>194</sup> be treated as having many of the same rights and obligations as marital partners.<sup>195</sup> For example, the ALI defines "domestic-partnership property"<sup>196</sup> and then suggests that it "should be divided according to the principles set forth for the division of marital property."<sup>197</sup> The ALI also suggests that with certain exceptions, "a domestic partner is entitled to compensatory payments on the same basis as a spouse"<sup>198</sup> in the event the relationship dissolves. Domestic partners can opt out of these obligations.<sup>199</sup> However, if they choose not to, they have significant rights and obligations with respect to each other.<sup>200</sup> That said, the ALI is not offering a new version of common-law marriage under another name.<sup>201</sup> As the ALI explains:

Where recognized, common-law marriage is fully equivalent to duly licensed ceremonial marriage. In terms of legal incidents, there is no distinction between a lawful common-law marriage and a lawful ceremonial marriage. By contrast, although American law has recognized *inter se* claims of domestic partners, it has generally declined to establish rights with respect to third parties and the state. Similarly, these Principles, by their limited scope, are confined to the *inter se* claims of domestic partners. Thus, the recognition of *inter se* claims of domestic partners in these Principles does not revive

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D. Wardle, *Deconstructing Family: A Critique Of The American Law Institute's "Domestic Partners" Proposal*, 2001 BYU. L. REV. 1189 (2001).

194. PRINCIPLES, *supra* note 184 at § 6.03(1) ("domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple").

195. See *infra* notes 196-98 and accompanying text.

196. PRINCIPLES, *supra* note 184 at § 6.04(1) (explaining that with one exception, "property is domestic-partnership property if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period").

197. *Id.* at § 6.05.

198. *Id.* at § 6.06(1)(a).

199. *Id.* at § 6.01(2) (suggesting that with certain exceptions a "contract between domestic partners that (i) waives or limits claims that would otherwise arise under this Chapter ... is enforceable according to its terms and displaces any inconsistent claims under this Chapter").

200. See *supra* notes 196-98 and accompanying text.

201. PRINCIPLES, *supra* note 184 at § 6.01 cmt. a ("This Chapter governs financial claims between parties to a non-marital relationship. It addresses the legal obligations that domestic partners, as defined for purposes of this Chapter, have toward one another at the dissolution of their relationship. Nothing in this Chapter creates claims against any other persons or the state.").

the doctrine of common-law marriage in jurisdictions that have abolished it.<sup>202</sup>

Thus, the ALI distinguishes domestic partnership from common-law marriage by noting that domestic partners have rights and obligations *vis a vis* each other, but that domestic partnership status—unlike common-law marriage—has no implications for third parties such as employers or the state.<sup>203</sup> While an employer might decide to extend benefits to domestic partners as a matter of equity or as a way of attracting or keeping good employees,<sup>204</sup> there is no legal obligation to do so.<sup>205</sup>

The ALI proposal has a variety of attractive features.<sup>206</sup> It is designed to bring about a fairer distribution of goods acquired during a qualifying relationship,<sup>207</sup> and may even help society avoid shouldering certain burdens in the event that a domestic partnership relationship ends and one of the parties has no assets or means of support.<sup>208</sup> However, the point here is not to discuss whether particular state legislatures should adopt the ALI recommendations in whole or in part,<sup>209</sup> but merely to suggest that a broad reading of the marriage amendment might preclude a state legislature from adopting these recommendations even were the legislature to believe that doing so is good public policy. If a marriage amendment precludes a non-marital partner from receiving insurance benefits or having the ability to determine the disposition of a non-marital loved one's remains,<sup>210</sup> then the amendment would likely also be interpreted as precluding domestic partner support or the distribution of domestic partnership property. By the same token, the amendment might well be interpreted to preclude a *Marvin* arrangement where non-marital partners treat their relationship as a marriage for support or property division purposes at dissolution. However, if the marriage amendment is read narrowly, then it might not preclude adoption of the ALI recommendations or enforcement of *Marvin*

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202. *Id.*

203. *Id.*

204. *See supra* note 165.

205. *Cf. Rusack v. Harsha*, 470 F.Supp. 285, 291 (1978) (stating that a Restatement published by the ALI is not binding on the court).

206. *See infra* notes 207-08.

207. PRINCIPLES, *supra* note 184 at § 6.02(1).

208. *See id.* at § 6.02(2).

209. *See generally* Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 BYU L. REV. 1135 (2001) (listing reasons why adopting the recommendations would be good public policy).

210. *See infra* accompanying text note 222.

agreements, since there are a whole host of third party benefits that are associated with marriage, but are not associated with *Marvin* agreements or ALI domestic partnerships.<sup>211</sup>

Most, if not all, of the state marriage amendments cannot plausibly be construed as limiting the power of the state legislature to incorporate either *Marvin* agreements or the ALI domestic partners proposal into local law. None of the amendments include any language that refers to or even alludes to *Marvin* agreements or the ALI domestic partners proposal, and should not be broadly construed to preclude the state from effectuating policies which will benefit both the state and many non-traditional families.

## II. The Constitutional Implications of the State Marriage Amendments

When construed broadly, the marriage amendments are vulnerable to federal constitutional attack on equal protection and due process grounds. Not only should many of these amendments be construed narrowly in light of their plain language and good public policy, but also to reduce their vulnerability to being invalidated as a violation of federal constitutional guarantees.

### A. Marriage Amendments Violate Equal Protection Guarantees

State marriage amendments implicate a variety of constitutional concerns, especially when they are construed broadly. They impose unjustifiable burdens on the state, society, and individuals and violate the Fourteenth Amendment's equal protection guarantees.

Recently, Nebraska's marriage amendment was struck down in federal district court in *Citizens for Equal Protection, Inc. v. Bruning*.<sup>212</sup> The court made clear that it was not striking down the amendment because it precluded same-sex marriage,<sup>213</sup> but because the "amendment goes far beyond merely defining marriage as between a man and a woman."<sup>214</sup> The court noted

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211. See *supra* notes 201-02 and accompanying text for a discussion of why the ALI provision is not simply a recommendation that common-law marriage be recognized.

212. 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd* 455 F.3d 859 (8th Cir. 2006).

213. See *id.* at 995 n.11 ("The court need not decide whether and to what extent Nebraska can define or limit the state's statutory definition of marriage.")

214. *Id.* at 995.

that that the amendment “potentially prohibits or at least inhibits people, regardless of sexual preference, from entering into numerous relationships or living arrangements that could be interpreted as a same-sex relationship ‘similar to’ marriage,”<sup>215</sup> and struck down the amendment because of its “expansive reach.”<sup>216</sup>

Understanding that the “incidents of marriage vary,”<sup>217</sup> the *Bruning* court explained that many “social or associational arrangements run the risk of running afoul of the broad prohibitions”<sup>218</sup> of the amendment. Of course, the Nebraska amendment does not expressly include a prohibition on extending the incidents of marriage to non-marital couples. Instead, it suggests that the “uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”<sup>219</sup> Nonetheless, the Nebraska Attorney General interpreted the amendment as precluding the extension of any rights which might arise as a consequence of marriage.<sup>220</sup> This not only seems to preclude awarding the incidents of marriage, but might be interpreted to include any rights arising from marriage,<sup>221</sup> even those not traditionally considered as the “incidents of marriage.”<sup>222</sup>

The *Bruning* court pointed out that the Nebraska

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215. *Id.*

216. *Id.* at 996

217. *Id.* at 995.

218. *Id.*

219. See NEB. CONST. art. I, § 29 (1999).

220. *Bruning*, 368 F. Supp. 2d at 988.

Because “the rights being created are *placed on the same plane as rights* which arise as a consequence of the marital relationship,” the Attorney General found that the proposed legislation “would be *giving legal effect to a same sex relationship, thereby validating or recognizing it,*” which would run counter to Section 29.

*Id.*

221. See *supra* notes 48-50 and accompanying text.

222. Cf. *Bruning*, 368 F. Supp. 2d at 999-1000.

Plaintiffs seek only “a level playing field” that would permit them to access the Nebraska Unicameral to lobby for legal protections that have already been permitted in other states. Plaintiffs assert that they seek only to *advocate* to members of the Unicameral for passage of legislation that would make domestic partners responsible for each others’ living expenses; allow a partner hospital visitation; provide for a partner to make decisions regarding health care, organ donations and funeral arrangements; permit bereavement leave; permit private employer benefits; allow survivorship, intestacy and elective share; and permit same-sex couples to adopt children.

*Id.*

amendment bore a striking resemblance to the Colorado amendment<sup>223</sup> struck down by the United States Supreme Court in *Romer v. Evans*.<sup>224</sup> When striking down the Colorado amendment—which operated to “repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government”<sup>225</sup>—the *Romer* Court suggested that the amendment was “at once too narrow and too broad,”<sup>226</sup> because “it identifie[d] persons by a single trait and then denies them protection across the board.”<sup>227</sup> The range of benefits that could not be sought absent repeal of the Nebraska amendment was extremely large.<sup>228</sup>

The *Bruning* court mentioned another similarity between the Nebraska and Colorado amendments, namely, that the court could only conclude that “the intent and purpose of the amendment is based on animus against . . . [the affected] class.”<sup>229</sup> This mirrors the *Romer* Court’s observation that the Colorado amendment’s “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.”<sup>230</sup>

In some ways, the Nebraska amendment was especially vulnerable to being struck down as a violation of equal protection guarantees. This was because it stated that the “uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”<sup>231</sup> In effect, the state was distinguishing among non-marital relationships—precluding the recognition of

223. *Id.* at 1002 (“The court finds that Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*. Although not mentioned by name, the State has focused primarily on the same class of its citizens as did Colorado.”).

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

225. *Id.* at 629.

226. *Id.* at 633. See also *Bruning*, 368 F. Supp. 2d at 1002 (noting that the reach of the Nebraska amendment “is at once too broad and too narrow to satisfy its purported purpose of defining marriage, preserving marriage, or fostering procreation and family life. It is too narrow in that it does not address other potential threats to the institution of marriage, such as divorce. It is too broad in that it reaches not only same-sex ‘marriages,’ but many other legitimate associations, arrangements, contracts, benefits and policies”).

227. *Romer*, 517 U.S. at 633.

228. See *supra* note 222 and accompanying text.

229. *Bruning*, 368 F. Supp. 2d at 1002.

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

231. See NEB. CONST. art. I, § 29 (1999).

same-sex, but not different-sex, non-marital relationships.<sup>232</sup> Even those seeking to promote marriage might have trouble justifying this kind of differential treatment.

Many of the amendments do not focus on same-sex non-marital relationships in particular but instead preclude the recognition of non-marital relationships more generally.<sup>233</sup> Perhaps this more-general focus is offered because the proponents wished to discourage non-marital cohabitation more generally,<sup>234</sup> or because they wished to avoid any difficulties that might arise from targeting same-sex couples in particular.<sup>235</sup>

In her concurrence to *Lawrence v. Texas*,<sup>236</sup> Justice O'Connor noted that one of the defects in Texas's same-sex sodomy prohibition was that the law resulted in "discrimination against homosexuals as a class in an array of areas outside the criminal law."<sup>237</sup> She explained that when a law exhibits "a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."<sup>238</sup> She further pointed out that the Court has "been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where . . . the challenged legislation inhibits personal relationships."<sup>239</sup>

Marriage amendments as a general matter preclude same-sex couples from marrying<sup>240</sup> and are designed to—and do—inhibit personal relationships.<sup>241</sup> Further, it is difficult to maintain that the refusal to recognize same-sex marriages and civil unions does

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232. Cf. Baker, *supra* note 117, at 230.

This approach, which singled out same-sex relationships, has been recently challenged on equal protection grounds in federal court, not because same-sex relationships are denied the protections of marriage, but under an argument that the amendment treats them differently than other (heterosexual) non-marital relationships.

*Id.*

233. See ARK. CONST. amend. 83 (2004); KY. CONST. § 233A (2004); NEB. CONST. art. I, § 29 (1999); N.D. CONST. art. XI, § 28 (2004); S.D. CONST. art. 21, § 9 (2005); TEX. CONST. art. I, § 32 (2005); UTAH CONST. art. I, § 29 (2004).

234. See *supra* note 142 and accompanying text.

235. See *infra* notes 237-47 and accompanying text for a discussion of the possible constitutional ramifications of targeting on the basis of orientation.

236. 539 U.S. 558 (2003) (O'Connor, J., concurring).

237. *Id.* at 584.

238. *Id.* at 580.

239. *Id.*

240. See *supra* note 3 and accompanying text.

241. See *supra* notes 4-5 and accompanying text.

not somehow target the basis of orientation. Such classifications should be subject—at the very least—to heightened rational basis review.<sup>242</sup>

When discussing statutes which target orientation, Justice O'Connor implied that same-sex marriage bans had the potential to withstand constitutional scrutiny.<sup>243</sup> Yet, as Justice Scalia suggests, Justice O'Connor does not mention any legitimate state interests which might justify same-sex marriage bans.<sup>244</sup> Further, even if the state came up with a reason capable of withstanding scrutiny, whether the state could also justify refusing to extend the benefits of marriage to same-sex couples is a separate issue.<sup>245</sup> Finally, it seems even more difficult to justify the policy which Nebraska tried to effectuate—precluding same-sex, but not different-sex, non-marital couples from receiving benefits from the state.<sup>246</sup>

It is difficult to understand how same-sex marriage bans can be reconciled with contemporary equal protection jurisprudence.<sup>247</sup>

242. See Mark Strasser, *Monogamy, Licentiousness, Desuetude, and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas*, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 124-33 (2005) (discussing why heightened rational basis review is too weak a standard).

243. *Lawrence*, 539 U.S. at 585 (O'Connor J., concurring) ("Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.")

244. See *id.* at 601-02 (Scalia, J., dissenting).

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O'Connor seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest in § 21.06 could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society." In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as "preserving the traditions of society" (good); or invalidate them by characterizing them as "expressing moral disapproval" (bad).

*Id.*

245. Cf. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (holding that the Vermont Constitution required that same-sex couples be eligible to receive the benefits of marriage, even if the state had to create a new status in order to effectuate that requirement).

246. See *Romer v. Evans*, 517 U.S. 620, 631-32 (arguing that a state constitutional amendment preventing legislation to protect against discrimination based on sexual orientation violates equal protection). Precluding benefits to same-sex couples would very similar to the facts in *Romer*.

247. See generally Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophisticated Rhetoric*, 69 BROOK. L. REV. 1003, 1021-27 (2004).



It is even harder to see how equal protection guarantees can permit a state to refuse to extend to same-sex, non-marital couples and their families the benefits which they need as much as, if not more than, comparably situated different-sex couples and their families. Same-sex couples, like different-sex couples, are raising children and caring for elderly parents. Basically, such families need and deserve the same protections and benefits that different-sex families need and deserve. Both the states and these individual families are harmed when these benefits and protections are not provided.

Suppose that a state marriage amendment is not construed to impose burdens on same-sex couples in particular, but instead on non-marital couples in general. Even such an amendment, if broadly construed, might be held to violate equal protection guarantees. For example, in *Phelps v. Johnson*, an Ohio Court of Common Pleas struck down part of the Ohio constitutional amendment after broadly construing it.<sup>248</sup> The court interpreted the amendment to preclude application of the Domestic Violence Statute to unmarried cohabitants and then suggested that “differentiation between the protections provide[d] married victims of domestic violence, *vis a vis* unmarried victims, bears no rational relationship to a legitimate state interest.”<sup>249</sup> After all, the Ohio Legislature had recognized that special domestic violence dangers arise in the context of relationships, and that these dangers require specific legislative action.<sup>250</sup>

Arguably, the refusal to extend domestic violence protection to non-marital cohabitants is an example of treating relevantly similar parties dissimilarly without sufficient justification, and is the kind of differential treatment that the Equal Protection Clause is designed to prevent.<sup>251</sup>

It is unclear whether the kind of analysis offered in *Phelps* will be upheld on review, especially because the amendment—when construed narrowly—would avoid the difficulties suggested in the *Phelps* opinion. Nonetheless, the opinion at least suggests that there may be equal protection difficulties if the amendment is

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248. See *Phelps v. Johnson*, 2005 WL 4651081, at \*3 (Ohio Ct. Com. Pl. Nov. 28, 2005).

249. See *id.*

250. See *State v. Williams*, 683 N.E.2d 1126, 1128 (Ohio 1997) (discussing the Ohio Supreme Court’s recognition that the legislature had found that individuals in relationships required special protection from domestic violence).

251. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating “all persons similarly situated should be treated alike.”).

construed very broadly—a point which other courts have also suggested.<sup>252</sup> Further, if the *Phelps* analysis is rejected on the theory that (1) a statutory classification distinguishing between marital and non-marital relationships must only be rationally related to a legitimate state interest to survive rational basis review, and (2) the promotion of marriage is a legitimate end and a statute offering special protections when domestic abuse occurs within the context of marriage creates a greater incentive to marry, then there may well be other implications which many amendment supporters may live to regret.

Suppose that someday in the distant future the United States Supreme Court were to hold that same-sex marriage is protected by federal constitutional guarantees. Such an occurrence would likely make unenforceable all of the state constitutional amendments precluding same-sex couples from marrying.<sup>253</sup> Yet, it is unclear how some of the provisions restricting non-marital benefits would be construed. After all, if the sole concern had been to preclude same-sex couples from receiving marital benefits, the amendment might have been worded like Georgia's.<sup>254</sup>

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252. *Cf. City of Cleveland v. Voies*, 2005 WL 1940135, at \*3 (Ohio Mun. Mar. 23, 2005), *rev'd*, 2006 WL 440341 (Ohio App. 8 Dist. Feb. 23, 2006).

Finally, in an alternative argument, the City contends that a judicial interpretation which renders void that portion of the domestic violence statute that protects unmarried, cohabiting victims would violate the Equal Protection Clause of the U.S. Constitution's 14th Amendment. This is due to the fact that unmarried, cohabiting victims would not be afforded the additional statutory protections that the domestic violence statute provides a married victim or cohabiting victim who has children with the offender. If it is in fact determined that the Equal Protection Clause is violated, the city suggests that the Amendment, rather than the domestic violence statute, be found unconstitutional.

*Id.*

253. *See Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). When the Court struck down interracial marriage bans, several state constitutional provisions were thereby made unenforceable.

254. *See* GA. CONST. art I, § 4, para. 1 (2004).

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.

*Id.*

Those amendments which preclude non-marital couples from receiving benefits might be construed as intended to apply to same-sex and different-sex, non-marital couples alike and, further, might be thought of as rationally related to the promotion of marriage. It might well be that such amendments would not be struck down on equal protection grounds,<sup>255</sup> which might require individuals to expend time and money to amend their state constitutions so that non-marital couples and their children could receive the kinds of benefits that married couples and their children need.<sup>256</sup> It is plausible to believe that many of the amendment supporters would regret their votes if they precluded non-marital couples from receiving benefits that same-sex, married couples enjoy.

*B. Broadly Construed Marriage Amendments Violate Due Process Guarantees*

The marriage amendments may implicate due process guarantees as well. Not only may there be difficulties involved in the state's refusal to recognize same-sex unions, but there may be additional issues implicated by a broad construction, which, for example, requires that certain parental rights established in one state not be recognized in another.<sup>257</sup> Courts should construe the marriage amendments narrowly to reduce the potential equal protection and due process difficulties.<sup>258</sup>

In *Lawrence*,<sup>259</sup> the United States Supreme Court held that the Texas law criminalizing same-sex relations was unconstitutional on due process grounds.<sup>260</sup> Such a holding may affect whether same-sex relationships are protected by the Due

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255. Cf. *Voies*, 2005 WL 1940135, at \*3.

256. A separate issue for state courts would be whether the provisions of the amendments would be severable or whether, instead, the provision reserving benefits for married couples would never have been approved without the other provision precluding same-sex couples from marrying.

257. Cf. Chad Graham, *Gay in the Red States*, THE ADVOCATE 34, Feb. 15, 2005, available at 2005 WLNR 2201536.

In Oklahoma, Anne Magro and her partner, Heather Finstuen, have seen firsthand how quickly lawmakers can take away protections. The couple joined a lawsuit by Lambda Legal to try to repeal Oklahoma's law against adoptions by gays, which was signed into law May 4. It outlaws adoptions by gay and lesbian parents from out of state, even for those who've legally cemented their adoption rights in other states.

*Id.*

258. *Branch v. Smith*, 538 U.S. 254, 272 (2003).

259. *Lawrence v. Texas*, 539 U.S. 558 (2003).

260. See *id.* at 578.

Process Clause because the Court's holding—that same-sex relations, but not same-sex relationships, are protected by due process guarantees—would invert the traditional prioritization that due process guarantees are thought to offer.<sup>261</sup> Indeed, even the *Bowers* Court recognized that due process guarantees protect family relations.<sup>262</sup> However, unlike the *Lawrence* Court, the *Bowers* Court failed to recognize that same-sex partners, like different-sex partners, have relationships.<sup>263</sup>

The *Bowers* Court believed that there was “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other.”<sup>264</sup> The *Lawrence* Court chided the *Bowers* Court for its “failure to appreciate the extent of the liberty at stake,”<sup>265</sup> explaining, “[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”<sup>266</sup> The *Lawrence* Court understood that same-sex partners engaging in sexual relations might be doing so in the context of a committed relationship, where the sexual conduct is “but one element in a personal bond that is more enduring.”<sup>267</sup>

By analogizing same-sex relationships to marital relationships and holding that adult, consensual, same-sex relations are constitutionally protected, at least in part, the *Lawrence* Court implies that same-sex relationships have constitutional protection.<sup>268</sup> Indeed, Justice Scalia suggests that the *Lawrence* “opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition

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261. See generally Strasser, *supra* note 246, at 1017-21 (developing the argument that the Court inverted the prioritization).

262. See *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Skinner v. Oklahoma ex rel. Williamson* (316 U.S. 535 1942)).

263. See *Lawrence*, 539 U.S. at 567 (“That statement, we now conclude, discloses the Court’s own failure to appreciate the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain conduct demeans the claim the individual put forward.”).

264. *Bowers*, 478 U.S. at 191.

265. *Lawrence*, 539 U.S. at 567.

266. *Id.*

267. *Id.*

268. *Cf. id.*

in marriage is concerned.”<sup>269</sup>

Perhaps Justice Scalia is incorrect. In the future, someone may be able to offer a not-yet-articulated reason to restrict marriage to different-sex couples—one that is sufficiently compelling to pass constitutional muster. Even if there is such a reason, it likely would not justify a refusal to accord same-sex couples a variety of benefits to which they would be entitled if they could marry.<sup>270</sup>

Suppose that the issue of whether the Due Process Clause protects same-sex unions is bracketed.<sup>271</sup> The amendments at issue might still implicate due process concerns insofar as they interfere with parent-child relationships.

Once an adoption is final, the parent-child relationship is treated as if the parent and child are related by blood.<sup>272</sup> As the United States Supreme Court has recognized, the liberty “interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>273</sup> Insofar as the marriage amendments are interpreted to preclude the recognition of the parental rights of the unmarried, the due process protections of the Fourteenth Amendment are triggered.<sup>274</sup>

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269. *Id.* at 604-05 (Scalia, J., dissenting).

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution?”

*Id.* (citations omitted).

270. *Cf. Baker v State*, 744 A.2d 864, 867 (Vt. 1999) (suggesting that benefits, although not marriage, had to be extended to same-sex couples).

271. Courts striking down a marriage amendment in part or in whole tended to do so without speaking to whether the amendment’s reserving marriage for different-sex couples violated constitutional guarantees. *See Bruning*, 368 F. Supp. 2d 980, 985 n.1 (D. Neb. 2005), *rev’d* 455 F.3d 859 (8th Cir. 2006) (“The court is not asked to decide whether a state has the right to define marriage in the context of same-sex and opposite-sex relationships.”); *Phelps v. Johnson*, 2005 WL 4651081, at \*1 (Ohio Ct. Com. Pl. Nov. 28, 2005) (“the court finds that this Judgment Entry should not be construed to express any opinion whatsoever regarding the issue of whether same-sex marriages should be legally recognized in the State of Ohio”).

272. *See Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982) (“Adoptive parents have all the legal rights . . . in their children as natural parents.”).

273. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

274. *See id.*

In *Stanley v. Illinois*,<sup>275</sup> the Court made clear that the rights of never-married parents cannot be ignored by the state,<sup>276</sup> and the Court in *Troxel v. Granville*<sup>277</sup> reaffirmed its commitment to that principle.<sup>278</sup> Those who interpret a state marriage amendment to prevent the recognition of parental rights of unmarried individuals invite the courts to strike down the amendment as unconstitutional.

When suggesting that the marriage amendments may well implicate due process protections even after bracketing the constitutionality of precluding same-sex couples from marrying, the point, of course, is not to deny the importance of the right to marry or the burden imposed by states precluding same-sex couples from enjoying that right. On the contrary, as the United States Supreme Court recognized in *Zablocki v. Redhail*,<sup>279</sup> the "right to marry is of fundamental importance for all individuals."<sup>280</sup> Assuming no changes to the Federal Constitution,<sup>281</sup> when some future Court finally recognizes that the right to marry a same-sex partner is protected by the Federal Constitution, all states will have to recognize that right.

The *Lawrence* Court noted:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>282</sup>

The current Court may not be ready to recognize that same-sex marriage restrictions, while "once thought necessary and proper, only serve to oppress."<sup>283</sup> However, even if that is true, both the United States Supreme Court and lower courts should see

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275. 405 U.S. 645 (1972).

276. *See id.* at 658.

277. 530 U.S. 57 (2000).

278. *See supra* note 272 and accompanying text.

279. 434 U.S. 374 (1978).

280. *Id.* at 384.

281. *See generally* Symposium, *Federal Marriage Amendment: Yes or No?*, 2 U. ST. THOMAS L.J. 1-198 (2004) (discussing the proposal to amend the Federal Constitution to preclude same-sex couples from marrying).

282. *Lawrence v. Texas*, 539 U.S. 558, 578-579 (2003).

283. *Id.* at 579.

that the marriage amendments—when broadly construed—violate both equal protection and due process guarantees.

### Conclusion

Several states have passed marriage amendments, and it is safe to assume that more will be passed in the near future. As a general matter, these amendments are designed to preclude same-sex couples from marrying. However, the amendments vary greatly with respect to what they do in addition to that. Thus far, the courts have had great difficulty in figuring out how to interpret these amendments. Regrettably, some courts have gone far beyond the language of the amendments themselves to make them much more burdensome. This can neither be justified in terms of the canons of amendment construction nor good public policy.

Most, if not all, of the marriage amendments implicate constitutional guarantees because, at the very least, they target on the basis of orientation and are designed to inhibit personal relationships. Broad constructions of these amendments are even more constitutionally vulnerable because they impose greater burdens on those adversely affected. Courts considering how to interpret their own state's marriage amendment have ample reason to construe them narrowly, including the canon of interpretation which requires courts, where possible, to offer interpretations of statutes and amendments which make them in accord with constitutional requirements.<sup>284</sup> In most cases, a broad interpretation of the state's marriage amendment will not account for the intentions of those passing it, the language of the amendment itself, good public policy, constitutional requirements, or principles of fairness. Judges must do their utmost to reduce the harm imposed by these amendments, for the sake of society as a whole and the affected individuals themselves. To do otherwise would not only involve adding insult to injury, but also shirking their judicial responsibilities.

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284. *Branch v. Smith*, 538 U.S. 254, 272 (2003) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result.").

