

MARRIAGE AMENDMENTS AND THE READER IN BAD FAITH

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I. INTRODUCTION

In the ongoing legal struggle over the definition of marriage in the United States, the opposing sides not only have conflicting views about the underlying constitutional and policy questions, but also about the appropriate forum in which these conflicts should be worked out. Thus, while the highest courts of three states have concluded that those states' definitions of marriage were constitutionally infirm,¹ the legislatures of thirty-six states have enacted statutes to reaffirm their states' definition of marriage as the union of a man and a woman.²

As the momentum (real or perceived) in favor of a redefinition of marriage has increased, so has opposition to the redefinition. A unique and possibly unprecedented development has been the enactment of state

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¹ See *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 696 (Mass. 2003).

² See ALA. CODE § 30-1-19 (2000); ALASKA STAT. § 25.05.013 (1998); ARIZ. REV. STAT. ANN. § 25-101 (2000); ARK. CODE ANN. §§ 9-11-107, 9-11-109, 9-11-208 (1987); COLO. REV. STAT. § 14-2-104 (2000); DEL. CODE ANN. tit. 13, § 101 (1975); FLA. STAT. § 741.212 (2000); GA. CODE ANN. § 19-3-3.1 (1982); HAW. REV. STAT. § 572-3 (1999); IDAHO CODE ANN. § 32-209 (1996); 750 ILL. COMP. STAT. 5/212 (2000); IND. CODE § 31-11-1-1 (2005); IOWA CODE § 595.2 (1998); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. § 402.00 (West 2000); LA. CIV. CODE ANN. art. 89 (2000); ME. REV. STAT. ANN. tit. 19-A, § 701 (2000); MICH. COMP. LAWS §§ 551.1, 551.271 (2000); MINN. STAT. § 517.01 (1990); MISS. CODE ANN. § 93-1-1 (1997); MO. REV. STAT. § 415.022 (2000); N.H. REV. STAT. ANN. § 457:1 (1987); N.H. REV. STAT. ANN. § 457:2 (1987); N.H. REV. STAT. ANN. § 457:3 (1987); N.C. GEN. STAT. § 51-1.2 (2000); N.D. CENT. CODE § 14-03-01 (1960); OHIO REV. CODE ANN. § 3101(C)(1) (West 2004); OKLA. STAT. tit. 43, § 3.1 (2000); PA. CONS. STAT. § 1704 (2000); S.C. CODE ANN. § 20-1-15 (2000); S.D. CODIFIED LAWS § 25-1-1 (1968); TENN. CODE ANN. § 36-3-113 (1955); TEX. FAM. CODE ANN. § 6.204 (2003); UTAH CODE ANN. § 30-1-4 (1953); VA. CODE ANN. § 20-45.2 (2000); WASH. REV. CODE § 26.04.020 (2000); W. VA. CODE § 48-2-603 (2000); *see also* CAL. FAM. CODE § 308.5 (West 2000) (California statute enacted in 2000 after being proposed and approved by ballot initiative rather than by legislative action).

constitutional amendments in eighteen states over the last eight years.³ This number is likely to increase as additional states vote on proposed amendments in the coming years.⁴

The passage and enforcement of these amendments are, predictably, not without controversy. The amendments have been subject to legal challenges in the debates surrounding ratification and, in some cases, in post-ratification litigation.⁵ This article first briefly surveys the current state marriage amendments. It then turns to legal objections to the amendments including those raised in the public debate surrounding their passage and those arising in litigation. The article also demonstrates that the objections presented largely stem not from real legal problems but, instead, from opposition to the underlying policy of the amendments. This contributes to a "bad faith" reading of the amendments which emphasizes unsound interpretations of the amendments in order to dissuade supporters of marriage who would likely support the amendments otherwise.

II. EXISTING STATE MARRIAGE AMENDMENTS

The eighteen existing marriage amendments share a number of similarities and exhibit some important differences. For instance, all of the amendments were passed by significant margins when they were voted on by citizens. The greatest margin was in Mississippi which approved its amendment with 86% of the vote.⁶ Five states (Arkansas, Kentucky, Georgia, Louisiana and Oklahoma) approved their amendments with

³ ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. § 263-A; MO. CONST. art. I, § 33; MONT. CONST. art. 13, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

⁴ See Brad Knickerbocker, *Ripples Spread as States Vote on Same-Sex Marriage*, CHRISTIAN SCI. MONITOR, Apr. 7, 2005, at 2, available at <http://www.csmonitor.com/2005/0407/p02s02-usju.html>.

⁵ *Id.*

⁶ See Dyana Bagby, *Marriage Ban Sweeps 11 States*, WASHINGTON BLADE, Nov. 5, 2004, available at <http://www.washblade.com/2004/11-5/news/national/11states.cfm>; Michael Foust, *La. Judge Tosses out Marriage Amendment; 78 Percent Had Approved It*, BP NEWS, Oct. 5, 2004, available at <http://www.bpnews.net/bpnews.asp?ID=19333>.

margins ranging from 75% to 78%.⁷ Another nine states (Alaska, Hawaii, Kansas, Missouri, Montana, Nebraska, Nevada, North Dakota and Utah) approved their amendments with percentages ranging from 66% to 73%.⁸ The other states' passage rates were 56% in Oregon, 59% in Michigan, and 62% in Ohio.⁹ In addition, all of the amendments also address the state's definition of marriage as well as the recognition of marriages contracted in other states.¹⁰

Of the amendments approved to this point, ten were initiated by legislatures (Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and Utah) and eight by popular initiative (Arkansas, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, and Oregon).¹¹ The majority of the amendments currently in effect explicitly address not only the definition of marriage, but also the creation of a quasi-marital status meant to approximate marriage under a different name (Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, and Utah).¹²

Although these amendments are similar, they arose from different motivations. For example, the first two amendments, in Alaska and Hawaii, were both responses to specific court decisions.¹³ In Alaska, a

⁷ See sources cited *supra* note 6.

⁸ See sources cited *supra* note 6; see also David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 20 (2000); Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 244 (1999); Tom Shaw, *Lawsuit Over 416 Readied*, OMAHA WORLD-HERALD, Nov. 19, 2000, at 1B; Sean Whaley, *State Ballot Question 2*, LAS VEGAS REVIEW-JOURNAL, Oct. 24, 2000, at 42AA; Steve Kanigher, *Marriage Proposal Heading to Legislature*, LAS VEGAS SUN, Nov. 6, 2002, at 9; John Hanna, *Kansas Marriage Amendment Approved by Wide Margin*, KCTV5 NEWS, Apr. 6, 2005, <http://www.kctv5.com/global/story.asp?s=3172049&clientType=printable>.

⁹ See Bagby, *supra* note 6.

¹⁰ See William C. Duncan, *Revisiting State Marriage Recognition Provisions*, 38 CREIGHTON L. REV. 233, 261-62 (2005).

¹¹ *Id.*

¹² *Id.* at 262-63.

¹³ See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *Baehr v. Miiike*, CIV. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

trial court decision invoked the state constitution's privacy provisions in identifying a fundamental right to choose a life partner.¹⁴ This led to the proposal and ratification of an amendment within the year.¹⁵ The Hawaii Amendment was also spurred by court decisions – the 1993 decision of the Hawaii Supreme Court that the marriage statute constituted sex discrimination and the 1996 decision of a superior court which held on remand that the state could show no compelling justification for the discrimination in the statute.¹⁶ The text of the Hawaii amendment clearly relates to this context as it specifies that the legislature, rather than the court, has the authority to define marriage.¹⁷

The next two amendments, Nebraska and Nevada, arose from the failure of state legislatures to enact marriage recognition statutes.¹⁸ Two events loom large in the motivation for the enactment of the thirteen amendments approved in 2004, as well as Kansas' enactment in 2005. The first event was the decision of the Massachusetts Supreme Judicial Court to redefine marriage in Massachusetts.¹⁹ The second event was the high profile media event in which the mayor of San Francisco issued thousands of marriage licenses to same-sex couples across the country.²⁰ Within months of these events, thirteen states had amended their constitutions to define marriage and others were acting to join them.²¹

III. ANSWERING OBJECTIONS TO THE AMENDMENTS

Although the law review literature has not yet begun to assess these developments, the public debates surrounding the enactment of the amendments and the litigation challenging them in some states has produced a list of objections to the amendments. These can be grouped into three general categories: procedural, substantive and philosophical.

¹⁴ *Brause*, 1998 WL 88743, at *1.

¹⁵ See Clarkson et al., *supra* note 8, at 244.

¹⁶ *Lewin*, 852 P.2d at 60; *Miike*, 1996 WL 694235, at *21.

¹⁷ *Lewin*, 852 P.2d at 60; *Miike*, 1996 WL 694235, at *21.

¹⁸ See Duncan, *supra* note 10, at 246-48.

¹⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

²⁰ See Cheryl Wetzstein, *Licenses to Gays Top 2,000*, WASH. TIMES, Feb. 17, 2004, at A1, available at <http://www.washtimes.com/national/20040216-115934-7612r.htm>.

²¹ Knickerbocker, *supra* note 4.

While formidable as a rhetorical matter, the objections to marriage amendments are without merit if assessed analytically.

A. *Procedural*

1. *Rush to Judgment*

The first procedural objection identified was that some of the amendments were enacted after a rush to judgment either by quick legislative approval or signature gathering.²² This objection discounts the fact that the marriage amendments faced and overcame significant procedural hurdles. In every instance, the legislatively proposed amendments had to garner super-majorities in both legislative houses.²³ As for the initiatives, significant numbers of signatures had to be gathered just to allow a vote on the amendments, sometimes against significant legal efforts to challenge the gathering.²⁴ Because the legislative majorities and signatures were often quickly secured, opponents challenged the resulting amendments as thoughtless or rushed.²⁵ This ignores a more plausible explanation for the quickly garnered support – the public understanding of marriage is so widely shared that it is not difficult for people to react against efforts to discard that meaning. The objection also implies that the large majority of voters who approved these amendments were either unable to make reasonable judgments or acted in bad faith.

²² See generally Kevin Mayhood, *Group Seeks Support for Gay-Marriage Ban*, COLUMBIA DISPATCH, May 29, 2004, at 2B.

²³ See, e.g., MONT. CONST. art. XIV, § 8 (requiring amendment to receive two-thirds vote of all members of the legislature before being submitted to the people); GA. CONST. art. X, § I, para. 2 (requiring amendment to receive two-thirds vote of each house before being submitted to the people).

²⁴ Duncan, *supra* note 10, at 237.

²⁵ See Editorial, *Gay Marriage Foes Wrong to be Rushing*, DAYTON DAILY NEWS, Aug. 7, 2004, at A6.

2. *Single Subject Rule*

Although legal standards vary from state to state,²⁶ many states require that multiple amendments must be approved separately. Separate approval allows voters to have a fair opportunity to make discrete choices without feeling they approved of something they would not have supported because that thing is tied to something that they would have approved.²⁷ Arguments in lawsuits and during public campaigns have charged that some of the marriage amendments advanced multiple issues in the same ballot question.²⁸

This objection is also flawed. It too assumes that voters are incapable of having a sophisticated understanding of what they are being asked to vote on. It further requires a tortured reading of the amendments based on a false dichotomy not recognized by amendment sponsors and supporters. The dichotomy advanced by amendment opponents is that marriage is merely a word (something of a trademark), which can be easily separated from the legal benefits it triggers.²⁹ Therefore, in order to comply with the single subject rule, an amendment can only address the use of the term marriage and any substantive effect of being married must be treated as a separate question.³⁰ This distinction, however, is merely artificial and has no precedent in the law of marriage. Every state statutory scheme provides marriage with an independent legal significance. Specifically, by marrying, couples automatically assume certain obligations and gain various benefits even if they do not fully want these obligations or benefits to follow their decision. Other relationships may trigger one or

²⁶ See Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004).

²⁷ See, e.g., OR. CONST. art. XVII, § 1; KY. CONST. § 256.

²⁸ See, e.g., Forum for Equal. PAC v. McKeithen, 893 So. 2d 715 (La. 2005).

²⁹ See Complaint at 2, Martinez v. Kulongoski, No. 05C-11023 (Or. Cir. Ct. filed Jan. 2005), available at http://www.domawatch.org/cases/oregon/martinezvkulongoski/20040131_complaint.pdf (alleging that Oregon's single sentence stating Oregon's policy to only recognize as valid the marriage of one man and one woman violated the Oregon's single subject rule because the amendment *affects* numerous constitutional provisions).

³⁰ *Id.*

more of these benefits based on dependence or some other policy not related to marriage.

The idea that the status of marriage can be separated from the benefits flowing from it is a legal fiction created in recent court decisions.³¹ Legislators and voters can reasonably conclude that the creation or recognition of a legal status which has the identical effect of a marriage, but is called by a different name, is really a stealth redefinition of marriage. Consequently, legislators and voters can reasonably conclude that a simultaneous vote on what marriage will mean legally and what it will not mean legally does not implicate two separate questions. It is not enough to say, as some opponents do, that they would have liked to vote for the definition of marriage but also for some marriage equivalent like civil unions. These issues are linked in the efforts of the proponents of the amendments, and it is their intent, not that of the objectors, that is relevant.

Any amendment may have an effect on conflicting values if the determination of the conflict is made by polling the subjective opinions of opponents. The Georgia Constitution, which is the subject of one of the single-subject challenges,³² contains a number of provisions that illustrate this fact. Article I, section 1, paragraph 4, provides in part: “[n]o inhabitant of this state shall be molested in person or property or be prohibited from holding any public office or trust on account of religious opinions. . . .”³³ This provision, understood by its framers to address the matter of “freedom of religion,” could be objected to by those who have no concerns about allowing individuals their own belief without being deprived of property, but would not go so far as to prevent the government from creating a religious test for public office. Louisiana’s state marriage amendment contains “a single plan to adequately defend traditional marriage,”³⁴ and all elements of the amendment advanced that purpose:

³¹ See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998).

³² See *O’Kelley v. Cox*, 604 S.E.2d 773 (Sup. Ct. Ga. 2004).

³³ GA. CONST. art. I, § I, para. 4.

³⁴ *McKeithen*, 893 So. 2d at 736.

[i]n effect, the amendment provides the only contract or legal instrument whereby the state is mandated to bestow all or substantially all the rights, civil effects, and legal incidents of marriage upon the parties in recognition of the legal status created or established by said contract or instrument is the contract of marriage between one man and one woman.³⁵

B. Substantive

1. Denies Benefits

The most incessant and aggressively advanced argument against state marriage amendments has been that these amendments will result in the denial of rights to same-sex couples (and possibly other unmarried persons).³⁶ This argument has often taken the form of a rhetorical “parade of horrors” with the amendments purportedly denying hospital visitation to committed couples, invalidating wills, etc. In the Utah amendment debate, the slogan was: “it goes too far.”³⁷ Specific charges vary from state-to-state but generally focus on either an alleged wide scope of the amendment or the unfairness of denying certain benefits to unmarried couples.

The six states whose amendments merely define marriage as a union of a man and a woman would seem to be less open to these kinds of charges since their effect is relatively straightforward. These amendments still face the charge of denying benefits to same-sex couples. For instance, opponents might say that the amendment would prevent same-sex couples

³⁵ *Id.*

³⁶ Eric Stefanec, *Mimicking Marriage: As the Evolution of the Legal Recognition of Same-Sex Marriage Progresses, Civil Unions Currently Represent the Best Alternative to Marriage*, 30 U. DAYTON L. REV. 119 (2004).

³⁷ Travis Reed, *Battle Over Gay Marriage Toughens*, DAILY HERALD, Oct. 2, 2004, available at <http://www.harktheherald.com/modules.php?op=modload&name=News&file=article&sid=36273&mode=thread&order=0&thold=0>.

from accessing “thousands” of benefits.³⁸ This is not, however, absolutely precise. While it is true that many benefits and obligations automatically accrue to married couples (assuming they do not opt out of these through a valid ante nuptial agreement), it does not necessarily follow that these benefits are denied to the unmarried.³⁹ Many benefits will still be accessible through private agreements or a legal tool such as a power of attorney.⁴⁰ Thus, the marriage definitions do not foreclose the extension of individual benefits to unmarried couples.

The remaining states with more detailed amendments have been more intensively attacked for denying rights. The responses to these attacks obviously depend on the actual language of the amendments.

Three amendments address marriage equivalents by prohibiting recognition or validity of a “legal status” which is “identical or substantially similar to marriage” (or “marital status”) for “unmarried individuals” or “persons.”⁴¹ The language of these amendments makes clear that they will have no effect on private arrangements because they apply only to a “legal status.” An employer’s decision to offer benefits or an individual’s will cannot create a “legal status.” Only a government body can do that. The scope of the restriction is further limited by the fact that the legal status must be identical or substantially similar to marriage. Thus, the extension to unmarried couples of a limited number of benefits, even if those benefits are typically afforded only to married couples, would not violate this prohibition. Certainly, benefits which are generally provided to persons on a basis other than marriage (such as insurance coverage which is provided to dependents or visitation privileges which are extended to parents) could be offered to unmarried persons without running afoul of these amendments.

³⁸ Joshua K. Baker, *1,000 Federal Benefits of Marriage? An Analysis of the 1997 GAO Report*, IMAPP POLICY BRIEF, May 26, 2004, available at <http://www.marriedebate.com/pdf/iMAPP.GAO.pdf> (questioning same-sex couples being prevented from accessing thousands of benefits claims).

³⁹ See generally *id.* (listing several benefits that married couple can expect to receive).

⁴⁰ See Teresa Stanton Collett, *Benefits, Nonmarital Status, and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379 (2002).

⁴¹ ARK. CONST. amend. 83, § 2; KY. CONST. § 233a; LA. CONST. art. XII, § 15.

Two amendments prohibit recognizing other legal statuses as marriages or giving them “the same or substantially equivalent legal effect.”⁴² The analysis of extensions of benefits under these provisions would be the same as the ones noted above. These amendments also require the creation or recognition of a legal status (thus limiting their effect to public acts rather than private arrangements) and are narrowly targeted at statuses that are equivalent to marriages.⁴³ The meaning of “equivalence” (or “substantially similar” as in the previous amendments) is elucidated by looking at the kinds of legal status the language in these amendments aim to prevent. When the first marriage amendments were adopted in 1998, they addressed only the definition of marriage.⁴⁴ Certainly there were laws at the time that provided benefits to unmarried persons, but the amendment framers saw no need to address these. This situation changed in 2000 when the Vermont Legislature, by order of the Vermont Supreme Court, created the new legal status of “civil unions.”⁴⁵

The innovation of the civil union law was that it went far beyond giving piecemeal benefits to unmarried persons. The laws created a legal status (complete with licensing, solemnization and dissolution procedures) that had the effect of creating a marriage equivalent by defining a civil union as “two eligible persons [who] have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.”⁴⁶ These laws further provided that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage” and “[a] party to a civil union shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”⁴⁷

The domestic partnership status in California closely follows the state’s marriage law in a number of ways. First, the rules on capacity are

⁴² N.D. CONST. art. XI, § 28; UTAH CONST. art. I, § 29.

⁴³ See constitutional provisions cited *supra* note 42.

⁴⁴ ALASKA CONST. art. I, § 25 (1998); HAW. CONST. art. I, § 23 (1998).

⁴⁵ See cases cited *supra* note 31.

⁴⁶ VT. STAT. ANN. tit. 15, § 1201(2) (2004).

⁴⁷ *Id.*

almost identical: both can involve only two people; neither partner can be married to anyone else; the partners can not be related by blood in a way that would invalidate a marriage; they have to be eighteen years old; and they must be capable of consenting.⁴⁸ Secondly, the law specifically incorporates marital benefits by reference: “[r]egistered domestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed upon spouses.”⁴⁹ The provision relating to superior court dissolution of domestic partnerships also incorporates marriage by reference: “[t]he dissolution of a domestic partnership . . . shall follow the same procedures, and the partners” shall have the same rights and duties “as apply to the dissolution of marriage.”⁵⁰ The law also requires state agencies to modify forms that “use the terms spouse, husband, wife, father, mother, marriage, or marital status” to include “appropriate references to state-registered domestic partner, parent, or state-registered domestic partnership.”⁵¹ The section on construction calls for a liberal interpretation of the law so as to “secure to eligible couples who register as domestic partners” the benefits and duties which “the laws of California extend to and impose upon spouses.”⁵²

Other amendments will likely have a similar effect even though their language on the issue varies. For instance, the Oklahoma provision states that neither the “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.”⁵³ This clearly prevents the result in the Massachusetts and Vermont cases where courts construed the state constitutions to require redefining marriage and the creation of its equivalent.⁵⁴ This amendment would not affect the provision of benefits to unmarried couples if done through the legislature which generally does not “construe” other law in the exercise of its duties.

⁴⁸ See CAL. FAM. CODE § 297 (West 2005).

⁴⁹ *Id.* at § 297.5(a).

⁵⁰ *Id.* at § 299(d).

⁵¹ CAL. GOV'T CODE § 14771 (West 2005).

⁵² 2003 Cal. Stat. c.421 (A.B.205).

⁵³ OKLA. CONST. art. II, § 35 (emphasis added).

⁵⁴ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); accord *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

The Michigan amendment declares that only the union of a man and a woman may be “recognized as a marriage or similar union for any purpose.”⁵⁵ The relevant language here, “similar union,” tracks the formulations of the amendments described above although it is arguably less narrow. The amendment would still not affect arrangements that are private in nature since these do not depend on marital status; it would clearly allow some benefits to be afforded to the unmarried, provided they do not rely on the creation of some kind of legal status (“union”).

Ohio’s amendment is unique for specifically mentioning “political subdivisions.”⁵⁶ However, like the other amendments, it uses the term “legal status” to prevent application to private arrangements and requires that the status must intend “to approximate the design, qualities, significance or effect of marriage.”⁵⁷ This is a broader approach than some of the other amendments and the effect of the “intent” requirement is not yet clear. It would certainly apply to the Vermont and California laws which specifically reference the intent to treat unmarried persons as “spouses.”⁵⁸ A more limited grant of benefits based on dependence (which is a concept traditionally separate from and broader than marital status) would likely not be affected.

The Kansas and Georgia amendments are the most broadly-worded amendments. The Georgia amendment seems to track the other states’ use of the concept of “status” with its use of “union” suggesting that it would only apply to publicly created statuses rather than privately ordered arrangements.⁵⁹ The Kansas amendment seems, at first glance, not to contain this limitation because it uses the term “relationship.”⁶⁰ However, both amendments say that this “union” or “relationship” cannot be “entitled” to the “benefits” (in Georgia) or “rights or incidents” (in Kansas) of marriage.⁶¹ This suggests that the benefits would have to flow, by operation of law (an “entitlement”), to the status or relationship, which

⁵⁵ MICH. CONST. art. I, § 25.

⁵⁶ OHIO CONST. art. XV, § 11.

⁵⁷ *Id.*

⁵⁸ VT. STAT. ANN. tit. 15, § 1201(2); CAL. FAM. CODE § 297.

⁵⁹ See GA. CONST., art. I, § IV, para. I(a).

⁶⁰ See KAN. CONST. art. 15, § 16 (2005).

⁶¹ See GA. CONST., art. I, § 4, para. I(a) (2004); KAN. CONST. art. 15, § 16 (2005).

strongly implies that Kansas' amendment does not apply to private ordering.⁶² Since these amendments do not use such language as "same," "substantially equivalent," or "similar," they can be read more broadly than the other amendments in terms of the benefits to which they apply.

The modifier in both the Georgia and Kansas amendments is the phrase "of marriage." The effect of the amendment is limited to benefits or rights that are specifically tied to marriage. This would continue to allow individuals access to benefits available on a basis other than marital status. As Professor Teresa Stanton Collett notes:

[t]he availability of private agreements and a careful analysis of the 'marital benefits' reveal that there are few advantages in furtherance of economic sharing by married couples that are not available to same-sex couples through private ordering of their relationships, and the few advantages that cannot be duplicated impact remarkably few individuals.⁶³

Since many rights associated with marriage (such as hospital visitation) are generally available to people who are not married (i.e. parents and children), the effect of the language in the two amendments may actually be much more modest than an initial reading might suggest.

Nebraska's amendment is unique because it uses examples to describe the kinds of legal statuses that cannot be created or recognized in the state.⁶⁴ This makes the amendment simultaneously broader and narrower than the other amendments. It is broader, at least insofar as it applies to more than just legal statuses that are extremely marriage-like since domestic partnerships can be very limited in their legal effect.⁶⁵ It is

⁶² See *Kansas Corporations To Maintain Gay Partner Benefits Despite Amendment*, 365GAY.COM, Oct. 8, 2005, <http://www.365gay.com/newscon05/04/040705ksFolo.htm> (stating that this is also the understanding of major corporations who have suggested that they will continue to offer employment benefits to domestic partners of their employees in Kansas).

⁶³ Collett, *supra* note 40, at 392.

⁶⁴ See NEB. CONST. art. I, § 29.

⁶⁵ See William C. Duncan, *Domestic Partnership Laws in the United States: A Review*

also broader in that it does not specify the type or number of benefits that will not be available.⁶⁶ As long as the legislature does not create (or a court recognize from another state) a status similar to a civil union or domestic partnership, benefits can flow to the unmarried couple. For instance, the amendment would not be implicated if a law allowed medical decision-making on the basis of a power of attorney or insurance coverage for a dependent.

This argument neither assumes nor implies that extending benefits to unmarried persons solely on the basis of a sexual relationship is good public policy.⁶⁷ It merely posits that the dramatic claims of amendment opponents that contracts will be voided and the unmarried denied health coverage are not supported by reference to the actual amendments which they claim will produce these results.

In concluding this section, one area of the law where an amendment has been held to invalidate an existing legal provision should not be overlooked. This is the area of domestic violence protection. The seriousness of this objection is underscored by the fact that coverage in domestic violence statutes is one area of the law where the vast majority would agree that cohabitants are appropriately recognized since research suggests they experience higher rates of domestic abuse.⁶⁸ As has been widely reported in the press, a lower court in Ohio suggested in *Ohio v. Burk* that that the state's marriage amendment prevents prosecution of cohabitants for domestic violence because "cohabiting is a relationship that in all essential respects approximates the significance or effect of marriage."⁶⁹ However, in a case which was not widely reported, another Ohio court has reached the opposite conclusion.⁷⁰ This is not surprising since the decision in *Burk* is certainly novel.

and Critique, 2001 BYU L. REV. 961 (2001).

⁶⁶ See NEB. CONST. art. I, § 29.

⁶⁷ See William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2004).

⁶⁸ *Id.* at 1007-08.

⁶⁹ *Ohio v. Burk*, No. CR 462510, slip op. at 6 (Ohio Ct. Com. Pl. Mar. 23, 2005).

⁷⁰ See *id.* at 11.

As the ACLU points out in a brief in a similar Ohio case, “[a]lthough cohabitation defines a relationship between people, that relationship is factual rather than legal. Cohabitation is not a legal status of any sort, let alone one like marriage, or that ‘intends to approximate the design, qualities, significance or effect of marriage.’”⁷¹ This accords with the definition of the word cohabitation: “[t]he *fact or state* of living together, especially as partners in life, usually with the suggestion of sexual relations.”⁷² Thus, by merely recognizing the fact that some unmarried people live together, the state has not (as the amendment prohibits) “create[d] or recognize[d] a legal status.”⁷³ The Ohio amendment language is unique, and the relevance of this analysis would be even more pronounced in states where the amendments are arguably narrower, requiring the creation of a legal status *identical* to marriage in order to violate the amendment.

2. *Federal Constitutional Claims*

While this article is not the setting to address all of the federal constitutional claims in depth,⁷⁴ this article demonstrates that any claim that these amendments are self-evidently unconstitutional cannot be sustained. Perhaps most significant is the fact that the few federal courts which have heard federal constitutional challenges to marriage laws have, without exception, rejected these challenges.

The first case to weigh the constitutionality of a state marriage law raised federal claims and was eventually appealed to the U.S. Supreme

⁷¹ Memorandum of American Civil Liberties Union of Ohio as Amicus Curiae in Support of the Position that Ohio Domestic Violence Laws are Not Affected by Issue 1 at 3, *State v. Forte* (Ohio Ct. Com. Pl. 2005) (No. 460137).

⁷² BLACK'S LAW DICTIONARY 277 (8th ed. 2004) (emphasis added).

⁷³ See OHIO CONST. art. XV, § 11.

⁷⁴ See Monte Stewart, *Judicial Redefinition of Marriage*, 21 CANADIAN J. FAM. L. 11 (2004) (comprehensively responding to equality and dignity claims); William C. Duncan, “The Mere Allusion to Gender”: Answering the Charge that Marriage is Sex Discrimination, 46 ST. LOUIS U. L.J. 963 (2002); William C. Duncan, *The Case for a Federal Marriage Amendment*, 30 T. MARSHALL L. REV. 145 (2004).

Court.⁷⁵ The case resulted in a decision on the merits, specifically, a dismissal for failure to state a substantial federal question.⁷⁶ Contemporaneous state court decisions similarly rejected federal claims.⁷⁷ The U.S. Supreme Court's dismissal was relied on by a later federal court of appeals decision which rejected federal constitutional claims in a challenge to the definition of marriage for immigration purposes.⁷⁸

After the U.S. Supreme Court decision in *Lawrence v. Texas*,⁷⁹ a same-sex couple sued to compel an Arizona court to issue marriage licenses claiming that the *Lawrence* decision mandated a redefinition of marriage.⁸⁰ The Arizona Court of Appeals rejected the claim that the federal right of privacy should result in a new definition of marriage.⁸¹ More recently, a federal bankruptcy court and a federal district court have upheld the federal Defense of Marriage Act's ("DOMA") definition of marriage as the union of a man and a woman against constitutional challenges.⁸² The bankruptcy court distinguished *Lawrence* because that case involved privacy issues, not public status and held that there was no fundamental right to same-sex marriage.⁸³ The court also rejected the argument that DOMA discriminated on the basis of gender and concluded that "sexual orientation" classifications did not merit heightened equal protection scrutiny.⁸⁴ The court reasoned that the legislature could

⁷⁵ *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *cert. dismissed*, 409 U.S. 810 (1972) (failure to state a substantial federal question).

⁷⁶ *Id.*

⁷⁷ See *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. App. 1974), *cert. denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Dean v. D.C.*, 653 A.2d 307 (D.C. App. 1995).

⁷⁸ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1980), *cert. denied*, 458 U.S. 1111 (1982).

⁷⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a Texas law making sodomy between persons of the same-sex a criminal offense).

⁸⁰ *Standhardt v. Sup. Ct.*, 77 P.3d 451 (Ariz. Ct. App. 2003).

⁸¹ *Id.*

⁸² *In re Kandu*, 315 B.R. 123, 138-41 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, No. 8:04-CV-1680-T-30TBM, 2004 WL 3142528, at *4-6 (M.D. Fla. July 20, 2004).

⁸³ *In re Kandu*, 315 B.R. at 138-41.

⁸⁴ *Id.* at 142-43.

rationally conclude that DOMA advances a legitimate state interest in ensuring that children are raised by a mother and a father.⁸⁵

In the district court case, the plaintiffs had argued that the U.S. Supreme Court decision in *Lawrence* created a fundamental right to same-sex marriage.⁸⁶ The court rejected the claim relying on contrary Eleventh Circuit precedent which held that *Lawrence* did not recognize any new fundamental right, the *Lawrence* majority disavows of an effect on marriage, and the prudential consideration that recognizing a fundamental right removes a question from the political debate.⁸⁷ In regards to the equal protection claims, the court held that no suspect class was affected by the marriage law so the statute would receive rational basis scrutiny.⁸⁸ Since the Eleventh Circuit recognized that “encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest,” the statute survived that rational basis scrutiny.⁸⁹

A federal district court judge in Nebraska who denied the State’s motion to dismiss a federal constitutional challenge to Nebraska’s marriage law prompted much controversy.⁹⁰ This decision does not defeat the assertion that marriage laws have never been invalidated under the federal constitution because it is only an initial ruling on a motion to dismiss.⁹¹ It is unlikely that the extremely novel claims made by the plaintiffs in that case (such as the charge that Nebraska’s amendment is a bill of attainder)⁹² will prevail in the long run. Notably, the language in the Nebraska amendment is unique compared to the other states, and a successful challenge to that amendment would not likely apply to other state marriage amendments. While it is certainly not impossible that some court may eventually rule that a marriage amendment is unconstitutional, the overwhelming

⁸⁵ *Id.* at 145-47.

⁸⁶ *Wilson*, 2004 WL 3142528, at *4.

⁸⁷ *Id.* at *4-6 (citing *Lofton v. Sec. of Dept. of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)).

⁸⁸ *Id.* at *6.

⁸⁹ *Id.* at *7-8.

⁹⁰ See *Citizens for Equal Prot., Inc. v. Bruning*, 290 F. Supp. 2d 1004 (D. Neb. 2003).

⁹¹ *Id.* at 1005.

⁹² See Duncan, *The Case for a Federal Marriage Amendment*, *supra* note 74 at 156-58 (addressing the claim).

authority to the contrary suggests that objections to the marriage amendments in public campaigns are not a valid reason to reject them.

C. *Philosophical*

1. *Unnecessary*

Since many of the amendments have been proposed in states which already had statutory provisions defining marriage as the union of a man and a woman, a popular objection to the amendments has been that they are unnecessary (and by extension, can thus only be motivated by ulterior motives).⁹³ The obvious irony is that this argument is made by some of the same people who argue that the definition of marriage as the union of a man and a woman is unconstitutional. They felt necessity for the state amendments comes from exactly these arguments against marriage and their acceptance in some courts. In other words, if the opponents of state marriage amendments had not been pursuing court mandates redefining marriage as the union of any two persons, there would be little or no pressure to amend state constitutions to affirm the definition of marriage as the union of a man and a woman. Amendment opponents characterize supporters as mean-spirited,⁹⁴ wanting only to enact unnecessary laws to express spite. Yet, they do not disavow the decisions that spurred these amendments and would, in fact, challenge the laws they claim make the amendments unnecessary if they thought they could do so successfully.

Two things are clear from current law. First, it is not inconceivable that current marriage laws will be held unconstitutional absent state marriage amendments. This is abundantly demonstrated by the 2003

⁹³ See, e.g., Karen Tee, *Michigan Bans Same-Sex Unions in Constitution*, MICH. DAILY UNIV. WIRE, Nov. 3, 2004, available at http://www.michigandaily.com/vnews/display.v/ART/2004/11/03/4188c482317b3?in_archive=1 (noting that a Michigan State College of Law professor observed that "state laws already ban gay marriage and that Michigan's conservative courts currently would not use the state constitution to overturn the statutory ban on gay marriage. Hence . . . the wording of this amendment is hostile to homosexual people . . .").

⁹⁴ Cheryl Wetzstein, *Missouri Marriage Amendment Wins Handily*, WASH. TIMES, Aug. 4, 2004, available at <http://www.washingtontimes.com/national/20040804-120544-8709r.htm>.

decision of the Massachusetts Supreme Judicial Court and the subsequent lower court decisions calling for a redefinition of marriage.⁹⁵ Statutory law will not necessarily prevent such a result. For instance, two trial court decisions in Washington (which enacted a marriage statute in 1998) held that the state's marriage law was unconstitutional.⁹⁶ Second, even where a court does not invalidate the marriage law, that state will likely face the question of whether it will recognize a same-sex marriage or its equivalent contracted in another state. There are reasons to believe that even some states with settled definitions of marriage as the union of a man and a woman would recognize same-sex marriages from another state. For instance, a New York Attorney General Opinion argues that this should be the result in New York.⁹⁷ It is possible that a U.S. Supreme Court decision may eventually settle the issue, but given the federal structure of our government which reserves most domestic relations matters to state law, these amendments will likely settle an issue that would otherwise be settled in litigation.

2. *Sacred Document*

Finally, some objectors claim that a state constitution is a sacred or inviolable document that ought not to be sullied by minor matters such as the definition of marriage.⁹⁸ The importance of state constitutions is, of course, not to be questioned. But constitutions contain more than endless guarantees of individual rights. They are also charters for lawmaking and protections for self-government. That is why such a large part of each constitution consists of structural and procedural provisions. This includes the portions of the constitution that provide for its amendment. The

⁹⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *accord Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004); *Hernandez v. Robles*, 2005 N.Y. slip op. 25057, 2005 WL 363778 (N.Y. App. Div. Feb. 4, 2005); *In re Coordination Proceeding*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005); *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004), *rev'd*, 110 P.3d 91 (Or. 2005); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004).

⁹⁶ *Andersen*, 2004 WL 1738447; *Castle*, 2004 WL 1985215.

⁹⁷ See 1 Op. N.Y. Att'y Gen. 1 (2004), 2004 WL 551537 (informal opinion).

⁹⁸ See James Dao, *Renewed Efforts Made Against Same-Sex Marriage*, THEOCRACY WATCH, July 16, 2004, http://www.theocracywatch.org/homo_states_times_july15_04.htm.

“inviolable document” argument as an objection to marriage amendments is a non sequitur. If the constitution was not meant to be changed, why would the document include a specific provision for doing just that? Given the enthusiasm of amendment opponents for judicial redefinition of marriage, it would seem that the concern about the constitution’s sacredness is really a disagreement about the locus of constitutional decision-making. The majority of amendment opponents believe in a constitutional mandate to redefine marriage which is to be refereed by judges. Amendment supporters believe that their constitutions provide them an opportunity to involve themselves in the processes of government. They act on behalf of marriage amendments because they recognize the unique value of marriage as a vital social institution which transmits important values across society and through generations.

V. CONCLUSION

It seems clear that the objections to state marriage amendments arise from two sources. The first source is based on “readers in bad faith.” These are the individuals who claim that the amendments will result in highly improbable outcomes based on implausibly broad readings of the amendments which they generally discard after the amendments are approved. Overlapping with this group is a second group made up of individuals who favor a legal redefinition of marriage and who correctly see marriage amendments as the most important obstacle to the achievement of that end. Some in this latter group mute their opposition to marriage amendments per se by *implying* that their opposition to a particular amendment is not based on their support for same-sex marriage, but rather on a concern that a specific amendment they oppose would “go too far.” This tactic is based on a judgment, probably supported by fact, that a forthright claim for redefining marriage would not garner broad support.

We have demonstrated here that the objections raised against the marriage amendments are without merit. Obviously, those who believe that constitutional or public policy reasons compel a redefinition of marriage will still object to the amendments. However, positive arguments for defining marriage as the union of any two persons have been conspicuously absent in the public debate over marriage amendments.

This is unfortunate because the public campaigns for marriage amendments, unlike the litigation to redefine marriage, allow for a wide range of input from citizens (especially non-lawyers) on the most pressing social issue of our day. If the terms of debate for these campaigns are based on misunderstandings or manipulations, citizens (who would otherwise be shut out of the debate confined to courtrooms) are not fairly provided the opportunity to weigh in on the question of whether the social institution of marriage should be discarded in favor of an entirely different institution.⁹⁹ Hopefully, future campaigns will allow for this input, not only for the value it provides to democratic decision-making, but also for the sake of marriage itself.

⁹⁹ See Monte N. Stewart & William C. Duncan, *Marriage and the Betrayal of Loving and Perez*, 2005 B.Y.U. L. REV. 555, 592 (2005).