

STATUS, SUBSTANCE, AND STRUCTURE:  
AN INTERPRETIVE FRAMEWORK FOR  
UNDERSTANDING THE  
STATE MARRIAGE AMENDMENTS

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I. INTRODUCTION

In November 2003, the Massachusetts Supreme Judicial Court put the nation on notice when it ruled that Massachusetts marriage laws were “rooted in persistent prejudices against persons who are . . . homosexual,” and that, while the state constitution “cannot control such prejudices [,] . . . neither can it tolerate them.”<sup>1</sup> Within a year of the Massachusetts court’s four to three decision in *Goodridge v. Department of Public Health*,<sup>2</sup> Congressional leaders were seriously discussing a marriage amendment to the United States Constitution<sup>3</sup> and voters in thirteen states responded by overwhelmingly approving state constitutional amendments that define marriage as the union of husband and wife, bringing the national total of state marriage amendments to seventeen.<sup>4</sup> Additional states appear likely to do so in 2005 and 2006.<sup>5</sup>

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<sup>1</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

<sup>2</sup> *Id.*

<sup>3</sup> *See, e.g.*, S.J. Res. 40, 108th Cong. (2004).

<sup>4</sup> Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true> (Nov. 3, 2004). Overall, state marriage amendments were considered in at least thirty-one states in 2004 (including legislative proposals in twenty-six states and initiative petitions in six). *Id.* Thirteen of those amendments appeared on the ballot, while three additional measures were given initial approval but require approval again in the next legislative session before being placed on the ballot. *Id.* In each of these states, the amendments passed by wide margins, ranging from 12% (56% to 44% in Oregon) to 72% (86% to 14% in Mississippi). Cheryl Wetzstein, *Eleven States Uphold Traditional Marriage*, WASH. TIMES, Nov. 3, 2004, at A01. The National Gay and Lesbian Task Force calculates that 20.6 million Americans voted on a marriage amendment on Nov. 3, 2004, roughly one in five American voters, and cumulatively, the amendments passed by a two to one margin (67% to 33%), with nearly fourteen million Americans voting in favor. Press Release, National Gay and Lesbian Task Force, *Anti-Gay Marriage Amendments Pass in 11 States*, at <http://www.thetaskforce.org/media/release.cfm?releaseID=756> (Nov. 3, 2004).

<sup>5</sup> Brad Knickerbocker, *Political Battles Over Gay Marriage Still Spreading*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004, at 01; Peterson, *supra* note 4.

Despite the breadth and diversity of support for state marriage amendments, the amendment process was often contentious. With twelve different texts among the thirteen amendments adopted in 2004, debate often swirled around the meaning (and legal consequences) of the amendments. *The New York Times*, in language reminiscent of the *Goodridge* decision, lumped all the amendments together, condemning them collectively as “mean-spirited measures,” and “sweeping bursts of bigotry,” aimed only at “enshrining discrimination in . . . state constitutions.”<sup>6</sup> Others raised more specific concerns about the scope of particular amendment texts, suggesting that they might work to cut off hospital visitation rights, private employee benefits, or medical decision-making authority.<sup>7</sup>

A definitive interpretation of each amendment is beyond the scope of this essay, especially in light of the fact that none of the interpretive questions raised in political debate have yet been considered in litigation. This essay, rather, analyzes the language of the seventeen state marriage amendment texts, making a preliminary attempt to classify them based on likely interpretation and consequences. My goal is to clarify the options available to policymakers while offering some specific recommendations.

The marriage amendments come in three broad categories: status (or definitional) amendments, substantive amendments, and structural amendments. The status amendments are largely one-sentence amendments, defining marriage as the union of a man and woman without specifically addressing the legal incidents (“benefits”) of marriage. These amendments state, for example, “only a marriage between one man and one woman is valid or recognized as a marriage in this state,”<sup>8</sup> and have been adopted in six states (Alaska, Mississippi, Missouri, Montana Nevada, and Oregon).

The ten substantive amendments also define marital status, but then add a second sentence protecting (to varying degrees) the unique legal position of marriage by limiting the extension of marital rights and obligations to unmarried couples. For example, the Kentucky amendment states:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status

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<sup>6</sup> Editorial, *Marriage and Politics*, N.Y. TIMES, Oct. 29, 2004, at A24.

<sup>7</sup> See, e.g., Jim Siegel, *Partner Benefits Could be Curtailed*, CINCINNATI ENQUIRER, Oct. 9, 2004, at 1B (citing Ohio Attorney General Jim Petro and Capital University Law Professor Mark Strasser).

<sup>8</sup> MONT. CONST. art. XIII, § 7.

identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.<sup>9</sup>

Unlike the status amendments, these substantive amendments vary widely in scope and text from state to state. These variations in text suggest substantive differences in the degree of protection (and likely effectiveness) these amendments offer.

The structural amendment, adopted only in Hawaii, is directed to the separation of powers: “The Legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>10</sup> It does not adopt any particular definition of marriage. Rather, the structural amendment specifically grants the legislature authority to recognize marriage as the union of man and woman.<sup>11</sup>

## II. STATUS AMENDMENTS

Six states have adopted status amendments, defining marriage as the union of a man and woman with relatively minor variations in text or effect from state to state.<sup>12</sup> Each contains a reference both to validity (of in-state marriages) and recognition (of foreign marriages). The Alaska amendment language is typical of these texts, adding just nineteen words to the Constitution: “To be valid or recognized in this State, a marriage may exist only between one man and one woman.”<sup>13</sup> Other amendments were patterned after the Alaska text.

### A. Textual Variations

Distinctions among the six status amendments are minor, such as the substitution of “shall” for “may,”<sup>14</sup> “a man and a woman” or “a male and female person” in place of “one man and one woman,”<sup>15</sup> and “recognized or given effect” instead of “valid or recognized.”<sup>16</sup> Three of the amendments reverse the syntax, giving added emphasis to the

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<sup>9</sup> KY. CONST. § 233a.

<sup>10</sup> HAW. CONST. art. I, § 23.

<sup>11</sup> Peterson, *supra* note 4.

<sup>12</sup> These states include Alaska, Mississippi, Missouri, Montana, Nevada, and Oregon. See ALASKA CONST. art. I, § 25; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; 2004 Miss. Ballot Measure 1; 2004 Or. Ballot Measure 36.

<sup>13</sup> ALASKA CONST. art. I, § 25.

<sup>14</sup> Although some amendments use the permissive “may” rather than the imperative “shall,” when limited by the word “only,” the two variations (“may . . . only” and “shall . . . only”) are virtually indistinguishable. If any distinction were to be made between the two, it would be the argument that the use of “shall” creates an affirmative duty to recognize opposite-sex marriages in the state, while the permissive “may” is meant to leave the legislature authority not to recognize marriage at all.

<sup>15</sup> MO. CONST. art. I, § 33 (“a man and a woman”); NEV. CONST. art. I, § 21 (“a male and female person”); 2004 Miss. Ballot Measure 1 (“a man and a woman”).

<sup>16</sup> NEV. CONST. art. I, § 21.

marriage idea by stating “only a marriage” between one man and one woman shall be valid or recognized.<sup>17</sup>

The insertion of “one man and one woman” instead of “a man and a woman” may indicate a desire to also preclude polygamy. Other vehicles should be considered, however, to address the question of polygamy. While both wordings would likely preclude polyamorous (group) marriages, it is unclear that either would prevent an individual from entering multiple marriages.<sup>18</sup>

The Mississippi amendment is distinctive due to its length, spelling out the details of interstate-marriage recognition.<sup>19</sup> Whereas the other states combine the issues of in-state validity and interstate recognition, the Mississippi Legislature separated the two issues, drafting a two-sentence amendment in which the first sentence addresses the validity of in-state marriage licenses (“Marriage may take place and may be valid under the laws of this state only between a man and a woman.”), while the second sentence addresses interstate recognition (“A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.”). The shorter and more common “valid or recognized” appears sufficient to reach the same result.<sup>20</sup>

Prior to the adoption of the Oregon amendment, Oregon law did not contain an explicit policy regarding the interstate recognition of same-sex unions. Invoking the “public policy exception” to the general rule requiring that full faith and credit be given to marriages contracted in sister states, the drafters of the Oregon amendment inserted a reference

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<sup>17</sup> The three amendments that lead with the idea of marriage before speaking of its validity or recognition include Montana, Nevada, and Oregon. MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; 2004 Or. Ballot Measure 36.

<sup>18</sup> Historically, polygamous marriages have involved one man entering into separate marriages with each of several women. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878). Although one man may have taken several wives, the wives were not deemed married to one another. It is unlikely that the text of any of the marriage amendments would prevent one man from entering into multiple marriages simultaneously.

<sup>19</sup> H. Con. Res. 56 (Miss. 2004) (2004 Miss. Ballot Measure 1).

Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.

*Id.*

<sup>20</sup> *Id.*

to the public policy of Oregon.<sup>21</sup> The Oregon text also includes a reference to the political subdivisions of the state—a response to the actions of county officials who, in the spring of 2004, began issuing marriage licenses to same-sex couples.<sup>22</sup> The reference to political subdivisions sent a clear message to local politicians in the state, but likely added little by way of legal effect because marriage is already governed by state law and not subject to patchwork redefinition at the local level.<sup>23</sup>

### B. Legal Effects

What do the status amendments do? The six status amendments have three primary legal effects: (1) they define marriage for all purposes of state law; (2) they insulate that definition from both judicial and legislative revision; and (3) they establish policy with respect to interstate marriage recognition. As a secondary matter, the status amendments also reduce (but do not eliminate) the potential for state courts to require the extension of marital benefits to unmarried couples as the Vermont Supreme Court did in *Baker v. State*.<sup>24</sup>

#### 1. Defining marriage

Each of the status amendments requires that, to be valid under state law, marriage must be between a man and a woman. That is, only the union of a man and a woman is eligible for a marriage license issued under the law of the state, and licenses issued to two men or to two women are not valid. In this respect, the status amendments do not create new marriage policy, but rather restate existing policy recognizing marriage as the union of a man and a woman.

#### 2. Protecting marriage

Because the definition of marriage contained in the marriage amendment merely restates existing law, the significance of the status amendments is found in the procedural protections that these amendments place around existing marriage policy. Whereas a common law or statutory understanding of marriage is subject to revision by

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<sup>21</sup> 2004 Or. Ballot Measure 36 (“It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”); *see also* NEV. CONST. art. I, § 21.

<sup>22</sup> David Austin & Laura Gunderson, *Same-Sex Weddings Begin*, OREGONIAN, Mar. 3, 2004, at A01.

<sup>23</sup> The reference to political subdivisions is likely more significant when addressing the legal incidents of marriage, and may be used to preclude recognition of domestic partnerships at the county and municipal level. *See, e.g.*, OHIO CONST. art. XV, § 11 (“This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”).

<sup>24</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

either legislative action or (of greater concern to many proponents) judicial decision,<sup>25</sup> a constitutional definition of marriage insulates that definition from both judicial and legislative review. By inserting a definition of marriage into the state constitution, the people of a state ensure that definition will not be repealed without their active participation via a subsequent statewide referendum.<sup>26</sup>

### 3. Recognizing foreign marriages

Each status amendment also addresses the question of foreign marriage recognition such that same-sex marriages, even if validly contracted in a foreign jurisdiction, are not recognized within the state. Only in Oregon did this constitute a new policy statement; in the other five states, the same policy had already been expressed by statute. The right of states to decline recognition of foreign marriages contrary to the public policy of the forum state is well established.<sup>27</sup> In setting its marriage recognition policy into the state constitution, the people of the state both clearly articulate public policy on the issue and again insulate that policy from both legislative and judicial revision, requiring the statewide referendum of a subsequent constitutional amendment to repeal the policy.<sup>28</sup>

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<sup>25</sup> In Alaska and Oregon, the status amendments were in direct response to pending litigation threatening to overturn the statutory understanding of marriage, while the other status amendments were in response to the perceived threat of future litigation. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Multnomah Co. Or. Cir. Ct. Apr. 20, 2004).

<sup>26</sup> Throughout this article, when I refer to the insulation of state marriage policy from judicial review, it should be noted that this is a reference to review on state constitutional grounds. The inability of a state constitutional amendment to insulate state law from federal constitutional (or statutory) review highlights the additional need for some form of federal constitutional amendment in order to completely safeguard the power of states to retain a traditional definition of marriage.

<sup>27</sup> See, e.g., *Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws: Hearing Before the Constitution, Civil Rights, and Prop. Rights Subcomm. of the S. Judiciary Comm.*, 108th Cong., 2004 WL 406849 (Mar. 3, 2004) (testimony of Lea Brilmayer); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 37 (1998) ("The public policy exception, which protects states against the application of foreign laws that are repugnant to the principles upon which the forum state is grounded, is rooted in the principles of federalism and the protection of sovereignty which inheres in the Tenth Amendment.").

<sup>28</sup> This does not preclude the possibility of a finding that recognition is mandated by the Full Faith and Credit Clause of the U.S. Constitution, but rather prevents state courts from recognizing foreign same-sex marriages as a matter of state law or policy.

#### 4. Courts requiring extension of marital benefits

Status amendments also mitigate (and arguably eliminate) the legal basis for imposition of a marriage-like status for unmarried couples by judicial ruling, at least insofar as that ruling rests on the premise that same-sex couples are unconstitutionally denied access to marriage. In *Baker v. State*, the Vermont Supreme Court ruled that

the laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts.<sup>29</sup>

As a remedy, the court gave the legislature the option of rewriting the marriage laws to include same-sex couples or creating a parallel status for same-sex couples with all the rights, benefits, and obligations of marriage.<sup>30</sup> While the legislature ultimately chose the latter option,<sup>31</sup> the judicial mandate was premised on the unconstitutionality of the Vermont marriage laws. Without such a finding of unconstitutionality, there would have been no finding of an injury and thus no need for civil unions to remedy that injury.

This precise question has been raised recently in Oregon and Montana. Prior to the November 2004 elections, in which Oregon and Montana voters approved status amendments, parties in pending litigation sought to require the extension of spousal benefits to unmarried couples. In Oregon, this took the form of a direct challenge to the Oregon marriage law, after county officials in Multnomah County (Portland) began issuing marriage licenses to same-sex couples in March of 2004.<sup>32</sup> The trial judge found the marriage law to “impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits.”<sup>33</sup> Explicitly adopting the path of the Vermont Supreme Court, the Oregon circuit court stayed its decision, giving the legislature ninety days after the start of the next legislative session in which to adopt a comprehensive system of marital benefits and responsibilities for same-sex couples.<sup>34</sup> At the time of publication, and following the approval of the Oregon

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<sup>29</sup> *Baker*, 744 A.2d at 884.

<sup>30</sup> *Id.* at 886.

<sup>31</sup> VT. STAT. ANN. tit. 15, §§ 1201-07 (2002).

<sup>32</sup> *Li v. State*, No. 0403-03057, 2004 WL 1258167, at \*1 (Multnomah Co. Or. Cir. Ct. Apr. 20, 2004).

<sup>33</sup> *Id.* at \*7.

<sup>34</sup> *Id.* at \*8.

marriage amendment, the case is pending before the Oregon Supreme Court.<sup>35</sup>

In Montana, the plaintiffs were state university system employees seeking access to employee-spouse benefits.<sup>36</sup> Unlike the Oregon litigation, the Montana plaintiffs explicitly disavowed any intent to challenge the marriage law.<sup>37</sup> Following the adoption of the Montana amendment, the Montana Supreme Court issued a narrow ruling requiring the extension of marital benefits to unmarried same-sex couples as long as there existed a process by which unmarried opposite-sex couples could obtain the benefits by simply signing an affidavit.<sup>38</sup>

Some have argued that a status amendment goes further, also preventing the state *legislature* from enacting a new marriage-like status for same-sex couples (e.g., “civil unions”) which would entitle (or subject) them to the legal benefits and obligations of marriage.<sup>39</sup> In other states, proponents of the status amendments have explicitly disavowed this intent. To the extent that such interpretation hinges on the intent of the people, it is possible that the voters in Alaska may have intended such a result.<sup>40</sup> Conversely, in the other status amendment states, where the amendments were adopted after the creation of civil unions in Vermont, such an intent is doubtful.<sup>41</sup>

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<sup>35</sup> *Li v. State*, 95 P.3d 730 (Or. 2004).

<sup>36</sup> *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 448 (Mont. 2004).

<sup>37</sup> *See id.* at 449.

<sup>38</sup> *Id.* at 453. The court construed the University System’s affidavit of common law marriage as a means by which unmarried opposite-sex couples could (falsely) swear to their marital status, thereby obtaining benefits. *Id.* at 451. In the absence of such an affidavit procedure, or if the affidavit were more narrowly drawn so as to clearly encompass only married couples, the court did not suggest the restriction of spousal benefits to married couples would suffer any constitutional defect. *Id.* at 453.

<sup>39</sup> This is essentially the argument being made in California, where an initiative statute defining marriage as the union of a man and a woman was adopted prior to the creation of Vermont civil unions. *See Lee Romney, Judge Backs Partner Rights Law*, L.A. TIMES, Sept. 9, 2004, at B4. Plaintiffs in the case argue that, while the legislature may extend benefits to unmarried couples, it cannot create a legal status identical to marriage in all but name. *Id.* A trial judge rejected this argument, and the case is currently pending on appeal. *Id.*

<sup>40</sup> At the time the Alaska marriage amendment was adopted (November 3, 1998), “civil unions” had not yet been created in Vermont, and there was not yet a public debate over the separation of marital status and marital benefits.

<sup>41</sup> Prior to the Vermont Supreme Court decision in *Baker*, there had been no legal segregation of marital status from marital benefits. Thus, when Alaska voters defined “marriage” as the union of a man and woman, it is likely that they intended to include both marital status and the legal incidents of marriage because they did so prior to *Baker*. Because of the way the public debate evolved after *Baker*, however, the 2004 marriage debate clearly reflected the separation of questions of status and legal incidents, such that the four states adopting status amendments in 2004 should be understood as addressing only the status of marriage while leaving the question of legal incidents to the legislature.



With only minor variation from state to state, any of the status amendments are likely to fulfill the same basic functions of marriage definition and recognition. With little substantive difference, there is much to be said for simplicity: “Only marriage between a man and a woman is valid or recognized in this state.”

### III. SUBSTANCE AMENDMENTS

In late 1999, the Vermont Supreme Court ruled that the Vermont Constitution required the benefits of marriage be extended to same-sex couples.<sup>42</sup> In response to the Court’s order, the Vermont Legislature created the new legal relationship of “civil union” for same-sex couples, ascribing to that union all the legal incidents (rights, benefits, and responsibilities) of marriage.<sup>43</sup> Commentators on both sides of the marriage debate described these new civil unions as “same-sex marriage by another name,”<sup>44</sup> or “marriage lite,”<sup>45</sup> as the Legislature maintained a nominal distinction between civil unions and marriage.<sup>46</sup>

When Vermont formally segregated the legal status of marriage and the legal incidents of marriage, those drafting marriage amendments began seeking ways to address this new development. As a spokesman for the Nebraska amendment campaign told *The New York Times*, “Because of the action in Vermont, we really feel we’ve been forced to adopt this language to close this loophole.”<sup>47</sup> In 2000, Nebraska became the first state to consider and approve a marriage amendment which both defines marriage and explicitly limits the marriage-like recognition of other relationships.<sup>48</sup>

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<sup>42</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>43</sup> VT. STAT. ANN. tit. 15, § 1201 (2002).

<sup>44</sup> David Orgon Coolidge, *The Civil Truth About “Civil Unions”*, THE WKLY. STANDARD, June 26, 2000, at 26.

<sup>45</sup> Julie Deardorff, *Vermont is Front Line of Gay Marriage Fight*, CHI. TRIB., Apr. 3, 2000, at N1.

<sup>46</sup> VT. STAT. ANN. tit. 15, § 1201 (2002) (“Marriage’ means the legally recognized union of one man and one woman.”).

<sup>47</sup> Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, Oct. 21, 2000, at A9. Various state legislatures have considered legislation to insert “civil unions” into their marriage protection statutes, though no court has required recognition of civil unions where same-sex marriage recognition is precluded. Similarly, no court has held that unmarried couples are entitled to the incidents of marriage where a constitutional amendment already defines marriage. In Vermont, civil unions were the remedy to a marriage statute the court found to be underinclusive and discriminatory. In the absence of a constitutional defect in the marriage statute, however, there was no independent requirement that the state provide the incidents of marriage to unmarried couples.

<sup>48</sup> Apart from the equal protection concerns, which have already been raised in litigation, the Nebraska amendment presents a good example of the difficulty facing

By 2004, nine of the thirteen marriage amendments on the ballot linked the status and legal incidents of marriage, limiting (to varying degrees) the scope of marital benefits to which courts or legislatures could extend to unmarried couples.<sup>49</sup> Unlike the status amendments, there is no single approach or text that has become standard among these substance amendments. While each of the ten substance amendments contains a first sentence defining marriage as the union of a man and a woman, and thus affords the same procedural protections as the status amendments, the substance amendments diverge widely with respect to the second sentence.

#### A. Textual Variations

The first of the substance amendments, the Nebraska amendment, followed a “relationship model” describing (and naming) specific relationships which would be denied recognition in Nebraska. The Nebraska amendment states in part: “The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”<sup>50</sup> This approach, which singled out same-sex relationships, has been recently challenged on equal protection grounds in federal court, not because same-sex relationships are denied the protections of marriage, but under an argument that the amendment treats them differently than other (heterosexual) non-marital relationships.<sup>51</sup>

Most of the recently adopted substance amendments have instead followed a “recognition model,” imposing recognition limitations which apply equally to all forms of non-marital unions. For example, the Louisiana amendment reads in part: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall

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amendment drafters who seek to address the various names under which the incidents of marriage could be assigned to another relationship.

<sup>49</sup> See GA. CONST. art. I, § IV, para. I; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; UTAH CONST. art. I, § 29; 2004 Ark. Ballot Measure 3, *available at* [http://www.sos.arkansas.gov/elections/elections\\_pdfs/2004/amendments/04amendsforballot3.pdf](http://www.sos.arkansas.gov/elections/elections_pdfs/2004/amendments/04amendsforballot3.pdf) [hereinafter Ark. Ballot]; 2004 N.D. Ballot Measure 1. In addition, each of the three amendments which were given initial approval in 2004 fall within this category of substance amendments. See 2004 Mass. H. 3190; 2004 Tenn. H.J.R. 990; 2004 Wis. A.J.R. 66. Of these, the Massachusetts amendment is unique in that, while the other substance amendments seek to preserve the connection between the status of marriage and its legal incidents, the Massachusetts amendment formalizes the segregation of status and legal incidents, creating a separate legal status of “civil union” entitled to all the legal rights, benefits, and responsibilities of marriage. 2004 Mass. H. 3190.

<sup>50</sup> NEB. CONST. art. I, § 29.

<sup>51</sup> *Citizens for Equal Prot. v. Bruning*, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* <http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf> (last visited Mar. 2, 2005).

not be valid or recognized.”<sup>52</sup> Of the nine substance amendments adopted in 2004, eight followed the recognition model while the Georgia amendment adopted something of a hybrid approach, combining elements of both the relationship and recognition models.<sup>53</sup>

### 1. The Relationship Model

The relationship model, adopted in Nebraska in 2000, defines a category of relationships and then declares that any relationship within that category will not be recognized for any purpose under state law. In Nebraska, the amendment drafters defined the relationship as “[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationships,” and declared that such relationships “shall not be valid or recognized in Nebraska.”<sup>54</sup>

### 2. The Recognition Model

In contrast to the relationship model, the “recognition model” establishes a definition of marriage and then limits the scope or nature of recognition that may be extended to any other (*i.e.*, any non-marital) relationship. For example, the North Dakota amendment states, “Marriage consists only of the legal union between a man and a woman. No other domestic relationship, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”<sup>55</sup> This approach, adopted in eight states (Arkansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, and Utah) in 2004, preserves the unique status of marriage in the law by regulating the degree of recognition (varying from state to state) to which other relationships may be entitled on their own merits. In regulating the recognition of non-marital relationships, some states have prohibited the creation of a new legal status which is “identical or substantially similar to that of marriage,”<sup>56</sup> while other states have focused on the legal treatment of non-marital relationships, stating that non-marital relationships may not be given “the same or substantially equivalent legal effect” as marriage.<sup>57</sup> Two states specifically address the “legal incidents of marriage,” reserving those legal incidents to the marital relationship.<sup>58</sup>

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<sup>52</sup> LA. CONST. art. 12, § 15.

<sup>53</sup> GA. CONST. art. I, § IV, para. I.

<sup>54</sup> NEB. CONST. art. I, § 29.

<sup>55</sup> 2004 N.D. Ballot Measure 1. The Utah amendment is identical. Utah Const. art. I, § 29.

<sup>56</sup> KY. CONST. § 233a; LA. CONST. art. 12, § 15.

<sup>57</sup> 2004 N.D. Ballot Measure 1; UTAH CONST. art. I, § 29..

<sup>58</sup> GA. CONST. art. I, § IV, para. I; OKLA. CONST. art. II, § 35.

### 3. The Hybrid Model

Although no other state has adopted Nebraska's relationship model in full, the Georgia amendment is something of a hybrid between the relationship and recognition models. The Georgia amendment states in part, "No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage," and singles out unions between persons of the same sex; however, rather than denying recognition across the board as the Nebraska amendment did, the Georgia amendment simply states that such unions are not "entitled to the benefits of marriage."<sup>59</sup> By contrast, a hybrid amendment proposed (but not yet adopted) in Massachusetts singles out same-sex relationships for recognition in a "civil union," and declares that parties to a civil union are entitled to *all* the legal incidents of marriage.<sup>60</sup>

#### *B. Legal Effects*

Like the status amendments, each of the substance amendments defines marriage and protects it from both judicial and legislative redefinition. They also establish a clear policy with respect to the recognition of foreign same-sex marriages, usually employing the phrase "valid or recognized." The substance amendments differ in that they also establish greater limitations on the capacity of courts and legislatures to create a marriage-like alternative status for unmarried couples.

##### 1. Spousal benefits and recognition for unmarried couples

The core distinctive of the substance amendments is their explicit treatment of spousal status, benefits, or recognition for unmarried couples. Among the various amendments, there is a spectrum of recognition to which non-marital relationships may be entitled. At one end of the spectrum is an amendment denying unmarried couples *any* of the legal status, benefits, or obligations of marriage (*i.e.*, unmarried couples may receive none of the legal incidents of marriage). At the opposite end is an amendment denying unmarried couples *all* of the legal status, benefits, and obligations of marriage (*i.e.*, unmarried couples cannot receive every incident of marriage). Most of the marriage

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<sup>59</sup> GA. CONST. art. I, § IV, para. I. This begs the question of what benefits are "benefits of marriage." Many benefits that attach to marriage are not unique to marriage (*e.g.*, joint property ownership, medical decision making). See *infra* Part III.B.3. Nor are such benefits static over time. *Id.* Thus, the most plausible reading of this amendment is that it protects the unique nature of marital benefits, but leaves the definition and regulation of marital benefits in the hands of the legislature, which in turn means that the legislature has authority to expand (or contract) a particular benefit such that it is no longer a unique benefit of marriage. *Id.*

<sup>60</sup> 2004 Mass. H. 3190.

amendments adopted to date fall somewhere between these two ends of the spectrum.

The Nebraska amendment is perhaps the broadest of the substance amendments. It denies all legal recognition of marriage-like status to same-sex couples, including “civil union, domestic partnership or other similar same-sex relationship[s].”<sup>61</sup> A number of status amendment states adopted a narrower approach, declaring that non-marital relationships are not entitled to status (legal recognition) or treatment (benefits and obligations) which is “identical or substantially similar” (Kentucky, Louisiana, and Arkansas)<sup>62</sup> or “the same or substantially equivalent” (Utah and North Dakota)<sup>63</sup> to that of marriage. Each of these five recognition amendments permit some (likely significant) form of recognition for same-sex relationships if the legislature should so choose, yet they preclude the recognition of full spousal status for unmarried couples such as that created by Vermont-style “civil unions” or California-style “domestic partnerships.”<sup>64</sup>

Other amendments in the recognition model draw the benefit boundaries differently. Whereas the Louisiana and Utah approaches state that non-marital relationships are not entitled to *all* (or almost all) the incidents of marriage, and the Nebraska amendment denies same-sex relationships *any* legal recognition or marital benefits, the amendments adopted in Ohio, Michigan, Oklahoma and Georgia are more nuanced.

The Ohio amendment precludes the state (and its political subdivisions) from creating a “legal status . . . that intends to approximate the design, qualities, significance, or effect of marriage,”<sup>65</sup> while the Michigan text states that no other relationship is to be “recognized as a marriage or similar union for any purpose.”<sup>66</sup> The Ohio

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<sup>61</sup> NEB. CONST. art. I, § 29.

<sup>62</sup> KY. CONST. § 233a; LA. CONST. art. XII, § 15; 2004 Ark. Ballot Measure 3.

<sup>63</sup> UTAH CONST. art. I, § 29; 2004 N.D. Ballot Measure 1.

<sup>64</sup> It would remain for the courts to determine at what point a legal status acquires a level of recognition making it “identical or substantially similar” to marriage. Local domestic partnership ordinances would likely not run afoul of the amendments since the scope of recognition is both local (as opposed to statewide) and limited to specific legal incidents (as opposed to invoking the full panoply of domestic relations law).

<sup>65</sup> OHIO CONST. art. XV, § 11. It has been suggested that the Ohio amendment more properly falls within the relationship model since it precludes recognition of any legal status for non-marital relationships which “intends to approximate the design, qualities, significance, or effect of marriage.” *Id.* Any ambiguity should be resolved, however, in favor of the recognition model, in that the verb “intends” must relate to the singular noun “status” rather than the plural “relationships.” *See id.* Thus, the Ohio amendment should be read to preclude recognition of a legal status that approximates marriage, rather than precluding recognition of relationships which approximate marriage.

<sup>66</sup> MICH. CONST. art. I, § 25.

text clearly bars the creation of any new legal status patterned after marriage, including not only civil unions but also domestic partnerships and other marriage-like relationships. It says nothing, however, with respect to specific benefits, ostensibly allowing the legislature to allocate benefits on the basis of household or other relevant characteristics. The Michigan text simply states that no relationship (other than marriage) is to be recognized as a “marriage or similar union” for any purposes of state law.<sup>67</sup> Both proponents and opponents of the Michigan measure agree that “similar union” precludes not only civil unions, but also domestic partnership recognition by state and local governments, a view with which Michigan Attorney General Steve Cox recently concurred.<sup>68</sup>

The amendments adopted in Georgia and Oklahoma focus on the benefits of marriage. If a particular benefit can be described as a “legal incident of marriage,” unmarried couples have no legal right to that benefit. Rather than lock in place a particular definition of marital benefits, however, the amendments leave that question untouched, implicitly leaving that authority with the legislature. Thus, these amendments fall between the two extremes on the recognition spectrum, reserving the incidents of marriage to married couples, but leaving the legislature authority to expand or contract the scope of a particular benefit (*e.g.*, health insurance) such that it is no longer a uniquely marital benefit and applies equally to other relationships.

## 2. Impact on private actors

One of the most significant political concerns surrounding the substance amendments is that the amendments would impinge upon the ability of individuals to enter into private employment contracts, estate planning documents, and other legal agreements. The simplest way to address this concern is to specifically limit the amendment to state actors.<sup>69</sup> For example, the Georgia text applies only to recognition “by

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<sup>67</sup> *Id.*

<sup>68</sup> Dawson Bell, *Questions, Answers on Michigan Gay Marriage Issue*, DETROIT FREE PRESS, Sept. 13, 2004, at [http://www.freep.com/news/mich/gaymarriage13e\\_20040913.htm](http://www.freep.com/news/mich/gaymarriage13e_20040913.htm) (last visited Mar. 2, 2005); Mich. Att’y Gen. Op. 1717 (March 16, 2005) (concluding that the Kalamazoo domestic partnership benefits ordinance “accords ‘domestic partnerships’ a ‘marriage-like’ status,” contravening the recently adopted provisions of article I, section 25 of the Michigan Constitution). The Michigan Attorney General also noted that “[t]he provisions of benefits itself does not violate the amendment, but the benefits cannot be given based on the similarity of the union or domestic partnership agreement to a legal marriage.” Mich. Att’y Gen. Op. 1717.

<sup>69</sup> Potential ambiguity over the scope of the amendment can arise from passive sentence construction. To illustrate, compare “no other relationship shall be recognized as the legal equivalent of a marriage” with “this state shall not recognize any other relationship as a marriage or its legal equivalent.” The second example is clearly limited, by its terms, to state actors, eliminating the potential ambiguity which could arise with the first example.

this state,” while the Ohio amendment reaches “[t]his state and its political subdivisions.”<sup>70</sup> The Louisiana and Oklahoma texts deal only with the interpretation of “this constitution or any state law,” leaving private actions untouched.<sup>71</sup> Amendment drafters in several other states mitigated these concerns by focusing on the recognition of a “legal status,” in place of terms such as “union” or “relationship.”

Even in the handful of states where the language is not specifically limited to state action, courts are unlikely to interpret any ambiguity as an expansive intrusion upon private actors.<sup>72</sup> The Utah and North Dakota amendments, in referring to the treatment of non-marital “domestic unions,” speak of their “legal effect,” apparently reflecting the intent of the drafters to address only the governmental recognition of such unions.<sup>73</sup> In Michigan, a recent attorney general opinion advises that the amendment should not be construed as reaching private actors: “Its placement in Article 1 of Michigan’s Constitution is legally significant, however, in that Article 1, entitled “Declaration of Rights,” generally articulates limits on *government* conduct.”<sup>74</sup>

### 3. Equal protection challenges

Perhaps the most significant concern of state amendment drafters is the possibility that a marriage amendment, after having been approved by the voters, would later be ruled to be a violation of the United States Constitution. The Equal Protection Clause has to date been the most common source of federal constitutional challenge to state marriage laws.<sup>75</sup> Federal lawsuits challenging the Nebraska and Oklahoma amendments are currently pending in district court, with the plaintiffs in both cases claiming equal protection violations.<sup>76</sup>

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<sup>70</sup> GA. CONST. art. I, § IV, para. I; OHIO CONST. art. XV, § 11.

<sup>71</sup> LA. CONST. art. XII, § 15; OKLA. CONST. art. II, § 35.

<sup>72</sup> In an analogous case, the United States Supreme Court rejected the government’s attempt to prosecute private actors for an infringement of Second Amendment rights to “keep and bear arms for a lawful purpose.” *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). Although not explicitly limited to governmental action, the Supreme Court ruled that the Second Amendment is to be interpreted as a limitation on Congressional power. *Id.*

<sup>73</sup> UTAH CONST. Art. I, § 29; 2004 N.D. Ballot Measure 1.

<sup>74</sup> Mich. Att’y Gen. Op. 7171 (March 16, 2005) (emphasis in original) (also quoting *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 344 (Mich. 1985) (“The Michigan Constitution’s Declaration of Rights provisions have never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action.”)).

<sup>75</sup> See, e.g., *Citizens for Equal Prot. v. Bruning*, No. 4:03CV3155 (D. Neb. filed Apr. 2003), *complaint available at* <http://www.domawatch.org/cases/nebraska/citizensforequalprotectionvag/complaint.pdf> (last visited Mar. 2, 2005).

<sup>76</sup> *Id.*; Curtis Killman, *Lawsuit Challenges State Marriage Amendment*, TULSA WORLD, Nov. 4, 2004, at A13.

The equal protection claims against the Nebraska amendment are unique to the text of that amendment. In Nebraska, the American Civil Liberties Union has argued that the amendment, with its specific reference only to relationships between “two persons of the same sex,” targets individuals on the basis of their sexual orientation and denies them full participation in the political process.<sup>77</sup> The lawsuit argues that, while the amendment prohibits all recognition of same-sex domestic partnerships, it contains no similar provision banning opposite-sex domestic partnerships, imposing a higher hurdle for same-sex couples than for opposite-sex couples seeking the same right.<sup>78</sup> If the court were to accept this claim, holding that the Nebraska amendment discriminates on the basis of sexual orientation regarding political access to domestic partnership legislation, the state would then be in the difficult position of justifying a preference for opposite-sex unmarried partnerships over same-sex partnerships.<sup>79</sup>

The Georgia amendment is potentially open to a similar claim, although to a lesser extent than the Nebraska amendment. Whereas the Nebraska amendment flatly denies all recognition of same-sex marriage-like relationships, the Georgia amendment states only that relationships “between persons of the same sex” are not “entitled to the benefits of marriage.”<sup>80</sup> Thus, while facially singling out same-sex relationships, the Georgia amendment is more narrowly tailored to its purpose of protecting the unique benefits of marriage, and thus less vulnerable to an equal protection challenge.

The recognition amendments avoid these concerns altogether, making no effort to single out specific relationships, but rather preserving the unique status of marriage by limiting the recognition of all other relationships. In this way, the recognition amendments are preferable, in that they avoid equal protection claims arising from the drafting of the amendment and keep the focus on the underlying issue: Does the Equal Protection Clause require legal recognition of unisex marriages? If federal courts, and ultimately the Supreme Court, begin to answer this question in the affirmative, all of the state amendments will fall. The object of state amendment drafting is to avoid raising additional equal protection concerns due to the particular language being employed.

Of the substance amendments, a recognition approach focused on the unique status (as opposed to particular legal incidents) of marriage

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<sup>77</sup> Complaint at 5, *Citizens for Equal Prot.* (No. 4:03CV3155).

<sup>78</sup> Neither same-sex nor opposite-sex domestic partnerships are recognized under current Nebraska law.

<sup>79</sup> See generally *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>80</sup> GA. CONST. art. I, § IV, para. I.



provides a good model: “Marriage in this state consists only of the union of a man and a woman. No other relationship shall be recognized as a marriage by this state, or given a substantially equivalent legal status.”

#### IV. STRUCTURE AMENDMENTS

Unlike the status and substance amendments, both of which insert a definition of marriage into the state constitution, Hawaii’s structural amendment is a more narrow, separation of powers approach, protecting the power of the legislature to recognize marriage as the union of husband and wife free from court interference.

The Hawaii marriage amendment is the only example to date of a structural marriage amendment,<sup>81</sup> and was adopted only after a status amendment failed to garner majority support in the legislature. In effect, the Hawaii structure amendment has been much the same as that of the status amendments adopted elsewhere, protecting the definition of marriage from litigation threatening to rewrite it.<sup>82</sup> At the same time, however, by virtue of the grant of power “to reserve marriage to opposite-sex couples,” the legislature implicitly carries the authority *not* to reserve marriage to opposite-sex couples.<sup>83</sup>

The legal impact of the structural amendment is much the same as that of a status amendment, except that it is binding only upon the courts and permits the legislature to redefine marriage to include same-sex couples should it desire to do so. Like the status amendment, the structural amendment both takes the definition of marriage out of the hands of the state courts and, in protecting the constitutionality of state marriage laws, removes the basis for a constitutional challenge and subsequent decision requiring the creation of a marriage-like status for same-sex couples. Although the structural approach has garnered little attention in the eight years since the Hawaii amendment was adopted, the structural approach is likely to see renewed interest in states where legislators have been unable to pass a stronger amendment and are seeking a compromise to preserve the status quo (and their own legislative authority) in the face of a judicial challenge to a state’s marriage laws. The structural approach might even prove to be of

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<sup>81</sup> The Arkansas amendment includes elements of a structural amendment, granting the legislature specific authority to determine the legal incidents of marriage: “The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.” 2004 Ark. Ballot Measure 3.

<sup>82</sup> See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>83</sup> HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

interest at the federal level, where most of the debate has thus far been focused on various forms of a status amendment.<sup>84</sup>

A structural amendment today should reflect the separation of marital status and legal incidents which occurred with the adoption of civil unions in Vermont: "The legislature shall have power to reserve marriage and its legal incidents to the union of a man and a woman." This approach offers a broad appeal both to those concerned about preserving the institution of marriage and to those concerned about preserving legislative authority and the separation of powers.

#### V. CONCLUSION

For those who support government policies which continue to recognize marriage as the union of husband and wife, state marriage amendments have proven a necessary (though not sufficient) response to judicial encroachment. In the absence of a federal marriage amendment, state amendments provide the broadest measure of protection available to the people of an individual state.

While the majority of same-sex marriage lawsuits to date have been based on state constitutional claims, a (growing) minority have turned their attention to provisions of the United States Constitution. These cases, based on the Full Faith and Credit Clause of Article IV, and more significantly, on the Due Process and Equal Protection Clauses of the 14th Amendment, would circumvent even the broadest protections contained in a state constitutional amendment.<sup>85</sup> This highlights the additional need for a federal constitutional amendment.

The two approaches are complementary. In the absence of a federal amendment, the state amendments remain vulnerable. Even with a federal amendment, the state amendments would continue to play a significant role in settling the law and policy of an individual state. Many of the state measures would still provide unique protections, or (as some commentators have suggested) would dovetail with an amendment

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<sup>84</sup> An important consideration with a structural amendment at the federal level would be to tailor it narrowly so as not to interfere with existing Supreme Court decisions governing marriage. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). Patterning an amendment after the Hawaii model, the amendment might read: "The power to reserve marriage and its legal incidents to the union of a man and a woman shall be reserved to the legislatures of the several states, and directly to the people in referendum when so designated by state law." Alternatively, a text might be framed in terms of preserving the preexisting authority of the people and their elected representatives: "The right of the people of the several states to reserve marriage to the union of a man and a woman, and to attach unique legal benefits and obligations because of marriage, shall not be infringed."

<sup>85</sup> This threat is not limited to the federal courts because a sympathetic state court, limited by a state constitutional amendment, could instead rule on federal constitutional grounds.

that leaves the definition of marriage to the people of the individual states.

The process of drafting state marriage amendments necessarily involves a number of considerations. There is the obvious question of legislative efficacy with which this article has primarily dealt. Does the text of the amendment do what the proponents intend for it to do, and conversely, does it avoid the pitfalls of unintended consequences? Beyond this, however, drafters must also consider the political expediency, and their ability to get the measure passed, both in the legislature and at the ballot box. Finally, there is the question of the measure's legal enforceability once passed. Each of these three considerations is weighed differently from state to state, producing what are now sixteen different amendment texts in seventeen states. With additional amendments being considered in the 2005 and 2006 legislative sessions, the number of textual variations is likely to continue to grow as the people of various states take steps to protect the definition of marriage.

## MARRIAGE AMENDMENT MODELS

### I. STATUS AMENDMENT

"Only marriage between a man and a woman is valid or recognized in this state."

### II. SUBSTANCE AMENDMENT

"Marriage in this state consists only of the union of a man and a woman. No other relationship shall be recognized as a marriage by this state or its political subdivisions, or given a substantially equivalent legal status."

### III. STRUCTURE AMENDMENT

"The legislature shall have power to reserve marriage and its legal incidents to the union of a man and a woman."

## STATE MARRIAGE AMENDMENT TEXTS

### STATUS AMENDMENTS

State	Yes	No	Text
Alaska (1998)	68.1% (152,965)	31.9% (71,631)	To be valid or recognized in this State, a marriage may exist only between one man and one woman.
Mississippi	86%	14%	Marriage may take place and may be valid under

(2004)	(924,540)	(149,867)	the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.
Missouri (2004)	70.6% (1,055,771)	29.4% (439,529)	To be valid and recognized in this state a marriage shall exist only between a man and a woman.
Montana (2004)	67% (294,056)	33% (147,927)	Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.
Nevada (2002)	67.2% (337,197)	32.8% (164,573)	Only a marriage between a male and female person shall be recognized and given effect in this state.
Oregon (2004)	57% (979,049)	43% (742,442)	It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.

### SUBSTANCE AMENDMENTS

State	Yes	No	Text
Arkansas (2004)	75% (746,382)	25% (248,827)	<p>Marriage consists only of the union of one man and one woman.</p> <p>Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.</p> <p>The legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.</p>

Georgia (2004)	76% (2,317,981)	24% (729,705)	<p>(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.</p> <p>(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.</p>
Kentucky (2004)	75% (1,222,240)	25% (417,087)	Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.
Louisiana (2004)	78% (619,908)	22% (177,067)	Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.
Michigan (2004)	59% (2,686,132)	41% (1,902,133)	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.
Nebraska (2000)	70.1% (477,571)	29.9% (203,667)	Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

North Dakota (2004)	73% (222,899)	27% (81,396)	Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.
Ohio (2004)	62% (3,249,157)	38% (2,011,168)	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.
Oklahoma (2004)	76% (1,075,079)	24% (347,246)	A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.  B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.  C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.
Utah (2004)	66% (562,619)	34% (286,697)	Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

### STRUCTURE AMENDMENT

State	Yes	No	Text
Hawaii (1998)	69.2% (285,384)	28.6% (117,827)	The Legislature shall have the power to reserve marriage to opposite-sex couples.