The Perils of Marriage as Transcendent Ontology: National Pride at Work v. Governor of Michigan

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Abstract:

National Pride at Work v. Governor of Michigan provides a unique opportunity to watch as courts struggle to define “marriage.” This is not a suit seeking recognition of same-sex marriages. It presents the question of whether an amendment to the Michigan state constitution prohibiting recognition of same-sex marriages or any “union” that is “similar” to marriage also prohibits public employers in the state from conferring benefits on the same-sex partners of their employees. The trial and appeals courts came to exactly opposite conclusions, and their respective positions nicely demarcate the options in what promises to be an ongoing debate in the many states that now have statutes or constitutional amendments prohibiting recognition of same-sex marriages. This article demonstrates how the trial court adhered strictly to the amendment itself and state statutes, while the appeals court covertly imported an ontological definition of “marriage” that relies more on the judges’ personal philosophies than on the relevant law.

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Introduction

The Michigan state court system has started the difficult process of applying a state constitutional amendment prohibiting recognition of same-sex marriages. Although the case has yet to reach the Michigan Supreme Court, the existing, conflicting opinions in National Pride at Work v. Governor of Michigan – from the Trial and Appeals Courts – are worth examining for what they tell us about how judges evaluate arguments over the definition of marriage. For purposes of understanding how the debate over marriage in the United States is actually playing out in courts, these opinions will remain interesting regardless of the Michigan Supreme Court’s decision in the case. They are history in the making. Their reasoning may serve as guideposts for other courts, especially insofar as the Michigan Supreme Court adopts one approach or the other in its own decision. As the Appellate Opinion notes, not only is the application of the Michigan anti-marriage amendment a question of first impression within the Michigan state courts, no other state has yet had occasion to apply an amendment with the same or similar language, making resort to decisions of other states’ courts unavailing.

It would seem that support for or opposition to recognition of same-sex marriages is a simple matter of an up-or-down vote. National Pride at Work v. Governor of Michigan

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4 Id. at 2. The opinion explicitly compares similar language in the constitutions of Kentucky and Wisconsin, but notes that neither state’s courts has had occasion to interpret their amendments. It also notes that the courts of Missouri and Florida had occasion to interpret statutes prohibiting recognition of same-sex marriages in those states, but the language is too dissimilar for those cases to provide guidance. Id. at n. 3. For compilations of state constitutional amendments prohibiting recognition of same-sex marriages, including specific language, see Equality from State to State: Gay, Lesbian, Bisexual, and Transgender Americans and State Legislation 23-24 (2006) (hereinafter, Equality from State to State II); Carrie Evans, Equality from State to State: Gay, Lesbian, Bisexual, and Transgender Americans and State Legislation 26-30 (2004) (hereinafter, Equality from State to State I).
demonstrates otherwise. This case is the opening salvo of the legal battles that will occur in state and federal courts for the foreseeable future as those courts interpret the various statutes and state constitutional amendments that prohibit recognition of same-sex marriages.\(^5\) It is not a suit demanding recognition of same-sex marriages. Rather, the question is whether the Michigan amendment prohibiting recognition of same-sex marriages also prohibits public employers in the state from conferring employee benefits on the same-sex partners of their employees.\(^6\)

The amendment reads: “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.”\(^7\) Although recognition of same-sex marriages is not at issue here, resolution of the case requires the courts to settle on a definition of “marriage” in order to decide if public employers have “recognized” a “similar union” to “marriage” when they confer employee benefits on the same-sex partners of employees.\(^8\)

The Trial and Appeals Courts in this case came to exactly the opposite conclusions\(^9\) despite applying the same constitutional provision\(^10\) to the same set of facts\(^11\) using the same

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\(^5\) See Equality from State to State I & II, supra.

\(^6\) Trial Opinion at 3: “The narrow issue to be decided in this case is whether a public employer may voluntarily, either through the collective bargaining process or otherwise, agree to provide its employees with so-called ‘same sex benefits.’ The benefits at issue here consist mainly of medical insurance coverage for a person whom the employee designates.” Plaintiffs include employees of the City of Kalamazoo, State of Michigan, and the state’s public universities. Id. at 3-5. Pride at Work is a lesbian/gay constituency group of the AFL-CIO. See prideatwork.org (last visited June 12, 2007).


\(^8\) Trial Opinion at 3; Appellate Opinion at 2.

\(^9\) Trial Opinion at 12-13: “Plaintiffs’ employers are not prohibited by Const 1963, art 1, sec 25, from voluntarily providing these health care benefits and using criteria which do not recognize a union similar to marriage to determine those who will receive these benefits of employment. It is ordered, therefore, that Plaintiffs’ motion for summary disposition is granted… and this Court declares that Const 1963, art 1, sec. 25 does not prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of policy”; Appellate Opinion at 2: “We reverse”; id. at 15.

\(^10\) Trial Opinion at 5-6; Appellate Opinion at 2 n. 2. See text accompanying note 7 for text of amendment.

\(^11\) Trial Opinion at at 5; Appellate Opinion at 3.
principles of constitutional interpretation.\textsuperscript{12} A key problem for the courts in interpreting this amendment is that it contains a potential contradiction within itself. It starts with a very specific statement of purpose, “to secure and preserve the benefits of marriage for our society and for future generations of children,” but it ends with a blanket statement that it prohibits, “for any purpose,” the recognition of any “agreement” “as a marriage or similar union.”

The Trial Court and the Appeals Court resolved this potential contradiction in different ways. Their different resolutions, in turn, reflect their conflicting decisions about how to define marriage. Focusing on the introductory statement of purpose and its use of the term “benefits,” the Trial Court defined marriage in terms of its incidents.\textsuperscript{13} Focusing on the prohibition against recognizing “agreement[s]… for any purpose,” the Appeals Court defined marriage in terms of its entry criteria.\textsuperscript{14} This article takes the position that the Trial Court’s approach is preferable to the Appeals Court’s approach. The Trial Court’s approach avoids the potential contradiction within the amendment by reading “for any purpose” in light of the meaning of “marriage,” which it in turn derives by reference to the introductory statement of purpose. In contrast, by going outside the amendment itself for its definition of marriage, the Appeals Court renders the potential contradiction actual. The Trial Opinion is thus more consistent than the Appellate Opinion with the language of the amendment itself, but also with the principles of constitutional interpretation that both courts claim to agree on, and the larger principles of American law, both as articulated in specific decisions of the United States Supreme Court, and in the broader philosophical principles of the Anglo-American legal tradition.

\textsuperscript{12} See infra, sec. I.A.
\textsuperscript{13} Trial Opinion at 7.
\textsuperscript{14} Appellate Opinion at 7-10.
The demand for recognition of same-sex marriages has spawned an extensive scholarly debate.\(^\text{15}\) The debate among law faculty and other observers has produced important insights, but to date it has necessarily focused primarily on suits demanding recognition of same-sex marriages.\(^\text{16}\) Opinions in which judges define “marriage” for purposes of applying statutes and amendments prohibiting recognition of same-sex marriages will change the debate. Even as they remain subject to review by a higher court, the opinions in *National Pride at Work* are important, fascinating, and perhaps unexpected.


In particular, with their zeal to establish firmly the definition of marriage, conservatives have inadvertently demonstrated the truth of French philosopher Jacques Derrida’s claim about deconstruction\(^{17}\): meaning is much more a function of the relationships among terms in a text than it is about any supposed fit between the words and an independent reality that the words purport to describe. Or, the effort to specify exactly in words the phenomenon one wishes to refer to ultimately creates more definitional instability, not less. No matter how carefully opponents of same-sex marriage write their statutes and amendments, judges will have to make choices about the meanings of words, as the Trial and Appellate Opinions in the instant case illustrate. Conservatives have also demonstrated the truth of claims by another French philosopher, Michel Foucault\(^ {18} \): that definitions of terms involving “sexuality,” including “marriage,” have an irreducibly political and administrative character in the modern West\(^ {19} \). The debate over same-sex marriage is primarily about the desire in certain quarters to perpetuate hierarchies by specifying one category of persons who will occupy the bottom half of the binary\(^ {20} \).

Conservative lawyer/activists Jay Alan Sekulow and John Tuskey have written that judges who fail to understand the correct meaning of “marriage” will have trouble seeing why they should interpret marriage laws to exclude same-sex couples\(^ {21} \). With their argument, Sekulow and Tuskey both draw on and perpetuate a much larger conservative literature that

\(^{17}\) Jacques Derrida, Of Grammatology (1976).


\(^{21}\) Jay Alan Sekulow and John Tuskey, Sex and Sodomy and Apples and Oranges: Does the Constitution Require States to Grant a Right to Do the Impossible? 12 BYU J. PUB. L. 309, 314 (1998): “Any sound strategy for defending a state’s right to refuse to recognize same-sex relationships as marriages must consider this: a judge who cannot see any meaningful distinction between committed same-sex relationships and what we historically have called marriage likely will find a right to same-sex marriage.”
strives to establish an ontology of marriage. That is, they wish to escape the deconstructive instability of language by establishing a reality of marriage as ontological fact that lies beyond the capacity of legislators, judges, or any other human beings to alter. As Glenn Stanton of the Christian conservative group Focus on the Family puts it, “Marriage precedes and exceeds the church and the state.” But such a claim is antithetical to the Anglo-American legal and political tradition, and may in some important sense preclude the possibility of politics altogether. If the correct definitions of our institutions lie beyond the human capacity to adopt, discard, or modify them, then what need do humans have for political institutions with which to debate, adopt, discard, or modify other institutions?

More concretely, the conflicting opinions in National Pride at Work demonstrate that Sekulow and Tuskey are correct in their expectation that judges who find the ontological account of marriage unpersuasive will have trouble understanding why they should exclude same-sex couples from it. Or, more precisely, the Trial Opinion in National Pride at Work demonstrates


23 Sekulow and Tuskey, supra note 21 at 314: “The debate over same-sex marriage, then, and the issues that debate raises, are as much ontological as legal: What is marriage? Is there something qualitatively different about the committed sexual union of a man and a woman we historically have called ‘marriage’ that justifies treating that union differently than the close (or even intimate) relationships between persons?”

24 Stanton, supra note 22.

25 William B. Turner, Of Marriage and Monarchy: Why John Locke Would Support Same-Sex Marriage, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968274. Of course, even if that claim is antithetical to the Anglo-American political tradition, part of the tradition is to protect the rights of persons who advance the claim to do so, whether as a general matter of free expression, or as a matter of religious belief and practice, or both.
that defining marriage in terms of its incidents, rather than in terms of a transcendent ontology, makes it much easier for judges to distinguish specific efforts at conferring benefits on same-sex couples from legislation and amendments prohibiting the recognition of same-sex marriage.

Although the Appeals Court claimed to rely solely on the plain language of the amendment, the indisputable fact remains: the amendment uses the term “benefits,” but it makes no reference at all to the entry criteria for marriage. The Trial Court hewed strictly to the amendment itself while the Appeals Court covertly imported its own, ontological/ideological, definition of marriage.

So the reverse is also true: judges who rely on an ontological definition, or on the criteria for entering the institution, are more likely to find that any benefits for same-sex couples violate prohibitions on recognizing those couples’ relationships as marriage or a “similar union.” The Appellate Opinion in National Pride at Work demonstrates both the fact of such reasoning, and the problems with it. In principle, if marriage is truly an ontological fact, then it should be impervious to degredation from the conferral of benefits on same-sex couples. That conservatives both advance an ontological definition of marriage, and oppose benefits for same-sex couples, reveals the ideological character of their position. In terms of American law, conservatives face a dilemma. If they would justify an ontological definition of marriage on its own terms, they must find a non-religious ground to do so. Then they must explain why marriage defined ontologically will suffer if same-sex couples get benefits. Otherwise, they

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26 See RESTATEMENT, SECOND: CONFLICT OF LAWS (1971) p. 231, § 283 for discussion of distinction between the status of marriage and the incidents of marriage.
27 Appellate Opinion at 7, 10.
28 Supra note 7 and accompanying text.
29 Infra sec. I. B. & C.
30 See infra, notes 81-83 and accompanying text.
inevitably raise the inference that their primary motivation is not to defend marriage, but to harm
lesbians and gay men.\textsuperscript{31}

The most elementary problem with Sekulow and Tuskey’s argument, as manifest in the
Appellate Opinion, is this: why should judges’ ontological preferences have the force of law?
Christian conservatives rely on and perpetuate a long-standing tradition of republican thought in
the United States that depends on the founding assumption of an omnipotent deity whose moral
order we stray from at our peril.\textsuperscript{32} The Constitution of the United States, however, makes no
explicit appeal to such transcendent order. Indeed, it prohibits the establishment of religion,\textsuperscript{33}
and the use of religious tests for public office.\textsuperscript{34} This especially becomes a problem for any
conservatives who wish to portray themselves as adhering strictly to the plain language of the
document and its original meaning in order to defend a political order as the Constitution defines
it.\textsuperscript{35} By what logic does a judge who adheres to the plain language of the Constitution justify
importing a transcendent ontology into her interpretation of that language when the document
itself provides no warrant to do so – indeed contains language apparently prohibiting the practice
– whether for defining marriage, or for any other purpose?

Beyond the definition of “marriage,” these two Opinions raise the question of how to
understand conflicting judicial interpretations. In terms of deciding the law, of course, we rely
on the appeals process. Disagreement among courts at different levels on issues of law is
routine. Lacking any better mechanism, we simply identify one court as the highest and allow it
to have the final say. Even at the highest level, however, the judges often disagree among

\textsuperscript{31} See infra, sec. III.B.
\textsuperscript{32} See, e.g., DONALD CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN’S CRUSADE 8-
10 (2005). This belief is clear in the writings of many conservatives about same-sex marriage. See supra note 22.
\textsuperscript{33} U.S. Const., amend. I.
\textsuperscript{34} U.S. Const., art. IV.
themselves. Especially with respect to lesbian/gay civil rights claims, conservatives – both judges and outside observers – tend to characterize any disagreement with their willingness to allow majorities to heap disabilities on lesbians and gay men as evidence of either stupidity, or bad faith, or both on the part of their interlocutors.\textsuperscript{36} Apparently, opponents of equality for lesbians and gay men believe that it is impossible for reasonable persons to disagree on the issue.

This article presents a different explanation for divergent opinions among judges with respect to lesbian/gay civil rights, or at least with respect to same-sex marriage. It offers a close reading of the Trial and Appellate opinions in \textit{National Pride at Work}. These judges hewed closely to the text of the amendment, statutes, and other documents that were directly relevant to their decisions. Citing no other sources except for the Michigan constitution, statutes, and precedent, and filings from the case itself, the judges gave away little information about their respective worldviews. Emulating the judges’ practice, this article is short and, from this point forward, it relies on few sources other than the two Opinions. The purpose of this approach is to focus as tightly as possible on the significance for legal outcomes of different definitions of “marriage.” Ultimately, the best explanation for the difference between the Trial and Appellate Opinions in \textit{National Pride at Work v. Governor of Michigan} is that the Trial Court interpreted the law on its own terms, while the Appeals Court covertly imported an ontological definition of

\textsuperscript{36} \textit{See}, e.g., \textit{Lawrence v. Texas}, 539 U.S. 558, 602 (2003) (Scalia dissenting): “Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”; \textit{Romer v. Evans}, 517 U.S. 620, 653 (1996) (Scalia dissenting): “Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will”; DOBSON, \textit{MARRIAGE UNDER FIRE}, supra note 22, quoting law professor Gerard V. Bradley, “The only way to rein in this runaway Court is to change the supreme positive law: the Constitution. The Federal Marriage Amendment (FMA) would do that. It would impose upon willful judges and justices a limitation on their ability to redefine the family’’’; \textit{Bush Hits Hard at Gay Marriage}, \textit{N.Y. Times}, Oct. 30, 2006: “For decades, activist judges have tried to redefine America by court order, ’’ [President George W.] Bush said Monday. ‘Just this last week in New Jersey, another activist court issued a ruling that raises doubt about the institution of marriage. We believe marriage is a union between a man and a woman, and should be defended’’’; SPRIGG, supra note 22.
“marriage” that does not appear in Michigan law, and would violate other constitutional principles if it did.

The first section of this article reviews the two opinions, examining first the principles of constitutional interpretation that they articulate, then their logic in deciding the substantive issue. The second section explores how the two courts defined “marriage” in their respective opinions. The third section explores the claims of the Trial and Appellate Opinions to vindicate the “intent of the people.”

I. A Matter of Interpretation

The Trial and Appellate Opinions in *Michigan Pride at Work* involve textual interpretation in perhaps its purest form. It seems obvious that the answer to the question – whether the Michigan amendment prohibits public employers from conferring employee benefits on the same-sex partners of employees37 – will have a major impact on the plaintiffs.38 Even so, the Attorney General claimed that the plaintiffs lacked standing for failure to allege a case or controversy.39 In other words, the question was too abstract for a court to consider. In making this argument, the Attorney General initially acted on behalf of the Governor, but the Governor secured separate counsel and withdrew the motion to dismiss for lack of standing.40 The

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37 Trial Opinion at 3: “The narrow issue to be decided in this case is whether a public employer may voluntarily, either through the collective bargaining process or otherwise, agree to provide its employees with so-called ‘same sex benefits’.”
38 Id. at 5: “The plaintiffs in this case fall mainly into three categories consisting of (1) state employees who had their benefit provision withheld from their contract, (2) city of Kalamazoo employees who will lose their benefits on January 1, 2006, and (3) employees of various universities who risk losing their benefits if the Attorney General opinion is followed.” The Attorney General issued an opinion on March 16, 2005 stating that provision of benefits to same-sex partners of public employees violated the anti-marriage amendment. *Id.*
39 Appellate Opinion at 4; see also, Trial Opinion at 5 n. 1.
40 Appellate Opinion at 4.
Attorney General then intervened in the case separately, but did not preserve the standing claim through the appellate level.

The case, then, was politically fraught and procedurally complicated in its inception, but the procedural complications ultimately had no discernable impact on the substantive opinions of the two courts. Neither court addressed the merits of the challenge to plaintiffs’ standing. The Appeals Court explicitly eschewed any evaluation of the impact its interpretation might have on “employee recruitment, retention and morale, and marketplace competitiveness” as “irrelevant considerations in interpreting the constitutional amendment at issue.” Both opinions are the application of language in a constitutional amendment to language in the employment policy documents of the employers in question, to the statutes defining marriage and its incidents in Michigan, and to the definitions of “domestic partnership” that the employers rely on.

A. How to Interpret a Constitution

According to the Trial Opinion, “The parties agree on the rules that control interpretation of a constitutional provision… The words should be given their plain meaning at the time of

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41 Id.
42 Appellate Opinion at 5 n. 6.
43 Note that Governor Granholm and General Cox also disagreed about the official response of the State of Michigan to challenges to affirmative action policies at the University of Michigan (Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003), reh’g denied, 539 U.S. 982 (2003)). See Kathy Barks Hoffman, Cox Criticizes Granholm Again, This Time for Budget Cuts, AP State and Local Wire, March 1, 2007 (describing various public conflicts between Granholm and Cox, including differences over affirmative action and benefits for same-sex couples); David Eggert, Michigan Appeals Court Halts Ruling on Same-Sex Benefits, AP State & Local Wire, Oct. 31, 2005 (describing Mich. appeals court’s stay of trial court ruling in National Pride at Work, noting different positions of Granholm and Cox, reporting poll results indicating that 47 percent of Michigan voters support the trial court’s decision, 39 percent oppose it, and 14 percent are undecided); Governor Backs Affirmative Action, NY TIMES, Feb. 13, 2003 (explaining that Granholm asked Cox to file briefs with the United States Supreme Court in support of the university’s policies, but Cox refused).
44 Trial Opinion at 5 n. 1: “standing is no longer an issue in this case”; Appellate Opinion at 5 n. 6: “Although the AG [Attorney General] argued in part below that plaintiff’s [sic] claims should be dismissed for lack of standing, the AG has not raised or briefed this issue on appeal. Therefore, we consider the claim abandoned.” (Citation omitted).
45 Appellate Opinion at 2.
ratification."\(^{46}\) The court must use “[t]he meaning… which realizes the intent of the people who ratified the Constitution.”\(^{47}\) “Where the text is plain and unambiguous, further construction is unnecessary.”\(^{48}\) The Trial and Appeals Courts differed at least in their emphasis regarding one rule of constitutional interpretation. According to the Trial Court, it “must” consider “the circumstances surrounding the provision’s adoption and the purpose sought to be accomplished” where doing so will “clarify the meaning” of the constitutional provision, and therefore also clarify “the intent of the people.”\(^{49}\) The Trial Opinion states, “It is a well-established rule of Constitutional interpretation that ‘the Court cannot properly protect the mandate of the people without examining both the origin and the purpose of a constitutional provision, because provisions stripped of their content [sic] may be manipulated and distorted into unintended meanings.’”\(^{50}\)

By contrast, according to the Appellate Opinion, “if the constitutional language is clear, reliance on extrinsic evidence is inappropriate.”\(^{51}\) This turns out to be a central element in the Appeals Court’s reasoning, as will become clear below.\(^{52}\) Suffice here to raise the question: how does a court ever know that language is clear without reference to extrinsic evidence?\(^{53}\) This is an especially pressing question where the court’s interpretation of allegedly clear language

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\(^{47}\) Trial Opinion at 6, citing Hathcock, 468.


\(^{49}\) Trial Opinion at 6, citing Peterman v. Dept. of Natural Resources, 446 Mich. 177, 184-185; 521 NW2d 499 (1994).

\(^{50}\) Trial Opinion at 6, citing Peterman, 446 Mich. at 185. The word “content” in the Trial Opinion is apparently a typographical error. The passage in Peterman has “context.”

\(^{51}\) Appellate Opinion at 6, citing American Axle at 362.

\(^{52}\) Infra sec. III.A.

\(^{53}\) See, e.g., Laurence Tribe, Comment, in MATTER OF INTERPRETATION, supra note 34 at 76-78: “In choosing among these views of what counts as ‘the Constitution,’ and as binding constitutional law, one must of necessity look outside the Constitution itself…. There is certainly nothing in the text itself that proclaims the Constitution’s text to be the sole or ultimate point of reference – and, even if there were, such a self-referential proclamation would raise the problem of infinite regress and would, in addition, leave unanswered the very question with which we began: how is the text’s meaning to be ascertained?”
contradicts another court’s interpretation. By definition, conflicting interpretations among equally competent expositors indicates lack of clarity in the underlying language. Apparently the Appeals Court believes it has some access to a truth that transcends the consciousnesses of the individual judges, and which is superior to the understanding of the judge in the Trial Court. They offer no other explanation for their ability to assert clarity in language that one of their colleagues has interpreted to mean exactly the opposite of what they claim it means.

Finally, the Appeals Court stated a third rule for interpreting constitutional provisions in Michigan: “wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does.”54 It is unclear from the two opinions how this rule of constitutional construction relates to the final rule that the Trial Court articulated: “That rule is to construe the provision so it will not conflict with other constitutional provisions.”55 Conflict among constitutional provisions creates the presumption that one provision or the other must be invalid.56 But surely other bases for finding “constitutional invalidity” exist as well. The Trial Opinion offers no citation in support of its rule against finding conflict among constitutional provisions.57 It explained the source of the rule this way: “[p]laintiffs set forth a final rule of constitutional construction that may be applied if necessary.”58 The Trial Opinion notes that, in his capacity as intervening defendant,59 the Michigan Attorney General asserted that this rule

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54 Appellate Opinion at 6, citing Traverse City School District at 406.
55 Trial Opinion at 6.
57 Trial Opinion at 6.
58 Id.
59 See supra, notes 40, 43.
“need not be used,” which the Trial Court agreed with.\textsuperscript{60} The Trial Opinion contains no indication, however, that anyone disputes the validity of the rule per se.\textsuperscript{61}

Thus, on the one hand, the Trial and Appeals Courts articulated nearly identical principles for applying the Michigan anti-marriage amendment. On the other hand, at least one of those rules – whether to appeal to extrinsic evidence for the purpose of interpreting constitutional language – necessarily leaves considerable discretion to, and therefore considerable room for disagreement among, judges. In order to appreciate the different uses the Trial and Appeals Courts put this rule to, we must examine in some detail the entireties of their respective opinions. The following discussion closely follows the text of those opinions.

B. The Trial Court Opinion

The Trial Court saw no purpose in evaluating the validity of the rule of avoiding conflict among constitutional provisions because its substantive analysis of the anti-marriage amendment created no conflict with other constitutional provisions.\textsuperscript{62} According to the Trial Court, the purpose of the anti-marriage amendment is clear from the plain language of the amendment itself: “to secure and preserve the benefits of marriage for our society and for future generations of children.”\textsuperscript{63} Here it seems the Trial and Appeals Courts agree: both consider themselves capable of determining accurately the meaning of the anti-marriage amendment without reference to extrinsic evidence.\textsuperscript{64} But again, this identity of interpretive principle only becomes a point of confusion insofar as the two Courts came to exactly the opposite legal conclusion. The

\textsuperscript{60} Trial Opinion at 6.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 6-7.
\textsuperscript{63} 1963 Const., art. 1, sec. 25, quoted in Trial Opinion at 7.
\textsuperscript{64} Supra notes 49-53 and accompanying text.
Trial Court is at least free of the charge that it claims clarity while choosing an interpretation that directly contradicts another court.\(^65\)

The Trial Court can also claim that its interpretation is consistent with relevant statutes. Immediately after quoting this passage, the Trial Opinion states: “Health care benefits are not among the statutory rights or benefits of marriage.”\(^66\) The Trial Opinion focuses on health care benefits because “[t]he benefits at issue here consist mainly of medical insurance coverage for a person whom the employee designates.”\(^67\) It focuses on “the benefits of marriage” because preservation of those benefits is the declared purpose of the amendment.\(^68\)

The Trial Court’s reasoning is elliptical. But it does engage in reasoning, making logical steps from question to answer with specific textual support for each step. A fuller statement of the syllogism must be that, insofar as the people hope to protect “the benefits of marriage” by amending the state constitution, and state statutes define the benefits of marriage, then the conferral of a type of benefit that does not appear in the statute defining marriage and its benefits cannot violate an amendment whose purpose is to protect those statutory benefits.

The Trial Court next addressed the parties’ conflicting interpretations of the phrase “recognized as a marriage or similar union” from the amendment.\(^69\) Does conferring health care benefits on the same-sex partners of public employees entail “recogniz[ing]… a marriage or similar union”? Although the parties offered conflicting definitions of “recognize,”\(^70\) the Trial Court focused on two other terms, “marriage” and “union.”\(^71\) It did so because Michigan

\(^{65}\) Id. See also, infra, sec. III.A.  
\(^{66}\) Trial Opinion at 7.  
\(^{67}\) Id. at 3.  
\(^{68}\) See supra, note 63 and accompanying text.  
\(^{69}\) Trial Opinion at 7.  
\(^{70}\) Id. at 7. See also id. at 8 n. 2 for the Court’s citation of a dictionary definition of the term.  
\(^{71}\) Id. at 8.
precedent enjoins judges to give effect to all of the text in a constitutional amendment,\(^{72}\) taking care to interpret terms in light of the amendment’s purpose,\(^{73}\) rather than simply “in a strict grammatical sense.”\(^{74}\) According to the Trial Court, “The employer-defined criteria for obtaining the health insurance benefits in this case are not based on marriage.”\(^{75}\) The only question left, on this analysis, is whether those criteria “recognize” a “union” that is “similar” to “marriage.”\(^{76}\)

The Trial Court held that the employers’ criteria for conferring health insurance benefits on the same-sex partners of employees did not have the effect of recognizing a union similar to marriage for purposes of the anti-marriage amendment.\(^{77}\) “The criteria are no more than a collection of characteristics the employer has identified for purposes of extending health insurance benefits.”\(^{78}\) This assertion builds on the previous observation that the benefits in question are not part of the statutory definition of marriage. Neither the reason for having the criteria – conferring health insurance benefits – nor the criteria themselves, on this view, relate in any discernable way to “marriage” as defined in the Michigan statutes or Constitution.

The Trial Opinion comes close to arguing here that the definition of marriage in the Michigan statutes and Constitution is self-enforcing, almost a tautology. Ironically, in doing so, the Trial Court demonstrates the potential instability of an ontological definition, or its potential utility to persons who support conferring benefits on same-sex couples. It notes that the employers who set criteria for conferring benefits cannot “recognize[…] a marriage or similar union” insofar as “a marriage or similar union” is a singular, unitary category, yet the benefits

\(^{72}\) Id. at 8, citing House Speaker v. Governor, 443 Mich. 560, 579; 506 NW2d 190 (1993).
\(^{73}\) Trial Opinion at 8, citing Livingston Co. v. Dept. of Management & Budget, 430 Mich. 635; 425 NW2d 65 (1988).
\(^{74}\) Trial Opinion at 8.
\(^{75}\) Id. at 8. See id. at 3-4 for lists of the criteria the three employers used.
\(^{76}\) Id. at 8.
\(^{77}\) Id.
\(^{78}\) Id.
criteria vary among the employers.79 “Nor can the criteria be said to create a union where one
does not exist according to law. Civil unions are not recognized in this state.”80

Again the Trial Court reasons elliptically, but the point is clear enough. The employers
in question are all public entities, units or subsidiaries of the Michigan state government.81 None
of them claims by articulating benefits criteria for its employees to have the power to define
“marriage,” however. To find that their employee-benefits criteria “recognize[…a marriage or
similar union” would be to attribute to them the absurd claim that municipalities, public
universities, or the state government in its capacity as an employer, have the power to override
the state legislature, even the state Constitution. “Employer-defined criteria for the receipt of
health care benefits cannot create a union where one does not exist.”82

This observation demonstrates the ironic possibility of the conservatives’ insistence on an
ontological definition of marriage. If marriage is in fact the transcendent, unitary institution that
conservatives claim – if, that is, marriage is necessarily more than the sum of its incidents83 –
then even conferring every incident of marriage on same-sex couples could not make the unions
of those couples into marriages. The Trial Opinion makes no such claim, but the subtext seems
to be a challenge to conservatives to accept their own logic: the Trial Court felt no concern that
permitting employers to give benefits to their employees’ same-sex partners would violate a
prohibition on recognizing marriages or similar unions among same-sex couples because the
advocates of the prohibition assert that same-sex couples definitionally – ontologically -- cannot

79 Id.
80 Id.
81 Id. at 3-4.
82 Id. at 8.
83 Supra notes 22, 26 and accompanying text.
meet the requirements of marriage.\textsuperscript{84} If same-sex couples are so very different from opposite-sex couples as to provide any rational basis whatsoever\textsuperscript{85} for an amendment prohibiting same-sex marriages, then conferring the incidents of marriage on them cannot make them any more like a married couple, especially if marriage by definition has some existence apart from the sum of its incidents. The prohibition, on this view, is self-enforcing in the most literal sense. Ontology does not depend on legislation. Therefore, legislation cannot threaten ontology.

The Trial Court goes on to make an even broader claim. Not only do the employee-benefit criteria not create a union, whether similar to marriage or not, they do not even depend completely on the existence of a relationship between the employee and the covered partner.\textsuperscript{86} This is true on the face of the criteria in the case of the City of Kalamazoo.\textsuperscript{87} Further, it is necessarily the case for all three employers insofar as the conferral of benefits ceases with the end of the employer-employee relationship, regardless of whether the personal relationship between the employee and the partner continues.\textsuperscript{88}

Defining marriage solely in terms of its incidents, according to the Trial Opinion, makes clear that the modest benefits for same-sex partners involved in this case “pale in comparison to

\textsuperscript{84} Sekulow and Tuskey, \textit{Sex and Sodomy and Apples and Oranges}, supra note 22. The title of this article alone indicates clearly the authors’ belief that engaging in sodomy differentiates same-sex couples from married couples definitionally, which is to say, ontologically.

\textsuperscript{85} \textit{Lawrence}, at 539 U.S. at 577-79 (holding that majority’s moral disapproval simpliciter is not a rational basis for prohibiting conduct); \textit{id.} at 599 (Scalia dissenting): “I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence--indeed, with the jurisprudence of any society we know--that it requires little discussion” (emphasis in original).

\textsuperscript{86} Trial Opinion at 9.

\textsuperscript{87} \textit{Id.}: “In fact, the benefits at issue are not entirely based upon a relationship at all. The state of Michigan criteria include that the ‘covered dependent’ share a close personal relationship with the employee. The University of Michigan requires a relationship of mutual support, caring and commitment. However, there is no such requirement for the receipt of benefits from the City of Kalamazoo.” \textit{See id.} at 3 for list of Kalamazoo’s domestic partnership requirements, which do include requiring the parties to “share a common residence” for at least 6 months and share financial arrangements, including “daily living expenses related to their common welfare.”

\textsuperscript{88} \textit{Id.}
the myriad of legal rights and responsibilities accorded to those with marital status.” The Trial Opinion cites cases from several jurisdictions describing the significant differences between marriage and domestic partnership registries. One such difference is the limited benefits available under domestic partnership registries as compared to marriage. Another is the absence of a state licensing requirement for domestic partnerships, in stark contrast to marriage.

The Trial Opinion then ties the many rights and responsibilities of marriage, not only to the requirements for entering marriage, but also to the requirements for leaving it. “Termination of a marriage requires judicial intervention. The importance of the marital relationship and the interest of the state in protecting it compel the state to grant rights even after the relationship terminates.” In contrast, starting or ending the eligibility of same-sex partners for employee benefits is a matter of simple declaration, involving neither a license nor judicial intervention. Again, the eligibility ceases with the end of the employment relationship. No judicial action is involved, and the employee’s covered partner has no reasonable expectation of continued benefits after the employee’s employment ends.

The Trial Court finished with a brief discussion of the amendment’s last three words, “for any purpose.”

The Court takes these words to mean what they say in the context of the entire amendment. If the employers in this case were recognizing a marriage or similar union,
then they would be prohibited from doing so for any purpose. However... this Court cannot conclude that the employers are recognizing a marriage or similar union. In other words, the definition itself must precede any determination of its purpose. A prohibition on recognizing marriages or similar unions for any purpose applies only to acts that recognize marriages or similar unions. Where no such recognition occurs, the phrase “for any purpose” does not apply, but only for the same reason that the rest of the language in the amendment does not apply: it describes conduct, recognizing a marriage or similar union, that the plaintiffs’ employers have not engaged in.

This point illustrates the possibility for confusion between the beginning of the amendment, “To secure and preserve the benefits of marriage for our society and for future generations of children,” and the end, “for any purpose.” The trial court read the “for any purpose” language as depending on the definition of “recognized as a marriage or similar union.” Although the trial court separately considered what constitutes recognition of a marriage or similar union, still it deliberately interpreted the entire amendment in terms of its preliminary statement of purpose. This is a reasonable act of reading the amendment backwards: the ordinary meaning of “for any purpose” is so broad that one must determine the domain within which the words apply, which is marriage in this case. In order to discern the boundaries of that domain, the Trial Court then looked to the amendment’s own statement of purpose, “to secure and preserve the benefits of marriage.”

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97 Id.
98 See supra notes 76-80 and accompanying text.
99 Trial Opinion at 8 (citations omitted): “Neither the common meaning of recognize nor examination of that word in isolation allows for a determination of the intended meaning. The amendment must be interpreted to give reasonable effect to all, not just some, of its parts. The Court must look at the constitutional provision not only in a strict grammatical sense, but also in light of the general purpose for which the provision was adopted.” See also supra notes 63-68 and accompanying text.
100 See infra, notes 214-18 and accompanying text.
Reasoning thus, the trial court granted plaintiffs’ motion for summary disposition, holding that public employers in Michigan do not violate the amendment when they confer employee benefits on the same-sex partners of their employees. The Michigan Court of Appeals reversed, expressly rejecting the Trial Court’s balancing of the amendment’s components in the process. The next section explores the logic of the Appeals Court’s opinion.

C. The Appeals Court Opinion

Michigan appeals courts review both constitutional issues and orders for summary disposition de novo. The Appeals Court rejected the argument of the plaintiffs, which the Trial Court adopted, that “health insurance is not a benefit of marriage as health insurance is not among the statutory benefits of marriage.” According to the Appeals Court,

[p]laintiffs’ emphasis on the [amendment’s] statement of purpose ignores the provision’s mandate: that only one ‘agreement’ – the union of one man and one woman in marriage – may be recognized as a marriage or similar union for any purpose. The operative language of the amendment plainly precludes the extension of benefits related to an employment contract, if the benefits are conditioned on or provided because of an agreement recognized as a marriage or similar union.

101 Trial Opinion at 12.
102 Appellate Opinion at 2.
103 See infra, notes 105-07 and accompanying text.
104 Appellate Opinion at 5.
105 Id. at 7. See supra note 65-68 and accompanying text.
106 Appellate Opinion at 7. Emphasis in original.
The Appellate Opinion goes on to discuss the meaning of “recognized” and “similar union.”

“Plaintiffs argue that to violate the amendment the state must, in effect ‘create’ a marital union. We disagree, because creating and recognizing are not the same.”

The Appeals Court found it necessary to interpret “recognize” in the anti-marriage amendment as a legal term, “i.e., to acknowledge the legal validity of something.” It then offered a long quotation from the Trial Opinion asserting that the criteria that employers used to confer health insurance on the same-sex partners of employees did not “‘recognize “a union’.” According to the Appeals Court, in finding that the employers’ benefits criteria did not recognize a union, the Trial Court failed to appreciate that three of the four benefit plans required employees who wished to cover their same-sex partners to have entered a registered domestic partnership “agreement.” But the amendment also uses the term “agreement” in defining the types of relationship that the state may and may not recognize.

The Appeals Court was not so reductive as to assert that the terminological coincidence between the anti-marriage amendment and the instant domestic partnership registries – their use of the word “agreement” alone -- was sufficient by itself to make the resulting domestic partnerships similar to marriages for purposes of the amendment. Rather, the operative similarity lay in “the purposes of a domestic partnership agreement to proclaim the existence of the relationship by establishing a mechanism for the public expression, sanction and

107 Id.
108 Id.
109 Id. at 8, citing City of Detroit v. Walker, 445 Mich. 682, 699; 520 NW2d 135 (1994): “‘[a] vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice’.”
110 Appellate Opinion at 8, quoting Trial Opinion at 8. See supra note 71ff and accompanying text.
111 Appellate Opinion at 8.
112 Id., citing 1963 const., art. 1, sec. 25: “…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.” Emphasis added. See text accompanying note 7 for full text of amendment.
The Appellate Opinion goes on to emphasize the public character of the domestic partnership agreements as the key element that makes them too similar to marriage to survive under the terms of the amendment. This feature alone is sufficient, according to the Appeals Court, to overcome the observation that the incidents attaching to domestic partnerships are miniscule compared to those attaching to marriage. “Contrary to plaintiffs’ argument, a publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of article 1, section 25, as the amendment plainly precludes recognition of a ‘similar union for any purpose.’”

The Appeals Court then extended this reasoning by examining in more detail the requirements of the various domestic partnership registries. It adopted the position of the Attorney General, who identified “five attributes that are the same basic criteria for the requirements of legal marriage” as specified in the Michigan statutes. The attributes are:

1. each requires that the partner be of the same-sex [sic]; cf MCL 551 (requiring that spouse be of the opposite sex);
2. each requires there be some kind of agreement concerning the relationship; cf MCL 551.2 (marriage requires the consent of the parties);
3. each requires that the partner not be a blood relation; cf MCL 551.3; MCL 551.4 (listing blood relations that cannot marry); and
4. each requires that the partner not be married to another or have a similar relationship to another person; cf MCL 551.5 (prohibition against bigamy); and
5. each mandates an age requirement of 18 years of age; cf MCL 551 (minimum age for marriage is 16 years).

For the Appeals Court, this similarity between the entry requirements for domestic partnerships and for marriage was dispositive: “By recognizing a domestic partnership agreement for the

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113 Appellate Opinion at 8, citing domestic partnership registry for the City of Ann Arbor.
114 Appellate Opinion at 9. This claim invites the objection that the anti-marriage amendment improperly infringes on the right to expressive association of same-sex couples. See BSA v. Dale, 530 U.S. 640 (2000).
115 See supra, note 85 and accompanying text.
116 Appellate Opinion at 9.
117 Id. at 9-10.
118 Id.
purpose of providing benefits, [the plans] run directly afool of the plain language of the amendment.”119

But this statement is false given the Appeals Court’s own prior conclusion. If, as they determined, “recognize” in the amendment is a legal term,120 then the only relevant form of recognition is one that has the force of law. Simply because the employers here are agencies of state government does not mean that their every action has the force of law in the required sense. What matters for the comparison between the criteria for domestic partnerships and for marriage is not the coincidence of the criteria, but the fact that the state gives force to marriage licenses121 that it does not give to domestic partnership registries. This is an elementary observation about the significance of licensing,122 which in turn is an elementary observation about the power of the state.123 The Trial Court understood this distinction.124 The Appeals Court did not.125

The Michigan Appeals Court, unlike conservative activists who oppose recognition of same-sex marriages,126 did not expressly offer an ontological or metaphysical definition of marriage. It claimed to rely exclusively on relevant state statutes and municipal ordinances. It insisted, however, that the dispositive issue with respect to evaluating the conferral of benefits on

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119 Id. at 10.
120 Supra note 109 and accompanying text.
121 See Case, Marriage Licenses, supra note 15.
122 Id. (comparing marriage licenses to driver’s and pet licenses and corporate charters).
123 See “license,” WEST’S ENCYCLOPEDIA OF AMERICAN LAW 313 (2005): “Licenses are issued by the administrative agencies of local, state, and federal lawmaking bodies. Administrative agencies are established by legislative bodies to regulate specific government activities and concerns”; BLACK’S LAW DICTIONARY 938 (8th ed., Bryan A. Garner, ed., 2004): “License – a permission, usu. revocable, to commit some act that would otherwise be unlawful.” See, e.g., Williams v. North Carolina, 325 U.S. 226 (1945) (upholding conviction for bigamy after prosecutors demonstrated invalidity of couple’s divorces in another state from their respective previous spouses – that is, what the petitioners in Williams did was illegal for want of a valid license).
124 Supra notes 90-94 and accompanying text.
125 See Appellate Opinion at 10: “Therefore, in the case of each of the plans, upon being advised of the existence of the employer required agreement, the employer is then contractually, i.e., legally obligated to recognize the agreement for the purpose of providing health care benefits to the dependent. In this way, the agreement between the employee and the dependent constitutes a union similar to marriage, because with the agreement (as with a marriage), the employer has a legal obligation to recognize the union and provide benefits to the eligible dependent (as with a spouse).” It is slightly amazing that persons who claim expertise in American law would so conflate a contract and a license in this context.
126 See Sekulow and Tuskey, supra note 21.
the same-sex partners of public employees under the amendment was the definition of marriage, and it chose to reach beyond the text of the amendment in deciding how to define marriage.\textsuperscript{127} But, apart from the question of why the judges would choose to reach beyond the amendment even as they claim to rely only on its plain language,\textsuperscript{128} the Appeals Court’s discussion demonstrates the intractable problems that relying on an ontological definition of marriage creates. Absent some belief in an ontological definition of marriage that transcends statutes, the Appellate Opinion quickly degenerates into a confusion of illogic and incoherence. As the next section demonstrates, the Appeals Court honors the requirement to base its interpretation on the language of the amendment only in the breach.

II. How to Define “Marriage”

A. Benefits v. Entry Criteria

The Appeals Court’s choice to rely on entry criteria to determine the similarity of domestic partnerships to marriage is completely unjustified. The Trial Court chose to focus on the benefits of marriage because the plain language of the amendment so directs.\textsuperscript{129} The Appeals Court claims to interpret “each” term in the amendment,\textsuperscript{130} and chides the Trial Court for ignoring the amendment’s use of the term “agreement.”\textsuperscript{131} Yet the Appeals Court’s own decision to focus on the entry criteria for defining “marriage” – the terms of the agreement – turns out to be an endless source of confusion. The term “benefit” is usefully concrete in this context – one can list precisely the benefits of marriage in the Michigan statutes. The Appellate

\textsuperscript{127} See Appellate Opinion at 6, where begins sec. IV. Sec. IV.A. of the opinion contains the Court’s identification of rules for constitutional interpretation. Sec. IV.B. begins, “Michigan has a long public policy tradition of favoring the institution of marriage,” and continues with extensive citation to MCL § 551, the statute defining marriage.
\textsuperscript{128} Appellate Opinion at 2: “Our decision only interprets the amendment and applies it as interpreted to this particular situation presented in this case.” See also, id. at 7.
\textsuperscript{129} Supra notes 66-68 and accompanying text.
\textsuperscript{130} Appellate Opinion at 7.
\textsuperscript{131} Id. at 8.
Opinion does so. The term “agreement,” by contrast, is remarkably untethered, such that the Appeals Court can choose to emphasize whatever characteristics of agreements it chooses, without reference to statute, precedent, or dictionary. Christian conservatives cite the Bible as the source of their ontological definition of marriage. Because they cannot do so, the Appeals Court seized on the invitingly elastic term “agreement” as the core of their definition.

The text of the Appellate Opinion demonstrates vividly why such definitional leeway is dangerous. The Appeals Court wishes to refute plaintiffs’ claim that the domestic partnerships in question are not similar to marriage because the “legal rights, responsibilities, and benefits” of domestic partnerships are miniscule compared to those of marriage. To make its case, the Appeals Court asserts: “In Michigan, marriage is recognized ‘as inherently a unique relationship between a man and a woman,’ MCL 551.272. Marriage triggers legal rights, responsibilities and benefits not afforded to unmarried persons, pursuant to a compact that is public and social in nature.”

But this sentence proves the case of the plaintiffs, not of the Appeals Court – domestic partnerships are not similar to marriage precisely because marriage “triggers legal rights, responsibilities and benefits not afforded to unmarried persons.” Similarly, the statutory language that the Appeals Court quotes comes close to defining marriage in ontological terms: “inherently [i.e., without need for statutory definition] a unique relationship.” But this only

132 Id. at 7 n. 9.
133 infra notes 214-19 and accompanying text.
134 See id. at 9.
135 Id.
136 Id.
137 Id. Emphasis in original.
138 Id.
139 Id., quoting MCL 551.272. “Unique” means “1. of which there is only one; one and no other; single, sole, solitary; 2a. That is or forms the only one of its kind; having no like or equal.” OXFORD ENGLISH DICTIONARY (1989).
confirms the critique of the ontological definition of marriage: if marriage has inherent qualities that make it unique, then nothing else can be similar to it, making it completely safe from imitation even without the help of legislation or judicial opinions.

According to the Appeals Court, apparently one inherent quality of marriage is its “public” character, which domestic partnership registries supposedly share. This emphasis only begs the question: on what does the public character of marriage depend? Oddly for a court, the Appeals Court’s account of marriage and domestic partnerships badly misunderstands the key role of the state in making marriage “public” in a way that domestic partnerships are not. The next section explores this point.

**B. The Role of the State**

The Appellate Opinion states flatly that “creating and recognizing are not the same.” This is a key claim in the Court’s reasoning; here it rejects the plaintiffs’ argument that public employers do not “recognize” any unions among employees by conferring benefits on the employees’ same-sex partners because the conferral does not create a union in the same sense as

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140 Supra, notes 79-85 and accompanying text.
141 See supra note 137 and accompanying text, note 139.
142 Id. at 9: “The ‘public proclamation’ nature of a domestic partnership agreement grants a same-sex couple the status to hold themselves out as a publicly recognized monogamous couple, i.e., a union…. Marriage triggers legal rights, responsibilities and benefits not afforded to unmarried persons, pursuant to a compact that is public and social in nature…. Contrary to plaintiffs’ argument, a publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of article 1, section 25….“ Emphasis in original.
143 Appellate Opinion at 7: “Whether the public employer’s extension of employment benefits, i.e. same-sex domestic partnership benefits, is based on an agreement recognized as a marriage or similar union, requires this Court to discern the meanings of ‘recognized’ and ‘similar union.’ Plaintiffs argue that to violate the amendment the state must, in effect ‘create’ a marital union. We disagree, because creating and recognizing are not the same.” (Emphasis in original.) Note how, in this passage, the Court assumes what it must prove by conflating “employment benefits” with “same-sex domestic partnership benefits.” Later the Court lists the relevant criteria for entering a domestic partnership, id. at 9-10, none of which includes any reference to health insurance. But this only proves the Trial Court’s claim: health insurance benefits depend on the employment relationship, not the domestic partnership, which functions here merely as an indicator of eligibility. Supra notes 77-78 and accompanying text.
the creation of a marriage, or in any sense. The Appeals Court’s claim is plainly false. Unless one relies on the transcendent ontology of Christian conservatives (or some other transcendent ontology), recognition of marriages by the state is so patently a function of their creation by the state as scarcely to need remark, except in the face of the proposition’s denial. Creation and recognition are obviously different acts with respect to material objects. To recognize a building, for example, is not the same as to create a building. With respect to legal objects, however, creation and recognition are often different components of the same act.

The Appeals Court cites precedent for its definition of “recognize” as a legal term:

“‘[a] vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice’.” But this quotation does not address the issue of creation at all. It is true that, in the legal tradition of the United States, individuals have inalienable rights that, in principle, precede and justify the existence of government. The U.S. Supreme Court has recognized marriage as such a right. In that

144 Appellate Opinion at 7.
145 Philosopher John Searle conclusively demonstrated this point with his analysis of speech acts. See JOHN SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 16-18 (1979): “Declarations. It is the defining characteristic of this class that the successful performance of one of its members brings about the correspondence between the propositional content and reality, successful performance guarantees that the propositional content corresponds to the world:… if I successfully perform the act of declaring a state of war, then war is on; if I successfully perform the act of marrying you, then you are married…. The mastery of those rules which constitute linguistic competence by the speaker and hearer is not in general sufficient for the performance of a declaration. In addition, there must exist an extra-linguistic institution and the speaker and hearer must occupy special places within this institution. It is only given such institutions as the church, the law, private property, the state and a special position of the speaker and hearer within these institutions that one can excommunicate, appoint, give and bequeath one’s possessions or declare war[, ]” or declare two persons to be husband and wife. See also, JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 33 (1969): “[C]onstitutive rules do not merely regulate, they create or define new forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games.” Similarly, the rules of marriage, which the Appeals Court cites, Appellate Opinion at 6-7, 9-10, create the very possibility of being married.
146 The Appellate Opinion also contains two dictionary definitions of “recognize,” at 7 n. 11. The point of these definitions is unclear, however, given that the Court does not claim to rely on them.
148 DECL. OF IND. (1776).
149 Zablocki v. Redhail, 434 U.S. 374, 383 (1978): “our past decisions make clear that the right to marry is of fundamental importance”; Loving v. Virginia, 388 U.S. 1, 12 (1967): “[t]he freedom to marry has long been
sense, we must say that government recognizes, but does not create, our rights, including marriage.

But if state action is irrelevant to the creation of marriages, then the Appeals Court’s own reliance on state statutes as its gold standard in determining that domestic partner registries are sufficiently similar to marriage to “run afoul” of the anti-marriage amendment makes no sense. Who or what else, for purposes of judicial opinions, creates marriage if not the state? The Appeals Court, apparently unwittingly, gives itself only two options, neither desirable. It can justify its definition of marriage by appeal to a transcendent ontology, thereby inviting the objection that it establishes the religion of whatever ontology it chooses (unless it can find a transcendent ontology that does not depend on a religion). Or it can render a nullity the very amendment it would uphold: how can the state prohibit a status that it cannot create?

This point demonstrates how the conservative reliance on transcendent ontology precludes the practice of politics, and even the rule of law. Rather than relying directly on the constitution and statutes themselves, as the Trial Court did, the Appeals Court relies on a separate, covert definition of marriage that does not depend on the relevant law. Or, to the extent

recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men”; Skinner v. Oklahoma, 316 U.S. 535, 541 (1942): “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival”; Meyer v. Nebraska, 262 U.S. 390 (1923); Maynard v. Hill, 125 U.S. 190 (1888). Note that the Zablocki opinion, 434 U.S. at 384-85, goes on to discuss the right to marry in the context of privacy rights decisions, including Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Roe v. Wade, 410 U.S. 113 (1973). Not that the Appeals Court, or any other entity with a commitment to prohibiting recognition of same-sex marriages, would want to follow this line of reasoning. This is exactly the line of cases that the U.S. Supreme Court initially refused to extend to include the right of lesbians and gay men to commit sodomy, Bowers v. Hardwick, 478 U.S. 186 (1986). The Court overruled Bowers, however, in Lawrence v. Texas, 539 U.S. 558 (2003). In doing so, both the majority, id. at 578, and concurrence, id. at 585 (O’Connor concurring), cabined their reasoning so as not to apply to marriage, but the dissent argued (id. at 600-04, Scalia dissenting) that the inescapable logic of their opinions would lead to “judicial imposition” of same-sex marriage. See also, David D. Meyer, A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption, 51 VILLANOVA L. REV. 891 (2006).

150 Appellate Opinion at 9-10. See supra, notes 117-18 and accompanying text.
151 Appellate Opinion at 10. See supra note 119 and accompanying text.
152 Supra notes 66-68 and accompanying text.
that the Appeals Court did compare the requirements of the domestic partnership registries with the requirements of the marriage statutes, thereby apparently relying only on law, it did so solely because of its antecedent choice to base its decision on the entry criteria for the institution. This choice, in turn, disregards the plain language of the amendment, which asserts preservation of benefits as its purpose, and it does so on the basis of no other language, either in the amendment itself, or any relevant statutes. The only other plausible possibility as the source of the Appeals Court’s definition of marriage is a transcendent ontology. But judges are not supposed to interpret the claims of transcendent ontology. They are supposed to interpret the law.

Even if one wishes to posit the existence of an abstract ideal of marriage in the air, still the point remains that the state only recognizes those marriages that conform to the state’s statutes. The Appellate Opinion depends crucially on the truth of this proposition. But this same proposition also proves that the state, in recognizing marriages, creates them as well, and in two senses. It creates the status of married persons generally by enacting statutes that establish criteria for entering that status, and it creates individual marriages by granting licenses to those who meet the criteria.

The Appellate Opinion states as much, quoting state statute in the process. Having noted that consent of the parties is essential to the civil contract of marriage, the Appellate Opinion goes on: “However, ‘[c]onsent alone is not enough to effectuate a legal marriage…. Consent shall be followed by obtaining a license… and solemnization….’” MCL § 551.2.”

153 Appellate Opinion at 9-10.
154 Supra notes 66-68 and accompanying text.
155 Id. See supra, notes 117-18 and accompanying text.
156 See Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004); Li v. State, 2005 WL 852310 (Or. Apr. 14, 2005) (both opinions invalidating marriage licenses issued to same-sex couples as violating statutory requirements). See also, definition of “license,” supra note 123.
157 Appellate Opinion at 6.
this is the one requirement of marriage that is absent from the Appeals Court’s comparison between the requirements for marriage and the requirements for domestic partnerships.\(^{158}\) It is absent from that comparison for one obvious reason: domestic partnerships do not require licensing.

Given its distinction between creation and recognition,\(^{159}\) the Appeals Court must accept the proposition that “effectuate” in MCL § 551.2 means “recognize,” not “create.” If anything, however, to effectuate – to make effective – is to demonstrate the significant overlap, in law, between creation and recognition. The absurdity of the Appeals Court’s reasoning becomes manifest if one substitutes the terms “recognize” and “create” for “effectuate” in the quotation above: “[c]onsent alone is not enough to [recognize] a legal marriage…,” “[c]onsent alone is not enough to [create] a legal marriage.” Use of the term “recognize” in this context produces nonsense, while use of the term “create” makes perfect sense. Or, use of the term “recognize” in this context makes sense only insofar as one reads it as a synonym for “create.”

The Appellate Opinion also states, “marriage is defined by statute. MCL 551.1 et seq.”\(^{160}\) Indisputably. Couples may define marriage as they wish, but they will not enjoy the benefits of marriage unless they meet the statutory criteria and receive a license from the state. That is, benefits and licensing, the two components that the Appeals Court’s comparison to domestic partner registries fails to mention,\(^{161}\) define marriage. Again, substituting in this statement the terms that the Appeals Court wishes to differentiate with respect to marriage – recognize and create – for the term “defined” tells us much about the absurdity of the Appeals Court’s position: “marriage is [recognized] by statute,” “marriage is [created] by statute.” It is non-trivially true

\(^{158}\) Id. at 9-10.
\(^{159}\) Supra note 143 and accompanying text.
\(^{160}\) Appellate Opinion at 6.
\(^{161}\) Supra notes 157-58 and accompanying text.
that individuals can create marriages that statutes do not recognize. When they do so, the reason that the state has no responsibility to recognize those marriages is that the state did not participate in creating them – creation and recognition may not be identical in this context, but they overlap so fully as to render absurd the Appeals Court’s claim.

That is, even where individuals choose to create a marriage through their mutual consent – even where they choose to recognize themselves as married -- they are legally incapable of doing so except insofar as they also “obtain[] a license.”162 With its license, the state simultaneously creates and recognizes the marriage. The license is necessary to the creation of the union. Where the state refuses to recognize a given marriage, what is the point in insisting that a marriage has still been created despite that nonrecognition?163 Where the state does recognize a marriage, what is the point in insisting that such act of recognition is not also an act of creation, or that the marriage so recognized depends for its existence on some creator other than the state? It is impossible to avoid the conclusion that, by distinguishing “recognize” in the Michigan anti-marriage amendment from the act of creation, the Appeals Court covertly posits a transcendent Creator – a God – as the origin of marriage.

Or, the Appeals Court’s distinction between recognition and creation is without a difference, unless the creating entity somehow transcends the state. The people transcend the state in the Anglo-American political tradition, but such observation only begs the response that the people have chosen the state as the vehicle by which they create marriages for themselves. Here is the public character of marriage, on which the Appeals Court would hang the similarity

162 MCL 551.2, quoted in Appellate Opinion at 6.
163 See In re Kandu, 315 B.R. 123 (2004). In Kandu, the Court upheld its rejection of lesbian couple’s joint bankruptcy filing under Defense of Marriage Act, 1 U.S.C. § 7, which provides that “spouse” for purposes of federal law means only “a person of the opposite sex who is a husband or a wife.” Id. at 131. The couple had filed jointly for bankruptcy on the basis of their lawful marriage in Canada. Id. at 130.
between marriage and domestic partnerships, but it is a character that domestic partnership registries lack. Perhaps the Appeals Court knows of some other transcendent entity, but they fail to specify what it is. The only other transcendent entities that persons in western culture have consistently posited and relied on are deities, leading again to the suspicion that the Appeals Court’s opinion covertly establishes the judges’ personal religious beliefs as the basis for their legal interpretation.

The operative distinction, as the Trial Opinion explained, is that the domestic partnerships of same-sex couples that justify conferring employee benefits do not require further action by the state for validation. In recognizing domestic partnerships, public employers take an action that any corporation, acting as a private employer, could also take. But private employers do not have the power to create marriages. This distinction is implicit in the Trial Opinion’s discussion: “If a spouse receives health care benefits, it is as a result of a contractual provision or policy directive of the employer. Likewise, health care benefits are not limited to those who are married.” Employers can choose to include whom they wish in their employees’ benefit plans “[w]ithin the confines of what the health insurance provider offers” – parents, siblings, cousins, friends, neighbors -- neither recognizing nor creating any union in the process. That employers rarely, if ever, define eligibility for employee benefits so broadly is a matter of cost, not of concern for accidentally creating marriages in violation of statute.

Thus, even if employers recognize same-sex relationships by conferring benefits on the same-sex partners of their employees, that act of recognition is entirely different – not an act of creation – from the state’s official act of simultaneously creating and recognizing a marriage.

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164 Supra notes 113-16 and accompanying text.
165 Supra notes 77-78, 93-95 and accompanying text.
166 Trial Opinion at 8.
167 Trial Opinion at 7.
168 Id.
The Appeals Court is correct to distinguish recognition from creation, but only with respect to domestic partnerships, not with respect to marriage. Their own logic demonstrates the opposite of their conclusion: the important difference between domestic partnerships and marriages, not the similarity between the two. Not only is a “domestic partnership license” not necessary for creation of the union, it is not even available. This is the self-enforcing character of the official definition of marriage that the Trial Opinion relies on.169

Besides demonstrating the facial illogic of the Appellate Opinion, this point illustrates how the definitional logic of conservatives contravenes the most basic principles of American government. Although the state does not have the power to create natural rights in the citizens, the citizens do have the power to confer on the state the capacity to create and defend other rights. The Appeals Court is necessarily committed to this position with its explanation for why the anti-marriage amendment cannot contravene the equal protection provision of the Michigan state constitution.170 Thus, the sharp distinction the Appeals Court asserts between creation and recognition is not the result of any reasonable definition of the two terms in the context of legal statuses and state power. It is, rather, a tendentiously retrospective definition that the Court posits in the hope of justifying its acceptance of the Attorney General’s argument that domestic partnerships are “similar to” marriage.171

But the Appeals Court’s opinion demonstrates the inherent illogic of the conservative position with respect to state power. If, as the Appellate Opinion asserts, the people have

169 Supra notes 79-80 and accompanying text.
170 Appellate Opinion at 13: “It is a cornerstone of a democratic form of government to assume that a free people act rationally in the exercise of their power, are presumed to know what they want, and to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that the proposal is for the public good and expresses the free opinion of a sovereign people. In re Proposals D & H, 417 Mich. 409, 423; 339 NW2d 848 (1983).” According to this logic, by definition, the prohibition on same-sex marriages in the Michigan constitution cannot violate the equal protection provision in the same constitution.
171 Appellate Opinion at 9-10: “The AG argues the state plan and the University of Michigan, Michigan State University, and City of Kalamzoo’s plans share five attributes that are the same basic criteria for the requirements of legal marriage…. We agree.”
plenary power to define marriage in their constitution, then to characterize the domestic partnership registries of various state agencies and municipalities as “similar to” marriage for purposes of the amendment prohibiting recognition of same-sex marriages is to attribute to those agencies and municipalities the belief that they can override the decisions of the people.

This position, in turn, demonstrates the logic of the Trial Court’s holding. By emphasizing the plain language of the amendment’s statement of its purpose, to protect the benefits of marriage, the Trial Opinion arrives at a definition of marriage that simultaneously achieves the amendment’s stated purpose and allows for the conferral of non-marital benefits on unmarried persons. Although the Appeals Court accuses the Trial Court of disregarding the rest of the amendment in its focus on the statement of purpose, actually, the Appeals Court ignores the statement of purpose in its focus on the definition of marriage. Insofar as a definition of marriage is essential to correct application of the amendment – how else to determine what is sufficiently “similar to” marriage to violate the amendment? – and the amendment’s own statement of purpose uses the term “benefits,” which the state defines by statutes, then the Appeals Court’s choice to look elsewhere for its definition creates two possible definitions of marriage – one in terms of benefits, one in terms of entry criteria -- that contradict each other.

Thus, the Trial Court’s reading, which the Appeals Court characterizes as disregarding the remainder of the amendment, actually treats the amendment as a whole, and as a unitary element in a larger, coherent system, in contrast to the Appeals Court’s own reading, which bifurcates it with the result of sowing confusion. If the meaning of the amendment is clear

172 Supra note 170.
173 See supra notes 81-82 and accompanying text.
174 See supra notes 63-68 and accompanying text.
175 Appellate Opinion at 7.
176 Id.
without resort to extrinsic evidence, as the Appeals Court claims, and the amendment uses the term “benefits” in defining its purpose, and therefore as part of its definition of marriage, then a definition of marriage that completely disregards the statutory benefits, as the Appeals Court’s definition does, is inconsistent with the plain language of the amendment. Indeed, the plain language of the amendment’s statement of purpose – “[t]o secure and preserve the benefits of marriage” -- asserts that the only part of marriage that the people intend to preserve is the benefits, not marriage in toto, except that any distinction between marriage as defined by its benefits and some separate totality of marriage is purely the result of the Appeals Court’s act of definitional/ontological fiat.

As the Trial Court held, this plainly means that the only elements of marriage that are relevant to the application of the amendment are the benefits, which the people chose to refer to explicitly in ratifying the amendment. Because both the Trial and Appellate Opinions claim to effect the intent of the people, even as the two Courts came to directly opposite conclusions, the question of how to determine the people’s intent merits exploration in a separate section.

III. The Intent of the People?

Both the Trial and Appellate Opinions claim to protect the people’s power to legislate by interpreting the anti-marriage amendment according to the people’s intent. Explaining the principles of constitutional interpretation that, with the parties’ consent, the Trial Court would abide by, the Court explained, “The meaning [of the constitutional amendment] must be that

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177 Id. at 10: “Because article 1, section 25 is unambiguous and plainly precludes the recognition of same-sex domestic partnerships or similar unions for any purpose, this Court need not look to extrinsic evidence to ascertain the voters’ intent.”
178 Trial Opinion at 7.
179 Trial Opinion at 6, 7; Appellate Opinion at 6.
which realizes the intent of the people who ratified the Constitution.”\textsuperscript{180} Similarly, the Appeals Court began its discussion of “rules for construing constitutional provisions” by quoting \textit{County of Wayne v. Hathcock}\textsuperscript{181}: “[T]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.”\textsuperscript{182} Observers such as Justice Antonin Scalia have noted the conceptual incoherence inherent in attributing unified intent to large groups of persons, whether assembled formally as a legislature or the people as a whole voting on a specific piece of legislation.\textsuperscript{183}

Nevertheless, such is the standard that both courts in the instant case adopted. Regardless of its conceptual incoherence for persons who would reflect on theories of judging, the appeal to the intent of the people in \textit{National Pride at Work v. Governor of Michigan} provides a standard that one can evaluate for internal consistency. On that standard, the Appellate Opinion founders as badly on the shoals of logic as it did in trying to distinguish “recognize” and “create.”

A. Extrinsic Evidence

The Trial and Appeals Courts also agreed that they could legitimately use extrinsic evidence if necessary in order to discern the people’s intent.\textsuperscript{184} Their renditions of this rule differed in emphasis, however. According to the Trial Opinion, “consideration must be given to the circumstances surrounding the provision’s adoption and the purpose sought to be accomplished” where doing so will “clarify the meaning” of the provision and help “determine the intent of the people.”\textsuperscript{185} The Appeals Court agreed that “the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be

\textsuperscript{180} Trial Opinion at 6.
\textsuperscript{182} Appellate Opinion at 6, quoting \textit{Hathcock, supra}.
\textsuperscript{183} SCALIA, A MATTER OF INTERPRETATION, supra note 34 at 16-23, 32-37.
\textsuperscript{184} Trial Opinion at 6; Appellate Opinion at 6.
\textsuperscript{185} Trial Opinion at 6.
In the context of the Appellate Opinion, this assertion is at best ironic. Conservatives are quick to find judicial usurpation of the people’s legislative power in any opinion upholding the rights of lesbians and gay men. Yet the Michigan Appeals Court’s formulation of the contrary proposition – that it only effects the intent of the people with its interpretation – begs the question: what basis does the Court have for asserting that its interpretation of the amendment is consistent with the intent of the people when it systematically refuses to consider extrinsic evidence? To state the proposition is to refute it: judges know best the intent of the people, so they need not consult evidence of that intent. This statement is either absurd or Orwellian. The Appeals Court claims to have vindicated the intent of the people by discerning that intent solely through its own interpretation of the amendment’s language.

This is a particularly important question in the instant case. The Appeals Court specifically characterized as “irrelevant” “the arguments advanced in several of the amicus briefs regarding the effect of the amendment on employee recruitment, retention and morale, and marketplace competitiveness.” This is, of course, a slightly different point. Here the Court is not evaluating the relevance of evidence to its interpretation of the language in the amendment. It is evaluating the relevance of types of arguments, characterizing them as irrelevant for the Court’s purposes because they are policy arguments, not legal arguments. “The vote to adopt the marriage amendment charted the policy direction for Michigan. Our decision only interprets the

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188 *Supra* note 36.
189 *Lawrence*, 539 U.S. 603-04 (Scalia dissenting): “it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”
190 Appellate Opinion at 2.
amendment and applies it as interpreted to this particular situation presented in this case [sic].”191

The larger point, however, is that the Appeals Court is eager from the outset to insist that its opinion results solely from the application of well established rules of constitutional interpretation to the plain language of the amendment, thereby eliminating the personal opinions of the judges in favor of the people’s intent.192

But the Appellate Opinion inadvertently demonstrates how the refusal to rely on extrinsic evidence is the opportunity and excuse for importing the judges’ personal preferences, in this case for a transcendent, ontological definition of marriage. One of the great benefits of relying on empirical evidence is that it provides justification for arguments that all parties can examine for themselves if they so choose. The Appeals Court, however, by insisting that the language of the amendment was too clear on its face to warrant resort to extrinsic evidence, overlooked one important piece of empirical evidence regarding the intent of the people: a poll at the time of the Trial Court’s decision found that 47 percent of Michigan voters supported allowing benefits to same-sex partners under the anti-marriage amendment, 39 percent opposed allowing such benefits, and 14 percent were undecided.193

One may offer various objections. Public opinion polls are not completely reliable. But neither are voting procedures.194 Regardless, particularly with respect to questions of popular intent, a public opinion poll responding directly to a court verdict interpreting a constitutional amendment, absent specific showing of inaccuracy in the particular poll itself, is definitionally more reliable evidence than the ruminations of judges sitting in their offices. The poll is evidence. Judicial ruminations are not. The Michigan Rules of Evidence state that “a court may

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191 Id.
192 See also, Appellate Opinion at 2: “we feel constrained to observe at the outset that this case is not about the lifestyle or personal living decisions of individual citizens.”
193 Eggert, supra note 43.
take judicial notice, whether requested or not.”

The court may take judicial notice “at any stage of the proceeding.” “A judicially noticed fact must be one not subject to reasonable dispute in that it is… (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Perhaps the Appeals Court has some argument from either the method of the poll, or from epistemology more generally, for doubting the validity of the poll in question. If so, it should have explained its reasoning.

The Appeals Court had a responsibility, logically and legally, to address this point not least because the plaintiffs expressly raised it in their complaint. According to the summary in the Appellate Opinion, the second of plaintiff’s arguments was “that the amendment’s proponents’ assurances that the passage of the amendment would not effect [sic] benefits to same-sex partners supported” their position that conferral of such benefits does not violate the amendment. The poll confirms this claim. The Appellate Opinion also asserts the rule that “a free people act rationally in the exercise of their power, are presumed to know what they want,


196 MRE 201(e). See Goecke, supra: “A court may take judicial notice of facts not noticed below, whether requested or not, at any stage of the proceeding. MRE 201(c), (e).”

197 MRE 201(b)(2). Rule 201(b)(1) defines a judicially noticed fact as one that is “generally known within the territorial jurisdiction of the trial court.”

198 First Amended Complaint for Declaratory Relief, May 5, 2005, National Pride at Work v. Governor, Case No. 05:368-CZ, Circuit Court for the County of Ingham at ¶4: “If there is any ambiguity about the reach of the Marriage Amendment, this court must look to the intent of the voters. The voters of Michigan, in approving the Marriage Amendment, were not motivated by any malevolent desire to strip families of health insurance or job benefits. The ballot committee that sponsored Proposal 2 consistently and repeatedly assured voters that the ‘Proposal 2 is Only about marriage’ and ‘not about rights or benefits or how people choose to live their lives.’ Exhibit 1, Citizens for Protection of Marriage Statements (emphasis in original).” Available at http://www.aclumich.org/pdf/briefs/domesticpartnership/domesticpartnerships2.pdf (last visited, May 13, 2007).

199 Appellate Opinion at 4. See also, Announcement: We are together. We are united. And we will not abandon this struggle (Triangle Foundation, Mich. LGBT organization, June 8, 2007): “We can only hope that our state’s Supreme Court holds Gary Glenn and his followers to their assurances at the time Proposal 2 passed that it was never intended to take away health care coverage from families and their children.”
and to have understood the proposition submitted to them in all of its implications.\textsuperscript{200} A constitutional amendment itself is definitionally an expression of the people’s intent in a manner that a public opinion poll is not (although a properly executed survey may produce a more reliable representation of what the entire population thinks than voting, which is a highly self-selective activity).

But this only evades the key question: given a constitutional amendment, how does one know which of competing interpretations best comports with the people’s intent? Especially where one court has already rendered an opinion on such an issue, for a subsequent court to assert exactly the opposite interpretation when doing so defies not only the first court, but empirical evidence that a plurality of the people agree with the opinion of the first court, is patently illogical. It certainly does not deserve uncritical characterization as the implementation of the people’s intent, nor as the obvious, necessary implication of the amendment’s plain language.

The judiciary has the responsibility to determine the proper application of the law, including interpretation of the people’s intent as expressed via constitutional amendment.\textsuperscript{201} But such a claim does not exempt judges from examining all competent evidence of the people’s intent, unless the people, or their representatives, somehow acted irrationally solely with respect to the adoption of the Michigan Rules of Evidence, or perhaps solely with respect to the rule allowing for judicial notice within the larger body of the Rules of Evidence. If the people acted rationally both in amending the Michigan constitution to prohibit recognition of same-sex

\textsuperscript{200} Appellate Opinion at 13.
\textsuperscript{201} Marbury v. Madison, 5 U.S. 137, 177; 1 Cranch 137 (1803): “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”
marriages, and in allowing Michigan judges to take judicial notice of adjudicative facts, then any judge who hopes to discern the intent of the people has the duty to examine all relevant evidence.

Perversely, not only has the Appeals Court failed to consider one major piece of evidence for the people’s intent, its interpretation has the effect of attributing to the people a form of malevolence. The next section demonstrates this point.

B. Malevolence = Animus

Plaintiffs’ complaint eschews “malevolent desire” as the people’s intent for adopting the anti-marriage amendment. The Trial Opinion’s interpretation of the amendment comports with this assertion, noting that the express purpose of the amendment, by its own plain language, is “to secure and preserve the benefits of marriage for our society and for future generations of children.” The Appeals Court asserts, by contrast, that the Trial Court’s interpretation of the amendment emphasizes the statement of purpose at the expense of the rest of the amendment. According to the Appellate Opinion, “the common understanding of constitutional text is determined ‘by applying each term’s plain meaning at the time of ratification.’ Accordingly, the provision must be examined as a whole.”

On this view, according to the Appellate Opinion,

Plaintiffs’ emphasis on the statement of purpose ignores the provision’s mandate: that only one ‘agreement’ – the union of one man and one woman in marriage – may be recognized as a marriage or similar union for any purpose. The operative language of the amendment plainly precludes the extension of benefits related to an employment contract,

\[\text{(citation omitted, emphasis added by Appeals Court).}\]
if the benefits are conditioned on or provided because of an agreement recognized as a marriage or similar union.206

The problem with the Appeals Court’s approach is that, by focusing on the type of relationship and the means of creating it, rather than the benefits, they inevitably raise the inference that the real motive for the amendment is an unconstitutional animus toward a group of persons.

The doctrinal logic comes from Romer v. Evans,207 where the U.S. Supreme Court struck down a Colorado constitutional amendment because the only apparent purpose for it was to express “animus” toward lesbians and gay men.208 The Court found such purpose to violate the Equal Protection Clause of the Fourteenth Amendment.209 It identified two key flaws in Colorado’s Amendment 2:

First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and… invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.210

The reading of the Appeals Court makes the Michigan anti-marriage amendment look much more like Colorado’s Amendment 2 than does the reading of the Trial Court.

It is true that the Michigan amendment applies equally to same-sex, and all unmarried opposite-sex, couples, making the equal protection issue less obvious in this instance.211 There is no “single named group.”212 But by its own terms, unmarried opposite-sex couples may escape

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206 Id.
208 Id. at 632.
209 Id.
210 Id.
211 See Appellate Opinion at 15 for adoption of this argument.
212 517 U.S. at 632.
the operation of the amendment simply by marrying. Same-sex couples do not have that option. This is plainly a status distinction. The more the effect of the amendment is to chase down same-sex couples and prevent them from receiving benefits that opposite-sex couples can take for granted, as the Appeals Court wishes to do, the more the amendment becomes susceptible to the Romer analysis.\textsuperscript{213} Again, the illogic of the conservative ontological definition of marriage becomes clear: same-sex couples are so very different from opposite-sex couples that they do not qualify for marriage, but any recognition of a same-sex relationship at all is sufficient to render it similar to marriage. A conspiracy theorist might even begin to wonder if the Appellate Opinion is really the work of lesbian/gay rights activists who want to make the amendment look as mean-spirited as possible in the hope of increasing the chances for success of an equal protection challenge under Romer.

Again, comparison to the Trial Opinion is instructive. Its focus on “benefits” as the term that connects the meaning of “marriage” in the amendment to state statutes – or fails to make such connection – gives the amendment a rational basis: securing and protecting the benefits of marriage. The choice of the Appeals Court to posit an ontological definition of marriage based on the entry criteria for marriage and for domestic partnerships puts the focus on the types of persons. One type of persons, same-sex couples, may not have benefits that another type of persons, opposite-sex couples, may have. But distinctions among types of persons for their own sake violate the Constitution.\textsuperscript{214}

\textsuperscript{213} \textit{Romer}, 517 U.S. at 631: “we cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”

\textsuperscript{214} \textit{Romer}, 517 U.S. at 635: “We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. ‘Class legislation…[is] obnoxious to the prohibitions of the Fourteenth Amendment….’ Civil Rights Cases, 109 U.S. [3] at 24 [(1883)].”
The same is true when the Trial Opinion sensibly and explicitly makes its reading of the “for any purpose” language depend on its antecedent definition of “marriage.” 215 By asserting that the phrase, “for any purpose,” cements the amendment’s prohibition of public employers’ conferring benefits on the same-sex partners of employees, the Appellate Opinion seems to unleash a completely unbounded, roving assault on lesbians and gay men in their public agreements with one another. Imagine two lesbians who enter into a contract for the purpose of creating a corporation. 216 They now have an agreement that serves, inter alia, to declare publicly their relationship. 217 The Appellate Opinion’s reading of the amendment to define marriage—that it applies to any agreement for the purpose of publicly recognizing a relationship 218 -- necessarily prohibits the lesbians’ business contract, or it prohibits the Michigan state courts from enforcing that contract.

The Appeals Court may object to this argument by pointing to the five similarities it notes between domestic partnership agreements and marriages. 219 But two of those apply facially to corporations – agreement between the parties, and minimum age of eighteen. 220

215 Supra notes 96-100 and accompanying text.
216 MCL 1131: “Submission of document; delivery, filing; return of copy; public inspection; maintaining records or files; copies of documents and destroying originals; facsimile or electronic transmission as original; effective date of document; fees. Sec. 131. (1) A document required or permitted to be filed under this act shall be submitted by delivering the document to the administrator together with the fees and accompanying documents required by law.” MCL 450.1201: “Incorporators. Sec. 201. One or more persons may be the incorporators of a corporation by signing in ink and filing articles for the corporation.” MCL 450.1209: “Article of incorporation; permissible provisions. Sec. 209. (1) The articles of incorporation may contain any provision not inconsistent with this act or another statute of this state…. “ MCL 450.1221: “Beginning of corporate existence; filing of articles as evidence. Sec. 221. The corporate existence shall begin on the effective date of the articles of incorporation as provided in section 131. Filing is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general.”
217 MCL 1131, supra.
218 Appellate Opinion at 8: “the purposes of a domestic partnership agreement [is] to proclaim the existence of the relationship by establishing a mechanism for the public expression, sanction and documentation of the commitment....”
219 Appellate Opinion at 9-10. See supra notes ___ and accompanying text for discussion.
220 MCL 722.1: “Definitions. Sec. 1. As used in this act: (a) ‘Minor’ means a person under the age of 18 years.” MCL 722.4e: “Rights and responsibilities of emancipated minor; obligation and liability of parents. (1) A minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an
Parties to the creation of a corporation could stipulate contractually that the incorporators must be the same sex, and not be blood relations. One question that this approach begs is: how many similarities must the court find between a given agreement and the state marriage statutes before the agreement becomes sufficiently “similar” to violate the amendment prohibiting recognition of same-sex marriages? The Appellate Opinion gives no indication whatsoever of its process for deciding that five similarities is enough, or if some similarities are more important than others. Adherence to the language of the amendment is supposed to restrain judges. The Appeals Court grants to itself a completely unrestrained license to decide how many characteristics a given agreement must have with marriages in order to become sufficiently similar as to violate the amendment. The Appeals Court also contradicts itself on this point insofar as it hangs the similarity of domestic partnerships to marriage on the statutes defining marriage, but excludes the statutory requirement for a license, which it cites elsewhere as a requirement for marriage.

IV. Conclusion

A minor shall be considered emancipated for the purposes of, but not limited to, all of the following: (a) The right to enter into enforceable contracts, including apartment leases. (b) The right to sue or be sued in his or her own name.... (e) The right to act autonomously, and with the rights and responsibilities of an adult, in all business relationships, including, but not limited to, property transactions and obtaining accounts for utilities, except for those estate or property matters that the court determines may require a conservator or guardian ad litem.”

MCL 37.2202 prohibits employment discrimination because of sex. Arguably, however, its definition of “employer,” MCL 37.2201(a), does not include the parties to a contract creating a corporation, neither of whom employs the other. Further, on at least one view, stipulations of gender composition for relationships, unlike stipulations of racial composition, do not violate the principle of equal protection. See Lawrence, 539 U.S. at 599-600 (Scalia dissenting): “To be sure, [Tex. Stat.] § 21.06 does distinguish between the sexes insofar as concerns the partner with whom the sexual acts are performed: men can violate the law only with other men, and women only with other women. But this cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex.” See also Appellate Opinion at 14-15 (rejecting equal-protection challenge to amendment if interpreted to prohibit benefits for same-sex partners of public employees).

See Scalia, supra note 35 generally.

Appellate Opinion at 9-10. See supra notes 157-58 and accompanying text for discussion.

Appellate Opinion at 6.
As this discussion indicates, the Appeals Court’s decision collapses into endless contradictions. The Appeals Court fails to heed its own assertion about the presumed rationality of the people in their legislation\textsuperscript{225} by offering an interpretation of a Michigan constitutional amendment that contradicts various parts of the Michigan statutes, and fails elementary tests of logic. The problem is that, rather than rely solely on the language of the amendment itself, as the Court claimed to do, it covertly chose to import an ontological definition of “marriage,” in keeping with the political preferences of conservative activists.

The Trial Court, by contrast, balanced the competing goals of effecting the intent of the people, avoiding conflicts among constitutional and statutory provisions, and minimizing the potential for a federal constitutional challenge, and it did so simply by adhering to the language of the amendment itself. Citizens have an undisputed right to believe in marriage as a transcendentally ontological institution if they so choose. However, as courts in other jurisdictions decide cases involving statutory and constitutional definitions of “marriage,” they will do well to heed the lesson that the Michigan Appeals Court ignored: the job of judges in the United States is to interpret the language of statutes and constitutions, not to enforce speculation about transcendent ontologies.

\textsuperscript{225} Supra note 170.