THE RIGHT TO MARRY AND STATE MARRIAGE AMENDMENTS: IMPLICATIONS FOR FUTURE FAMILIES

Mark P. Strasser*

I. INTRODUCTION

The United States Supreme Court struck down state same-sex marriage bans in *Obergefell v. Hodges*,[1] thereby invalidating state marriage amendments precluding such unions. However, precisely because the marriage amendments differ in wording and have been construed in different ways by the courts, *Obergefell* is unlikely to completely invalidate all of them. Thus, while all of the states will recognize same-sex marriage, some marriage amendments will likely be viewed as limiting the benefits that are permissibly accorded to non-marital couples (whether composed of individuals of the same sex or of different sexes) and their families (whether or not including children).

Part II of this Article discusses the wording and interpretation of various state marriage amendments, exploring some of the limitations imposed by the amendments *in addition* to the restrictions on who may marry whom. Part III discusses the implications of some of the more robust amendments in light of current marriage demographics, noting how these limitations enshrined in the state constitutions may be very difficult to remove. The Article concludes by discussing some negative effects that these state constitutional amendments will likely have.

II. THE DIFFERING MARRIAGE AMENDMENTS AND THEIR INTERPRETATIONS

State marriage amendments vary significantly. Some are narrowly tailored to prevent the recognition of same-sex marriage,[2] while others

 Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

1. 135 S. Ct. 2584 (2015).

2. *See, e.g.*, ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); ARIZ. CONST. art. XXX, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); ARK. CONST. amend. LXXXIII, § 1 ("Marriage consists only of the union of one man and one woman.").

are worded more broadly to prevent the state from according benefits traditionally associated with marriage to non-marital couples.[3] Now that the United States Supreme Court has held that the federal Constitution precludes states from refusing to recognize same-sex marriages,[4] the highest courts in several states may have to construe their respective states' marriage amendments in light of the federal Constitution's protections for same-sex unions. While some courts will likely hold the state's marriage amendment unenforceable *in toto*, others will likely hold that federal guarantees require only the partial invalidation of that state's marriage amendment. The latter holdings will leave a variety of limitations enshrined within the respective state constitutions, adversely impacting many families in unforeseen and undesirable ways.

A. The Variation in State Law

Several states have constitutional amendments precluding the recognition of same-sex marriages. The wording in those bans sometimes narrowly focuses on prohibiting same-sex couples from marrying within a particular state or preventing state recognition of those same-sex marriages celebrated elsewhere.[5] At other times, the wording more

3. *See, e.g.*, FLA. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."); MICH. CONST. art. I, § 25 ("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."); S.C. CONST. art. XVII, § 15 ("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.").

4. *See Obergefell*, 135 S. Ct. at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same[] sex may not be deprived of that right and that liberty.").

5. *See* ALA. CONST. amend. DCCLXXIV(e) ("The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."); ALASKA CONST. art. 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); ARIZ. CONST. art. XXX, § 1 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); ARK. CONST. amend. LXXXIII, § 1 ("Marriage consists only of the union of one man and one woman."); COLO. CONST. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); GA. CONST. art. I, § 4, ¶ I(a) ("This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state."); IDAHO CONST. art. III, § 28 ("A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); MISS. CONST. art. XIV, § 263-A ("Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this State."); MO. CONST. art. I, § 33 ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); MONT. CONST. art. XIII, § 7 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this

broadly focuses on preventing state recognition of both same-sex marriages and also "marriage-like" relationships.[6] Sometimes, the amendment specifically prohibits state recognition of "marriage-like" relationships involving same-sex couples,[7] whereas at other times state

state."); NEB. CONST. art. I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."); NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); OR. CONST. art. XV, § 5a ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."); TENN. CONST. art. XI, § 18 ("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. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee.").

6. *See* FLA. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."); KAN. CONST. art. XV, § 16(b) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."); KY. CONST. § 233A ("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 ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); MICH. CONST. art. I, § 25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); OHIO CONST. art. XV, § 11 ("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."); S.C. CONST. art. XVII, § 15 ("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."); S.D. CONST. art. XXI, § 9 ("Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."); TEX. CONST. art. I, § 32 ("Marriage in this state shall consist only of the union of one man and one woman. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); UTAH CONST. art. I, § 29 ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); VA. CONST. art. I, § 15-A ("That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. 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."); WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.").

7. *See* ALA. CONST. amend. DCCLXXIV(g) ("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."); GA. CONST. art. I, § 4, ¶ I(b) ("No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."); NEB. CONST. art. I, § 29 ("Only marriage between a man and a woman shall be valid

law precludes the recognition of any marriage-like relationships regardless of their composition.[8] It is likely underappreciated that the United States Supreme Court's striking down same-sex marriage bans on federal grounds will leave in place many restrictions on the benefits that can be accorded to non-marital couples.

B. Narrowly Focused Amendments

Several states have constitutional amendments whose language is narrowly focused on preventing the celebration or recognition of same-sex marriages.[9] Now that the United States Supreme Court has held that the federal Constitution protects the right to marry a same-sex partner, these amendments are unenforceable insofar as they preclude the

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or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

8. *See* ARK. CONST. amend. LXXXIII, § 2 ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman."); FLA. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."); KAN. CONST. art. XV, § 16(b) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."); KY. CONST. § 233A ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); MICH. CONST. art. I, § 25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); OHIO CONST. art. XV, § 11 ("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."); S.C. CONST. art. XVII, § 15 ("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."); S.D. CONST. art. XXI, § 9 ("The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."); TEX. CONST. art. I, § 32(b) ("This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."); UTAH CONST. art. I, § 29(2) ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); VA. CONST. art. I, § 15-A ("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."); WIS. CONST. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.").

9. *See supra* note 5 (highlighting state constitutional amendments that narrowly focus on the prohibition of same-sex marriage).

celebration or recognition of such unions.[10] Yet, a separate question involves how those amendments will be construed by the courts, and the amendments may well be construed as doing more than merely preventing same-sex couples from marrying. If so construed, the amendments will continue to limit the benefits that state legislatures can award to non-marital couples and their families, even though the amendments can no longer justify a refusal to recognize a same-sex marriage.

Consider Montana's amendment, defining marriage: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[11] On its face, the amendment has a fairly limited reach because it only speaks to which marriages will be recognized or considered valid within the state. However, a different question involves how that amendment has been or might be interpreted by the courts.

In *Donaldson v. State*,[12] several couples challenged Montana's refusal to grant same-sex couples any of the rights or benefits of marriage. The couples made clear that they were not challenging Montana's refusal to recognize same-sex marriage per se.[13] They instead claimed that the state was constitutionally required to set up an alternate system, so that same-sex couples could enjoy some of the benefits of marriage even if they were not permitted to participate in the institution of marriage.[14] The district court noted that the plaintiffs had not claimed that particular laws were unconstitutional,[15] but instead wanted the court to direct the legislature

10. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[T]he Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."); *see* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *Obergefell*, 135 S. Ct. at 2604–05 ("The Court now holds that same-sex couples may exercise the fundamental right to marry.").

11. MONT. CONST. art. XIII, § 7.

12. 292 P.3d 364 (Mont. 2012).

13. *Id.* at 365 ("Plaintiffs expressly do not challenge Montana law's restriction of marriage to heterosexual couples, do not seek the opportunity to marry, and do not seek the designation of marriage for their relationships.").

14. *Id.* ("[Plaintiffs] contend however that there is a 'statutory structure' in Montana law that prohibits them from enjoying 'significant relationship and family protections and obligations automatically provided to similarly-situated different-sex couples who marry[,]' . . . [and that] this statutory structure interferes with their rights under Article II of the Montana Constitution, including their rights to equal protection, due process, and the rights to privacy, dignity and the pursuit of life's necessities.").

15. *Id.* ("The District Court noted that Plaintiffs do not seek a declaration that any specific statutes are unconstitutional.").

to enact a statutory scheme to correct this perceived inequity.[16] Basically, the plaintiffs were asking the court to order the legislature to create a civil union status following the example set by the Vermont Supreme Court in *Baker v. State*.[17]

The trial court in *Donaldson* held that "ordering the Legislature to enact a statutory scheme to address Plaintiffs' goals of achieving equal treatment . . . would be an inappropriate exercise of judicial power."[18] When upholding the trial court's refusal to grant the desired remedy,[19] the Montana Supreme Court suggested that the plaintiffs should be afforded the opportunity not only to amend their complaint but to specify which statutes were constitutionally offensive and which level of scrutiny to employ in the constitutional analysis.[20]

Justice Rice's concurrence offers an example of how the Montana amendment might be interpreted in the future. He interpreted the amendment to afford special protection to marriage, which he described as "a unique relationship, dissimilar to all other relationships and alone essential to the nation's foundation and survival."[21] Because of the unique status of marriage, he reasoned that "the State errs neither by recognizing it as such nor by giving it exclusive treatment."[22] Justice Rice feared that according non-marital couples the benefits of marriage "would strip from the law the exclusive treatment of marriage as a basis for providing any concrete legal benefit."[23]

Now that the United States Supreme Court has held that same-sex marriage is protected by the federal Constitution, the Montana amendment could be interpreted to be nullified in its entirety.[24] But if the amendment is given the interpretation suggested by Justice Rice's

16. *Id.* at 366 ("The District Court concluded, however[,] that 'what plaintiffs want here is not a declaration of the unconstitutionality of a specific statute or set of statutes but rather a direction to the legislature to enact a statutory arrangement.'").

17. 744 A.2d 864, 867 (Vt. 1999) (holding that precluding same-sex couples from having access to the benefits of marriage violated state constitutional guarantees).

18. *Donaldson*, 292 P.3d at 365.

19. *Id.* at 366 ("We agree with the District Court that Plaintiffs' requested relief exceeds the bounds of a justiciable controversy, and decline to provide the declaratory relief requested." (citation omitted) (citing Gryczan v. State, 942 P.2d 112, 117 (Mont. 1997))).

20. *Id.* at 367 ("The Plaintiffs should be afforded the opportunity to amend their complaint and to develop an argument as to the nature of the State's interest in advancing specific laws as well as the level of constitutional scrutiny that should be applied to those laws by the courts.").

21. *Id.* at 368 (Rice, J., concurring).

22. *Id.*

23. *Id.*

24. An Oregon court followed Montana's lead and narrowly construed that state's marriage amendment, rejecting that it precluded the state from affording marital benefits to non-marital couples. *See* Shineovich and Kemp, 214 P.3d 29, 38 (Or. Ct. App. 2009) ("The state takes the position that Measure 36 restricts only the right of same-sex couples to marry and does not alter any existing rights of such couples to obtain legal benefits presently granted on the basis of marital status.").

concurrence, Montana would still be precluded by the state constitution from affording marital benefits to non-marital couples,[25] state recognition of same-sex marriage notwithstanding. The *Obergefell* Court's emphasis on the unique status of marriage[26] might be used to justify the refusal to accord non-marital relationships some of the benefits of marriage.

C. More Broadly Focused Amendments

A number of states adopted amendments that not only prohibited same-sex marriage, but also precluded the states from according benefits to marriage-like relationships like domestic partnerships or civil unions.[27] A majority of the electorate in those states presumably wanted to reserve not only the name "marriage" for certain different-sex couples but also many of the material benefits associated with marriage.[28]

Consider the Nebraska Constitution, defining marriage: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."[29]

A question not addressed by *Obergefell* is whether a state can recognize different-sex, but not same-sex, civil unions or domestic partnerships.[30] That would depend in part on the justification offered by

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25. *See Donaldson*, 292 P.3d at 374 ("Marriage has always been much more—a concrete legal status which the law recognized and favored with exclusive treatment, including benefits and obligations. In adopting the Marriage Amendment, Montana voters determined to permanently preserve this exclusive treatment for marriage by placing it in the Constitution.").

26. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) ("Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. . . . The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.").

27. *See, e.g.*, FLA. CONST. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."); KAN. CONST. art. XV, § 16(b) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."); KY. CONST. § 233A ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.").

28. *See* Appling v. Doyle, 826 N.W.2d 666, 673 (Wis. Ct. App. 2012) ("[T]he only reasonable conclusion based on the language of the amendment is that voters thought about the 'legal status' of marriages and domestic partnerships as a whole picture, including eligibility, formation, and termination requirements, along with the rights and obligations that attend marriage.").

29. NEB. CONST. art. I, § 29.

30. A state might permit both same-sex and different-sex couples to enter into a civil union or domestic partnership. *See, e.g.*, CAL. FAM. CODE § 297(b)(4)(B) ("Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over [sixty-two] years of age."). *See also id.* § 297(a) ("Domestic partners are two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring.").

the state, although it seems unlikely that the state could justify such a limitation on civil unions or domestic partnerships.[31]

Suppose that the state could not justify its recognition of different-sex, but not same-sex, civil unions or domestic partnerships. In that event, it would still be necessary for the Nebraska amendment to be authoritatively construed. A court might say that the amendment is simply unenforceable as a general matter, and thus it precludes neither the recognition nor celebration of same-sex marriages nor the creation or recognition of civil unions or domestic partnerships. In the alternative, a court might delete the constitutionally offensive language and read the amendment as precluding the recognition of civil unions, domestic partnerships, or other non-marital relationships more generally. Thus, a court might read that amendment as if it had been written: "Only marriage ~~between a man and a woman~~ shall be valid or recognized in Nebraska. The uniting of two persons ~~of the same sex~~ in a civil union, domestic partnership, or other similar ~~same-sex~~ relationship shall not be valid or recognized in Nebraska."[32]

Would a court delete the constitutionally offensive language or instead simply strike down the amendment *in toto* because it is offensive to federal constitutional guarantees? That is unclear, although different courts might reasonably be expected to take different approaches.

Consider for purposes of illustration how different state supreme courts have interpreted their respective states' doctrines of necessaries. In *Richland Memorial Hospital v. Burton*,[33] the South Carolina Supreme Court explained that the "common law doctrine as modified by statute . . . provides that, in the absence of contract, a husband is liable for his wife's necessaries supplied to her by a third person."[34] However, such a statute does not pass muster—"the necessaries doctrine, as codified in [Section] 20-5-60 [of the South Carolina 1976 Code of Laws], denies husbands equal protection of the laws by failing to impose a reciprocal obligation on wives."[35] Given that constitutional infirmity, the South Carolina court had two choices: strike down the statute or make it gender-neutral. The court chose the latter, holding that "the necessaries doctrine

31. *Cf.* Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 142 (2012) ("If civil unions are unavailable to different-sex couples, then only same-sex couples have the right to exercise the liberty of choosing among alternative relationship recognition vehicles. And if only same-sex couples are offered such a choice, the law treats similarly situated individuals differently and therefore unequally." (footnote omitted)).

32. NEB. CONST. art. I, § 29 (alterations added).

33. 318 S.E.2d 12 (S.C. 1984).

34. *Id.* at 13 (citing O'Hagan v. Fraternal Aid Union, 141 S.E. 893 (S.C. 1928)).

35. *Id.*

allows third parties providing necessaries to a husband or wife to bring an action against the individual's spouse."[36]

The Virginia Supreme Court took a different tack. In *Schilling v. Bedford County Memorial Hospital, Inc.*,[37] the court held that the necessaries doctrine "creates a gender-based classification not substantially related to serving important governmental interests and is unconstitutional."[38] However, instead of adopting the appellee's suggestion "to extend the doctrine so it applies to wives as well as husbands,"[39] the court simply struck it down,[40] leaving to the legislature the task of re-crafting the doctrine so it would pass muster.[41]

Suppose that a Nebraska court considering whether to strike or instead modify the Nebraska amendment took the latter approach by deleting the language that would have imposed a burden solely on same-sex couples. A separate issue would involve how narrowly the amendment should be construed. Possible approaches are illustrated in an Eighth Circuit decision involving the Nebraska amendment's constitutionality.

In *Citizens for Equal Protection v. Bruning* (*Bruning II*),[42] the Eighth Circuit Court of Appeals reviewed a district court's decision striking down the Nebraska marriage amendment.[43] The appellate court accepted the claims that "the many laws . . . extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage,'"[44] and that "[b]y affording legal recognition and a basket of rights and benefits to married . . . couples, such laws 'encourage procreation to take place within the socially recognized unit that is best situated for raising children.'"[45] The court justified the refusal to recognize civil unions because "the expressed intent of traditional marriage laws [is] to encourage . . . couples to bear and raise children in committed marriage relationships."[46]

The *Bruning II* court upheld the Nebraska amendment, notwithstanding the denial to same-sex couples of the right to marry or

36. *Id.*
37. 303 S.E.2d 905 (Va. 1983).
38. *Id.* at 908.
39. *Id.*
40. *Id.* ("It . . . is unconstitutional.").
41. *Id.* ("[T]his task, if advisable, is better left to the General Assembly.").
42. 455 F.3d 859 (8th Cir. 2006), *abrogated by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
43. *Bruning II*, 455 F.3d at 871, *rev'g* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005) (*Bruning I*).
44. *Bruning II*, 455 F.3d at 867.
45. *Id.*
46. *Id.* at 868.

enter into civil unions.[47] Now that the United States Supreme Court has held that same-sex marriage is constitutionally protected, the *Bruning II* analysis must be modified.[48] The unresolved issues include whether any of the Nebraska amendments survive and, if so, the degree to which it precludes the state from awarding marriage-type benefits to individuals in non-marital relationships.

The *Bruning II* court held both that the amendment reserves a number of rights for married couples and that doing so was constitutionally permissible. A court considering the amendment now might interpret it as privileging marriage over other types of relationships and thus as reserving some or all of the benefits of marriage for those who have married. Or, a different court might look at the state amendment and note that it does not on its face preclude different-sex, non-marital couples from receiving benefits traditionally associated with marriage. The court might then interpret the amendment as only imposing burdens on same-sex couples. If so, and if targeting in that way violates constitutional guarantees, the amendment might be struck in its entirety and understood not to impose any limitations as a state constitutional matter.

Suppose an amendment targets individuals on the basis of orientation by reserving marriage for different-sex couples and, in addition, privileges marriage over other types of relationships, regardless of whether those non-privileged relationships involved individuals of the same sex or of different sexes. Consider the South Dakota constitutional provision: "Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."[49] While the state is clearly targeting same-sex marriage,[50] it is also privileging marriage as a general matter over any other "quasi-marital relationship."[51] By framing the issue more generally and precluding the recognition of any quasi-marital relationship however composed, the second sentence, unlike the first,

47. *Id.* at 871 ("We hold that [Section] 29 [of the Nebraska Constitution, article 1] and other laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States.").

48. *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (stating that besides *Bruning II* and *Obergefell*, "the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution").

49. S.D. CONST. art. XXI, § 9.

50. *Id.* ("Only marriage between a man and a woman shall be valid or recognized in South Dakota.").

51. *Id.*

seems much less vulnerable to the charge that it is targeting on the basis of orientation. A court considering the constitutionality of the South Dakota state constitutional amendment would invalidate the first sentence, but might not invalidate the second, in which case it would be necessary to decide what counts as a "quasi-marital relationship" in South Dakota.

Marital status confers a host of rights upon marital couples,[52] and many would suggest that conferring a few of the rights that married couples enjoy upon a non-marital couple[53] would not make the latter relationship marital or even quasi-marital.[54] However, such a view assumes that the number of accorded benefits plays an important role in determining what is "marriage-like." For example, a Kansas appellate court suggested that non-marital relationships would not be deemed "marriage-like" unless they were accorded *all* of the benefits of marriage.[55]

One commentator has suggested that the relevant criterion should focus on how the relationship is defined rather than on how many benefits are accorded.[56] Using this approach, a relationship is marriage-like if the criteria for entering into the relationship either mirror or are

52. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that 'hundreds of statutes' are related to marriage and to marital benefits.").

53. Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 755 (2010) ("[C]ourts in a few states have gradually extended some legal benefits to non-marital relationships.").

54. *See* Appling v. Doyle, 826 N.W.2d 666, 673 (Wis. Ct. App. 2012) ("[V]oters would have understood that, regardless of differences in rights and obligations, the 'legal status' of marriage is a phrase that includes reference to the substantial rights and obligations that go with marriage and that, if the legislature conferred those *same* rights and obligations on same-sex couples, however such couples are identified, the resulting legally recognized relationship would be substantially similar to marriage."); Mark Strasser, *The Future of Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAWS. 87, 105–06 (2008) ("Other amendments not only reserve marriage for different-sex couples but also preclude the state from recognizing a status for same-sex couples that is identical or substantially similar to marriage. Presumably, this prohibition would preclude recognition of civil unions or robust domestic partnerships, but might permit a status that affords a more limited range of benefits, such as health benefits through a state employer." (footnotes omitted)).

55. State v. Curreri, 213 P.3d 1084, 1090 (Kan. Ct. App. 2009) ("It is noteworthy that the constitutional amendment does not refer to '*a* right or *an* incident of marriage.' Its reference to 'the rights or incidents of marriage' obviously refers not to an isolated right that a married person may share in common with nonmarried persons, but rather the 'bundle of rights' that identifies marriage as a distinct and separate institution. This provision in the amendment seeks to cut off attempts to circumvent the amendment's definition of marriage by those seeking recognition of a relationship, other than between one man and one woman, which otherwise purports to bear *all* the hallmarks of a conventional marriage." (first and second emphasis in original, third emphasis added)).

56. *See generally* E. Gregory Wallace, *The Sky Didn't Fall: The Meaning and Legal Effects of the North Carolina Marriage Amendment*, 22 AM. U. J. GENDER SOC. POL'Y & L. 1, 10–30 (2014) (reviewing the language in the North Carolina marriage amendment).

close to those that are used for marriage.[57] But that would mean that a marriage-like relationship entitling the parties to only *one* of the benefits to which marital couples are entitled would offend state constitutional limitations.[58] It would also mean that a relationship defined in terms of different criteria would not qualify as marriage-like, even if the relationship were accorded *all* of the benefits and obligations of marriage.[59]

One need not adopt a single criterion to determine which relationships are "marriage-like." One might instead adopt an approach that looks at *both* the criteria for entering into (or exiting) the relationship *and* the benefits and obligations acquired by virtue of being in that relationship.[60] However, it would then be helpful to have guidance both with respect to which criteria would militate in favor of calling something "marriage-like" and with respect to how many benefits would militate in favor of a finding that a relationship was being treated as a marriage.

A state might wish to avoid the difficulties associated with determining which relationships are marriage-like and might instead follow Idaho's example: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."[61] Presumably, this means that the only domestic status that can be given legal recognition is marriage and that other domestic relationships will not be recognized or considered valid.

Consider a cohabiting non-marital couple, Brett and Morgan. Each has a job and is insured through that job. Each owns a car that is titled in his or her own name. Each is named on the apartment lease. They do not have a special status and for legal purposes might be treated as if they were roommates who shared an apartment as a way of reducing expenses.

Suppose in addition that Brett has a child whom Morgan wishes to adopt via second-parent adoption, which involves an adoption of a child by an adult who might be partnered with, but is not married to, the child's

57. *Id.* at 26 ("So long as the same-sex couple (or unmarried heterosexual couple) is required to satisfy marriage-like criteria to receive the legal right or benefit, and so long as the right or benefit is one that typically is reserved for married persons, the state has created a legal status that recognizes or validates a 'domestic legal union' other than heterosexual marriage.").

58. *Id.*

59. *See Appling*, 826 N.W.2d at 672 ("[T]hat would mean that voters thought the marriage amendment would permit legally recognized same-sex-couple relationships that are formed with criteria different than marriage criteria but carry with them all the rights and obligations that attend marriage—in other words, marriage by another name.").

60. *See id.* at 674 ("'[L]egal status' refers not only to eligibility and formation requirements, but also to rights and obligations and, for that matter, termination requirements.").

61. IDAHO CONST. art. III, § 28.

legal parent.[62] As a general matter, a second-parent adoption is only possible if no person other than the would-be adopter's adult partner has parental rights[63] and thus would not be permissible if an ex-partner retained parental rights by virtue of a biological connection to the child.[64] Where a second-parent adoption takes place, the parental rights of the legal parent are not terminated in order for the second parent to adopt.[65]

Some states do not permit second-parent adoptions, reasoning that the only time an adult can adopt a child with the existing parent retaining parental rights is when the would-be adoptive parent is the child's stepparent.[66] The rationale behind permitting an exception for stepparents is that because the child is living in the home with the parent and the parent's spouse, it would make no sense to require the legal parent to surrender his or her parental rights in order for the other parent to adopt since each parent will continue to be in the home and play an important role in the child's life.[67]

The same rationale permitting a stepparent to adopt without terminating the parental rights of the stepparent's spouse might be used

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62. *In re* Adoption of I.M., 288 P.3d 864, 869 (Kan. Ct. App. 2012) ("A second-parent adoption is when an unmarried partner is permitted to adopt the biological or legal child of the parent without requiring the parent to relinquish any parental rights, so long as the parent consents to the adoption.").

63. *But cf.* Judith Daar & Erez Aloni, *Three Genetic Parents—For One Healthy Baby*, L.A. TIMES (Mar. 21, 2014), http://www.latimes.com/opinion/op-ed/la-oe-daar-mitochondrial-replacement-20140321-story.html ("Since January, a new California law allows for a child to have more than two legal parents.").

64. Peter Wendel, *Inheritance Rights and the Step*-Partner *Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 376 (2006) ("The second-parent adoption rule provides that, *where a child who is being adopted has only one legally recognized parent*, adoption by that parent's unmarried partner does not legally displace the natural parent but rather establishes a 'second' parent-child relationship which complements the existing parent-child relationship." (emphasis added) (footnote omitted)).

65. *See* Sharon S. v. Superior Court, 73 P.3d 554, 558 n.2 (Cal. 2003) ("The phrase 'second-parent adoption' refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or nonlegal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities." (internal quotations omitted) (quoting Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 5 (1999))).

66. *See* Jane Marie Lewis, Note, *New-Age Babies and Age-Old Laws: The Need for an Intent-Based Approach in Tennessee to Preserve Parent-Child Succession for Children of Assisted Reproductive Technology*, 43 U. MEM. L. REV. 479, 492–93 (2013) ("The exception is that a stepparent who adopts a spouse's natural child does not sever the parent-child relationship between the child and *that* parent." (footnote omitted)). *Cf.* Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 243 (2014) (discussing "North Carolina's stepparent adoption scheme, which requires the termination of the biological or previous parent's parental rights unless the stepparent is married to the existing parent").

67. *See* Wendel, *supra* note 64, at 395 n.232 ("[T]he stepparent adoption exception is appropriate because it recognizes that, unlike the classic adoption paradigm, in the stepparent adoption scenario the non-custodial natural parent does not necessarily step out of the child's life.").

to justify permitting a cohabiting partner to adopt without terminating the legal parent's rights because the child will continue to be raised by both parents in the home, whether or not the adoption is formalized.[68] States permitting second-parent adoptions have often recognized that these differing scenarios are analogous in this respect.[69] Yet, one of the issues for a state with an amendment like Idaho's might be whether second-parent adoption is precluded precisely because it is likening a domestic, non-marital, cohabiting relationship to a marital one.

The Idaho Supreme Court addressed whether Idaho permitted second-parent adoption in *In re Adoption of Doe*.[70] The trial court reasoned that local law precluded an unmarried partner from adopting a partner's child.[71] On appeal, the plaintiff argued that "Idaho's adoption statutes unambiguously allow her to adopt, that she meets all of the statutory requirements to adopt, that a second, prospective parent may adopt without terminating the rights of the existing legal parent, and that it is immaterial that she is considered unmarried under state law."[72] The Idaho Supreme Court agreed, noting "the unambiguous language in [Idaho Code Section] 16–1501 that allows for 'any adult person residing in and having residence in Idaho' to adopt 'any minor child'"[73] and explaining that the relevant law "contains no provisions that limit adoption to those who are married."[74] The court reasoned that "[t]he Legislature has imposed no restrictions that would disqualify Jane Doe from seeking to adopt Jane Doe I's children, and the [c]ourt will not imply any such restrictions based upon Idaho's marital statutes."[75] Because the Idaho Supreme Court was unwilling to impose additional limitations that were not expressly included within the law,[76] the court

68. *Id.* ("To the extent that this is the justification, however, there is no basis for distinguishing the stepparent adoption scenario from the step-*partner* adoption scenario.").

69. Jason C. Beekman, *Same-Sex Marriage: Strengthening the Legal Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples*, 18 WASH. & LEE J. C.R. & SOC. JUST. 215, 226 (2012) ("Second-parent adoption is modeled on stepparent adoption, a statutory scheme that allows a biological (or adoptive) parent's spouse to adopt a child without terminating the biological parent's legal rights." (footnote omitted)).

70. 326 P.3d 347 (Idaho 2014).

71. *Id.* at 351 ("[T]his court [i.e., the magistrate court] concludes that the legislature's intent in relation to adoptions is that the petitioner must be in a lawfully recognized union, i.e. married to the prospective adoptee's parent, to have legal standing to file a petition to adopt that person's biological or adopted child.").

72. *Id.*

73. *Id.* at 353.

74. *Id.*

75. *Id.*

76. *Id.* at 351.

did not interpret the statute as requiring the termination of all parental rights before a non-spouse could adopt a child.[77]

Other courts have been unwilling to permit non-spouses to adopt while at the same time permitting the already recognized parent to retain her parental rights. In *In re Adoption of I.M.*,[78] a former stepfather sought to adopt his ex-wife's child.[79] The child viewed him as her father.[80] The ex-wife consented to the adoption[81] as long as she did not have to surrender her own parental rights for the adoption to be approved.[82] The rights of the child's biological father were not at issue—allegedly, he was unfit and had never played any role in the child's life.[83]

The Kansas appellate court refused to grant the adoption, even though there would have been no bar had the ex-stepparent still been married to the child's mother.[84] The court agreed with those courts "that have strictly interpreted similar statutory language to require the relinquishment of all parental rights of the biological parents, except in the case of a traditional stepparent adoption."[85]

Two different points might be made about *In re Adoption of I.M.* First, there is a question of statutory construction—different state courts have taken very different approaches when deciding whether local law permits second-parent adoptions when the issue has not been expressly addressed by the legislature.[86] But the point here is not about the best way to interpret the statutes regarding adoption. Rather, it is that if a non-marital partner's ability to adopt without requiring the termination of the custodial parent's rights is thought to be a right normally associated with

77. *Id.* at 353.

78. 288 P.3d 864 (Kan. Ct. App. 2012).

79. *Id.* at 866.

80. *Id.* ("I.M. considers J.M. to be her father and she calls him her father.").

81. *Id.* at 867.

82. *Id.* at 866 ("I.M.'s mother agrees that the adoption would be in I.M.'s best interest, but does not want to give up her own parental rights to I.M.").

83. *Id.* at 867 ("The petition also set forth that consent from E.B. was unnecessary because he was an unfit parent who made no effort to support or communicate with I.M. before or after her birth.").

84. *See id.* at 867, 868 ("J.M. is no longer I.M.'s stepparent, so we must treat this as an independent adoption under the statute. . . . [J.M.] has no statutory authority to consent to his own adoption of I.M.").

85. *Id.* at 869.

86. *See* Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1047 (1999) ("Courts have been divided about whether to permit second-parent adoptions, even when the relevant legislature has failed to speak to the issue directly and even when that legislature has made clear that the relevant statutes should be construed to benefit the child.").

marriage, then some of the state marriage amendments may be construed as precluding the legislature from permitting second-parent adoptions.[87]

Consider the Kentucky constitutional amendment, which reads: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[88] At issue in *S.J.L.S. v. T.L.S.*[89] was whether the statutory provisions governing stepparent adoption could be applied to a non-marital couple, especially in light of state constitutional constraints.[90] The Kentucky appellate court addressing that issue wrote:

> The overwhelmingly obvious answer is no. Without question, it is inappropriate to use a legal fiction [by saying that a non-marital partner is equivalent to a legal spouse][91] to sidestep a public policy so clearly expressed by the Legislature in statute and by the People of the Commonwealth in its ratification of a Constitutional provision.[92]

Suppose, however, that the Kentucky legislature were to change its mind about the wisdom of prohibiting second-parent adoptions. That would not matter. If the Kentucky Supreme Court were to adopt the reading of the relevant state constitutional provision offered in *S.J.L.S.*, namely, that the state constitution prohibits treating a non-marital relationship as marital and that second-parent adoptions do so,[93] the Kentucky Constitution would have to be changed before the legislature could authorize second-parent adoptions.

When the marriage amendments are read broadly, they can have substantial consequences for families, even bracketing some of the direct effects of being unable to marry a life partner.[94] Consider the reading of

87. In *D.M.T. v. T.M.H.*, the Florida Supreme Court implied that had the legislature reserved a particular benefit for married couples, the state marriage amendment might have precluded non-marital couples from receiving that benefit. 129 So. 3d 320, 342–43 (Fla. 2013) (discussing how the marriage amendment had not reserved one particular benefit for marital couples and thus same-sex couples could also receive that benefit, whereas a different benefit had been reserved for marital couples and thus same-sex couples could not receive that latter benefit).

88. KY. CONST. § 233A.

89. 265 S.W.3d 804 (Ky. Ct. App. 2008).

90. *Id.* at 815–16.

91. *See id.* at 816 (discussing the "family court . . . adopt[ing] the 'legal fiction' that the relationship between T and S is equivalent to marriage").

92. *Id.* at 818.

93. *See id.* (holding, inter alia, that a person who was not the legal spouse of the child's parent could not be considered a stepparent).

94. *See* Courtney Thomas-Dusing, Note, *The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements*, 17 J. GENDER RACE & JUST. 163, 166 (2014) (discussing "traditional marriage rights such as property division, insurance and employment benefits, hospital visitation, inheritance rights, and tort claims").

the Michigan marriage amendment offered in *Stankevich v.Milliron*[95] (*Stankevich I*). At issue in *Stankevich I* was the parental status of Jennifer Stankevich, who married Leanne Milliron in Canada.[96] Subsequent to the marriage, Milliron delivered a child.[97] The Michigan Constitution precludes the recognition of same-sex marriage,[98] so the Michigan appellate court held that the marriage validly celebrated in Canada could not be recognized.[99]

Yet, Stankevich was not asking the state to recognize her relationship with Milliron because the couple had already separated.[100] Instead, Stankevich sought recognition as the child's equitable parent under Michigan law.[101] But the Michigan Supreme Court has confined equitable parent doctrine to those in legal marriages,[102] so the state bar on the recognition of same-sex marriage meant that Stankevich could not be recognized as an equitable parent,[103] regardless of how such a ruling would affect the interests of the child whom Stankevich had helped to raise.

The Michigan marriage amendment has been construed rather broadly. In *National Pride at Work, Inc. v. Governor of Michigan*,[104] the Michigan Supreme Court considered whether the amendment precluded domestic partner benefits.[105] The amendment read: "'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

95. No. 310710, 2013 WL 5663227 (Mich. Ct. App. Oct. 17, 2013) (*Stankevich I*) *vacated*, Stankevich v. Milliron, No. 148097, 2015 WL 5311174 (Mich. Sept. 11, 2015) (*Stankevich II*).

96. *Stankevich I*, 2013 WL 5663227, at *1 ("The parties entered into a same-sex marriage in Canada in July 2007.").

97. The couple married while Milliron was pregnant. *See id.* ("Before that date, defendant had been artificially inseminated, and later gave birth to a child.").

98. MICH. CONST. art. 1, § 25 ("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.").

99. *Stankevich I*, 2013 WL 5663227, at *3 ("Thus, to recognize plaintiff's same-sex union as a marriage . . . would directly violate the constitutional provision that, '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*.'" (quoting MICH. CONST. art I, § 25)).

100. *Id.* at *1.

101. *Id.* at *2.

102. *See* Van v. Zahorik, 597 N.W.2d 15, 20 (Mich. 1999) ("The present custody dispute is not in the context of a divorce, and the children at issue were not born or conceived during marriage. Accordingly, the doctrine of equitable parenthood would not apply to the present case.").

103. *Stankevich I*, 2013 WL 5663227, at *4 ("[P]laintiff is not a parent as defined under the [Child Custody Act] or the equitable parent doctrine . . . .").

104. 748 N.W.2d 524 (Mich. 2008).

105. *Id.* at 529 (addressing "whether the marriage amendment . . . prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners").

the only agreement recognized as a marriage or similar union for any purpose.'"[106]

Plaintiffs argued that an employer's conferring domestic partnership benefits does not amount to the employer recognizing a marriage between the parties.[107] The Michigan Supreme Court disagreed, noting that the failure to call something a marriage does not establish that the relationship is not being treated as a marriage.[108] The court explained that the question before it was not the name given to the relationship, but whether that relationship was being treated as a marriage or something similar to a marriage.[109]

The court reasoned that a domestic partnership is a kind of union[110] and then addressed whether a domestic partnership is sufficiently similar to a marriage[111] to run afoul of the amendment's limitations. The court explained that the amendment might still be triggered by a relationship that was not the equivalent of marriage because "[a] union does not have to possess *all* the same legal rights and responsibilities that result from a marriage in order to constitute a union 'similar' to that of marriage."[112]

That two relationships might be similar even if not accorded identical benefits does not establish how many or which benefits must be awarded for the relationship to be classified as similar for purposes of the marriage amendment. Rather than address which or how many benefits would trigger the amendment's limitations, the Michigan Supreme Court took a different approach.

The court noted two respects in which marriages and domestic partnerships are similar, namely, "marriages and domestic partnerships are the only relationships in Michigan defined in terms of both gender and lack of a close blood connection."[113] Because domestic partnerships and marriages "have these core 'qualities in common,'" the court

106. *Id.* at 532 (quoting MICH. CONST. art. I, § 25).

107. *Id.* at 533.

108. *Id.* ("[J]ust because a public employer does not refer to, or otherwise characterize, a domestic partnership as a marriage or a union similar to a marriage does not mean that the employer is not recognizing a domestic partnership as a marriage or a union similar to a marriage.").

109. *Id.* ("The pertinent question is not whether public employers are recognizing a domestic partnership as a marriage or whether they have declared a domestic partnership to be a marriage or something similar to marriage; rather, it is whether the public employers are recognizing a domestic partnership as a union similar to a marriage.").

110. *Id.* at 534 ("When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits. Therefore, a domestic partnership is most certainly a union.").

111. *Id.* ("The next question is whether a domestic partnership is similar to a marriage.").

112. *Id.*

113. *Id.* at 537.

concluded that "domestic partnerships are unions similar to marriage."[114] Once it was established that domestic partnerships and marriages were sufficiently similar, *no* benefits could be accorded to the former than were normally accorded to the latter.[115]

Yet, the court's observation that both relationships were defined in terms of sex was accurate only if understood in a particular way because the "sex" requirement for the two was not the same—the partners had to be of different sexes for marriage and of the same sex for domestic partnerships.[116] While each relationship was defined in part based on the category of sex, the criteria differed with respect to whether the sexes of the partners had to match.

Suppose domestic partnerships had not been defined in terms of gender—individuals of the same sex or of different sexes could qualify as domestic partners. It is simply unclear whether the court would have held that the amendment barred the recognition of domestic partnerships when no gender limitation had been imposed.[117] One suspects so,[118] however, because the individuals would still be entering into the union to secure a particular benefit.[119] The Michigan court explained that "the

114. *Id.* (footnote omitted). *See also* Kristofer A. Scarpa, Comment, *State Constitutional Law—Marriage—Michigan Marriage Amendment Bars Public Employers from Providing Health Benefits to Same-Sex Partners of Employees.* National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008)*, 40 RUTGERS L.J. 995, 1000 (2009) ("The majority reasoned that because these two characteristics are unique to both marriages and domestic partnerships, and the combination of the two elements are unique *only* to marriages and domestic partnerships, the two types of relationships resemble each other to such an extent that they should be classified as 'similar' for purposes of the marriage amendment." (footnote omitted)).

115. *Nat'l Pride at Work*, 748 N.W.2d at 538 ("[I]f there were any residual doubt regarding whether the marriage amendment prohibits the recognition of a domestic partnership for the purpose at issue here, this language makes it clear that such a recognition is indeed prohibited 'for any purpose,' which obviously includes for the purpose of providing health-insurance benefits.").

116. *Id.* at 535 ("All the domestic-partnership policies at issue here require the partners to be of a certain sex, i.e., the same sex as the other partner. Similarly, Michigan law requires married persons to be of a certain sex, i.e., a different sex from the other." (footnote omitted)).

117. Different-sex couples might prefer a kind of domestic partnership status to marriage. *See* Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 276 (2013) ("Today, different-sex couples in D.C., Hawaii, Illinois, and Nevada can choose between marriage and a quasi-marriage civil union or domestic partnership. These alternatives may be attractive for symbolic reasons, but they may also offer substantive advantages such as federal law invisibility." (footnote omitted)).

118. *See Nat'l Pride at Work*, 748 N.W.2d at 541 (noting the following statement by the Michigan Civil Rights Commission: "If passed, Proposal 2 would result in fewer rights and benefits for unmarried couples, both same-sex and heterosexual, by banning civil unions and overturning existing domestic partnerships. Banning domestic partnerships would cause many Michigan families to lose benefits such as health and life insurance, pensions and hospital visitation rights." (footnote omitted)).

119. *See id.* at 534 ("When two people enter a domestic partnership, they join or associate together for a common purpose, and, under the domestic-partnership policies at issue here, legal consequences arise from that relationship in the form of health-insurance benefits.").

pertinent question is not whether these unions give rise to all the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage 'for any purpose.'"[120] Yet, that might be taken to mean that even if domestic partnerships were not defined in terms of sex and those closely related by blood were not barred from entering into domestic partnerships, the court still might say that the amendment precluded the state from recognizing such relationships because the union would be recognized for the purpose of securing benefits.

Some public employers in Michigan modified their domestic partnership policies after *National Pride at Work* to enable employees to secure coverage for a non-family member with whom the employee lived.[121] But by making one of the criteria whether the individual was a family member, those employers might have made their policies vulnerable to challenge. Using the *National Pride at Work* approach as a model, a Michigan court might suggest that awarding such benefits on the basis of "family" was also precluded by the amendment,[122] even though domestic partner status could only be accorded to a non-family member.

An alternative interpretation of the Michigan amendment was that it precluded the state from awarding certain benefits specifically related to marriage to non-marital couples,[123] like the presumption of parenthood when a child is born into a marriage.[124] But the court rejected that narrowing interpretation, instead construing the amendment broadly so

120. *Id.* (footnote omitted).

121. Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 VAND. L. REV. EN BANC 11, 28 n.97 (2012) ("A number of Michigan's public employers responded to the ruling by replacing domestic-partner benefits with benefits provided to a broader category termed 'other qualified adults,' which typically consists of nonrelatives and nontenants who have lived with an employee for more than six months.").

122. Using the category of "sex," rather than asking whether the partner was of the same or different sex, was one of the factors making the domestic partner benefits impermissible. *See Nat'l Pride at Work*, 748 N.W.2d at 537 (finding that public employers that provided health insurance benefits to eligible same-sex partners violated article 1 of the Michigan Constitution). Just as the court found that the amendment reached domestic partner benefits even though those benefits were accorded to *same-sex* partners and marital benefits were restricted to *different-sex* partners, a court might hold that the amendment precluded awarding benefits to adult *non-family* members. The court might reason that using the category of family or "close blood relative" as a factor (even if the idea was to exclude blood relatives, *see id.*) would itself be a factor making domestic partner benefits impermissible.

123. *Id.* at 538 ("Plaintiffs argue that the marriage amendment does not prohibit public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners because health-insurance benefits do not constitute a benefit of marriage." (footnote omitted)).

124. *See* Pecoraro v. Rostagno-Wallat, 805 N.W.2d 226, 228 (Mich. Ct. App. 2011) ("In Michigan, a child conceived and born during a marriage is legally presumed the legitimate child of that marriage, and the mother's husband is the child's father as a matter of law.").

that no benefits associated with marriage could be accorded to a marriage-like union.[125]

The Michigan Supreme Court could overrule *National Pride at Work*, perhaps emphasizing that by limiting marriage to "the union of one man and one woman,"[126] the amendment was targeting on the basis of orientation. However, a reversal of that decision without some important change in the intervening jurisprudence might be taken to impugn the *National Pride at Work* court's methods or motivations.[127] The amendment could be repealed via referendum, although state initiative campaigns can be very expensive, which might deter individuals from mounting such a campaign.[128] In short, it does not seem likely that the Michigan marriage amendment will be construed narrowly in the near term. But that means that the Michigan marriage amendment will likely preclude the Michigan legislature from affording a variety of benefits to non-marital couples, even if doing so would promote the public interest. Ironically, the limitations that the Michigan electorate may not have supported in the first place seem firmly in place in the Michigan Constitution and will be relatively difficult to remove.[129]

Not all of the state high courts interpret their state marriage amendments to impose robust restrictions. In *State v. Carswell*,[130] the Ohio

125. *Nat'l Pride at Work*, 748 N.W.2d at 539 ("The people of this state have already spoken on this issue by adopting this amendment. They have decided to 'secure and preserve the benefits of marriage' by ensuring that unions similar to marriage are not recognized in the same way as a marriage for any purpose." (footnotes omitted)).

126. MICH. CONST. art. I, § 25.

127. *Cf.* William B. Turner, *The Perils of Marriage as Transcendent Ontology:* National Pride at Work v. Governor of Michigan, 9 GEO. J. GENDER & L. 279, 284 (2008) (discussing *National Pride at Work* and then noting that "[t]he debate over same-sex marriage is primarily about the desire in certain quarters to perpetuate hierarchies by specifying one category of persons who will occupy the bottom half of the binary" (footnote omitted)).

128. *Cf.* Schuette v. BAMN, 134 S. Ct. 1623, 1662 (2014) (Sotomayor, J., dissenting) ("In 2008, for instance, over $800 million was spent nationally on state-level initiative and referendum campaigns, nearly $300 million more than was spent in the 2006 cycle. . . . 'In several states, more money [is] spent on ballot initiative campaigns than for all other races for political office combined.'" (quoting T. DONOVAN, C. MOONEY & D. SMITH, STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM 132 (2012))); James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2158 (2013) (discussing "an expensive initiative proposal and approval campaign").

129. *See Nat'l Pride at Work*, 748 N.W.2d at 548–49 (Kelly, J., dissenting) ("[Citizens for the Protection of Marriage Committee] told voters that the 'marriage amendment' would bar same-sex marriage but would not prohibit public employers from providing the benefits at issue. It is reasonable to conclude that these statements led the ratifiers to understand that the amendment's purpose was limited to preserving the traditional definition of marriage. And it seems that a majority of likely voters favored an amendment that would bar same-sex marriage but would go no further." (footnote omitted)).

130. 871 N.E.2d 547 (Ohio 2007).

Supreme Court construed the Ohio marriage amendment narrowly.[131] That amendment reads: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."[132] The court offered the following explanation of the amendment's meaning:

> The definition of "status," our understanding of the legal responsibilities of marriage, and the rights and duties created by the status of being married, combined with the first sentence of the amendment's prohibition against recognizing any union that is between persons other than one man and one woman causes us to conclude that the second sentence of the amendment means that the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage—a marriage substitute.[133]

The Ohio Supreme Court explained that the amendment precluded the state from recognizing civil unions.[134] However, if the state recognized a status that accorded some, but not all, of the benefits of marriage, then the amendment's restrictions would not be triggered.[135]

Consider a domestic partners registry that accords same-sex partners a legal status affording them very few, if any, benefits. One issue is whether the state is precluded by the marriage amendment from recognizing such a status for unmarried couples. An Ohio appellate court reasoned that "Cleveland's domestic partner registry is, in essence, simply a label that confers little or no legal benefits on the domestic partners and thus does not 'approximate the design, qualities, significance or effect of marriage.'"[136] Because it did not approximate marriage in those ways, the court upheld the constitutionality of the registry.[137]

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131. *See id.* at 551 (interpreting the meaning of the amendment as prohibiting the state from "creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman").

132. OHIO CONST. art. XV, § 11.

133. *Carswell*, 871 N.E.2d at 551.

134. *Id.* ("The second sentence of the amendment prohibits the state and its political subdivisions from circumventing the mandate of the first sentence by recognizing a legal status similar to marriage (for example, a civil union)." (footnote omitted)).

135. *See id.* (interpreting the marriage amendment to mean that "the state cannot create or recognize a legal status for unmarried persons that bears *all* of the attributes of marriage" (emphasis added)).

136. Cleveland Taxpayers for Ohio Constitution v. City of Cleveland, No. 94327, 2010 WL 3816393, at *4 (Ohio Ct. App. Sept. 30, 2010).

137. *Id.*

It might be argued that affording one or a few benefits to a domestic partner would not trigger the amendment only if the accorded benefit was not normally associated with marriage. But the interpretation of the amendment as precluding the award of benefits or obligations associated with marriage to a non-marital couple has been rejected in Ohio as well.[138]

Consider spousal support. Traditionally, spousal support is awarded as part of a divorce decree ended upon the death of either party or the remarriage of the party receiving support.[139] The rationale behind ending it upon the remarriage of the spouse receiving support is that the support will no longer be needed because the new spouse will take on that obligation.[140]

One effect of terminating support upon remarriage is that the ex-spouse has an incentive to cohabit with but not marry a partner so that the spousal support will continue.[141] That incentive could be removed by specifying that support will be terminated upon the remarriage or cohabitation of the ex-spouse receiving support.[142]

New spouses and cohabiting partners are distinguishable in that the former, but not the latter, have acquired a status that imposes legal

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138. *See id.* at *3–4 (explaining that even though the domestic partners registry imposes some marital duties as well as "the legal right of being registered and recognized as a domestic unit," it did not violate the constitution because the Ohio Supreme Court held that "any legally established relationship bearing less than all the attributes of marriage is constitutional").

139. *See, e.g.*, Amber N. Csaszar, *Statutory Interpretation*, 63 MD. L. REV. 949, 952 (2004) ("In Maryland, the right to receive alimony traditionally terminates upon remarriage." (footnote omitted)); Odette Marie Bendeck, *Florida's "Cohabitation" Statute: The Revolution That Wasn't*, 82 FLA. B.J., June 2008, at 95, 95 ("Prior to the new statutory language, the only bright-line basis upon which to terminate alimony was the death of either party or the remarriage of the receiving spouse.").

140. Note, *The Void and Voidable Marriage: A Study in Judicial Method*, 7 STAN. L. REV. 529, 542 (1955) ("The obligation ceases upon remarriage since the ex-wife has acquired another source of support . . . .").

141. DAVID M. BILODEAU, *Divorce Demystified*, *in* 1 MASS. BASIC PRAC. MANUAL § 6-9-333 (5th ed. 2015) ("[H]istorically, alimony recipients have frequently cohabitated with a third party with whom they shared an intimate relationship without any plans of remarriage in order to continue receiving alimony payments from an ex-spouse."); Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 519 (2006) ("In most states, spousal support ends automatically upon the recipient's remarriage, but in many states, it does not automatically end upon the recipient's cohabitation." (footnotes omitted)).

142. *See, e.g.*, Salvato v. Salvato, 2 N.E.3d 974, 975 (Ohio Ct. App. 2013) ("[Lawrence's] spousal support obligation shall terminate in the event of the death of either party, [Windy's] remarriage or [her] cohabitation with an unrelated male in a relationship similar to marriage." (alterations in original) (quoting the divorce decree from the trial court)). *Cf.* McCoy, *supra* note 141, at 519 ("[W]hen two romantically involved partners choose to live together, they *constructively* assume mutual duties of support and service toward each other. Due to these constructive duties of support, it makes little sense for courts to continue requiring people to support former spouses who are now being supported by others." (emphasis added)).

obligations towards the other partner.[143] Because of that difference, a state might not choose to treat cohabitants and new spouses as equivalent for cessation of spousal support purposes.[144] The focus here, however, is not on what approach is best as a matter of public policy.[145] Rather, it is on whether a state marriage amendment would preclude a state from terminating spousal support upon the continuing cohabitation of the support-receiving spouse.[146] Arguably, doing so would treat a marital relationship (remarriage) and a non-marital relationship (cohabitation) as equivalent.

In *Fitz v. Fitz*,[147] an Ohio appellate court addressed whether the state's marriage amendment precluded treating cohabitation, like remarriage, as a basis for terminating support.[148] The trial court had held that doing so "would be tantamount to finding cohabitation to be the equivalent of marriage."[149] The appellate court reversed[150] because a holding that spousal support need no longer be paid to the cohabiting ex-spouse "does not, in and of itself, confer a legal status tantamount to marriage."[151]

The appellate court reasoned that "[t]he act of terminating or modifying spousal support on the grounds of cohabitation does not create or recognize a legal status for individuals who cohabitate."[152] Even if it had, that status would involve only one rather than "all of the attributes of marriage"[153] and thus could hardly be construed as "a marriage substitute."[154] Precisely because the Ohio Supreme Court has construed the Ohio marriage amendment as only precluding the state from "creat[ing] or recogniz[ing] a legal status for unmarried persons that bears

143. *See* McCoy, *supra* note 141, at 519 ("[A] major difference between spouses and cohabitants is that cohabitants do not assume *legal* duties of support and service toward each other . . . ." (emphasis added)).

144. *Id.* ("In most states, spousal support ends automatically upon the recipient's remarriage, but in many states, it does not automatically end upon the recipient's cohabitation." (footnotes omitted)).

145. *See, e.g.*, Ianitelli v. Ianitelli, 502 N.W.2d 691, 693 (Mich. Ct. App. 1993) ("Cohabitation, by itself, is not to be equated with remarriage.").

146. *See* S.C. CODE ANN. § 20-3-130(B)(1) (2014) ("Alimony and separate maintenance and support awards may be granted pendente lite and permanently in such amounts and for periods of time subject to conditions as the court considers just including, but not limited to: (1) Periodic alimony to be paid but terminating on the remarriage or continued cohabitation of the supported spouse . . . .").

147. No. 92535, 2009 WL 3155124 (Ohio Ct. App. Oct. 1, 2009).

148. *Id.* at *1.

149. *Id.* at *3.

150. *Id.*

151. *Id.* at *2.

152. *Id.* at *3.

153. State v. Carswell, 871 N.E.2d 547, 551 (Ohio 2007).

154. *Id.*

all of the attributes of marriage—a marriage substitute,"[155] the state's treating cohabitation and remarriage alike for purposes of terminating spousal support does not make cohabitation and remarriage equivalent.

A broad interpretation of the Ohio marriage amendment might have yielded a different result. If it were interpreted to preclude the recognition of a union or status that in any way "'intends to approximate the design, qualities, significance or effect of marriage' for unmarried relationships"[156] and if a cohabiting relationship were treated as a status similar to (re)marriage for spousal support purposes, then the state's marriage amendment would bar using cohabitation as a basis for stopping spousal support. The Ohio marriage amendment would have had the paradoxical effect of inducing a class of people to choose cohabitation over (re)marriage.

III. MARRIAGE AMENDMENTS AND CURRENT DEMOGRAPHICS

Any analysis of the impact of state marriage amendments must be made in light of current demographic trends. An increasing number of people live together without the benefit of marriage,[157] and the way that state marriage amendments are interpreted can have profound effects upon the lives of those people. A marriage amendment interpreted to impose robust limitations on the state may preclude members of a growing number of families from receiving a variety of benefits to the detriment of the individuals themselves and society as a whole.

A. Non-Marital Cohabitation

More and more unmarried couples are living together,[158] and many of those couples are raising children.[159] Some of those couples cannot

155. *Id.* (emphasis added).

156. *Id.* at 556 (Lanzinger, J., dissenting).

157. *See* Casey E. Copen et al., *First Premarital Cohabitation in the United States: 2006–2010 National Survey of Family Growth*, 64 NAT'L HEALTH STATISTICS REPS., Apr. 4, 2013, at 3, *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf (showing that "48% of women interviewed in 2006–2010 cohabited [with a partner prior to marriage], compared with 43% in 2002 and 34% in 1995").

158. Jennifer V. Hughes, *Crucial Questions for Unmarried Home Buyers*, N.J. (Feb. 9, 2014), http://www.northjersey.com/real-estate/crucial-questions-for-unmarried-home-buyers-1.712568?page=all ("The number of unmarried couples who live together has mushroomed.").

159. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 277 (2009) ("While it is true that an increasing proportion of children born in the United States are born to unmarried parents, a large proportion of these births are to couples who are unmarried and cohabiting." (footnote omitted)).

marry,[160] whereas others are permitted to marry but for whatever reason choose not to do so.[161]

One possible reaction to the differing marriage choices that individuals make is to say that they are free to choose as they will, although they must accept the benefits and burdens of their choices.[162] Yet, one of the questions at hand involves determining the appropriate allocation of benefits and burdens based upon marital status, and it is by no means obvious that the traditional array is the optimistic mix.[163] Thus, even if it were true that an individual choosing not to marry would not have a right to complain in the sense that he or she consciously decided not to accept either the benefits or the burdens of marriage, that would not establish the wisdom of reserving a great array of benefits for married couples. It might be that both the unmarried individuals themselves and society as a whole would be better off if some benefits (and, perhaps, burdens) traditionally associated with marriage were also accorded to non-marital couples.

A different possible approach is to offer an array of benefit–burden combinations that are associated with differing relationships.[164] Or, one

160. Now that the Court has held that same-sex marriage is protected under the federal Constitution, some of the individuals living together without the benefit of marriage may be choosing to do so rather than being precluded from marrying regardless of whether or not they wish to do so.

161. *See, e.g.*, Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 755 (2012) ("[D]ifferent-sex couples who choose long-term cohabitation rather than marriage may have a predilection for greater individual autonomy." (footnote omitted)); Emily E. Diederich, Note, *'Cause Breaking Up Is Hard to Do: The Need for Uniform Enforcement of Cohabitation Agreements in West Virginia*, 113 W. VA. L. REV. 1073, 1077 (2011) ("Some couples choose to cohabitate because, in light of today's divorce rates, they are fearful of the commitments attendant to marriage." (footnote added)). Other commentators suggest that non-marital cohabitation rates may have risen, at least in part, because of the decriminalization of sexual relations outside of marriage. *See* William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1956 (2012) ("The most plausible legal reason for declining marriage rates, therefore, is not the repeal of mandatory rules against interracial marriage, but is instead the repeal of mandatory rules penalizing sexual cohabitation and nonmarital children and the creation of a menu of legal options for romantic couples." (footnote omitted)).

162. *See* Eskridge, *supra* note 161, at 1956 ("Offered a choice of cohabitation with fewer legal benefits than marriage, many couples have chosen not to marry. There is every reason to believe that many of these couples have made choices that are optimal for them."); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446 (1992) ("Traditionally, . . . the law distinguished sharply between marriage and other intimate relationships and used marriage or marital status as a [sic] criteria for allocating a wide variety of public benefits and burdens.").

163. *Cf.* James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 65 (2004) ("Focusing on marriage's *functions* rather than on its inherent natural or secular *meanings* may ultimately shift the public debate away from whether any particular type of couple fits within the definition of marriage, and toward a more pragmatic inquiry into whether particular types of entitlements and obligations should be available to all our domestic households." (footnote omitted)).

164. *Cf.* Eskridge, *supra* note 161, at 1890–91 ("[T]he utilitarian perspective supports rules that open up choices for American adults, not only as to whom they want to partner with but also as to the rules of their partnership. The utilitarian perspective does not necessarily favor unlimited choice;

might permit couples in effect to design their own relationship rights and responsibilities via contract.[165]

Which options should be offered would seem to be a matter of public policy (assuming that the choices were not in violation of constitutional guarantees).[166] Different states might offer differing schemes.[167] Further, states might decide to change their own benefit–burden options in light of the changing needs of society.[168] But the focus here is not on which benefits or burdens in particular should be accorded to non-marital couples, but simply on whether the marriage amendments are tying the hands of legislatures in ways that were neither anticipated nor desired.

B. The Pernicious Effect of the Marriage Amendments

States currently disagree about which benefits should be reserved for marital couples, e.g., whether a parent must surrender his or her parental rights before a non-marital partner can adopt that child.[169] There may be other differences, such as how property might be distributed when a relationship ends.[170] Further, states may differ about whether support can be ordered when non-marital relationships end.[171]

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this perspective can support mandatory rules in many instances and guided-choice rules and menus in most other cases.").

165. *See* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 576 (2013) (recommending "a registration-based marriage alternative . . . [which] would offer couples the option to sign—and deposit with the state—a contract defining the partners' obligations and rights vis-à-vis each other and changing their status to that of 'registered partners'").

166. The State of Virginia argued that deference should be given to its public policy decision to prohibit interracial marriage. *See* Loving v. Virginia, 388 U.S. 1, 8 (1967) ("[T]he State argues . . . [that] this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages."). The State's contention was rejected. *See id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

167. *See* Aloni, *supra* note 165, at 575 ("[A] few states have enacted covenant marriage in an attempt to reduce divorce rates . . . ." (footnote omitted)).

168. *Cf.* Kyle Thomson, Note, *State-Run Insurance Exchanges in Federal Healthcare Reform: A Case Study in Dysfunctional Federalism*, 38 AM. J.L. & MED. 548, 550 (2012) (discussing the theory that "policies are often best run by states in order to conform to the peculiarities of their own populace and the particular needs and desires of the citizens in any given state" (footnote omitted)).

169. Shannon Price Minter, *Interstate Recognition of LGBT Families*, 36 HUM. RTS. 10, 10 (2009) ("[M]any states either automatically recognize both partners in a same-sex couple as legal parents of a child born to one of them or permit the couple to obtain a second-parent adoption. But in a number of states, there is no way for both partners to become legal parents to their children.").

170. *See* Kristin Bullock, Comment, *Applying* Marvin v. Marvin *to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1031 (1992) ("Forced into a nonmarital status, same-sex cohabitants are left without the legal distribution of property upon separation or death that comes automatically with marriage." (footnote omitted)).

171. *See* J. Thomas Oldham, *Lessons from* Jerry Hall v. Mick Jagger *Regarding U.S. Regulation of Heterosexual Cohabitants or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1411 (2001) ("[I]n most states cohabitants have no 'status'-like rights, regardless of the duration of the cohabitation or whether the relationship was childless or minor children were in the household, an

That states differ about the best approaches to these issues is unsurprising. Not only might some states consider factors that other states do not when deciding whether to pass particular legislation, but states will also differ about how heavily to weigh certain factors compared to others. The difficulty pointed to here is not that states might vary (within constitutionally prescribed limitations), but that the marriage amendments may well be construed in ways that were not understood at the time they were passed and now may preclude state legislatures from acting in ways that would promote local public policy.

It is fair to suggest that there is always a danger that state constitutional amendments will be interpreted in unforeseen ways, which is simply the chance that electorates take when voting for such amendments. Yet, at least in some cases, the marriage amendments were advertised as *not* doing exactly what the state supreme courts have construed them to do.[172] But that may mean that in the frenzy to prevent same-sex couples from marrying,[173] the state constitutions will have been amended in ways that not only have failed to achieve the primary task of precluding same-sex marriage (because of federal constitutional guarantees), but will now prevent the legislatures from responding to changing demographics and serving the needs of both same-sex and different-sex non-marital couples and their families.

IV. CONCLUSION

Various states have marriage amendments in their constitutions. As a general matter, they were designed to prevent the states from recognizing or giving effect to same-sex marriages wherever celebrated. Many amendments did not solely focus on marriage, but in addition privileged marriage over non-marital relationships (defined in sex-neutral terms).

Obergefell renders some state constitutional amendments void and of no effect. However, others will likely be viewed as having no legal effect only insofar as they preclude the celebration or recognition of same-sex marriages, but will still be operative with respect to privileging marriage over other types of relationships.

'unmarried' couple can cohabit for a long period and raise children and still have no rights or obligations (other than child support) when the relationship ends.").

172. *See supra* note 129 and accompanying text (discussing how the construction of the Michigan amendment has conflicts with what the voters were told it would do).

173. *See supra* notes 5–8 and accompanying text (outlining those states with constitutions that prohibit recognition of same-sex marriage and marriage-like relationships). Each of these state constitutional amendments precluded the celebration or recognition of same-sex marriages.

Perhaps marriage should be privileged over other kinds of relationships as a matter of public policy. Perhaps not. But even so, it is not at all clear that marriage should be privileged in exactly the ways that it has been privileged historically. Several state legislatures are or will be constrained by their state marriage amendments and precluded from according various benefits and burdens to non-marital couples, even if doing so would help the couples, their families, and society as a whole. *Obergefell* has removed one of the pernicious effects of the state marriage amendments. Regrettably, in various states, other pernicious effects will likely continue unabated with no end in sight.