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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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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. Since 1998, forty-four states have prohibited the creation or recognition of same-sex marriage,² and twenty-seven states have solidified their positions on this issue through the passage of state constitutional amendments.³ Eighteen of these amendments extend their prohibitions even farther by refusing to create or recognize civil unions, domestic partnerships, or any other alternative to traditional marriage that is patterned after marriage.⁴ 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 entities⁵ from providing domestic partner benefits to their gay and lesbian employees? Public institutions around the country – especially institutions of higher learning – are struggling with this issue. If current law prevents them from offering domestic partner benefits, how can they compete effectively for talented gay and lesbian employees, and retain the ones they currently 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

¹ Assistant Professor of Law, Villanova University School of Law. The author thanks Tara Radin, Dave Caudill, Greg Magarian, Mike Carroll, Joy Mullane, Michael Moreland, Daryl Levinson, the Hofstra Colloquium on Law and Sexuality sponsored by the Hofstra University School of Law (with particular thanks to Holning Lau), and the Faculty Exchange Program at the University of Missouri School of Law for their guidance, feedback, and exceptional patience during the process of writing this article. Additional thanks to Tejal Mehta, Maura Burke, and Heather Zelle for their truly excellent research assistance.

² See HERITAGE FOUNDATION, *Marriage in the Fifty States*, available at <http://www.heritage.org/Research/Family/Marriage50/index.cfm> (last visited on March 11, 2008).

³ *See id.*

⁴ See Appendix 1. The state amendments referenced here are the following: Alabama (Ala. Const. amend. 774), Arkansas (Ark. Const. amend. 3), Georgia (Ga. Const. art. I, § 4), Idaho (Idaho Const. art. III, § XXVIII), 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. art. XIII, § 13). This group of amendments is 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.

⁵ 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 A. (arguing that recognition is a term of art that requires state action for its operation).

Penn, unlike Wisconsin, offers a domestic partner benefits plan.⁶ Partially for identical reasons, another Wisconsin employee – this time, a highly-placed administrator – took a deanship position at Arizona State University.⁷ The Student Housing Director at the University of Kansas recently expressed her support for a proposed partner benefits plan so that she can cover her soon-to-be-retired life partner.⁸ Even though she and her partner wish to remain in Kansas, the director has noted that moving to a school in another state would net her the benefits that she and her partner need.⁹ This controversy over domestic partner benefits has also become 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.¹⁰ The university, however, maintained that its hands were tied: state law prevented it from offering family or spousal benefits to any person not recognized as a spouse or family member under Texas law.¹¹

In addition, public employers in Ohio, Kentucky, Idaho, Louisiana, and Michigan – each of whose amendments falls into the problematic category – are currently addressing explicit challenges to their ability to offer partner benefits to their gay and lesbian employees. A state legislator in Ohio, for instance, has filed suit against Miami University, alleging that its domestic partner benefits program violates the marriage amendment.¹² Similarly, the Kentucky Senate has recently passed a bill which prohibits government agencies from offering partner benefits to their gay and lesbian employees.¹³ In Idaho, the Attorney General has issued an opinion which finds that the City of Moscow's decision to offer benefits to the domestic partners of its employees

⁶ See HUMAN RIGHTS CAMPAIGN FOUNDATION, *THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 27* (2006-2007) (hereinafter "The State of the Workplace") (discussing some of the consequences of not offering domestic partner benefits).

⁷ See 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 Michigan) (last visited on March 12, 2008). The administrator stated that Wisconsin had lost employee candidates when they realized that the university did not offer partner benefits. *See id.* Moreover, she noted that several of her colleagues had begun looking for new jobs because of the lack of partner benefits. *See id.*

⁸ See Jonathan Kealing, *Benefits Urged for Domestic Partners*, LAWRENCE JOURNAL-WORLD, March 5, 2008, available at http://www.mobile.ljworld.com/news/2008/mar/05/benefits_urged_domestic_partners/ (discussing the conclusion reached by the University of Kansas' University Senate Executive Committee that the school should offer domestic partner benefits) (last visited on March 11, 2008).

⁹ *See id.*

¹⁰ See *Hunger Strike for Partner Benefits*, Inside Higher Ed, January 21, 2008, available at <http://www.insidehighered.com/layout/set/print/news/2008/01/21/hunger> (last visited on February 26, 2008).

¹¹ *See id.*

¹² See *Brinkman v. Miami Univ.*, 2007 WL 2410390 (Ohio Ct. App. Aug. 27, 2007), at *1. The trial court dismissed the suit in on standing grounds, and the Court of Appeals affirmed. *See id.*

¹³ See Stephanie Steitzer, *Bill Bans Same-Sex Partner Benefits*, THE COURIER-JOURNAL, available at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20080131/NEWS0101/801310406> (Jan. 31, 2008). The University of Kentucky and the University of Louisville began offering partner benefits in 2006. *See id.* They have argued that passage of this bill will hamper their ability to recruit the most talented individuals. *See id.*

likely “constitute[d] recognition of a domestic legal union other than marriage” in violation of the marriage amendment.¹⁴ Finally, parties in Louisiana are in the midst of litigation concerning the validity of New Orleans’ domestic partner benefit plan.¹⁵ Other potential challenges are certainly looming on the horizon.¹⁶

This impending wave of employee-benefits litigation will force courts to address a variety of interpretive challenges as they consider the operative scope of the amendments. 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 or akin to marriage. Of course, the language used by the MSAs varies wildly 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: (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, I describe the former group of amendments as “Incidents Model” MSAs and the latter group of amendments as “Comparative Model” MSAs. This paper will focus on the impact of the Comparative Model MSAs.

The scope of the prohibitions in the Comparative Model MSAs will ultimately turn on the degree of replication between marriage and any parallel 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 *similar* to marriage. At present, domestic partner benefits plans which are offered by public employers face huge potential threats in Comparative Model MSAs states because their effectiveness depends on state recognition of relationships that arguably mimic marriage to a prohibited degree.

How should courts address these challenges under their respective marriage amendments when they inevitably arise? Numerous scholars would argue that the amendments are flatly unconstitutional and should not apply to anything at all.¹⁸ Other scholars eschew this approach

¹⁴ See City of Moscow, Health Insurance Policy, Idaho Op. Att’y Gen. 9 (2008).

¹⁵ See *Ralph v. City of New Orleans*, No. 2003-09871, Civ. D. Ct. Parish of Orleans (Jan. 15, 2008).

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* n. 6, at 52 (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 & INEQU. 59, 60-62 (2007) (hereinafter “Plain Meaning”) (describing the various textual differences that exist among the amendments).

¹⁸ See *id.* at 59 (arguing that the marriage amendments should be narrowly-construed in order to avoid constitutionally infirm applications); see also L. Lynn Hogue, *Romer Revisited, or “The Devil in the Details”: Is*

by considering whether various material goods – including domestic partner benefits – are threatened by the enforcement of these amendments.¹⁹ In this Article, I will also consider the impact of enforcement, but I will do so by proposing an interpretive methodology that courts may use when trying to evaluate the validity of domestic partner benefits plans.²⁰ I ultimately conclude that such plans do not violate the provisions of the first two sub-categories of Comparative Model MSAs, but may, in fact, violate the provisions of the third sub-category. In order to evaluate whether the plans do violate the provisions of the third sub-category of Comparative Model MSAs, I recommend that courts look at the history underlying the passage of the amendments and determine whether the voters intended to prohibit public employers from offering such plans. If the answer to this question is yes, then the plans should be invalidated; if the answer to this question is no, then the plans should be upheld.

Part One offers an overview of domestic partner benefits plans and discusses the manner in which they are currently being threatened by the interpretation of the Comparative Model MSAs. This threat, however, begs an important question: given the increased acceptance of gays and lesbians in many other areas of life, why, exactly, are these benefits regimes under threat? A seeming paradox exists between the growing levels of tolerance for gays and lesbians in society and the decision by voters to support these amendments whose potential wide-ranging effect was communicated to them prior to the election. What, exactly, did the voters intend to accomplish when they supported the passage of the marriage amendments? Part One will conclude with an inquiry into this question.

Part Two will then take a close look at one of these controversies, *National Pride at Work v. Michigan*, which is currently pending before the Michigan Supreme Court. As a matter of first impression, this case represents the first time that a state court of last resort has considered the scope of a public entity's authority to offer domestic partner benefits in light of the state's

Georgia's Marriage Amendment Constitutionally Defective?, 7 FLA. COASTAL L. REV. 255 (2005) (arguing that Georgia's marriage amendment violates the United States Supreme Court's decision in *Romer v. Evans*); Lisa M. 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 14th Amendment); Wilson Huhn, *Ohio Issue 1 is Unconstitutional*, 28 N.C. CENT. L. J. 1 (2005) (arguing that the Ohio marriage amendment is unconstitutional); 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); 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); Sarah K. Snow, *What Missouri 'Shows Me' About Sexual Orientation Legislation*, 37 U. TOLEDO L. REV. 807 (2006) (arguing that Missouri's marriage amendment is subject to challenge under *Romer* because animus motivated its passage); 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).

¹⁹ See Strasser, *supra* n. 17, *Plain Meaning*, 25 LAW & INEQU. 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. 549 (2005) (arguing that none of the marriage amendments should preclude domestic partner benefits, and if they do, they might be vulnerable *Romer v. Evans* and *Lawrence v. Texas*); William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233, 240-246 (2005) (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).

²⁰ As noted, my focus is on the Comparative Model MSAs, but courts whose amendments do not fall into that category might still use the analysis that I propose.

marriage amendment.²¹ Analysis of both the factual backdrop of *National Pride at Work* and the case itself illustrates the interpretive difficulties that may arise when public employers in states with Comparative Model MSAs condition the receipt of partner benefits on the existence of the gay or lesbian relationship. In this section, I will conclude that the Court of Appeals offered an interpretive methodology that was more appealing than the methodology offered by the trial court, but that the analysis grew less persuasive when the court failed to consider the role of voter intent when interpreting the meaning of the similarity provision in the Michigan amendment.

After examining some of the methodological errors that a reviewing court might make, Part Three identifies the primary concepts in the Comparative Model MSAs – “recognition,” “status,” and “similarity to marriage” – and offers an analysis of these terms that will help courts understand them in the event that they are called upon to evaluate them. In the course of the analysis, I find that a public employer’s decision to premise the dispensation of partner benefits on the existence of the employee’s relationship violates the prohibition against recognizing a status for unmarried individuals, but the crux of the analysis is the similarity provision: if the status recognized by the state does not fall within the scope of the similarity provision laid out by the amendment, then the domestic partner benefits plan should be upheld.

I. Background

A. 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, protection against discrimination in employment and in public accommodations, the invalidation of anti-sodomy statutes, the establishment of adoption rights, and a remarkable increase in the number of openly-gay public officials.²² Their

²¹ Even though the Michigan Supreme Court will be the first *high* court to resolve this issue, it will not be the first *court* to do so. *In re Utah State Retirement Board* considered whether Salt Lake City’s decision to provide health care benefits to the domestic partners of city employees violated Utah’s marriage amendment. *See In re Utah State Retirement Board*, No. 050916879 (Utah D. Ct. 2006), available at <http://www.acluutah.org/normanruling.pdf>. The trial court found that the “Adult Designee Benefit” established by the city did not give “the same or substantially equivalent legal effect” as marriage to any other “domestic union.” *Id.* at 4.

²² The United States Supreme Court, for instance, handed gays and lesbians two of their most significant legal victories to date in *Romer v. Evans* and *Lawrence v. Texas*. In *Romer*, the Supreme Court invalidated Colorado’s Amendment 2, which prohibited state officials from extending anti-discrimination protection to gays and lesbians as

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,²³ while others have established relationship regimes that parallel marriage as closely as possible.²⁴ Massachusetts, of course, is the lone state that has allowed gays and lesbians to marry.²⁵ These victories, however, do not represent the generally prevailing political norm. From 1998-2003, six states passed amendments banning same-sex marriage. Since then, however, twenty-one states have done so.²⁶ The move to ban same-sex marriage reached its high point with the

a class. See *Romer v. Evans*, 517 U.S. 620, 623-626 (1996). 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 v. Texas*, 539 U.S. 558, 578-579 (2003); see also Michael J. Klarman, *Brown & Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 487-489 (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*.”). In addition, at least eleven states and the District of Columbia either implicitly or explicitly permit gay and lesbian couples to adopt children. See Gary J. Gates, et al., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 3* (March 2007), available at <http://www.law.ucla.edu/WilliamsInstitute/publications/FinalAdoptionReport.pdf> (last visited March 11, 2008). On the political front, twenty states and the District of Columbia prohibit discrimination on the basis of sexual orientation. See *infra* n. 56. Twelve of those states and the District of Columbia also prohibit discrimination on the basis of gender identity. See *infra* n. 57. In addition, 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, available at <http://www.heraldnet.com/apps/pbcs.dll/article?AID=/20080123/NEWS03/559000605&template=printart>, (last visited March 11, 2008). Finally, public and private employers around the country have been offering their employees domestic partner benefits in ever-increasing numbers. See *infra* nn. _____. These victories, and others, attest to the fact that gay and lesbian issues are reshaping various aspects of the American legal and political landscape.

²³ Hawaii, Maine, Washington, and the District of Columbia offer limited protection to committed gay and lesbian relationships. See HAW. REV. STAT. § 572-1.6 (2007); see also ME. REV. STAT. ANN. tit.5, § 4572 (2007); WASH. REV. CODE § 26.60.060 (2007); D.C. STAT. § 32-701 et seq. (2008).

²⁴ Vermont, Connecticut, New Jersey, and New Hampshire have passed civil union statutes which guarantee gay and lesbian couples all of the same rights that married heterosexual couples receive under state law. See VT. STAT. ANN. tit. 15, § 1204 (2000); CONN. GEN. STAT. 46b-38aa (2007); N.J. STAT. ANN. § 37: 1-31 (2007); N.H. REV. STAT. ANN. § 457-A:1 (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. FAMILY CODE § 297 (2008); see also OREGON FAMILY FAIRNESS ACT, H. 2007, 74th Leg. Assem., Reg. Sess. (Or. 2007).

²⁵ 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*, 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.

²⁶ See HERITAGE FOUNDATION, *Marriage in the Fifty States*, *supra* n. 2.

passage of eleven amendments during the 2004 presidential election.²⁷ The 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.²⁸ Just over twenty-five years later, approximately 9300 employers in the United States currently offer domestic partner benefits, the most common of which are health care benefits.²⁹ Such employers include more than half of *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).³⁰ Fifty-eight percent of employers offer domestic partner benefits to both same-sex and opposite couples.³¹ The remaining companies limit their programs to same-sex couples because they do not have the option of marriage.³²

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.³³ Other employers are compelled to offer partner benefits as a result of the labor

²⁷ See *CNN.com: Election Results*, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/>

²⁸ See Alene Russell, *Domestic Partnership Benefits: Equity, Fairness, and Competitive Advantage*, A HIGHER EDUCATION BRIEF (American Association of State Colleges and Universities, Oct. 2007) (hereinafter "Equity, Fairness, and Competitive Advantage").

²⁹ See *id.* (discussing the number of employers in the nation who offer partner benefits); see also Mary Beth Braitman, Terry A.M. Mumford, and Katrina M. Clingerman, *Implementing a Domestic Partner Benefits Policy*, HUMAN RESOURCES 192 (Winter 2008), available at <http://www.icemiller.com/publications/19-ANSWR-Winter2008.pdf> (last visited Feb. 26, 2008) (detailing the kinds of benefits that employers typically cover).

³⁰ See *id.* at 4-5 (discussing the number of employers providing partner benefits across multiple sectors of the economy); see also THE STATE OF THE WORKPLACE, *supra* n. 6, at 21 (same).

³¹ See Russel, *Equity, Fairness, and Competitive Advantage*, *supra* n. 28, at 4.

³² See Samir Luther, DOMESTIC PARTNER BENEFITS: EMPLOYER TRENDS AND BENEFITS EQUIVALENCY FOR THE GLBT FAMILY 9 (March 2006), available at <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf>.

³³ See Braitman, et al., *Implementing a Domestic Partner Benefits Policy*, *supra* n. 29, at 189.

negotiations process.³⁴ Still others do so “because they believe it is the right thing to do.”³⁵ 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.³⁶

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,³⁷ 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 lesbian employees.³⁸ One-third of the amendments restrict only the creation or recognition of same-sex marriage,³⁹ 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.⁴⁰ It is this latter group of amendments that poses the real challenge. If, for instance, 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

³⁴ *See id.*

³⁵ *Id.*

³⁶ *See* THE STATE OF THE WORKPLACE, *supra* n. 6, 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. Montana University 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).

³⁷ *See supra* n. 5 (discussing the implied state action requirement contained in the amendments).

³⁸ 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.

³⁹ *See e.g.*, Alaska (Ala. Const. art. I, § 25), Colorado (Colo. Const. art. II, § 31), Hawaii (Haw. Const. art. I, § 23), Mississippi (Miss. Const. art. XIV, § 263A), Missouri (Mo. Const. art. I, § 33), Montana (Mont. Const. art. XIII, § 7), Nevada (Nev. Const. art. I, § 21), Oregon (Or. Const. art. XV, § 5), and Tennessee (Tenn. Const. art. XI, § 18).

⁴⁰ *See e.g.*, Alabama (Ala. Const. amend. 774), Arkansas (Ark. Const. amend. 3), Georgia (Ga. Const. art. I, § 4), Idaho (Idaho Const. art. III, § XXVIII), 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. art. XIII, § 13).

amendment?⁴¹ Moreover, if it did, is this the outcome that the voters had in mind when they voted in favor of the marriage amendments?

B. Comparative Model MSAs and Voter Intent

As noted above, the marriage amendments can be broken down into two categories. Nine of the twenty-seven amendments – the Single-Subject Amendments (“SSAs”) – focus exclusively on defining marriage as the union between a man and a woman. The SSA states are Alaska, Colorado, Hawaii, Mississippi, Missouri, Montana, Nevada, Oregon, and Tennessee.⁴² By contrast, the remaining amendments – the Multi-Subject Amendments (“MSAs”) – not only limit marriage to heterosexual unions but also prohibit state courts and legislatures from creating or recognizing unions that are similar in some fashion to marriage.⁴³ Finally, the MSAs themselves break down into the Incidents Model MSAs and the Comparative Model MSAs.

Generally speaking, the Comparative Model MSAs not only bar states from treating same-sex unions as marriages, but also from creating or recognizing a legal status for any

⁴¹ 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, EMPLOYERS THAT OFFER DOMESTIC PARTNER HEALTH BENEFITS (2007), available at www.hrc.org/workplace/dpbsearch (last visited on 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 (listing numerous local governments across the country that offer domestic partner benefits packages for employees); City of Moscow, Health Insurance Policy, Idaho Op. Att’y Gen. 1, 3 (2008) (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).

⁴² See Alaska (Ala. Const. art. I, § 25), Colorado (Colo. Const. art. II, § 31), Hawaii (Haw. Const. art. I, § 23), Mississippi (Miss. Const. art. XIV, § 263A), Missouri (Mo. Const. art. I, § 33), Montana (Mont. Const. art. XIII, § 7), Nevada (Nev. Const. art. I, § 21), Oregon (Or. Const. art. XV, § 5), and Tennessee (Tenn. Const. art. XI, § 18). Hawaii’s SSA is unique in that it grants the legislature exclusive authority to limit marriage to a man and a woman. See Haw. Const. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples”).

⁴³ See Alabama (Ala. Const. amend. 774), Arkansas (Ark. Const. amend. 3), 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. art. XIII, § 13). By way of comparison, Connecticut, New Hampshire, New Jersey and Vermont have passed civil unions statutes which guarantee gay and lesbian couples all of the same rights that married heterosexual couples receive under state law. See e.g. VT. Stat. Ann. tit. 15, § 1204 (2000). Similarly, California, Oregon, and Washington have created equally generous regimes, but rather than using the “civil unions” terminology, they instead use the term “domestic partnership.” See e.g. Cal. Family Code § 297 (2005). Finally, Maine and Hawaii offer limited protection to committed gay and lesbian relationships. See e.g. Me. Rev. Stat. Ann. tit.5, § 4572 (2005).

unmarried relationship. Meeting this latter prohibition, however, will not itself violate the amendment. Instead, the policy in question must also violate a final provision in the amendment – one which identifies the degree of similarity to traditional marriage that the amendments permit. In a Comparative Model regime, then, a gay or lesbian public employee may lose (or never acquire) partner benefits when two conditions are met: (1) if the state has conferred a legal status on his or her relationship, and (2) if that status is sufficiently close to marriage to violate the similarity provision. Conversely, even if a status has been conferred on the relationship, the employee should *receive* partner benefits if that status is not close enough to marriage to violate the similarity provision. Ultimately, the scope of the prohibition depends on the language of the amendments, and they become operative under one of three circumstances: (1) if the creation or recognition of a legal status for relationships of unmarried individuals is *identical* to marriage; (2) if the creation or recognition of a legal status for relationships of unmarried individuals is *identical or substantially similar* to marriage; or (3) if the creation or recognition of a legal status for unmarried individuals is *similar* to marriage.⁴⁴ The meaning of these terms is arguably unclear: What does it mean to have a “legal status”? If the language of the amendment specifically precludes the recognition of a “union” rather than a “legal status,” does recognition of the union imply the existence of a “legal status”? What does it mean to “recognize” a “union” or a “legal status”? If an amendment prohibits the creation or recognition of a legal status that is “similar” to marriage, at what point do resemblances rise to the level of improper “similarity”?

The ambiguity of the language in the Comparative Model MSAs suggests a rather troubling conclusion: the voters who passed the amendment may not have truly understood the potential of their operative scope. This, then, begs an important preliminary question: *why* did they approve the amendments in the first place? The answer to this question is hinted at by two sources of information: (1) the sections of the amendments that *are* clear, and (2) the political context in which the amendments were adopted. As noted, all of the amendments contain explicit prohibitions on same-sex marriage: gay and lesbian couples may neither get married in these states nor expect recognition if they marry in other states.⁴⁵ Popular disapproval of gay marriage was quite strong, and it is possible that the voters’ approval of the anti-marriage provisions would have outweighed any concerns about the ambiguous provisions.

Beyond that, the political context surrounding the amendments inspired worry in some voters that their preferences were at risk of being ignored. The near-validation of same-sex marriage in *Baehr*, its actual validation in *Goodridge*, and the spate of illegal marriage ceremonies around the country made some voters fear that gay marriage was just a court decision or renegade mayoral action away.⁴⁶ Moreover, state supreme courts in Vermont 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.⁴⁷ Undoubtedly, many voters

⁴⁴ See Appendix 1.

⁴⁵ See Appendices 1-3.

⁴⁶ See, e.g., Jameel Naqvi, *Proposal Would Entrench Gay Marriage Ban*, MICHIGAN DAILY, October 28, 2004 (“Kristina Hemphill, spokeswoman for Citizens 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, § 34(C) (“Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.”).

⁴⁷ See *Baker v. State*, 744 A.2d 864 (Vt. 1999); see also *Lewis v. Harris*, 98 A.2d 196 (N.J. 2006).

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. In every state except for Arizona, voters removed the marriage question from the arena of debate.⁴⁸

The striking success of the anti-gay marriage movement shows that this issue is the Waterloo of progress for equality advocates. Nonetheless, 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 in this direction.⁴⁹ These numbers reflect a growing shift in perception about gay acceptability within our culture, 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.⁵⁰ Anti-gay bias is on the decline.⁵¹ Twenty states and the District of Columbia prohibit discrimination on the basis of sexual orientation.⁵² Twelve of those states and the District of Columbia also prohibit discrimination on the basis of gender identity.⁵³ 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.⁵⁴ Gays and lesbians are gradually becoming a normalized segment of mainstream American life.

⁴⁸ William Butte, *California's Decisions Could Affect Florida*, SOUTH FLORIDA SUN-SENTINEL, Feb. 15, 2008, p. 25A (discussing the defeat of the marriage amendment in Arizona).

⁴⁹ See, e.g., Gary Langer, *Poll: Support for Civil Unions Rises, Yet Sharp Divisions Remain* (Nov. 8, 2007), available at <http://abcnews.go.com/PollingUnit/story?id=3834625&page=1>.

⁵⁰ See, e.g., *Average Coming-Out Age Now 13* (Oct. 11, 2006), available at <http://www.gay.com/news/article.html?2006/10/11/4> (discussing the fact that gays and lesbians are public announcing their sexuality at earlier ages in their lives).

⁵¹ See, e.g., *American Prejudice*, ZOGBY INTERNAT'L (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 Hate Crime Statistics* (Nov. 2007) (noting that approximately 15.5% of hate crimes committed in 2006 were motivated by sexual orientation bias), available at <http://www.fbi.gov/ucr/hc2006/pressrelease.html>.

⁵² 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, www.hrc.org/state_laws (last updated November 26, 2007).

⁵³ See *id.*

⁵⁴ 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; AMC's *Mad Men*, set on Madison Avenue in the pre-Stonewall 1960s, features two recurring characters who struggle with the loneliness of the closet; Showtime's *The L Word* is a glossy soap opera devoted to the romantic entanglements of a group of lesbian friends; HBO's *The Wire* features both a well-respected lesbian police officer and a gay lone wolf gangster who steals 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 *Project Runway*, http://www.bravotv.com/Project_Runway/index.php; see also *Mad Men*,

How, then, can one reconcile these changes with the fact that voters across the country supported the Comparative Model MSAs by very comfortable margins? 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 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." At best, then, civil unions represent a compromise position: committed gays and lesbians receive the tangible benefits of marriage, but the most important intangible benefit remains out of reach.

The Comparative Model MSAs, of course, reject this compromise. Voters who approved these amendments chose to deny gays and lesbians access to both the name of marriage and the universe of its attendant benefits. This position is consistent with a view which holds that civil unions are nothing more than marriage by another name, and from the standpoint of consistency, if a voter rejects same-sex marriage, he or she should reject civil unions, too. The desire to protect both the name and the substance of marriage created an impulse in the drafters that was frankly *too* clever: anticipating efforts by legislators or judges to create a *civil union* equivalent by another name, the drafters included broad, prohibitory language in the amendments that simply covered too much ground.

As a result, these amendments threaten consequences for gay and lesbian couples that are potentially devastating. Ohio and Utah, for instance, have domestic violence statutes which cover unmarried couples who are "living as spouses" (including gay and lesbian couples).⁵⁵ To date, both states have considered 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.⁵⁶ In addition, the Nebraska Attorney General considered whether the legislature could pass a statute, consistent with its marriage amendment, allowing an individual's domestic partner to donate organs from the decedent.⁵⁷ The Attorney General concluded that doing so would violate the terms of the marriage amendment.⁵⁸ The most significant challenges are occurring in those states whose public entities offer benefits to the domestic partners of their gay and lesbian employees: 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

<http://www.amctv.com/originals/madmen/>; *The L Word*, <http://www.sho.com/site/lword/home.do>; *The Wire*, <http://www.hbo.com/thewire/>; *The Shield*, http://www.fxnetworks.com/shows/originals/the_shield/main.html.

⁵⁵ See discussion *infra*, Part III; see also UTAH CODE ANN. § 30-6-1(2)(b) (2008).

⁵⁶ See discussion *infra*, Part III; see also *National Briefing Gay Marriage: Get Ready for Congressional Slugfest Round Two*, AMERICAN POLITICAL NETWORK, Vol. 10, No. 9, November 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 to her unmarried client).

⁵⁷ See Nebraska Op. Att'y Gen. No. 03004 (Mar. 10, 2003).

⁵⁸ See *id.*

the city's Public Employees Health Program extending coverage to the "Adult Designee" of an employee did not violate the state marriage amendment;⁵⁹ and finally, litigation is ongoing over this issue in Ohio, Louisiana, and Michigan.⁶⁰ This last set of examples poses a crucial question that the courts in those states are either in the process of answering, or may find themselves called upon to answer: does the language in each state's respective amendment prevent public entities from offering their gay and lesbian employees domestic partner benefits plans?

Currently, the Michigan Supreme Court is reviewing a dispute that will likely have a persuasive impact on courts across the nation, and thus far, neither the trial court nor the appellate court has offered an analysis of the problem that is altogether persuasive. In *National Pride at Work, Inc. v. Governor*, the question before the Court is whether Michigan's marriage amendment precludes the state from offering health care benefits to the domestic partners of its gay and lesbian employees. Part Two will offer an extensive analysis of this case, given its significance in the current debate.

II. *National Pride at Work, Inc., et al. v. Governor of Michigan*

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A. Backdrop

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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.⁶¹ The proposed amendment failed, however, when it did not garner the required two-thirds majority.⁶² Soon thereafter, the Michigan Christian Citizen's Alliance started an initiative committee in an effort to achieve the same end.⁶³ 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.⁶⁴ On November 2, 2004, voters in the

⁵⁹ See *In re Utah State Retirement Board*, No. 050916879 (Utah D. 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." See *id.*

⁶⁰ See *Brinkman v. Miami Univ.*, 2007 WL 2410390 (Ohio Ct. App. Aug. 27, 2007); see also *Ralph v. City of New Orleans*, No. 2003-09871, Civ. D. Ct. Parish of Orleans (Jan. 15, 2008); *Nat'l Pride at Work v. Governor*, 732 N.W.2d 139 (Mich. Ct. App. 2007) (discussed *infra* Part II).

⁶¹ *Wedding Wall: Balloted gay marriage ban denies equal protection*, The Michigan Daily, July 6, 2004, <http://media.www.michigandaily.com/media/storage/paper851/news/2004/07/06/Opinioneditorials/Wedding.Wall-1424382.shtml> (last visited on November 12, 2007) (hereinafter "Wedding Wall").

⁶² See *id.*

⁶³ See Plaintiff-Appellant's Brief on Appeal, State of Michigan (Supreme Court) (hereinafter "Plaintiff's Brief"), dated August 30, 2007, at 7.

⁶⁴ See Chris Killian, *Michigan Split on Marriage Proposal*, October 14, 2004, at <http://media.www.westernherald.com/media/storage/paper881/news/2004/10/14/News/Michigan.Split.On.Marriage.Proposal-2123912.shtml> (last visited on November 12, 2007). The petition was quite successful – supporters needed only approximately 318,000 signatures in order to win a spot on the ballot.

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.”⁶⁵ One of eleven same-sex marriage amendments to pass nationwide that day, Michigan’s amendment was approved by 59% of the voters.⁶⁶ It was a clear victory for same-sex marriage opponents and an expected defeat for proponents of gay and lesbian rights.⁶⁷

Even though the language of the Michigan amendment is somewhat opaque, its primary purpose is simple and straightforward – voters intended to eliminate the⁶⁸ possibility of same-sex marriage in the state of Michigan.⁶⁹ 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 the marital union.⁷⁰ Nevertheless, the contours of the prohibition are unclear. Did the ban extend only to the creation of comprehensive parallel regimes like those in Vermont, New Hampshire, 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?⁷¹ Or did it also extend to the creation of regimes like those in Washington, Hawaii, Maine, and the District of Columbia, where gay and lesbian relationships receive limited public acknowledgement and protection under state law?⁷² Would it negatively impact the ability of gay and lesbian couples to adopt or foster children?⁷³ Would it limit the ability of gay *and* straight unmarried couples to receive protection under the domestic violence statutes?⁷⁴

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

⁶⁵ See Mich. Const. art. I, § 25 (2004).

⁶⁶ See *Protect Our Families Michigan*, at <http://protectmifamilies.org/teir.php?page=21> (last visited on November 12, 2007).

⁶⁷ 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.

⁶⁸ 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.”).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *supra* n. 24.

⁷² See *supra* n. 23.

⁷³ 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 denial of benefits reserved for legally married couples, including the right to adopt and raise a family).

⁷⁴ See *infra*, Part III (discussing the experience of the Ohio courts when evaluating this question).

agreements in place which offered health-care benefits to the domestic partners of gay and lesbian employees.⁷⁵ 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.⁷⁶ 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.
- (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.⁷⁷

After the passage of the Marriage Amendment, OSE and UAW became especially concerned about the legality of the proposed agreement.⁷⁸ 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.⁷⁹

⁷⁵ 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).

⁷⁶ See *Brief of Amici Curiae Internat'l Union, UAW and Its Local 6000 in Support of [P]laintiffs-Appellants*, in the Supreme Court, dated August 13, 2007, at 1.

⁷⁷ See *id.*, Ex. 2, Letter of Understanding, Article 43, Section C (dated December 3, 2004) (hereinafter "Letter of Understanding").

⁷⁸ See *id.* at 1-2.

⁷⁹ See *supra* n. 22, Letter of Understanding (outlining the criteria which established eligible dependency for same-sex domestic partners and describing the parties' intent to postpone ratification of the agreement until a court declared that the agreement did not violate the Marriage Amendment).

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,⁸⁰ 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.⁸¹

The policy implemented by the University of Michigan came under scrutiny as questions about the viability of these partner benefit plans became more intense.⁸² The university defended its plan as necessary to attract the kind of intellectual talent that supported 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.⁸³ 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.⁸⁴

Similarly, the City of Kalamazoo implemented a plan in 2000 which offered health care benefits to all employees and their domestic partners.⁸⁵ 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 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) shared their finances and living expenses; and (6) had signed a

⁸⁰ 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 Plaintiff-Appellant's Brief on Appeal*, dated August 30, 2007, at 7. He argued 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. . . ." *Id.* at 8.

⁸¹ *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).

⁸² Even though it is not a party to the *National Pride at Work* litigation, the University of Michigan's plan was analyzed by both the trial court and the court of appeals. [cite]

⁸³ *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*, in the Supreme Court of Michigan, dated August 24, 2007, at 3, 20.

⁸⁴ *See id.* Ex. 1, p. 3.

⁸⁵ *See id.* at *1.

Certification of Domestic Partnership.⁸⁶ Currently, the city is a defendant in the *National Pride at Work* litigation and is defending the constitutionality of its benefit plan.

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.”⁸⁷ 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 and women.”⁸⁸ 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.”⁸⁹ 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.”⁹⁰ As such, the policy violated the amendment.⁹¹ 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.⁹² Shortly thereafter, plaintiffs filed their action in *National Pride at Work*.

B. *National Pride at Work* – Trial Court decision

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The trial court in *National Pride at Work* described the question before it as follows: “[W]hether a public employer may voluntarily, either through the collective bargaining process or otherwise, agree to provide its employees with so-called “same sex benefits.”⁹³ The benefits at issue were primarily health-care benefits meant to cover the domestic partner of the employee in question.⁹⁴ Benefits programs offered by defendant City of Kalamazoo, as well as the State of

⁸⁶ *See id.* at *2.

⁸⁷ Opinion No. 7171, Office of the Attorney General, State of Michigan, 2005 WL 639112 (March 16, 2005).

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

⁹⁰ *Id.*

⁹¹ *See id.* 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. *See id.*

⁹² *See Nat’l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005), at *2.

⁹³ *Id.*, at *1. The question addressed by the trial court actually mischaracterized the true issue – the impact of the prohibition potentially established by the amendment was not confined to same-sex relationships; it also extended to heterosexual domestic partnerships. *See id.*

⁹⁴ *See id.*

Michigan⁹⁵ and the University of Michigan, served as illustrative examples for purposes of the court's analysis.

The trial court grounded its analysis in the rules governing constitutional interpretation in the state of Michigan. The most significant rules guiding the court's analysis were the direction to "give[] [the words] their plain meaning at the time of ratification," and to implement "[t]he meaning . . . which realizes the intent of the people who ratified the Constitution."⁹⁶ Courts were certainly allowed to consider the circumstances surrounding adoption when the language was ambiguous, but in this case, the language was sufficiently clear to avoid resort to extrinsic evidence of the voters' intent.⁹⁷

The trial court identified the very first phrase of the amendment – "to secure and preserve the benefits of marriage for our society and for future generations of children" – as support for its claim that the voters had clearly stated their intent.⁹⁸ According to the trial court, the opening language of the amendment evinced the overriding purpose of preserving the *statutory* benefits of marriage – benefits which did not include a guarantee of health care.⁹⁹ Individuals did not receive health-care benefits as a matter of statutory right as soon as they were married; rather, the receipt of health-care benefits was simply a function of the employment relationship: "If a spouse receives health care benefits, it is a result of a contractual provision or policy directive of the employer."¹⁰⁰ The circumstances under which these benefits were dispensed were not governed by the creation and implementation of legal rules. Rather, eligibility for the receipt of these benefits depended entirely on the employees' ability to meet the criteria established by their respective employers.¹⁰¹

After interpreting the opening language of the amendment in this manner, it appeared that there was nothing left to decide. If the "benefits" described in the amendment referred only to the statutory benefits that arose as a consequence of marriage, and if health-care benefits did not fall into that category, then presumably the state employee plans were not covered by the terms of the amendment. The trial court, however, did not end its analysis here. Focusing on the word "recognize," the court next considered the meaning of the second major phrase in the amendment: "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union."¹⁰² The Michigan Attorney General argued that the state "recognized" a union by acknowledging its existence and premising the receipt of benefits

⁹⁵ The benefits provided by the State of Michigan that are described here refer only to those benefits that were negotiated with the UAW. *See Nat'l Pride at Work*, 2005 WL 3048040, * 2.

⁹⁶ *Id.* at *3 (citations omitted).

⁹⁷ *See id.* at **3-4.

⁹⁸ *See id.*

⁹⁹ *Id.* at *4.

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *See Nat'l Pride at Work*, 2005 WL 3048040, at *4.

on its existence.¹⁰³ Plaintiff National Pride at Work, on the other hand, argued that “recognition” of a relationship would require the state, as a sovereign entity, to bestow a formal status on a non-marital union or offer individuals in such unions guaranteed rights.¹⁰⁴ Since the employee benefit plans did not accomplish either end, there was no “recognition” within the meaning of the amendment.¹⁰⁵

The trial court, however, declined to take either approach suggested by the parties. Instead, it chose a third approach – it proposed to interpret “recognize” in light of the purpose animating the specific provision within which the word was contained. Once again, the purpose of this section of the amendment was apparent on the face of the amendment: to ensure that “only a union between one man and one woman [would] be recognized ‘as a marriage or similar union.’”¹⁰⁶ In an ostensible effort to effectuate this purpose, the trial court asked whether the eligibility criteria *themselves*, rather than the state’s decision to premise the receipt of benefits on meeting these criteria, recognized a marriage or a similar union.¹⁰⁷ After quickly dispensing with the notion that recognition of marriage was at stake, the trial court further concluded that the criteria did not, in fact, recognize a similar union.¹⁰⁸ As an initial matter, no union arose from the criteria.¹⁰⁹ Moreover, the criteria differed from employer to employer, providing yet another basis for failing to find any recognition within the meaning of the amendment.¹¹⁰ Finally, the trial court argued that “the criteria could not be said to create a union where one [did] not exist according to law.”¹¹¹

Even if the criteria had “recognized” a union, the trial court would have held that they did not recognize a union “similar to marriage.”¹¹² Once again relying on an understanding of marriage that was rooted in the statutory regime that defined the duties and benefits of marriage, the trial court argued that the eligibility criteria for health-care benefits established by the state employers “pale[d] in comparison to the myriad . . . legal rights and responsibilities accorded to those with marital status.”¹¹³ Comparison of the specific statutory rights and duties that arise through marriage, as well as the method of termination and the legal consequences that flow

¹⁰³ See Opinion No. 7171, Office of the Attorney General, State of Michigan, 2005 WL 639112 (March 16, 2005) (hereinafter “AG Opinion”).

¹⁰⁴ See Plaintiff’s Brief 16.

¹⁰⁵ See *id.*

¹⁰⁶ *Nat’l Pride at Work*, 2005 WL 3048040, at *4.

¹⁰⁷ See *id.* The decision by the trial court to frame the relevant question in this way will be critiqued in a subsequent section.

¹⁰⁸ See *id.* at **4-5.

¹⁰⁹ See *id.* at *4.

¹¹⁰ See *id.*

¹¹¹ *Id.*

¹¹² See *id.* at *5.

¹¹³ *Id.*

from the end of a marriage, persuaded the court that no union *similar* to marriage was implicated by the health-care benefits programs:

The criteria in the present case do not come close to approaching the legal status that marriage holds in our society. The relationship between the employee and the covered dependent, not being defined by law, is left to the parties to define privately. The criteria neither reflect that nor recognize that. The criteria define eligibility for health insurance benefits and do not act as recognition of a union similar to marriage.¹¹⁴

Ultimately, the trial court held that the marriage amendment did not apply to the state employer health-care benefit plans. Therefore, state employers were not barred by the amendment from offering partner benefits to their unmarried employees.¹¹⁵

C. National Pride at Work – Court of Appeals decision

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The Michigan Court of Appeals reversed. Framing the question before it in slightly different manner, the Court of Appeals considered “[w]hether a public employer’s extension of employment benefits, e.g., same-sex domestic-partnership benefits, [was] based on an *agreement recognized as a marriage or similar union*. . . .”¹¹⁶ If it was, then the benefits were invalid: “The operative language of the amendment plainly precludes the extension of benefits related to an employment contract if the benefits are conditioned on or provided because of an *agreement recognized as a marriage or similar union*.”¹¹⁷ Thus, even though both courts were ultimately focused on the authority of state employers to act in the way that they did, the Court of Appeals question was more precisely attuned to the central debate that was pending before it.

This difference between the two opinions notwithstanding, both courts began at the same analytical starting place. Much like the trial court, the Court of Appeals opened the substantive portion of its analysis by identifying the primary rules of constitutional interpretation on which Michigan courts rely.¹¹⁸ Also, much like the trial court, the Court of Appeals found that the “mandate” of the amendment was clear: “that only one ‘agreement’ – the union of one man and one woman in marriage – may be recognized as a marriage *or similar union for any purpose*.”¹¹⁹ In doing so, however, the Court of Appeals dismissed the trial court’s view that the amendment’s

¹¹⁴ See *id.* at **5-6.

¹¹⁵ See *id.* at ** 6-7.

¹¹⁶ *Nat’l Pride at Work v. Governor*, 732 N.W. 2d 139, 148 (Mich. Ct. App. 2007) (hereinafter “Appellate Decision”).

¹¹⁷ *Appellate Decision*, 732 N.W. 2d at 148.

¹¹⁸ See *id.* at 147 (identifying those principles of construction as the following: (1) the rule of common understanding, which attempts to realize the voters’ intent by focusing on the plain language of the amendment; (2) the notion that courts may rely on extrinsic evidence if the meaning of the constitutional language is ambiguous; and (3) the direction that courts should avoid interpretations that create invalidity under the federal constitution.

¹¹⁹ *Id.* at 148.

statement of purpose – “to secure and preserve the benefits of marriage” – was effectively identical to its mandate.¹²⁰

Central to the court’s analysis was the meaning of the word “recognize.” The court held that “the common understanding of the term ‘recognize’ as used in the amendment is [meant] in a legal sense, i.e., to acknowledge the validity of something.”¹²¹ The question, then, was whether the policy in question acknowledged the validity of a relationship similar to marriage when it premised partner eligibility for health-care benefits on the existence of a close, personal relationship. The court made two analytical moves here: (1) it considered whether the requirement that the couples be in a domestic partnership of some sort demonstrated that an “agreement” was at stake, and (2) it compared domestic partnerships to marriage. Insofar as “agreements” were concerned, the Court of Appeals noted that “the employee and the employee’s eligible dependent must have agreed to be jointly responsible for basic living expenses and other common expenses of maintaining a household.”¹²² The court went on to note the following: “Upon being advised of the existence of the employer-required agreement, the employer is contractually, i.e., legally, obligated to recognize the agreement for the purpose of providing health-care benefits to the dependent.”¹²³ Under the terms of these policies, then, the public entity acquired a legally enforceable obligation upon proof that the employee and his or her partner had agreed to embrace a relationship that the marriage amendment had arguably rendered invisible to the law.¹²⁴

The state’s acknowledgement of the agreement was meaningless, though, if the agreement was not similar to marriage. In order to evaluate this issue, it was necessary for the court to have an understanding of what marriage meant, and then to measure domestic partnerships against that understanding. Starting with the definition of marriage, the court found that the institution was defined by the Michigan Code as “a unique relationship between a man and a woman . . . [that the] state has a special interest in encouraging, supporting, and protecting . . . in order to promote, among other goals, the stability and welfare of society and its children.”¹²⁵ Myriad rights, responsibilities, benefits, and privileges were available to and imposed upon married couples as they entered an institution that was simultaneously private, public and social in its conception:

Marriage is a civil contract, but it is not a pure private contract. It is affected with a public interest and by a public policy. The status of children, preservation of the home, private morality, public decency, and the like afford ample grounds for special treatment of marriage as a contract, by statute and decision. In recognition

¹²⁰ This disagreement is ironic since both courts purported to rely on the plain language of the amendment.

¹²¹ *Appellate Decision*, 732 N.W. 2d 149.

¹²² *Id.* at 151.

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.* at 148 n. 8. This definition is wholly inadequate, however, because it does not define the contours of the relationship to which non-marital and non-heterosexual unions must be compared. *See infra* nn. ____.

of its public and social nature, courts have cast about it the protecting mantle of presumptions, sustaining validity of marriage, said to be the strongest known to the law.¹²⁶

Even though domestic partnership agreements did not carry with them the same social caché or legal significance, and further, did not give rise to the same welter of rights and responsibilities, they were nonetheless similar in certain crucial ways to marriage. First of all, domestic partnership agreements were created in order to “proclaim the existence of the relationship by establishing a mechanism for the public expression, sanction, and documentation of the commitment.”¹²⁷ Second, the entry requirements for the domestic partnership agreements in the record were comparable to those for marriage: (1) there was a gender requirement; (2) there was a need for the consent of the parties to the relationship; (3) there was a need to prove that the parties were not blood relations; (4) there was a need to ensure that no marriages are similar relationships existed for either of the parties; and (5) there was a minimum age requirement.¹²⁸ In light of these similarities, the trial court erred when it held that the prohibition of the amendment did not apply to the benefit plans that were at issue here.

D. Critique of the Analyses Employed by the Trial Court and the Court of Appeals

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1. Trial Court Critique

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Even though the trial court reached a result that was vitally important for a minority population in the state, the manner in which it reached the result created more problems than it solved. The trial court began its analysis by asking the right question: “[W]hether a public employer may voluntarily, either through the collective bargaining process or otherwise, agree to provide its employees with so-called ‘same-sex benefits.’”¹²⁹ It ran into difficulty, though, when it began to interpret the meaning of the word “recognize.”

As it began its analysis of “recognize,” the court noted the different positions taken by the plaintiffs and the Attorney General. The plaintiffs argued that the word “refer[red] to the State of Michigan [i]n its sovereignty conferring some status or rights on the union.”¹³⁰ By way of contrast, the Attorney General argued that “the word ‘recognize’ [meant] acknowledg[ing] the existence of something and that any benefit at all that is provided to a same-sex union would acknowledge the existence of that union.”¹³¹ Rejecting both approaches, the trial court instead opted not to define the word at all.

¹²⁶ *Id.* at 150 (citation omitted).

¹²⁷ *Id.* at 149-150.

¹²⁸ *See id.* at 150-152.

¹²⁹ *Nat’l Pride at Work v. Granholm*, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005), at *1. As noted above, the trial court should have phrased the question in a way that included unmarried heterosexual couples, too, but the overall gist of the question is correct.

¹³⁰ *Id.*

¹³¹ *Id.*

Rather than offering a straightforward meaning of the word that could be applied to the facts before the court, the trial court argued that “[n]either the common meaning of recognize nor examination of that word in isolation allow[ed] for a determination of the intended meaning.”¹³² It was necessary to look at both the definitional sense of the word, as well as the underlying purpose which animated the provision in which the word was found.¹³³ Looking at the provision, the court found that it was unambiguous: “The provision requires that only a union between one man and one woman will be recognized ‘as a marriage or a similar union.’” Clearly, the benefits in question were not based on marriage, so the question was whether “the criteria act[ed] as recognition of ‘a union similar to marriage.’”¹³⁴

The court answered this question by focusing on whether or not a union arose from or was created by the designated criteria; if a union had arisen from the criteria, one could then say that the state had recognized a status. The court made three arguments: (1) no union arose from the criteria themselves because they did nothing more than establish eligibility for receiving the benefits; (2) no union arose from the criteria because they differed by employer; thereby negating the possibility of public recognition of a status, and (3) no union was created by the criteria because one could not create a union where one did not exist according to law.¹³⁵

The court’s analysis in this case was somewhat problematic. As an initial matter, both the plaintiffs and the Attorney General offered reasonable definitions of the word “recognize,”¹³⁶ definitions that would encompass a union that did, in fact, “arise” from the stated criteria. If a union *did* arise from the criteria designated by the state agency, then the state would have created a status for that relationship by establishing it formally within the law. Moreover, if a union arose from the criteria, the state would, by definition, be acknowledging it, precisely *because* it had created it. The court, however, seemed to imply that recognition would occur only if the state gave these unions a formal status designation in the law, and nothing of the sort had happened here.¹³⁷ This claim would have been more persuasive if the court had offered better arguments in support of it.¹³⁸

The analysis became substantially weaker with its second point – no union arose from the criteria because they differed by employer. The response to this argument is evident: the criteria in question need not be uniform in order for the union to exist, or for the union to be recognized by the state. In fact, it is common for domestic partner plans to vary from employer to employer, but the fact of variance does not support a claim of non-recognition. As will be discussed in greater detail, if a public employer confers a status on an individual, and if consequences are

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ Black’s Law Dictionary defines the word “recognition” as “[r]atification; confirmation; an acknowledgment that something done by another person in one’s name had one’s authority.” BLACK’S LAW DICTIONARY 1271 (17th ed. 2000). This definition actually encompasses both the plaintiffs’ and the Attorney General’s positions.

¹³⁷ In fact, the court seemed to accept the plaintiffs’ definition of “recognize” without actually saying so.

¹³⁸ *See infra* Part III (extended discussion of a more persuasive definition of “recognize”).

triggered when the individual achieves that status, one can reasonably argue that the status has been recognized by the employer.¹³⁹ This analysis of recognition does not depend on the uniformity of the criteria which confer the status; it merely depends on the action taken by the public employer itself.¹⁴⁰ Again, if the court wished to offer an alternative account of the meaning of recognition, it needed to bolster the argument with more analysis than it offered in this case. Finally, the last point raised was simply odd. The court argued that a union could not be created by the criteria if the union did not already exist. If the purpose of the criteria was to *create* a union that would be formally recognized under the law, then presumably, the union was not already in existence. If the union already existed, there would be no need to create the same union. The court's analysis of the word "recognize" is largely unpersuasive.

The court continued its unsatisfactory analysis when it turned to the meaning of the word "union." It suggested that the Attorney General's argument – that the employers were recognizing "unions" because they turned on the existence of a "relationship" – was flawed because the plans were not *entirely* based on the existence of a relationship.¹⁴¹ The court acknowledged that the plans established by the state of Michigan and the University of Michigan *did* require proof of a relationship in order to establish eligibility for the benefits;¹⁴² nevertheless, it found that the existence of a relationship was not key because "the benefits terminate upon termination of employment even if a relationship between the parties continues."¹⁴³ Moreover, the existence of a relationship was only one requirement for eligibility – if other requirements were not met, the request for coverage would be denied.¹⁴⁴ The plans simply allowed employers to provide voluntarily "health insurance benefits to those who [met] certain criteria that the employer [had] established."¹⁴⁵

Even though the court's reasoning is flimsy, its ultimate conclusion here is correct: merely providing health care benefits to a designated individual does not constitute recognition of a "union." If the plans simply asked employees to designate a person to receive benefits, no one could reasonably argue that they violated the prohibition contained in the marriage amendment. Of course, this is not what the plans did – the benefits at stake could be received *only* if the individual employees had "agreed" to live in relationships (or "unions") that met the criteria defined by the employer. In fact, given the manner in which the plans operated, the state met the definitions of "recognize" offered by both the plaintiffs and the Attorney General: not only did the state recognize the relationships by explicitly acknowledging their existence, it

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at *5.

¹⁴² The court argued that "there is no such requirement [of a relationship] for the receipt of benefits from the City of Kalamazoo." *Id.* The City of Kalamazoo, however, required eligible employees to have signed a Certification of Domestic Partnership that was filed with the city. [Cite to the City of Kalamazoo's brief.]

¹⁴³ *Nat'l Pride at Work*, 2005 WL 3048040 at *5. This point is less than persuasive – it is equally true that the benefits would terminate if the employment relationship continued, but the *relationship* ended.

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

accorded them a certain amount of public significance by privileging their life choices over those of individuals who were not in relationships. A single person could not simply designate any individual to receive health care benefits under any of these regimes; instead, that single person would have to be in an unmarried relationship with either a man or a woman and meet the other requirements before designating a recipient for health insurance.

The trial court, then, reached a conclusion that could not be supported under a reasonable interpretation of the marriage amendment. This, of course, begs, an important question: did the court of appeals fare any better?

2. Critique of the Court of Appeals Opinion

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The logic employed by the Court of Appeals was far more straightforward than the analysis employed by the trial court. Nevertheless, analytical problems exist in this opinion, as well. As noted above, the Court of Appeals' analysis began with its perceived "mandate" of the amendment – namely, that only an *agreement* between a man and a woman could be recognized as a marriage or a similar union. By conceptualizing the mandate in this way, the court was eventually free to turn its focus to the nature of the agreement that was at stake. If the agreement was similar to marriage, and if the state "recognized" it within the meaning of the amendment, then the plans would have to fail. After finding that the plans "recognized" the agreements in a formal sense of the word, the court considered whether the plans violated the similarity provision of the amendment. Given the similarity between the eligibility requirements under the state plans and the requirements for marriage, the court held that the amendment had been violated.¹⁴⁶ Moreover, the recognition by the state granted "a same-sex couple the ability to hold themselves out as a publicly recognized monogamous couple, i.e. a union."¹⁴⁷ The couples' abilities to hold themselves out as a publicly recognized union meaningfully distinguished them from people who were simply dating – even if there were limited privileges that flowed from the decision to enter into this public agreement, the fact that the state offered a method through which public acknowledgement might occur manifestly created a new a status for these couples. As such, these couples were "similar" in some sense to married people.

Even though the analysis offered by the Court of Appeals is clean and arguably persuasive, the interpretive methodology that it used was flawed. The question of "similarity" is far more complex than the Court of Appeals was willing to credit, and the court should have offered a more searching rationale in support of its conclusion that the domestic partnership agreements that were recognized by the state actually violated the amendment. "Similar" is a word whose meaning is rather flexible: two things might be similar if they have *one* element in common, if they have *some* elements in common, or if they have *every* element in common. Rather than exploring the ambiguity that is inherent in this word, the court simply found that the similarity between the eligibility criteria for marriage and the domestic partner plans was sufficient to violate the amendment.

¹⁴⁶ See *id.* at 150-151.

¹⁴⁷ *Id.* at 149-150.

Even though there were problems in the analytical approaches taken by both the trial court and the court of appeals, they were essentially working in a vacuum. The marriage amendments have not been subject to sustained critical analysis yet, so it is not clear how these terms should be interpreted. Part III will address this problem by offering an interpretive guide that future courts might follow if presented with similar concerns.

III. Interpreting Critical Terms and Concepts in the Comparative Model MSAs –“Status,” “Recognition,” and “Identical/Similar”

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A. Understanding Status and Recognition

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.¹⁴⁸ Courts in these states will almost certainly have 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.”¹⁴⁹ Although these terms appear frequently in the law,

¹⁴⁸ 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. See App. at _____. 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. See Samir Luther, *Domestic Partner Benefits: Employer Trends and Benefits Once Equivalency for the GLBT Family* 9, HUMAN RIGHTS CAMPAIGN FOUNDATION, March 2006, 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* Part III. 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. See, e.g. [cite a case where an individual sued an employer (preferably, a public employer) for failing to abide by the terms of a contract.] 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, 240-246 (2005) (suggesting that the concept of legal status is 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.

¹⁴⁹ 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

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 this word 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.”¹⁵⁰ 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 of the term by arguing that “status” refers to those “characteristic[s] of an individual that [have] some legal consequences.”¹⁵¹ 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.”¹⁵² Balkin’s view of status is echoed by Black’s Law Dictionary, which defines status as “[t]he rights, duties, capacities and incapacities which determine a person to a given class.”¹⁵³ Similarly, the Oxford Dictionary of Current English notes that status is “the official classification given to someone or something.”¹⁵⁴ 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

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.

¹⁵⁰ 5 U.S.C. § 2301(b)(2) (West 2008)

¹⁵¹ J.M. Balkin, *The Constitution of Status*, 106 YALE L. J. 2313, 2325 (1997) (describing the differences between legal status and sociological status).

¹⁵² *Id.* Moreover, Balkin notes that “the legal concept of status is often distinguished from conduct,” which further narrows the meaning attached to the idea of a “legal status.” *Id.*

¹⁵³ BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

¹⁵⁴ OXFORD DICTIONARY OF CURRENT ENGLISH 892 (4th ed. 2006).

consequence. A person who participated in Nazi persecution during World War II, for instance, becomes a member of the category defined as “deportable;”¹⁵⁵ 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;¹⁵⁶ if a territory acquires wetland status, certain unique administrative duties will subsequently be imposed on the Natural Resources Conservation Service.¹⁵⁷ Many other examples of status designations exist throughout the law.

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 each other. Much like the idea of “status,” “recognition” is a critical term that often appears in the law, but is rarely defined. Black’s Law Dictionary defines recognition as “[r]atification; confirmation; an acknowledgment that something done by another person in one’s name had one’s authority.”¹⁵⁸ Similarly, at least one federal court has found that recognize means “to acknowledge by admitting to a privileged status.”¹⁵⁹

The confusion generated by the meaning of the ambiguous terms used in the marriage amendments, including 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.¹⁶⁰ 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.¹⁶¹ 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.’”¹⁶² 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

¹⁵⁵ See 8 U.S.C.A. § 1227(a)(4)(D) (West 2008) (defining as a deportable offense participation in Nazi persecution, genocide, the commission of torture, or the commission of an extrajudicial killing).

¹⁵⁶ See, e.g., 22 A.L.R. 4th 294 (collecting federal and state cases which discuss the continued viability of these common law designations)

¹⁵⁷ See 7 C.F.R. § 12.2(a) (2008) (defining “NRCS” and describing generally its responsibilities).

¹⁵⁸ See *supra* n. 128, BLACK’S LAW DICTIONARY 1271. The Oxford English Dictionary defines recognize as “genuine, legal, or valid.” See also *supra* n. 128, OXFORD DICTIONARY OF CURRENT ENGLISH 755.

¹⁵⁹ *Price v. U.S.*, 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).

¹⁶⁰ [cite]

¹⁶¹ See Kentucky Att’y Gen. Opinion at 4.

¹⁶² See *id.*

terms to the circumstances at issue. This prediction finds support in the Ohio courts. Ohio’s marriage amendment states as follows:

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.*¹⁶³

Litigation over the amendment focused on the potential conflict between the second sentence and the application of the domestic violence statute to unmarried individuals. Unmarried defendants could be prosecuted under the statute upon proof that they were “living as . . . spouse[s]” with the complainant. 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.¹⁶⁴ 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*. 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. *Ohio v. Carswell: The Meaning and Application of “Status”*

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Since 1979, Ohio’s domestic violence laws have protected unmarried individuals who were victimized at the hands of a cohabiting intimate partner.¹⁶⁵ 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: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”¹⁶⁶ 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.”¹⁶⁷ 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.*”¹⁶⁸ 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)

¹⁶³ Ohio Constitution, Art. XV, § 11 (2004) (emphasis added).

¹⁶⁴ See *infra* n. 186.

¹⁶⁵ 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), **2-6 (discussing the legislative history underlying the passage of the Ohio domestic violence statute).

¹⁶⁶ OHIO REV. CODE ANN. § 2919.25(A) (West 2003).

¹⁶⁷ *Id.* at § 2919.25(F)(1)(a)(iii).

¹⁶⁸ *Id.* at § 2919.25(F)(2) (emphasis added).

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.”¹⁶⁹ *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.”¹⁷⁰

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 which focused on two ideas: (1) a person’s standing before the law, and (2) the degree to which this standing created “certain legal rights, duties, and liabilities.”¹⁷¹ Based on this understanding, the Court interpreted 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” – 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.”¹⁷² This 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.¹⁷³

The Court then turned to the meaning of the “family or household” provision in the domestic violence statute. In the Court’s view, this term did nothing more than create a class of potential victims to whom the law offered its protection. 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.¹⁷⁴ Finally, the state did not create the relationship of cohabitation; the cohabiting couples established this state of affairs themselves.¹⁷⁵ Since the state played no role in creating the relationship, it could not be deemed to create or recognize any status in violation of the amendment.¹⁷⁶ The phrase “living as a spouse” simply “identifi[ed] a particular class of persons for purposes of the domestic-violence statutes.”¹⁷⁷

¹⁶⁹ *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.).

¹⁷⁰ Ohio Constitution, Art. XV, § 11 (2004).

¹⁷¹ *Carswell*, 871 N.E.2d at 551.

¹⁷² *Id.* (Emphasis added).

¹⁷³ *See id.* at 552.

¹⁷⁴ *See id.* at 553.

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *Id.* at 554.

2. Critiquing the Account of Status Offered by the *Carswell* Court

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The analysis of “status” employed by the Ohio Supreme Court was problematic for two reasons: (1) it limited the scope of the amendment’s authority in a manner that was flatly inconsistent with its language by holding that the only legal status prohibited by the amendment was a marriage substitute bearing *all* of the attributes of marriage; and (2) by holding that the phrase “living as a spouse” did nothing more than identify a class of victims, the Court failed to account for the fact that everyone who was covered by the provision acquired either a set of rights or a set of liabilities by virtue of the designation. The former objection is a straightforward one: if the amendment drafters had intended such a narrow scope for the amendment, they could easily have crafted a provision which prohibited the state from creating or recognizing a legal status “for relationships of unmarried individuals that *replicates* the design, qualities, significance or effect of marriage,” or was “*equivalent to* the design, qualifies, significance or effect of marriage.” The drafters could have used any number of terms to limit the amendment in precisely the way suggested by the Court, and yet, they did not. One might argue in response that the intent of the *framers* is not the most important consideration, but rather, that the intent of the *voters* should guide the Court’s analysis.¹⁷⁸ Assuming that one could support the position, one might further argue that all available evidence shows that the narrowing construction applied by the Court was consistent with the voters’ understanding of the amendment. In fact, Ohio law specifically allows courts to adduce extrinsic evidence of voter intent when interpreting ambiguous provisions of the state constitution.¹⁷⁹ The provision of the amendment that was examined in *Carswell* is inarguably ambiguous; why, then, did the Court avoid this methodological approach when it reached this conclusion? Obviously, there is no answer to this question, but if the majority’s conclusion was based on a clear sense of what the voters intended, it should have expressly said so.¹⁸⁰

The latter objection proposed above is clearly in the minority position – only a relative handful of the lower courts in Ohio reached this conclusion,¹⁸¹ and only one member of the Ohio

¹⁷⁸ See, e.g., 16 Ohio Jur. 3d Constitutional Law § 49 (citing *Castleberry v. Evatt*, 147 Ohio St. 30, 33 Ohio Op. 197, 67 N.E.2d 861, 167 A.L.R. 198 (1946); *Shryock v. City of Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915)). Indeed, the polestar in the construction of constitutions, as well as other written instruments, is the intention of the makers and adopters. *Id.* (citation omitted).

¹⁷⁹ See, e.g., 16 Ohio Jur. 3d Constitutional Law § 59 (citing *Board of Elections for Franklin County v. State ex rel. Schneider*, 128 Ohio St. 273, 191 N.E. 115, 97 A.L.R. 1417 (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, 29 Ohio L. Abs. 625, 3 Ohio Supp. 150 (C.P. 1939), *aff’d*, 138 Ohio St. 596, 21 Ohio Op. 481, 37 N.E.2d 609 (1941)).

¹⁸⁰ As an open supporter of gay and lesbian rights, I applaud an outcome which limits the degree of suffering that they might have sustained under a broader interpretation of the amendment. Having said that, I do not applaud the appearance of judicial gamesmanship – the Court offered no explanation for interpreting the word “approximate” consistently with the word “equivalent.” I do not accuse the members of the Ohio Supreme Court of disingenuousness; nevertheless, one cannot help but notice the analytical sleight of hand that occurred in this instance.

¹⁸¹ See, e.g., *City of Cleveland v. Voies*, 2005 WL 1940135 (Ohio Mun. Mar. 23, 2005), at **9-11 (holding that the domestic violence statute creates a status in violation of the marriage amendment); see also *State v. Dixon*, 2005 WL 1940110 (Ohio Ct. Comm. Pleas April 26, 2005), at **3-4 (same); *State v. Ward*, 849 N.E.2d 1076, 1082 (Ohio Ct. App. 2006) (same); *State v. Steineman*, 2006 WL 925166 (Ohio Ct. App. 2006), at *1 (same); *State v. McIntosh*,

Supreme Court dissented on these grounds. Nonetheless, their analyses of “status” were logical and direct, and barring a stronger argument to the contrary, should have prevailed in the majority opinion. As noted above, the domestic violence statute provides that, “No person shall knowingly cause or attempt to cause physical harm to a family or household member.”¹⁸² “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.¹⁸³ If one follows the methodology of the majority – namely, analyzing the language of the amendment and the language of the domestic violence statute rather than relying on any extrinsic evidence of voter intent – it becomes abundantly clear that applying the domestic violence statute to unmarried individuals violates the terms of the amendment.

The *Carswell* Court started its substantive analysis in the right place – with a focus on the meaning of “legal status.” Moreover, the Court’s definition of status reasonably focused on the consequences that flowed from attaining a particular “standing,” or “position,” before the law.¹⁸⁴ If one takes this definition seriously, it seems that a person would who acquired such “standing,” would have to possess a very particular set of characteristics. If the person did not possess these characteristics, no legal consequences would flow. Even the lower courts that found a violation of the amendment offered definitions of status that were consistent with the *Carswell* majority’s view. In *City of Cleveland v. Voies*, for instance, the Municipal Court found that “[a]ny time the law carves out specific designations for a particular group of people to have specialized treatment, they are, in fact, conferring a legal status on them.”¹⁸⁵

At this point, however, the *Carswell* court made a significant error in its analysis: it failed to consider adequately the consequences of 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. An abusive partner 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

2006 WL 925179 (Ohio Ct. App. April 7, 2006), at *1 (same); *State v. Shaffer*, 2006 WL 1459769 (Ohio Ct. App. May 30, 2006), at **2-3 (same); *State v. Logsdon*, 2006 WL 1585447 (Ohio Ct. App. June 12, 2006), at **5-6 (same); *State v. McKinney*, 2007 WL 437839 (Ohio Ct. App. Feb. 12, 2007), at *4 (same); cf. *State v. Peterson*, 2005 WL 1940114 (Ohio Ct. Comm. Pleas April 18, 2005), at *2 (holding that the application of the domestic violence statute to unmarried individuals violates the marriage amendment without offering any analysis of “status” or “recognition”).

¹⁸² See *supra* n. 170.

¹⁸³ See *supra* n. 171.

¹⁸⁴ See *Carswell*, 871 N.E.2d at 551 (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).

¹⁸⁵ *City of Cleveland v. Voies*, 2005 WL 1940135, at *9; see also *State v. Dixon*, 2005 WL 1940110 (quoting without attribution the *Voies* case, with one minor adjustment: “Anytime the law carves out specific designations for a particular group of people to have specialized treatment, they are in fact generically, conferring a legal status upon them.”).

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.”¹⁸⁶ This argument was proposed by organizations that work with victims of domestic violence, and ironically, it proves the point: but for the law’s designation of these couples as 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.

If one views the statute from the perspective of the complainants, the individuals whose relationships with the defendants meet the relevant characteristics of those who “live as spouses” acquire certain *rights* under the domestic violence statute. As an initial matter, attainment of this status grants *both* cohabiting partners the right to file charges against the other under the domestic violence statute.¹⁸⁷ Moreover, the statute grants unmarried complainants who are living as spouses a right to seek temporary protection orders from a court upon filing a complaint.¹⁸⁸ Additionally, 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.¹⁸⁹ An unmarried complainant, therefore, has a right to insist that such a detention take place.

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.

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

¹⁸⁶ *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).

¹⁸⁷ See *Carswell*, 871 N.E.2d at 555 (dissenting opinion) (describing the rights that individuals acquire under the statute if they are deemed to be living as spouses).

¹⁸⁸ See OHIO REV. CODE ANN. § 2919.26

¹⁸⁹ 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.* (premiering the officer’s authority on a reasonable belief that the domestic violence statute has been violated).

The foregoing analysis of status 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.¹⁹⁰ 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 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.*¹⁹¹

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.

¹⁹⁰ 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).

¹⁹¹ 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).

Applying “status” and “recognition” to a hypothetical example will serve to illustrate the manner in which these terms work. John and Jason are males in their early-30s who have been involved in an exclusive, intimate relationship for more than two years. They have been living together for the past eighteen months and it is their intention to continue living together indefinitely. There is no blood relationship between them, and neither one has ever been married or in a registered domestic partnership with any other individual. They have not married each other or been joined in a civil union because they live in a Comparative Model MSA state which forbids the establishment of such arrangements. Nonetheless, prior to the passage of the amendment in their state, they signed an affidavit at City Hall which registered them as domestic partners under the local domestic partner registry.¹⁹² Finally, their economic lives are fully intertwined with the other: John is an assistant professor of Political Science at the local public university, Jason is a violinist in the local symphony orchestra, and they use their combined income to pay for all of their personal and household expenses.

In an effort to minimize the discrimination experienced by its gay and lesbian employees and increase its ability to recruit talented individuals, the Human Resources Office at John’s school has decided that it wants to implement a partner benefits program. This program would extend health insurance coverage to the domestic partners of its gay and lesbian employees. In order to qualify for coverage under the program, employees and their partners must meet the following criteria:

- (1) the parties must be at least 18 years old;
- (2) the parties must share a close, personal relationship with each other and must be jointly responsible for basic living expenses, including the cost of food, shelter, and the common expenses of maintaining a household;
- (3) the parties must not currently have a similar relationship with any other person, and they must not have had a similar relationship (including marriage) with any other person within the past twelve months;
- (4) the parties may not be a member of the other’s immediate family, defined as a spouse, child, parent, grandparent, grandchild, brother, sister, aunt, uncle, or cousin within the second degree;
- (5) the parties must be of the same gender
- (6) the parties must have shared the same regular and permanent residence for at least the past six months, and must intend to do so for the indefinite future;
- (7) the parties must be registered in the city as domestic partners.

In this case, the local orchestra does not offer health insurance coverage, so John would like to cover Jason under his policy (currently, Jason does not have any other health insurance of his own). Based on the foregoing, Jason obviously qualifies for coverage under the proposed partner benefits program. If the program is implemented and he actually receives those benefits, can one argue that this public school – an entity of the state – has recognized a status for the couple in violation of the terms of the state’s marriage amendment?

¹⁹² It is true that such registries might also violate the terms of an amendment in a Comparative Model MSA state. Examination of this question, however, is beyond the scope of this paper. Nevertheless, it is appropriate to add this detail to the hypothetical problem because such requirements are often included among the list of eligibility criteria for the receipt of partner benefits.

The answer here has to be “yes.” Once it is established that John and Jason meet the criteria laid out by the school, they fall into the official classification of “eligible individual.” Moreover, the status of eligibility has been defined entirely with reference to the nature of the intimate relationship between them. If Jason was simply John’s roommate, or if he was in the middle of divorce proceedings with his soon-to-be ex-wife, or if they had not registered as domestic partners with the city, Jason would not fall into the class of individuals who are eligible for coverage under the policy. Even though the status designation has not been created by judicial action or set forth in a statute, the characteristics for acquiring the status nonetheless have been set by an arm of the state. Furthermore, Jason’s acquisition of the status which arose after meeting the eligibility criteria triggers the state employer’s contractual promise to cover him under its health insurance program. As such, Jason’s status has been recognized by the public employer. A legal consequence has flowed from the official recognition of his eligible status – if the employer does not provide the benefits, John will have an action against his employer for breach of contract.

Of course, finding that an official status has been recognized by the state is only the first part of any analysis under the Comparative Model MSAs. The next step is to examine whether the status recognized by the state is sufficiently similar to marriage to fall within the scope of prohibition laid out by the amendment. The next section will consider this question in greater detail.

C. Understanding “Identical/Similar”

While it is important 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. Among the Comparative Model MSAs, one state – Alabama – prohibits the recognition of a parallel union that is *identical* to marriage: “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.”¹⁹³ Six states – Arkansas, Kentucky, Louisiana, North Dakota, Utah, and Wisconsin – prohibit the recognition of parallel institutions that are *identical or substantially similar* to marriage.¹⁹⁴ The remaining eight states – Idaho, Michigan, Nebraska, Ohio, South Carolina, South Dakota, Texas, and Virginia – have amendments whose language

¹⁹³ See Ala. Const. amend. 774.

¹⁹⁴ The relevant portions of these amendments state as follows: Arkansas: “Legal status for unmarried persons which is *identical or substantially similar to marital status* shall not be valid or recognized in Arkansas. . . .”; Kentucky: “A legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized.”; Louisiana: “A legal status *identical or substantially similar to that of marriage* for unmarried individuals shall not be valid or recognized.”; North Dakota: “No other domestic union, however denominated, may be recognized as a marriage or given the same or *substantially equivalent legal effect*.”; Texas: “This state or a political subdivision of this state may not create or recognize any legal status *identical or similar to marriage*.”; Utah: “No other domestic union, however denominated, may be recognized as a marriage or given the same or *substantially equivalent legal effect*.”; Wisconsin: “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.

suggests that mere *similarity* between a recognized status and marriage will be invalid.¹⁹⁵ How should courts analyze these provisions?

As noted above, Alabama is the only Comparative Model MSA state that 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.”¹⁹⁶ 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 Vermont-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-like relationships.¹⁹⁷ Currently, there are *no* same-sex relationships that perfectly replicate marriage from the formal standpoint of legal equality.¹⁹⁸ Therefore, if a public employer in Alabama chose to grant employee benefits to its

¹⁹⁵ The relevant portions of these amendments state as follows: Idaho: “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 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, Maine, and Washington would arguably be precluded under the amendment, in part because of their arguable similarity to marriage); Michigan: “[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.”; 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.”; Ohio: “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.”; South Carolina: “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 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.); South Dakota: “The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”; Texas: “This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”; 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 effect of marriage.” See Appendix 1.

¹⁹⁶ OXFORD DICTIONARY OF CURRENT ENGLISH 768.

¹⁹⁷ See, e.g., OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 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).

¹⁹⁸ 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. See 1 U.S.C. § 7 (2008) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the

gay and lesbian employees based on any of the criteria in the plans at stake in *National Pride at Work*, the amendment would not invalidate these plans. None of the plans create or recognize a status that replicates marriage, so the state has retained significant discretionary authority in this instance to offer benefits to its gay and lesbian citizens.

The next category of amendments – those which preclude the creation or recognition of status categories for unmarried couples that are identical or substantially similar to marriage – begs the question, “What is *substantially similar* to marriage?”¹⁹⁹ The Alabama analysis explains how courts should understand the word “replicates,” or in this case, “identical,” but the understanding of “substantially similar” is less clear. Again looking to the dictionary, “substantially” means “to a great or significant extent; for the most part; essentially.”²⁰⁰ The lack of clarity, however, arises when considering the meaning of the word “similar,” and this lack of clarity plagues the third category of amendments, as well.²⁰¹ Insofar as dictionary definitions are concerned, “similar” means “like something but not exactly the same,”²⁰² but this definition is not terribly 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?

The dictionary definition of “similar” clearly does not address the matter in adequate fashion. A better source for defining “similar” is a group of cases which considered whether domestic partner registries and/or domestic partner benefits regimes established by state or local laws were sufficiently similar to marriage to violate state prohibitions on permitting same-sex marriage.²⁰³ In *Knight v. Superior Court*,²⁰⁴ *Devlin v. City of Philadelphia*,²⁰⁵ and *Slattery v.*

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.”).

¹⁹⁹ See *supra* n. 199.

²⁰⁰ THE NEW OXFORD AMERICAN DICTIONARY 1687.

²⁰¹ 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.

²⁰² OXFORD DICTIONARY OF CURRENT ENGLISH 847.

²⁰³ The cases I examine do not perfectly capture the issues at stake in this debate. First of all, the cases do not examine the meaning or applicability of the state constitutional amendments which address marriage and/or parallel unions. Second, these cases consider whether the establishment of a domestic partner registry or domestic partner benefits plan is identical to marriage, rather than merely similar to marriage. Nonetheless, the analyses in these cases identify some of the most important elements of comparison that courts should keep in mind when they evaluate the question of “similarity” when reviewing their states’ marriage amendments.

²⁰⁴ 128 Cal. App. 4th 14 (Ct. App. 2005).

²⁰⁵ 862 A.2d 1234 (Pa. 2004). See also *Lowe v. Broward County*, 766 So.2d 1199 (Fla. Ct. App. 2000) (holding that the extension of domestic partner benefits by a public entity did not equate those relationships to marriage), *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. Ct. App. 1999) (same); *Tyma v. Montgomery County*, 801 A.2d 148 (Md. 2002) (same), *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998) (same), and *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001) (same).

City of New York,²⁰⁶ the courts offered detailed analyses of those questions. In doing so, they described civil marriage²⁰⁷ as comprised of two constitutive elements: (1) a status component, and (2) a rights/benefits component. The status component was acquired by meeting the entry requirements established by statute, and then formalizing the union in a state-sanctioned ceremony. The rights and benefits of civil marriage, on the other hand, were simply the “bundle of sticks” that a couple received after acquiring marital status.²⁰⁸ Examining those cases will highlight some of the primary considerations that the Comparative Model MSA states should keep in mind when they are trying to evaluate this question of similarity.

1. *Knight v. Superior Court*

Considerations of marital status, domestic partner status, and the comparison between the two are critical to the analysis in these cases, and *Knight v. Superior Court* does a masterful job of illustrating this point. In *Knight*, the California Supreme Court considered whether the legislature violated the state’s Defense of Marriage Act (“Act” or “baby DOMA”²⁰⁹) when it passed new legislation granting “[r]egistered domestic partners . . . the same rights, protections, . . . benefits, . . . responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses.”²¹⁰ California’s baby DOMA states as follows: “Only marriage between a man and a woman is valid or recognized in California.”²¹¹ Plaintiffs used this language in support of their claim that the Act was meant to accomplish two goals: (1) prevent the recognition of same-sex marriage, and (2) exclusively reserve for married couples the rights and privileges associated with the institution.²¹² By extending those rights and privileges to unmarried couples, plaintiffs claimed that the domestic partnership statute effectively amended the Act.²¹³ Since the Act was the subject of an initiative petition that was approved by the voters,

²⁰⁶ 686 N.Y.S.2d 683 (Sup. Ct. 1999).

²⁰⁷ I use the phrase “civil marriage” because it is the form of marriage that was analyzed by the courts, and because it is the only kind of marriage that courts are institutionally competent to review. A full analysis of marriage would note that the institution has meaning as a sociological, anthropological, economic, historical, and religious institution, among other disciplines. See, e.g., Lynn D. Wardle, *What is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53, 58-59 (2006) (noting that marriage has various meanings in religion, psychology, sociology, anthropology, history, and within distinctive communities). Most judges are not trained to analyze questions along these lines (and even if they were, these disciplines incorporate so many contested theories of analysis that it would be difficult for a court to justify choosing one theoretical approach). Therefore, it would exceed the scope of a court’s authority to examine marriage along these or other, non-legal lines.

²⁰⁸ See *id.*

²⁰⁹ State-based defense of marriage acts are often referred to as “baby DOMAs” because they mirror their analytical progenitor, the federal Defense of Marriage Act.

²¹⁰ *Knight v. Sup. Ct.*, 128 Cal. App. 4th at 17.

²¹¹ CAL. FAM. CODE § 308.5 (West 2007).

²¹² See *id.* at 22.

²¹³ See *id.*

any amendments would also have to be approved by the voters.²¹⁴ The domestic partner statute had not been subject to popular approval; as such, plaintiffs claimed that it was invalid.²¹⁵

The Court, however, rejected the plaintiffs' analysis. As an initial matter, the Court held that the plain language of the Act was "concerned only with who is entitled to obtain the *status* of marriage, and not with the rights and obligations associated with marriage."²¹⁶ It was true that the legislature could not unilaterally alter the definition of marriage as the union of one man and one woman; it was also true that the legislature had not done so when it passed the domestic partnership legislation. The Court's evaluation of the plain language of the Act did not end here. It also looked at more broadly-constructed same-sex marriage prohibitions that were passed around the nation and found that many of them explicitly stated that no unmarried couples would be entitled to the benefits and privileges of marriage.²¹⁷ This evidence suggested that if the drafters of California's baby DOMA had intended to restrict the legislature's ability to grant the rights and benefits of marriage to unmarried couples, they could have followed the models employed by these states. Instead, they offered voters a more narrowly-constructed proposal whose language merely imposed a gender requirement on marriage. In addition, the Court found that the objective intent underlying the Act supported this position. After looking at the ballot materials that accompanied its passage, the Court held:

[The Act] was intended solely to preserve the status of marriage in California for persons of the opposite sex by preventing the recognition of marriages from other jurisdictions if those marriages are between homosexuals. No mention [was] made of an intent to limit the rights and obligations of domestic partnerships, civil unions, or any other kind of same-sex relationship regardless of its characterization. If this were the actual intent of the proponents of [the Act], the electorate was not given the opportunity to vote on that undisclosed objective.²¹⁸

It was clear to the voters that the sole purpose of the Act was to implement a gender-based gatekeeping requirement that would reserve marital status for opposite-sex couples. No other considerations were on the table at the time.

Viewed in conjunction with the other gatekeeping requirements for marriage under California law, it was apparent that domestic partner status was not equivalent to marital status. First of all, couples who wished to marry had to acquire a license.²¹⁹ Couples who wished to become domestic partners, on the other hand, merely had to file a Declaration of Domestic Partnership which specified their intent to form or continue a committed relationship.²²⁰ Second,

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ *Id.* at 25 (emphasis added).

²¹⁷ *See id.* at 24-25. The Court pointed to the language employed by the marriage amendments in Arkansas, Georgia, Kentucky, Louisiana, Nebraska, Ohio, and Texas. *See id.*

²¹⁸ *Id.* at 26.

²¹⁹ *See* CAL. FAM. CODE § 350 (West 2008).

²²⁰ *See id.* at 301-31; *see also* CAL. FAM. CODE § 298.5 (West 2008).

married couples who wished to divorce had to undergo proceedings that were overseen by a court.²²¹ The rules for terminating a domestic partnership, however, were quite different. Domestic partners who had no children, had been together less than five years, and who met particular conditions that bore on property and debt could terminate the partnership simply by filing a Notice of Termination with the Secretary of State.²²² Ultimately, the comparison between marital status and domestic partner status revealed that the two were insufficiently similar to support plaintiffs' claim.

The Court's analysis, however, did not end with its consideration of status. It also looked at the rights and benefits granted to civil marriage, and once again, found that between marriage and domestic partnerships were not equivalent. Taking a close look at the function of the rights and benefits attached to marriage, the Court concluded that, "The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society.'"²²³ The rights and responsibilities that flowed from marriage had a distinctly instrumental purpose – they were a crucial aspect of ensuring social stability. Therefore, the legislature made a reasonable policy choice when it expanded the rights associated with domestic partnership, precisely *because* gays and lesbians were creating family structures that implicated the same societal concerns raised by married couples. Since the law prevented gay and lesbian couples from getting married, the state needed another mechanism for regulating their relationships; the expanded rights and responsibilities offered by the domestic partner statute allowed the state to do this.²²⁴ Nevertheless, this wide-ranging expansion of domestic partner rights and responsibilities was still not equivalent to the rights and responsibilities of married couples:

[D]omestic partners do not receive a number of marital rights and benefits. For example, they may not file joint tax returns and their earned income is not treated as community property for state income tax purposes, and they are not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, an federal employment benefit laws.²²⁵

In light of this conclusion, the Court found that the plaintiffs' request to invalidate the domestic partner statute should be denied. *Knight*, then, is particularly instructive when trying to determine whether domestic partner status is sufficiently similar to marriage to violate a Comparative Model MSA amendment. Even though the issue in *Knight* considered whether the statute in question rendered domestic partnerships *equivalent* to marriage, the California

²²¹ See *Knight*, 128 Cal. App. 4th at 31; see also CAL. FAM. CODE §§ 2400-2403 (West 2008).

²²² See *Knight*, 128 Cal. App. 4th at 31; see also CAL. FAM. CODE § 299 (West 2008).

²²³ *Id.* at 28 (quoting *Elden v. Sheldon*, 46 Cal.3d 267, 275 (1988) (abolishing common law marriage) (internal citation omitted)).

²²⁴ See *id.* at 28-29.

²²⁵ *Id.* at 30 (emphasis added).

Supreme Court identified the vast differences that exist between marriage and domestic partnerships, *even when the state has gone as far as it possibly can to render the two equivalent*. A case like *Knight* will surely assist other courts around the country when they try to decide whether the domestic partner status designations recognized by public employer benefits plans are sufficiently similar to marriage to constitute a violation of their respective amendments.

2. *Devlin v. City of Philadelphia*

Devlin v. City of Philadelphia presented a set of factual circumstances that were measurably different from those at stake in the *Knight* case, but the analysis employed by the Pennsylvania Supreme Court also focused on the purported identity between a domestic partner relationship and marriage.²²⁶ The statute at issue in *Devlin* was different from the one examined in *Knight* – the domestic partner statute in *Knight* was akin to the civil union statutes of states like New Jersey and Vermont, while the statute in *Devlin* was structured like the typical domestic partner statutes found in localities around the country.²²⁷ In *Devlin*, the Pennsylvania Supreme Court held that the status created by this kind of domestic partner statute was highly distinct from the status created by the marriage laws.

The controversy in *Devlin* began when the Philadelphia City Council passed two bills, one of which amended the definition of “marital status” to include the status of being a “Life Partner,” and the other one of which required employers in the city who were not covered by ERISA to treat Life Partners as dependents who were eligible for employee benefits.²²⁸ After the City Council Passed the amendment to the city code, “marital status” was redefined to include “the status of being single, married, separated, divorced, widowed, or a life partner.”²²⁹ The plaintiffs argued that these statutes infringed on the state’s exclusive authority to regulate marriage because they effectively treated same-sex couples as married, but the Pennsylvania Supreme Court disagreed.²³⁰

As an initial matter, including “life partner” in the definitional category of “marital status” did not result in any equation between “life partner” and “married.” Rather, the Court found that “the reference to ‘the status of being . . . a life partner’ . . . merely supplement[ed] the terms ‘single,’ ‘divorced’ and ‘widowed’ as yet another unmarried ‘marital status.’”²³¹ In addition, the Court noted that the myriad rights and responsibilities attendant upon marriage did not follow from achieving life partner status. Life partners did not acquire the same rights that

²²⁶ See generally *Devlin v. City of Philadelphia*, 862 A.2d 1234 (Pa. 2004).

²²⁷ More often than not, the domestic partner statutes passed by local governments are considered “pale marital substitutes” because they are largely symbolic, and to the degree that they offer tangible benefits, they are usually restricted to health care benefits for municipal employees. See, e.g., Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 FORDHAM L. REV. 1699, 1739 (1998) (discussing the inherent limitations of domestic partner statutes created by local ordinances).

²²⁸ See *Devlin*, 862 A.2d at 1237-1238.

²²⁹ *Id.* at 1237 n.2 (quoting PHIL. CODE § 9-1102(u)).

²³⁰ See *id.* at 1238.

²³¹ *Id.* at 1243.

married couples received in the areas of divorce, alimony, child support, child custody, and equitable distribution, among others.²³² The rights and benefits that life partners acquired “[were] but a small fraction of what marriage affords its participants.”²³³ Finally, the Court found that the decision to provide employee benefits to life partners affected nothing more than “the *personnel* and *administration* of the offices local to Philadelphia.”²³⁴ As such, the Court could not reasonably conclude that the Philadelphia City Council had approved a marital equivalent in violation of state law.

3. *Slattery v. City of New York*

Last, in *Slattery v. City of New York*, the plaintiffs argued that city officials had infringed on the state’s exclusive authority to regulate in the area of marriage and domestic relations by passing the domestic partner statute.²³⁵ Like the Supreme Courts of California and Pennsylvania, the court in *Slattery* rejected this claim. First of all, the court noted that the criteria necessary for acquiring domestic partner status were different from those that were necessary for establishing marital status. According to the local ordinance, a couple could register as domestic partners if their relationship met the following requirements: (1) both were New York City residents, or at least one was employed by the city; (2) both individuals were at least eighteen years old; (3) neither individual was married to someone else; (4) neither individual was a registered member of another domestic partnership; (5) at least six months had to have passed since the termination of any other domestic partnership of which either or both individuals had been a part; (6) neither individual was related to each other in a manner that would prevent them from getting married under state law; and (7) the partners lived together and shared a close, intimate, personal relationship.²³⁶ Once these characteristics were met, a couple could become domestic partners simply by signing an affidavit.²³⁷ These requirements differed substantially from those that were necessary for marriage under New York law. Couples that wished to marry had to acquire a license, meet several health and blood testing requirements, and have the relationship solemnized by a state-approved officiant.²³⁸

The court also compared the benefits available to married couples and domestic partners, and used this distinction as another basis upon which the court distinguished marriage from domestic partnerships. Married couples received rights, benefits, duties and obligations that simply did not follow from achieving domestic partner status. Among the many privileges and obligations associated with marriage, the court specifically noted that married couples were able to legitimize their children; they enjoyed financial rights in their spouse’s properties; they had

²³² *See id.* at 1244.

²³³ *Id.*

²³⁴ *Id.* at 1246 (citation omitted) (emphasis in original).

²³⁵ *Slattery v. City of New York*, 686 N.Y.S.2d 683 (Sup. Ct. 1999).

²³⁶ *See Slattery*, 686 N.Y.S.2d at 686.

²³⁷ *See id.*

²³⁸ *See id.* at 686-687.

rights that bore on the dispensation of estate assets after the death of a spouse; and they received various protections after the termination of a marriage.²³⁹ Domestic partners, on the other hand, did not receive these benefits and were not subject to these obligations. Instead, registration merely ensured the following: city employees who were in domestic partner relationships would be entitled to bereavement and child care leaves of absence, as well as certain health and retirement benefits; all domestic partners would have visitation rights in correctional facilities and health facilities operated by the city; and finally, all domestic partners living in buildings operated by the city or under the jurisdiction of the Department of Housing Preservation and Development would be characterized as “family members” for the purpose of determining succession or occupancy rights.²⁴⁰ All told, the rights and benefits that gays and lesbians acquired after registering as domestic partners did not begin to approximate those that heterosexual couples realized after getting married. Therefore, it was not plausible to suggest that the city had created marriage by another name when it implemented the domestic partnership statute.

D. Variable Prohibitions on Degrees of Similarity Between Domestic Partnerships and Marriage, and the Corresponding Impact on Partner Benefits Plans

The example of John and Jason will help a court determine whether the status recognized by John’s employer falls within the scope of the prohibition established by the particular amendment in question. In order to see whether the plan proposed by John’s employer passes muster, the hypothetical must be evaluated under the three types of MSAs presented here: those that prohibit the recognition of a status that is identical to marriage, those that prohibit the recognition of a status that is substantially similar to marriage, and those that prohibit the recognition of a status that is similar to marriage.

1. “Identical to” Criterion

In a state that prohibits the recognition of a status that is identical to marriage, Jason should be covered under the partner benefits policy. As discussed above, the “identical to” language sets a high threshold that is difficult to meet, and would not be met in this case. *Knight*, *Devlin*, *Slattery*, and similar cases are directly on point here: When evaluating whether a status conferred by a partner benefits plan is equivalent to marriage, a court would have to consider the most important institutional aspects of marriage. From the standpoint of the civil law, the most important institutional factors embodied in marriage are its status designation and the rights and benefits that flow from that status. Just as the analyses in those cases concluded that the domestic partner designations at stake were not the equivalent of marriage, the same conclusion is true here. The status recognized by John’s employer does not come close to marriage. Couples who wish to marry need not show that they are already financially interdependent; they need not prove that their relationship is an exclusive one; recently-divorced individuals are not subject to a waiting period before marrying another person; and finally, the parties need not live together. It is true that in a Comparative Model MSA state, there is a gender requirement for

²³⁹ See *id.* at 687-688.

²⁴⁰ See *id.* at 686.

marriage that parallels the gender requirement in the partner benefits plan, and there are blood relationship requirements that a couple must also meet, but on balance, the two statuses simply are not equivalent.

The lack of identity between John and Jason's relationship and marriage becomes increasingly stark when one compares the benefit that they receive after acquiring a status under the employment contract, and the benefits that couples receive when they acquire marital status. Jason will receive one benefit – coverage under John's health insurance policy – that arises from his eligible status. Receiving this one benefit cannot reasonably sustain a claim of equivalence. First of all, health insurance is not a "benefit" of marriage; it is a fringe benefit of employment whose provision depends on the terms of the employment agreement, not the marital status of the employee. This is demonstrated by the fact that many employers do not offer any health care benefits to their employees at all.²⁴¹ Second, even if health insurance *was* a benefit of marriage, it is the only benefit that Jason would receive, as compared to the thousands of benefits that married couples receive under state and federal law. No reasonable judge could find that the program in question here is identical to marriage. Therefore, if John and Jason live in a state that prohibits the recognition of a status that is identical to marriage, the benefits program will be sustained.

2. "Substantially Similar to" Criterion

In a state that prohibits the recognition of a status that is "substantially similar" to marriage, Jason should still receive coverage under the partner benefits policy. The analysis above explains how he will prevail under an "identical" analysis; the question now is how he will prevail under the "substantially similar" analysis. As noted above, "substantially" means "to a great or significant extent; for the most part; essentially."²⁴² "Similar" means "like something but not exactly the same."²⁴³ If these definitions are blended, one may conclude that the phrase "substantially similar" means "essentially the same as something, but not exactly like that something." How, exactly, does one determine whether one item embodies the essence of yet another item? One plausible solution is to show that the most important characteristics of the former item are present in the latter. Substantial similarity would therefore exist between two items if the most important characteristics of each were held almost entirely in common between the two.

The relevant comparison, of course, is between domestic partnerships and marriage: are the two regimes essentially equivalent, even if they are not exactly the same? The *Knight*, *Devlin*, and *Slattery* courts offer some assistance here, as well, since the analyses in those cases turned on the core features of civil marriage – status and benefits. If a court accepts that these elements are, in fact, the core of civil marriage, domestic partnerships are essentially equivalent if they mirror civil marriage along these two dimensions. As noted above, however, this degree

²⁴¹ As of 2005, only 59.5% of Americans received employer-sponsored insurance. See CENTER ON BUDGET AND POLICY PRIORITIES, *The Number of Uninsured Americans is at an All-Time High* (August 29, 2006), available at <http://www.cbpp.org/8-29-06health.htm>.

²⁴² See *supra*, n. 205.

²⁴³ See *supra* n. 206.

of similarity simply does not exist.²⁴⁴ First of all, the entry and exit requirements are different in marriage and domestic partnerships. People who want to marry each other have to acquire licenses; people who wish to become domestic partners merely indicate their assent to the relationship. In addition, married people who wish to exit the relationship must receive a judicially-reviewed divorce; domestic partners merely need to indicate their desire to terminate the relationship. Moreover, the benefits that flow from marriage vastly outnumber the benefits that flow from membership in a domestic partnership. It is true that there are some features in common. Often times, both marriage and domestic partnership arrangements have gender requirements. Similarly, they both tend to have blood relationship requirements. Finally, both have anti-“polyunion” requirements. These similarities notwithstanding, they simply do not rise to the level of substantial similarity.

Looking, then, at John and Jason, the status conferred by the employment policy and the benefits received under it are not substantially similar to the essential elements of marriage. Even if there are admitted similarities that exist between the domestic partner relationship recognized by the policy and marriage, it is unquestionably true that most of the factors that bear on their status differ substantially from the factors that bear on marital status, and further, that the benefit they receive pales in comparison to the benefits they could receive if they were married. Therefore, John and Jason should prevail in a Comparative Model MSA state that adopts the “substantially similar” limitation on state recognition of unmarried relationships.

3. “Similar to” Criterion

The analysis becomes substantially more difficult when considering whether the status recognized by the employment policy is similar to marriage. Two things that are compared to each other are technically “similar” if they share *every* element in common; conversely, they are arguably “similar” if they share *one* aspect in common. As discussed, the eligibility criteria in the John/Jason example are potentially similar to the eligibility criteria for marriage, and depending on the analysis employed by the state courts, this might be sufficient to invalidate the policy. Having said that, the term “similarity,” standing alone, is an ambiguous one that does not convey any limiting principle on which a court might rest its analysis. Therefore, what principled interpretive choices can a court make when trying to decide whether a partner benefits program like the one proposed for John and Jason violates the similarity prohibition of the amendment?

The answer to this question is frankly unclear, and will almost certainly be the subject of fierce litigation when the question presents itself. One possible source of a resolution, however, comes from the evidence of the debates that surrounded the passage of these amendments. This evidence might help a reviewing court decide whether the voters believed that the dispensation by public entities of domestic partner benefits policies would violate the amendment. Reliance

²⁴⁴ Brodie M. Butland, *The Categorical Imperative: Romer as the Groundwork for Challenge State Defense of Marriage Amendments*, 68 OHIO ST. L. J. 1419, 1431 (2007) (“It is questionable whether domestic partnerships are truly “similar to marriage,” never mind “substantially similar to . . . marriage,” because of their limited reach. While previous courts and commentators have cited a veritable laundry list of state benefits and protections that accompany marriage, domestic partnerships and reciprocal beneficiaries have enjoyed only a limited number of these.”); see also Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 379 (2002) (noting that some domestic partnership arrangements are symbolic, while others offer a strikingly limited set of material benefits).

on evidence of voter intent is not a revolutionary proposition; state law rules of constitutional interpretation regularly direct courts to engage in just this kind of analysis. In fact, these rules commonly state that in the presence of linguistic ambiguity, courts must consider the intent of the voters when interpreting their constitutions.²⁴⁵ Given the ambiguity that exists in this case, a close examination of voter intent is appropriate. In order to examine comprehensively the intent of the voters when passing the amendments, the following analysis will not simply focus on those states whose amendments prohibited mere similarity between marriage and other proscribed statuses; it will look at all of the Comparative Model MSA regimes because most of them were passed relatively contemporaneously, between 2004 and 2005.

a. Evaluating the Voters' Intent to Undermine Public Employers' Rights to Offer Partner Benefits to Their Same-Sex Employees

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?²⁴⁶ 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?²⁴⁷ Courts and commentators have debated these questions for years, and those debates will undoubtedly continue to do so 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. The most reasonable approach to finding this intent is to rely on public sources which were widely available during the period in time when the measure was passed:

²⁴⁵ See, e.g., *Hodges v. Dawdy*, 149 S. W. 656 (Ark 1912) (“In ascertaining the intention of the people who adopted the amendment, we may and should look to the history of the times as well as the provisions of the Constitution prior to the adoption of the amendment, ascertain what the mischief was to be remedied, and, in consideration of all these things, arrive at the intention of the people in adopting the amendment.”); see also *Toncray v. Budge*, 95 P. 26 (Idaho 1908) (“The only reasonable way in which to construe language in a constitutional provision is to read it in the light of known conditions existing at the time of its adoption, and in doing so the court will look to the history of such time as gathered from the press, public writings, and current literature.”).

²⁴⁶ See generally 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).

²⁴⁷ 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. 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?

“Constitutional provisions and statutory enactments should be read and construed in light of the condition of affairs and circumstances existing at the time of their adoption” and “against which its provisions were directed, and in doing so the court will look to the public history of such time as the same can be gathered from the press, public writings, and the current literature of that time.”²⁴⁸

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 are legitimate avenues for extrapolating the intent of the voters. While none of these resources will offer a definitive account of what the voters meant to accomplish when they passed the measure, they at least offer a reasonable assurance that a number of voters encountered them and may have been influenced by them.

Insofar as the marriage amendments are concerned, 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.²⁴⁹ 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.”²⁵⁰ 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 amendment²⁵¹ were equally direct about the impact of the amendment. The explanation which accompanied the Arizona ballot contained numerous 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

²⁴⁸ *Toncray v. Budge*, 14 Idaho 621 (Idaho 1908).

²⁴⁹ See SECRETARY OF STATE, *Ohio Issues Report, State Issue Ballot Information for the Nov. 2, 2004 General Election*, available at <http://www.sos.state.oh.us/sos/electionsvoter/2004/OIR2004.pdf>.

²⁵⁰ *Id.* at 4.

²⁵¹ 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, available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop107.htm?PrintMe=Y> (last visited, March 2, 2008) (“ARIZONA SEC’Y OF STATE, 2006 BALLOT PROPOSITIONS”)

private agreements.”²⁵² 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.²⁵³

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.”²⁵⁴ 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 interest.²⁵⁵

Michigan provides another example where 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 offering domestic partner benefits: “Under [the amendment], every single person 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.”²⁵⁶ 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.²⁵⁷ The

²⁵² See *id.*

²⁵³ *Id.*

²⁵⁴ William Butte, *California’s Decisions Could Affect Florida*, SOUTH FLORIDA SUN-SENTINEL, Feb. 15, 2008, p. 25A.

²⁵⁵ See Kay Whitlock, *The Perfect Storm: Why Progressives Must Reframe the Narrow Terms of Marriage Politics*, PEACEWORK, Vol. 34, Iss. 374, April 1, 2007 (assessing the value of new strategies in seeking relationship-recognition for gay and lesbian families).

²⁵⁶ Michael Jackman, *Six Words of Separation: Proposal 2’s Opponents See High Stakes in Fine Print*, METRO TIMES DETROIT, October 20, 2004, available at <http://www.metrotimes.com/editorial/printstory.asp?id=6866> (projecting a wide range of consequences that might flow under the terms of the amendment).

²⁵⁷ See MICHIGAN FAMILY FORUM, *FAQs on Proposal 2*, <http://www.michiganfamily.org/special-protectmar/documents/faq-prop2.htm>. (last visited on March 3, 2008).

page posed the following question: “Will public universities be prohibited from providing benefits to partners of employees?”²⁵⁸ 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 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.*²⁵⁹

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?”²⁶⁰ 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.”²⁶¹ 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 percent of voters believed that “local governments and universities should *not* provide benefits, such as health and life insurance, to the partners of gay and lesbian employees.”²⁶² 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.²⁶³

²⁵⁸ *Id.*

²⁵⁹ *Id.* (emphasis added).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Gary Glenn and 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).

²⁶³ Some supporters argued that the amendments would not affect the ability of private companies to implement domestic partner benefit policies. *See, e.g.*, IDAHO SEC’Y OF STATE, 2006 GENERAL ELECTION PROPOSED CONSTITUTIONAL AMENDMENTS (available as an exhibit to Idaho Attorney General Opinion No. 08-21508) (on file with the author) (Feb. 4, 2008) (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, available at [get the http cite] (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.”). 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.

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 must have 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.²⁶⁴ 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 government employers, which give health care and other benefits to the unmarried partners of employees."²⁶⁵ 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.²⁶⁶ 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.

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.²⁶⁷

²⁶⁴ See, e.g., ARIZONA SEC'Y OF STATE, 2006 BALLOT PROPOSITIONS (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 Temple. No state, county, or city entity would be able to reinstate them or pass laws that would establish these benefits in the future.").

²⁶⁵ *Proposal 04-02: Banning of Same-Sex Marriage and Similar Unions*, CITIZENS RESEARCH COUNCIL OF MICHIGAN, available at <http://www.crcmich.org/PUBLICAT/2000s/2004/memo1076b.html> (last updated Sept. 24, 2004) ("Proposal 04-02").

²⁶⁶ 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.

²⁶⁷ The concern was also raised by activists during the months and weeks leading up to the various elections. The Michigan ACLU, for instance, advocated fiercely against the passage of the amendment: "If this amendment is enacted . . . , [i]t would strip unmarried couples of all domestic partnership benefits given by municipalities,

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.”²⁶⁸ The Idaho Secretary of State also weighed into 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.”²⁶⁹ 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.²⁷⁰

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.²⁷¹ In other words, fully 62 percent of the voters opposed the *substance* of the measure! 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.²⁷² In fact, only 33 percent of those who voted for the amendment believed that it would “[p]revent gay and [l]esbian couples from having any basic benefits or rights, such as health insurance or hospital visitation.”²⁷³ Polling in Salt

universities and could even reach to private companies doing business in Michigan.” John Scalise, *Proposal 2 is Bad for Michigan*, Oct. 11, 2004, available at <http://www.aclumich.org/modules.php?name=ExtraNews&file=print&sid=26> (last visited on March 3, 2008). This piece was an editorial that appeared in two Michigan newspapers. See *id.* See also Amanda York, *Critics See Problems in Gay Marriage Ban*, CINCINNATI POST, October 26, 2004, p. 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 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, p. 2.

²⁶⁸ *Proposal 04-02*, CITIZENS RESEARCH COUNCIL OF MICHIGAN.

²⁶⁹ IDAHO SEC’Y OF STATE, 2006 GENERAL ELECTION PROPOSED CONSTITUTIONAL AMENDMENTS (available as an exhibit to Idaho Attorney General Opinion No. 08-21508) (emphasis added).

²⁷⁰ See Attorney General Opinion (Sept. 14, 2006) (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).

²⁷¹ See Thomas Oliphant, *The Gay Marriage Deception*, THE BOSTON GLOBE, Nov. 7, 2004.

²⁷² Rebecca Walsh, *Many Utahns Favor Gay-Couple Benefits*, THE SALT LAKE TRIBUNE, Oct. 21, 2005, 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.

²⁷³ *Briefing Paper*, EQUALITY UTAH, Mar. 15, 2006 (arguing that local governments have both public policy and ethical justifications for granting partner benefits to their gay and lesbian employees).

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.”²⁷⁴ If these voters had intended to prevent domestic partners from receiving benefits from public entities, surely they would not have changed their minds within the space of *one year*.

What conclusions can one draw here? It is clear that some portion of the electorate in the Comparative Model MSA states understood the wide-ranging impact of the amendments and appreciated the risk they posed to the domestic partners of gay and lesbian public employees. Undoubtedly, some of the voters were unclear and indifferent; still others were likely unclear and *did not* intend to create wide-ranging harm. Nevertheless, if one considers certain national figures – for instance, the percentage of people nationally who support alternative marriage forms, the number of localities around the country that currently offer domestic partner benefits, the number of localities around the country that have implemented domestic partner registries, and the number of states that forbid discrimination on the basis of sexual orientation in employment – combined with the evidence from individual states suggesting confusion in the electorate, one can tentatively conclude that the voters did not intend to prohibit the extension of partner benefits. The evidence of national trends, however, cannot be weighed in dispositive fashion against the evidence presents itself in each individual state. Therefore, the answer to the dilemma created by the ambiguous language used in the “similar to” amendments is deeply uncertain: it truly depends on an assessment of the voters’ intent in each of the states.

b. Application

This lack of clarity, then, extends to the question of whether the proposed hypothetical policy that would cover John and Jason passes muster in one of the states imposing a “similar to” criterion. If they live in a state like Michigan, where a wealth of evidence supports the claim that the voters understood the risk to domestic partners who were employed by public entities, and at least *some* evidence shows that they *approved* of this outcome, the plan might be invalid. On the other hand, if they live in a state like Wisconsin where the evidence shows that the framers of the amendment never intended to invalidate partner benefits offered by public entities, they might be able to prevail on their claims.²⁷⁵ At the end of the day, a court in a “similar to” state that was reviewing John and Jason’s claim should examine closely the evidence of voter intent before finding that the policy should be either upheld or invalidated under the amendment.

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

²⁷⁴ *Briefing Paper, supra* n. 97.

²⁷⁵ N.B. The language of Wisconsin’s amendment actually prohibits the recognition of status regimes for unmarried couples that is “identical or similar to” marriage. Nevertheless, it presents a fascinating instance of amendment proponents who explicitly – and consistently – stated that it was *never* their intent to prohibit public employers from creating employee benefits programs. [cite]

take heart in knowing 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.”²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ In fact, two private employers – Nationwide Insurance and Catholic Charities, a San Francisco-based non-profit employer – have implemented household benefits plans.²⁷⁹ 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.

²⁷⁶ *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> (last visited Mar. 3, 2008).

²⁷⁷ *See id.*

²⁷⁸ *See* Thomas F. Coleman, *Michigan Court Provides Loophole in Benefits Ruling*, COLUMN ONE: EYE ON UNMARRIED AMERICA, February 19, 2007, available at <http://www.unmarriedamerica.org/column-one/02-19-07-michigan-dp-benefits.htm> (last visited Mar. 3, 2008).

²⁷⁹ *See id.*

Appendix 1

<i>Comparative Model Multi-Subject Amendments</i>		
	Text	Citation
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.
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 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.”	Mich. Const. art. 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 Dakota	“The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”	S.D. Const. art. XXI, § 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>		
	Text	Citation
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>		
	Text	Citation
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.
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	Or. Const. art.

	a marriage between one man and one woman shall be valid or legally recognized as a marriage.”	XV, § 5.
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.