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**THE MARRIAGE AMENDMENTS,  
EQUALITY AND PARTNER BENEFITS:  
A LETTER TO THE CITY COUNCIL OF MOSCOW, IDAHO**

Elizabeth Barker Brandt<sup>1</sup>

**INTRODUCTION**

This short article grew out of a letter I wrote to a member of the City Council of Moscow, Idaho. The letter was written in response to the member's question about whether Idaho's state constitutional amendment banning equal marriage<sup>2</sup> precluded the City of Moscow from providing health insurance benefits to the same-sex domestic partners of its employees. In 2006, Idaho voters had passed a referendum amending the state constitution to provide that "[m]arriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."<sup>3</sup>

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<sup>1</sup> Elizabeth Barker Brandt was born in 1957. She obtained her B.A. in Speech and Theater from the College of Wooster in 1979 and her J.D. from Case Western Reserve University in 1982, where she was elected to the Order of the Coif. Brandt is currently the James E. Rogers Distinguished Professor and the Associate Dean for Faculty Affairs at the University of Idaho College of Law. She is a member of the Idaho Supreme Court's Child Protection Committee and its Committee on Children and Families in the Courts. She is also active with the Idaho State Bar Association and serves as secretary of the Idaho Family Law Council. Brandt is a member of the editorial Board of the ABA Family Law Quarterly and the Executive Committee of the Family and Juvenile Law Section of the Association of American Law Schools.

<sup>2</sup> I will use the term "equal marriage" in this article. The movement to permit marriage between same-sex couples is a movement for "marriage" – the same kind of marriage that different-sex couples currently enjoy. The terms "gay marriage" or "same-sex marriage" imply that same-sex couples seek some special or different form of marriage. Moreover, the opposition to equal marriage is part of a larger strategy to condemn and punish lesbians, bisexuals, transgender individuals and gay men. Thus, the campaign to authorize marriage between same-sex couples is primarily a campaign for equality. See Interview by David Shankbone with Evan Wolfson, Founder and Executive Director, Freedom to Marry (Sep. 30, 2007) (transcript available at [http://en.wikinews.org/wiki/Interview\\_with\\_gay\\_marriage\\_movement\\_founder\\_Evan\\_Wolfson](http://en.wikinews.org/wiki/Interview_with_gay_marriage_movement_founder_Evan_Wolfson)) ("We're not fighting for gay marriage, or same-sex marriage, or any phrase like that. We are fighting for an end to exclusion from marriage. We are fighting for the freedom to marry, the same freedom, rules, responsibilities and respect as our non-gay brothers and sisters have. It's not just a question of wording.").

<sup>3</sup> IDAHO CONST. art. III, § 28.

My argument to the Moscow City Council member was that offering health care benefits to same-sex partners of city employees constituted neither recognition nor validation of a “domestic legal union” under the Idaho language. Unfortunately, the recent decision of the Michigan Supreme Court in *National Pride at Work v. Governor of Michigan*,<sup>4</sup> regarding similar language in an amendment to Michigan’s Constitution,<sup>5</sup> reaches a different conclusion. The Michigan court’s holding furthers the goals of those who oppose LGBT<sup>6</sup> civil rights by subscribing to the broadest possible interpretation of its state’s discriminatory amendment. The effect of the Michigan Supreme Court’s interpretation is to penalize LGBT people through public condemnation of their relationships.<sup>7</sup> The *National Pride* opinion underscores the importance to the LGBT civil rights movement of clearly articulating an interpretation of state constitutional marriage amendments that supports the extension of employment benefits to same-sex domestic partners. Such an approach will foster the implementation of incremental protections for LGBT people who, in many states, have been denied the opportunity to marry.

I have included most of my letter in the hope that others might use it to persuade policy makers at all levels, first of the importance of equal marriage rights, and second that laws banning equal marriage should not also limit domestic partnerships. The article begins with a discussion of *National Pride at Work* and several other recent court decisions regarding

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<sup>4</sup> 748 N.W. 2d 524 (Mich. 2008).

<sup>5</sup> MICH. CONST. 1963, art. 1, § 25 (providing that “[to] secure and preserve the benefits of marriage for our society and for 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.”).

<sup>6</sup> The term “LGBT” refers to lesbians, gay men, bisexual individuals and transgender individuals.

<sup>7</sup> The anti-marriage campaign is being led by individuals and groups who have staked out a larger agenda to heap moral condemnation on LGBT people. For example, James Dobson, who founded Focus on the Family, has written one of the most popular books advocating against equal marriage. The Focus on the Family website offers counseling for individuals experiencing “unwanted same-sex attractions” and contains articles advocating against the “legitimization of homosexual behavior.” See Focus on the Family, <http://www.focusonthefamily.com/> (last visited June 8, 2009); JAMES DOBSON, MARRIAGE UNDER FIRE (2007). Other conservative groups oppose both equal marriage and what they term the larger “homosexual agenda.” See, e.g., The American Family Association, <http://www.afa.net/> (last visited June 8, 2009); The Family Research Council, <http://www.frc.org/> (last visited June 8, 2009).

the scope of state unequal marriage amendments. The letter, along with footnoted annotations, follows.

### NATIONAL PRIDE AT WORK

The fight over equal marriage moved to the courts as soon as the first discriminatory marriage amendments passed.<sup>8</sup> The *National Pride* case arose because a number of political entities and educational institutions within the state of Michigan had already adopted employee benefits policies that permitted LGBT employees to elect health insurance coverage for their domestic partners<sup>9</sup> when Michigan voters passed that state's discriminatory marriage amendment. In 2005, shortly after the Michigan Constitution was amended, the state's Attorney General issued a formal opinion concluding that these policies and agreements violated the marriage amendment.<sup>10</sup>

In response, the *National Pride* litigation was initiated.<sup>11</sup> The trial court declared that the Michigan constitutional amendment did not bar public employers from providing health insurance to the domestic partners of employees.<sup>12</sup> That decision was reversed by the Michigan Court of Appeals.<sup>13</sup> Thereafter, the

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<sup>8</sup> Freedom to Marry, Get Informed: Maps, [http://www.freedomtomarry.org/get\\_informed/maps.php#amendments](http://www.freedomtomarry.org/get_informed/maps.php#amendments) (last visited June 8, 2009) (reporting that, as of June 2008, twenty-six states had adopted constitutional amendments requiring unequal marriage, and two states had pending proposals).

<sup>9</sup> At issue in the *National Pride* case were policies at the city of Kalamazoo, the Eaton/Clinton/Ingham County Community Mental Health Board, the State of Michigan and several universities including the University of Michigan, Eastern Michigan University and Wayne State University. 748 N.W. 2d at 529, at note 1.

<sup>10</sup> Op. Mich. Att'y Gen., 2005 Mich. OAG No. 7171, 2005 WL 639112 (Mar. 16, 2005) (opinion issued in response to request by Michigan representative regarding the continuing constitutionality of the city of Kalamazoo's partner benefits policy in light of the Michigan constitutional amendment).

<sup>11</sup> 748 N.W. 2d at 529-30. (The plaintiff, Pride at Work, is an official constituency group of the AFL-CIO, organized both to advocate for the interests of LGBT union members as well as for LGBT equality in the workforce in general). See *Pride at Work: About Us*, <http://prideatwork.org/page.php?id=63> (last visited on June 8, 2009); 748 N.W. 2d at 529 note 1 (a number of individuals and public entities affected by the amendment and the Attorney General's opinion joined the lawsuit as plaintiffs).

<sup>12</sup> 748 N.W. 2d at 530.

<sup>13</sup> *National Pride at Work v. Governor of Michigan*, 732 N.W. 2d 139 (Mich. Ct. App. 2007).

Michigan Supreme Court affirmed the appellate court, finding the domestic partner benefit policies unconstitutional. In so doing, the court – while appearing to take a very constrained approach – gave broad effect to the text of the amendment. It reasoned that the amendment precluded the recognition of any unions that are “similar to marriage” in any way. Publically recognized domestic partnerships, it reasoned, did not have to mirror marriage or even share a significant number of common characteristics with marriage in order to run afoul of the amendment.<sup>14</sup>

The majority opinion in *National Pride at Work* is an example of mindless and selective textualism.<sup>15</sup> The court started its reasoning by quoting Thomas Cooley, a pivotal figure in American constitutional jurisprudence and a former Chief Justice

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<sup>14</sup> 748 N.W. 2d at 533-37.

<sup>15</sup> Recently two broad theoretical approaches to the interpretation of statutes have emerged. The first, strongly identified with Justice Antonin Scalia, has been labeled (primarily by its critics) as “textualism.” Jane Schacter writes that “[t]he hallmark of this “new textualism” is its emphasis on statutory language and the “reasonable” meaning of the words used in a law. Textualists view legislative intent as irrelevant on the theory that only a statute’s text is subject to the constitutional requirements of bicameralism and presentment and thus only the text represents formal ‘law.’ Unenacted, unspecified legislative intentions, by contrast, escape the rigors of bicameralism and presentment and thus cannot claim the legitimacy of statutory text.” Jane Schacter, *The Pursuit of “Popular Intent:” Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 118 (1995). In contrast, an intentionalist approach more readily looks to legislative history and other sources beyond the words of the enactment. State courts applying this approach to the interpretation of initiatives and referenda often “explicitly identify popular intent as the object of their interpretive search, using phrases like ‘the ‘collective intent’ of the people,’ “the voters’ intent,’ ‘the people[’s] inten[t],’ the ‘intent of the legislative body; in this case, the electorate,’ or the ‘intent of the enacting body.’” *Id.* at 117. Implicit in Schacter’s description is the difficulty of applying an interpretive approach in cases of direct democracy. Others in addition to Schacter have written about the difficulty of determining the intent behind initiatives and referenda. See, e.g., Ethan J. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L.J. 49 (2008) (arguing that laws adopted through direct democracy should be interpreted as the “average voter” might understand them, in part because determining popular intent through non-text sources is too unpredictable and difficult); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (arguing, in part, that because laws resulting from direct democracy lack the usual checks of the legislative process and because determinations of “voter intent” are too unpredictable, courts should be more free to impose rational limitations on the scope and application of such laws).

of the Michigan Supreme Court.<sup>16</sup> According to the Michigan court, “[t]he primary objective in interpreting a constitutional provision is to determine the original meaning of the provisions to the ratifiers.”<sup>17</sup> Cooley’s theory of constitutional interpretation thus turned on discovering the understandings of people at the time of the provision’s adoption. He believed that constitutional interpretation should be rooted in the text of the document as understood by its drafters, i.e., that constitutional interpretation should reflect the history and experiences of those drafters.<sup>18</sup>

Unfortunately, although the Michigan court began with this admonition that constitutional interpretation requires attention to context, it immediately reverted to a myopic form of textualism, working its way word by word through what it termed the “operative language”<sup>19</sup> of the amendment and uncritically ascribing common dictionary definitions to each individual word or phrase without regard to context. For example, relying upon the dictionary definition of the word “union,” the court concluded that a domestic partnership was a union.<sup>20</sup> Next, relying on the dictionary definition of “similar” as “having a likeness or resemblance, [especially] in a general way; having qualities in common,”<sup>21</sup> the court concluded that in order to be a union “similar” to marriage, domestic partnership need not share many traits in common with marriage. Rather, any overlap could support the conclusion that domestic partnership is a “union” “similar to marriage.”<sup>22</sup>

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<sup>16</sup> HISTORY OF MICHIGAN LAW (Paul Finkelman & Martin J. Hershock eds., 2006).

<sup>17</sup> 748 N.W. 2d at 533, (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 66 (1883)).

<sup>18</sup> Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1505-10 (arguing that the “central technique of [Cooley’s theory of] constitutional interpretation is to read the constitutional text through the prism of the Anglo-American common law.”); Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368, 399 (1997) (concluding that Cooley was a “pragmatist . . . trying to help courts shaping their constitutions to serve citizens as they might have hoped to be served.”).

<sup>19</sup> 748 N.W. 2d at 533 (the court focused on the second clause of the amendment, dismissing the first clause as a “statement of purpose” and implying that it was surplusage).

<sup>20</sup> *Id.* (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1991)).

<sup>21</sup> *Id.* at 534-35.

<sup>22</sup> *Id.* at 534-35.

Applying this reasoning, the court found two traits shared by marriage and domestic partnership. First, both marriage and domestic partnership have gender requirements: marriage is determined by the gender of the partners (male-female), and likewise the applicability of domestic partnership benefits depends on the participants' gender (most provisions only applied to same-sex partners).<sup>23</sup> Second, both marriage and domestic partnership preclude access from individuals who are close blood relatives: marriage between close blood relatives is prohibited, and the domestic partnership provisions similarly exclude closely-related domestic partners. Because these two characteristics are uniquely shared by marriage and domestic partnership, as compared to other relationships entitled to public recognition, the commonality supported the court's conclusion that marriage and domestic partnership "resemble one another 'in a general way.'" <sup>24</sup> The court viewed the similarities it identified as particularly persuasive because, as it noted, "[a]lthough there are, of course, many different types of relationships in Michigan law that are accorded legal significance . . . marriages and domestic partnerships share two obviously important and apparently unique (at least in combination) qualities in common."<sup>25</sup>

The problem with the Michigan Supreme Court's reasoning is that it compared proverbial apples and oranges, i.e., it compared formal statutory requirements for marriage with informal, non-uniform characteristics of domestic partnership. None of the various Michigan domestic partnership policies purported to define or regulate domestic partnership in general; they did not attempt to provide an exclusive or definitive approach to domestic partnership. For example, although each of the local Michigan policies permitted benefits to be conferred on same-sex partners, none of the policies prohibited employees from having different-sex domestic partners. Likewise, while the policies did not extend benefits to domestic partners who were closely related to an employee, none of the policies prohibited employees from identifying a closely-related person as a domestic partner. In short, neither Michigan law nor the benefits policies in question purported to set forth an exclusive or comprehensive definition of "domestic partnership."<sup>26</sup> Rather the policies merely affirmatively

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<sup>23</sup> *Id.* at 535-37.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 535-36.

<sup>26</sup> Across the country and the world, domestic partnerships often include different sex individuals and persons who are closely related. *See* Sanford Katz,

established which types of domestic partners – those of the same sex who were not closely related – were eligible for health insurance coverage.<sup>27</sup>

Next the court examined the meanings of the terms “recognize,” “only agreement” and “for any purpose.” Based on dictionary definitions, it concluded that public employers who conferred benefits on domestic partners of employees were acknowledging the validity of such relationships and thus were “recognizing” them.<sup>28</sup> The court did not consider that the term “recognize” may have had a more specific contextual legal meaning. “Recognition” is a conflict of laws term which refers to formal acceptance of and enforcement of the acts and judgments of a sister state.<sup>29</sup> The court found this recognition of such marriage-like relationships inconsistent with the constitutional requirement that marriage be the “only agreement” “recognized” in the state “for any purpose.”<sup>30</sup> Having concluded that domestic partnership is a “union” “similar to marriage” and that offering health benefits to domestic partners violated the proscription that “Marriage” is the “only agreement” entitled to such “recognition” “for any purpose,” the court struck down the domestic partner benefit policies at issue.<sup>31</sup>

The *National Pride* court’s slavish attention to the decontextualized, common definition of each individual word in the amendment distorts the amendment’s meaning in two different ways. First, to use a trite adage, the court could not see

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*Emerging Models for Alternatives to Marriage*, 33 FAM. L. Q. 663, 669-674 (1999) (arguing that domestic partnership policies have emerged not only to provide a marriage alternative to same-sex couples, but also in response to the increasing recognition of cohabitation among different sex couples). For example, Salt Lake County, Utah has recently experimented with including an employee’s “adult designee” in its insurance coverage. Such a designee may be either a straight or gay partner or may be some other person in the employee’s life. See Jeremiah Stettler, *Gay Rights Issues: S.L. County OKs Adult-Designees’ Benefits*, SALT LAKE TRIBUNE (Feb. 18, 2009), available at [http://www.sltrib.com/ci\\_11724319](http://www.sltrib.com/ci_11724319). See also Katherine Acey et al, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, BEYONDMARRIAGE.ORG, July 26, 2006, [http://www.beyondmarriage.org/full\\_statement.html](http://www.beyondmarriage.org/full_statement.html).

<sup>27</sup> 748 N.W. 2d 531-33.

<sup>28</sup> *Id.* at 538-39.

<sup>29</sup> See *infra* note 67.

<sup>30</sup> *Id.* (as with the terms “similar” and “union,” the court relied on the dictionary to define these terms).

<sup>31</sup> *Id.*



the forest for the trees. Context can qualitatively change or enhance the meanings of words. For example, the opening clause of the Preamble to the United States Constitution, “We the People of the United States, in Order to form a more perfect Union . . . ,”<sup>32</sup> can be distorted as follows: “The English speaking persons of the United States, in order to give shape to a complete combination. . . .”<sup>33</sup> The lyrical prose is not the only thing lost in the re-writing. Despite its attention to one version of the exact meaning of each word, this interpretation does not capture the sense of the Constitution’s Preamble. Context is everything. To understand the Preamble, one must know that the Constitution replaced the unworkable Articles of Confederation. The reference to a “more perfect union” is likely a comparison to the earlier, less-than-perfect Confederation.<sup>34</sup> And while the founders were proposing a new structural form for the infant government, the term “people” probably did not include all persons living in the new country, since blacks, Native Americans and women were each excluded from participation in the constitution-making process and the new government.<sup>35</sup>

Second, while adhering to the dictionary definitions of the words in the amendment’s “operative” text, the Michigan Supreme Court conveniently dismissed completely the first clause of the amendment.<sup>36</sup> That clause provides that the amendment was

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<sup>32</sup> U.S. CONST. pmb1.

<sup>33</sup> I arrived at this interpretation by referring to the first definitions of words in the first clause of the Preamble using WEBSTER’S NEW WORLD COLLEGE DICTIONARY (4<sup>th</sup> ed. 2004). The definition of people is “all the persons of a racial, national, religious or linguistic group.” The definition of form is “to give shape or form to; make, as in some particular way.” The definition of more is “greater in amount, extent, degree or number.” The definition of perfect is “[c]omplete in all respects; without defect or omission; sound; flawless.” The definition of union is “a uniting or being united; combination.”

<sup>34</sup> See, e.g., *Lane County v. Oregon*, 74 U.S. 71, 76 (1869) (“The people, through [the Constitution], established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States.”).

<sup>35</sup> See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

<sup>36</sup> 748 N.W. 2d at 538-39 (“[T]he first part of the amendment states its purpose, and the second part states the means by which this purpose is to be achieved. Doubtless, there are those who would disagree about the efficacy of achieving the former purpose by the latter means. However, it is not for this Court to decide whether there are superior means for ‘structur[ing] and preserv[ing] the benefits of marriage or indeed whether the means chosen in the amendment are ineffectual or even counterproductive.”).

intended “[to] secure and preserve the benefits of marriage for our society and for future generations of children . . . .” Pride at Work argued that the first clause should be read to modify the second, so that the amendment would only prohibit the extension of the “benefits of marriage” to other types of relationships.<sup>37</sup> It pointed out that health insurance is not generally considered a benefit of marriage and therefore its availability to domestic partners of employees was not limited by the amendment. Yet the court rejected this position, reasoning that the first clause of the amendment was not the “operative” clause, but merely a “statement of purpose” that apparently did not inform or limit the amendment’s remaining text. The court emphasized that “[t]his operative part [the second clause] specifies that public employers must not recognize domestic partnerships for any purpose.”<sup>38</sup>

Finally, apparently eschewing completely its initial invocation of Justice Cooley’s admonition that the “primary objective” of constitutional interpretation is to determine the intent of those who adopted the provision, the Michigan court declined to consider the intent of the adopters. The advocacy group responsible for placing the constitutional amendment on the ballot had stated during the election campaign that the amendment would not preclude public employers from offering

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<sup>37</sup> Jana Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1458-60 (discussing the “incidents” or “obligations” of marriage as the “elements” of the state-imposed marriage contract); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 230-232 (1982) (noting that the incidents of marriage are those aspects of marriage that were imposed upon the spouses by law and which traditionally could not be modified by contract); Katherine Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 83-86 (1998) (arguing that the incidents or rights and obligations of marriage are those rights and duties to which the spouses are held by law). See also Barbara J. Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, And Domestic Partnerships*, 13 WIDENER L.J. 699, 718-19 (2004) (employing a broad definition of the “incidents of marriage” to argue for, at minimum, some interstate recognition of same-sex marriage: “Incidents of marriage” refers to each of the specific benefits, rights, or responsibilities flowing to a married couple based on their marital status.”); Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 LAW & INEQ. 59, 68-77 (2007) (arguing that because there is little agreement on what the incidents or benefits of marriage are, some unequal marriage amendments may be interpreted very broadly).

<sup>38</sup> 748 N.W.2d at 539.

health insurance benefits.<sup>39</sup> Opponents of the amendment had publically worried that its language could be interpreted to preclude domestic partner benefits.<sup>40</sup> Yet despite the prominence of the domestic-partner-benefit issue during the campaign, the court seemed to view this evidence of intent as merely electoral noise. It made no attempt to sort out, categorize or weigh the various interpretations of the amendment that had been presented to the voters during the electoral campaign and concluded instead that the most that could be said of the adopters' intent was that there had been "debate" about the amendment's meaning during the campaign.<sup>41</sup>

Beyond its mechanical and inconsistent attention to the amendment's text, the Michigan court declined to address the larger contextual question of whether domestic partnership resembles marriage. For those who choose not to marry for political or social reasons, or who are unable to marry, domestic partnership has been commonly understood as an alternative to marriage.<sup>42</sup> These non-marital relationships, whether between

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<sup>39</sup> A brochure prepared by the proponents of the Michigan amendment stated "[t]his is not about rights or benefits or how people choose to live their life. This has to do with family, children and the way people are. It merely settles the question once and for all what marriage is—for families today and future generations." 748 N.W.2d at 541 note 22. During the campaign, counsel for the proponents "asserted that the amendment would not prohibit public employers from providing health insurance benefits to domestic partners." *Id.*

<sup>40</sup> 748 N.W.2d at 541 (quoting literature produced by the Michigan Civil Rights Commission and other groups).

<sup>41</sup> *Id.* at 542 ("Therefore, all that can reasonably be discerned from the extrinsic evidence is this: before the adoption of the marriage amendment, there was public debate regarding its effect, and this debate focused in part on whether the amendment would affect domestic-partnership benefits."). This rejection of an intentionalist approach to interpretation is not consistent with the emerging norms for interpreting direct democracy enactments. *See, e.g.* Schacter, *supra* note 15, at 149-50 (explaining that most courts reserve a strict textual approach to legislation arising from a deliberative legislative process, but attempt to discern popular intent when legislation results from direct democracy); Lieb, *supra* note 15, at 54-56 (cataloguing the various interpretive approaches employed by courts and stating that most courts "routinely refer to the voters' intent as the linchpin in interpretation."); Cathy R. Silak, *The People Act, The Courts React: A Proposed Model for Interpreting Initiatives in Idaho*, 33 IDAHO L. REV. 1, 62 (1996) (concluding that courts should avoid a strict textual approach when interpreting initiatives and referenda and should attempt to determine the voters' intent).

<sup>42</sup> Nancy Polikoff has argued that marriage is not the most appropriate form of family organization because of its history of oppression, especially of women, and has argued that families should be defined by function and not by status. *See* NANCY D. POLIKOFF, *BEYOND STRAIGHT AND GAY: VALUING ALL FAMILIES*

persons of the same or different sexes, have often been condemned by marriage proponents precisely because they are *not* marriage and allegedly threaten marriage (presumably because they are attractive alternatives to marriage and thus may cause couples to decide not to marry at all).<sup>43</sup> Regardless of the merits of the debate, many marriage proponents appear to view domestic partnership as inherently not marriage – outside, that is, the current controversy over gay marriage.

Sorting out our *public* conception of marriage is difficult. I do not mean by this point to invoke the debate about whether governments should continue to recognize marriage as opposed to some new and equal institution of civil unions.<sup>44</sup> Rather, I mean to suggest that the court should have asked what the public characteristics of marriage are, and whether the provision of

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UNDER THE LAW (2008); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, *Ending Marriage as We Know It,* 32 HOFSTRA L. REV. 201 (2003); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In The Right Direction,* 2004 U. CHI. LEGAL F. 353 (2004). Before the debate over gay marriage, however, domestic partnership laws had started to emerge as an alternative to marriage for different-sex couples who eschewed marriage for political and social reasons. See Sanford Katz, *Emerging Models for Alternatives to Marriage,* 33 FAM. L. Q. 663 (1999); Martha M. Ertman, *The ALI Principles’ Approach to Domestic Partnership,* 8 DUKE J. GENDER L. & POL’Y 107 (2001). See generally, Mark Strasser, *The Future of Marriage,* 21 J. AM. ACAD. MATRIM. LAW. 87, 102-105 (2008) (discussing state approaches to recognizing the needs of non-marital families).

<sup>43</sup> See, e.g., Margaret Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples,* 7 J. L. & FAM STUD. 135, 177 (2005) (summarizing the traditional critique of cohabitation). See also, Ruth L. Deech, *The Case Against Legal Recognition of Cohabitation,* 29 INT’L & COMP. L.Q. 480 (1980); John Leo, *Marriage on the Rocks,* U.S. NEWS & WORLD REP., Dec. 16, 2002, at 47; Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute’s ‘Domestic Partners’ Proposal,* 2001 BYU L. REV. 1189, 1194 (arguing that the ALI principals which propose formal recognition of domestic partnership “seriously weaken and undermine the institution of marriage.”).

<sup>44</sup> For a quick take on this debate see MARY LYNDON SHANLEY, *JUST MARRIAGE* (2004). See also, David Cruz, *Disestablishing Sex and Gender,* 90 CAL. L. REV. 997, 1081-1083 (2002); Andrew Koppelman, *Sexual and Religious Pluralism,* in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215, 226-28 (Saul M. Olyan & Martha C. Nussbaum eds., 1998); Michael W. McConnell, *What Would it Mean to Have a “First Amendment” for Sexual Orientation?,* in *SEXUAL ORIENTATION & HUMAN RIGHTS,* *supra* 234, 248-51.

health benefits to domestic partners encroaches upon public notions of marriage.<sup>45</sup>

Most writers on marriage readily concede that marriage “has different meanings in different contexts.”<sup>46</sup> Marriage began as a religious institution<sup>47</sup> that eventually attained civil recognition.<sup>48</sup> Even as a religious institution, marriage has many different forms, some of which are substantially out of sync with current public conceptions of marriage in the U.S. For example, a number of religions do not recognize divorce.<sup>49</sup> Yet divergent

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<sup>45</sup> See Cruz, *supra* note 44, at 1078-84 (arguing that once marriage is “disestablished” and the religious justifications for mixed-sex marriage are deconstructed, there is no justification for the continued public adherence to a mixed-sex requirement for marriage).

<sup>46</sup> Lynn D. Wardle, *What is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOCACY 53, 58-59 (2006) (pointing out that psychological, social and religious understanding among different groups of people vary substantially but arguing that “as a matter of contemporary and historical legal positivism, and deeply imbedded legal realism, marriage nearly universally today and uniformly throughout western tradition has been the union of a man and a woman.”); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 1 (2000) (“Marriage is like the sphinx – a conspicuous and recognizable monument on the landscape, full of secrets.”).

<sup>47</sup> Cott observes “[t]he common sense of the British colonials at the time of the American Revolution was Christian; Christian common sense took for granted the rightness of monogamous marriage.”. Cott, *supra* note 46, at 9.

<sup>48</sup> Michael Grossberg describes the situation in England and, in turn, in the American Colonies: “English law demanded that brides and grooms negotiate a five-step nuptial course: espousals, publication of banns, execution of the espousal contract at church, celebration, and sexual consummation. Yet clandestine marriages flourished in early modern England as dissenters, couples fleeing parental opposition, and others flocked to clergymen willing to perform private marriages for a fee. . . . [C]ouples who contracted and consummated their unions generally won legal recognition from the ecclesiastical courts that governed nuptials. But the gap between law and practice proved vexing for the English and their colonists.” MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 65 (1988).

<sup>49</sup> The Catholic Church does not recognize divorce. Observant Catholics must obtain an annulment of their marriages in order to be eligible to remarry. See Fr. Leonard Kennedy, *The Annulment Crisis in the Church*, CATHOLIC INSIGHT, Mar. 1999, available at [http://www.catholicinsight.com/online/church/divorce/c\\_annul.shtml](http://www.catholicinsight.com/online/church/divorce/c_annul.shtml) (“The Catholic Church does not accept divorce. Jesus insisted on the original intention of the Creator who willed that marriage be indissoluble.” (Mt 5:31-21; 19:3-9; Mk 10:9; Lk 16:18; 1 Cor 7:10-11)). However, the Church can declare the nullity of a marriage, i.e., declare that the marriage never existed (Code of Canon Law, #1095-1107; see also the Catechism of the Catholic Church under “Divorce”). See also Lindsay L. Abbate, *Comment: What God Has Joined “Let”*

religious marriage practices have not impeded the development of a separate law of public marriage.<sup>50</sup> In evaluating whether state actions constitute an approximation of marriage, it is important that reference be made to this separate norm of public marriage as opposed to idiosyncratic parochial conceptions of marriage held by various religious believers.

The public law of marriage, in addition to dictating who may be married, also establishes who may officiate at a marriage ceremony, what obligations and rights marriage involves, and whether and how a marriage may be ended.<sup>51</sup> The health insurance policies at issue in the Michigan case did not dictate who could enter into domestic partnership, nor did they establish a mechanism for officiating or licensing domestic partnerships. Nor did the policies establish any rights and obligations for domestic partnership beyond the eligibility for health insurance coverage. And finally, the domestic partnership policies at issue did not regulate when and how a domestic partnership could be dissolved. The National Pride court's myopic examination of the text and unwillingness to examine the amendment through the lens of context, enabled it to ignore these overarching distinctions between domestic partnership and marriage.

Hopefully, *National Pride at Work* will not influence future courts' interpretations of partner benefit policies in light of discriminatory marriage amendments. The opinion's myopic, inconsistent approach and its failure to attend either to the specific context of the Michigan amendment or to the larger context of domestic partnership and marriage, should undermine its influence. For now, however, it stands out as the only precedent in the area. Although litigation has been one of the primary fronts upon which the LGBT civil rights movement has

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*Man Put Asunder: Ireland's Struggle Between Cannon and Common Law Relating to Divorce*, 16 EMORY INT'L L. REV. 583 (2002) (discussing the friction between Catholic canon law and Irish law regarding the availability of divorce and annulment). Likewise, many Jews believe that only a man may initiate divorce. See Jessica Davidson Miller, *The History of the Agunah in America: A Clash of Religious Law and Social Progress*, 19 WOMEN'S RTS. L. REP. 1 (1997).

<sup>50</sup> For example, in the end, opposition to no-fault divorce did not succeed in preventing no-fault reform from being adopted in most states. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997).

<sup>51</sup> COTT, *supra* note 46, at 2-3.

advanced in recent years, the Michigan opinion stands as evidence that courts will not uniformly provide relief from oppressive unequal enactments aimed at stigmatizing and penalizing LGBT people, and underscores the importance of political persuasion to advance the cause of LGBT civil rights.

*National Pride at Work* is the first – and so far only – case to consider the reach of a state’s unequal marriage amendment. In addition to its specific context, however, the opinion should be understood in the larger and more supportive context of LGBT civil rights litigation. Prior litigation has focused on whether the exclusion of LGBT people from the various benefits of marriage is constitutional as a matter of state and federal equality and substantive due process considerations. Early successes in equal marriage cases at the state level, in cases such as *Baehr v. Lewin*<sup>52</sup> and *Baker v. Vermont*,<sup>53</sup> have resulted from the application of

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<sup>52</sup> 852 P.2d 44 (Haw. 1993). In *Baehr*, several same-sex couples who were denied marriage licenses filed suit against the State of Hawai‘i arguing that Hawai‘i’s statute defining marriage as between a man and a woman violated their right to privacy and discriminated against them on the basis of gender. The Hawai‘i Supreme Court rejected the petitioners’ privacy argument but held that the limitation of marriage to individuals of different sexes was a sex-based classification that was subject to strict scrutiny. On remand, the court held the Hawai‘i marriage law unconstitutional. *Baehr v. Miike*, 1996 WL 694235 (Hawai‘i Cir.Ct. Dec 03, 1996), *affirmed*, 87 Haw. 34, 950 P.2d 1234 (1997). In 1998, the voters in Hawai‘i amended the state constitution permitting the legislature to define marriage as between a man and a woman. The legislature did so and established a state-wide registration system for same-sex couples that conferred some of the benefits of marriage on registrants. For a brief summary of the litigation in *Baehr v. Lewin* see Lambda Legal: *Baehr v. Miike*, <http://www.lambdalegal.org/our-work/in-court/cases/baehr-v-miike.html> (last visited June 8, 2009). The litigation in *Baehr* touched off a national panic among conservative groups who feared that their states would be compelled to recognize Hawai‘i’s same-sex marriages. One result was the enactment at the federal level of the Defense of Marriage Act, and of state Defense of Marriage Acts in 38 states. See Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified in 1 U.S.C. §7 and 28 U.S.C. §1738C); Human Rights Campaign – State, [http://www.hrc.org/laws\\_and\\_elections/state.asp](http://www.hrc.org/laws_and_elections/state.asp) (last visited June 8, 2009). These laws expressly defined marriage as between a man and woman and set forth the policy of the federal government and the various states against recognition of same-sex marriages performed in other states.

<sup>53</sup> 744 A.2d 864 (Vt. 1999). Several same-sex couples sought a declaratory judgment that failure to issue them marriage licenses violated both Vermont’s marriage law (which at the time did not expressly provide that marriage was between a man and a woman), and their equality rights under the state constitution’s common benefits clause (similar to an equal protection provision). The Vermont Supreme Court stopped short of holding that the

equal protection analysis and have brought courts to the forefront in the movement to recognize equal marriage. While these successes were only partial – neither court actually recognized equal marriage<sup>54</sup> – they set the stage for the decision of the Supreme Court of Massachusetts in *Goodridge v. Department of Public Health*,<sup>55</sup> which required the state of Massachusetts to recognize equal marriage. What is more, although efforts have since been made to amend the state constitution and overturn *Goodridge*, such efforts have proved unsuccessful.<sup>56</sup>

Since *Goodridge*, several additional state courts have struck down discriminatory marriage statutes on equal protection grounds.<sup>57</sup> Local officials around the country have attempted, so

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marriage law should be extended to same-sex couples, but instead held that discrimination against such couples in providing public benefits violated the state's constitutional equality provisions.

<sup>54</sup> See Lambda Legal, *supra* note 52. In response to the decision in *Baker*, the Vermont legislature enacted a civil union statute that gives same-sex couples all the same rights, benefits and responsibilities under state law as married persons. VT. STAT. ANN. tit. 15 §1204(a) (2000). Vermont's law was far-reaching in its protection of LGBT couples, but by enacting a civil union statute instead of amending its marriage law to allow same-sex marriage, the state deprived Vermont civil unions of certain recognition of their relationships in other states. See Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VER. L. J. 15 (2000) (discussing the Vermont statute); Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L. J. 1075 (2001) (discussing interstate recognition of Vermont Civil Unions); Emily Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 AVE MARIA L. REV. 497 (2005) (discussing full faith and credit issues generally with regard to civil unions and domestic partnerships).

<sup>55</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>56</sup> See Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 L. & SEXUALITY 11, 40-41 (2006).

<sup>57</sup> *Varnum v. O'Brien*, 763 N.W. 2d 862 (Iowa 2009) (holding that sexual orientation is a "quasi-suspect" classification and striking down gender limitations in the state's marriage statute as violative of equal protection); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008) (holding unconstitutional various portions of Connecticut's exclusionary marriage schemes on the basis of equal protection and substantive due process, reasoning that lesbians and gays were a suspect classification and that intermediate scrutiny should be applied to the state's law restricting marriage to different-sex couples, and recognizing that a broad civil union statute did not provide the same benefits as marriage); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (rejecting the argument that the fundamental right to marry included same-sex marriage, but finding that conferring public benefits based on marriage violated the equal protection rights of gay men and lesbians). State court marriage litigation has not always been successful. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (rejecting both substantive due process and



far with only limited success, to use their power to officiate marriages between same-sex couples in an attempt to force *Goodridge*-type reviews under their own state constitutions.<sup>58</sup> In other states, activists have sought injunctions ordering local officials to perform same-sex marriages despite contrary state law.<sup>59</sup> Most recently, two state legislatures have moved to authorize same-sex marriages.<sup>60</sup>

At the federal level, the United States Supreme Court has slowly begun to recognize that state attempts to fence LGBT people out of public and political life are unconstitutional. In *Romer v. Evans*,<sup>61</sup> the Court struck down a Colorado law that barred LGBT people civil rights protections, reasoning that moral disapproval of homosexuality was not a legitimate governmental end. In *Lawrence v. Texas*, the Court struck down a Texas sodomy statute reasoning that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”<sup>62</sup>

The federal cases, however, have stopped short of clearly announcing that gays and lesbians are covered by the same equality principals that might protect other disfavored groups from adverse governmental actions. In *Romer* the court did not apply heightened scrutiny or recognize LGBT people as a suspect class.<sup>63</sup> While the *Lawrence* opinion is more ambiguous about

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equal protection attacks on New York’s marriage law); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995) (rejecting both an equal protection and a substantive due process challenge to the District of Columbia’s marriage law); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (holding that Maryland’s marriage law did not violate the state constitution).

<sup>58</sup> See *In re Marriage Cases*, 183 P. 3d 384 (Cal. 2008) (consolidating six cases growing out of the decision by San Francisco Mayor Gavin Newsom to begin officiating same-sex marriages; holding that restrictions on same-sex marriage violated due process and privacy provisions of the state constitution). For a discussion of this strategy, see Sylvia A. Law, *Who Gets to Interpret the Constitution: the Case of Mayors and Marriage Equality*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2007).

<sup>59</sup> See, e.g., *Anderson v. King County*, 138 P.3d 963 (Wash. 2006); *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354 (2005).

<sup>60</sup> 2009 Vermont Laws No. 3 (S115).

<sup>61</sup> 517 U.S. 620 (1996).

<sup>62</sup> 539 U.S. 558, 582 (2003).

<sup>63</sup> Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 512-13 (2004) (pointing out the use of rational basis review in *Romer*, but arguing that

whether it applied heightened scrutiny, it also failed to expressly recognize LGBT people as members of a suspect class.<sup>64</sup> Thus, while these cases are the beginning of a federal law of LGBT equality, their possible impact on state attempts to preserve discriminatory marriage laws is less than clear.<sup>65</sup>

## THE LETTER

You asked whether Article III, Section 28 of the Idaho Constitution precludes the City of Moscow from adopting a policy permitting employees to elect health insurance benefits for their same-sex domestic partners. Article III, Section 28 provides: “Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”<sup>66</sup> The question raised by the City of Moscow’s policy is whether

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since the 1970s the court has slowly been moving toward more rigorous rational basis review and suggesting that the court is slowly abandoning its traditional three tiered review in substantive due process and equal protection cases).

<sup>64</sup> *Id.* Much has been written about the Court’s enigmatic due process analysis in *Lawrence*. See, e.g., Pam Karlan, *Forward: Loving Lawrence*, 102 MICH. L. REV. 1447, 1449 (2004) (observing, in the Forward to a Symposium Issue on *Lawrence*, that in that case the Court “sidestepped” the traditional tiered structure of due process and equal protection analysis); Goldberg, *supra* note 63, at 512-13 (arguing that *Romer* and *Lawrence* are part of a new, still emerging, approach to substantive due process and equal protection analysis); Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 30-31 (2005) (attempting to parse the language in *Lawrence* to support an argument for heightened scrutiny).

<sup>65</sup> See Bryan K. Fair, *Ultimate Associations: Same-Sex Marriage and the Battle Against Jim Crow’s Other Cousin*, 63 U. MIAMI L. REV. 269 (2008) (arguing that restrictions on same-sex marriage are unconstitutional and that, if tolerated, signal a return to that separate-but-equal jurisprudence that supported Jim Crow); Sharon Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685 (2008) (arguing that when the appropriate constitutional analysis is employed, courts should conclude that state bans on gay marriage are unconstitutional); Strasser, *supra* note 36 (reviewing the various marriage amendments and arguing that if broadly construed, they violate the federal constitution); Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 278-310 (2006) (arguing that the state marriage amendments may be unconstitutional); Nancy C. Marcus, *Beyond Romer & Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 408-433 (2006) (arguing that together *Romer* & *Lawrence* evidence a new approach to Fourteenth Amendment analysis that can be the basis for striking down discriminatory legislation).

<sup>66</sup> IDAHO CONST. art. III, §28.

providing health benefits constitutes the official recognition or validation of a “domestic legal union” other than marriage.<sup>67</sup>

First, conferring health insurance benefits on the intimate partners of employees is not akin to officially recognizing or validating a marriage between employees and their intimate partners. The language of the marriage amendment implies that *official* recognition is what is barred.<sup>68</sup> Because informal actions

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<sup>67</sup> See Strasser, *supra* note 37, at 66-67 (describing the language of the various state marriage discrimination amendments). Idaho’s amendment appears to resemble those in other states that bar “approximations of marriage. *Id.*

<sup>68</sup> The terms “valid” and “recognized” used in Article III, Section 28 are not unique to the anti-gay marriage amendments. Rather they are generally accepted terms of art in the area of conflicts of law and must be understood in this context. These exact terms are used in Idaho’s statutory provision regarding recognition of out of state marriages. Section 32-209 of the Idaho code is entitled “*Recognition of foreign or out-of-state marriages*” and provides: “All marriages contracted without this state, which would be *valid* by the laws of the state or country in which the same were contracted, are *valid* in this state, unless they violate the public policy of this state.” IDAHO CODE § 32-209 (1996). As is clear from the law of conflicts generally, and from the language of the Idaho statute “validity” is determined by local law – that is, in the case of same sex marriage, the law of the state in which the marriage is performed. The general choice of law rule regarding the validity of marriage is that the local law in which the ceremony was performed should be the law chosen to validate the marriage. See Restatement (second) of Conflict of Law § 283; Unif. Marriage & Divorce Act § 210; ALBERT A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 138 (1962)(discussing the general rule of validation of marriages). Where a state applies this rule of validation, it can be said to “recognize” the marriage. See EUGENE F. SCOLES, ET AL, CONFLICT OF LAWS §13.6 at 566 (4<sup>th</sup> ed. 2004)(“Under the usual view in the United States, first consideration in assessing the *validity* of a marriage is to determine compliance with the requirements of the law where the alleged marriage took place. If the parties comply with the rules of the place the marriage is celebrated, they usually will be *recognized* elsewhere as husband and wife....”). When a sister state marriage is “recognized”, it is treated as valid for all purposes in the recognizing state. See Barbara Cox, *Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same Sex Couples’ Marriages, Civil Union, and Domestic Partnerships*, 13 WIDENER L. J. 699, 718-719 (2004)(pointing out that courts have generally “viewed the term ‘marriage’ as ‘an all purpose concept’” and have accorded “universal recognition” to marriage), citing Willis L. M. Reese, *Marriage in American Conflict of Laws*, 26 INT’L & COMP. L.Q. 952, 952(1977).

Making health benefits available to the families of employees does not constitute recognition of marriage because it does not invoke the state’s marriage powers in any way that is enforceable against others or that requires the respect of other states or governments. Rather the provision of health benefits is akin to a private contract – enforceable between the parties, but not obligating new parties to enter the same contract. The decision of an employer to offer partner benefits does not obligate other employers to offer such

acknowledging same-sex relationships do not invoke the official power of the state in any way and do not make such relationships otherwise binding or enforceable, they should not be swept into the reach of the amendment. For example, marriages are licensed by the state of Idaho and may be dissolved only through death or a court order. The act of state licensing is what requires other states to accord full faith and credit to a valid marriage entered into in a state.<sup>69</sup> Yet no such comparable recognition occurs when a public employer offers health insurance to its employees. Nor does the enforceability of a same-sex relationship change merely through the provision of health insurance.

Health insurance and marriage are not intuitively related to each other.<sup>70</sup> Health benefits are commonly extended to many individuals other than spouses.<sup>71</sup> For example, many employer-

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benefits. Thus the provision of benefits does not make domestic partnerships legally enforceable or binding in any way. Such a policy merely ensures that while the relationship continues, benefits will be available.

<sup>69</sup> The Full Faith and Credit Clause of the U.S. Constitution requires states to respect the “official acts” of sister states. U.S. CONST. art. IV, § 1. The goal of the clause is to promote uniformity among the states but also to protect the sovereignty of an individual state’s ability to undertake official acts without being undermined by a sister state. *See generally* James D. Sumner, Jr., *The Full Faith and Credit Clause--Its History and Purpose*, 34 OR. L. REV. 224 (1955); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957); Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith And Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006).

<sup>70</sup> The proponents of benefits for same-sex domestic partners made this argument unsuccessfully in *National Pride at Work*. *See* 748 N.W. 2d at 538-39 note 18 (Kelly, J., dissenting); *cf.* *Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004) (reversing the trial court’s dismissal of a claim that the state university system engaged in unconstitutional discrimination by giving health benefits to the different sex partners of university employees but not to the same-sex partners of such employees, and pointing out that the qualification for benefits under the university policy was not truly based on marriage).

<sup>71</sup> In two separate orders, for example, the judges of the United States Court Appeals for the Ninth Circuit issued orders requiring the Director of the Administrative Office of the United States Courts to certify same-sex spouses, married under California’s same-sex marriage law, for participation in the federal employee health program. *See In the Matter of Karen Golinski*, 3 (9th Cir. Jan. 13, 2009) *available at* [http://www.ce9.uscourts.gov/articlefiles/Jan13\\_2009\\_USCA9\\_EDR\\_Order.pdf](http://www.ce9.uscourts.gov/articlefiles/Jan13_2009_USCA9_EDR_Order.pdf) (Judge Kozinski construed the word “family” in the Federal Employee Health Benefits Act, 5 U.S.C. § 8903(1) to authorize the federal Office of Personnel Management to contract for health insurance to include family members other than spouses and children, such as

provided health care plans extend benefits to older children who are no longer dependents, grandchildren and stepchildren.<sup>72</sup> Between an adult and a child, the relationship most parallel to marriage would be adoption. Yet coverage for a stepchild does not equate to an adoption of the child by the employee-stepparent. Thus, the inclusion of such family members within the coverage of a health plan does not constitute the recognition of a “domestic legal union” between the employee and the family member.

Not only is the extension of employer health coverage to family members not indicative of marriage, but the availability of such coverage is not a characteristic of marriage. Certainly marriage is one of the most common bases upon which benefits are extended to intimate partners, but it would be a stretch to say that the availability of health benefits is one of the major characteristics of marriage.<sup>73</sup> Few heterosexual persons get married solely to become eligible for health benefits.<sup>74</sup> In many situations, spousal health coverage is unavailable. Even where subsidized spousal health benefits are provided, no law requires a person to cover her or his spouse.<sup>75</sup> Thus, the provision of health insurance is not generally considered one of the duties that married couples owe one another. Rather married couples owe a general duty of support, which may include the provision of

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parents or siblings living in an employee’s household); In the Matter of Brad Levenson (9th Cir. Feb. 2, 2009) available at [http://www.ceg.uscourts.gov/articlefiles/Feb.2\\_2009\\_final\\_FPD\\_ERD\\_ORD.pdf](http://www.ceg.uscourts.gov/articlefiles/Feb.2_2009_final_FPD_ERD_ORD.pdf) (order by Judge Stephen Reinhardt finding that the denial of federal benefits to same-sex employees is likely to be found unconstitutional).

<sup>72</sup> Adoption is an officially-recognized, state-created parent-child relationship. See, e.g., IDAHO CODE §16-1501-15. See also Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 32-35 (2000) (discussing adoption and marriage as state-sanctioned ways to create legally cognizable relationships).

<sup>73</sup> The debate over gay marriage has revived a lively discussion of what rights constitute “incidents of marriage.” See, e.g., Mark Strasser, *An Amendment to Protect Marriage*, 20 BYU J. PUB. L. 387 (2006).

<sup>74</sup> Securing health insurance does not show up as a reason to marry in popular relationship counseling books. See, e.g., ELIZABETH MARTYN, *BEFORE YOU SAY I DO* (2003) (listing five good reasons to marry, e.g. because the couple is in love, they want to make a commitment, their culture expects marriage, to start a family, to celebrate, and it’s the right time).

<sup>75</sup> State insurance laws authorize but do not require the coverage of spouses on health insurance. See, e.g., Irina Dushi & Marjorie Honig, *Price and Spouse's Coverage in Employee Demand for Health Insurance*, (Feb. 25, 2003) (undocumented work, available at SSRN: <http://ssrn.com/abstract=362580>) (explaining that higher premiums cause employees to opt out of available coverage, such as coverage for spouses).

insurance. But no court would require a spouse to maintain insurance for the other spouse.<sup>76</sup>

Finally, the availability of health insurance to an employee's intimate partner does not entitle the partners to *any* of the official benefits conferred upon married persons by the state.<sup>77</sup> For example, they remain ineligible for a marriage license and other means of solemnizing their relationship under state law. Children born to one partner are not presumed to be children of the other; the non-biological parent of such children is not entitled to child custody and likewise does not have a duty to pay child support. The partners are not treated as spouses for purposes of consenting to medical care, inheritance, surviving spouse benefits, or income tax. Nor are they entitled to recover for loss of consortium or wrongful death of the other partner. If the relationship breaks down, the partners are not protected by the laws of divorce, spousal support, or equitable distribution. In short, the intimate partner relationship in which one partner's employer-provided health insurance covers the other does not legally resemble a marriage in any way.

The Idaho Attorney General's opinion,<sup>78</sup> which takes the position that the anti-gay marriage amendment bars municipalities within Idaho from offering domestic partner benefits, is based in part on the "Effect of Adoption" and "for" and "against" statements that appeared on the ballot with the constitutional amendment. It is also based on the A.G.'s analysis of precedent in Washington and Michigan. As the A.G. notes, the following language appeared on the ballot:

If adopted the proposed amendment would add language to the Constitution of the State of Idaho to provide that a

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<sup>76</sup> State courts have held that a spouse's duty of support requires him or her to summon medical care when a spouse needs it. A spouse can be held responsible to third parties for the other spouse's medical bills. But the case law has never gone so far as to require spouses to provide health insurance or to pay for available coverage. See Twila Perry, *The Essentials of Marriage: Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEMINISM 1, 12-14 (2003).

<sup>77</sup> As part of the debate regarding gay marriage, many have categorized the list of rights, duties and responsibilities relating to marriage that are not available to LGBT couples. The ABA Family Law Section has published one of the most comprehensive and well documented lists. See ABA Section on Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339 (2004).

<sup>78</sup> Op. Idaho Att'y Gen. No. 08-21508 (Feb. 4, 2008) (on file with the author).

marriage is only between a man and a woman. The language prohibits recognition by the state of Idaho and its political subdivisions of civil unions, domestic partnerships, or any other relationship that attempt to approximate marriage. *The language further prohibits the state and its political subdivision from granting any or all of the legal benefits of marriage to civil unions, domestic partnerships, or any other relationship that attempts to approximate marriage.*<sup>79</sup>

In addition, the A.G.'s opinion cites some of the "for" and "against" statements that were also included on the ballot. The opinion assumes that these statements control the interpretation of Article III, Section 28.

The "Effect of Adoption" and the "for" and "against" statements are important interpretive sources.<sup>80</sup> They explain the intentions of the leading proponents and opponents of the amendment. Essentially the "Effect of Adoption" and "for" and "against" provisions are akin to legislative history. However, under most canons of statutory construction, courts turn first to the plain language of the statute for purposes of statutory interpretation.<sup>81</sup> If the language of the statute is unclear or ambiguous, courts construing statutes will then turn to legislative history to provide interpretive context for the meaning of an enactment's words and to provide insight. The Idaho intent documents do not address the ability of municipalities to offer health insurance to the domestic partners of employees. Rather these documents stress that the amendment was intended to preclude any official recognition of same-sex relationships as marriages, and to bar the recognition or validation of relationships that are "approximations of marriage."<sup>82</sup> Moreover,

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<sup>79</sup> *Id.* at 1-2 (emphasis added in the Attorney General's Opinion) (quoting the purpose statement from Idaho H.J.R. No. 2 (2006)).

<sup>80</sup> See generally, *supra* note 15 and accompanying texts for more discussion of the role of intent in interpreting amendments.

<sup>82</sup> The purpose statement specifically uses the term "approximates." Its first statement is that "[t]he language of this bill, including the term 'domestic legal union' is intended to protect marriage as being only between a man and a woman." See HJR2, *supra* note 79. The purpose statement also provides that "[i]t is the intent that the language of this bill shall not (a) interfere with the ability of persons or entities to enter into private contracts . . ." This language from the legislative statement of purpose was not included by the Secretary of

the intent documents make clear that only the “benefits of marriage” are restricted by the amendment. As pointed out earlier, health insurance can hardly be said to be a benefit of marriage.

The intent documents also support the argument that employment benefits for domestic partners are not implicated by the amendment. The purpose language provides that the amendment does not “interfere” with contracts between “persons or entities,” an oblique reference to unofficial contractual ordering in support of same-sex relationships – such as employment contracts which provide benefits.<sup>83</sup> Moreover the intent documents underscore the earlier point of this letter that the amendment’s terms “recognition” and “validation” should be limited to official acts of the state and not informal acknowledgments of employees’ personal relationships.<sup>84</sup>

The most logical interpretation of the marriage amendment is that it does not limit the ability of the state and its subdivisions to recognize non-marital relationships, so long as those relationships are not elevated to such an extent that their recognition could be an approximation of marriage. States recognize many types of relationships that share some common characteristics with marriage but are nonetheless not marriage. For example, the state-recognized evidentiary privileges common between spouses also exist between attorneys and their clients, as

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State in the “Statement of Meaning and Purpose.” *See Id.* The ballot language is available on the Idaho Secretary of State’s website at [http://www.idsos.state.id.us/elect/inits/06\\_sjr107\\_stmnt\\_effect.htm](http://www.idsos.state.id.us/elect/inits/06_sjr107_stmnt_effect.htm) (last visited June 8, 2009).

<sup>83</sup> Not only does the purpose statement refer specifically to relationships that “approximate marriage,” the “Statements FOR the Proposed Amendment” drafted by the Idaho Legislative Council and included in state-sponsored voter pamphlets consistently refer to state policy regarding marriage. The first and fourth statements emphasize that the amendment does not change existing Idaho Law (“Same gender marriages are not currently allowed under Idaho statutes, and this amendment provides for the same prohibition at the state constitutional level to ensure that Idaho state courts do not allow or require the recognition of same gender marriages. . . . This amendment does not deny any existing rights under Idaho law, but Idaho’s current marriage laws could be weakened in the future without this amendment.”). Ben Ysura, Idaho Sec. of State, 2006 HJR2 Statements For and Against, *available at* [http://www.idsos.state.id.us/elect/inits/06\\_hjr2\\_stmnt\\_forandagainst.htm](http://www.idsos.state.id.us/elect/inits/06_hjr2_stmnt_forandagainst.htm).

<sup>84</sup> The purpose statement refers exclusively to limitations on the “State of Idaho and its political subdivisions” and refers to granting “legal benefits of marriage.” *Id.*



well as doctors and their patients.<sup>85</sup> Likewise, the state recognizes that parents may claim children as dependents on a tax return, just as spouses may be claimed as dependents.<sup>86</sup> The state also recognizes that business partners may be held liable for debts incurred by other business partners, just as a spouse may be held liable for the debts of the other spouse.<sup>87</sup> Further, the state recognizes that cotenants in property share co-management of that property, just as spouses share co-management of community property.<sup>88</sup> Each of these types of relationships shares some governmental treatment in common with marriage, yet no one would suggest that such common treatment morphs these other relationships into marital relationships. Nor does Article III, Section 28 preclude the state from conferring some benefits on the relationship between same-sex partners that may also be conferred upon married spouses.

I strongly encourage the City Council to approve the policy providing health insurance benefits to the domestic partners of city employees. This policy sends a message that Moscow is a welcoming place. It reflects the sentiment of voters in the city who overwhelmingly voted against the unequal marriage amendment. The policy signals that the City of Moscow intends to grapple with the real-world needs of city employees and their families. I believe that the policy will contribute to increased productivity by city employees.<sup>89</sup> Further, it will assist the City in attracting high quality employees and will position the city to

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<sup>85</sup> See Richard A. Laws, *Comment: Underprivileged: What's Wrong With Rule 516*, 40 IDAHO L. REV. 695, 695-97 (2004) (comparing the various privileges provided for under the Idaho Rules of Evidence).

<sup>86</sup> See Idaho State Tax Commission, *2008 Individual Income Tax Instructions 3*, available at [http://tax.idaho.gov/pdf/2008/EPB00004i\\_10-24-2008.pdf](http://tax.idaho.gov/pdf/2008/EPB00004i_10-24-2008.pdf) (explaining the Idaho provisions for claiming both spouses and children as dependents).

<sup>87</sup> See Alexandria Striech, *Comment: Spousal Fiduciaries in the Marital Partnership: Marriage Means Business But the Sharks Do Not Have A Code of Conduct*, 34 IDAHO L. REV. 367(1998) (comparing marriage and business partnerships on questions of mutual liability for breach of fiduciary duty).

<sup>88</sup> Compare IDAHO CODE § 55-104 and IDAHO CODE § 32-912.

<sup>89</sup> Many private employers offer domestic partner benefits. The Human Rights Campaign reports that 49% of Fortune 500 companies and 78% of Fortune 100 companies offer such benefits. See Samir Luter, *Domestic Partner Benefits: Employer Trends and Benefits Equivalency for the GLBT Family 3* (2006), available at <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf>.

compete with private employers who offer similar benefits.<sup>90</sup> Most importantly, by adopting this policy the City of Moscow will be treating its employees with the dignity and respect to which they are entitled.<sup>91</sup>

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<sup>90</sup> See, e.g., Alene Russell, *American Association of State Colleges and Universities, Domestic Partnership Benefits: Equity Fairness and Competitive Advantage* (October 2007), available at [http://www.aascu.org/policy\\_matters/pdf/domestic\\_partners07.pdf](http://www.aascu.org/policy_matters/pdf/domestic_partners07.pdf) (arguing that domestic partner benefits are increasingly a competitive lever in higher education necessary to recruit and retain top employees).

<sup>91</sup> The Moscow, Idaho City Council approved the policy providing benefits for the domestic partners of same-sex employees in February, 2008, three months after the anti-gay marriage amendment was adopted in Idaho. At the time the mostly conservative, business-oriented council was threatened with suit. Opponents of gay marriage disparaged the city and implied that they would file lawsuits that would be costly to the residents of the city. To date, nothing has happened.