STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV
Case No. 2011 AP001572

JULAINE K. APPLING, JO EGELHOFF, JAREN E. HILLER, RICHARD KESSENICH, and EDMUND L. WEBSTER,

Plaintiff-Appellants-Cross-Respondents,

v.

JAMES E. DOYLE, KAREN TIMBERLAKE, and JOHN KIESOW,

Defendants-Respondents

FAIR WISCONSIN, INC., GLENN CARSON, MICHAEL CHILDERS, CRYSTAL HYSLOP, JANICE CZYSCON, KATHY FLORES, ANN KENDZIERSKI, DAVID KOPITZKE, PAUL KLAWITER, CHAD WEGE, and ANDREW WEGE,

Intervening Defendants-Respondents-Cross-Appellants

ON APPEAL FROM
THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE DANIEL R. MOSER, PRESIDING
DANE COUNTY CASE NO. 10-CV-4434

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUE

Article XIII, § 13 of the Wisconsin Constitution preserves marriage as being only "between one man and one woman," and, to this end, bans any "legal status" that is "identical or substantially similar to that of marriage for unmarried individuals." Chapter 770 creates a legal status for unmarried individuals that mirrors the fundamental criteria for marriage, and this status has been accorded legal recognition through a bundle of rights and benefits that were formerly generally only accorded to marriage, and always only so bundled for marriage. Was the circuit court wrong to rule that Chapter 770 does not violate art. XIII, § 13?

STATEMENT ON ORAL ARGUMENT AND PUBLISHING

This case addresses both the building block of Wisconsin society—the institution of marriage—and the enduring meaning of art. XIII, § 13 of the Wisconsin Constitution. Thus, oral argument is necessary and a published opinion settling the law in this area and giving guidance to future voters, legislatures, and litigants is required.

STATEMENT OF THE CASE

Marriage is a long-standing, world-wide idea that is a building block of society. Thus, in November 2006, the people of Wisconsin—by a 19-point margin—amended the state constitution regarding marriage, affirming its legal status in Wisconsin as the union of one man and one woman, and protecting that status from being undermined by the creation of substantially similar *statuses*. Through the collective voice of its citizens, the Wisconsin Constitution thus requires that:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A *legal status* identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Wis. Const. art. XIII, § 13 (emphasis added).

Throughout history, diverse cultures and faiths have recognized marriage as the best way to promote healthy families and societies. Accordingly, the voters' addition of art. XIII, § 13 to the constitution was not unexpected. But three years later, in August 2009, the Wisconsin Legislature enacted Chapter 770, creating a legal status titled "domestic partnership." This new legal status is defined almost identically to marriage, entered into in essentially the same manner as marriage, and accorded

many of the unique incidents of marriage. Thus, Chapter 770's enactment invoked the question now pending before this Court: whether it violates the Wisconsin Constitution. Shortly after Chapter 770's passage, Plaintiffs-Appellants filed this lawsuit as concerned Wisconsin taxpayers to have Chapter 770 declared unconstitutional.

Because the Attorney General agrees that Chapter 770 is unconstitutional, he refused its defense.[1] Accordingly, the Government Defendants appointed special counsel, who filed a motion for summary judgment on December 22, 2010. Plaintiffs-Appellants filed a cross-motion for summary judgment on March 8, 2011, as did the Intervening-Defendants-Appellees.

Following a change in gubernatorial administrations, the Government Defendants filed a motion on May 13 to withdraw their motion for summary judgment, as well as their Answer to the lawsuit, because the new administration also agrees that Chapter 770 is unconstitutional. The circuit court granted the Government Defendants' motion to withdraw its brief but allowed the substance of the brief to be incorporated into the Intervening

[1] *See*, *e.g.*, http://www.jsonline.com/news/statepolitics/53957072 .html, last visited September 1, 2011.

Defendants-Appellees' filing. Thus, as the record stands, the Wisconsin Governmental Defendants concede the allegations of the Complaint filed by Plaintiffs-Appellants, with the only opposition put forth by the Intervening Defendants-Appellees.

On June 20, 2011, the circuit court denied Plaintiffs-Appellants' motion for summary judgment, and granted the Intervening Defendants-Appellees' motion, concluding that Chapter 770 is not unconstitutional because "the sum total of domestic partners' legal rights, duties, and liabilities is not identical or so essentially alike that it is virtually identical to the sum total of spouses' legal rights, duties, and liabilities." (R. 131:31).

On July 1, 2011, Plaintiffs-Appellants initiated this appeal.[2]

ARGUMENT

Article XIII, § 13 of the Wisconsin Constitution protects the unique and important institution of marriage in Wisconsin by cementing its enduring definition and banning other legal statuses that mimic marriage. In part, art. XIII, § 13 was

[2] Plaintiffs-Appellants are collectively "Appling" hereinafter; Intervening Defendants-Appellees are collectively "Fair Wisconsin" hereinafter.

enacted in response to marriage-mimicking statuses being created in other states. *See*, *e.g.*, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (cited by the circuit court at R. 131:14). Crucially, art. XIII, § 13 was not enacted to proscribe the extension of legal rights or benefits to citizens and, thus, is devoid of language regarding things like "rights," "duties," "benefits," or "liabilities." Indeed, as marriage is far more than a collection of rights and liabilities, art. XIII, § 13 intentionally employs a focus upon a substantial similarity in *legal status* and not in the ever-evolving *incidents* of marriage. Thus, if the legislature generally accorded all of marriage's legal incidents to every Wisconsin citizen, without regard to their relational status, art. XIII, § 13 would remain inviolate.

Accordingly, Chapter 770's unconstitutionality does not derive from the many marriage-mirroring rights, duties, benefits, or liabilities accorded to the status it creates. Rather, it is due to the *legal status* Chapter 770 creates, which has deliberately pervasive similarities to the legal status of marriage that can only be explained as an attempt to unconstitutionally mimic marriage. By creating and recognizing the legal status of "domestic partnership" for a relationship designed to resemble

marriage—an exclusive, sex-specific, two-person, consensual relationship between persons of a certain age that, because of its sexual nature, may not be shared by persons too closely related by blood—the legislature acted unconstitutionally.

Yet the circuit court was erroneously "only concerned with the legal rights, duties, and liabilities of both statuses" and explicitly refused to analyze the similarity of the legal statuses *themselves*, apart from the incidents accorded them. That fundamental error provides sufficient basis to overturn its decision.

Further, even the circuit court's improper analysis illustrates Chapter 770's unconstitutionality. While the rights, duties, and liabilities that flow *after* creating the domestic partner legal status are not dispositive of the question before this Court, that domestic partnerships alone are granted unique marital incidents in a bundle that is only otherwise available to marriage shows that Chapter 770 is meant to unconstitutionally mimic marriage.

I. Standard of Review

There are no facts in dispute, so this Court's review regards the circuit court's legal findings, which are reviewed *de novo*.

Tews v. NHI, LLC, 2010 WI 1137, ¶ 40, 330 Wis.2d 389, 407, 793 N.W.2d 860, 868-69. This Court's review is independent of the judgment by the circuit court, but the same methodology should be applied. *Id.*

"All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible." *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). It must be shown beyond a reasonable doubt that Chapter 770 violates the constitution. *Id.*

II. Based on the plain language and historical context of Article XIII, § 13, Chapter 770 is clearly unconstitutional.

The meaning and purpose of art. XIII, § 13 is controlled primarily by its plain language, and secondarily by its historical context. Courts may, if necessary, reference the earliest, contemporaneous legislative action regarding the constitutional provision following adoption, if such legislative actions exist. *State v. Johnson*, 176 Wis. 107, 186 N.W. 729, 730 (1922) (citing *Dean v. Borchsenius*, 30 Wis. 236, 1872 WL 3106, *4 (1872); *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785, 793 (1882)); *McConkey v. Van Hollen*, 2010 WI 57, ¶44, 326 Wis.2d 1, 25, 783 N.W.2d 855, 867 ("Text and historical context should make the

purpose of most amendments apparent.") (citing *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis.2d 1, 719 N.W.2d 408); *accord Dairyland*, 295 Wis.2d 1, 81-82 (2006) (Prosser, J., dissenting).

A. The constitution's plain meaning bans recognizing legal statuses that, like Chapter 770, are substantially similar to marriage.

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Wis. Const. art. XIII, § 13. As the supreme court recognized in *McConkey,* the second sentence exists "to ensure that the requirements of the first sentence could not be rendered illusory by later legislative or court action recognizing or creating identical or substantially similar legal statuses." *McConkey*, 326 Wis.2d at 30. The portions of that crucial sentence relevant to this case are "legal status…[like] that of marriage," "substantially similar," and "valid or recognized." Chapter 770 clearly both validates and recognizes domestic partnerships, and a bevy of other Wisconsin laws accord domestic partnerships legal recognition, so the only issues are whether Chapter 770 creates a "legal status" like "that of marriage."

1. "Legal status" like "that of marriage"

To define "status," the circuit court relies solely on *Black's Law Dictionary* and posits that the phrase "legal status" in art. XIII, § 13 is the "sum total of a person's legal rights, duties, [and] liabilities." (R. 131:10). By selecting this definition, the circuit court severs the phrase "legal status" from the modifier "identical or substantially similar to that of marriage," transforming "legal status" into something not contemplated by either the legislature or the voters. Under the guidance of the circuit court, instead of art. XIII, § 13 being about a "legal status" like "that of marriage," it now concerns merely a generic "legal status."

But as the law makes clear, marital status is not a generic status, nor is it defined by its ever evolving rights, duties, and liabilities—much less the "sum total" of them. Rather, those matters are mere incidents to the status itself, which is instead defined by the basic characteristics of the marital relation. "Marriage is not about benefits. In fact, marriage law has always begun with a recognition of its uniqueness as a status—a union between a man and a woman." William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 B.Y.U. L. Rev. 961, 987 (2001).

Thus, for instance, the supreme court found that "the parties by reason of their *marital status* under the laws of Illinois continued as husband and wife while in Wisconsin, but while they were here their personal duties, obligations, and liabilities *incidental to that status* were such as existed or arose under our laws…" *Forbes v. Forbes,* 226 Wis. 477, 277 N.W. 112, 115 (1938), *overruled on other grounds, Haumschild v. Continental Cas. Co.,* 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (emphasis added).[3] Accordingly, the statutory chapter entitled "Marriage," Wis. Stat. 765, solely defines the controlling characteristics of marriage *and says not a word about the rights or benefits incident to it*. *In fact, neither the Marriage chapter nor Chapter 770 attach incidents to the statuses they establish*. The circuit court thus erred in evaluating the substantial similarity of the legal statuses by ignoring the statuses themselves and focusing upon incidents to the statuses.

For example, when Wisconsin refuses to recognize one's alleged marital status from another jurisdiction, it is not because

[3] *Haumschild* overruled *Forbes* as it related to choice of law jurisprudence, but not as to the distinction between marital status and the incidents thereto. *See also Xiong v. Edmondson*, 2002 WI App 110, ¶ 14, 255 Wis.2d 693, 700 (recognizing that marital status is controlled by the law where a marriage is contracted, but that the "substantial rights of husband and wife" are controlled by the law of the matrimonial domicile).

of the nature of the incidents accorded that status in the jurisdiction of its creation, but rather because of the characteristics of the status itself. *Xiong v. Edmondson*, 2002 WI App 110, ¶ 14, 255 Wis.2d 693, 700, 648 N.W.2d 900, 903 (citing *In re Estate of Campbell*, 260 Wis. 625, 631 (1952)). Were the circuit court's novel concept of marital status adopted by this Court, such would turn on its head "[t]he general rule of law … that a marriage valid where it is celebrated is valid everywhere." *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787, 788 (1908). Rather, the recognition of marital relationships from other jurisdictions would not hinge upon the legal status itself, but on a convoluted analysis comparing and contrasting the "sum total of a person's legal rights, duties, [and] liabilities" as a married person in the place of celebration against the "sum total of a person's legal rights, duties, [and] liabilities" in the State of Wisconsin. And since only a small handful of states formally employ the unique principles of community property in marital matters,[4] only the marriages solemnized by community property

[4] In addition to Wisconsin, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are all considered to be "community property states." *See* http://www.irs.gov/pub/irs-pdf/p555.pdf.

states might arguably qualify for potential recognition within Wisconsin.

But this is not the law. In *Xiong*, this Court did not answer the question of whether a valid marriage existed by comparing the incidents of marriage in Laos to the incidents of marriage in Wisconsin. Rather, this Court appropriately focused its analysis on the status itself, particularly regarding the status's formation. *Xiong*, 255 Wis.2d at 700-04. Thus, on multiple different fronts, the law of this state clearly establishes that the legal status of marriage is not determined by adding up the incidents that flow to that status after its formation.

And Wisconsin is not alone in acknowledging the longstanding bright line between one's marital status and the incidents which flow from that status. Three years ago, when facing an issue very similar to the one before this Court, the Michigan Supreme Court acknowledged this universal bright line in recognizing that "the dissimilarities [about incidental rights and benefits] identified by plaintiffs are not dissimilarities pertaining to the *nature* of the marital and domestic-partnership unions themselves, but are merely dissimilarities pertaining to the *legal affects* that are accorded these relationships." *National*

Pride at Work, Inc. v. Governor of Michigan, 481 Mich. 56, 59, 748 N.W.2d 524, 534 (2008). *See also Calhoun v. Bryant*, 133 N.W. 266, 271 (S.D. 1911) (distinguishing between marital "status" and marital "right[s]" as "mere incidents flowing from that 'status'").

Nor can marital status be defined by the legal rights given it, lest the legal status of marriage be regularly destabilized by the legislature's addition or removal of benefits. But by holding that marital status is determined by the "*sum total* of the legal rights, duties and liabilities" accorded to it, and directly rejecting that marital status is defined by its "quintessential features" (R. 131:30, 34) (emphasis added), the circuit court declared that the legal status of marriage will vary, at the whim of the legislature, as the incidents of marriage are changed. This "stick-counting" approach to determining marital status is not only contrary to Wisconsin jurisprudence, but creates a shaky foundation for marriage that is inconsistent with promoting marital stability. *See* Wis. Stat. § 765.001(2) (establishing marital stability as state policy).

Therefore, tying marital status inextricably to the incidents that flow from that status is unsustainable in discerning whether a particular "legal status" is like "that of marriage." Indeed, no

particular number or type of incidents are required for marriage to be marriage. Marriage would not be abolished if, for example, Wisconsin detached from it all the legal incidents available to domestic partners. Nor did marriage cease to exist when several of its incidents were fundamentally altered and removed through the introduction of no-fault divorce. *See Dixon v. Dixon*, 107 Wis.2d 492, 501, 319 N.W.2d 846, 850-51 (Wis. 1982) (recognizing no-fault divorce as a "sweeping reform" to marriage). Similarly, were the incidents of marriage generally granted to each individual Wisconsin resident, marriage would still retain its unique legal status. Thus, while the incidents of marriage vary from jurisdiction to jurisdiction, those variances do not change the nature of the marital status itself.

Therefore, a "legal status" like "that of marriage" is determined by the specific legal characteristics of that status. In Wisconsin, marital status requires:

(1) A limit of two persons. Wis. Stat. § 765.01.

(2) Parties are of specified sexes. *Id.*

(3) Parties are competent to consent. Wis. Stat. § 765.03(1).

(4) Parties generally are over a specified age. Wis. Stat. § 765.02(1).

(5) Parties are limited by consanguinity. Wis. Stat. § 765.03(1).

(6) Parties cannot be married to someone else. *Id.*

These fundamental characteristics to the marital status are distinctive, as—until 2009—no other type of Wisconsin legal status had an even remotely similar definition.

2. "Substantially similar"

Not only did the circuit court err in defining "legal status" as utilized in art. XIII, § 13, it also erred in determining whether the "legal status" of "domestic partnership" is "substantially similar" to marriage. Armed with only a dictionary, the circuit court rewrote "substantially similar" to read "virtually identical." (R. 131:30). Not only does the modifier "virtually" require stronger congruence with that to which a comparison is made, thus making it a different word from "substantially," "identical" is plainly not analogous to "similar."

As stated by the supreme court, "similar" means "comparable" or having a "resemblance." *State v. Hamilton*, 146 Wis.2d 426, 433, 432 N.W.2d 108, 112 (1988) (quoting *United*

States v. Raynor, 302 U.S. 540, 547 (1937) *and State v. Kay Distrib. Co.*, 110 Wis.2d 29, 36-37, 327 N.W.2d 188, 193 (Wis. App. 1982)). "'Substantially' means in substance; in the main; essentially, by including the material or essential parts." *Darlington v. Studebaker-Packard Corp*. 191 F. Supp. 438, 439 (N.D. Ind. 1961) (citations omitted). And, as defined by the circuit court's chosen resource, "substantial similarity" means a "strong resemblance" resulting from appropriating "nontrivial amounts" of a thing's characteristics. BLACK'S LAW DICTIONARY 1417 (8th ed. 2004). "Substantially similar," then, means having a strong resemblance or being closely comparable as result of copying noticeable amounts of the mimicked thing's defining or essential features. Accordingly, a legal status substantially similar to marriage need not be "virtually identical," but rather one that "compares" to or "resembles" marriage by carrying "nontrivial amounts" of the characteristics that create or define it as a legal status.

3. Domestic partnership is a legal status substantially similar to marriage.

Chapter 770 established the "legal status of domestic partnership." Wis. Stat. § 770.001. The essential components of

Chapter 770's domestic partnership status mimics *every one* of marriage's six defining characteristics, requiring:

(1) A limit of two persons. Wis. Stat. § 770.05.

(2) Parties are of specified sexes. *Id.* at (5).

(3) Parties are competent to consent. *Id.* at (1).

(4) Parties are over a specified age. *Id.* at (1).

(5) Parties are limited by consanguinity. *Id.* at (4).

(6) Parties cannot be married to or in domestic partnership with someone else. *Id.* at (2).

This domestic partnership status thus unconstitutionally mirrors marital status.[5]

Further showing the substantial similarity of the legal statuses of marriage and domestic partnership is the absence of any other similar or moderately congruent legal status. No other legal status has even a remotely similar insistence on gender, consanguinity, number of and limit to its participants, or exclusivity. Moreover, no other status remotely contemplates

[5] There are also several other substantial similarities between the statuses. Both require agreements or contracts as a precondition, *compare* Wis. Stats. §§ 765.01 and 770.10, and are of indefinite duration, ending only after an affirmative act by one of the parties to the status. Domestic partnerships also require that the parties "share a common residence," Wis. Stat. § 770.05(3), an aspect of marriage that is so common that Wisconsin provides extensive protections for the marital residence. *Harris v. Kunkel*, 227 Wis. 435, 437-38, 278 N.W. 868, 869 (1938).

bundling all these requirements together. *See, e.g., National Pride*, 481 Mich. at 72, 748 N.W.2d at 536 ("[M]arriages and domestic partnerships appear to be the only [statuses recognized by state law] that are defined in terms of *both* gender and the lack of a close blood connection." (emphasis in original)). Thus, the legal status created by Chapter 770 is substantially similar to marriage, as it exists exclusively with marriage on one side of a great chasm that separates them from all other legal statuses known at law.

Moreover, Chapter 770 itself declares domestic partnerships the direct legal alternative to marriage. Under Wis. Stat. § 770.12(4)(b), a domestic partner who marries another "automatically terminate[s]" the domestic partnership. All other legal statuses—like parent, landowner, corporate officer, business partner, or employer—can be held irrespective of marital status. Only the legal status of domestic partner is mutually exclusive with marital status, and this is because the two statuses are essentially the same.[6]

[6] Similarly, in another way that Chapter 770 mimics marital status, a person cannot have more than one domestic partnership at a time. Wis. Stat. § 770.05(2). Again, this is not true of statuses other than marriage as, *e.g.*, one can stand as parent to more than one child or as employer of more than one employee.

The circuit court attempts to distinguish domestic partnerships by pointing to a handful of insignificant differences. But such differences are absorbed by art. XIII, § 13's use of "substantially similar" instead of just "identical."

Further, the circuit court's noted distinctions are irrelevant. It found significant, for instance, that marriage regards opposite-sex couples and domestic partnerships regard same-sex couples. But both statuses are substantially similar because they are sex-specific. (R. 131:33-34). Moreover, the second sentence of art. XIII, § 13 was enacted precisely to prevent either redefining marriage or creating an alternative legal status for non-married couples. *McConkey*, 2010 WI 57, at ¶ 55. A catalyst behind art. XIII, § 13 cannot now be used to distort its purpose and meaning.

Lost in its attempt to rewrite the constitution to read "virtually identical," the circuit court notes that marriage allows a couple of exceptions to its general rules on age and consanguinity. (R. 131:33). But these minor variations are perfectly permissible in a "substantially similar" analysis. Further, age and consanguinity parameters regarding marriage reflect each state's reasoned policy regarding the uniquely

procreative nature of opposite-sex relationships, which is not a concern for domestic partnerships since they must be composed of same-sex couples.[7]

Finally, the circuit court erred in its reliance on the requirement that domestic partners share a household. (R. 131:33-34). This requirement actually mirrors Wisconsin marriage law, as community property principles establish presumptively shared residences and property as a matter of law. *See*, *e.g.*, *In re Estate of Kobylski*, 178 Wis.2d 158, 168, 503 N.W.2d 369, 372 (Wis. App.1993) ("All property of married persons either is, or is presumed to be, marital property unless it is proven to be otherwise."). Even if spouses physically reside in two separate residences, the martial monies used to enhance those residences legally and inextricably bind together the spouses and their properties. *See*, *e.g.*, *DeWitt v. Edward L. Jones Estate*, 211 Wis.2d 891, 568 N.W.2d 652 (Wis. App. 1997). Moreover, spousal residence sharing is so universal that, in

[7] *See* Wis. Stat. § 765.02(2) (allowing a narrow means by which some younger couples can become married with the close superintendence of the parents or other legal authorities to help stabilize such marriages). *See also* Wis. Stat. § 765.03(1) (women over age 55 and sterile couples cannot generally have children, thus limiting the State's interest regarding procreation and, accordingly, relaxing the rules against marriages between close relatives.).

addition to the application of community property principles, the existence of the homestead or marital residence is a longstanding fixture of Wisconsin law. *See, e.g.*, *Harris v. Kunkel*, 227 Wis. 435, 437-38, 278 N.W. 868, 869 (1938). Thus, Chapter 770's housing requirement shows how remarkably it resembles marital status.[8]

In sum, Chapter 770 violates art. XIII, § 13 by creating a legal status that is substantially similar to marriage. Without going any further, then, the circuit court's ruling should be reversed and Appling granted summary judgment.

There are, though, several other proofs of Chapter 770's substantial similarity to marriage.

4. The formation of domestic partnerships is substantially similar to that of marriage.

Chapter 770's formation of domestic partnerships strikingly resembles the process for marriage. As with marriage, prospective domestic partners go to the clerk of the county where they have resided for 30 days,[9] provide the same identification

[8] After its attempts to distinguish the legal statuses, the circuit court jettisoned even its arguments on this point, ultimately refusing to compare "the 'quintessential features' of each legal status," and returning to its incident-counting exercise. R. 131:34.

[9] *Compare* Wis. Stats. §§ 765.05 *with* 770.07(1)(a).

and confidential information,[10] make the same affirmation of accuracy,[11] pay a fee which must be "the same amount" as the one for marriage,[12] wait the same amount of time to receive the declaration[13] (or pay a fee to expedite receipt[14]), and then receive the declaration from the same official.[15] Chapter 770 even requires the county clerk to provide domestic partners with the same information on fetal alcohol syndrome that is given to married couples.[16] The steps to obtain a domestic partnership are nearly identical to those for marriage.

After obtaining their license, expectant spouses ceremonially seal their relationship before at least two witnesses and an authorized official.[17] Similarly, domestic partners solemnize their relationship before a notary public.[18] The completed documents for both relationships are then recorded by

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[10] *Compare* Wis. Stats. §§ 765.09(2) and (3) *with* 770.07(1) (both statuses requiring "documentary proof of identification," a "social security number of each party," and "a certified copy of a birth certificate" from "each applicant").

[11] *Compare* Wis. Stat. §§ 765.09(3)(a) *with* 770.07(1)(d).

[12] *See* Wis. Stat. § 770.17

[13] *Compare* Wis. Stats. §§ 765.08(1) *with* 770.01(b).

[14] *Compare* Wis. Stats. §§ 765.08(2) *with* 770.07(1)(b)(2).

[15] *Compare* Wis. Stats. §§ 765.12(1)(a) *with* 770.07(2).

[16] *Compare* Wis. Stats. §§ 770.10 *with* 765.12(1)(a).

[17] *See* Wis. Stats. § 765.002, 765.16 (notably, the spouses themselves can act as the witnesses).

[18] *See* Wis. Stat. § 770.10

the register of deeds,[19] who then sends the paperwork to the state registrar of vital statistics.[20] Thus, the process for entering both relationships or legal statuses is, to use the circuit court's words, "virtually identical." In fact, were prospective spouses to accidentally acquire domestic partnership instructions, they could essentially follow those instructions to acquire a marriage license.

5. The incidents of domestic partnerships are accorded and bundled substantially similarly to the incidents of marriage.

The circuit court also erred by adding up *how many* marital incidents are accorded to domestic partnerships. By its clear language, and—as established below—its clear purpose, art. XIII, § 13 does not establish a "stick-counting" exercise. But comparing *how* the incidents of both statuses are accorded *is* helpful in discerning the marriage-mirroring nature of the status created by Chapter 770.

With the enactment of Chapter 770, Wisconsin law now generally considers domestic partners as equivalent to spouses. Indeed, virtually *everywhere* domestic partners are accorded a

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[19] *Compare* Wis. Stats. §§ 770.10 *with* 765.19.
[20] *Compare* Wis. Stats. §§ 770.10 *with* 765.13.

legal right, it is as a direct alternative to marriage. That is, the statute granting the right nearly always grants it to a "spouse *or* domestic partner."[21]

Often, the legal equivalency between the statuses is explicit. For instance, hospitals and other healthcare institutions must "extend the *same right* of accompaniment or visitation to a patient's domestic partner under Chapter 770 as is accorded the spouse of a patient under the policy."[22] (Emphasis added). This requirement is *only* for spouses and domestic partners, and to the exclusion of parents, guardians, siblings, and others. Similarly, when admitted to a healthcare facility, spouses and domestic partners—and *only* spouses and domestic partners—must generally be permitted to share a room. Wis. Stat. § 50.09(1)(f)(1).

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[21] *See, e.g.,* Wis. Stat. § 50.06(3)(a) ("The following individuals, in the following order of priority, may consent to an admission…: The spouse or domestic partner of the incapacitated individual."); Wis. Stat. § 905.05 (extending the husband-wife testimonial privilege to domestic partners, making the privilege one that covers "any private communication by one to the other made during their marriage or domestic partnership."); Wis. Stats. §§ 859.25, 861.21, and 861.41 (rights to property of a surviving spouse or surviving domestic partner); Wis. Stat. § 101.9208(4m) (manufactured home title transfer fee); Wis. Stat. § 342.17(4)(b) (motor vehicle titles).

[22] *See* Wis. Stats. §§ 50.032 and .033 (adult family homes); 50.034 (residential care apartment complexes); 50.035 (community-based residential facilities); 50.04 (nursing homes); 50.36 (hospitals); and 50.942 (hospices).

Indeed, every right extended to domestic partners is already enjoyed by spouses. There are essentially no legal rights exclusive to domestic partners. That the incidents appurtenant to domestic partners derive wholly from marriage uncovers the true nature of the unconstitutional legal status created by Chapter 770.

The circuit court dismisses these similarities by suggesting that many of the rights accorded spouses and domestic partners are open to others, like parents and children. (R. 131:40). However, once again, the circuit court misses the mark in analyzing the incidents as dispositive of whether a substantially similar status exists, instead of appropriately viewing the incidents as merely demonstrative of the status created by Chapter 770.

Moreover, the circuit court is incorrect about many of the examples it cites, as the incidents are not equally available to parents or children as they are to spouses and domestic partners. For instance, the rights bestowed in Wis. Stats. §§ 50.06(3) and 50.94(3)(a) are available only to parents or children when no

spouse or domestic partner exists.[23] Thus, the circuit court's suggestion that incidents of marriage are simultaneously available to others, like parents and children, is not altogether true. Further, that some rights are granted more broadly does not change the force that many incidents of marriage are uniquely available *only* to those with marital or domestic partner status.

Moreover, spousal and domestic partner status are, as shown above, directly analogous: both are two-person relationships, between persons of specified sexes, at a certain age, not closely related by blood, consenting to the relationship, and not in a formal domestic relationship with another. This is not true of *any* of the other type of legal status. For instance, a parent can be a parent to multiple children, regardless of anyone's sex and necessarily without regard to consanguinity or consent. Thus, domestic partners and spouses are exclusive legal classifications, discrete from all other family members. That family members may sometimes enjoy the rights given to

[23] Other statutes similarly privilege or distinguish domestic partners, like spouses, over other family members. Wis. Stats. §§ 103.165(3)(a), 861.35(1m).

domestic partners and spouses does not change the fact that the former are in a separate class from the latter.

The circuit court likewise fails in its use of testimonial privileges to support its conclusions. It is, first, incorrect that other statutes extend a similar privilege to a "health care provider and patient, an attorney and client, and a clergy member and parishioner." (R. 131:41) (citing Wis. Stat. § 905). No health care provider, attorney, or member of the clergy enjoys any form of privilege. The privilege belongs exclusively to the patient, the client, and the parishioner. *See*, *e.g.*, *State v. Meeks*, 2003 WI 104, ¶ 28, 263 Wis.2d 794, 666 N.W.2d 859 (concluding that the attorney-client privilege belongs to the client). Only with spouses—and now, domestic partners—do both parties to a privileged communication have independent claim to the privilege. Second, the professional relationship between, say, a doctor and patient is in no way parallel to the profoundly personal relationship between spouses.

Finally, stepping back from the particular manner in which the incidents of marriage are accorded, and instead viewing the collective manner in which the bundle of marital rights are disseminated, brings into sharp focus the striking resemblance

between domestic partnerships and marriage. *The law now bundles rights for domestic partners previously solely so bundled for marriage.* No other legal status even comes close to receiving this bundled dissemination of marital incidents. Nor is there any plausible justification, beyond the creation of an alternative marital status, for privileging adult same-sex relationships over, for instance, parents, children, and other family members.

Clearly, Chapter 770 has unconstitutionally created an alternative marital status.

B. The Marriage Amendment's historical context shows that Chapter 770 creation of a legal status substantially similar to marriage causes the very harm the amendment was designed to prevent.

After the plain language of the Marriage Amendment is "giv[en] priority" in interpretation, *Dairyland*, 295 Wis.2d 1, 81-82 (2006) (Prosser, J., dissenting), the next inquiry is into the historical context surrounding its passage. The proponents of the Marriage Amendment were clear that it (a) did not restrict extending rights or benefits to non-spouses, and (b) prevented the creation of a legal status that strongly resembled marriage. In other words, those responsible for art. XIII, § 13's passage were

not concerned with "stick counting," but rather marriage-mimicking legal statuses.

Further, by adopting the Marriage Amendment, voters affirmed Wisconsin's commitment to the man-woman model of marriage and expressly rejected the state sponsorship of other marriage models.

1. The historical context of the Marriage Amendment affirms Chapter 770's unconstitutionality.

The purpose in the interpretation of a constitutional amendment is "to give effect to the intent of the framers and the people who adopted it . . . ." *State v. Cole*, 264 Wis.2d 520, 530, 665 N.W.2d 328, 333 (2003) (quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis.2d 718, 729-30, 150 N.W.2d 447, 452 (1967)). "[I]t is," as the supreme court has said, "a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted." *Id*.[24] In contrast to statutory construction, extrinsic sources are considered even if the constitutional text is unambiguous. *Buse v. Smith*, 74 Wis.2d 550, 568 (1976).

[24] *See also State ex rel. Zimmerman v. Dammann*, 228 N.W. 593, 595 (1930) ("[T]he intent and purpose of the framers of the Constitution should therefore be a guide to its application and interpretation.").

"[T]he intent," the supreme court has observed, "is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument…" *Thompson v. Craney*, 199 Wis. 2d 674, 690 (1997) (quoting *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 184 (1925)).[25]

As Justice Prosser explained,

> courts consider the debates surrounding amendments to the constitution and the circumstances at the time these amendments were adopted. We have said that courts may examine 'the history of the times,' meaning not only the legislative history of a provision … but also 'the state of society at the time' … These concerns are often illuminated by contemporaneous debates and explanations of the provision both inside and outside legislative chambers.

Dairyland, 295 Wis.2d 1, 81-82 (2006) (Prosser, J., dissenting) (internal citations omitted).[26] The supreme court's choice to conduct a "more intense review of extrinsic sources than our methodology in statutory interpretation," *id.* at 80 (Prosser, J.,

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[25] *See also Thompson*, 188 Wis.2d at 711 (Wilcox, J., concurring) (quoting *Payne v. City of Racine*, 217 Wis. 550, 555-56 (1935) ("[A] constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth…")).

[26] This methodology has been in use for several decades. *Buse*, 74 Wis.2d at 568. The steps were first laid out in this order in *Board of Ed. v. Sinclair*, 65 Wis.2d 179 (1974) and have been used since, including in 2010 by the supreme court in interpreting art. XIII, § 13. *McConkey*, *supra.*

dissenting), is because the voters have the final say and they "necessarily consider second-hand explanations and discussion at the time of ratification." *Id.* In assessing these materials, this Court should "find out, if possible, the real meaning and substantial purpose of those who adopted it," *State ex rel. Martin v. Heil*, 242 Wis. 41, 55 (1942), and whether the electorate, having heard both sides of the debate, would find Chapter 770 offensive to the purposes of art. XIII, § 13.

Notably, this process is not a search for the subjective understanding of legislative authors. Indeed, there is no reason that the intent of the authors has any particular relevance, apart from their role in defining the public meaning on which the voters acted. The framers' overall intent or objective is only relevant after other controlling sources have failed to provide an answer.[27]

This Court must operate on the presumption that, "when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the

[27] *State v. Beno*, 116 Wis.2d 122, 138, 341 N.W.2d 668 (Wis. 1984) ("[W]hen the *Sinclair* and *Buse* rules of constitutional interpretation do not provide an answer, the meaning of a constitutional provision may be determined by looking at the objectives of the framers in adopting the provision.").

ratification campaign provides evidence of voters' intent." *Dairyland*, 295 Wis.2d at 37 (Butler, J., majority). This Court must look to the "debates and explanations of the provision" during the statewide ratification campaign, using a number of sources, primarily public media. *Id.* at 39, 50 n.38 (Butler, J., majority) and 135-36 (Prosser, J., dissenting).[28]

While there are inherent difficulties with discerning voter's intent,[29] the best—and required—way to discern the amendment's public meaning is to ask what an *informed* voter would have thought it meant. *Dairyland*, 295 Wis.2d at 40 (the understanding that "informed voters" had about a constitutional amendment "must" control the Court's "construction and interpretation" of the amendment). And though elections are usually filled with conflicting accounts of an enactment's meaning, the debate in Wisconsin was uniquely harmonized as it pertained to the meaning of art. XIII, § 13's impact on marriage-like relationships.

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[28] It has been suggested that they also consider informational materials provided to voters during the campaign. *See* Christopher R. McFadden, *The Wisconsin Bear Arms Amendment and the Case Against an Absolute Prohibition on Carrying Concealed Weapons*, 19 N. Ill. U.. L. Rev. 709, 711 (1999).

[29] *See Mortier v. Town of Casey*, 452 N.W.2d 555, 564 (Wis. 1990) (Abrahamson, J., dissenting).

The arguments of proponents and opponents alike demonstrated an understanding that an enactment like Chapter 770 would run afoul of art. XIII, § 13. Indeed, the opponents of art. XIII, § 13 dominated the public debate, outspending proponents on broadcast media by an astonishing ratio of over 6 to 1.[30] But because the record reveals a common core understanding of the meaning or impact of the amendment, the collective campaigns spent millions informing Wisconsin voters that a scheme like Chapter 770 would be impermissible.[31]

2. The Marriage Amendment was meant to preserve the status quo and prohibit alternative forms of marriage.

a. The Passage of the Marriage Amendment

The Marriage Amendment was first introduced on February 9, 2004 as 2003 Assembly Joint Resolution 66, co-sponsored by over one-third of the Assembly.[32] After a favorable

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[30] Fair Wisconsin paid approximately $3 million to its advertising company, Adelstein Liston of Chicago. Vote Yes for Marriage paid approximately $395,000 to its advertising company, Non Box of Hales Corners. Vote Yes also purchased approximately $75,000 worth of radio advertising on its own. *See, e.g.,* R. 130B:196, 207, 241, 379-385, 395, 890-922 (Fall 2006 pre-election reports and January 2007 continuing reports filed with the Wisconsin Elections Board by Vote Yes and Fair Wisconsin).

[31] While the views of an amendment's proponents are usually privileged over those of its opponents, *Heil*, 242 Wis. at 55, where congruence exists as to the meaning of the enacted provision at issue, there is a no need for a distinction at law.

[32] R. 130B:77-79 (2003 Assembly Joint Resolution 66).

report by the Committee on the Judiciary, the bill went to the Assembly floor.[33] There, a substitute amendment was offered for the bill to contain only what is now the first sentence of art. XIII, § 13.[34] The Assembly rejected the proposal[35] and adopted the bill by a bipartisan majority of 68 to 27.[36]

The legislation proceeded to the Senate, where it was taken up after a favorable committee vote.[37] Twelve amendments were offered by Senator Tim Carpenter (D-Milwaukee), all of which were rejected on basically party-line votes.[38] On final passage, the Senate adopted the bill by a bipartisan majority of 20 to 13.[39] The Marriage Amendment had now passed the first of two different legislatures required before it could be put to the people.

In 2005, it was again introduced in the Senate[40] and, once again, passed out of committee. Again, the Senate rejected an amendment[41] to reduce the effort to only the first sentence of art.

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[33] R. 130B:80-83 (History of 2003 Assembly Joint Resolution 66).
[34] R. 130B:84-85 (Assembly Amendment 1 to 2003 AJR 66).
[35] R. 130B:86-87 (Roll Call on AA 1 to 2003 AJR 66).
[36] R. 130B:88-91 (Roll Call on Adoption of 2003 AJR 66).
[37] R. 130B:80-83.
[38] Senator Roger Breske, a Democrat from Eland, consistently supported the amendment as originally written. *Id.*
[39] R. 130B:92-93 (Roll Call on Adoption of 2003 AJR 66). Besides Breske, the other Democrat was Dave Hansen of Green Bay.
[40] R. 130B:111-114 (2005 Senate Joint Resolution 53).
[41] R. 130B:127-129 (Senate Substitute Amendment 1 to 2005 SJR 53).

XIII, § 13.[42] After rejecting several other amendments, the Senate favorably reported the underlying legislation along party lines.[43]

The Assembly leadership sent the Senate-passed bill straight to the Rules Committee, which scheduled it promptly for floor action in a special session.[44] The Assembly again rejected a first-sentence-only substitute, 57 to 38,[45] and then passed the underlying bill in a bipartisan vote, 62 to 31,[46] sending the proposed Marriage Amendment to the people for a vote.

The fall ratification campaign included all of the features of a major statewide race. The organization leading the charge against the amendment was Fair Wisconsin, which raised and spent over $4.3 million dollars against the measure in 2006.[47] Its efforts included seven different television advertisements,[48] radio advertising, a large paid staff,[49] and a statewide grassroots

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[42] R. 130B:130-131 (Roll Call on SSA 1 to 2005 SJR 53).

[43] R. 130B:132-133 (Roll Call on 2005 SJR 53).

[44] R. 130B:134-137 (History of 2005 Senate Joint Resolution 53).

[45] R. 130B:138-139 (Roll Call on ASA 2 to 2005 SJR 53).

[46] R. 130B:144-145 (Roll Call on Adoption of 2005 SRJ 53).

[47] R. 130B:146-148 ("Referendum Committees," Wisconsin Democracy Campaign, October 31, 2007).

[48] R. 130A:152-155 (five of Fair Wisconsin's seven television ads).

[49] Over 50 paid staff in 10 field offices statewide. *See* R. 130B:149-151 (Mike Fitzpatrick, "National ACLU's Eagen: 'Fair Wisconsin Getting It Right,'" Quest Newsroom, September 12, 2006).

effort.[50] By contrast, the primary organization of proponents, Vote Yes for Marriage, spent just $634,000 in 2006,[51] and ran only one TV advertisement.[52] However, because the collective understanding of the impact of the amendment was the same regarding marriage-mirroring relationships, Wisconsinites were privy to a $5,000,000.00 statewide campaign educating them that the amendment would prevent a scheme like Chapter 770.

On November 7, 2006, over 1.25 million Wisconsin voters—59% of those voting—cast ballots in favor of the amendment.[53] "Yes" on the amendment carried 71 of Wisconsin's 72 counties[54] and, according to CNN exit polling, garnered majority support from males and females, every age bracket but one, every income bracket but one, and nearly every education bracket. It won a majority of union households and swept urban, suburban, and rural voters.[55]

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[50] R. 130B:152-155 (Mike Fitzpatrick, "Fair Wisconsin Canvasses Voters and Names Coordinators In All Counties," Quest Newsroom, May 21, 2006).

[51] R. 130B:146-148 ("Referendum Committees," Wisconsin Democracy Campaign, October 31, 2007).

[52] R. 86:1 (DVD entitled "Appling v. Doyle Exhibit J, Vote Yes for Marriage Video Ad"). Record Document 86 is in a black folder labeled simply "Julaine Appling Affidavit Exhibits."

[53] R. 130B:159-161 (CNN America Votes 2006).

[54] It lost only in Dane County. *See* R. 130B:162-170 ("County Returns: State Referenda," Wisconsin State Elections Board, December 5, 2006).

[55] R. 130B:171-177 (CNN America Votes 2006).

The Marriage Amendment's proponents stuck to two consistent themes. First, the amendment would preserve the marital status quo by preventing the creation of marriage substitutes that were either identical or substantially similar to marriage.[56] Second, as the legislative proponents made clear in a written memo, "no particular privileges or benefits would be prohibited" under the amendment, so long as they were not were not accorded on the basis of a legal status that was substantially similar to that of marriage. *See* R. 130B:1605 (Memo by legislative sponsors). The memo even gave examples of the many benefits that could be granted to non-spouses and distinguished the Wisconsin amendment from another state's that "actually…specifically prohibit[ed] the extension of benefits to same-sex companions." *Id.*

This message was not confined to the legislature. As was said during a public debate on Milwaukee Public Television just

[56] R. 130B:1605 (Memo by legislative sponsors of Marriage Amendment soliciting legislative support, stating the amendment "would preserve the institution of marriage in this state as it always has been—between a man and a woman…In addition, [the proposed amendment] states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used—civil union, civil compact, state sanctioned covenant, whatever."); *accord McConkey*, 783 N.W.2d at 869 n. 22 (quoting most of the same passage from the memo).

days before the vote, "the [marriage] protection amendment is about preserving a one man, one woman marriage. It's not about benefits."[57]

While the circuit court pointed to some isolated statements by proponents suggesting that the legal status created by domestic partnerships would be untouched by the art. XIII, § 13, that reliance is misplaced for several reasons. First, as Lester Pines, the attorney originally defending this case for Governor Doyle, said during the televised public debate, the isolated statements of some proponent legislators were inconsistent with the actual legislative action on the proposed amendment:

> [T]he [legislator] proponents of the amendment, the only place that they've said anything about this officially is on the floor when they're asked to put in an amendment to [the proposed Marriage Amendment] *to specifically say domestic partner benefits would not be affected by* [the proposed Marriage Amendment], *and they refused to even consider that amendment. So they have spoken in the legislative history*. So what they say on TV or what they say in interviews has little to do with what they

[57] R. 66:18 (Transcript of MPT debate at subpage 14:9-12). *See also* R. 130B:1606-1609 (Mike Levenhagen, consultant with the Family Research Institute of Wisconsin, quoted in J.E. Espino, "Midwest gains same-sex couples," The Appleton Post-Crescent, 1A, October 31, 2006 ("Marriage is not a benefits package. The (goal of the) constitution is to promote the general welfare of the state. It does not single out gay couples or unmarried couples. It's about protecting the institution of marriage, not about rights or benefits.")).

> have actually said about this. *They refuse to exempt domestic partners.*[58]

Second, the comments that the circuit court highlighted were both speculative and never addressed a marriage-mimicking scheme like Chapter 770. Third, the circuit court improperly focused on isolated comments instead of the statewide campaign, which determined what the voters saw, read, and heard, and thus what was in the minds of the voters when they overwhelmingly made the decision to enact both sentences of art. XIII, § 13.

Fair Wisconsin and others opposed to the Marriage Amendment were explicit, in their $4.3 million campaign that reached the informed voters of Wisconsin, that Chapter 770-style domestic partnerships would be banned by the amendment's passage. They correctly contended that the amendment would ban "legal recognition of relationships that are similar to marriage—that includes civil unions and domestic partnerships," and that stopping the amendment would mean that "civil unions and domestic partnerships will continue to be options for couples."[59] Like Proponents, Fair Wisconsin recognized that this

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[58] R. 66:25 (Transcript of MPT debate at subpage 41:18-42:5).

[59] R. 130A:145 (Article from Fair Wisconsin's "No on the Amendment Blog" entitled "Top 10 Reasons to Vote 'No'").

effect of the proposed amendment was because "[d]omestic partner policies…require couples to…demonstrate…the **marriage-like nature of their relationship**."[60] (Emphasis added.)

Further, Fair Wisconsin argued at every turn that the amendment was—among other things—a "civil union" ban.[61] To those who were confused about what a civil union was, it offered a definition—which it said "does a good job of explaining civil unions"—that stated that civil unions are "also called domestic partnerships."[62] Other advocates saw the "substantially similar" language as proscribing legal statuses like Chapter 770's, because such statuses would give "[i]ndividuals in committed relationships…the **same legal status as married people**."[63] (Emphasis added.)

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[60] R. 130A:146 (Article from Fair Wisconsin's "No on the Amendment Blog" entitled "Blog Debate: My Rebuttal to Question 2").

[61] *See, e.g.*, R. 130A:147-151 (Articles from Fair Wisconsin's "No on the Amendment Blog" entitled "It's Been a Year," "Wisconsin Second in Pop. Growth of Gay Couples," and "Why our Grandmothers are Voting No"); *see also* R. 130A:152-155 (Video recordings of Fair Wisconsin's aired advertisements against the Marriage Amendment).

[62] R. 130A:156 (Article from Fair Wisconsin's "No on the Amendment Blog" entitled "Republican Senator: That Language Should Not Be in There").

[63] R:130A:158-159, (Article from Fair Wisconsin's "No on the Amendment Blog" entitled "My Job is to Make People 'Substantially Similar'").

b. The Marriage Amendment was enacted for and justified by a specific purpose.

Proponents also explained precisely *why* preserving marriage is important. As Professor Teresa Stanton Collett stated during a televised public debate, aired just before the vote, "[t]he institution of marriage has been, at least the civil institution, has been built around this idea that a man and a woman come together and have this procreative capacity." (R. 130A:115). Peter Sprigg, Vice President for Policy at the Family Research Council, added that

> allowing same-sex marriage would undermine the social ideal, which is represented by the marriage law, which is that children…should be raised by the mother and father whose union created them. And therefore, marriage as the union of a man and a woman is a natural reality, not just a civil one or a religious one. But it's rooted in the order of nature itself.

(R. 130A:119).

Dr. Kevin Voss, Director of Concordia Bioethics Institute and instructor of philosophy, summed up the argument for the Marriage Amendment:

> I believe the amendment will benefit us by helping to preserve an institution that's vital for an orderly society. Marriage between one man and one woman offers many goods which are almost too many to list.

> Marriage socializes men. It regulates sexuality. It protects women from exploitation and abuse, and it provides a stable platform from which we can raise healthy well-adjusted children.[64]

In the only television ad ran by the pro-Marriage Amendment campaign, proponents emphasized retaining the public meaning of marriage as a union only between a man and a woman—particularly in the eyes of the next generation.[65]

Proponent's publications also emphasized the procreative foundation of marriage. One stated that "[c]ivilized cultures throughout history have understood, and recent research supports, that a physically present mother and father, that is, a man and a woman married to one another, provide the best environment for children."[66] Further, "[t]here is a legitimate 'state interest' in marriage because monogamous, lifelong marriage between one man and one woman brings order and a number of benefits to society."[67] Another paper stated that "[c]hanging the definition of marriage would intentionally create

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[64] R. 66:16-17 (Transcript of MPT debate at subpage 8:25—9:10).

[65] R. 86:1 (depicting children who were confused by what school teachers were saying about the public redefinition of marriage); *see also* R. 130A:101 (warning about the consequences of judicially-imposed same-sex marriage for Massachusetts schoolchildren).

[66] R. 130A:112 (Proponent flyer on "Preserving One-Man/One-Woman Marriage & the Constitutional Amendment Process").

[67] *Id.*

motherless or fatherless children."[68] These arguments are supported by a large body of social science research showing that children fare best when raised by their biological mother and father in a low conflict marriage.[69]

In all this, the proponents of the Marriage Amendment were simply seeking to preserve the marital status quo. *McConkey*, 326 Wis.2d 28. The sex-specific and procreative nature of marriage has long been well-established in Wisconsin. Wisconsin statutes provide that "[m]arriage is the institution that is the foundation of family and society." Wis. Stat. §§

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[68] R. 130A:110 ("Vote Yes For Marriage" flyer).

[69] *See, e.g.,* R. 130D (Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier and Better-Off Financially*, New York: Doubleday (2000)); R. 130C (Elizabeth Marquardt, *Between Two Worlds: The Inner Lives of Children of Divorce*, New York: Crown, 2005); *also see* R. 130B:1005-1328 (collecting the following written materials: Amici Curiae Brief of James Q. Wilson, et al., *In re Marriage Cases*, Case No. A 110449 (Cal. Ct. App. 2006); *Marriage and the Law: A Statement of Principles*, New York: Institute for American Values & Institute for Marriage and Public Policy, 2006; Elizabeth Marquardt, *Family Structure and Children's Educational Outcomes*, New York: IAV, 2005; W. Bradford Wilcox, et al., *Why Marriage Matters*, Second Edition: *Twenty-Six Conclusions from the Social Sciences*, New York: IAV 2005; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*," 15 *The Future of Children* 75, Fall 2005; *Marriage and the Public Good: Ten Principles*, Princeton: The Witherspoon Institute, 2006; Lorraine Blackman, Obie Clayton, Norvall Glenn, Linda Malone-Colon & Alex Roberts, *The Consequences of Marriage for African Americans: A Comprehensive Literature Review*, New York: Institute for American Values, 2005; William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OREGON L. REV. 1001, (2004)). For a summary of the research, see Helen M. Alvare, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and Its Predecessors* 16 STAN. L. & POL'Y REV. 135, 179-180 (2005) (summarizing reviews of the literature).

765.001(2), 944.01. The supreme court recognized that "[t]here are three parties to a marriage contract – the husband, the wife, and the state" because "the state unquestionably has…an interest in the maintenance of the relation which for centuries has been recognized as a bulwark of our civilization." *Fricke v. Fricke*, 257 Wis. 124, 126 (1950).[70]

Article XIII, § 13 affirms the man-woman/procreative "conjugal model" of marriage in Wisconsin over the alternative "close relationship" model.[71] In the conjugal model, "[m]arriage…is a sexual union of husband and wife, who promise each other sexual fidelity, mutual caretaking, and the joint parenting of any children they may have."[72] It is necessarily normative because "its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly

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[70] *See also Smith v. Smith*, 52 Wis.2d 262 (1971) ("It is in the public interest to maintain a marriage relationship").

[71] R. 130B:945 (COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA at 7 (2005)); *see also* Maggie Gallagher, *Rites, Rights and Social Institutions: Why and How Should the Law Support Marriage?* NOTRE DAME JOURNAL OF LAW & PUBLIC POLICY, 226, 229-235 (2004); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 UNIVERSITY OF ST. THOMAS L. REV. 33, 43-46 (2004).

[72] R. 130B:950 (FUTURE OF FAMILY LAW at 12).

(and even at times unexpectedly) produce." If "law and culture choose to 'do nothing'" about sexual attraction between men and women, the passive, unregulated heterosexual reality is multiple failed relationships and millions of fatherless children."[73]

By nature, the conjugal model of marriage is child-focused. Its norms and mores—"the rule of two," the insistence of spouses upon sexual exclusivity, the expectation of permanence, the recognition of the importance of fathers *qua* fathers—flow directly from the potentially procreative nature of heterosexual unions. In fact, "if human beings did not reproduce sexually, creating human infants with their long period of dependency, marriage would not be the virtually universal human social institution that it is."[74]

By contrast, the "close relationship" model of marriage posits that marriage is best "seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it."[75] This view holds that the purpose of marriage is to facilitate intimate relationships, and its norms are driven by the idea of "pure relationship" [*i.e.*,]…one

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[73] *Id.*
[74] *Id.* at 952 (FUTURE OF FAMILY LAW at 14).
[75] *Id.*

that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction [brought] to the individuals involved."[76]

The "close relationship" model is the foundation for the legal recognition of same-sex relationships. It exalts the "happiness of the pair" and demands that same-sex unions be treated as the equivalent of man-woman marriage.[77]

c. Chapter 770 undermines the conjugal model of marriage adopted by the voters.

Voting to preserve the inherently diverse and procreative "one man-one woman character of marriage" that is the "foundation of…society," *McConkey*, 783 N.W.2d at 868, 869, Wisconsinites voted to preserve the "conjugal model" of marriage, to the exclusion of all other models of adult relationships.[78] Voters necessarily concluded that same-sex and heterosexual relationships are not equivalent with respect to those purposes and social goods that are served by legal recognition of marriage. Voters concluded that redefining marriage, as well as the

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[76] *Id*. at 953 (FUTURE OF FAMILY LAW at 15).

[77] *Id*.

[78] If, as suggested by the circuit court, the purpose of art. XIII, § 13 was merely to prevent judicial imposition of same-sex marriage or civil unions (R. 131:31), an amendment prohibiting a court from imposing such a status or stripping the judiciary of jurisdiction over such matters would have sufficed. *See*, *e.g.*, Hawai'i const. art. 1, § 23.

creation of other legal statuses, would threaten the accomplishment of those purposes and social goods.

Thus, the creation of a status that is calculated to confer the same or a substantially similar social or legal status creates exactly the type of undermining of marriage that the voters sought to prevent. While contracts and other financial arrangements allow non-spouses to approximate some of the financial benefits of marriage, "[t]he crucial element of domestic partnerships is not the fact that they allow unmarried couples to gain some benefits of marriage."[79] Rather, it is Chapter 770's domestic partnership status that is unconstitutional, because it "provide[s] legal and societal sanction to nonmarital relationships. [It] send[s] a message that participating in nonmarital relationships is as valid a choice as to be married"[80]—precisely the message that was rejected by Wisconsin voters. Thus, Chapter 770 harms Wisconsin's voter-approved model of conjugal marriage in a number of ways, primarily by undermining its exclusive claim to normativity.

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[79] *Domestic Partnership Laws in the United States*, 2001 B.Y.U. L. Rev. at 987.

[80] *Id*. at 989.

Unfortunately, Chapter 770's harm is already manifest. For instance, in addition to the new laws that effectively treat domestic partners as spouses, many statutes now redefine "family" to include domestic partners.[81] Indeed, Chapter 770 was placed in the statutory grouping titled "Marriage and Family." *See* Wis. Ch. 765-770. This undermines marriage's normative status as "the foundation of the family." Wis. Stat. § 765.001(2).

Just recently, John Muir Middle School in Wausau illustrated the unconstitutional impact of Chapter 770's new legal status. Each spring, Muir has its students play the "Game of Life," forming a family unit, and learning to manage a family budget. Before Chapter 770's enactment, Muir required one boy and one girl to form a family unit. After the enactment of Chapter 770, Muir announced to its teen and pre-teen students that, because it bases "the game on what is legal in Wisconsin," two boys or two girls could form family units, just as a boy and girl might.[82]

Thus, "what is legal in Wisconsin" is the existence of a new legal status, established by Chapter 770, that is viewed by

[81] Wis. Stats. §§ 949.06, 971.17, 980.11.
[82] R. 130A:165 (John Muir Middle School Letter, Spring 2011).

educators as an equal alternative to marriage. In forming their "family units," educators gave *children* a choice between two legal statuses viewed as equally viable options. This is precisely the danger that proponents warned in their single television ad would result from the creation of alternative marital statuses: schools would teach *children* "a whole new way of thinking" about marriage and family.[83] Indeed, in a presentation about the dangers Wisconsin schoolchildren faced without a marriage amendment, proponents quoted Massachusetts schools justifying activities similar to Muir's: schools "teach[] children about the world they live in, and in Massachusetts same-sex marriage is legal." (R. 130A:101).

Notably, the panoply of marital incidents extended to the domestic partnership legal status did not play into the types of family units offered to Muir schoolchildren. What controlled was the viewpoint of the "legal status" of domestic partnership as a legal and equally viable alternative to marriage. This poignant example crystallizes both the purpose of art. XIII, § 13, and the unconstitutionality of Chapter 770.

[83] R. 86:1.

III. Since the earliest subsequent legislative action regarding the Marriage Amendment is the law challenged as violating the Amendment, relying on that law to interpret the Amendment is unnecessary, misleading, and inappropriate.

While courts "may" review the legislature's earliest, contemporaneous legislative act to determine an amendment's meaning, *Dairyland*, 295 Wis.2d at 82 (Prosser, J., dissenting),[84] doing so here would be especially inappropriate since the earliest legislative act—Chapter 770—was not enacted contemporaneously with the Marriage Amendment, and is also precisely what is being challenged.

When the rule of reviewing subsequent acts of the legislature was first used in 1921, the Wisconsin Supreme Court was not using the meaning of the act being challenged to determine the constitutionality of the act being challenged. *See State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 114, 184 N.W. 683, 685 (Wis. 1921). In fact, no prior case reviewing the earliest legislative enactment following the adoption of the constitutional provision involved the earliest legislative act being, in fact, the

[84] *See also Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept.*, 270 Wis.2d 318, 353-55, 677 N.W.2d 612 (Wis. 2004) (where the absence of a first enactment was not crippling to the review process).

act being challenged.[85] Thus, if Chapter 770 is permitted to define the meaning of art. XIII, § 13, then this Court would establish new precedent that the legislature could undermine any unwanted constitutional amendment by subsequently enacting a contrary provision.

Further, the first enactment tool requires an immediate or contemporaneous legislative enactment, not one several years later. The inception of this rule focused upon "*contemporary legislative construction* of this constitutional provision, which construction is entitled to great deference." *Payne v. City of Racine*, 217 Wis. 550, 259 N.W. 437, 438-39, 440-42 (Wis. 1935) (emphasis added) (quoting *State ex rel. Pluntz v. Johnson*, 176 Wis. 107, 114, 184 N.W. 683, 685 (Wis. 1921)). "Contemporary legislative construction" has value because it examines the same

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[85] *See, e.g.*, *Dairyland, supra*; *Schilling v. Wisconsin Crime Victims Rights Bd.,* 2005 WI 17, ¶ 16, 278 Wis.2d 216, 692 N.W.2d 623; *State v. Cole*, 264 Wis.2d 520, 665 N.W.2d 328 (2003) (no subsequent legislative act); *Thompson v. Craney,* 199 Wis.2d 674, 680, 546 N.W.2d 123 (1996) (earliest legislative enactment was in 1848); *Payment of Witness Fees in State v. Brenizer*, 188 Wis.2d 665, 674, 524 N.W.2d 389 (Wis. 1994) (earliest legislative enactment was in 1850); *State v. Beno*, 116 Wis.2d 122, 341 N.W.2d 668 (Wis. 1984); *Buse v. Smith*, 74 Wis.2d 550, 563-72, 247 N.W.2d 141 (Wis. 1976) (earliest legislative enactment was in 1849); *Payne v. City of Racine*, 217 Wis. 550, 259 N.W. 437, 438-39, 440-42 (Wis. 1935) (challenging the interpretation of the phrase "public utility," but not challenging the statute itself as unconstitutional); *State v. Johnson*, 176 Wis. 107, 114, 186 N.W. 729, 730 (1922) (earliest contemporaneous legislative enactment rendered the meaning of art. VI, § 4 to encompass a "hold over" interpretation of Wis. Stat. § 59.12).

legislature that placed the constitutional amendment on the ballot. Thus, for instance, *Buse v. Smith* considered an 1849 statutory enactment following the adoption of the 1848 constitution. *Buse*, 74 Wis.2d at 568, 247 N.W.2d at 149. The most recent case on point also involved contemporaneous legislative action. *Dairyland*, 295 Wis.2d 1, 40-41, 719 N.W.2d 408, 427-28 (reviewing multiple 1993 enactments following a 1993 constitutional amendment).

If the guidance of *any* subsequent legislative action is mandatorily instructive, as suggested by the circuit court (R. 131:27-30), no matter how attenuated that action may be from the enactment of the constitutional provision in question, then politics, not intent, has the power to control the meaning of the people's enactment. But "[a] contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms used by the legislature." *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N. W. 785, 793 (1882) (quotation omitted).

Here, there is no legislative action contemporaneous with the enactment of art. XIII, § 13. The first legislative action—the passage of Chapter 770 itself—was taken several years later by a

much different legislature whose political composition was antithetical to the legislatures that championed the enactment of art. XIII, § 13.

Thus, using Chapter 770 as a controlling guide to determining its own constitutionality both undermines the concept of studying contemporaneous legislative enactments and would establish a new rule that a legislature may undermine constitutional amendments with subsequent statutes.

CONCLUSION

Chapter 770 created a legal status that unconstitutionally resembles marriage and the law now accords to that status incidents in a manner that shows it to be the substantial equivalent of marriage. Thus, Chapter 770 creates precisely the harms that the Marriage Amendment was passed to prevent. The Circuit Court's ruling should be reversed and summary judgment should be granted to Appling.

Respectfully submitted on this 26th day of September, 2011.

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CERTIFICATION OF FORM AND LENGTH REQUIREMENTS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,955 words.

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated: September 26, 2011.

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CERTIFICATE OF SERVICE

I certify that the 3 copies foregoing was sent via U.S. First Class mail on the 26th day of September, 2011, to the following:

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CERTIFICATION OF MAILING PURSUANT TO 809.80(4)

I certify that 10 copies and 1 original of the Appellants opening brief and Appendix were mailed to the Wisconsin Court of Appeals via UPS overnight delivery on September 26, 2011, and are therefore timely as this Court considers the brief and appendix "filed on the date of mailing or delivery set forth in the certification." Wis. Stat. Ann. § 809.80(4)(b).

Dated: September 26, 2011.

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