

ABSTRACT

THE LAW OF UNINTENDED CONSEQUENCES: The Far-Reaching Effects of Same-Sex Marriage Ban Amendments

In 2004, thirteen states passed same-sex marriage ban amendments in response to a Massachusetts ruling from the previous year that sanctioned marriage for gay couples. Most of the amendments contained two prongs that defined marriage and also prohibited legal recognition of unmarried relationships in an attempt to avoid marriage substitutes, such as civil unions

These amendments not only blatantly discriminate against same-sex couples by barring them from marriage, but the amendments also insidiously cause further damage by using undefined and ambiguous language capable of discriminating against gays and lesbians in ways not admitted by the proponents and not intended by the voters.

One such unintended consequence is occurring in the State of Ohio where the Amendment is being interpreted to exclude both homosexual and heterosexual unmarried couples from the state's domestic violence laws. Several state courts have held that the domestic violence laws conflict with the recently-enacted Amendment by unlawfully recognizing a legal status for unmarried couples.

This Note will address the duplicity of marriage amendments and discuss the aftermath as it is unfolding for domestic violence victims in Ohio. While the courts are unlikely to allow this unintended consequence affecting domestic violence victims to proceed, it is unfortunate that the intended consequence of intolerance towards gays will continue.

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“Injustice anywhere is a threat to justice everywhere.” – Dr. Martin Luther King, Jr.

I. INTRODUCTION

What does same-sex marriage have to do with domestic violence? Dozens of domestic violence victims in Ohio are asking themselves that very question. In 2004, Ohio passed a same-sex marriage ban amendment that not only eroded equality for gays and lesbians, but also eliminated the rights of unmarried domestic violence victims – both gay and straight.

The citizens of Ohio got more than they bargained for when they passed the Marriage Amendment¹ (hereafter referred to as the “Amendment”). Like many of the states that passed amendments in 2004,² Ohio’s Amendment has the dual purpose of restricting marriage to heterosexual couples and prohibiting the state from recognizing other types of unmarried relationships similar to marriage. The alleged purpose of the second “recognition” clause is to prevent the state from recognizing out-of-state same-sex marriages or civil unions.³ However, the clause is written so broadly and ambiguously that it is capable of discriminating against gays and lesbians in ways not admitted by the proponents and not intended by the voters.

This Note will focus on one such consequence where the Amendment is being interpreted to exclude both homosexual and heterosexual unmarried couples from the state’s domestic violence laws. Several courts have held Ohio’s domestic violence laws conflict with the recently-enacted Amendment by unlawfully extending protection to unmarried cohabitants “living as a spouse.”⁴

This distorted interpretation must fail and the Ohio Supreme Court should ultimately conclude the domestic violence laws do not conflict with the Amendment. Unfortunately, the broader problem of having a vague and discriminatory marriage amendment enshrined in the state constitution will remain and will inevitably lead to other consequences unintended by the voters.⁵

¹ OHIO CONST. art. XV, § 11. The Marriage Amendment, referred to as “Issue 1” on the ballot, was adopted by initiative petition on November 2, 2004 and became effective on December 2, 2004. It reads: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”

² Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah.

³ State v. Burk, No. 86162, 2005 WL 3475812, at ¶ 18 (Ohio Ct. App. Dec. 20, 2005). See also Ohio Campaign to Protect Marriage, The Facts about Issue 1, http://www.ohiomarriage.com/Facts_About_Issue_1.shtml (last visited Apr. 3, 2006).

⁴ See *infra* Part V.

⁵ See *infra* Part V.D.

Amendments that bar homosexuals from marriage are destructive enough by themselves, but the proponents of these measures are taking their intolerance one step further by trying to dismantle any legal rights that same-sex couples have managed to achieve for themselves. Only a handful of states provide legal recognition for same-sex relationships,⁶ which leaves same-sex couples forced to create their own private contractual agreements to protect themselves and their families. Proponents seek to strip away these rights by expanding the marriage amendments to prevent the states from recognizing any other legal relationships formed by gays and lesbians.

The proponents, however, face a quandary over how to achieve this goal. The United States Constitution has a pesky Equal Protection Clause⁷ that prohibits discrimination against a class of citizens when the law is not rationally related to a legitimate state interest.⁸ Unfortunately for the proponents of these measures, animosity does not suffice as a legitimate purpose.⁹ Thus, the proponents resort to using vague language to hide their discriminatory intent – all the while masking their true intent from voters and attempting to avoid a constitutional challenge.

The result of this contortionist act is bad law. The proponents' attempt to enact language that discriminates without outright discriminating has led to poorly-drafted marriage amendments that are subject to perverse interpretations. As demonstrated in Ohio, these broad amendments will inevitably lead to unintended consequences.

This Note will address the duplicity and inherent danger of the marriage amendments, and discuss the aftermath as it is unfolding for domestic violence victims in Ohio. Part II of this Note gives a brief overview of the current status of same-sex marriage in the United States, at both the state and federal level. Part III includes a general discussion about same-sex marriage ban amendments, and explains why the states have been enacting them. Part IV discusses Ohio's Marriage Amendment in detail, including analysis of the Amendment language and the intent behind its enactment. Part V considers the unintended consequences of the Amendment as it pertains to Ohio's domestic violence laws. This section examines the domestic violence cases at issue, with analysis showing the Amendment should not be interpreted to invalidate the domestic violence laws. Part VI provides general commentary on the consequences of these ambiguous marriage amendments and reflects on the future of marriage amendments.

⁶ Massachusetts is the only state that allows gay marriage. The following states have some form of legal recognition for same-sex relationships, such as civil unions or domestic partnerships: California, Connecticut, Hawaii, Maine, New Jersey, and Vermont. See *infra* Part II.B-C.

⁷ U.S. CONST. amend. XIV, § 1.

⁸ *Romer v. Evans*, 517 U.S. 620, 631-33 (1996).

⁹ *Id.* at 634 (holding that laws “born of animosity toward the class of persons affected” cannot constitute a legitimate governmental interest); *Lawrence v. Texas*, 539 U.S. 558, 582-583 (2003) (O’Conner, J., concurring) (finding that “moral disapproval of this group [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause”).

II. SAME-SEX MARRIAGE

A. Federal Law

State marriage laws were typically considered under the purview of the states¹⁰ until 1996 when President Clinton signed the federal Defense of Marriage Act (DOMA).¹¹ Congress enacted DOMA in response to a Hawaii Supreme Court ruling¹² finding the state's same-sex marriage ban unconstitutional, which Congress feared would lead to same-sex marriage in Hawaii and recognition of same-sex marriage across the country.¹³ DOMA defines marriage at the federal level as between one man and one woman,¹⁴ and creates an exception to the Full Faith and Credit Clause¹⁵ of the United States Constitution by permitting states to refuse to recognize same-sex marriages granted in other states.¹⁶ It is arguable that DOMA violates the Full Faith and Credit Clause of the United States Constitution, which requires all of the states recognize the records and judicial proceedings of the other states.¹⁷ To ensure DOMA's viability, President George W. Bush publicly supports a federal amendment to the United States Constitution banning same-sex marriage,¹⁸ and the 109th Congress is considering a constitutional amendment to do so.¹⁹

¹⁰ Dominick Vetri, *The Gay Codes: Federal and State Laws Excluding Gay & Lesbian Families*, 41 WILLAMETTE L. REV. 881, 891 (2005).

¹¹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹² *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). See *infra* Part III.A. for discussion of *Baehr*.

¹³ See Troy King, *Same-Sex Couples: Defining Marriage in the Twenty-First Century: Marriage Between a Man & a Woman: A Fight to Save the Traditional Family One Case at a Time*, 16 STAN. L. & POL'Y REV. 57, 65 (2005) (describing the impetus for the federal Defense of Marriage Act).

¹⁴ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7).

¹⁵ U.S. CONST. art. IV, § 1 (which reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

¹⁶ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C).

¹⁷ See George W. Bush, Remarks by the President: President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (admitting that DOMA could be struck down by the courts.). For arguments that DOMA violates the United States Constitution, see generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Mark Strasser, "Defending" Marriage in Light of the *Moreno-Cleburne-Romer-Lawrence* Jurisprudence: Why DOMA Cannot Pass Muster After *Lawrence*, 38 CREIGHTON L. REV. 421 (2005); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 (2004). But see Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365 (2005) (arguing that Congress has the authority to enact DOMA under the Effects Clause of the Full Faith and Fair Credit Clause).

¹⁸ See George W. Bush, State of the Union Address (Jan. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/01/2004120-7.html> (warning that "activist judges" may redefine marriage, in which case a constitutional marriage amendment would be required); George W. Bush, Remarks by the President: President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (arguing that a constitutional amendment is necessary to "protect marriage in America").

¹⁹ Marriage Protection Amendment, Sen. Wayne Allard (R-CO). S.J. Res. 1, 109th Cong. (2005). The text reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither

B. State Law

Massachusetts is currently the only state granting full marriage rights to same-sex couples. The Massachusetts Supreme Court forced the state legislature to permit same-sex marriage after its 2003 ruling in *Goodridge v. Department of Public Health*.²⁰ *Goodridge* held that denying same-sex couples the right to marry violated both equal protection and due process under the state constitution,²¹ which “forbids the creation of second class citizens.”²² The court decided the marriage ban “arbitrarily” denied access to the benefits and protections of marriage provided by the state²³ and concluded the marriage restriction was “rooted in persistent prejudices against . . . homosexual[s].”²⁴ Finding no relation between the ban and the state’s alleged purpose of protecting children and families, the court found permitting same-sex couples to marry actually achieves the state’s goal of preserving stable families and creating a secure child-rearing environment.²⁵ Massachusetts has granted over 6,600 marriage licenses since May 2004, with the state suffering no visible detrimental effects.²⁶

The *Goodridge* decision only benefits residents of Massachusetts. The state supreme court recently held that out of-state couples may not be married in Massachusetts if their home state would prohibit the marriage.²⁷ This essentially restricts same-sex marriage to the citizens of Massachusetts because the other 49 states prohibit gay couples from marrying. Forty-five states have either statutory Defense of Marriage Acts (commonly referred to as “mini-DOMAs”) or state constitutional amendments restricting marriage to a man and a woman.²⁸ The

this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.” For a discussion on the constitutionality of a federal marriage amendment, see Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487 (2005).

²⁰ *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

²¹ *Id.* at 961.

²² *Id.* at 948.

²³ *Id.* at 949.

²⁴ *Id.* at 968.

²⁵ *Id.* at 962-64, 969.

²⁶ See Editorial, *The Normality of Gay Marriage*, N.Y. TIMES, Sept. 17, 2005, at A14; Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

²⁷ *Cote-Whitacre v. Dep’t. of Pub. Health*, SJC-09436, 2006 WL 786227, at *4 (Mass. Mar. 30, 2006) (holding state law prohibits the state from granting marriage licenses to non-residents where the marriage would be prohibited by the non-residents’ home jurisdiction).

²⁸ Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. See Kavan Peterson, *Washington Gay Marriage Ruling Looms*, Stateline.org, Mar. 29, 2005 (updated Nov. 23, 2005), <http://www.stateline.org/live/ViewPage.action?siteNodeId=137&languageId=1&contentId=20695>.

remaining four states²⁹ do not have specific laws barring same-sex marriage, but the restriction is implicit by use of the terms “husband” and “wife” in the laws.³⁰

C. Marriage Substitutes: Civil Unions and Domestic Partnerships

A handful of states have created alternatives to marriage in an effort to give same-sex couples the same rights and responsibilities of marriage without actually calling it “marriage.” The Vermont Legislature was forced to create civil unions³¹ in 1999 by a state supreme court decision holding the state constitution required Vermont to extend the same benefits and protections of heterosexual marriage to same-sex couples.³² The Connecticut Legislature, in contrast, voluntarily enacted its civil union act in 2005.³³ California,³⁴ Hawaii,³⁵ Maine,³⁶ and New Jersey³⁷ all have some form of domestic partnership benefits that provide same-sex couples with legal rights.

While these legal relationships offer state benefits similar to marriage, they fall far short of true equality under the law.³⁸ Quasi-marital relationships fail because they are not recognized outside the borders of the state and they do not entitle the couple to the 1,138 federal laws and policies³⁹ available to married couples.⁴⁰ While certainly better than no legal protection at all, marriage substitutes continue to bestate-sanctioned disparate treatment based on a person’s identity.⁴¹

²⁹ New Jersey, New Mexico, New York and Rhode Island. See Kavan Peterson, *Washington Gay Marriage Ruling Looms*, Stateline.org, Mar. 29, 2005 (updated Nov. 23, 2005), <http://www.stateline.org/live/ViewPage.action?siteNodeId=137&languageId=1&contentId=20695>.

³⁰ Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 *BYU J. PUB. L.* 569, 575 & n.25 (2004).

³¹ VT. STAT. ANN. tit. 15, §§ 1201-1207 (2006).

³² *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999).

³³ CONN. GEN. STAT. ANN. § 46b-38aa to 38oo (West 2006).

³⁴ CAL. FAM. CODE § 297-299.6 (West 2006) (called “domestic partners”).

³⁵ HAW. REV. STAT. § 572C-1 to C-7 (2006) (called “reciprocal beneficiaries”).

³⁶ ME. REV. STAT. ANN. tit. 22, § 2710 (2006) (called “domestic partners”).

³⁷ N.J. STAT. ANN. § 26:8A-1 to A-12 (West 2006) (called “domestic partnership”).

³⁸ See *In Re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (advisory opinion holding that a proposed bill to create civil unions in response to the *Goodridge* decision does not comply with the state’s equal protection clause and is an “unconstitutional, inferior, and discriminatory status for same-sex couples”). See also Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage Versus Unions*, 54 *DEPAUL L. REV.* 783 (2005) (arguing that civil unions are not “separate but equal” to marriage).

³⁹ U.S. GEN. ACCOUNTING OFFICE, *DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT*, GAO-04-353R (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

⁴⁰ State-sanctioned same-sex marriage, such as that permitted in Massachusetts, also fails to provide same-sex couples with full marriage equality. The federal Defense of Marriage Act bars same-sex marriages from receiving federal benefits, and allows other states to refuse to recognize out-of-state same-sex marriages. Dominick Vetri, *The Gay Codes: Federal and State Laws Excluding Gay & Lesbian Families*, 41 *WILLAMETTE L. REV.* 881, 885-87 (2005).

⁴¹ But see Nancy K. Kubasek, Alex Frondorf & Kevin J. Minnick, *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 *J. LAW & PUB. POL’Y* 229 (2004) (defending civil unions as an incremental step towards equality).

III. SAME-SEX MARRIAGE BAN AMENDMENTS

A. Background: Setting the National Stage for Passage of Marriage Amendments

The State of Hawaii was the first state to resort to amending its state constitution to ensure that its statutory marriage laws would remain intact. The Hawaii Supreme Court ruled in 1993 that Hawaii's law restricting marriage to opposite sex couples was discriminatory based on sex,⁴² but the Hawaii Supreme Court later found the case moot⁴³ after the voters of Hawaii approved an amendment in 1998 granting the legislature the authority to restrict marriage to opposite-sex couples.⁴⁴

Alaska faced a similar situation in 1998 when a lower court found the right to choose a life partner was a fundamental right triggering a strict scrutiny standard.⁴⁵ Before further court proceedings could determine if the state had a compelling interest, the voters of Alaska passed a referendum restricting marriage to opposite sex couples.⁴⁶

While Hawaii and Alaska amended their constitutions to circumvent judicial decrees in their own state, the State of Nebraska became the first state to enact a marriage amendment as a preemptive measure against *other states'* marriage laws. Nebraska enacted its same-sex marriage ban amendment⁴⁷ in 2000 in response to Vermont's creation of civil unions.⁴⁸

Other states soon followed Nebraska's lead after the State of Massachusetts legalized same-sex marriage in its 2003 *Goodridge* decision.⁴⁹ This ruling ignited fear in the states because they feared their own state courts would similarly find their mini-DOMAs unconstitutional, and they were also concerned about being forced to recognize out-of-state marriages, notwithstanding the federal DOMA. Thus, the states responded with a flurry of constitutional amendments in 2004 designed to stave off similar rulings in their own states.⁵⁰ All thirteen states⁵¹ with marriage amendments on the ballot in 2004 passed the measures.

⁴² Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993). For analysis claiming discrimination against gays and lesbians should be classified as "sex discrimination" and thus should receive heightened scrutiny, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994).

⁴³ Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999).

⁴⁴ HAW. CONST. art. I, § 23 (a one-sentence amendment that reads: "The legislature shall have the power to reserve marriage to opposite-sex couples.").

⁴⁵ Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

⁴⁶ ALASKA CONST. art. I, § 25.

⁴⁷ NEB. CONST. art. I, § 29.

⁴⁸ See Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 229 (2004/2005).

⁴⁹ Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). See *supra* Part II.B.

⁵⁰ The voter information pamphlet for the Ohio Amendment specifically stated that the Amendment would prohibit judges in Ohio from redefining marriage like the judges of the Massachusetts Supreme Court. THE OHIO BALLOT BD., OHIO ISSUES REPORT, STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004

B. Summary of State Marriage Amendments

A total of nineteen states have amended their state constitutions to restrict marriage to opposite-sex couples.⁵² The amendments generally fall into two categories: narrow amendments that solely define marriage as between heterosexual couples, and broad amendments that contain a second clause restricting recognition of homosexual relationships.⁵³ Six of the nineteen states have the narrow definitional amendments.⁵⁴ The remaining states, including Ohio, went further by enacting broad amendments that prohibit state recognition of all other marital-like relationships.⁵⁵ For the sake of brevity and clarity, this Note will refer to these second clauses as “recognition” clauses.⁵⁶

The recognition clauses were enacted to prevent the states from recognizing out-of-state same-sex marriages and other quasi-marital relationships, such as Vermont’s civil unions or California’s domestic partnerships.⁵⁷ Of the twelve states that passed recognition clauses, only two states use the actual term “same-sex” when describing the type of prohibited relationships.⁵⁸ The earliest state to enact such an amendment was Nebraska, and a district court subsequently struck it down based on equal protection grounds because the recognition clause singled out same-sex relationships.⁵⁹

GENERAL ELECTION, at 4 (2004), *available at* <http://www.sos.state.oh.us/sos/electionsvoter/2004/OIR2004.pdf>. *See also* The Ohio Campaign to Protect Marriage, Mission Accomplished!, <http://www.ohiomarriage.com> (last visited Apr. 3, 2006) (The Ohio Campaign to Protect Marriage, the leading proponent of Ohio’s Amendment, attributed the success of the marriage amendments to the *Goodridge* decision by stating: “In an odd sense, we thank the Massachusetts Supreme Judicial Court for what they did in attempting to force their morality on the rest of the nation. Homosexual activists have over played their hands and it appears to be the very catalyst that has awakened the church . . .”).

⁵¹ Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah.

⁵² Alaska, Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah.

⁵³ Hawaii does not fall into either category. Hawaii’s amendment was unique in that it did not actually define marriage, but rather granted power to the state legislature to “reserve marriage to opposite-sex couples.” For a comparison of the state marriage amendments, *see* Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221 (2004/2005).

⁵⁴ Alaska, Mississippi, Missouri, Montana, Nevada, and Oregon.

⁵⁵ Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, Texas, and Utah.

⁵⁶ *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623 (2004) (using the term “recognition law” for state laws that restrict recognition of other state-sanctioned same-sex relationships). *See also* Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221 (2004/2005) (referring to the broad amendments as “substance amendments” and further classifying subsets as either a “relationship model,” “recognition model,” or “hybrid model”).

⁵⁷ *State v. Burk*, No. 86162, 2005 WL 3475812, at ¶ 18 (Ohio Ct. App. Dec. 20, 2005). *See also* Ohio Campaign to Protect Marriage, The Facts about Issue 1, http://www.ohiomarriage.com/Facts_About_Issue_1.shtml (last visited Apr. 3, 2006).

⁵⁸ Georgia and Nebraska.

⁵⁹ *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (appeal pending).

Ohio⁶⁰ and the other states enacting marriage amendments in 2004 took a lesson from the pending Nebraska case⁶¹ and refrained from using homosexual-specific language in their amendments by referring to either “unmarried” relationships⁶² or using some other neutral language.⁶³ This effort to hide their discriminatory intent to avoid a similar constitutional challenge resulted in overbroad, sweeping recognition clauses that are responsible for the unintended consequences stemming from the marriage amendments, as demonstrated in Ohio.

IV. OHIO’S MARRIAGE AMENDMENT

A. Ohio’s Existing Law Relating to Same-Sex Marriage

The definition of marriage was already codified in state law when the voters passed the Marriage Amendment in 2004. Ohio’s existing mini-DOMA statute had the dual purpose of limiting marriage to one man and one woman,⁶⁴ and prohibiting state recognition of out-of-state same-sex marriages or other similar legal relationships.⁶⁵

The statute specifically prohibited extending “statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes.”⁶⁶ However, the legislature was wise enough to include instruction that this prohibition would not be construed to:

- (a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons . . . ;
- (b) Affect the validity of private agreements that are otherwise valid under the laws of this state.⁶⁷

The legislature also included legislative intent to explain the purpose of the mini-DOMA was to define marriage and to ensure that “substitutes for marriage,” such as Vermont’s civil unions, are not to be recognized by the state.

⁶⁰ Ohio’s recognition clause may still be subject to some of the same arguments raised in *Bruning*, notwithstanding the attempt to draft a non-discriminatory amendment by avoiding the term “same-sex relationship.” See *infra* Part.IV.B.2.

⁶¹ *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (appeal pending).

⁶² Arkansas, Kentucky, Louisiana, Ohio, and Oklahoma.

⁶³ Kansas (“No relationship, other than marriage, shall be recognized”); Michigan (“[Opposite-sex marriage] shall be the only agreement recognized”); North Dakota (“No other domestic union, no matter how denominated, may be recognized”); Texas (“[The state] may not create or recognize any legal status identical to or similar to marriage.”); and Utah (same as North Dakota).

⁶⁴ OHIO REV. CODE ANN. § 3101.01(A).

⁶⁵ *Id.* at § 3101.01(C)(2),(4).

⁶⁶ *Id.* at § 3101.01(C)(3).

⁶⁷ *Id.* at § 3101.01(C)(3)(a),(b).

It also reiterated that there was no intent to affect other benefits enjoyed by all persons, either married or unmarried, same-sex or opposite-sex.⁶⁸

These caveats ensured that the statute would cause no more damage other than its intended purpose of restricting marriage to heterosexual couples. The statute and the legislative intent clearly state that the statute was not intended to affect other relationships.

Oddly enough, the proponents of the Ohio Marriage Amendment did not use this established statutory language already enacted by the legislature, even though their stated purpose was the same. Instead, the proponents chose to use untested language, which left the Amendment open to interpretation – and lawsuits.

B. Analysis of Ohio's Amendment Language

Ohio's Amendment not only defines marriage, but also contains a sweeping second clause that restricts the state's recognition of unmarried relationships. The Amendment reads as follows:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁶⁹

1. Ambiguous Language

The Amendment uses vague, undefined terms that have no established legal meaning in Ohio. No one really knows what types of relationships “intend” to “approximate the design, qualities, significance or effect of marriage.” Qualities of marriage? Effect of marriage? These words set a subjective standard that could be interpreted to abolish any type of relationship that is normally considered a natural benefit of marriage or has “overlapping factual characteristics in common with marriage.”⁷⁰ For instance, spouses inherit property from each other intestate; thus, inheriting property could be defined as an effect or quality of marriage. An unmarried couple entering into a private contractual agreement to inherit each other's property upon their deaths could easily be interpreted as intending to approximate the effect of marriage. If the aggrieved next of kin decided to challenge this private agreement, the Amendment could render the private contract unconstitutional as a court might hesitate to enforce an agreement between unmarried persons that “intends to approximate the design, qualities, significance or effect of marriage.” The same could be true of

⁶⁸ H.B. 272, § 3, 125th Gen. Assem., Reg. Sess. (Ohio 2004).

⁶⁹ OHIO CONST. art. XV, § 11.

⁷⁰ Brief of Appellant at 5, *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

inheritance, joint property rights,⁷¹ powers of attorney, adoptions, custody agreements, medical decision-making, health benefits: any type of legal benefit normally granted to married couples is at risk of being annihilated for unmarried couples.

2. Comparison to Nebraska's Unconstitutional Amendment

The district court in *Citizens for Equal Protection, Inc. v. Bruning*⁷² found Nebraska's amendment that prohibited recognition of same-sex relationships "similar" to marriage to be overly broad because it "potentially prohibits or at least inhibits people, regardless of sexual preference, from entering into numerous relationships or living arrangements that could be interpreted as a same-sex relationship 'similar to' marriage."⁷³ Nebraska's amendment was restricted to same-sex relationships and the court still found it to be overly broad.⁷⁴ In comparison, Ohio's convoluted recognition clause that prohibits recognition of unmarried relationships that intend to "approximate the design, qualities, significance or effect of marriage" is certainly "both exceedingly vague and overly broad"⁷⁵ because it sweeps in *any unmarried* relationship that could be considered similar to marriage.

Similar to Nebraska, Ohio's Amendment is both too narrow and too broad in that it does not address the stated purpose of the amendment, which was to "preserve marriage."⁷⁶ It is too narrow in that it does not prevent other "potential threats to . . . marriage, such as divorce."⁷⁷ The Amendment is also too broad in that "it reaches not only same-sex 'marriages,' but many other legitimate associations, arrangements, contracts, benefits and policies."⁷⁸

Bruning's conclusion that there was an "inadequate fit" between Nebraska's stated goal of preserving marriage and the "breadth"⁷⁹ of the amendment is also applicable to Ohio's Amendment. The goal of promoting and protecting family stability would be advanced by "expanding the rights and creating responsibilities of registered domestic partners."⁸⁰ Instead, Ohio's Amendment, like Nebraska's, actually frustrates

⁷¹ State v. Rodgers, 827 N.E.2d 872, 880 (Ohio Ct. Com. Pl. 2005), *aff'd*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006) (discussing the possibility that the Amendment could hypothetically affect business partnerships that grant joint property rights because the business partners are in an unmarried relationship that "intends to approximate the qualities of marriage" by granting joint tenancy rights).

⁷² *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005) (appeal pending).

⁷³ *Id.* at 995.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ THE OHIO BALLOT BD., OHIO ISSUES REPORT, STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION, at 4 (2004), *available at* <http://www.sos.state.oh.us/sos/electionsvoter/2004/OIR2004.pdf>.

⁷⁷ *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 1002 (D. Neb. 2005) (appeal pending).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1004.

⁸⁰ *Id.*

this goal by preventing couples from forming stable relationships with incumbent legal responsibilities.⁸¹

C. Proponents Concealed True Intent and Effect of the Amendment

The proponents use “protecting marriage” as an emotional pretext to enact purposefully vague amendments that hide their far-reaching implications from the voters.⁸² While the true intent of the proponents is to discriminate against gays,⁸³ they cannot allow this hidden agenda to manifest itself in the words of the amendment.

1. Proponents’ Intent Behind the Amendment

Citizens for Community Values (CCV), a conservative Cincinnati group associated with Focus on the Family, sponsored the Amendment and was the driving force behind its enactment.⁸⁴ The President of CCV⁸⁵ was also the Chairperson of the Ohio Campaign to Protect Marriage, the political action committee instrumental in passing the Amendment.⁸⁶ While publicly these groups may have implied the Amendment was about “protecting marriage”⁸⁷ and was not about attacking gays, privately their Web sites reveal a far more vicious intent. CCV’s Web site has a lengthy diatribe about the evils of homosexuality, wherein it calls homosexuality, along with rape, incest, pedophilia, and bestiality, “a distortion of God’s intention for human sexuality.”⁸⁸ It argues people have a right to treat gays differently by calling it “legitimate discrimination” and says “homosexual behavior is unhealthy and destructive to the individual, to families, and thus to communities and to society as a whole.”⁸⁹ CCV complains that society has “succumbed” to the “gay agenda” by granting domestic partner benefits and including sexual orientation in employment discrimination laws.⁹⁰

⁸¹ *Id.*

⁸² See Thomas Oliphant, Op-Ed, *The Gay Marriage Deception*, BOSTON GLOBE, Nov. 7, 2004, at D11 (discussing how the Amendment was used as a cover for stripping gays of contractual rights).

⁸³ Wilson Huhn, *Ohio Issue 1 Is Unconstitutional*, 28 N.C. CENT. L.J. 1, 16 (2005).

⁸⁴ Brief Amicus Curiae of Citizens for Community Values, Urging Reversal at 1, *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005). See also Michelle Goldberg, *Homosexuals Are Hellbound!*, SALON.COM, Oct. 18, 2004 (describing Citizens for Community Values’ relationship to the Amendment); Alan Johnson, *Bill Would End Domestic-Violence Loophole: Issue 1 Created Disparity in Law for the Unmarried*, COLUMBUS DISPATCH, Apr. 20, 2005, at 1C (same).

⁸⁵ Phil Burress.

⁸⁶ Brief Amicus Curiae of Citizens for Community Values, Urging Reversal at 1, *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005).

⁸⁷ THE OHIO BALLOT BD., OHIO ISSUES REPORT, STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION, at 4 (2004), available at <http://www.sos.state.oh.us/sos/electionsvoter/2004/OIR2004.pdf> (The marriage amendment on Ohio’s November 2004 ballot was called the “Marriage Protection Amendment” by its proponents, the Ohio Campaign to Protect Marriage. The purpose of the Amendment was to “preserve” marriage as between one man and one woman, and to prevent marriage from being “alter[ed] and undermine[d].”).

⁸⁸ Citizens for Community Values, “The Homosexual Issue” Where Do We Stand? And Why?, http://www.ccv.org/Homosexuality-Where_CCV_Stand.htm (last visited Apr. 3, 2006).

⁸⁹ *Id.*

⁹⁰ *Id.*

The article ends by asking its readers to join CCV by "resisting, on every front, the organized effort to normalize homosexual behavior in our society."⁹¹

Other proponents of the Amendment did not hide behind their Web sites, but rather publicly admitted their true feelings about homosexuality. A vice chairman of the conservative Constitution Party of Ohio, another proponent of the measure, stated during a public debate on the issue that homosexuality is a sin that "merits discrimination" and that he supported the "criminalization of homosexuality."⁹²

2. Proponents Purposefully Obscured Effect of the Amendment from Voters

The language of Ohio's Amendment did not "fairly inform voters of the impact of the amendment beyond marriage. It use[d] vague language that obscure[d] the fact that certain protections for same-sex couples, such as [domestic partnerships], would be banned by the amendment."⁹³ This prevented Ohio voters from casting "an intelligent and informed ballot."⁹⁴

The voter information guide provided to Ohio voters included one page each of arguments in support of and in opposition to the Amendment.⁹⁵ The Ohio Campaign to Protect Marriage provided the arguments in support and stated the Amendment would: 1) define marriage as one man and one woman; 2) exclude homosexual and bigamous marriages; 3) prevent Ohio courts from forcing the state to recognize same-sex marriage; and 4) prevent the government from using tax dollars "to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage."⁹⁶ Presumably this last statement refers to domestic partnership benefits, but the Ohio Campaign to Protect Marriage did not clearly define what it meant. It also stated the Amendment would not "interfere in any way with the individual choices of citizens as to the private relationships they desire to enter and maintain" or interfere with government benefits awarded to individuals in homosexual relationships as long as the benefits are not being granted because the relationship imitates marriage.⁹⁷

Several of these comments appear to refer to domestic partnerships, but in staying true to the ambiguous nature of the Amendment, the proponents hid behind the elusive legalese of the measure and did not clearly identify if or how it would specifically

⁹¹ *Id.*

⁹² Michelle Goldberg, *Homosexuals Are Hellbound!*, SALON.COM, Oct. 18, 2004; Alan Johnson, *Homosexuality Should Be Crime, Proponent of State Issue 1 Says*, COLUMBUS DISPATCH, Oct. 9, 2004, at 5B.

⁹³ Brief of Interested Parties, Advisory Opinion to the Attorney General Re: Florida Marriage Protection Amendment at 2, No. SC05-1563 (Fla. 2005), *available at* http://www.ncrlrights.org/cases/pdf/FL_ballot_initiative_opnbrief.pdf.

⁹⁴ *Id.* at 25.

⁹⁵ THE OHIO BALLOT BD., OHIO ISSUES REPORT, STATE ISSUE BALLOT INFORMATION FOR THE NOVEMBER 2, 2004 GENERAL ELECTION (2004), at 4-5, *available at* <http://www.sos.state.oh.us/sos/electionsvoter/2004/OIR2004.pdf>.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.*

affect or limit domestic partner benefits, or any other legal rights for same-sex couples. The Ohio Campaign to Protect Marriage did openly admit its intent to prohibit domestic partnership rights on its Web site,⁹⁸ yet it failed to clearly inform the voters of that agenda in the voter pamphlet.

The proponents' refusal to come clean about the elimination of domestic partnership rights in the voter pamphlet suggests they were making calculated attempts to hide the unpopular consequences of the Amendment from the public. The proponents' hesitancy to reveal the truth may have been because the majority of the public favors legal rights for gays and lesbians. Exit polls in the 2004 election showed that 60% of the public supported some form of legal recognition for same-sex couples, either in the form of same-sex marriage (25%) or civil unions (35%).⁹⁹ A Pew Research Center survey in August 2004 revealed that 80% of Americans were supportive of legal recognition for gays (32% supported same-sex marriage and 48% supported civil unions).¹⁰⁰ With these statistics, the proponents probably feared the Amendment would fail if they fully disclosed the purpose as stripping gays and lesbians of contractual and domestic partnership rights in addition to banning same-sex marriage.

The proponents' duplicity is further demonstrated by their actions taken after the passage of the Amendment. The attorney who drafted Ohio's Marriage Amendment has sued an Ohio university to stop its employee domestic partner benefits program.¹⁰¹ Again, this was clearly the proponents' intent from the beginning, yet they were not candid with the voters about it.

More disturbing is the proponents' broad application of the Amendment after its passage. Citizens for Community Values has filed an amicus brief in one of the cases challenging the constitutionality of Ohio's domestic violence law, arguing that the Amendment does indeed render Ohio's domestic violence law unconstitutional as applied to unmarried cohabitants who are "living as a spouse."¹⁰² CCV stated that "an exact duplication of marriage by non-marital relationships . . . is not necessary in order to trigger the prohibition of the amendment. The Marriage Amendment does not call for any more than *an intention* to approximate marriage in any one of the announced respects."¹⁰³ (Emphasis added.) It also stated the Amendment prohibits "*the very legal recognition* of the [unmarried] relationships in the first place, *for any purpose*."¹⁰⁴ (Second emphasis added.) This is further proof that the Amendment was not just about

⁹⁸ Ohio Campaign to Protect Marriage, The Facts About Issue 1, <http://www.ohiomarriage.com> (last visited Apr. 3, 2006).

⁹⁹ CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Apr. 3, 2006).

¹⁰⁰ THE PEW FORUM ON RELIGION AND PUB. LIFE, THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES (2005).

¹⁰¹ *Brinkman v. Miami Univ.* (Ohio Ct. Com. Pl. Butler County Nov. 22, 2005). See *infra* Part V.D for discussion of this lawsuit.

¹⁰² Brief Amicus Curiae of Citizens for Community Values, Urging Reversal at 5, *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005).

¹⁰³ *Id.* at 6-7.

¹⁰⁴ *Id.* at 8.

defining marriage. The proponents of this measure seemingly want the vague language construed as broadly as possible to reach into the lives of gays and lesbians in ways beyond simply restricting marriage.

V. UNINTENDED CONSEQUENCES OF OHIO'S MARRIAGE AMENDMENT

Soon after the Amendment took effect in December 2004, unmarried defendants charged with domestic abuse began filing motions to dismiss the domestic violence charges. Dozens of defendants have challenged the constitutionality of Ohio's domestic violence laws as applied to unmarried couples.¹⁰⁵ They allege use of the term "living as a spouse," which is used to define household members for purposes of the domestic violence law, violates the state constitution by creating a legal status for unmarried couples that approximates marriage in violation of the recently-enacted Amendment.¹⁰⁶

In order to fully discuss this distortion of the Marriage Amendment and its implications, it is important to understand the unique problems posed by domestic violence and to review Ohio's specific domestic violence law.

A. Background on Domestic Violence

Ohio established criminal and civil remedies for the crime of domestic violence in 1979.¹⁰⁷ Prior to that, domestic abuse had been treated as a private family matter and often not viewed as a crime.¹⁰⁸ Domestic violence occurs when one partner exerts physical and emotional control over his or her intimate partner in a pattern of abuse through the use of fear, humiliation, economic dependency, verbal or physical assaults, and the threat of future violence.¹⁰⁹ Domestic violence occurs in same-sex relationships

¹⁰⁵ See *infra* Part V.C.

¹⁰⁶ This creative defense was discovered by a law clerk working in the Public Defender's Office that was defending Frederick Burk, one of the first defendants to use this argument. See Kerry Howley, *Assault Ambiguity: Marriage Bans and Domestic Abuse; Ohio Marriage Law*, REASON, July 1, 2005, at 12(2); *State v. Burk*, No. CR 462510, 2005 WL 786212, at ¶ 25 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005)

¹⁰⁷ STANLEY MORGANSTERN & BEATRICE SOWALD, *BALDWIN'S OHIO PRACTICE OHIO DOMESTIC RELATIONS LAW* § 5:1 (Thomson/West 2005).

¹⁰⁸ See *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099, at *4-5 (Ohio Ct. Com. Pl. Apr. 18, 2005) (describing the history of domestic abuse and the hesitancy of the police to arrest batterers, which prompted the state to enact the crime of domestic violence); Brief of Appellant at 28, *State v. Burk*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (describing the "Rule of Thumb," which permitted husbands to beat their wives as long as the rod was "no larger than the diameter of his thumb"); Brief of Appellant at 28 n.7, *State v. Burk*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (citing *State v. Black*, 1864 WL 1041 (N.C. 1864)) (explaining that in the 1800's, a North Carolina court specifically stated the husband was allowed to beat his wife as long as he did not inflict permanent injury or use excessive force. "[T]he law will not invade the domestic forum or go behind the curtain."); Pamela M. Jablow, Note, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1097-98 (2000) (discussing the history of domestic abuse).

¹⁰⁹ Michelle Aulivola, Note, *Gay and Lesbian Families in the 21st Century: Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 163 (2004).

at about the same rate as heterosexual relationships (25% to 33%).¹¹⁰ Gay and lesbian victims, however, suffer from an additional layer of complications not faced by their heterosexual counterparts.¹¹¹ Abusers exercise added control over victims by threatening to “out” them to their families and co-workers.¹¹² Homosexuals are often leery of an inadequate response from the police or domestic violence shelters,¹¹³ and five states limit their domestic violence laws to heterosexual couples.¹¹⁴ In contrast, Ohio courts have taken a progressive role in broadly interpreting the state’s domestic violence laws to openly include homosexual relationships.¹¹⁵

B. Ohio’s Domestic Violence Law

The Ohio Legislature recognized the “special nature” of violence in the home when drafting its domestic violence statute.¹¹⁶ The legislature created increased penalties for subsequent offenses to address the problem of recurring violence, and it authorized temporary and civil protection orders to protect victims from their intimate abusers. The legislature clearly “believed that an assault involving a family or household member deserves further protection than an assault on a stranger.”¹¹⁷

Ohio’s domestic violence laws purposefully encompass many individuals who have an intimate or familial relationship to the batterer. The law protects people from being abused by a “family or household member,”¹¹⁸ which is broadly defined to include the following persons who are residing or have resided with the abuser: a current or former spouse, a person *living as a spouse*, a parent or child of the offender, or any

¹¹⁰ Mary Beth D. Collins, Note, *Same-Sex Domestic Violence: Addressing the Issues for the Proper Protection of Victims*, 4 J.L. SOC’Y 99, 100 (2002).

¹¹¹ For in-depth analysis on the problem of same-sex domestic violence, see generally Michelle Aulivola, Note, *Gay and Lesbian Families in the 21st Century: Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162 (2004); Adele M. Morrison, *Queering Domestic Violence to “Straighten Out” Criminal Law: What Might Happen When Queer Theory and Practice Meet Criminal Law’s Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN’S STUD. 81 (2003); Tara R. Pfeifer, Comment, *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 PENN. ST. L. REV. 1251 (2005); Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93 (2005).

¹¹² Michelle Aulivola, Note, *Gay and Lesbian Families in the 21st Century: Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 164 (2004).

¹¹³ *Id.* at 164-67.

¹¹⁴ Delaware, Louisiana, Montana, North Carolina, and South Carolina. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 106 (2005).

¹¹⁵ *State v. Yaden*, 692 N.E.2d 1097, 1098, 1101 (Ohio 1997) (holding that Ohio’s domestic violence laws include same-sex couples); *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991) (same); *State v. Linner*, 665 N.E.2d 1180, 1184 (Ohio Hamilton Mun. Ct. 1996) (same).

¹¹⁶ *State v. Williams*, 683 N.E.2d 1126, 1129 (1997).

¹¹⁷ *Id.* at 1129.

¹¹⁸ The crime of domestic violence is defined as “No person shall knowingly cause or attempt to cause physical harm to a family or household member,” OHIO REV. CODE ANN. § 2919.25(A) (Baldwin 2005), and “No person shall recklessly cause serious physical harm to family or household member,” OHIO REV. CODE ANN. § 2919.25(B) (Baldwin 2005).

other person related by blood or marriage to the offender.¹¹⁹ It also includes a person who has had a child with the offender, irrespective of whether they have resided together.¹²⁰ Thus, the statute is by no means limited to marital relationships. It protects nieces and nephews, aunts and uncles, children, stepchildren, parents, stepparents, grandparents, boyfriends, girlfriends: anyone with an intimate or familial relationship who has resided with the batterer. In fact, the statute would not cover a married couple who had never lived together.¹²¹ This demonstrates the statute was simply designed to protect all kinds of cohabitating people from intimate violence, and did not premise this protection on a legal marital status.

The descriptive term “living as a spouse” is used to define cohabitating individuals who are not married or related by blood or marriage.¹²² The statute does not define “cohabitating,” and the courts have broken down cohabitation into two elements: sharing of familial or financial responsibilities,¹²³ and consortium.¹²⁴ The courts have held that domestic violence “arises out of the relationship between the parties” based on these factors,¹²⁵ and that each case must be decided on a case-by-case basis.¹²⁶ Again, this reinforces that the domestic violence laws are not premised on a legal marital status, but rather on the facts of the intimate relationship between the parties in question.

1. Same-Sex Domestic Violence

Ohio courts have taken great strides in keeping the domestic violence laws accessible to all citizens, regardless of sexual orientation.¹²⁷ Ohio courts first held that the domestic violence statute applies to same-sex couples in *State v. Hadinger* (1991).¹²⁸ *Hadinger* reasoned that the broad language of the statute implied the legislature’s intent to “provide protection to persons who are cohabitating regardless of their sex” and to interpret the statute otherwise “would eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence.”¹²⁹

¹¹⁹ OHIO REV. CODE ANN. § 2919.25(F)(1) (Baldwin 2005).

¹²⁰ *Id.*

¹²¹ *State v. Burk*, No. 86162, 2005 WL 3475812, at ¶ 32 (Ohio Ct. App. Dec. 20, 2005).

¹²² OHIO REV. CODE ANN. § 2919.25(F)(2) (Baldwin 2005) (“Living as a spouse” is further defined in the statute as “a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabitating with the offender, or who otherwise has cohabitated with the offender within five years prior.”).

¹²³ *State v. Williams*, 683 N.E.2d 1126, 1130 (1997) (defining sharing of familial or financial responsibilities as including “shelter, food, clothing, utilities, and/or commingled assets”).

¹²⁴ *Id.* at 1130 (factors of consortium include “mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations”).

¹²⁵ *Id.* at 1129.

¹²⁶ *Id.* at 1130.

¹²⁷ *State v. Rodgers*, 827 N.E.2d 872, 875, 881 (Ohio Ct. Com. Pl. 2005), *aff’d*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006) (explaining that Ohio’s domestic violence laws have consistently been interpreted broadly to protect both gay and straight unmarried persons and have “never been interpreted narrowly or restricted to protecting only those in a traditional heterosexual marriage”).

¹²⁸ *State v. Hadinger*, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991).

¹²⁹ *Id.*

The courts reaffirmed the state's commitment to protecting same-sex couples when the court upheld a domestic violence charge in a lesbian relationship in *State v. Linner* (1996).¹³⁰ The *Linner* case was more expansive in its reasoning and proposed that the domestic violence statute would be found unconstitutional on equal protection grounds if it were to apply only to heterosexuals by excluding homosexuals.¹³¹ One year later in *State v. Yader* (1997), the court again confirmed that same-sex couples deserve the same protection as heterosexual couples, and observed the legislature implicitly condoned the inclusion of same-sex couples in the domestic violence laws by failing to amend the statute to exclude gay and lesbian couples during the four times the legislature amended the statute since *Hadinger* was decided.¹³² These cases reinforce the notion that the domestic violence laws are not interrelated to marital status by extending domestic violence protection to gays and lesbians who cannot be married.

2. Consequences of Removing Domestic Violence Protection

Domestic violence laws are tailored to address the unique dynamic of a repetitive crime involving an offender and victim who have an intimate relationship and often live in the same home. In most cases of assault, the victim may safely return to her home, and lock her doors to keep out her assailant. In domestic violence cases, the victim returns to find her assailant living in her home. Ohio's domestic violence laws include specialized protections for domestic violence victims that would otherwise be unavailable if it were prosecuted as a crime other than domestic violence.

a. Punishment

The punishment for domestic violence addresses the repetitive nature of the crime where the batterers continue to abuse their partners; thus, the punishment increases with the number of convictions. The first offense of domestic violence is a misdemeanor, while second and third offenses are elevated to felonies with increased jail time and fines.¹³³ The increase in jail time is important because studies have shown that batterers are less likely to commit violence if they serve jail time.¹³⁴

¹³⁰ *State v. Linner*, 665 N.E.2d 1180, 1185 (Ohio Hamilton Mun. Ct. 1996).

¹³¹ *Id.* at 1184.

¹³² *State v. Yader*, 692 N.E.2d 1097, 1098, 1101 (Ohio 1997).

¹³³ A first offense of domestic violence is a first degree misdemeanor, punishable by up to six months in jail and a fine of up to \$1000.00, OHIO REV. CODE ANN. § 2919.25(D)(2) (Baldwin 2005). A second offense is a fourth degree felony, punishable by a possible prison term of six to twelve months and a fine of up to \$2500.00, OHIO REV. CODE ANN. § 2919.25(D)(3) (Baldwin 2005). Third and subsequent offenses of domestic violence are third degree felonies, punishable by possible prison terms of one to five years, and fines of up to \$10,000.00, OHIO REV. CODE ANN. § 2919.25(D)(2) (Baldwin 2005). *See also* *State v. Burk*, No. CR 462510, 2005 WL 786212, at ¶¶ 2-3 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (describing the difference between domestic violence and assault charges).

¹³⁴ Sara Catania, *No Safe Haven, The Counselor*, MOTHER JONES, August 2005, at 49.

If the defendant cannot be charged with domestic violence, he or she may be charged with assault.¹³⁵ The definitions for the two crimes are the same, except the domestic violence statute is restricted to harm inflicted on a “family or household member.”¹³⁶ While the definition of the crimes may be similar, the punishments are not. All assaults are misdemeanors punishable by six months in jail and a \$1000.00 fine,¹³⁷ which is the equivalent of a first offense of domestic violence. The penalties for assault are not enhanced by subsequent offenses and remain the same regardless of how many times the defendant may have assaulted the particular victim.¹³⁸

b. Protection Orders

Victims of certain violent crimes, including domestic violence¹³⁹ and assault,¹⁴⁰ are eligible for temporary protection orders (TPO) after a criminal complaint has been filed against the defendant. The TPO prevents the defendant from going to the victim’s residence,¹⁴¹ which is imperative since both the defendant and the victim often reside in the same home. Temporary protection orders are limited in that they remain in effect only until the disposition of the criminal case,¹⁴² or in the case of domestic violence, until a civil protection order is granted.¹⁴³

Domestic violence victims have the option of obtaining a civil protection order¹⁴⁴ (CPO) at any time, which is far more expansive and superior to a TPO in several ways. Civil protection orders last up to five years,¹⁴⁵ and they are not contingent on a criminal charge being filed. The court may grant a CPO at any time based upon a showing of domestic violence against a “family or household member,”¹⁴⁶ which is defined using the same terms as the criminal domestic violence statute.¹⁴⁷ Civil protection orders address many of the unique problems faced by domestic violence victims. The court may force

¹³⁵ State v. Burk, No. CR 462510, 2005 WL 786212, at ¶ 27 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev’d*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹³⁶ The crime of domestic violence is defined as “No person shall knowingly cause or attempt to cause physical harm to a family or household member,” OHIO REV. CODE ANN. § 2919.25(A) (Baldwin 2005), and “No person shall recklessly cause serious physical harm to family or household member,” OHIO REV. CODE ANN. § 2919.25(B) (Baldwin 2005). The crime of assault is defined as “No person shall knowingly cause or attempt to cause physical harm to another or to another’s unborn,” OHIO REV. CODE ANN. § 2903.13(A) (Baldwin 2005), and “No person shall recklessly cause serious physical harm to another or to another’s unborn,” OHIO REV. CODE ANN. § 2903.13(B) (Baldwin 2005).

¹³⁷ OHIO REV. CODE ANN. § 2903.13(C).

¹³⁸ Assault can be elevated to a felony under specified circumstances, such as assaults committed with a deadly weapon or causing serious injury, OHIO REV. CODE ANN. § 2913.11 (Baldwin 2005), or assaults by caretakers of functionally impaired persons or assaults against certain public service employees, OHIO REV. CODE ANN. § 2903.13 (Baldwin 2005).

¹³⁹ *Id.* at § 2919.26.

¹⁴⁰ *Id.* at § 2903.213.

¹⁴¹ *Id.* at § 2919.26(C)(1).

¹⁴² *Id.* at § 2903.213(E)(2).

¹⁴³ *Id.* at § 2919.26(E)(2).

¹⁴⁴ *Id.* at § 3113.31.

¹⁴⁵ *Id.* at § 3113.31(E)(3)(a).

¹⁴⁶ *Id.* at § 3113.31(C).

¹⁴⁷ *Id.* at § 3113.31(A)(3)-(4).

the batterer to leave the home and grant sole possession of the residence to the victim;¹⁴⁸ it may temporarily grant custody of the children to the victim;¹⁴⁹ it may require the batterer to continue providing support to the family;¹⁵⁰ it may force the batterer to allow the victim use of the family car;¹⁵¹ and it may require both the batterer and the victim to seek counseling.¹⁵²

When a domestic violence charge is downgraded to an assault, the victim may still obtain a TPO against the abuser. However, the victim may no longer have access to the long-lasting and comprehensive power of a CPO if the judge interprets the Amendment to prevent its application to unmarried cohabitants “living as a spouse.”

c. Bail

Ohio law has special requirements for setting bail in domestic violence cases. The judge must consider, *inter alia*, the defendant’s history of domestic violence, the severity of the violence, the defendant’s mental health, and whether he or she has exhibited controlling behavior over the victim.¹⁵³ Requiring the judge to consider these extra factors unique to domestic abuse ensures an appropriate bail amount will be set.

d. Other Consequences

Statistics and related funding of domestic violence programs could also be negatively affected. The police are required to keep statistics on incidents of domestic violence, which are compiled into an annual statistical report.¹⁵⁴ If unmarried couples were eliminated from the realm of domestic violence, the annual statistics would show a woefully inaccurate picture of the extent of domestic abuse in Ohio, likely leading to reduced funding for violence programs and shelters.

If the courts ultimately interpret the Marriage Amendment to bar unmarried couples from the protection of domestic violence laws, the harm of the Amendment will reach well beyond discrimination against gays by turning back the clock on domestic violence victims to eviscerate years of legislative and judicial progress.

C. Ohio Cases Challenging the Constitutionality of

¹⁴⁸ *Id.* at § 3113.31(E)(1)(b).

¹⁴⁹ *Id.* at § 3113.31(E)(1)(d).

¹⁵⁰ *Id.* at § 3113.31(E)(1)(e).

¹⁵¹ *Id.* at § 3113.31(E)(1)(h).

¹⁵² *Id.* at § 3113.31(E)(1)(f).

¹⁵³ OHIO REV. CODE ANN. § 2919.251(B) (Baldwin 2005).

¹⁵⁴ *Id.* at § 3113.32 .

Ohio's Domestic Violence Law

Over thirty defendants have challenged the constitutionality of Ohio's domestic violence laws.¹⁵⁵ At least eleven lower courts have dismissed domestic violence charges after holding the Amendment renders the state's domestic violence statute unconstitutional

¹⁵⁵ State v. Dixon, No. 2005 CR 0091, 2005 WL 1940110 (Ohio Ct. Com. Pl. Apr. 26, 2005), *aff'd*, No. 2005-CA-47, 2006 WL 827395 (Ohio Ct. App. Mar. 31, 2006) (motion to dismiss granted in lower court; affirmed by court of appeals); State v. Pelfrey, No. 20763, 2006 WL 827402 (Ohio Ct. App. Mar. 31, 2006) (motion to dismiss denied); State v. Rodgers, 827 N.E.2d 872 (Ohio Ct. Com. Pl. 2005), *aff'd*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006) (motion to dismiss denied); State v. Ward, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App. Mar. 24, 2006) (motion to dismiss granted in lower court; affirmed by court of appeals); State v. Brown, No. 2005CA00074, 2006 Ohio App. LEXIS 1070 (Ohio Ct. App. March 13, 2006) (motion to dismiss denied); State v. Puckett, No. 05CA48, 2006 WL 574308 (Ohio Ct. App. Mar. 10, 2006) (motion to dismiss denied); City of Cleveland v. Voies, No. 2005 CRB 002653, 2005 WL 1940135 (Ohio Cleveland Mun. Ct. Mar. 23, 2005), *rev'd*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); State v. McCaslin, No. 05 CR 71 (Ohio Ct. Com. Pl. Columbiana County July 14, 2005), *rev'd*, No. 05 CO 44, 2006 WL 459261 (Ohio Ct. App. Feb. 21, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); State v. Nixon, No. 22667, 2006 WL 52251 (Ohio Ct. App. Jan. 11, 2006) (motion to dismiss denied); State v. Bryant, Nos. CA2005-02-025, CA2005-04-086, 2005 WL 3526679 (Ohio Ct. App. Dec. 27, 2005) (motion to dismiss denied); State v. Burk, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); State v. Edwards, No. 2005CA00129, 2005 Ohio App. LEXIS 6362 (Ohio Ct. App. Dec. 19, 2005) (motion to dismiss denied); State v. Rexroad, Nos. 05 CO 36, 05 CO 52, 2005 WL 3489726 (Ohio Ct. App. Dec. 13, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); State v. Carswell, No. 05CR22077 (Ohio Ct. Com. Pl. Warren County Mar. 30, 2005), *rev'd*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); City of Uhrichsville v. Losey, No. 2005 AP 03 0028, 2005 WL 3361100 (Ohio Ct. App. Dec. 7, 2005) (motion to dismiss denied); State v. Adams, No. 2005 CA 00103, 2005 WL 3196850 (Ohio Ct. App. Nov. 28, 2005) (motion to dismiss denied); State v. Newell, No. 2004CA00264, 2005 WL 1364937 (Ohio Ct. App. May 31, 2005) (motion to dismiss denied); Phelps v. Johnson, No. DV05 305642 (Ohio Ct. Com. Pl. Cuyahoga County Nov. 28, 2005) (motion to dismiss denied); State v. Jenkins, No. B-0502848 (Ohio Ct. Com. Pl. Hamilton County July 12, 2005) (motion to dismiss denied); State v. Arnold, No. CR 2005 02 0621 (Ohio Ct. Com. Pl. Summit County June 10, 2005) (motion to dismiss denied); State v. Abdellahi, No. 2005 CRB 6993 (Ohio Franklin County Mun. Ct. June 7, 2005) (motion to dismiss denied); State v. Danley, No. 05 CRB00356 (Ohio Fairborn Mun. Ct. May 25, 2005) (motion to dismiss denied); State v. Pike, No. 05CRB00325 (Ohio Fairborn Mun. Ct. May 23, 2005) (motion to dismiss denied); State v. Renner, No. CRB 05 00288 (Ohio Chillicothe Mun. Ct. Apr. 29, 2005) (motion to dismiss granted); State v. Steineman, No. 2005 CR 0068, 2005 WL 1940104 (Ohio Ct. Com. Pl. Apr. 26, 2005) (motion to dismiss granted); State v. McIntosh, No. 2004 CR 4712, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005) (motion to dismiss denied); State v. Peterson, No. 2005 CR 873, 2005 WL 1940114 (Ohio Ct. Com. Pl. Apr. 18, 2005) (motion to dismiss granted); Hufford v. Clark, No. DV0500206 (Ohio Ct. Com. Pl. Hamilton County Apr. 12, 2005), *available at* <http://www.ohiodvresources.org/attinfo/tips/#Cat7> (follow "Unmarried Hamilton County Decision Issue 1 Brief" hyperlink) (motion to dismiss denied); Gough v. Triner, No. 2005 DR 00041 (Ohio Ct. Com. Pl. Columbiana County Apr. 4, 2005) (motion to dismiss granted); Bloomfield v. Stearns, No. 2005-DV-12 (Ohio Ct. Com. Pl. Hancock County Mar. 24, 2005), *available at* <http://www.ohiodvresources.org/attinfo/tips/#Cat7> (follow "Bloomfield v. Stearns" hyperlink) (motion to dismiss denied); State v. Brown, No. 2004-CR-04436 (Ohio Ct. Com. Pl. Montgomery County Mar. 11, 2005) (motion to dismiss denied); City of Cleveland v. Knipp, No. 2004 CRB 039103, 2005 WL 1017620 (Ohio Cleveland Mun. Ct. Mar. 10, 2005) (motion to dismiss denied); State v. Forte, No. CR 460137 (Ohio Ct. Com. Pl. Cuyahoga County Feb. 11, 2005), *available at* <http://www.ohiodvresources.org/attinfo/tips/#Cat7> (follow "State of Ohio v. Forte" hyperlink) (motion to dismiss denied).

for unmarried cohabitants.¹⁵⁶ Several of these lower court decisions granting dismissals have been reversed by appellate courts.¹⁵⁷ However, one court of appeals has resisted this trend and is affirming dismissals of the lower courts by holding that the domestic violence laws are unconstitutional under the recently-enacted Amendment.¹⁵⁸ This split in authority will ultimately be decided by the Ohio Supreme Court.¹⁵⁹

1. Arguments that Domestic Violence Statute Is Unconstitutional

a. Lower Court Decisions

The first decision to find the domestic violence law unconstitutional was *State v. Burk* in March 2005,¹⁶⁰ which was later reversed by the court of appeals in December 2005.¹⁶¹ *Burk* I held that Ohio's domestic violence law conflicts with the Marriage

¹⁵⁶ *State v. Dixon*, No. 2005 CR 0091, 2005 WL 1940110 (Ohio Ct. Com. Pl. Apr. 26, 2005), *aff'd*, No. 2005-CA-47, 2006 WL 827395 (Ohio Ct. App. Mar. 31, 2006) (motion to dismiss granted in lower court; affirmed by court of appeals); *State v. Ward*, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App. Mar. 24, 2006) (motion to dismiss granted in lower court; affirmed by court of appeals); *City of Cleveland v. Voies*, No. 2005 CRB 002653, 2005 WL 1940135 (Ohio Cleveland Mun. Ct. Mar. 23, 2005), *rev'd*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. McCaslin*, No. 05 CR 71 (Ohio Ct. Com. Pl. Columbiana County July 14, 2005), *rev'd*, No. 05 CO 44, 2006 WL 459261 (Ohio Ct. App. Feb. 21, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Rexroad*, Nos. 05 CO 36, 05 CO 52, 2005 WL 3489726 (Ohio Ct. App. Dec. 13, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Carswell*, No. 05CR22077 (Ohio Ct. Com. Pl. Warren County Mar. 30, 2005), *rev'd*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Renner*, No. CRB 05 00288 (Ohio Chillicothe Mun. Ct. Apr. 29, 2005) (motion to dismiss granted); *State v. Steineman*, No. 2005 CR 0068, 2005 WL 1940104 (Ohio Ct. Com. Pl. Apr. 26, 2005) (motion to dismiss granted); *State v. Peterson*, No. 2005 CR 873, 2005 WL 1940114 (Ohio Ct. Com. Pl. Apr. 18, 2005) (motion to dismiss granted); *Gough v. Triner*, No. 2005 DR 00041 (Ohio Ct. Com. Pl. Columbiana County Apr. 4, 2005) (motion to dismiss granted).

¹⁵⁷ *City of Cleveland v. Voies*, No. 2005 CRB 002653, 2005 WL 1940135 (Ohio Cleveland Mun. Ct. Mar. 23, 2005), *rev'd*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. McCaslin*, No. 05 CR 71 (Ohio Ct. Com. Pl. Columbiana County July 14, 2005), *rev'd*, No. 05 CO 44, 2006 WL 459261 (Ohio Ct. App. Feb. 21, 2006) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Rexroad*, Nos. 05 CO 36, 05 CO 52, 2005 WL 3489726 (Ohio Ct. App. Dec. 13, 2005) (motion to dismiss granted in lower court; reversed by court of appeals); *State v. Carswell*, No. 05CR22077 (Ohio Ct. Com. Pl. Warren County Mar. 30, 2005), *rev'd*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005) (motion to dismiss granted in lower court; reversed by court of appeals).

¹⁵⁸ *State v. Ward*, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App.-2d Mar. 24, 2006) (holding the domestic violence law recognizes a "quasi-marital relationship" by including unmarried individuals "living as a spouse" in violation of the recently-enacted Marriage Amendment); *State v. Dixon*, No. 2005 CR 0091, 2005 WL 1940110 (Ohio Ct. Com. Pl. Apr. 26, 2005), *aff'd*, No. 2005-CA-47, 2006 WL 827395 (Ohio Ct. App.-2d Mar. 31, 2006) (following *Ward*). See *infra* Part V.C.1.b.

¹⁵⁹ *State v. Ward*, No. 2005-CA-75, 2006 WL 758540, at ¶ 7 (Ohio Ct. App.-2d Mar. 24, 2006) .

¹⁶⁰ *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev'd*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹⁶¹ *State v. Burk*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

Amendment as it applies to unmarried cohabitants “living as a spouse.”¹⁶² In so ruling, the court downgraded the defendant’s felony domestic violence indictment to a misdemeanor assault.¹⁶³

Burk I focused on the plain meaning of the words in the Amendment and statute, and concluded that the domestic violence laws recognize a legal status for unmarried individuals that “intends to approximate the design, qualities, significance or effect of marriage” by including unmarried cohabitants “living as a spouse.”¹⁶⁴ “Living as a spouse” is defined by cohabitation, which involves the sharing of familial or financial responsibilities and consortium, and therefore involves a relationship that functions like a marriage.¹⁶⁵ The Amendment prohibits the state from recognizing any legal status for unmarried relationships that approximates marriage; thus, *Burk* held, the plain meaning of the Amendment prohibits the state from recognizing unmarried cohabitants who are “living as a spouse” because cohabitation is a relationship that mimics the qualities of marriage.¹⁶⁶

The *Burk I* court discusses the breadth of the recognition clause as evidence that it intended to affect more than just same-sex marriage. While the commonly-accepted intent of the second clause was to prohibit recognition of civil unions or other marriage substitutes, the court observes that the Amendment’s language does not restrict itself to same-sex marriage relationships. Its explicit terms are “not so limited, but clearly is worded as broadly as possible, so as to encompass any quasi-marital relationships — whether they be same-sex or opposite-sex.”¹⁶⁷

Burk I dismissed voter intent as a factor in the analysis because there was “no way to divine the intentions of those who drafted, proposed, supported, or voted for it.”¹⁶⁸ The court acknowledged they probably did not intend to affect domestic violence laws, but chalked it up as an “unfortunate example of the ‘law of unintended consequences’.”¹⁶⁹ Other courts considering voter intent used evidence that voters were aware of the potential broad implications of the Amendment to support the conclusion that the Amendment renders the domestic violence law unconstitutional.¹⁷⁰

In *City of Cleveland v. Voies*, the court also advances the theory that the proponents of the Amendment must have intended to discourage all types of cohabitation and restrict all nonmarital benefits because the Amendment purposefully

¹⁶² State v. Burk, No. CR 462510, 2005 WL 786212, at ¶¶ 23-27 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev’d*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹⁶³ *Id.* at ¶ 27.

¹⁶⁴ *Id.* at ¶ 14.

¹⁶⁵ *Id.* at ¶ 13-15.

¹⁶⁶ *Id.* at ¶ 27.

¹⁶⁷ *Id.* at ¶ 12.

¹⁶⁸ *Id.* at ¶ 24.

¹⁶⁹ *Id.*

¹⁷⁰ State v. Dixon, No. 2005 CR 0091, 2005 WL 1940110, at *2 (Ohio Ct. Com. Pl. Apr. 26, 2005); State v. Steineman, No. 2005 CR 0068, 2005 WL 1940104, at *2 (Ohio Ct. Com. Pl. Apr. 26, 2005); City of Cleveland v. Voies, No. 2005 CRB 002653, 2005 WL 1940135, at ¶¶ 3-8 (Ohio Cleveland Mun. Ct. Mar. 23, 2005), *rev’d*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006).

did not contain the protections found in the state’s existing DOMA that specified it would not “prohibit the extension of specific nonmarital benefits otherwise enjoyed by all persons, married or unmarried relationships.”¹⁷¹

b. Appellate Decisions

The only appellate court to find the domestic violence law unconstitutional is the Second Appellate District.¹⁷² In contrast, appellate courts in the Fifth, Seventh, Eighth, Ninth, Tenth, and Twelfth Appellate Districts have upheld the domestic violence law.¹⁷³ The appellate court in *State v. Ward* placed great importance on the supremacy of the state constitution over statutory law, and emphasized that the constitution does not have to be deferentially construed to hold a statute valid.¹⁷⁴ *Ward* determined that the Amendment’s recognition clause was intended to prevent the state and the courts from creating exceptions to the marriage laws and eroding “the concept of traditional marriage.”¹⁷⁵ Viewing the statute through this lens, the court found the definition of “living as a spouse” to be similar to the definition of a marital relationship,¹⁷⁶ and thus determined the “living as a spouse” requirement was the “sort of quasi-marital relationship” the Amendment was intended to prohibit.¹⁷⁷

2. Arguments that Domestic Violence Statute Is Constitutional

a. Burk II

The court of appeals reversed *Burk* after finding the lower court’s analysis flawed on several levels. The trial court did not follow standard statutory interpretation when it failed to give the appropriate deference to the presumption of constitutionality of statutes enacted by the legislature¹⁷⁸ and when it failed to reasonably interpret the laws so that they “both may stand.”¹⁷⁹

Burk II noted the trial court’s failure to consider the intent behind both the Amendment and the domestic violence laws. The court confirmed the intent of the

¹⁷¹ *City of Cleveland v. Voies*, No. 2005 CRB 002653, 2005 WL 1940135, at ¶ 6 (Ohio Cleveland Mun. Ct. Mar. 23, 2005), *rev’d*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006).

¹⁷² *State v. Ward*, No. 2005-CA-75, 2006 WL 758540 (Ohio Ct. App.-2d Mar. 24, 2006) (holding the domestic violence law recognizes a “quasi-marital relationship” by including unmarried individuals “living as a spouse” in violation of the recently-enacted Marriage Amendment); *State v. Dixon*, No. 2005 CR 0091, 2005 WL 1940110 (Ohio Ct. Com. Pl. Apr. 26, 2005), *aff’d*, No. 2005-CA-47, 2006 WL 827395 (Ohio Ct. App.-2d Mar. 31, 2006) (following *Ward*).

¹⁷³ *State v. Rodgers*, No. 05AP-446, 2006 WL 827411, at ¶ 18 (Ohio Ct. App. Mar. 30, 2006) (summarizing the appellate rulings to date on this issue).

¹⁷⁴ *State v. Ward*, No. 2005-CA-75, 2006 WL 758540, ¶¶ 8-18 (Ohio Ct. App. Mar. 24, 2006).

¹⁷⁵ *Id.* at ¶ 27.

¹⁷⁶ *Id.* at ¶ 31-32 (describing the definition of cohabitation as the sharing of familial or financial responsibilities, and consortium, which the court found “could serve just as readily as a definition of the marital relationship”).

¹⁷⁷ *Id.* at ¶ 33.

¹⁷⁸ *State v. Burk*, No. 86162, 2005 WL 3475812, at ¶ 16 (Ohio Ct. App. Dec. 20, 2005).

¹⁷⁹ *Id.* at ¶ 17.

second clause was to prohibit the state from recognizing civil unions and other marriage substitutes.¹⁸⁰ The trial court erred when it erroneously concluded domestic violence laws conferred a legal status on individuals without regard to the legislature's true intent to provide protection to all cohabitating couples, regardless of marital status.¹⁸¹ Ohio's domestic violence statute and case law are broad and encompass many relationships other than marital.¹⁸² Whether a couple is cohabitating turns on the facts of their relationship, not their legal status or whether they are married.¹⁸³

The court of appeals in *Burk II* held "[b]ecause Ohio's domestic violence statute is predicated upon the factual determination of cohabitation -- and not the legal determination of marriage -- both [the Amendment] and Ohio's domestic violence statute may stand."¹⁸⁴ The court then reinstated Burk's felony domestic violence indictment.¹⁸⁵

b. Domestic Violence Statute Does Not Create or Require Marital Status

The legislature's intent in enacting the domestic violence statute was to prosecute batterers and protect victims, not to establish marital status.¹⁸⁶ There is no evidence the legislature intended to create any legal status approximating marriage by selecting the phrase "living as a spouse" to define and include unmarried cohabitants in the state's domestic violence laws.¹⁸⁷ The term "living as a spouse" is simply a descriptive phrase used to define who falls under the statute and does not establish that the individuals have some form of marital status.¹⁸⁸ Cohabitation is simply a "factual status that must be proven as an element of a crime."¹⁸⁹

Ohio's domestic violence laws do not require cohabitants to be married in order to obtain protection under the law.¹⁹⁰ In fact, the *Hadinger* decision explicitly rejected the argument that a lesbian defendant could not be charged with domestic violence because the cohabitants were women who could not be married and therefore could not

¹⁸⁰ *Id.* at ¶ 18.

¹⁸¹ *Id.* at ¶ 20.

¹⁸² *Id.* at ¶ 23.

¹⁸³ *Id.* at ¶ 30.

¹⁸⁴ *Id.* at ¶ 32.

¹⁸⁵ *Id.* at ¶ 33.

¹⁸⁶ *State v. Carswell*, No. CA2005-04-047, 2005 WL 3358882, at ¶ 20 (Ohio Ct. App. Dec. 12, 2005); *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099, at *5 (Ohio Ct. Com. Pl. Apr. 18, 2005). See also *State v. Williams*, 683 N.E.2d 1126 (1997) (citing the Ohio Legislative Service Commission Analysis).

¹⁸⁷ *City of Cleveland v. Knipp*, No. 2004 CRB 039103, 2005 WL 1017620, at *9 (Ohio Cleveland Mun. Ct. Mar. 10, 2005).

¹⁸⁸ *State v. Rodgers*, No. 05AP-446, 2006 WL 827411, at ¶ 15 (Ohio Ct. App. Mar. 30, 2006); *State v. Nixon*, No. 22667, 2006 WL 52251, at *13 (Ohio Ct. App. Jan. 11, 2006); Brief of Appellant at 26, *State v. Burk*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹⁸⁹ *State v. Rodgers*, 827 N.E.2d 872, 876 (Ohio Ct. Com. Pl. 2005), *aff'd*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006); Brief of Appellant at 2, *State v. Burk*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹⁹⁰ *State v. Rodgers*, No. 05AP-446, 2006 WL 827411, at ¶ 15 (Ohio Ct. App. Mar. 30, 2006).

be “living as a spouse.”¹⁹¹ The court’s extension of the domestic violence laws to same-sex cohabitants who cannot marry under state law illustrates that marital status is not required or implied by use of the term “living as a spouse.”

The domestic violence statute also does not create or extend a legal status to unmarried cohabitants by including them in the criminal domestic violence laws.¹⁹² When the state brings an unmarried couple under the protection and prosecution of the domestic violence laws, the state is not recognizing the couple as being married or sanctioning their relationship as being equivalent to marriage. An unmarried couple does not suddenly find itself able to access the multitude of privileges available to married couples after being considered “living as spouses” by the court for domestic violence purposes.¹⁹³ They may not inherit each other’s property intestate;¹⁹⁴ they are not entitled to spousal support;¹⁹⁵ they may not claim tax exemptions¹⁹⁶ or file joint tax returns;¹⁹⁷ and their communications are not privileged and excluded from testimony.¹⁹⁸

c. Ohio Public Policy Rejects Granting Legal Status for Unmarried Couples

The judicial and legislative treatment of unmarried couples in Ohio supports the state’s strong public policy against granting unmarried cohabitants any legal status, especially legal rights equivalent to marriage.¹⁹⁹ The fact that the courts broadly interpret Ohio’s domestic violence laws to include unmarried couples demonstrates that the domestic violence laws are not in fact creating any legal status for cohabitants.

Ohio’s marriage statute specifically states that extending marital benefits to “nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state.”²⁰⁰ Ohio expressly repealed its common-law marriage provision effective October 1991,²⁰¹ which further reinforces that Ohio refuses to grant any marital benefits to couples who have not actually married. While Ohio continues to recognize common-law marriages in existence prior to the date of repeal, it

¹⁹¹ *State v. Hadinger*, 573 N.E.2d 1191, 1191 (Ohio Ct. App. 10th 1991). *See also* *State v. Yaden*, 692 N.E.2d 1097, 1098, 1101 (Ohio 1997) (refuting a similar argument in a case involving a gay male relationship).

¹⁹² Brief of Appellant at 25, *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio Ct. Com. Pl. Mar. 23, 2005), *rev’d*, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

¹⁹³ *State v. Carswell*, No. CA2005-04-047, 2005 WL 3358882, at ¶ 19 (Ohio Ct. App. Dec. 12, 2005). *See also* Motion Contra Motion to Dismiss Ex-Parte Order and Petition for Civil Protective Order at 9, *Bloomfield v. Stearns*, No. 2005-DV-12 (Ohio Ct. Com. Pl. Mar. 24, 2005), *available at* <http://www.ohiodvresources.org/attinfo/tips/#Cat7> (follow “Bloomfield v. Stearns” hyperlink).

¹⁹⁴ OHIO REV. CODE ANN. § 2105.06 (Baldwin 2005).

¹⁹⁵ *Id.* at § 3103.03.

¹⁹⁶ *Id.* at § 5747.025(A).

¹⁹⁷ *Id.* at § 5747.08(E).

¹⁹⁸ *Id.* at § 2317.02(D).

¹⁹⁹ *See* STANLEY MORGANSTERN & BEATRICE SOWALD, *BALDWIN’S OHIO PRACTICE OHIO DOMESTIC RELATIONS LAW* § 2:69 (Thomson/West 2005) (discussing Ohio’s refusal to grant legal remedies to unmarried cohabitants).

²⁰⁰ OHIO REV. CODE ANN. § 3101.01 (C)(3) (Baldwin 2005).

²⁰¹ *Id.* at § 3105.12.

is likely these grandfathered common-law marriages are now unconstitutional under the Marriage Amendment.²⁰²

While many other states have judicially embraced some form of legal protection or equitable distribution for unmarried couples when they separate, such as constructive trusts or implied contracts, Ohio courts have repeatedly rejected any such legal protections for unmarried cohabitants.²⁰³

In *Tarry v. Stewart*,²⁰⁴ a woman attempted to convince an Ohio court to grant her such legal protection by invoking the state's domestic violence laws. The plaintiff was suing for equitable division of property after the termination of her fourteen-year cohabitation relationship.²⁰⁵ The plaintiff endeavored to prove that legal recognition of cohabitating couples is not against the public policy of Ohio by arguing that the domestic violence laws create an acknowledgement of unmarried relationships by providing protected status to persons "living as a spouse."²⁰⁶ The court rejected this claim by stating that Ohio case law clearly holds that cohabitation without marriage does not create an implied contractual relationship.²⁰⁷ Thus, the court essentially refuted the plaintiff's assertion that the state's domestic violence laws created any form of legal relationship between unmarried couples that could establish a precedent for providing other legal rights. This ruling would seem to contradict the holdings in the recent controversy that held Ohio's domestic violence laws create a legal status for unmarried couples.

d. Equal Protection of the Law

Two lower court rulings²⁰⁸ have held that interpreting the Amendment to bar unmarried cohabitants from the state's domestic violence laws could be challenged

²⁰² *City of Cleveland v. Voies*, No. 2005 CRB 002653, 2005 WL 1940135, at *6 (Ohio Mun. Ct. Mar. 23, 2005), *rev'd*, No. 86317, 2006 WL 440341 (Ohio Ct. App. Feb. 23, 2006).

²⁰³ *Lauper v. Harold*, 492 N.E. 2d 472, 473-74 (Ohio Ct. App. 1985) (holding that "mere cohabitation without marriage" does not entitle assets or property to be divided upon separation because "cohabitation without benefit of marriage . . . does not create an implied contractual relationship" and the parties "elected not to marry prior to cohabitation and should have been prepared to bear the consequences"). See also *Seward v. Mentrup*, 622 N.E.2d 756, 757 (Ohio Ct. App. 1993) (upholding the *Lauper* ruling by refusing to divide property in a nine-year lesbian relationship where there was no marriage or similar contract); *Haas v. Lewis*, 456 N.E. 2d 512, 513-14 (Ohio Ct. App. 1982) (denying the right to loss of consortium to unmarried cohabitants because the right of consortium "is incident to marriage and cannot exist without marriage"); *Tarry v. Stewart*, 649 N.E. 2d 1, 6-7 (Ohio Ct. App. 1994) (refusing to recognize a constructive trust or fiduciary relationship in a fourteen-year relationship where the wife contributed to the household both with her income and as a homemaker raising the unmarried couple's child).

²⁰⁴ *Tarry v. Stewart*, 649 N.E. 2d 1, 7 (Ohio Ct. App. 1994).

²⁰⁵ *Id.* at 1-2.

²⁰⁶ *Id.* at 7.

²⁰⁷ *Id.*

²⁰⁸ *State v. Abdellahi*, No. 2005 CRB 6993, at 6 (Ohio Franklin County Mun. Ct. June 7, 2005) (holding that interpreting the Amendment to bar unmarried couples would "arbitrarily subject certain victims to less protection based on their marital status or sexual orientation" in violation of the Equal Protection Clause); *Phelps v. Johnson*, No. DV05 305642, at 2 (Ohio Ct. Com. Pl. Cuyahoga County Nov. 28, 2005) (holding that the domestic violence laws do create a legal status for unmarried cohabitants, but denying the

under the Equal Protection Clause of the United States Constitution.²⁰⁹ The Equal Protection Clause ensures that all citizens shall receive equal treatment under the law,²¹⁰ and the state may only infringe upon this protection if its distinction is rationally related to a legitimate state interest.²¹¹

The alleged purpose of the Amendment is to preserve heterosexual marriage and prevent same-sex marriage.²¹² This purported state interest is not furthered by denying protection to victims of domestic violence simply because they are not married.²¹³ Interpreting the Amendment in such a way would deny protection of the law to an entire class of citizens without a rational governmental interest to justify the distinction.²¹⁴ Unmarried cohabitants who have a child with the abuser would continue to receive protection from the state's domestic violence laws because Ohio's statute specifically includes this class in the statute without reference to cohabitation "as spouses."²¹⁵ Thus, the law would extend protection to an unmarried cohabitant who was beaten by the father of her child, but would not cover an unmarried cohabitant who did not have a child with the abuser.²¹⁶ This nonsensical distinction serves no purpose other than to disadvantage the unmarried cohabitant who was wise enough to refrain from having children with the abuser. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."²¹⁷

The state has a compelling interest in protecting its citizens from all forms of domestic abuse and affording its citizens the full protection of the law. Ohio courts have broadly interpreted the state's domestic violence laws to include both unmarried homosexual and heterosexual couples.²¹⁸ The state does not have a legitimate reason for taking away this important right from a whole class of citizens that currently enjoy the

defendant's motion to dismiss the charges because it violates the Equal Protection Clause to draw a distinction between married and unmarried victims when the classification bears no rational relationship to the stated government interest).

²⁰⁹ U.S. CONST. amend. XIV, § 1.

²¹⁰ *Id.*

²¹¹ *Romer v. Evans*, 517 U.S. 620, 631-34 (1996).

²¹² *State v. Burk*, No. 86162, 2005 WL 3475812, at ¶ 18 (Ohio Ct. App. Dec. 20, 2005). *See also* Ohio Campaign to Protect Marriage, The Facts about Issue 1, http://www.ohiomarriage.com/Facts_About_Issue_1.shtml (last visited Apr. 3, 2006).

²¹³ Brief of Amici Curiae Action Ohio Coal. of Battered Women et al. in Support of Appellee State of Ohio at 14, *State v. McIntosh*, No. 2004 CR 4712, 2005 WL 1940099 (Ohio Ct. Com. Pl. Apr. 18, 2005), *appeal filed*, No. CA-21093 (Ohio Ct. App. 2005)

²¹⁴ Motion Contra Motion to Dismiss Ex-Parte Order and Petition for Civil Protective Order at 11, *Bloomfield v. Stearns*, No. 2005-DV-12 (Ohio Ct. Com. Pl. Mar. 24, 2005).

²¹⁵ OHIO REV. CODE ANN. § 2919.25(F)(1).

²¹⁶ *State v. Abdellahi*, No. 2005 CRB 6993, at 3 (Ohio Franklin County Mun. Ct. June 7, 2005).

²¹⁷ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

²¹⁸ *State v. Hadinger*, 573 N.E.2d 1191 (Ohio Ct. App. 10th 1991); *State v. Rodgers*, 827 N.E.2d 872, 875, 881 (Ohio Ct. Com. Pl. 2005), *aff'd*, No. 05AP-446, 2006 WL 827411 (Ohio Ct. App. Mar. 30, 2006); *State v. Linner*, 665 N.E.2d 1180 (Ohio Hamilton Mun. Ct. 1996).

full protection of the law. The Amendment was intended to stop same-sex couples from marrying; it “was not created to shield perpetrators of domestic violence.”²¹⁹

3. Ohio Legislative Fix

The Ohio State Legislature is considering a bill that would remove the problematic “living as a spouse” definition from Ohio’s domestic violence law to dispel any potential conflict with the state constitution.²²⁰ Unfortunately, this would only correct the problem as it relates to domestic violence. The broad, prejudicial implications of the Amendment cannot be fixed with clean-up legislation like a statute. The problems with the Ohio Amendment will remain until the courts strike it down or the voters go through the arduous process of repealing or amending it.

D. Other Unintended Consequences of the Marriage Amendment

Besides the twisted domestic violence interpretation, the Marriage Amendment is being distorted in other ways not intended by the voters. A court-sanctioned joint custody agreement between a former lesbian couple in Ohio is being challenged as invalid under the state constitution by the child’s biological mother, who wishes to stop visitation rights for her former partner.²²¹

As expected, the Amendment is being wielded to abolish domestic partnership rights for same-sex couples in Ohio. A Republican State Representative, Tom Brinkman, Jr., has filed a complaint seeking to enjoin Miami University (Oxford, Ohio) from offering same-sex domestic partner benefits to its employees.²²² The suit alleges that the University is creating a legal status for unmarried relationships in violation of the state constitution by providing benefits to “marriage-mimicking” same-sex relationships.²²³ It is no surprise that the attorney who drafted Ohio’s Amendment is representing Brinkman in the suit.²²⁴ This bolsters the argument that the true intent of the drafters was to dismantle domestic partnership rights for gays and lesbians; yet they failed to clearly communicate that in either the Amendment language or the voter information pamphlet so that Ohio voters could make an informed choice about whether they wanted to strip away these types of rights from gay couples.

Other states have also addressed the issue of whether domestic partnership benefits are preempted by the marriage amendments. After Michigan passed its

²¹⁹ State v. Pike, No. 05CRB00325, at 2 (Ohio Fairborn Mun. Ct. May 23, 2005).

²²⁰ H.B. 161, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

²²¹ Fairchild v. Fairchild, No. 01JU-03-2542 (Ohio Ct. Com. Pl. Franklin County filed Feb. 14, 2005).

²²² Brinkman v. Miami Univ. (Ohio Ct. Com. Pl. Butler County Nov. 22, 2005), *available at* <http://www.telladf.org/UserDocs/BrinkmanComplaint.pdf>.

²²³ *Id.* at 2.

²²⁴ David R. Langdon. See Citizens for Community Values, Rep. Tom Brinkman Sues Miami University over Domestic Partner Benefits Suit Claims Policy Violates Ohio’s Marriage Protection Amendment, http://www.ccv.org/CCV_Perspective-20051206.htm (last visited Apr. 3, 2005).

marriage amendment in 2004,²²⁵ the Governor suspended domestic partnership benefits for public employees pending judicial clarification on the effects of the amendment.²²⁶ The Michigan Attorney General issued an opinion that the amendment barred the state from granting domestic partnership benefits,²²⁷ but the circuit court disagreed. The court held that receiving health care benefits is not a statutory right or benefit of marriage, but rather is a contractual benefit of employment, and thus is not prohibited by the amendment.²²⁸

Alaska's Supreme Court similarly ruled that Alaska's same-sex marriage ban amendment does not preclude the state from offering benefits to same-sex partners of public workers.²²⁹ The court asserted that just because "the Marriage Amendment effectively prevents same-sex couples from marrying does not automatically permit the government to treat them differently in other ways."²³⁰

VI. CONSEQUENCES OF THE UNINTENDED CONSEQUENCES

The majority of Ohio appellate courts seem to be logically resolving the constitutionality of the domestic violence laws by considering the intent of the Marriage Amendment and by utilizing standard practices of statutory interpretation. But this resolves only the domestic violence issue – and only in Ohio. Other states might decide that granting protection to unmarried victims of domestic violence conflicts with their state marriage amendment.²³¹ The breadth and ambiguity of these amendments make countless other destructive interpretations possible. Unmarried couples in Ohio, both gay and straight, will continue to look over their proverbial shoulders, wondering if their private relationships and agreements will be attacked as unconstitutional under the Marriage Amendment.

This has especially broad implications for gay and lesbian couples. Unmarried heterosexual couples always have the option to marry if they want to enjoy the legal protections afforded by marriage; homosexual couples have no such choice. While a heterosexual spouse automatically has the right to make medical decisions, maintain custody of the children, and inherit property, same-sex couples do not have such automatic rights and must enter into private contractual agreements in an attempt to obtain some semblance of these legal protections automatically bestowed on all heterosexual married couples.

²²⁵ 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.").

²²⁶ ACLU, Michigan Marriage Amendment Does Not Reach the Workplace, Judge Rules, <http://www.aclu.org/lgbt/relationships/20055prs20050927.html> (last visited Apr. 3, 2006).

²²⁷ 7171 Op. Att'y Gen., 2005 Mich. AG LEXIS 4, at *25-28 (2005).

²²⁸ Nat'l Pride at Work, Inc. v. Granholm, No. 05-368-CZ, 2005 WL 3048040, at *4-7 (Mich. Cir. Ct. Sept. 27, 2005).

²²⁹ Alaska Civil Liberties Union v. State, 122 P.3d 781, 795 (Alaska 2005).

²³⁰ *Id.* at 787.

²³¹ A suit has been filed in Utah arguing a civil protection order for an unmarried domestic violence victim violates the state's recently-enacted marriage amendment. See Dee McAree, *Domestic Violence Laws Clouded by Gay Marriage Ban*, NAT'L L.J., Jan. 31, 2005, at P6.

This is perhaps the cruelest consequence of the marriage amendments. Not only do they ensure that gays cannot marry, but they proceed to strip away the private legal protections that gays and lesbians are forced to create for themselves in the absence of their ability to obtain them through marriage.

Ironically, the marriage amendments perpetuate the exact social damage that they purport to prevent.²³² Allowing homosexual couples to form legally-recognized marriages would provide stability to society and legal protection for their children, in the same way that heterosexual marriage benefits society.²³³ By denying same-sex couples access to these legal protections and incumbent responsibilities, the states are actually contributing to the social instability that they seek to prevent.

Further, these amendments are likely to have a corrosive effect on how society views gays and lesbians. By enshrining discrimination against homosexuals in their constitutions, states are publicly acknowledging that gays and lesbians do not deserve full equal protection under the law. This state-sanctioned bigotry implies gay people are “second class citizens”²³⁴ not worthy of equality and sets an example that it is acceptable for society to treat gays in a disparate fashion, thus leading to more discrimination against gays and lesbians.²³⁵

The amendments are also likely to have a fiscal impact on the states and private citizens. The broad amendments are fodder for judicial action due to the ambiguous language that is susceptible to far-flung interpretations, as evidenced by the dozens of domestic violence cases filed in Ohio. Private citizens will also be burdened with litigation costs if they have to fight to retain their legal rights that they had prior to the Amendment.

A. Future of State Marriage Amendments

Other states have apparently not learned the lessons of Ohio’s Amendment. Several states have measures pending to amend their state constitutions in the future.²³⁶

The State of California has several marriage initiatives pending,²³⁷ with at least two groups withdrawing because they were unable to gather the necessary signatures to get the initiative on the 2006 ballot.²³⁸ The State of California, however, is being

²³² Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 1004 (D. Neb. 2005) (appeal pending).

²³³ Goodridge v. Dep’t. of Pub. Health, 798 N.E.2d 941, 962-64, 969 (Mass. 2003).

²³⁴ *Id.* at 948 (Mass. 2003) (holding the state’s ban on same-sex marriage unconstitutional; stating the Massachusetts Constitution “forbids the creation of second class citizens”).

²³⁵ Lawrence v. Texas, 539 U.S. 558, 575 (2003) (arguing that making homosexual conduct illegal leads to further discrimination).

²³⁶ Alabama, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin.

²³⁷ Office of the Attorney General, State of Cal. Dep’t. of Justice, Initiative Measures Active, <http://www.caag.state.ca.us/initiatives/activeindex.htm> (last visited Apr. 3, 2006).

²³⁸ Lee Romney, *Same-Sex Marriage Foes Falter in '06 Ballot Efforts*, L.A. TIMES, Dec. 28, 2005.

honest about the true purpose and potential consequences of the pending initiatives. The California Attorney General accurately entitled one measure: “Marriage. Elimination of Domestic Partnership Rights. Initiative Constitutional Amendment.” The proponent of the marriage initiative alleged the title and summary were misleading and filed a petition to have the language changed.²³⁹ The court denied the petition, holding that the title and summary were accurate.²⁴⁰

The California Attorney General’s Office addressed the initiative with realistic honesty in describing the impact and ramifications of the proposed amendment. The title and summary stated the amendment would eliminate domestic partnerships, and void and restrict domestic partner rights. It proceeded to identify twelve domestic partnership rights that would be affected if the initiative passed.²⁴¹

The proponents of the amendment fought to prevent this frank assessment from being published likely because they feared the voters of California would defeat the measure if they knew it eliminated domestic partnerships, which have public support in California.²⁴² Instead of the Attorney General’s description, the proponents requested that the title and summary read: “Protection of Marriage. Government Prohibited from Abolishing or Diminishing Marriage” with no specific mention of destroying California’s progressive domestic partnership law.²⁴³

One cannot help but notice the irony of the proponents’ challenge to the Attorney General’s summary. They allege it is “false and misleading” and “not a true and impartial statement of the purpose of the measure,”²⁴⁴ when these were the very sins perpetrated against the voters of Ohio. The proponents’ method of operation is to introduce amendments with vague and ambiguous language that can later be interpreted to take away more rights than they claimed it would during the campaign.

The California Attorney General’s Office serves as a model for how to deal with ambiguous marriage amendments. If proponents insist on continuing to bring forth these broad and discriminatory amendments, then the states must force them to be honest about their implications. It is highly unlikely the voters of Ohio would have voted for the Amendment if there had been an official title that read: “Eliminates Domestic Violence Protection for Unmarried Individuals.”

²³⁹ Bowler v. Lockyer, No. 05CS01123 (Cal. Super. Ct. Aug. 1, 2005), available at <http://www.lambdalegal.org/cgi-bin/iowa/cases/documents.html?record=1768>.

²⁴⁰ Bowler v. S.C. (Lockyer), No. S137625, 2005 Cal. LEXIS 11296 (Cal. Oct. 4, 2005). See also Press Release, National Center for Lesbian Rights, Court Confirms Petition Language For Anti-Gay Measure Must Disclose Impact On Domestic Partners (Sept. 1, 2005), http://www.nclrights.org/releases/pr-petition_language090105.htm (last visited Apr. 3, 2006).

²⁴¹ Petition for Writ of Mandate to Amend Title and Summary Exhibit B, Bowler v. Lockyer, No. 05CS01123 (Cal. Super. Ct. Aug. 1, 2005) (stating the proposed amendment would affect domestic partnership rights in areas such as “ownership and transfer of property, inheritance, adoption, medical decisions, child custody and child support, health and death benefits, insurance benefits, hospital visitation, employment benefits, and recovery for wrongful death and other tort remedies”).

²⁴² Lee Romney, *Same-Sex Marriage Foes Falter in '06 Ballot Efforts*, L.A. TIMES, Dec. 28, 2005.

²⁴³ Petition for Writ of Mandate to Amend Title and Summary at 9-10, Bowler v. Lockyer, No. 05CS01123 (Cal. Super. Ct. Aug. 1, 2005).

²⁴⁴ *Id.*

VII. CONCLUSION

In their rush to take away rights from a minority class of citizens, the voters of Ohio also inadvertently trampled on the rights of the majority. Most Ohioans did not hesitate to enshrine discrimination against homosexuals in the state constitution; yet found it unacceptable when their broad strokes of bigotry at the polls reached out to affect heterosexual couples victimized by domestic violence. While the courts are unlikely to allow this unintended consequence affecting domestic violence victims to proceed, it is unfortunate that the intended consequence of intolerance towards gays and lesbians will continue.

Amending constitutions to remove civil liberties is not only offensive to the notion of justice, but it is also counter to the “basic tenets of our constitutional democracy” where rights are enumerated in our Constitution, not abolished.²⁴⁵ The ban on gay marriage is often compared to the anti-miscegenation laws that prohibited interracial marriage.²⁴⁶ Many states had these laws until the Supreme Court struck them down in 1967.²⁴⁷ There have been three attempts in our nation’s history to amend the United States Constitution to ban interracial marriage, all of which failed.²⁴⁸ This demonstrates why constitutions should not be amended to restrict rights based on the social prejudices of the day.²⁴⁹ At one point in our nation’s history, slavery was legal and interracial marriage was prohibited. Thankfully our country continues to evolve, and the prejudices of today will become the history of tomorrow. The nation’s attitude toward gays and lesbians continues to mature, with polls revealing a growing acceptance of homosexuality across all age groups, with the youngest generation most accepting.²⁵⁰ It is unfortunate that some states have elected to freeze their current prejudices into the permanence of their state constitutions. If such amendments are going to be made, the voters should at least be aware of what they are voting for.

“You can only protect your liberties in this world by protecting the other man’s freedom. You can only be free if I am free.” - Clarence Darrow

²⁴⁵ Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487, 1503 (2005).

²⁴⁶ See generally *id.* at 1507-09 (comparing the proposed federal marriage amendment to anti-miscegenation laws).

²⁴⁷ *Virginia v. Loving*, 338 US 1 (1967) (holding interracial marriage bans violate Equal Protection Clause).

²⁴⁸ Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 615 (2004).

²⁴⁹ See generally Indiana Civil Liberties Union, ICLU Testifies in Opposition to Amendment Blocking Same-Sex Marriage, Mar. 16, 2005, http://www.iclu.org/news/news_article.asp?ID=123 (excerpts from testimony delivered during legislative hearings on Senate Joint Resolution 7, a proposed constitutional amendment in Indiana banning same-sex marriage).

²⁵⁰ THE PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, THE 2004 POLITICAL LANDSCAPE EVENLY DIVIDED AND INCREASINGLY POLARIZED (2003).