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Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?

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EXPLORING THE IMPACT OF THE MARRIAGE AMENDMENTS: CAN PUBLIC EMPLOYERS OFFER DOMESTIC PARTNER BENEFITS TO THEIR GAY AND LESBIAN EMPLOYEES?

Tiffany C. Graham*

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I. INTRODUCTION

Over the course of the past decade, the question of same-sex marriage has been one of the most contentious issues affecting this country. Starting in 1998, forty-five states prohibited the creation or recognition of same-sex marriage,¹ and thirty states solidified their positions through the passage of state constitutional amendments.² Eighteen of these amendments extended their prohibitions even farther by refusing to create or recognize civil unions, domestic partnerships, or any other alternative to traditional marriage that was patterned after marriage.³ It is this last group of amendments that currently poses a potentially intractable problem: Is the language employed by these amendments so broad that they arguably prevent public entities⁴ from providing domestic partner benefits to their gay and lesbian employees? Public institutions around the country – especially institutions of higher learning – have struggled with this

¹ See National Convention of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited June 11, 2009).

² See *id.*; see also ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5; FLA. CONST. art. I, § 27. *But see* HAW. CONST. art. I, § 23 (allowing the legislature to define the meaning of marriage). Even though the Hawaii voters did not foreclose the possibility of same-sex marriage by supporting a provision that flatly prohibited the establishment of such unions, the legislature ultimately passed a statute which accomplished this goal. See National Convention of State Legislatures, *supra* note 1.

³ See Appendices 1-2. The state amendments referenced here are the following: Alabama (ALA. CONST. art. I, §36.03); Florida (FLA. CONST. art. I, § 27); Georgia (GA. CONST. art. I, § 4, P1); Idaho (IDAHO CONST. art. III, § 28); Kansas (KAN. CONST. art. XV, § 16); Kentucky (KY. CONST. § 233A); Louisiana (LA. CONST. art. XII, §15); Michigan (MICH. CONST. art. I, § 25); Nebraska (NEB. CONST. art. I, § 29); North Dakota (N.D. CONST. art. XI, § 28); Ohio (OHIO CONST. art. XV, § 11); Oklahoma (OKLA. CONST. art. II, § 35); South Carolina (S.C. CONST. art. XVII, § 15); South Dakota (S.D. CONST. art. XXI, § 9); Texas (TEX. CONST. art. I, § 32); Utah (UTAH CONST. art. I, § 29); Virginia (VA. CONST. art. I, § 15-A); and Wisconsin (WIS. CONST. art. XIII, § 13). These amendments are notable for two reasons: (1) they represent an effort by voters to restrain “activist” judges who might force their states to legalize gay and lesbian relationships, popular discomfort with the idea notwithstanding, and (2) they are typified by the use of far-reaching, ambiguous language that has swept partner benefits plans within their arguable reach.

⁴ The prohibitions in the amendments should apply only to public entities because the language used implies that proof of state action is necessary to establish a violation of the amendment. See Appendices 1-3 (noting that many of the amendments prohibit the recognition of same-sex marriage or similar regimes); see also discussion *infra* Part III.B. (arguing that recognition is a term of art that requires state action for its operation).

issue. If current law in their states prevents them from offering domestic partner benefits, how can they compete effectively for talented gay and lesbian employees, and retain the ones they already have?

This concern is neither trivial nor hypothetical. The University of Wisconsin, for instance, recently lost a top nanotechnology researcher to the University of Pennsylvania because Penn, unlike Wisconsin, offers a domestic partner benefits plan.⁵ Partially for identical reasons, another Wisconsin employee – this time, a highly-placed administrator – took a deanship position at Arizona State University.⁶ The Student Housing Director at the University of Kansas recently expressed her support for a proposed partner benefits plan so that she could cover her soon-to-be-retired life partner.⁷ Even though she and her partner wished to remain in Kansas, the director noted that moving to a school in another state would net her the benefits that she and her partner needed.⁸ This controversy over domestic partner benefits also became an issue at the University of Texas at Austin, where a lecturer in Arabic staged a hunger strike to publicize the university's failure to offer partner benefits to its gay and lesbian employees.⁹ The university, however, maintained that its hands were tied: state law prevented it from offering family or spousal benefits to

⁵ HUMAN RIGHTS CAMPAIGN FOUNDATION, *THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS* 27 (2006-2007), http://www.hrc.org/documents/State_of_the_Workplace.pdf [hereinafter *THE STATE OF THE WORKPLACE*] (discussing some of the consequences of not offering domestic partner benefits).

⁶ Megan Twohey, *UW Dean Cites Benefits in Leaving*, MILWAUKEE JOURNAL SENTINEL, June 14, 2005, available at <http://www.jsonline.com/story/index.aspx?id=333480> (discussing the political controversy surrounding domestic partner benefits in Wisconsin). The administrator stated that Wisconsin had lost employee candidates when they realized that the university did not offer partner benefits. Moreover, she noted that several of her colleagues had begun looking for new jobs because of the lack of partner benefits.

⁷ Jonathan Kealing, *Benefits Urged for Domestic Partners*, LAWRENCE JOURNAL-WORLD, Mar. 5, 2008, available at www2.ljworld.com/news/2008/mar/05/benefits_urged_domestic_partners/ (discussing the conclusion reached by the Kansas University's University Senate Executive Committee that the school should offer domestic partner benefits).

⁸ *Id.*

⁹ See Scott Jaschik, *Hunger Strike for Partner Benefits*, INSIDE HIGHER ED, Jan. 21, 2008, <http://www.insidehighered.com/layout/set/print/news/2008/01/21/hunger>.

any person not recognized as a spouse or family member under Texas law.¹⁰

In addition, public employers in Michigan, Ohio, Kentucky, Idaho, and Louisiana – each of whose amendments falls into the problematic category – have addressed explicit challenges to their ability to offer partner benefits to their gay and lesbian employees. The Michigan Supreme Court, for instance, recently became the first, and to date only, court of last resort in the nation to find that the marriage amendment in its state prohibited public employers from premising the receipt of partner benefits on the existence of an employee's gay or lesbian relationship.¹¹ Beyond that, a state legislator in Ohio filed an unsuccessful suit against Miami University, alleging that its domestic partner benefits program violated the marriage amendment.¹² Similarly, the Kentucky Senate recently passed a bill that prohibits government agencies from offering partner benefits to their gay and lesbian employees.¹³ In Idaho, the Attorney General issued an opinion stating that the City of Moscow's decision to offer benefits to the domestic partners of its employees likely "constituted recognition of [a domestic legal union other than marriage]" in violation of the marriage amendment.¹⁴ Finally, the City of New Orleans successfully defended a claim that its decision to provide benefits to the domestic partners of its gay and lesbian employees did not implicate the marriage laws of the state.¹⁵ Other challenges potentially loom on the horizon.¹⁶

¹⁰ See *id.*

¹¹ *National Pride at Work, Inc. v. Michigan*, 748 N.W.2d 524, 543 (Mich. 2008).

¹² See *Brinkman v. Miami Univ.*, No. CA2006-12-313, 2007 WL 2410390, at *1 (Ohio Ct. App. Aug. 27, 2007). The trial court dismissed the suit on standing grounds, and the Court of Appeals affirmed.

¹³ See Stephanie Steitzer, *Bill Bans Same-Sex Partner Benefits*, THE COURIER-JOURNAL, Jan. 31, 2008, at 1B. The University of Kentucky and the University of Louisville began offering partner benefits in 2006. They have argued that passage of this bill will hamper their ability to recruit the most talented individuals.

¹⁴ *City of Moscow, Health Insurance Policy*, Idaho Op. Att'y Gen. 9 (Feb. 4, 2008), <http://www.moscow.id.us/PDF%20Documents/AttorneyGeneralLetter.pdf>.

¹⁵ See *Ralph v. City of New Orleans*, 08-0767, p.17 (La. App. 4 Cir. 1/15/09); 4 So. 3d 146.

¹⁶ The local governments of Dallas, Texas and Travis County, Texas (which includes Austin) offer medical benefits, dental benefits, and COBRA to government employees. See Sarah Coppola, *City Weighs Cost of Higher Health Plan*, Austin-American Statesman, May 6, 2006, at D1. In addition, Ohio State University offers health care benefits to the domestic partners of its employees. See THE STATE OF THE WORKPLACE, *supra* note 5, at 52

Based on the experiences of states like Michigan, Ohio, Kentucky, Idaho, and Louisiana, public employers who premise the receipt of domestic partner benefits on the existence of an employee's gay or lesbian relationship might find themselves subject to lawsuits which claim that the marriage amendments in their states preclude the dispensation of these benefits. Courts, then, will have to address a variety of interpretive questions as they consider the operative scope of the amendments. The relative difficulty of those challenges will depend, of course, on the nature and complexity of the amendments themselves.

Among the states that have marriage amendments, they can be broken down into two broad categories: (1) Single-Subject Amendments ("SSAs") and (2) Multi-Subject Amendments ("MSAs"). SSAs merely prohibit same-sex marriage; MSAs prohibit both same-sex marriage and the establishment of state-recognized relationship regimes that are parallel to or akin to marriage. Of course, the language used by the MSAs varies from state to state; therefore, the effect of each amendment on a particular dispute may differ somewhat from state to state.¹⁷ These distinctions notwithstanding, two textual patterns have emerged among the MSAs: (1) the first pattern prohibits the states from granting the rights, benefits, privileges, or incidents of marriage to unmarried couples generally or same-sex couples in particular; and (2) the second pattern establishes a more generalized set of prohibitions. In this Article, the former group of amendments is described as "Incidents Model" MSAs and the latter group of amendments as "Comparative Model" MSAs.¹⁸ This Article will focus on an

(listing Ohio State University as one of the schools offering domestic partner benefits to its employees). All of these programs may find themselves subject to attack under the terms of Ohio's and Texas' respective amendments.

¹⁷ See, e.g., Mark Strasser, *State Marriage Amendments & Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59, 60-62 (2007) [hereinafter "*Plain Meaning*"] (describing the various textual differences that exist among the amendments).

¹⁸ Other scholars have also categorized the marriage amendments and have offered an interpretation of certain of their key terms. See, e.g., William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233 (2005) (categorizing the amendments); see also Carrie Lewand, Note, *Defining Constitutional Discrimination: An Analysis of Michigan's Constitutional Amendment to Define Marriage*, 83 U. DET. MERCY L. REV. 91 (2006) (same); C. Susie Lorden, Note, *The Law of Unintended Consequences: The Far-Reaching Effects of Same-Sex Marriage Ban Amendments*, 25 QUINNIPIAC L. REV. 211 (2006) (same); David M. Howenstine, Note, *Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws Under the Equal Protection Clause*, 81 WASH. L. REV. 417 (2006) (same); Brodie M. Butland, Note, *The*

interpretation of the Comparative Model MSAs insofar as they relate to public employers' domestic partner benefits plans.

A closer examination of the Comparative Model MSAs suggests that the scope of any prohibition will ultimately turn on the degree of replication between marriage and any alternative regime that is forbidden by the amendment in question. As such, the Comparative Model MSAs lend themselves to further subdivision into three categories: (1) those that prohibit both same-sex marriage and parallel arrangements that are *identical* to marriage; (2) those that prohibit same-sex marriage and parallel arrangements that are *identical or substantially similar* to marriage; and (3) those that prohibit same-sex marriage and parallel arrangements that are merely *similar* to marriage. At present, domestic partner benefits plans which are offered by public employers in Comparative Model MSA states are potentially subject to elimination because their effectiveness depends on state recognition of relationships that arguably mimic marriage to a prohibited degree.

In the event that such challenges arise, how should courts in these states address challenges to the continued existence of public employers' domestic partner benefits plans? Numerous scholars would argue that the amendments are flatly unconstitutional and the courts should not apply them to anything at all.¹⁹ Other scholars

Categorical Imperative: Romer as the Groundwork for Challenging State "Defense of Marriage" Amendments, 68 OHIO ST. L.J. 1419 (2007) (same).

¹⁹ L. Lynn Hogue, *Romer Revisited, or 'The Devil in the Details: Is Georgia's Marriage Amendment Constitutionally Defective?*, 7 FLA. COASTAL L. REV. 255 (2005) (arguing that the Georgia marriage amendment was sloppily drafted, and consequently, vulnerable to a successful equal protection challenge); Wilson Huhn, *Ohio Issue 1 is Unconstitutional*, 28 N.C. CENT. L. J. 1 (2005) (responding to numerous arguments that Ohio's proposed marriage amendment was both necessary and constitutional); Lewand, *supra* note 18 (arguing that Michigan's amendment violates equal protection and due process guarantees); Sean Perry, *When Marriage is Not Enough: Utah's Marriage Amendment in Context*, 7 J. L. & FAM. STUD. 275 (2005) (analyzing the scope of Utah's marriage amendment by comparing it to Nebraska's marriage amendment, and challenging the constitutionality of Utah's amendment); Lisa Polk, *Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right*, 66 MONT. L. REV. 405 (2005) (arguing that Montana's marriage amendment is unconstitutional under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment); Sarah K. Snow, *What Missouri 'Shows Me' About Sexual Orientation Legislation*, 37 U. TOLEDO L. REV. 807 (2006) (finding evidence of animus in the passage of Missouri's marriage amendment and concluding that it runs afoul of *Romer*); accord Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUSTON L. REV. 1193 (1999);

eschew this approach by considering whether various material goods – including domestic partner benefits – are threatened by the enforcement of these amendments.²⁰

In this Article, I will argue that courts should interpret the ambiguous provisions of the marriage amendments narrowly, with an eye toward effectuating the clearest identifiable voter intent as determined by the historical context within which the amendments arose.²¹ Many scholars have persuasively criticized the effort to locate voter intent when courts interpret the products of direct democracy.²² While it is true that these attempts are quixotic at best, courts are unlikely to abandon the practice. Therefore, this paper will argue that if courts persist in the attempt to find voter intent, they should do so by focusing on a combination of two sources of information: (1) evidence that speaks directly to the amendment at hand, such as the text of the amendment, any legislative debates surrounding its proposal (if it was proposed by a legislature), ballot explanations of

see Plain Meaning, *supra* note 17, at 59 (arguing that the marriage amendments should be narrowly-construed in order to avoid constitutionally infirm applications); *see also* Christopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J. L. & POL. 1 (2002) (focusing on the potential impact of the Nebraska amendment and its constitutional deficiencies); *see also* Mark Strasser, *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees*, 64 ALB. L. REV. 949 (2001) (arguing that the same-sex marriage referenda violate electoral process guarantees). *But see* Kevin G. Clarkson, David Orgon Coolidge, & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999) (arguing that the Alaska marriage amendment is constitutional); Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029 (2007) (defending the necessity of a marriage amendment in Minnesota).

²⁰ *See Plain Meaning*, *supra* note 17, at 91-92 (arguing that the language of the Michigan marriage amendment should not prevent employers from offering domestic partner benefits); *see also* L. Lynn Hogue, *State Choice-of-Law Doctrine & Non-Marital Same-Sex Partner Benefits: How Will States Enforce the Public Policy Exception?*, 3 AVE MARIA L. REV. 531, 549-60 (2005) (arguing that none of the marriage amendments should preclude domestic partner benefits, and if they do, they might be vulnerable given the Court's decisions in *Romer v. Evans* and *Lawrence v. Texas*); Duncan, *supra* note 18, at 240-46 (suggesting that a careful interpretation of the marriage amendments will result in the invalidation of public employees' domestic partner benefits plans, and the validation of others).

²¹ As noted, my focus is on the Comparative Model MSAs, but courts whose amendments do not fall into that category might still follow my proposed approach.

²² *See, e.g.*, Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

the amendment, and the like; and (2) the political-historical context within which the amendment was passed. By focusing on a combination of text and historical circumstance, courts should find that the only reliably discernible intent – to the degree that one exists – is the desire to prohibit the creation of same-sex marriage or civil union regimes. Not only is this finding consistent with the most basic intent that one can identify in this context, but it also avoids the problem of placing additional burdens on a marginalized, and in some instances, despised minority when it is not absolutely clear that those burdens were the object of the amendment.

II. OVERVIEW OF PARTNER BENEFITS AND THE MARRIAGE AMENDMENTS: AN IMPORTANT VICTORY THAT IS CURRENTLY UNDER THREAT

The dilemma that now faces the gay and lesbian community was probably inevitable. Over the course of the past twenty years, gays and lesbians have won gradually higher levels of acceptance from the public, and consequently, have achieved significant victories in many arenas. Those arenas include, among others, the receipt of employee benefits,²³ Supreme Court invalidation of a devastating rights-stripping provision and anti-sodomy statutes,²⁴ the establishment of adoption rights,²⁵ and a remarkable increase in the number of openly-

²³ Public and private employers around the country have been offering their employees domestic partner benefits in ever-increasing numbers. *See infra*, notes 35-39.

²⁴ The United States Supreme Court handed gays and lesbians two of their most significant legal victories to date in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Romer*, the Supreme Court invalidated Colorado's Amendment 2, which prohibited state officials from extending anti-discrimination protection to gays and lesbians as a class. 517 U.S. at 623-26. The Supreme Court in *Lawrence* invalidated anti-sodomy statutes across the nation, prompting several noted academics to compare the impact of the case to *Brown v. Board of Education*. *See Lawrence*, 539 U.S. at 578-79; *see also* Michael J. Klarman, *Brown & Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 487-89 (2005) (arguing that *Lawrence* may take the same path as *Brown* – initially vilified in certain quarters, but ultimately viewed as a model of progress); Pamela S. Karlan, *Introduction: Same-Sex Marriage as Moving Story*, 16 STAN. L. & POL. REV. 1 (2005) (suggesting that *Lawrence* might be the equivalent of *Brown* for the gay rights movement if it eventually leads the Supreme Court to strike down laws against same-sex marriage); *accord Constitutional Law Symposium: The Role of Courts in Social Change*, 54 DRAKE L. REV. 903, 904 (2006) (identifying Professor Jane Schacter as a panel participant who noted the sense among members of the gay rights movement that "[*Lawrence*] is our *Brown*.").

²⁵ At least eleven states and the District of Columbia either implicitly or explicitly permit gay and lesbian couples to adopt children. *See* Gary J.

gay public officials.²⁶ Their losses, however, have been most acute in the arena of marriage rights, and these failures have fueled the current debate over domestic partner benefits.

The quest for equal marriage rights is a short and familiar story. In 1990, same-sex marriage was not legally recognized or permitted anywhere in this country. Since then, of course, a handful of states have legalized same-sex relationships to varying degrees: several have established relationship regimes that carry with them limited sets of rights,²⁷ while others have established relationship regimes that parallel marriage as closely as possible.²⁸ Massachusetts, Connecticut, Vermont, Iowa, Maine, and New Hampshire are the only states that allow gays and lesbians to marry.²⁹ These victories, however, do not

Gates, et al., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 3 (Mar. 2007), available at <http://www.law.ucla.edu/WilliamsInstitute/publications/FinalAdoptionReport.pdf>.

²⁶ At present, there are approximately four hundred openly gay elected officials in the United States. See Rachel La Corte, *Only N.H. Has More Gay Lawmakers Than Washington*, HERALDNET, Jan. 23, 2008, <http://www.heraldnet.com/apps/pbcs.dll/article?AID=/20080123/NEWS03/559000605&template=printart>, (last visited Mar. 11, 2008).

²⁷ Hawaii, Washington, and the District of Columbia offer limited protection to committed gay and lesbian relationships. See HAW. REV. STAT. § 572-1.6 (2007); WASH. REV. CODE § 26.60.060 (2007); D.C. CODE §§ 32-701 to -710 (2008).

²⁸ New Jersey currently has a civil union statute that guarantees gay and lesbian couples all of the same rights that married heterosexual couples receive under state law. See N.J. STAT. ANN. § 37: 1-31 (2007). Similarly, California and Oregon have created equally generous regimes, but rather than using the “civil unions” terminology, they instead use the term “domestic partnership.” See CAL. FAM. CODE § 297 (2008); Oregon Family Fairness Act, OR. REV. STAT. § 11.106 (2007).

²⁹ See *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Mass. 2003). Not only did Massachusetts legalize same-sex marriage in *Goodridge*, but the state legislature defeated an effort to overturn the decision by means of a constitutional amendment. See Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban* (June 14, 2007), available at http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_1.html. Since Massachusetts legalized same-sex marriage, six other states – California, Connecticut, Iowa, Vermont, Maine, and New Hampshire – followed in its wake. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (holding that marriage is a fundamental right and that discrimination on the basis of sexual orientation would be subject to strict scrutiny); see also *Kerrigan v. Comm’r Public Health*, 957 A.2d 407 (Conn. 2008) (holding in a 4-3 decision that sexual orientation is a quasi-suspect status and that marriage discrimination on this basis failed to meet the requirements of intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (unanimously holding that

represent the generally prevailing political norm. Prior to 2004, only four states had passed amendments banning same-sex marriage.³⁰ Since then, however, twenty-six states have done so.³¹ The move to ban same-sex marriage reached its high point with the passage of eleven amendments during the 2004 presidential election.³² The

discrimination on the basis of sexual orientation was subject to intermediate scrutiny and that limiting marriage to opposite-sex couples could not survive this level of analysis); *An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage*, Vt. S. Bill 115, available at <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf> (identifying in a legislative act the changes to Vermont's marriage law that would permit same-sex marriage in the state); *Governor Signs LD 1020, An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom*, available at <http://www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=72146&v=Article-2006> (May 6, 2009) (discussing Maine's decision to legalize same-sex marriage); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009, available at <http://www.nytimes.com/2009/06/04/us/04marriage.html> (discussing the process through which New Hampshire legalized same-sex marriage). The California Supreme Court decision was subsequently overturned by the passage of Proposition 8, which amended the state constitution by restricting marriage to the union between one man and one woman. See Tamara Audi, et al., *California Votes for Prop 8*, WALL ST. J., Nov. 5, 2008, available at <http://online.wsj.com/article/SB122586056759900673.html> (discussing the impact of the Proposition 8 victory). The District of Columbia Council also recently decided to recognize same-sex marriages entered into in other jurisdictions. See, e.g., Nikita Stewart and Tim Craig, *D.C. Council Votes to Recognize Gay Nuptials Elsewhere*, WASH. POST, Apr. 8, 2009, at A01 (discussing the unanimous decision of the D.C. Council to recognize same-sex marriages performed outside of the District), available at <http://www.washingtonpost.com/wpdyn/content/article/2009/04/07/AR2009040702200.html>. Since the United States Congress must give final approval to this legislation, it is not yet clear whether the Council's decision will remain good law.

³⁰ See A History of Same-Sex Marriage Laws, <http://www.stateline.org/live/details/story?contentId=310206> (last visited June 14, 2009) (showing that Hawaii, Alaska, Nebraska and Nevada had passed constitutional amendments banning same-sex marriage by 2002).

³¹ See National Convention of State Legislatures, *Timeline: Same-Sex Marriage*, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited May 1, 2009) (showing that Alabama, Arkansas, California, Colorado, Georgia, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah, Kansas, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin passed amendments banning same-sex marriage after 2003); see also National Convention of State Legislatures, *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited May 12, 2009) (showing that Arizona and Florida also passed marriage amendments in 2008).

³² See CNN.com: *Election Results*, <http://www.cnn.com/ELECTION/2004/>

frenzy surrounding the passage of the amendments has died down substantially in the United States, but the reality of their presence is making itself known.

At the same time that voters have been placing limits on the ability of gays and lesbians to formalize their relationships, increasing numbers are embracing their sexuality and publicly making the lifestyle choices that heterosexual couples make: they are entering into committed relationships with their partners, buying homes in cities and suburbs, adopting and raising children, volunteering in their communities, and building careers. Public and private employers have observed these shifts in the American social landscape and responded to these changes in a variety of ways. One of the most significant responses has been through the provision of domestic partner benefits for their gay and lesbian employees.

American employers have been providing partner benefits since 1982, when the *Village Voice* newspaper began offering them to their unmarried employees.³³ Just over twenty-five years later, approximately 9,300 employers in the United States currently offer domestic partner benefits, the most common of which are health care benefits.³⁴ Such employers include more than half of the *Fortune* 500 companies, almost eighty percent of *Fortune* 100 companies, eighty-eight of the hundred top-grossing law firms, thirteen state governments and the District of Columbia government, 145 city and county governments, and more than 300 colleges and universities (of which approximately 141 are public schools).³⁵ Fifty-eight percent of employers offer domestic partner benefits to both same-sex and opposite-sex couples.³⁶ The remaining companies limit their programs

pages/results/ballot.measures/ (last visited May 12, 2009).

³³ See Alene Russell, *Domestic Partnership Benefits: Equity, Fairness, and Competitive Advantage*, AMERICAN ASSOCIATIONS OF STATE COLLEGES AND UNIVERSITIES, at 1 (Oct. 2007), http://www.aascu.org/media/pm/pdf/domestic_partners07.pdf.

³⁴ See *id.* (discussing the number of employers in the nation who offer partner benefits); see also Mary Beth Braitman, Terry A.M. Mumford, & Katrina M. Clingerman, *Implementing a Domestic Partner Benefits Policy*, HUMAN RESOURCES, Winter 2008, at 192, available at http://www.icemiller.com/publications/19-ANSWR_Winter2008.pdf) (detailing the kinds of benefits that employers typically cover).

³⁵ See THE STATE OF THE WORKPLACE, *supra* note 5, at 21, 23 (discussing the number of employers providing partner benefits across multiple sectors of the economy); see also Russell, *supra* note 33, at 4-5 (same).

³⁶ See Russell, *supra* note 33, at 4.

to same-sex couples because they do not have the option of marriage.³⁷

Employers have chosen to offer these benefits packages for a variety of reasons. First of all, many employers choose to offer partner benefits as a mechanism for recruiting and retaining talented workers and to gain a competitive advantage over employers who do not offer these benefits.³⁸ Other employers are compelled to offer partner benefits as a result of the labor negotiations process.³⁹ Still others do so “because they believe it is the right thing to do.”⁴⁰ Employers who fall into this last category are often committed to supporting diversity in the workplace and providing equal pay for equal work: in the absence of benefits, gay and lesbian employees receive significantly less compensation than their married colleagues who do receive such benefits – roughly one-fifth of overall compensation is derived from employer-provided benefits.⁴¹

The marriage amendments, of course, now threaten much of the progress signified by the provision of partner benefits. Although private sector employers are not affected, public employers might find that one potentially unintended effect of the amendments is the loss of their authority to offer domestic partner benefits to their gay and

³⁷ See SAMIR LUTHER, DOMESTIC PARTNER BENEFITS: EMPLOYER TRENDS AND BENEFITS EQUIVALENCY FOR THE GLBT FAMILY (Mar. 2006), at 9, available at <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf>.

³⁸ Braitman, et al., *supra* note 34, at 189.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See THE STATE OF THE WORKPLACE, *supra* note 5, at 13. Gay and lesbian employees, however, have not received these benefits as a matter of course. In many instances, advocates have had to fight for their provision. The American Civil Liberties Union, for example, has filed a lawsuit against the University of Wisconsin because of its refusal to allow gay and lesbian employees to include domestic partners on their health insurance plans. See *Helgeland v. Wisconsin*, 724 N.W.2d 208, 215 (Wis. Ct. App. 2006) (arguing that a law which prevents state employers from offering domestic partner health insurance violates the state’s constitutional guarantee of equal protection). Subsequent to the filing of this lawsuit, Wisconsin approved a marriage amendment which states in part, “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” See Appendix 1; cf. *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (holding that a university policy which provided health insurance coverage for the opposite-sex partners of its unmarried employees while denying such coverage to the same-sex partners of its gay employees could not withstand scrutiny under Montana’s equal protection clause).

lesbian employees.⁴² One-third of the amendments restrict only the creation or recognition of same-sex marriage,⁴³ but most of the remaining two-thirds prohibit the creation or recognition of a legal status for unmarried people that would be similar to marriage.⁴⁴ It is this latter group of amendments that poses the real challenge. If, for example, a public employer subject to one of these amendments offered partner benefits to a lesbian employee who met eligibility criteria that turned on the existence of her relationship, did the employer recognize a legal status for this union in violation of the amendment?⁴⁵ Moreover, if a court found that it did, is such an outcome fairly within the scope of the amendment? The task of

⁴² Unmarried heterosexual employees who work for public entities and qualify for domestic partner benefits are also threatened with the loss of partner coverage, but this Article will focus on gay and lesbian employees.

⁴³ See, e.g., ALASKA CONST. art. I, § 25, COLO. CONST. art. II, § 31, HAW. CONST. art. I, § 23, MISS. CONST. art. XIV, § 263A, MO. CONST. art. I, § 33, MONT. CONST. art. XIII, § 7, NEV. CONST. art. I, § 21, OR. CONST. art. XV, § 5a, and TENN. CONST. art. XI, § 18.

⁴⁴ See e.g., Alabama (ALA. CONST. art. I § 36.03), Arkansas (ARK. CONST. amend. 83, § 2), Georgia (GA. CONST. art. I, § 4), Idaho (IDAHO CONST. art. III, § 28), Kansas (KAN. CONST. art. XV, § 16), Kentucky (KY. CONST. pt. 2, § 233A), Louisiana (LA. CONST. art. XII, § 15), Michigan (MICH. CONST. art. I, § 25), Nebraska (NEB. CONST. art. I, § 29), North Dakota (N.D. CONST. art. XI, § 28), Ohio (OHIO CONST. art. XV, § 11), Oklahoma (OKLA. CONST. art. II, § 35), South Carolina (S.C. CONST. art. XVII, § 15), South Dakota (S.D. CONST. art. XXI, § 9), Texas (TEX. CONST. art. I, § 32), Utah (UTAH CONST. art. I, § 29), Virginia (VA. CONST. art. I, § 15), and Wisconsin (WIS. CONST. art. XIII, § 13).

⁴⁵ One particular source of concern is the continued validity of partner benefits programs offered by local governments across the country. Within the states whose amendments are especially problematic, the following localities may find their policies subject to challenge: Fayetteville, Arkansas; Atlanta, Georgia; Decatur, Georgia; DeKalb County, Georgia; Fulton County, Georgia; City of Moscow, Idaho; New Orleans, Louisiana; Detroit, Michigan; East Lansing, Michigan; Ingham County, Michigan; Washtenaw County, Michigan; Cleveland Heights, Ohio; Columbus, Ohio; Dallas, Texas; Travis County, Texas; Arlington County, Virginia; Dane County, Wisconsin; La Crosse County, Wisconsin; Madison, Wisconsin; and Milwaukee, Wisconsin. See THE HUMAN RIGHTS CAMPAIGN, DOMESTIC PARTNER BENEFITS (2007), available at <http://www.hrc.org/workplace/dpbsearch> (last visited Feb. 26, 2008); see also Intervening Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 3, *Ralph v. City of New Orleans*, No. 2003-9871 (Orleans Parish Civ. Dist. Ct. June 7, 2007) (listing numerous local governments across the country that offer domestic partner benefits packages for employees); City of Moscow, *supra* note 14, at 1, 3 (concluding that the City of Moscow, Idaho likely violated the state marriage amendment when it implemented a benefits plan for the domestic partners of its employees).

interpreting the amendments is one that a few courts have already faced, and there is reason to believe that others will do so in the future.

III. INTERPRETING THE CRITICAL TERMS AND CONCEPTS IN THE COMPARATIVE MODEL MSAS – “STATUS,” “RECOGNITION,” AND “IDENTICAL/SIMILAR”

A. UNDERSTANDING THE “STATUS” AND “RECOGNITION” PROVISIONS

1. General Definitional Assessment

As an initial matter, the Comparative Model MSAs forbid the validation or recognition of any status designation for unmarried individuals that is identical to, identical or substantially similar to, or similar to marriage.⁴⁶ Courts in these states will almost certainly have

⁴⁶ Nine of the Comparative Model MSA states – Arkansas, Idaho, Kentucky, Louisiana, Ohio, South Carolina, Texas, Virginia, and Wisconsin – explicitly forbid the creation or recognition of a “legal status” that is similar in some fashion to marriage. See Appendix 1. The remaining states do not specifically use either the phrase “legal status” or the word “status” when describing the prohibition – instead, they merely tend to say that the state will not recognize any relationship, union, agreement, or some variation thereof that is similar to marriage between gay men, lesbians, or other unmarried individuals. Ultimately, however, this is a distinction without a difference – *all* of these amendments forbid the recognition of a legal status that is similar in some fashion to marriage. Generally speaking, employers who implement domestic partner benefits plans define domestic partners as either same-sex or different-sex couples who meet the following requirements: (1) they are at least 18 years old; (2) they are not married; (3) they have an intimate, continuous, financially interdependent relationship that has lasted for some period of time, usually six months or longer; (4) they reside in the same home; and (5) they are not in a domestic partner relationship with anyone else. SAMIR LUTHER, DOMESTIC PARTNER BENEFITS: EMPLOYER TRENDS AND BENEFITS EQUIVALENCY FOR THE GLBT FAMILY (Mar. 2006), at 9, available at <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf>. If an employee’s relationship, union, agreement, or variation thereof meets these criteria, he or she *necessarily* acquires a status, even if it is only a status for the limited purpose of recovering under the contract. See *infra* notes 52-59. Moreover, the “status” acquired is a *legal* status because legally enforceable rights arise under the terms of the employment contract once the employee has acquired his or her status. The specific use of the phrase “legal status,” then, entails no limiting principle that meaningfully differentiates the amendments that use the phrase from those that do not use the phrase. See, e.g., William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233, 240-46 (2005) (suggesting that the concept of legal status is

to interpret these provisions at some point in the future, and their analyses will likely begin with a focus on the meanings of “status” and “recognition.”⁴⁷ Although these terms appear frequently in the law, they are nevertheless seldom defined, largely because their meanings are generally viewed as understood.

Given the manner in which the term “status” is often used, it makes sense that courts and commentators have not felt pressured to define the term standing alone. Rather frequently, the word “status” is used in conjunction with a modifier, and the modifier may have greater significance to the resolution of a dispute. By way of example, under federal law, merit system principles governing executive branch employees grant workers a right to “fair and equitable treatment in all aspects of personnel management without regard to . . . marital status.”⁴⁸ Therefore, if an executive branch employee claimed discrimination on the basis of marital status, the reviewing court would focus its attention on any evidence suggesting that a decision maker had used the employee’s status as single, married, divorced, or widowed to deny him or her certain benefits or opportunities. Since an individual might conceivably embody many different status designations under law, it is necessary to define the status which triggers a set of legal consequences.

Standing in isolation, then, the concept of “status” is broad and abstract. Professor Jack Balkin has offered a more precise calibration

embodied in the Arkansas, Kentucky, Louisiana, North Dakota, Utah, Oklahoma, Michigan, Ohio, Kansas, Georgia, and Nebraska amendments, whether or not they use the actual phrase). As such, all of the Comparative Model MSAs are subject to the analysis that I employ. Finally, for the sake of linguistic ease, I will use the words “status” and “legal status” interchangeably.

⁴⁷ Even though courts may also be called upon to construe “validation” at some point, this author believes that disputes are more likely to focus on “recognition.” The meaning of validation, in context, is probably more precise than the meaning of recognition because the best understanding of the term likely refers to a decision by the state to “[grant] legal strength or force” to an unmarried relationship by facilitating its “execut[ion] with proper formalities.” BLACK’S LAW DICTIONARY 1550 (6th ed. 1990) (defining “valid”). This definition suggests that the prohibition on validating unmarried relationships refers to an effort by the state to give force or effect to the formalization of such relationships, as in marriage or civil union. It is certainly true that one might also define “valid” more broadly to mean “sustainable and effective in law, as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be . . . enforced by law.” *Id.* This definition, however, would largely duplicate the meaning of “recognition” in violation of the principle that each word in an amendment should be construed in manner that avoids surplusage.

⁴⁸ 5 U.S.C.A. § 2301(b)(2) (West 2009).

of the term by arguing that “status” refers to those “characteristic[s] of an individual that [have] some legal consequences.”⁴⁹ He distinguishes legal status from sociological status, noting that “lawyers usually understand legal status as a feature of individuals and their relationships to the law . . . [while sociological status] is concerned about social structure: [i]t is concerned with competition and hierarchy among social collectivities.”⁵⁰ Balkin’s position echoes the notion that status is defined as “[t]he rights, duties, capacities and incapacities which determine a person to a given class.”⁵¹ Yet another view of status suggests that it is “the official classification given to a person, country, or organization, determining their rights or responsibilities. . . .”⁵² Viewing these definitions in concert with each other suggests that legal status refers to a set of characteristics that define an individual’s membership in an official class, as a consequence of which rights, duties, capacities and/or incapacities are acquired.

Each body of law – statutory law, common law, constitutional law, and regulatory law, as well as judicial interpretations of these bodies of law – identifies the status designations that are operative within it. These bodies of law contain multiple categories of classification, and establishing the criteria for membership in those categories will result in some form of legal consequence. For purposes of American immigration law, for example, a person who participated in Nazi persecution during World War II becomes a member of the category defined as “deportable;”⁵³ in certain jurisdictions, an entrant’s status as an invitee, licensee, or trespasser will determine the scope of a landowner’s duty of care toward him or her;⁵⁴ if a territory acquires wetland status, certain unique administrative duties will subsequently be imposed on the Natural Resources Conservation Service.⁵⁵ Many other examples of status designations exist throughout the law.

⁴⁹ J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2324 (1997) (describing the differences between legal status and sociological status).

⁵⁰ *Id.* at 2325. Moreover, Balkin notes, “the legal concept of status is often distinguished from conduct,” which further narrows the meaning attached to the idea of a “legal status.”

⁵¹ BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

⁵² THE NEW OXFORD AMERICAN DICTIONARY 1656 (2d ed. 2005).

⁵³ See 8 U.S.C.A. § 1227(a)(4)(D) (West 2008) (defining as a deportable offense participation “in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing”).

⁵⁴ See, e.g., 22 A.L.R.4th 294 (collecting federal and state cases that discuss the continued viability of these common law designations).

⁵⁵ See 7 C.F.R. § 12.2(a) (2009) (defining “NRCS” and describing generally its responsibilities).

Acquiring a status designation, however, is simply a precondition for triggering legal consequences; it is through the process of *recognition* that the consequences actually manifest. Therefore, when evaluating the Comparative Model MSAs, one must examine “status” and “recognition” in conjunction with one another. Much like the idea of “status,” “recognition” is a critical term that often appears in the law, but is rarely defined. Recognition has been defined as “[r]atification; confirmation; an acknowledgment that something done by another person in one’s name had one’s authority.”⁵⁶ Similarly, at least one federal court has found that recognize means “to acknowledge by admitting to a privileged status.”⁵⁷

The confusion generated by the meaning of the ambiguous terms used in the marriage amendments, including the term “recognize,” inspired constituents in a number of states to seek opinions from their Attorneys General regarding the likely validity of proposed or existing plans that offered benefits to gay and lesbian citizens. The Attorney General of Kentucky, for instance, was asked to consider whether that state’s marriage amendment precluded a public university from offering health insurance coverage to the domestic partners of its employees.⁵⁸ After considering the application of “recognize” in various contexts and its analysis by different courts, the Attorney General concluded, “whenever the government causes a benefit to depend upon a status, the status is ‘recognized.’”⁵⁹ Broadly speaking, then, “recognition” occurs when a legal consequence flows from acquiring a status that is officially defined.

Ultimately, states that are called upon to interpret their amendments are unlikely to encounter great difficulty when they define the concepts of “status” and “recognition.” Moreover, they are likely to find that any analysis of the relationship between the two is equally undemanding. Rather, interpretive problems are most likely to arise over the *application* of the terms to the circumstances at issue.

⁵⁶ BLACK’S LAW DICTIONARY, *supra* note 47, at 1271. *See also* OXFORD DICTIONARY OF CURRENT ENGLISH 755 (4th ed. 2006) (defining recognize as “genuine, legal, or valid”).

⁵⁷ *Price v. United States*, 100 F. Supp. 310, 316 (Ct. Cl. 1951) (internal quotation omitted) (discussing “recognition” in the context of determining whether plaintiff’s service in the Pennsylvania National Guard was “federally recognized” within the meaning of the Army and Air Force Vitalization and Retirement Equalization Act).

⁵⁸ *See, e.g.*, Kentucky Op. Att’y Gen. 07-004 (2007), *available at* <http://ag.ky.gov/nr/rdonlyres/82542717-d618-4d8e-9be8-83b5c6c79e98/0/oag0704.doc>.

⁵⁹ *See id.*

2. Status, Recognition, and the Application of These Terms to Public Employers' Domestic Partner Benefits Plans

The foregoing analysis of status and recognition begs an important question: does it translate into the employee benefits context? Employees receive benefits from their employers, not as a matter of statute, but rather, as a matter of contract. Moreover, eligibility for the benefits is based on criteria that are developed by the employer and differ from one employer to the next; they are not uniform, and they are not imposed by statute. Does the fact that these benefits are dispensed by contract alter the analysis of status that has been proposed thus far? In other words, would a public employer in a Comparative Model MSA state violate the prohibition against recognizing a status if the purported status is nothing more than a collection of eligibility requirements?

Status designations are not recognized only under formal legal circumstances, as when a judicial decision or a statute establishes the criteria that a particular individual must meet. Domestic partner benefit plans are actually a perfect example of how a status can be both conferred and recognized through the process of entering a contract. Of course, some commentators would argue to the contrary. They would maintain that these plans simply establish criteria that qualify a person to receive a benefit, and that no corresponding status has been recognized because the benefit is simply a byproduct of the employment relationship.⁶⁰ This analysis is correct as far as it goes, but it fails to appreciate one critical factor: when the employee meets the criteria established under the contract (i.e., meets those characteristics that place him or her in a particular class), he or she not only acquires the benefits, but also acquires a corresponding right of enforcement if the employer fails to produce those benefits. One commentator has described domestic partner benefits plans in similar terms:

Recognition of the partnership and the corresponding status of "domestic partner" in business and government contexts [are] typically achieved upon conformity with certain definitional guidelines. As

⁶⁰ See, e.g., William B. Turner, *The Perils of Marriage as Transcendent Ontology: National Pride at Work vs. Governor of Michigan* 34 (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=993971#PaperDownload (arguing that the form of recognition in which the state is involved when public employers dispense partner benefits is distinguishable from the form of recognition involved when the state recognizes, for instance, a marriage).

with any non-standard regulation, specific criteria defining the elements of a domestic partnership will vary from entity to entity. However, most definitions of domestic partnerships contain at least several common elements, including: (1) minimum time requirements that establish a committed relationship; (2) evidence of financial interdependence; (3) sharing a joint residence; (4) certain parameters of the relationship, such as exclusivity, no close blood relationship, and no current legal partner; and (5) naming the partner as a beneficiary of [a] life insurance [policy] or pension plan. These requirements are not the product of government regulation or subject to oversight, and therefore will surely continue to be modified as domestic partner status becomes more common.⁶¹

Thus, a status is acquired upon meeting those requirements that are based on an evaluation of the employee's intimate relationship with his or her partner, and recognition follows upon achieving that status. The critical question that remains, then, is whether the recognized status runs afoul of the similarity provisions contained in the amendments.

B. UNDERSTANDING THE "SIMILARITY" PROVISIONS

While it is certainly critical for courts to resolve correctly the questions surrounding the meaning and application of "recognition" and "status," challenges to these employee benefits plans will succeed or fail based on the degree of marital similarity that is prohibited by the amendment in question. Therefore, a court's approach toward interpreting the "similarity" provision will necessarily lie at the heart of any analysis that implicates the marriage amendments. Every Comparative Model MSA state adheres to interpretive guidelines that insist on adherence to the principle of effectuating the framers' intent.⁶² In the context of direct democracy, the operative fiction that

⁶¹ Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 NEW MEXICO L.REV. 19, 23 (2000) (quotations omitted) (emphasis added).

⁶² Since the publication of Jane Schacter's seminal article, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995), a great deal of scholarship has concluded that the search for voter intent in the direct democracy context is nothing more than the stuff of illusion. A few illustrative examples include the following: Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 492 (1996) (rejecting the search for popular intent); Elizabeth Garrett, *Who Directs Direct Democracy?* 4 U. CHI. L. SCH.

will govern the analysis is the notion that the framers are actually the voters. Consequently, courts will try to determine what the voters meant to accomplish when they approved each amendment. Two potential approaches that courts might take when they try to find the voters' intent are to: (1) examine and apply the plain language of the provision, or if the language is ambiguous, (2) gather extrinsic evidence for the sake of identifying the voters' intent.

1. Application of the Plain Language Model

ROUNDTABLE 17, 28 (1997) (describing the effort to use evidence of intent as an interpretive guide in the direct democracy setting as "entirely misguided"); Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 406-411 (2003) (discussing the problems inherent in the judicial search for voters' intent); Glenn C. Smith, *Solving the "Initiatory Construction" Puzzle (and Improving Direct Democracy) by Appropriate Refocusing on Sponsor Intent*, 78 U. COLO. L. REV. 257, 265 (2007) ("[C]ourts often draw highly detailed and implausible conclusions about the intent of . . . voters."); Jack L. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L. REV. 487, 508 (1998) (describing as "obvious" the notion that voter intent is an "illusory concept"). As Schacter noted, there are any number of problems associated with trying to find popular intent in the direct democracy setting: (1) the electorate, even on the state level, is huge, so isolating the intent of the voters is problematic from an empirical standpoint; (2) the voters do not rely on the forms of legislative history that offer a self-contained universe of materials on which to rely when examining the intent of a legislature; (3) voters do not deliberate publicly and on the record in the same way that legislators do, which makes the effort to identify their intent an exercise in unreliability; (4) the proposals on which the electorate votes often contain legal terms of art whose precise meaning will escape most voters; (5) the information on which many voters *do* rely – especially media sources – are often ignored by courts; and (6) the information on which *courts* often rely – including the text itself or explanatory materials that accompany the ballot – are often ignored by voters. See Schacter, *The Pursuit of "Popular Intent,"* 105 YALE L.J. at 110, 130. The intellectual persuasiveness of this commentary notwithstanding, as a practical matter, courts continue to struggle with the task of finding voter intent. Therefore, in a desire to speak directly to the project in which courts find themselves engaged, I will examine various sources that purport to highlight the voters' intent, but I will also place that evidence in a larger historical context that will (hopefully) allow courts to draw satisfactory inferences regarding the meaning of the amendments in question. Cf. Richard Frankel, Note, *Proposition 209: A New Civil Rights Revolution?*, 18 YALE L. POL'Y REV. 431, 439 (2000) (calling for a broad voter intent inquiry when analyzing direct democracy initiatives); Mark Strasser, *supra* note 17, *Plain Meaning*, 25 LAW & INEQ. at 93-98 (performing an analysis of voter intent when construing marriage amendments).

The inescapable common thread that runs through the rules of constitutional interpretation that the Comparative Model MSA jurisdictions follow is the courts' obligation to implement the intent of the voters.⁶³ The question that necessarily plagues these courts,

⁶³ See, e.g., *House v. Cullman County*, 593 So.2d 69, 80 (Ala. 1992) (citations omitted) ("It is familiar law in the interpretation of statutes, constitutional amendments and other writings, that the intent of such writing is the substance, and the verbiage is mere form. . . ."); see also *City of Fayetteville v. Washington County*, 255 S.W. 3d 844, 857 (Ark. 2007) ("When interpreting the language of a provision of the Arkansas Constitution, this court endeavors to effectuate the intent of the people passing the measure."); *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) (internal quotations omitted) ("The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it."); *Sweeney v. Otter*, 804 P.2d 308, 312 (Idaho 1990) ("[The] fundamental object in construing constitutional provisions is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters."); *City of Ashland v. Calvary Protestant Episcopal Church of Ashland*, 278 S.W.2d 708, 710 (Ky. 1955) ("Although current policy may differ from that of another time, the intent of the framers of the Constitution and of the people adopting it must be given effect."); *Malone v. Shyne*, 937 So. 2d 343, 349 (La. 2006) ("When the constitutional language is subject to more than one reasonable interpretation, it is necessary to determine the intent of the provision."); *Adair v. State*, 680 N.W.2d 386, 395 (Mich. 2004) (internal quotation omitted) ("A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people"); *In re Applications A-16027*, 495 N.W.2d 23, 32 (Neb. 1993) (internal quotations omitted) ("[E]ffect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions."); *Kelsh v. Jaeger*, 641 N.W.2d 100, 104 (N.D. 2002) ("When interpreting the state constitution, our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional statement."); *State v. Nixon*, 845 N.E.2d 544, 547 (Ohio App. 3d 2006) ("[I]f the meaning of a provision cannot be ascertained by the plain language therein, we may review the purpose of the provision to determine its meaning."); *Neel v. Shealy*, 199 S.E.2d 542, 545 (S.C. 1973) ("[W]hen construing a constitutional amendment, the Court [attempts] . . . to determine the intent of its framers and of the people who adopted it."); *Doe v. Nelson*, 680 N.W.2d 302, 307 (S.D. 2004) (internal quotations omitted) ("[T]he object of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it."); *Rooms With a View, Inc. v. Private Nat'l Mortgage Ass'n, Inc.*, 7 S.W.3d 840, 844-45 (Tex. Ct. App. 1999) ("In interpreting a constitutional provision[,] [i]f the literal text is unclear or could lead to an absurd result, [w]e consider

however, regards the manner in which that goal is accomplished. The first place where courts will look when they attempt to honor the intent of the voters is the language of the amendment:

It is to be presumed that language has been employed with sufficient precision to convey the intent of the people, and unless an examination demonstrates that such language has not been employed, nothing remains to be done except to enforce the provision.⁶⁴

Voters, however, ease the burden on courts when the amendments they support do, in fact, contain language that is sufficiently clear on its face to permit a plain language interpretation. Among the Comparative Model MSAs, only one state – Alabama – has spoken sufficiently clearly by prohibiting the recognition of a parallel union

the purpose of the provision, the intent of the provision's drafters, and the context in which it was written. . . ."); *Am. Bush v. City of S. Salt Lake*, 140 P.3d 1235, 1239 (Utah 2006) ("While we first look to the text's plain meaning, . . . [we nonetheless] inform our textual interpretation with historical evidence of the framers' intent."); *Dean v. Paolicelli*, 72 S.E.2d 506, 511 (Va. 1952) ("The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective."); *Thompson v. Craney*, 546 N.W.2d 123, 131 (Wis. 1996) ("The purpose in construing a constitutional amendment is to give effect to the intent of the framers and to the persons who adopted the amendment.").

⁶⁴ *Hodges v. Dawdy*, 149 S.W. 656 (Ark. 1912). Other Comparative Model MSA states have adopted the same general rule of construction. *See, e.g.*, *Planned Parenthood of Idaho, Inc. v. Kurtz*, 2001 WL 34157539 (Idaho Dist. 2001) (quoting *Sweeney v. Otter*, 804 P.2d 308, 312 (Idaho 1990)) ("The 'fundamental object in construing constitutional provisions is to ascertain the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters."); *Eaton Asphalt Paving Co., Inc. v. CSX Transp., Inc.*, 8 S.W.3d 878, 883 (Ky. App. 1999) (citing *Dalton v. State Property and Buildings Comm'n*, 304 S.W.2d 342, 359 (Ky. 1957)). ("[T]he language [in the Constitution] is to receive its plain and ordinarily understood meaning by the generality of the people."); *Ocean Energy, Inc. v. Plaquemines Parish Gov't*, 880 So.2d 1, 6-7 (La. 2004) ("The starting point in the interpretation of constitutional provisions is the language of the constitution itself. When a constitutional provision is plain and unambiguous and its application does not lead to absurd consequences, its language must be given effect."); *Nat'l Pride at Work, Inc. v. Gov.*, 748 N.W.2d 524, 533 (Mich. 2008) ("[T]he primary objective of constitutional interpretation, not dissimilar to any other exercise in judicial interpretation, is to faithfully give meaning to the intent of those who enacted the law. This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification.").

that is *identical* to marriage.⁶⁵ The remaining fifteen states do not speak with such precision. Seven of those states – Arkansas, Florida, Kentucky, Louisiana, North Dakota, Utah, and Wisconsin – prohibit the recognition of parallel institutions that are *identical or substantially similar* to marriage.⁶⁶ Eight of them – Idaho, Michigan, Nebraska, Ohio, South Carolina, South Dakota, Texas, and Virginia – have amendments whose language suggests that mere *similarity* between a recognized status and marriage will be invalid.⁶⁷ The

⁶⁵ See ALA. CONST. amend. 774.

⁶⁶ The amendments do not all use those precise words, but the sense of the amendments is the same. See ARK. CONST. amend. 83 (“Legal status for unmarried persons which is *identical or substantially similar to marital status* shall not be valid or recognized in Arkansas. . . .”); FLA. CONST. art. I, § 27 (“Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the *substantial equivalent thereof* shall be valid or recognized.”); KY. CONST. § 233A (“A legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized.”) (emphasis added); LA. CONST. art. XII, § 15 (“A legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized.”) (emphasis added); N.D. CONST. art. XI, § 28 (“No other domestic union, however denominated, may be recognized as a marriage or *given the same or substantially equivalent legal effect.*”) (emphasis added); UTAH CONST. art. I, § 29, cl. 2 (“No other domestic union, however denominated, may be recognized as a marriage or *given the same or substantially equivalent legal effect.*”) (emphasis added); WIS. CONST. art. XIII, § 13 (“A legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized in this state.”) (emphasis added). *Infra* App. 1.

⁶⁷ See IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state”). Presumably, the “legal union” language used by the Idaho legislature refers only to those relationships that are *formally* created by the state (for example, marriage or civil unions), but the point remains: even a legalized union like the limited-form domestic partnership or reciprocal beneficiary regimes in the District of Columbia, Hawaii, and Washington would arguably be precluded under the amendment, in part because of their arguable similarity to marriage. See also MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”); NEB. CONST. art. I, § 29 (“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.”); OHIO CONST. art. XV, (“The state and its political subdivisions shall not create or recognize a legal status for relationships that intends to approximate the design, qualities, significance or effect of marriage.”); S.C. CONST. Art. XVII, § 15 (“This State and its political subdivisions shall not create a legal status, right or claim respecting any other domestic union, however denominated. . . . Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that

language of similarity presents an analytical difficulty here, which will be addressed below.

As noted above, only one Comparative Model MSA state – Alabama – lends itself to a plain language analysis. The Alabama amendment states as follows: “A union *replicating* marriage of or between persons of the same sex . . . shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage.”⁶⁸ Critically, this language precludes recognition of a status for unmarried couples that “replicates” marriage. A replica, of course, is an identical copy of some other entity; it is “an exact copy or model of something.”⁶⁹ Applying this definition to the amendment, it is immediately clear that the only status designation covering a gay or lesbian relationship that is prohibited by the amendment is one that is identical to marriage. The language of the amendment, then, is so narrow and precise that it would cover only a marriage substitute that mimics marriage along *every* axis. As a technical matter, then, even a New Jersey-style civil union regime or a California-style domestic partnership regime would be legal under the terms of the Alabama amendment! Even though both regimes grant gay and lesbian couples rights that are equivalent to marriage under state law, they do not *replicate* marriage for one primary reason: the Defense of Marriage Act ensures that these couples do not have the same rights as married heterosexual couples under *federal* law, thus creating a highly significant difference between marriage and civil union relationships.⁷⁰ Currently, there are *no* alternative relationship regimes for same-sex couples that perfectly replicate marriage from the formal

is not valid or recognized in this State.”) (Together, these two provisions from South Carolina suggest the following: since “recognition” logically follows the creation of status, if the state cannot *create* a status for any domestic union other than marriage, it obviously cannot recognize one.); S.D. CONST. art XXI, § 9 (“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.”); Texas (“This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”) VA. CONST. art. I, § 15 (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 effect of marriage.”); *See infra*, App. 1.

⁶⁸ ALA. CONST. amend. DCCLXXIV (emphasis added).

⁶⁹ THE NEW OXFORD AMERICAN DICTIONARY 1436 (2d ed. 2005).

⁷⁰ *See e.g.*, Letter from Dayna K. Shah, Associate General Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf> (identifying a total of 1,138 federal laws in which marital status has an impact on the receipt of benefits, rights, or privileges).

standpoint of legal equality.⁷¹ Therefore, if a public employer in Alabama chose to premise the dispensation of benefits on an employee's status as being in a domestic partnership, the amendment would not invalidate these plans.

2. Seeking Voter Intent Through the Use of Extrinsic and Historically Contextual Evidence

The plain language approach will not work in every instance, however, as the next two groups of amendments demonstrate. The second group of amendments precludes the creation or recognition of status categories for unmarried couples that are *identical or substantially similar to marriage*, and while courts can certainly determine whether the recognition of a challenged union is *identical* to marriage, it is certainly not clear what is *substantially* similar to marriage. The problem is even more acute in the third group of amendments because they prohibit the creation or recognition of relationships that are merely *similar* to marriage. Both of these categories will necessarily contend with the problem of defining "similarity," and while the second group is more clear because those amendments restrict only those unions which are *substantially* similar to marriage, there still remains a profound lack of clarity when defining the overall manner in which this phrase operates. Starting with the second group of amendments, if one looks to the dictionary for assistance, "substantially" means "to a great or significant extent; for the most part; essentially."⁷² The dictionary definition does, not, however, offer a completely clear vision of the scope of the prohibition, nor does it offer useful guidance on how, precisely, one might distinguish between "substantial" and "identical" – the amount of daylight that exists between those two terms is far from obvious. The lack of clarity becomes even more problematic when considering the meaning of the word "similar," the same problem that also

⁷¹ This is true even for gay and lesbian couples who have formal access to marriage rights in Massachusetts. As noted, the language of the Defense of Marriage Act specifically states that marriage – for purposes of federal law – is the union between one man and one woman; therefore, a decision by an individual state to recognize same-sex marriage does not affect the exclusionary impact of DOMA on a married gay or lesbian couple. 1 U.S.C. § 7 (2008) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

⁷² THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 69, at 1687.

plagues the third category of amendments.⁷³ Insofar as dictionary definitions are concerned, “similar” means “like something but not exactly the same.”⁷⁴ This definition is far from helpful. Is a domestic partner relationship “similar” to marriage if *most* of its attributes are held in common with marriage? Is it similar if *some* of its attributes are held in common with marriage? What if it has only *one* attribute in common with marriage – is it still “similar” in some relevant respect to marriage?

These definitions of “substantial” and “similar” clearly do not address the matter in adequate fashion. As such, the plain language approach will not work. The rules of construction that apply in these states also note that courts may take other approaches in order to implement the voters’ intent, one of which is to look to the historical circumstances surrounding the passage of the amendment.⁷⁵ Considering the fact that these amendments were passed, largely en masse, as part of an overwhelming and mostly contemporaneous political rejection of courts and state executives who were “forcing” the issue of same-sex marriage on the public, it is appropriate to look to the time period during which they were passed because a wealth of information exists regarding the sense of the electorate at that time. As a practical matter, this means that courts which follow this

⁷³ The word “similar” is not used uniformly throughout the third category of amendments. It nonetheless serves as the conceptual baseline governing the comparison between marriage and any parallel relationship. For example, the Ohio amendment states: “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. The Nebraska amendment states: “The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” NEB. CONST. art I, § 29. If one compares the two amendments, one sees that Ohio precludes the creation or recognition of relationships that “approximate” marriage, while the Nebraska amendment prohibits the validation or recognition of any relationship that is similar to a civil union or domestic partnership, both of which are impliedly “similar” to marriage. Even though the amendments use different language, they arguably both tend toward the same end – preventing the establishment of any formalized relationship for gays and lesbians that looks like marriage in some ambiguous and undetermined way.

⁷⁴ OXFORD DICTIONARY OF CURRENT ENGLISH, *supra* note 56, at 847.

⁷⁵ See, e.g., *Kelsh v. Jaeger*, 641 N.W.2d 100 (N.D. 2002) (internal quotation omitted) (“[W]e may look to the historical context of an amendment [to determine the intentions of the people] and construe it in the light of contemporaneous history.”); *Doe v. Nelson*, 680 N.W.2d 302, 306 (S.D. 2004) (noting that constitutional interpretation can be guided by the historical context of its passage); *State v. Daniels*, 40 P.3d 611, 621 (Utah 2002) (noting that consideration of historical evidence is appropriate).

approach will find themselves relying on extrinsic evidence. Even though there are conceptual difficulties that are inherent in the search for a cognizable intent in the direct democracy context, and additional difficulties attend the reliance on extrinsic evidence, it is useful to take this evidence as seriously as possible.

a. Evaluating Voter Intent: Public Sources of Information That Contributed to the Shape of the Debate

Ascertaining the legislative intent behind a statute can be notoriously difficult for anyone who engages in the process of statutory construction. If an objective intent cannot be divined from the face of the statute, questions will arise about the sources of authority from which the interpreter will draw when addressing the issue. Are floor debates a legitimate source of authority for determining the intent behind a bill? Are statements from bill sponsors legitimate sources? Committee reports? Explanations from floor managers?⁷⁶ Moreover, how does one address the problem of competing intentions among legislators, or strategic intentions that are distinct from the subject matter of the bill?⁷⁷ Courts and commentators have debated these questions for years, and the debates will undoubtedly continue in the future.

As difficult as it is to determine the intention of a legislative body when it passes a statute, determining the intent of voters who approve a statewide measure, such as an amendment to the state constitution, is necessarily even less precise. One possible, if incompletely reliable, approach is to examine the public sources which were widely available during the time period just preceding the passage of the

⁷⁶ See George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L. J. 39 (1990) (analyzing the comparative value of different sources of legislative history).

⁷⁷ The former Senator Hillary Clinton provides an excellent example of a legislator ostensibly having a strategic intention when voting for a bill. When explaining her vote in support of the Authorized Use of Military Force, which President Bush subsequently used as the basis of his authority to invade Iraq in March 2003, Senator Clinton claimed that her true intent was to grant the president leverage when issuing his demands to Saddam Hussein. She argues that it was not her intention to support the president in actually going to war. See Anne E. Kornblut, *Clinton Dodges Political Peril for War Vote*, N.Y. TIMES, Aug. 5, 2006, available at <http://www.nytimes.com/2006/08/05/washington/05clinton.html>. Assuming ambiguity in the language of the statute, whose intention should be persuasive: a senator's strategic intention when supporting a bill, or another senator's direct intention to grant the president authority to go to war?

measure. Sources such as contemporaneous newspaper reports and editorials, transcripts from or recordings of broadcast public debates, any available reports from constitutional conventions or other deliberative bodies, books or pamphlets discussing the measure, and explanatory statements accompanying the ballot may suggest the factors voters had in mind when they voted in favor of a particular measure. While none of these resources will offer a definitive account of what voters meant to accomplish when they passed the measure, they at least offer some reasonable assurance that a number of voters encountered them and may have been influenced by them.

A look at the available evidence shows that it is not clear whether voters in the Comparative Model MSA states intended to strip public entities of their authority to offer domestic partner benefits. As an initial matter, there is copious evidence which suggests that, even if a number of voters did not subjectively intend that result, they reasonably should have known that the proposed language was sufficiently broad to encompass the possibility. First of all, leading proponents of the amendments in several states were upfront about their desire to achieve this precise goal. In Ohio, for instance, an official explanation of the marriage amendment which accompanied the ballot contained statements that supported and opposed the measure.⁷⁸ One of the statements in support of the measure stated as follows: “[The proposed marriage amendment] restricts governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage.”⁷⁹ This statement was submitted by the Ohio Campaign to Protect Marriage, which proposed the initiative petition that resulted in the amendment.

Various supporters of the failed Arizona amendment⁸⁰ were equally direct about the impact of the amendment. The explanation which accompanied the Arizona ballot contained numerous

⁷⁸ OHIO BALLOT BOARD, OHIO ISSUES REPORT – STATE ISSUE BALLOT INFORMATION FOR THE NOV. 2, 2004 GENERAL ELECTION, 4-5 (2004), <http://www.sos.state.oh.us/sos/upload/elections/2004/OIR2004.pdf>.

⁷⁹ *Id.* at 4.

⁸⁰ Even though the Arizona amendment failed, its proposed language was akin to those in the Comparative MSA category: “To preserve and protect marriage in this state, only a union between one man and one woman shall be valid or recognized as a marriage by this state or its political subdivisions and no legal status for unmarried persons shall be created or recognized by this state or its political subdivisions that is similar to that of marriage.”). ARIZONA SEC’Y OF STATE, 2006 BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW (2006), *available at* <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop107.htm?PrintMe=Y>.

statements of support for the amendment, two of which were provided by the Center for Arizona Policy, Inc. and the activist group, Protect Marriage Arizona. The Center for Arizona Policy disputed the “myth” that “[p]rivate contracts [would] be voided” by responding that “[t]he amendment only applie[d] to the government[,] . . . [and] ha[d] nothing to do with private agreements.”⁸¹ The statement from Protect Marriage Arizona was actually prepared by business leaders in the state who argued:

[T]his measure will not affect the ability of private businesses to choose what benefits to grant their employees. The amendment clearly applies only to public employers in the state of Arizona, for it states that no marriage substitutes can be recognized by the “state or its political subdivisions.” Private businesses clearly do not fall in this category.⁸²

Arizona voters actually *did* heed these warnings. Heterosexual voters – in particular, senior citizens – understood exactly how the amendment might undermine their lives: “Arizona voters narrowly rejected their amendment, due in part to the sizeable percentage of savvy cohabiting seniors who realized it could be used to jeopardize their rights as domestic partners to, for example, visit each other in the hospital or make medical decisions.”⁸³ Opponents of the measure ran a campaign that appealed to numerous constituencies – including same-sex couples, seniors, domestic violence survivors, unmarried heterosexual couples, and the business community – and in doing so, persuaded them that voting against the amendment was fundamentally in their own best interest.⁸⁴

Michigan provides another example of a campaign in which several amendment backers expressly stated their desire to prevent public employers from offering domestic partner benefits. One of the primary supporters of the Michigan marriage amendment was Gary Glenn, president of the American Family Association of Michigan. On various occasions, media outlets reported Glenn’s interpretation of the amendment, which he believed would prevent public employers from premising the receipt of benefits on an employees’ status as a domestic partner: “Under [the amendment], every single person

⁸¹ *Id.*

⁸² *Id.*

⁸³ William Butte, Op-ed., *California’s Decisions Could Affect Florida*, S. FLA. SUN-SENTINEL, Feb. 15, 2008, at 25A.

⁸⁴ See Kay Whitlock, *The Perfect Storm: Why Progressives Must Reframe the Narrow Terms of Marriage Politics*, PEACEWORK, Vol. 34, Iss. 374, Apr. 1, 2007 (assessing the value of new strategies in seeking relationship-recognition for gay and lesbian families).

currently receiving any kind of benefit would continue to do so. But it would not be on the basis of a government employer singling out homosexual relationships for the special treatment of being recognized as equal or similar to marriage.”⁸⁵ Similarly, the Michigan Family Forum, another leading supporter of the amendment, created a “Frequently Asked Questions” page on its website which addressed some of the major issues that were being debated during the election.⁸⁶ The page posed the following question: “Will public universities be prohibited from providing benefits to partners of employees?”⁸⁷ The Forum provided this answer:

Legal experts disagree on how much this may restrict public universities. The Michigan Constitution grants universities significant autonomy to govern themselves through their elected Boards. *It is reasonable to assume that state funds will be prohibited from [sic] going to same-sex partner benefits while other funding sources, such as tuition, fees or donations, will be allowed to pay for same-sex partner benefits.*⁸⁸

The answer to the question provided here was an honest, straightforward effort to educate the voter. Universities, however, were not the only public entities about whom the Michigan Family Forum offered an opinion. Another question asked, “Will unions or businesses be prohibited from negotiating contracts that offer benefits to same-sex partners of employees?”⁸⁹ Once again, the Forum provided a direct, straightforward response: “The state of Michigan will be prohibited from providing benefits to same-sex partners of state employees if those benefits are provided based on marital status, as most are.”⁹⁰ Even if one assumes that only a small percentage of voters visited the Michigan Family Forum website, other proponents made a number of statements that were issued to the public in widespread fashion. In fact, one poll taken prior to the election showed that 54% of voters believed that “local governments and universities should *not* provide benefits, such as health and life

⁸⁵ Michael Jackman, *Six Words of Separation: Proposal 2's Opponents See High Stakes in Fine Print*, METRO TIMES DETROIT, Oct. 20, 2004, available at <http://www.metrotimes.com/printStory.asp?id=6866> (projecting a wide range of consequences that might flow under the terms of the amendment).

⁸⁶ See MICHIGAN FAMILY FORUM, *FAQs on Proposal 2*, <http://web.archive.org/web/20070213073432/http://www.michiganfamily.org/special-protectmarr/documents/faq-prop2.htm> (last visited June 14, 2009).

⁸⁷ *Id.*

⁸⁸ *Id.* (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Id.*

insurance, to the partners of gay and lesbian employees.”⁹¹ It is quite reasonable, then, to believe that Michigan voters were aware of the probable impact of the amendment on domestic partner benefits offered by public employers.⁹²

Proponents of the amendments, however, were not the only parties offering these assessments. All across the country, opponents were busy sounding the alarm. They made a sustained effort to educate the public about the likely impact of the amendments under consideration in their states, and it does not stretch credulity to believe that voters likely encountered these statements at some point in time. The ballot explanation in Arizona, for instance, gave opponents a final opportunity to make their case before the voters, and they used it to express the fear that the amendment would hamper public employers’ abilities to offer partner benefits.⁹³ Similarly, the non-partisan Citizens Research Council of Michigan noted that the Coalition for a Fair Michigan, a fierce opponent of the measure, claimed that “passage would eliminate existing domestic partner benefits that are provided by state universities and some other

⁹¹ Gary Glenn & Patrick Gillen, *Nothing Dishonest About Gay Marriage Ban*, DETROIT FREE PRESS, July 12, 2007, available at <http://www.afamichigan.org/index.php?s=employer+benefits> (quoting a Detroit Free Press article from October 2004) (emphasis added).

⁹² Some supporters argued that the amendments would not affect the ability of private companies to implement domestic partner benefit policies. See, e.g., BEN YSURA, IDAHO SEC’Y OF STATE, 2006 GENERAL ELECTION PROPOSED CONSTITUTIONAL AMENDMENTS (available as an exhibit to Idaho Attorney General Opinion No. 08-21508) (Feb. 4, 2008) (on file with the author) (noting in the “Statements For” section, “This amendment does not prevent *private* industry from extending certain benefits to its employees nor does it limit a person’s right to name medical and financial agents or to enter into contractual agreements.”) (emphasis added); see also SOUTH DAKOTA SEC’Y OF STATE, 2006 BALLOT QUESTIONS (2006), available at <http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2006SouthDakotaBallotQuestionPamphlet.pdf> (emphasis added) (noting in the “Statements For” section, “*Private* companies in South Dakota will still be able to allow any benefits they choose for unmarried couples and their dependents.”) (emphasis added). Even though these were vague and elliptical statements about the potential impact of the amendments on the ability of *public* entities to implement such policies, when read fairly, they were substantively equivalent to the direct statements.

⁹³ See, e.g., ARIZONA SEC’Y OF STATE, *supra* note 80 (stating in the “Arguments Against” section, “The amendment would ban domestic partner benefits, mainly medical insurance, for all state, county, and city employees, including colleges, universities, and school districts. These current benefits would be taken away from employees of Pima County and the cities of Tucson, Phoenix, Scottsdale and Tempe. No state, county, or city entity would be able to reinstate them or pass laws that would establish these benefits in the future.”).

government employers, which give health care and other benefits to the unmarried partners of employees.”⁹⁴ In South Dakota, the opponents did not make explicit reference to public employers and partner benefits, but they argued against the amendment by focusing on the impact that similar amendments in other states had on governmental functions:

Voting NO doesn't make gay marriage legal. Voting NO keeps South Dakota the way it is right now.⁹⁵ Voting NO tells legislators that we care about these issues, but not at the risk of creating unintended consequences.

Voting yes had the unintended consequence of taking away health care for many unmarried families in Michigan.

Voting yes had the unintended consequence of removing domestic violence protections for unmarried straight couples in Ohio. Changing the Constitution tied judges' hands and forced them to let abusers go free.

Many senior couples don't remarry for risk of losing Social Security and pension benefits. Voting yes may remove their ability to make medical decisions for each other.⁹⁶

Obviously, these statements were not persuasive to South Dakota's voters, but they certainly gave the voters full information when weighing the potential consequences of a “yes” vote.⁹⁷

⁹⁴ Citizens Research Council of Michigan, *Proposal 04-02: Banning of Same-Sex Marriage and Similar Unions*, available at <http://www.crcmich.org/PUBLICAT/2000s/2004/memo1076b.html> [hereinafter, Proposal 04-02].

⁹⁵ South Dakota already had a statute which limited marriage to the union between a man and a woman. *See* S.D. CONST. art. XXI, § 9.

⁹⁶ SOUTH DAKOTA SEC'Y OF STATE, *supra* note 92.

⁹⁷ The concern was also raised by activists during the months and weeks leading up to the various elections. *See e.g.*, Amanda York, *Critics See Problems in Gay Marriage Ban*, CINCINNATI POST, October 26, 2004, at A8 (discussing a University of Kentucky law professor's concern that “the [proposed Kentucky] amendment [would] stand[] in the way of institutions such as her university that may want to provide domestic partner benefits to faculty.”). In addition, powerful Republican politicians in Ohio like then-Governor Bob Taft, Attorney General Jim Petro, and United States Senators

Finally, a number of objective assessments reached identical conclusions about the potential impact of the amendments. The non-partisan Citizens Research Council of Michigan, for instance, concluded that the “[l]ong term implications of passage are open to interpretation and range from simply strengthening existing state law that prohibits same-sex marriages to reversing the legality of domestic partner benefits, same-sex or otherwise, offered by public and private employers.”⁹⁸ The Idaho Secretary of State also weighed in on the debate when he assessed the amendment that accompanied the ballot: “The language [would] prohibit[] *the state and its political subdivisions* from granting any or all of the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage.”⁹⁹ Virginia’s Attorney General offered an assessment of the amendment prior to that state’s election, and he concluded that insurance plans offered to domestic partners by *private* employers would not be affected by the amendment; by implication, of course, *public* employers could have been affected.¹⁰⁰

All of the foregoing evidence notwithstanding, there is evidence that voters truly were confused. Exit polling in Ohio after passage of the amendment, for instance, showed that 27 percent of voters supported full marriage rights for gays and lesbians, 35 percent supported civil unions, and 27 percent opposed granting any legal rights to gays and lesbians.¹⁰¹ In other words, fully 62 percent of the voters supported the extension of at least *some* legal rights to gay and lesbian couples! The divergence between voter action and voter intent is equally dramatic in Utah, where 77 percent of voters believed that the amendment was only intended to define marriage.¹⁰² In fact, only 33 percent of those who voted for the amendment believed that it

George Voinovich and Mike DeWine opposed the amendment on similar grounds: “They asserted that the amendment would harm Ohio businesses by prohibiting employee benefits for domestic partners.” James Dao, *Genesis of a Crusade on Same-Sex Marriage*, *Internat’l Herald Trib.*, Nov. 27, 2004, at 2.

⁹⁸ Proposal 04-02, *supra* note 94.

⁹⁹ IDAHO SEC’Y OF STATE, *supra* note 92 (available as an exhibit to Idaho Attorney General Opinion No. 08-21508) (emphasis added).

¹⁰⁰ See Op. Att’y Gen. (Sept. 14, 2006), *available at* 2006 Va. AG LEXIS 34 (discussing the impact of Virginia’s proposed amendment on the legal rights of unmarried individuals in such areas as contract law, insurance policies, and domestic violence law).

¹⁰¹ See Thomas Oliphant, *The Gay Marriage Deception*, *THE BOSTON GLOBE*, Nov. 7, 2004, at D11.

¹⁰² Rebecca Walsh, *Many Utahns Favor Gay-Couple Benefits*, *THE SALT LAKE TRIB.*, Oct. 21, 2005, at A1, *available at* <http://votehouse.org/issues?PHPSESSID=69ec187a333e2d4440620ccbda412d4>. The polling which supports these figures was done less than one year after the amendment was passed by the voters.

would “prevent gay and lesbian couples from having *any* basic benefits or rights, such as health insurance or hospital visitation.”¹⁰³ Polling in Salt Lake County presents even more pronounced evidence of confusion: the amendment passed by 54 percent in Salt Lake County, but less than one year later, 57 percent of those same voters supported “local governments in Utah providing basic health insurance benefits to long-term committed partners of gay and lesbian employees.”¹⁰⁴ If these voters had intended to prevent domestic partners from receiving benefits from public entities, it is unclear why they would have changed their minds within the space of *one year*.

The ambiguity that is present in the language of similarity lies at the crux of the issue. How will a court know whether the state has created an institution that is identical, similar, or substantially similar to marriage? This broad, prohibitory language threatened (and continues to threaten) negative consequences for gay and lesbian couples because of the inherent difficulty in knowing exactly what those terms mean. This outcome is particularly troubling when the voters seem equally confused, as demonstrated by the fact that many of the voters who supported the amendments are arguably surprised by their impact.

The possible negative consequences that might flow from these amendments have manifested themselves in multiple instances. Ohio and Utah, for instance, have domestic violence statutes which cover unmarried couples who are “living as spouses” (including gay and lesbian couples).¹⁰⁵ Both states have considered, and rejected, claims that the application of these statutes to individuals who are “living as spouses” recognizes a legal status that is similar to marriage, in violation of the terms of their respective amendments.¹⁰⁶ In addition, the Nebraska Attorney General considered whether the legislature could pass a statute, consistent with its marriage

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *Briefing Paper*, EQUALITY UTAH, Mar. 15, 2006, at 3 (arguing that local governments have both public policy and ethical justifications for granting partner benefits to their gay and lesbian employees).

¹⁰⁵ See discussion *infra*, Part IV; see also UTAH CODE ANN. § 78B-7-102 (2)(b) (2008); OHIO REV. CODE ANN. § 2919.25(A) (West 2003).

¹⁰⁶ See *id.*; see also *National Briefing Gay Marriage: Get Ready for Congressional Slugfest Round Two*, THE HOTLINE, Nov. 15, 2004 (noting that a Salt Lake City attorney had recently filed a motion to dismiss domestic violence charges against her client, arguing that Utah’s recently passed marriage amendment made the application of the statute unconstitutional as applied to her unmarried client); see also *Ohio Gay Marriage Ban at Center of Domestic Violence Challenge* (2005), available at <http://www.woio.com/Global/story.asp?s=2902289&clienttype=printable> (noting that the Utah trial court judge who considered the argument had also rejected it).

amendment, allowing an individual's domestic partner to donate organs from the decedent.¹⁰⁷ The Attorney General concluded that doing so would violate the terms of the marriage amendment.¹⁰⁸ The most significant challenges, however, have occurred in those states whose public employers either offer benefits to the domestic partners of their gay and lesbian employees, or wish to do so: the Kentucky Senate, for instance, has passed a bill that would prohibit public entities from implementing partner benefit policies; the Idaho Attorney General has issued an opinion finding that a town's decision to offer such benefits likely violated the state constitution; a Salt Lake City trial court found that a provision in the city's Public Employees Health Program extending coverage to the "Adult Designee" of an employee did not violate the state marriage amendment;¹⁰⁹ the governor of Wisconsin is facing opposition over a provision in his budget proposal that would extend healthcare coverage to the domestic partners of gay and lesbian public employees;¹¹⁰ litigation over this issue has reached final, and different, conclusions in Louisiana, Ohio, and Michigan.¹¹¹ These issues pose a crucial

¹⁰⁷ See Op. Neb. Att'y Gen. No. 03004 (Mar. 10, 2003).

¹⁰⁸ See *id.*

¹⁰⁹ See Jill Laster, *Senate Passes Partner Benefits Ban*, KENTUCKY KERNEL, Jan. 31, 2008, available at <http://kykernel.com/2008/01/31/senate-passes-partner-benefits-ban/> (discussing the legislation prohibiting public employers from offering domestic partner benefits to their employees); see also City of Moscow, *supra*, note 14; In re Utah State Ret. Bd., No. 050916879 (Utah 3rd Dist. Ct. 2006) available at <http://www.acluutah.org/normanruling.pdf>. Salt Lake City defined "Adult Designee" as "a [dependent] person, not the spouse of the employee, who has resided in the domicile of the eligible employee for not less than twelve consecutive months and intends to continue to do so, is at least eighteen years old, and is economically dependent on or interdependent with the eligible employee."

¹¹⁰ See Stacy Forster, *Doyle Says Domestic Partner Proposal Does Not Violate Marriage Amendment*, MILWAUKEE-WISCONSIN JOURNAL SENTINEL ONLINE, Feb. 23, 2009, available at <http://www.jsonline.com/news/statepolitics/40064357.html> (describing the proposal and political opposition to it).

¹¹¹ See *Brinkman v. Miami Univ.*, 2007 WL 2410390 (Ohio Ct. App. Aug. 27, 2007); cf. *Ralph v. City of New Orleans*, No. 2003-09871 Orleans Parish Civ. Dist. Ct. Jan. 15, 2008 (finding in a similar, though distinguishable, case that the City of New Orleans' decision to grant its employees limited domestic partnership benefits was not effectively equivalent to same-sex marriage). The decision in *Ralph* was subsequently upheld by a three-judge panel of the Louisiana Court of Appeal. See Lambda Legal, *Louisiana Court of Appeal Upholds Benefits for Same-Sex Partners of New Orleans City Employees*, January 21, 2009, available at <http://www.lambdalegal.org/news/pr/louisiana-court-of-appeal-upholds-benefits.html>. The employee benefits issue has reached a different conclusion in Michigan, which considered whether the decision to premise the dispensation of domestic partner benefits on the existence of the same-

question that the courts in the Comparative Model MSA states have answered, or may find themselves called upon to answer: when public entities are challenged for offering or proposing to offer their gay and lesbian employees domestic partner benefits, how must courts interpret deeply ambiguous language that threatens to take those benefits away? If one broadens the inquiry by looking to the socio-political context within which the amendments were passed, courts will find that the clearest and most identifiable intent is also the most narrow intent – that the primary motivation behind voter support for these amendments was the desire to prohibit the creation of same-sex marriage or civil unions in their respective states.

b. Evaluating Voter Intent: the Socio-Political Context

Over the course of time, public disapproval of homosexuality has lessened substantially, and public support for same-sex marriage has improved dramatically. Nonetheless, it is still clear that a majority of Americans prefer traditional marriage, and did at the time of the passage of the marriage amendments.¹¹² The political context surrounding the passage of the amendments, then, was marked by a fear in many voters that their preference for traditional marriage was at risk of being ignored. The near-validation of same-sex marriage in *Baehr v. Lewin*,¹¹³ its actual validation in *Goodridge*, and the spate of illegal marriage ceremonies around the country ultimately made some voters fear that gay marriage was just a court decision or renegade mayoral action away.¹¹⁴ Moreover, state supreme courts in Vermont

sex relationship recognized a legal status that was similar to marriage, in violation of the Michigan marriage amendment. See *Nat'l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524, 543 (Mich. 2008).

¹¹² Between 2006 and 2008, the American attitude toward same-sex marriage did not significantly change – as an overall matter, 28% of Americans supported it in 2006, and only 29% supported it in 2008. ROBERT P. JONES, PH.D. & DANIEL COX, PUBLIC RELIGION RESEARCH, AMERICAN ATTITUDES ON MARRIAGE EQUALITY: FINDINGS FROM THE 2008 FAITH AND AMERICAN POLITICS STUDY 9 (2008), available at [http://www.publicreligion.org/objects/uploads/fck/file/HRC%20Final%20Draft\(1\).pdf](http://www.publicreligion.org/objects/uploads/fck/file/HRC%20Final%20Draft(1).pdf). The attitude of young adults between the ages of 18 and 34 shifted dramatically during that same period: in 2006, 37% of Americans in this group approved of same-sex marriage, but by 2008, 46% supported it. *Id.* The national numbers were not substantially different in 2004, when approximately 29-32% of Americans supported same-sex marriage. See DAVID MASCI, PEW FORUM ON RELIGION AND PUBLIC LIFE, A STABLE MAJORITY: MOST AMERICANS STILL OPPOSE SAME-SEX MARRIAGE 1 (2008), available at <http://pewforum.org/docs/?DocID=290>.

¹¹³ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹¹⁴ See, e.g., Jameel Naqvi, *Proposal Would Entrench Gay Marriage Ban*, MICH. DAILY, Oct. 27, 2004 (“Kristina Hemphill, spokeswoman for Citizens

and New Jersey forced their legislatures to implement civil union legislation, once again taking a decision about the status of same-sex relationships out of the hands of the people.¹¹⁵ Undoubtedly, many voters were motivated by twin concerns: a desire to reserve marriage and its privileges exclusively for heterosexuals, and a fear that they would have no role in defining the emerging position of gays and lesbians in society. Therefore, in every state except Arizona, once voters had the opportunity to address the issue, they passed the proposed amendments and removed the question from the arena of debate.¹¹⁶

These facts notwithstanding, the American public seems ready to extend *some* benefits and protections to gays and lesbians, as shown by the fact that 55 percent of Americans support civil unions for gay couples, as well as the fact that several states have already moved toward establishing such unions.¹¹⁷ These numbers reflect a growing shift in perception about gay acceptability within society, as evidenced by political and cultural changes which have almost certainly left their mark. Gays and lesbians are “coming out” to their friends and families at increasingly younger ages.¹¹⁸ Anti-gay bias is on the decline.¹¹⁹ Twenty states and the District of Columbia prohibit

for the Protection of Marriage, which collected the required signatures to put the proposal on the ballot, said an amendment would “keep Michigan from going through the fiasco that has occurred in other states.”); *see also* OKLA. CONST. art. 2, § 35(C) (“Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.”).

¹¹⁵ *See Baker v. State*, 744 A.2d 864 (Vt. 1999); *see also Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

¹¹⁶ *See Eric Ervin, Arizona Rejects Anti-Gay Marriage Amendment*, WASH. BLADE, Nov. 8, 2006, available at <http://www.washblade.com/2006/11-8/news/national/amendments.cfm> (discussing the defeat of the marriage amendment in Arizona). Arizona, however, eventually passed a marriage amendment. *See* ARIZ. CONST., art. XXX, § 1, available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/const/30/1.htm> (defining marriage as the union between one man and one woman).

¹¹⁷ *See, e.g., Gary Langer, Poll: Support for Civil Unions Rises, Yet Sharp Divisions Remain*, ABC NEWS (Nov. 8, 2007), available at <http://abcnews.go.com/PollingUnit/story?id=3834625&page=1>.

¹¹⁸ *See, e.g., Marian Elias, Gay Teens Coming Out Earlier to Peers and Family*, USA TODAY, Feb. 11, 2007, available at http://www.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm (discussing the fact that gays and lesbians are publicly announcing their sexuality at earlier ages in their lives).

¹¹⁹ *See, e.g., ZOGBY INT’L, AMERICAN PREJUDICE 16* (July 2007), available at <http://www.zogby.com/gsn/GSNReport.pdf> (finding that 87% of Americans believe that gays and lesbians should be free from workplace discrimination); *but see* Federal Bureau of Investigation, *FBI Releases 2006*

discrimination on the basis of sexual orientation.¹²⁰ Twelve of those states and the District of Columbia also prohibit discrimination on the basis of gender identity.¹²¹ Gay contestants on reality shows like *Project Runway* enjoy widespread popularity, and dramas like *Mad Men*, *The L Word*, *The Wire*, and *The Shield* offer a sophisticated vision of the complexity of gay and lesbian lives.¹²² Gays and lesbians are gradually becoming a normalized segment of mainstream American life.

How, then, can one reconcile these changes with the fact that voters across the country supported the Comparative Model MSAs by very comfortable margins? And what did they hope to achieve when they did so? The nation's growing support for gays and lesbians notwithstanding, the evidence reflects a deep ambivalence about the name that we give to gay and lesbian relationships. Many would argue that the most important "name," or label, that one can place on a relationship is "marriage," and voters were clearly not ready to extend to gays and lesbians this measure of equal social regard. The growing approval of civil unions does not undermine this claim – even though the numbers suggest that more people are acknowledging

Hate Crime Statistics (Nov. 2007), available at <http://www.fbi.gov/ucr/hc2006/pressrelease.html> (noting that approximately 15.5% of hate crimes committed in 2006 were motivated by sexual orientation bias).

¹²⁰ Those states are California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES, (NOV. 26, 2007), http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf.

¹²¹ See *id.*

¹²² Each show referenced above has done a masterful job of including (or focusing on) gay and lesbian contestants/characters: A disproportionate number of the male contestants on Bravo's *Project Runway* are openly gay; season one of AMC's *Mad Men*, set on Madison Avenue in the pre-Stonewall 1960s, featured two recurring characters who struggled with the loneliness of the closet; Showtime's *The L Word* was a glossy soap opera devoted to the romantic entanglements of a group of lesbian friends; HBO's *The Wire* featured both a well-respected lesbian police officer and a gay lone wolf gangster who stole drug stashes from the major players in town while armed with a sawed-off shotgun; and finally, FX's *The Shield* showed the "ex-gay" movement through the eyes of a deeply religious gay police officer who rejected his sexuality. See *The L Word*, <http://www.sho.com/site/lword/home.do>; see *Mad Men*, <http://www.amctv.com/originals/madmen/>; *Project Runway*, http://www.bravotv.com/Project_Runway/index.php; *The Shield*, http://www.fxnetworks.com/shows/originals/the_shield/main.html; *The Wire*, <http://www.hbo.com/thewire/>.

both the humanity of gays and lesbians and the urgency of their practical needs, many of these supporters still balk at conferring the dignity attached to the label “marriage.”

Given the apparent importance of reserving the word “marriage” for heterosexual unions, it stands to reason that voters would have approved the comparative model MSAs, the breadth of their language notwithstanding. Rather than focusing on the ambiguous language in the proposed amendments, voters who were more concerned with issues like taxes, the economy, the war on terrorism, and the war in Iraq might have focused on the language which was clear, and voted in favor of establishing an explicit prohibition on same-sex marriage. The drafters of the amendments – who almost certainly knew that the language could be used to prevent the creation of civil unions or their equivalents – appeared to win both the battle and the war. Not only was marriage restricted to heterosexual couples, but they would also be the only ones who had access to its universe of attendant benefits.

After looking at the direct extrinsic evidence and the evidence presented by the historical circumstances denoted by the socio-political context, what conclusions can one draw here? It seems reasonable to assert that most voters would have expressed a primary preference for outlawing same-sex marriage and maybe civil unions, but nothing else. Even though there is evidence which shows a wide-ranging amount of support for civil unions, one can look at the historical circumstances from 2004-2006, when most of the amendments were passed, and draw the conclusion that many people would have objected to them, too, largely because it appeared that civil unions were being forced on the electorate, much like same-sex marriage had been in Massachusetts. Even though one might craft an interpretation of the broadly-phrased amendments that would result in the loss of health care benefits for the domestic partners of gay and lesbian employees, the ambiguity of these amendments is so profound that courts are best advised to adopt a narrowing construction that hews as closely as possible to the intent that is readily ascertainable.¹²³ Attributing meaning to the amendments beyond the proscription of same-sex marriage, civil unions, and any other parallel institution that is identical to what the people would have understood as a civil union would move a court into territory that extends beyond its ability to approximate reasonably the voters’ intent.

¹²³ Other scholars have suggested that narrowing constructions of direct democracy acts are appropriate, especially when voters may have been confused about the meaning of a proposal, and when that confusion might result in unanticipated harm to a targeted minority. *See, e.g.,* Schacter, *supra* note 22, at 157; *see also* Strasser, *Plain Meaning*, *supra* note 17, at 59.

The Michigan Supreme Court, however, did not exercise such interpretive restraint when it reviewed a question regarding the legitimacy of domestic partner employee benefits programs that were implemented by the state. By contrast, the Ohio Supreme Court did take this approach when it reviewed the continued viability of applying a domestic violence statute to unmarried cohabiting couples who were “living as spouses.” In section IV, I will examine and critique the approach taken by both of these courts and conclude that the Michigan Supreme Court ruled incorrectly, while the Ohio Supreme Court reached the proper decision.¹²⁴

IV. THE MARRIAGE AMENDMENTS IN ACTION: *NATIONAL PRIDE AT WORK, INC., ET AL. V. GOVERNOR OF MICHIGAN AND OHIO V. CARSWELL*

A. *NATIONAL PRIDE AT WORK*

1. *Factual Backdrop*

Shortly after the Supreme Judicial Court of Massachusetts held that same-sex marriage would be legal in its state, a member of the Michigan State Legislature proposed that a constitutional amendment banning same-sex marriage be placed before the Michigan voters.¹²⁵ The proposed amendment failed, however, when it did not garner the required two-thirds majority.¹²⁶ Soon thereafter, the Michigan Christian Citizen’s Alliance started an initiative committee in an effort to achieve the same end.¹²⁷ This committee – Citizens for the Protection of Marriage – successfully collected more than 500,000 signatures on a petition demanding that the proposed amendment be placed on the November ballot.¹²⁸ On November 2, 2004, voters in

¹²⁴ Even though the Ohio Supreme Court’s ruling focused on the domestic violence statute rather than the provision of benefits to the domestic partners of gay and lesbian state employees, the analysis employed by the Ohio Supreme Court was stronger.

¹²⁵ *Wedding Wall: Balloted Gay Marriage Ban Denies Equal Protection*, THE MICH. DAILY, July 6, 2004, available at <http://media.www.michigandaily.com/media/storage/paper851/news/2004/07/06/Opinioneditorials/Wedding.Wall-1424382.shtml> [hereinafter, *Wedding Wall*].

¹²⁶ See *id.*

¹²⁷ Brief of Plaintiff-Appellant at 7, *Nat’l Pride at Work, Inc., et al. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2007) (No. 133554) [hereinafter *Plaintiff’s Brief*].

¹²⁸ See *Citizens for the Protection of Marriage v. Bd. of State Canvassers*, Order of Mandamus (Mich. Ct. App. Sep. 3, 2004), at 1, available at http://www.michigan.gov/documents/DOC000_101290_7.pdf. The petition was quite successful – supporters needed only 317,757 signatures in order to win a spot on the ballot.

the state of Michigan passed the marriage amendment, which states as follows: "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."¹²⁹ One of eleven same-sex marriage amendments to pass nationwide that day, Michigan's amendment was approved by 59 percent of the voters.¹³⁰ It was a clear victory for same-sex marriage opponents and an expected defeat for proponents of gay and lesbian rights.¹³¹

Even though the language of the Michigan amendment is somewhat opaque, its primary purpose is simple and straightforward – voters intended to eliminate the¹³² possibility of same-sex marriage in the state of Michigan.¹³³ More ambiguous, however, is the exact import of the "similar union" language. Voters certainly meant to block the creation of civil unions, their functional equivalent, or any other publicly cognizable union between an unmarried couple that was similar to the marital union.¹³⁴ Nevertheless, the contours of the prohibition are unclear. Did the ban extend only to the creation of comprehensive parallel regimes like those in New Jersey, California, and Oregon, each one of which allows gay and lesbian residents to enter into publicly-acknowledged relationships that are treated like marriage under state law?¹³⁵ Or did it also extend to the creation of regimes like those in Washington, Hawaii, and the District of Columbia, where gay and lesbian relationships receive limited public acknowledgement and protection under state law?¹³⁶ Would it negatively impact the ability of gay and lesbian couples to adopt or foster children?¹³⁷ Would it limit the ability of gay *and* straight

¹²⁹ See MICH. CONST. art. I, § 25 (2004).

¹³⁰ Dawson Bell, *Proposal 2: Gay Marriage Ban Easily Wins in State, Elsewhere; Constitutional Amendment Has Strong Support Across the Board*, DETROIT FREE PRESS, Nov. 3, 2004, at 9A.

¹³¹ *Id.*

¹³² See *id.* ("Michigan was one of 11 states to adopt constitutional amendments on marriage, signaling a strong grassroots reaction to court decisions permitting same-sex marriage in Massachusetts and decisions by local officials in various places to permit gay and lesbian couples to marry.").

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ N.J. STAT. ANN. § 37: 1-31 (2007); CAL. FAM. CODE § 297 (2008); Oregon Family Fairness Act, OR. REV. STAT. § 11.106 (2007).

¹³⁶ See HAW. REV. STAT. § 572-1.6 (2007); see also WASH. REV. CODE § 26.60.060 (2007); D.C. CODE §§ 32-701 to -710 (2008).

¹³⁷ See Danielle Epstein & Lena Mukherjee, Note, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT 782, 800 (1997) (arguing that a significant consequence of failing to recognize same-sex marriage is the

unmarried couples to receive protection under the domestic violence statutes?¹³⁸

Questions regarding the scope of the “similar union” language had an immediate practical impact in Michigan. Many state employers at the time of passage had policies or contractual agreements in place which offered health-care benefits to the domestic partners of gay and lesbian employees.¹³⁹ The passage of the amendment seemed to render doubtful the continued validity of those policies and agreements. One such proposed agreement existed between Michigan’s Office of State Employer (“OSE”) and its employees who were represented by the United Auto Workers (“UAW”) Union. On October 24, 2004, OSE and UAW entered into a tentative agreement that, for the first time, included health care and family medical leave benefits for the same-sex domestic partners of UAW members.¹⁴⁰ In order to qualify for the benefits, however, the domestic partners had to meet certain eligibility criteria laid out in the Letter of Understanding between the OSE and the UAW. The eligibility criteria were as follows:

- (1) Be at least 18 years of age.
- (2) Share a close personal relationship with the employee and be responsible for each other’s common welfare.
- (3) Not have a similar relationship with any other person, and not have had a similar relationship with any other person for the prior six months.
- (4) Not be a member of the employee’s immediate family as defined as employee’s spouse, children, parents, grandparents, or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles or cousins.
- (5) Be of the same gender.

denial of benefits reserved for legally married couples, including the right to adopt and raise a family).

¹³⁸ See *infra*, Part III (discussing the experience of the Ohio courts when evaluating this question).

¹³⁹ For example, Michigan State University, prior to June 2007, offered health insurance benefits to employees in same-sex domestic partnerships. See Colleen Maxwell, *Michigan University Stops Same-Sex Benefits*, June 6, 2007 at <http://www.afamichigan.org/2007/06/08/state-news-michigan-state-university-stops-same-sex-benefits/> (last visited Feb. 28th, 2008).

¹⁴⁰ See *Brief of Amici Curiae Internat’l Union, UAW and Its Local 6000 in Support of [P]laintiffs-Appellants*, at 1, *Nat’l Pride At Work, Inc. v. Governor of Michigan*, No. 133429, 481 Mich. 56 (1998), available at <http://courts.michigan.gov/supremecourt/Clerk/11-07/133429/133429-Index.htm>.

- (6) Have jointly shared the same regular and permanent residence for at least six months, and have an intent to continue doing so indefinitely.
- (7) Be jointly responsible for basic living expenses, including the cost of food, shelter and other common expenses of maintaining a household. This joint responsibility need not mean that the persons contribute equally or in any particular ratio, but rather that the persons agree that they are jointly responsible.¹⁴¹

After the passage of the Marriage Amendment, OSE and UAW became especially concerned about the legality of the proposed agreement.¹⁴² Rather than submitting the proposed agreement to the Civil Service Commission for ratification, OSE and the UAW agreed to delay their submission until a court held that the proposed contract was legal.¹⁴³

The proposed agreement between the OSE and UAW was not the only contract that was potentially threatened by the open-ended language of the amendment. Despite public reassurances provided by its backers that the proposed amendment would not threaten benefit plans,¹⁴⁴ it was nonetheless clear that the ambiguous language did, in fact, raise important questions about the full effect of the amendment. Specific concerns were raised about the validity of plans implemented by state universities, with a particular emphasis on the University of Michigan, as well as plans implemented by localities like the City of Kalamazoo.¹⁴⁵

The policy implemented by the University of Michigan came under scrutiny as questions about the viability of these partner benefit plans became more intense. The University defended its plan as

¹⁴¹ *Id.*, Ex. 2, Letter of Understanding, Article 43, Section C (Dec. 3, 2004) [hereinafter, Letter of Understanding].

¹⁴² *Id.* at 1-2.

¹⁴³ See Brief of Plaintiff-Appellant on Appeal, (Aug. 30, 2007) at 7, (A representative of Citizens for the Protection of Marriage, which sponsored the initiative resulting in the placement of the marriage amendment on the ballot, described the impact of the proposed amendment for the Michigan Board of Canvassers, which was responsible for certifying the ballot proposal). See also, *id.* at 8 (*arguing* that the amendment would not “preclude the public employer from extending . . . benefits, if they so chose, as a matter of contract between employer and employee. . . .”).

¹⁴⁴ *Id.*

¹⁴⁵ See *Nat’l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005), at **1-2 (describing the structure of the health-benefit plan implemented by defendant City of Kalamazoo, as well as a similar plan implemented by the University of Michigan).

necessary to attract the kind of intellectual talent needed to support the continued strength of its reputation for excellence, and argued that the voters did not intend to restrict its ability to offer these plans when they supported the amendment.¹⁴⁶ Under the terms of the university's benefit plan, a same-sex domestic partner meets the eligibility requirements if the following criteria are met: the person was (1) of the same sex as the employee; (2) unmarried; (3) unrelated by blood to the employee in a manner that would have precluded marriage if the option was available; (4) uncovered by the university's plan (i.e. cannot be a university employee); (5) registered as the employee's domestic partner in their particular locality; (6) more than six months away from the termination of a previous domestic partner relationship with another person.¹⁴⁷

Similarly, the City of Kalamazoo implemented a plan in 2000 which offered health care benefits to all employees and their domestic partners.¹⁴⁸ Individuals qualified as domestic partners under the City of Kalamazoo's plan if they met the following requirements: (1) were of the same gender; (2) were at least 18 years of age and had the mental competence to enter into a contract; (3) were sharing and had shared a common residence for at least six months; (4) were unmarried and were not related in a manner that would have precluded them from marrying under the Michigan statutes; (5) had shared their finances and living expenses; and (6) had signed a Certification of Domestic Partnership.¹⁴⁹

Shortly after the passage of the amendment, the plan offered by the City of Kalamazoo inspired State Representative Jacob W. Hoogendyk, Jr. to seek an attorney general opinion regarding its constitutionality. Michael Cox, the Michigan Attorney General, concluded that "the City's policy of offering benefits to same-sex domestic partners violates the amendment's prohibition against recognizing any 'similar union' other than the union of one man and woman in marriage."¹⁵⁰ In his opinion, the Attorney General identified the purpose of the amendment as protecting the "social, legal, and financial benefits [of marriage] uniquely [for] married men

¹⁴⁶ See Brief of the Regents of the University of Michigan, the Board of Governors of Wayne State University, Central Michigan Board of Trustees, the Board of Control of Northern Michigan University, Michigan Technological University, Saginaw Valley State University, and the Board of Regents of Eastern Michigan University as Amicus Curiae in Support of Plaintiff-Appellants, (Mich. Supreme Court Aug. 24, 2007), at 3, 20.

¹⁴⁷ *Id.* Ex. 1, at 3.

¹⁴⁸ Nat'l Pride at Work v. Granholm, No. 05-368-CZ, 2005 WL 3048040, at *1 (Mich. Cir. Ct. Sept. 27, 2005).

¹⁴⁹ *Id.* at *2.

¹⁵⁰ 2005 Mich. OAG No. 7171 (2005), 2005 WL 639112, at *9.

and women.”¹⁵¹ Viewing the rest of the amendment in light of this purpose, he concluded that the language was “best interpreted as prohibiting the *acknowledgement* of both same-sex relationships and unmarried opposite-sex relationships.”¹⁵² Since the City of Kalamazoo arguably granted formally-registered domestic partners a status that was similar to marriage, tying the receipt of benefits to an employee’s status as one half of a domestic partnership was a “recognition or acknowledgement of the validity of . . . same-sex relationships.”¹⁵³ As such, the policy violated the amendment.¹⁵⁴ On April 18, 2005, the City of Kalamazoo announced its intention to discontinue the benefits plan, effective January 1, 2006, unless a court ruled that the policy was legal.¹⁵⁵ Shortly thereafter, plaintiffs filed their action in *National Pride at Work*. The trial court and the Court of Appeals rendered a split decision: the trial court found that the amendment did not invalidate the partner benefits plans, and the Court of Appeals reversed. The Michigan Supreme Court subsequently affirmed that decision.

2. Analysis

In its analysis of Michigan’s marriage amendment, the Supreme Court started with the proposition that “[t]he primary objective in interpreting a constitutional provision is to determine the original meaning of the provision to the ratifiers. . . .”¹⁵⁶ The court proposed to identify the original meaning – which was reflective of the voters’ intent – by referring to the plain language of the amendment itself, which the court argued was unambiguous.¹⁵⁷

To that end, the court isolated the critical phrases of the amendment and interpreted each one in turn. Starting with the “similar union” language, the court considered whether domestic partnerships were similar to marriage. Noting that the dictionary definition of the word connoted mere “likeness” or “resemblance,” the court found that the amendment did not require extensive similarity between marriage and another form of relation.¹⁵⁸

¹⁵¹ *Id.* at *6.

¹⁵² *Id.* at *8 (emphasis added).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *9. The Attorney General also found that the prohibition contained in the amendment operated prospectively only. Therefore, contracts which were already in existence prior to the effective date of the amendment would not be impacted.

¹⁵⁵ *Nat’l Pride at Work v. Granholm*, 2005 WL 3048040, at *2.

¹⁵⁶ *See Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 533 (Mich. 2008).

¹⁵⁷ *Id.* at 540.

¹⁵⁸ *Id.* at 533-37.

Therefore, the plaintiffs' claim that there were vast differences between the legal effects of marriage versus domestic partnerships told only part of the story. The court also considered whether there were similarities in the *nature* of the two relationships, and it found several: both incorporated a gender requirement; both placed limitations on the permissible degree of blood relation that could exist between the two; both were binary relationships; both had obligations of mutual support; both relationships were contractual in nature; both relationships had a minimum age requirement; and both were indefinite in length.¹⁵⁹ These similarities convinced the court that marriage and domestic partnerships "resembl[ed] one another 'in a general way.'"¹⁶⁰

The court went on to consider whether the partner benefits plans "recognized" an "agreement" in violation of the amendment, and it held that they did. As an initial matter, recognition existed because legal consequences flowed from the fact of the relationship: "When public employers provide domestic partners health-insurance benefits on the basis of the domestic partnership, they are without a doubt recognizing the partnership."¹⁶¹ Moreover, the domestic partnerships were clearly agreements. Defined as "'the act of agreeing or of coming to a mutual arrangement,'" the court noted that each of the plans in question required eligible couples to sign domestic partnership agreements. Since the provision of benefits turned on the existence of the partners' relationship, and since the decision to enter the relationship was the product of a mutual bargain, the state had recognized a union in violation of the amendment.¹⁶²

At first blush, the analysis employed by the Michigan Supreme Court appears reasonable. It carefully considered the meaning of all relevant terms, and arguably did a credible job of ascribing meaning to those terms. The primary difficulty, however, lay in the fact that this court claimed that the language of the amendment was unambiguous. This position is simply insupportable. As discussed above, one might reasonably find solid meaning in the terms "status" and "recognize," as well as any other terms in the amendment that were not central to its interpretation. The language of similarity, however, was distinctly ambiguous because the amendment offered no guidance regarding the scope of similarity that the amendment meant to preclude.

¹⁵⁹ *Id.* at 534-37.

¹⁶⁰ *Id.* at 537.

¹⁶¹ *Id.*

¹⁶² The Court also interpreted the "for any purpose" clause as essentially punctuating the intent of the amendment, and construed the "benefits" clause as nothing more than a preamble. *Id.* at 538.

Moreover, a survey of the available extrinsic evidence that was directly related to the passage of Michigan's amendment does not definitively clarify the meaning of the similarity provision. As noted, some amendment backers explicitly stated that the impact of the amendment would extend precisely to situations like the matter under consideration in *National Pride at Work*. At least one poll suggested that a majority of Michigan voters understood that this outcome was likely. Opponents of the proposed amendment also noted that the amendment might have an impact beyond placing limits on marriage. Objective assessments commissioned by non-partisan research groups also sounded the warning bell.

It is not clear, though, whether these arguments actually registered for the voters. First of all, some backers of the proposed amendment insisted that it would apply *only* as a limitation on marriage and the creation of civil unions.¹⁶³ Second, structural inequalities that result in informational deficits between voters and proponents characterize the direct democracy setting, a flaw that would undoubtedly have been present in Michigan. Professor Jane Schacter has notably discussed this flaw in her seminal work on interpretive problems as they apply within the direct democracy context. Her discussion of informational asymmetries noted that they tend to result from multiple factors, including voters' failure to read complex proposals, their reliance on overly-simplified media accounts of proposals, their failure to understand legal jargon (presumably including terms of art), voter apathy, and other factors that bear on the likelihood that they will not fully understand the potential consequences of supporting a provision.¹⁶⁴ Moreover, the lack of sophistication that exists in the general population regarding the technical meanings of laws provides an opportunity for proponents to take advantage of voters, and Schacter notes that exploitation is a

¹⁶³ See, e.g., Gilda Z. Jacobs, *The Jacobs Report*, Mar. 25, 2005, available at <http://www.senate.mi.gov/dem/Newsletters/14/032505.pdf> (discussing the fact that backers of Michigan's proposed amendment "consistently and repeatedly advised the voting public, through media and campaign literature, that the intent and purpose of the proposed amendment was to limit marriage to a man and a woman and would not affect [domestic partnerships] or same sex partnership benefits"); see also D'Anne Witkowski, *Amendment Backers Set Sights on DP Benefits*, Nov. 12, 2004, available at <http://www.pridesource.com/article.shtml?article=10211> (arguing that the same amendment backers adopted two positions during the marriage debate, one which said that the amendment would threaten domestic partner benefits, and one which said that this position was completely unjustified and represented a media distortion of their position).

¹⁶⁴ See Schacter, *supra* note 62, at 155-57.

particular risk when the subject matter of the proposal targets marginal and socially despised groups.¹⁶⁵ Without question, many of these problems would have been present in the Michigan electorate, if only because they are generally present across the entire electorate. The amendment's backers reversed positions regarding the impact of the amendment, and the group under attack here – gays and lesbians – is clearly a marginalized minority group. As such, it would have been reasonable to conclude that there was likely voter confusion about the impact of the amendment, and concerns regarding tyrannical majorities should have given the Michigan Supreme Court pause. The evident factual and structural problems that were present here should have convinced the Court to act with modesty and temperance.

The fact that an interpretive ambiguity was built into the amendment should not have led the court to abandon its obligation to interpret the law as it was presented to it. Rather, the extraordinary lack of clarity that existed both on and below the surface of the amendment should have raised a red flag of caution for the court and encouraged it to exercise restraint.¹⁶⁶ The use of the word “similar” in the Michigan amendment is so unclear as to defy any confident, broad interpretation, so the Court should have implemented it in the narrowest fashion possible. If it had done so, it would have found that the only reasonable restraint to which the amendment was directed was the prohibition of same-sex marriage and civil unions; since dispensing employee benefits did not fall into either one of those categories, the court should have found that the amendment had no bearing on the state's authority to implement those policies. Instead of taking this approach, which would have been clearly, if imperfectly, consistent with the intent of the electorate, the court adopted an interpretation that was arguably not in line with the desires of most voters in Michigan.

Michigan should have followed the approach taken by the Ohio Supreme Court when it had to consider the applicability of Ohio's marriage amendment to its domestic violence statute. In *Ohio v. Carswell*, the Ohio Supreme Court rejected the interpretive approach that Michigan favored and instead limited the reach of the amendment to same-sex marriage and civil unions.

B. OHIO V. CARSWELL

Ohio's marriage amendment states as follows:

¹⁶⁵ See *id.* at 157.

¹⁶⁶ Others, quite notably Professor Schacter, have also suggested that restraint is properly exercised when the law in question is irredeemably ambiguous. See *id.* at 157-58 (arguing that in the face of ambiguity, courts should refrain from broad construction of the laws before them).

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.*¹⁶⁷

Litigation over the amendment focused on the tension that existed between the second sentence and the application of the domestic violence statute to unmarried individuals. Unmarried defendants could be prosecuted under the domestic violence statute upon proof that they were “living as . . . spouse[s]” with the complainant.¹⁶⁸ After the passage of the marriage amendment, defendants in these cases argued that the designation of “living as a spouse” recognized a legal status for unmarried people in violation of the amendment.¹⁶⁹ The lower courts in Ohio were split regarding the validity of the claim, but the Ohio Supreme Court resolved it against the defendants in *Ohio v. Carswell*.¹⁷⁰ This resolution of the debate turned significantly on the court’s understanding of “status” and the manner in which it applied to the domestic violence statute.

1. Beyond the Scope?: Considering the Relevance of the Marriage Amendment to the Domestic Violence Statutes

Since 1979, Ohio’s domestic violence laws have protected unmarried individuals who were victimized at the hands of a cohabiting intimate partner.¹⁷¹ Unmarried, cohabiting partners are protected under these laws by virtue of the manner in which “family or household member” has been defined, both by statute and by the Ohio Supreme Court. The domestic violence statute states as follows:

¹⁶⁷ OHIO CONST. art. XV, § 11 (2004) (emphasis added).

¹⁶⁸ See, e.g., *State v. Carswell*, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005), at *1 (overruling a trial court decision which found that the protection accorded by the domestic violence statute to those individuals who were living as spouses violated the marriage amendment).

¹⁶⁹ Multiple cases were filed in Ohio which challenged the constitutionality of the “living as a spouse” provision in the domestic violence statute. A few illustrative examples include the lower court decisions in *Carswell* itself, see *id.* at *1 (discussing the lower court decision); *State v. Burk*, 843 N.E.2d 1254, 1255 (2005); *State v. Douglas*, 2006 WL 1304860, at *1 (Ohio Ct. App. May 11, 2006).

¹⁷⁰ 871 N.E.2d 547 (Ohio 2007).

¹⁷¹ See Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Ohio Now Education and Legal Fund in Support of Appellee State of Ohio, 2006 WL 2351199 (Ohio July 17, 2006), at **2-6 (discussing the legislative history underlying the passage of the Ohio domestic violence statute).

“No person shall knowingly cause or attempt to cause physical harm to a family or household member.”¹⁷² The statute goes on to define “family or household member” as covering a number of different relationship categories, including “[a] person living as a spouse.”¹⁷³ This category is further defined as referring to “a person who is living or has lived with the offender in a common law marital relationship, *who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.*”¹⁷⁴ The domestic violence statutes do not define “cohabitation,” but in *State v. Williams*, the Ohio Supreme Court held that “the essential elements of ‘cohabitation’ are (1) sharing of familial or financial responsibilities and (2) consortium. . . . Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations.”¹⁷⁵ *Carswell* presented the Ohio Supreme Court with an opportunity to consider whether the application of these principles to an unmarried defendant in a domestic violence case “create[d] or recognize[d] a legal status for relationships of unmarried individuals that intend[ed] to approximate the design, qualities, significance or effect of marriage.”¹⁷⁶

The Court’s substantive discussion of the issue began with its definition of the phrase “legal status.” After examining several dictionary definitions, the Court settled on a view of status, that is, standing before the law, which focused on the degree to which this standing created “certain legal rights, duties, and liabilities.”¹⁷⁷ Based in part on this understanding, as well as the historical and political context within which the amendment was passed, the Court held that the operative phrase of the amendment – “[t]his state . . . 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”¹⁷⁸ – as meaning that “the state cannot create or recognize a legal status for unmarried persons that bears *all* of the attributes of marriage – a marriage substitute.”¹⁷⁹ This

¹⁷² OHIO REV. CODE ANN. § 2919.25(A) (West 2003).

¹⁷³ *Id.* at § 2919.25(F)(1)(a)(iii).

¹⁷⁴ *Id.* at § 2919.25(F)(2) (emphasis added).

¹⁷⁵ *State v. Williams*, 683 N.E.2d 1126, 1130 (Ohio 1997) (holding that there was sufficient evidence to find that a defendant and victim were cohabitants within the meaning of the domestic violence statute.).

¹⁷⁶ OHIO CONST. art. XV, § 11 (2004).

¹⁷⁷ *Carswell*, 871 N.E.2d at 551.

¹⁷⁸ OHIO CONST. art. XV, § 11.

¹⁷⁹ *Carswell*, 871 N.E.2d at 551 (emphasis added).

definition reflected the Court's view of the purpose of the amendment, which was to prevent the state from creating or recognizing a parallel marriage regime, like civil unions.¹⁸⁰

The Court then turned to the meaning of the "family or household" provision in the domestic violence statute. This provision triggered the central claim raised by the defendant because "family or household member" was defined as including "a person living as a spouse."¹⁸¹ The defendant claimed that it was unconstitutional to prosecute him under this provision because the "living as a spouse" language directly violated the marriage amendment.¹⁸² The Court, however, took a different view. First of all, the Court found that the statutory language did nothing more than create a class of potential victims to whom the law offered its protection.¹⁸³ Beyond that, the statute did not create any new rights, privileges or benefits for individuals who were subject to the "family or household member" provision.¹⁸⁴ Finally, the state played no role in creating the relationships in question.¹⁸⁵ As such, the domestic violence statute, as written, did not "create[] or recognize[e] . . . a legal status that approximated marriage through judicial, legislative, or executive action."¹⁸⁶ The domestic violence statute did not, therefore, violate Ohio's marriage amendment.

2. Critiquing the Carswell Analysis

The Ohio Supreme Court decision in *Carswell* offers much to critique, as well as much to praise. The primary basis for critique lies in the analysis of "status" employed by the Court. As noted above, the Court correctly found that the definition of "status" looks to the consequences that flow from attaining a particular "standing," or "position," before the law.¹⁸⁷ At making this point, however, the Court erred in its analysis: it failed to distinguish between simply attaining a status, and *attaining a status that approximated marriage*. Instead, it collapsed these two inquiries into one that focused solely on the latter concern. As a result, the Court failed to acknowledge the

¹⁸⁰ See *id.* at 552.

¹⁸¹ See *id.*

¹⁸² See *id.* at 549, 552.

¹⁸³ See *id.* at 552.

¹⁸⁴ See *id.* at 553.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 553-54.

¹⁸⁷ See *id.* (defining standing). N.B. The definition of "standing" in this context should be distinguished from the notion of standing which permits a litigant to bring forward a claim for adjudication. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (defining "standing" under Article III of the United States Constitution).

very real fact that legal consequences flowed from falling into the category of “living as spouses.”

Couples in Ohio whose living arrangements can credibly be viewed as spouse-like in nature attain a status under the domestic violence statute because proof of the designation carries rights and liabilities. Viewing the statute from the perspective of the complainants, if they are or were “living as spouses” with the defendants, they acquire certain rights under the domestic violence statute. As an initial matter, attaining this status grants the complainant a right to file charges against the cohabiting partner under the domestic violence statute itself.¹⁸⁸ In addition, the statute grants the unmarried complainant who is living as a spouse a right to seek temporary protection orders upon filing a complaint.¹⁸⁹ Moreover, if a police officer believes that an act of domestic violence has occurred between a couple that he or she reasonably believes is living as spouses, the putative defendant can be arrested in the absence of a warrant.¹⁹⁰ An unmarried complainant, therefore, has a right to insist that such a detention take place.

By contrast, the putative defendant is subject to a particular set of liabilities if he or she falls into the category of living as a spouse. He or she is not merely subject to criminal liability under the assault statute; this person is also subject to the distinct penalties and restraints that flow from violating the domestic violence statute: “[s]pecial bail considerations, *enhancement* of penalties[,] and civil protection orders would no longer be available to cohabiting couples if the domestic violence statutes [were] determined to be unconstitutional as applied.”¹⁹¹ This argument was proposed by organizations that work with victims of domestic violence and who opposed the position advanced by Carswell. Ironically, though, it proves the point: but for the law’s designation of these couples as

¹⁸⁸ See *Carswell*, 871 N.E.2d at 555 (Lanzinger, J., dissenting) (describing the rights that individuals acquire under the statute if they are deemed to be living as spouses).

¹⁸⁹ See OHIO REV. CODE ANN. § 2919.26.

¹⁹⁰ See OHIO REV. CODE ANN. § 2935.03(B)(1). An officer will reasonably believe that an unmarried complainant has alleged an act of domestic violence if he or she reasonably believes that the alleged defendant is living with the complainant as a spouse. See *id.* (premising the officer’s authority on a reasonable belief that the domestic violence statute has been violated).

¹⁹¹ *Brief of Amici Curiae Action Ohio Coalition of Battered Women, Ohio Domestic Violence Network, and Now Education and Legal Fund in Support of Appellee State of Ohio*, 2006 WL 2351199 (filed with the Ohio Supreme Court on July 17, 2006), at *6 (emphasis added) (noting that Ohio law provides distinct remedies, protections, and punishments in the domestic violence setting that are not available under the general criminal law).

falling into the category of “living as spouses,” a defendant who engaged in domestic violence would be subject to the penalties for criminal assault, and nothing more. The additional penalties provided under the domestic violence statute simply would not apply. Ultimately, one might argue that the domestic violence statute has created a special duty to refrain from assaulting a cohabiting partner by premising unique liabilities on the fact of the relationship.

Thus, the Court erred when it held that the statute merely created a category of victims, and did not create any new status category. The Court also erred when it held that no official recognition of the status occurred when prosecutors applied the domestic violence statute to individuals who fell into the contested category. The domestic violence statute creates a framework within which unmarried individuals who are living as spouses have a special right to expect non-violence in their relationships, a right that is supported by the enhanced penalties that are imposed and the protections that are granted if that right is violated. As such, the Court should have found that the domestic violence statute created a legal status that was recognized by prosecutors when they charged unmarried defendants under its provisions.

The acquisition of a legal status, however, does not answer the second question posed above: Does that legal status approximate *marriage*? Most courts, as their initial step, would have attempted to discern meaning from the plain language of the text. The Ohio Supreme Court, however, did not follow this approach when it concluded that the word “approximate,” in context, should be defined as “equivalent.” One might criticize the Court for rejecting the plain language approach by arguing that such an analysis would have yielded the proper measure of voter intent.¹⁹² In fact, a handful of the Ohio lower courts, as well as the lone dissenting justice in *Carswell*, used a plain language analysis when they found that the application of the domestic violence statute violated the amendment.¹⁹³ As noted

¹⁹² “Indeed, the polestar in the construction of constitutions, as well as other written instruments, is the intention of the makers and adopters.” Shryock v. City of Zanesville, 110 N.E. 937 (Ohio 1915); *see also* 16 Ohio Jur. 3d Constitutional Law § 49 (citing *Castleberry v. Evatt*, 67 N.E.2d 861 (Ohio 1946)).

¹⁹³ *See, e.g.,* *City of Cleveland v. Voies*, No. 2005 CRB 002653, 2005 WL 1940135, at **9-11 (Ohio Mun. Mar. 23, 2005), *rev’d*, No. 86317, 2006 WL 440341 (Ohio Ct. App. 2006) (holding that the domestic violence statute creates a status in violation of the marriage amendment); *see also* *State v. Dixon*, No. 2005-CR-0091, 2005 WL 1940110, at **3-4 (Ohio Ct. Comm. Pleas Apr. 26, 2005) (arguing same); *State v. Ward*, 849 N.E.2d 1076, 1082 (Ohio Ct. App. 2006), *rev’d sub nom.* *In re Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007) (arguing same); *State v. Steinman*,

above, the statute provides that, “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”¹⁹⁴ “Family or household member” is subsequently defined with reference to those persons who are “living as . . . spouse[s];” a couple lives as spouses if they cohabit; and finally, “cohabitation” is defined as including a variety of characteristics, among them sharing the financial responsibilities of daily family life and consortium.¹⁹⁵ Applying these definitions to the marriage amendment arguably results in a finding that, “the General Assembly inherently equate[d] cohabitating unmarried persons with those who [were] married and extend[ed] the domestic violence statutes to persons because their relationship approximates the significance or effect of marriage.”¹⁹⁶ A plain language enthusiast, then, might find that application of the domestic violence statutes therefore violated the amendment in this case.

The difficulty with the plain language approach, though, is the fact that the language of the Ohio amendment is anything but plain. What does it mean to approximate the “design” of marriage? Does this refer to the binary design of marriage? The age requirements of marriage? The blood limitations on marriage? When does a legal status approximate the “qualities” or “significance” of marriage? What *are* the qualities of marriage? Does the significance of marriage include its personal, philosophical, and religious significance, as well as its legal and political salience? The Ohio marriage amendment raises countless questions, none of which can be answered as fully as the breadth of the language requires. In light of these difficulties, the Court justifiably chose to bypass the plain language approach and

2006 WL 925166 at *1 (Ohio Ct. App. 2006) (same); *State v. McIntosh*, 2006 WL 925179 at *1 (Ohio Ct. App. Apr. 7, 2006) *overruled by* *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007) (same); *State v. Shaffer*, 2006 WL 1459769 at **2-3 (Ohio Ct. App. May 30, 2006), *overruled by* *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007) (same); *State v. Logsdon*, 2006 WL 1585447, at **5-6 (Ohio Ct. App. June 12, 2006), *overruled by* *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007) (same); *State v. McKinney*, 2007 WL 437839 at *4 (Ohio Ct. App. Feb. 12, 2007) (same); *cf.* *State v. Peterson*, 2005 WL 1940114 at *2 (Ohio Ct. Comm. Pleas Apr. 18, 2005), *overruled by* *In re Ohio Domestic-Violence Statute Cases*, 872 N.E.2d 1212 (Ohio 2007) (holding that the application of the domestic violence statute to unmarried individuals violates the marriage amendment without offering any analysis of “status” or “recognition”).

¹⁹⁴ OHIO REV. CODE ANN. § 2919.25(A), *supra* note 172.

¹⁹⁵ *Williams*, 683 N.E.2d at 1130, *supra* note 175 (holding that there was sufficient evidence to find that a defendant and victim were cohabitants within the meaning of the domestic violence statute).

¹⁹⁶ *See Carswell*, 871 N.E.2d at 556 (Lanzinger, J., dissenting).

identify the voters' intent by considering the extrinsic evidence which offered proof of the amendment's purpose.¹⁹⁷

As it did so, the Court specifically noted that the push to prohibit same-sex marriage or its equivalent arose after the Supreme Judicial Court in Massachusetts issued the *Goodridge* decision.¹⁹⁸ The Ohio legislature first responded by passing a statute which both prohibited same-sex marriage or its equivalent, and prohibited the recognition of a same-sex union entered into in another state.¹⁹⁹ Fearing that a state court might invalidate these provisions under Ohio's equal protection guarantee, a group of citizens successfully petitioned to amend the state constitution in a manner that was consistent with the statutory proscription.²⁰⁰ This contextual setting persuaded the Court to adopt a narrow interpretation of the amendment that reflected the only clear intent that history might support.

Unlike the Michigan Supreme Court, the Ohio Supreme Court reached the correct decision. The language of the amendment was ambiguous, but the narrow construction imposed by the Court reflected the clearest understanding of the voters' intent that it could reasonably identify. Even though the precise language of the amendment encompassed a broader prohibition – possibly even the prohibition for which *Carswell* advocated – it was simply unclear whether the voters intended to prevent unmarried couples from seeking protection under the domestic violence laws. Given the inherent ambiguity that was built into the amendment, the Court properly imposed a narrow construction on the amendment and saved unmarried, cohabiting couples from being subject to a law that was not seemingly designed with them in mind.

V. CONCLUSION

As equality advocates develop strategies for ensuring that gay and lesbian employees receive domestic partner benefits on the same basis as their heterosexual colleagues, they should take heart in knowing

¹⁹⁷ Ohio law specifically allows courts to adduce extrinsic evidence of voter intent when interpreting ambiguous provisions of the state constitution. *See, e.g.*, 16 Ohio Jur. 3d Constitutional Law § 59 (citing *Board of Elections for Franklin County v. State ex rel. Schneider*, 191 N.E. 115 (Ohio 1934) (arguing that evidence of the history behind the passage of a constitutional amendment may be considered when trying to determine the meaning of the provision)); *see also* *City of Middletown v. City Commission of Middletown*, 15 Ohio Op. 361 (C.P. Butler County 1939), *aff'd*, 21 Ohio Op. 481, 37 N.E.2d 609 (1941).

¹⁹⁸ *See Carswell*, 871 N.E.2d at 551 n.1.

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

that some of the most far-reaching amendments may, in fact, be less damaging than originally supposed. Fair interpretations of many of these amendments should result in the conclusion that partner benefits regimes remain valid under state law. Of course, new developments may obviate this concern. In response to the pressures that have been placed on their partner benefits programs, some public entities have begun to restructure their policies in such a way that gay and lesbian employees and their partners would still qualify for coverage, but the policies themselves would no longer turn on the existence of a domestic partner relationship. Michigan State University, for instance, has implemented a pilot program that would offer benefits to a category of people that it describes as “other eligible individuals.”²⁰¹ A person would qualify for benefits if he or she had lived with a non-unionized employee for eighteen months or more without being a tenant or dependent, and if the person was not automatically eligible to inherit the employee’s property under Michigan law.²⁰² Another option that a public entity might employ is to establish a “household benefits” plan that would allow an employee to designate one adult household member for coverage.²⁰³ In fact, two private employers – Nationwide Insurance and Catholic Charities, a San Francisco-based non-profit employer – have implemented household benefits plans.²⁰⁴ Plans like these, which base the receipt of benefits on neutral criteria, might ultimately be the wave of the future. If, however, these plans are not ideal because their fiscal impact is too great, or because some courts might invalidate them as transparent attempts to evade the prohibition of an amendment, the foregoing analysis might offer guidance to advocates who wish to protect the families of gays and lesbians around the country.

²⁰¹ Andy Guess, *A Way to Keep Domestic Partner Benefits*, INSIDE HIGHER ED, June 15, 2007, available at <http://www.insidehighered.com/layout/set/print/news/2007/06/15/benefits>.

²⁰² *Id.*

²⁰³ Thomas F. Coleman, *Michigan Court Provides Loophole in Benefits Ruling*, COLUMN ONE: EYE ON UNMARRIED AMERICA, Feb. 19, 2007, available at <http://www.unmarriedamerica.org/column-one/02-19-07-michigan-dp-benefits.htm>.

²⁰⁴ *Id.*

APPENDIX 1

| <i>Comparative Model Multi-Subject Amendments</i> | | |
|---|---|------------------------------|
| Alabama | "A union replicating marriage of or between persons of the same sex in the State of Alabama or in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state as a marriage or other union replicating marriage." | ALA. CONST. amend. 774 |
| Arkansas | "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." | ARK. CONST. amend. 83. |
| Florida | "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." | FLA. CONST. art. I, § 27. |
| Idaho | "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." | IDAHO CONST. art. III, § 28. |
| Kentucky | "A legal status identical or substantially similar to that of marriage for individuals shall not be valid or recognized." | KY. CONST. part II, § 233A |
| Louisiana | "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." | LA. CONST. art. XII, § 15. |
| Michigan | "To secure and preserve the benefits of marriage for our society and for future | MICH. CONST. art. |

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|----------------|---|------------------------------|
| | 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.” | I, § 25. |
| Nebraska | “The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.” | NEB. CONST. art. I, § 29. |
| North Dakota | “No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.” | N.D. CONST. art. XI, § 28. |
| Ohio | “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. |
| South Carolina | “A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right or claim created by another jurisdiction respecting any other domestic union, however denominated. Nothing in this section shall impair any right or benefit extended by the State or its political subdivisions other than a right or benefit arising from a domestic union that is not valid or recognized in this State.” | S.C. CONST. art. XVII, § 15. |
| South | “The uniting of two or more persons in a civil union, domestic partnership, or | S.D. CONST. art. XXI, § |

| | | |
|-----------|---|------------------------------|
| Dakota | other quasi-marital relationship shall not be valid or recognized in South Dakota.” | 9. |
| Texas | “This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.” | TEX. CONST. art. I, § 32. |
| Utah | “No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.” | UTAH CONST. art. I, § 29. |
| Virginia | “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.” | VA. CONST. art. I, § 15. |
| Wisconsin | “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” | WIS. CONST. art. XIII, § 13. |

APPENDIX 2

| <i>Incidents Model Multi-Subject Amendments</i> | | |
|---|---|-----------------------------|
| Georgia | "No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage." | GA. CONST. art. I, § 4. |
| Kansas | "No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage." | KAN. CONST. art. XV, § 16. |
| Oklahoma | "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." | OKLA. CONST. art. II, § 35. |
| Virginia | "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." | VA. CONST. art. I, § 15. |

APPENDIX 3

| <i>Single-Subject Amendments</i> | | |
|----------------------------------|--|-------------------------------|
| Alaska | "To be valid or recognized in this State, a marriage may exist only between one man and one woman." | ALASKA CONST. art. I, § 25. |
| Arizona | "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." | ARIZ. CONST. art. XXX, § 1. |
| California | "Only marriage between a man and a woman is valid or recognized in California." | CALIF. CONST. art. 1, § 7.5. |
| Colorado | "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." | COLO. CONST. art. II, § 31. |
| Hawaii | "The legislature shall have the power to reserve marriage to opposite-sex couples." | HAW. CONST. art. I, § 23. |
| Mississippi | "Marriage may take place and may be valid under the laws of this state only between a man and a woman." | MISS. CONST. art. XIV, § 263A |
| Missouri | "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman." | MO. CONST. art. I, § 33. |
| Montana | "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." | MONT. CONST. art. XIII, § 7. |
| Nevada | "Only a marriage between a male and female person shall be recognized and given effect in this state." | NEV. CONST. art. I, § 21. |
| Oregon | "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." | OR. CONST. art. XV, § 5a. |
| Tennessee | "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state." | TENN. CONST. art. XI, § 18. |