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STATE CONSTITUTIONAL LAW — SAME-SEX RELATIONS — SUPREME COURT OF MICHIGAN HOLDS THAT PUBLIC EMPLOYERS MAY NOT PROVIDE HEALTHCARE BENEFITS TO SAME-SEX DOMESTIC PARTNERS OF EMPLOYEES. — *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

In recent years, a considerable number of states have adopted constitutional amendments that deprive same-sex couples of the right to marry.<sup>1</sup> While the fundamental long-term question is whether these amendments violate the Federal Constitution,<sup>2</sup> in the short run, judges have been asked to interpret these measures without deciding their constitutionality.<sup>3</sup> Recently, in *National Pride at Work, Inc. v. Governor of Michigan*,<sup>4</sup> the Supreme Court of Michigan undertook such an interpretive exercise and held that the state's marriage amendment prohibits public employers from providing healthcare benefits to the same-sex domestic partners of their employees.<sup>5</sup> In reaching this conclusion, the majority erred in finding that the text of the amendment is unambiguous. In fact, the text is susceptible to different constructions, and accordingly, the majority should have further analyzed the history of the amendment to answer the question presented. In doing so, the majority should have reached the same conclusion as that of the dissent: the amendment should not be interpreted to bar public employers from providing healthcare benefits to the same-sex domestic partners of their employees.

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<sup>1</sup> See Human Rights Campaign, *Statewide Marriage Prohibitions* (Nov. 17, 2008), [http://www.hrc.org/documents/marriage\\_prohibitions.pdf](http://www.hrc.org/documents/marriage_prohibitions.pdf).

<sup>2</sup> The marriage amendments may violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, in light of relevant Supreme Court case law. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” and that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do”); *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (holding that a state constitutional amendment that prohibited the state and its subdivisions from proscribing discrimination on the basis of sexual orientation violated the Equal Protection Clause); *Zablocki v. Redhail*, 434 U.S. 374, 384, 387 (1978) (recognizing that the right to marry “is a central part of the liberty protected by the Due Process Clause” and “of fundamental importance for all individuals” and holding as violative of the Equal Protection Clause a statute that “interfere[d] directly and substantially with the right to marry”). For a recent assessment of whether the marriage amendments may also violate the Free Exercise and Establishment Clauses of the First Amendment, U.S. CONST. amend. I, see Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2124–34 (2008).

<sup>3</sup> See, e.g., *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (construing Alaska's marriage amendment); *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (construing Ohio's marriage amendment).

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

<sup>5</sup> *Id.* at 529.

On November 2, 2004, a majority of Michigan voters approved a proposal to amend the Michigan Constitution.<sup>6</sup> The amendment states: “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.”<sup>7</sup> At the time, various public employers, including state universities and municipalities, provided healthcare benefits to the eligible same-sex domestic partners of their employees.<sup>8</sup> In addition, the Office of the State Employer and a union had negotiated an agreement that would have provided such benefits to the same-sex domestic partners of state employees who were members of the union.<sup>9</sup> A few months after the marriage amendment was approved, however, the Attorney General of Michigan issued an opinion in which he concluded that the amendment prohibited public employers from providing domestic-partnership benefits.<sup>10</sup> In response, National Pride at Work, Inc., together with individual employees and their partners, filed an action against the Governor of Michigan in the Ingham County Circuit Court, seeking a declaration that the amendment did not impose such a ban.<sup>11</sup>

The circuit court ruled in favor of the plaintiffs and declared that the marriage amendment did not bar public employers from providing healthcare benefits to the same-sex domestic partners of their employees.<sup>12</sup> The court concluded that the public employers at issue did not recognize unions that were “similar” to marriage.<sup>13</sup> The court reasoned that the domestic partnerships, as defined by the employers’ eligibility criteria, were not comparable to marriage because the “hundreds of legal rights” that inhere in marriage — such as the right to joint ownership of personal property — were absent from these domestic partnerships.<sup>14</sup> Moreover, the court noted, health insurance was not a benefit of marriage, and thus its provision did not violate the

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<sup>6</sup> *Id.*

<sup>7</sup> MICH. CONST. art. I, § 25.

<sup>8</sup> The employers established various eligibility criteria for the benefits. For instance, most employers required that the employee and his or her partner share a residence, be jointly responsible for living expenses, and not be related by blood. *See Nat’l Pride at Work*, 748 N.W.2d at 531–32 & n.2.

<sup>9</sup> *Id.* at 529.

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at 529–30 & n.1. National Pride at Work is a nonprofit organization of the American Federation of Labor-Council of Industrial Organizations. *Id.* at 529 n.1.

<sup>12</sup> *Nat’l Pride at Work, Inc. v. Granholm*, No. 05-368-CZ, 2005 WL 3048040, at \*7 (Mich. Cir. Ct. Sept. 27, 2005).

<sup>13</sup> *Id.* at \*5.

<sup>14</sup> *See id.*

amendment's purpose, as indicated in its preambular clause: to reserve the "benefits of marriage" to only opposite-sex couples.<sup>15</sup>

The Attorney General of Michigan, who had intervened as a defendant at the circuit court, appealed, and the Court of Appeals of Michigan reversed.<sup>16</sup> The appellate court observed that the meaning of the amendment must be ascertained by looking at its operative clause and not just its preambular clause.<sup>17</sup> In analyzing the operative clause, the court concluded that the public employers did recognize unions that were "similar" to marriage by providing healthcare benefits to their employees' domestic partners.<sup>18</sup> The court reasoned that the criteria that the public employers used to determine who qualified as domestic partners were "functionally the same" as the eligibility criteria for marriage under Michigan law.<sup>19</sup> For instance, the employee and his or her partner could not be blood relations and had to be of a certain sex in relation to one another.<sup>20</sup> The court held that the public employers' reliance on such criteria amounted to an impermissible recognition of unions that were "similar" to marriage.<sup>21</sup>

The Supreme Court of Michigan affirmed.<sup>22</sup> Writing for the majority, Justice Markman<sup>23</sup> presented an analysis that closely tracked that of the court of appeals. Like that court, Justice Markman focused his inquiry on the text of the amendment's operative clause and compared the eligibility criteria for marriage under Michigan law with the eligibility criteria for domestic-partnership benefits.<sup>24</sup> In doing so, he concluded that the domestic partnerships at issue were similar to marriage because the two were the only relationships under Michigan law that were defined in terms of the individuals' sex and the absence of a close blood connection.<sup>25</sup> Accordingly, he held that the employers' use of such criteria to provide healthcare benefits ran afoul of the marriage amendment.<sup>26</sup> Justice Markman rejected the argument that the court

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<sup>15</sup> See *id.* at \*7 (quoting MICH. CONST. art. I, § 25).

<sup>16</sup> *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 732 N.W.2d 139, 143 (Mich. Ct. App. 2007). Though named as a defendant, the Governor of Michigan supported the plaintiffs before the circuit court; accordingly, the attorney general intervened in his own right as a defendant. See *id.* at 146.

<sup>17</sup> See *id.* at 148.

<sup>18</sup> See *id.* at 151.

<sup>19</sup> *Id.* at 150-51.

<sup>20</sup> *Id.* In addition to the marriage amendment, Michigan statutes prohibit same-sex couples from marrying. See *Nat'l Pride at Work*, 748 N.W.2d at 535 (collecting statutory provisions).

<sup>21</sup> *Nat'l Pride at Work*, 732 N.W.2d at 151.

<sup>22</sup> *Nat'l Pride at Work*, 748 N.W.2d at 529.

<sup>23</sup> *Id.* Chief Justice Taylor and Justices Weaver, Corrigan, and Young joined Justice Markman.

<sup>24</sup> See *id.* at 533-38.

<sup>25</sup> *Id.* at 537.

<sup>26</sup> *Id.* at 543.

ought to have considered the preambular clause and the history of the amendment.<sup>27</sup> He noted that neither should be taken into account when the language of the operative clause is unambiguous.<sup>28</sup>

Justice Kelly dissented.<sup>29</sup> First, she examined the amendment's history and concluded that Michigan voters did not intend to prohibit public employers from providing domestic-partnership benefits.<sup>30</sup> Indeed, she noted, a poll conducted shortly before the vote showed that nearly two-thirds of likely voters were opposed to banning domestic-partnership benefits.<sup>31</sup> Moreover, during the campaign, the organization responsible for placing the amendment on the ballot, the Citizens for the Protection of Marriage (CPM), repeatedly told the public that the measure was unrelated to domestic-partnership benefits.<sup>32</sup> In light of this history, Justice Kelly concluded that those who voted for the amendment intended only to prohibit same-sex marriage and not to ban domestic-partnership benefits.<sup>33</sup>

Second, Justice Kelly noted that the domestic partnerships at issue were not similar to marriage.<sup>34</sup> She explained that a relationship must share not only a private bond similar to that of marriage, but also a number of "comparable benefits, rights, and responsibilities" in order to be "similar" to marriage.<sup>35</sup> The domestic partnerships at issue, however, lacked the "hundreds of benefits" that inhere in marriage.<sup>36</sup> Indeed, health insurance was not a benefit of marriage under either federal or Michigan law, and under the employers' policies, it was the only benefit that those who were deemed domestic partners could claim.<sup>37</sup>

In this case, the majority committed a fundamental error in concluding that the amendment is unambiguous. The operative clause of the amendment is susceptible to different constructions, and thus the majority should have broadened its inquiry to encompass the history of the amendment. If it had done so, the majority would almost certainly have agreed with the dissent that the amendment should be interpreted to allow public employers to provide healthcare benefits to their employees' same-sex domestic partners.

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<sup>27</sup> *See id.* at 538–42.

<sup>28</sup> *Id.* at 539 n.20, 540.

<sup>29</sup> *Id.* at 544 (Kelly, J., dissenting). Justice Cavanagh joined Justice Kelly.

<sup>30</sup> *See id.* at 545–49.

<sup>31</sup> *See id.* at 548.

<sup>32</sup> *Id.* at 546–47.

<sup>33</sup> *Id.* at 544.

<sup>34</sup> *Id.* at 551.

<sup>35</sup> *Id.* at 550.

<sup>36</sup> *Id.* at 551.

<sup>37</sup> *Id.*

The majority was wrong in concluding that the text of the marriage amendment is unambiguous.<sup>38</sup> The majority noted that a term can properly be deemed ambiguous if it is “equally susceptible to more than a single meaning.”<sup>39</sup> Here, the opinions of the majority and of the dissent clearly demonstrate that the critical term “similar” in the amendment’s operative clause meets this standard for ambiguity. To begin, it is important to note that the majority and the dissent largely agreed on what constitutes “marriage,” the key word to which the term “similar” refers. Both noted that marriage entails not only a private bond between two individuals, but also a multitude of state-conferred benefits, rights, and responsibilities.<sup>40</sup>

Despite this agreement on what constitutes “marriage,” the majority and the dissent disagreed on what attributes a relationship must share with marriage in order for the two to be “similar” within the meaning of the amendment. By asserting that a domestic partnership is “similar” to marriage because both relationships require the relevant individuals to be of a certain sex and not to be related by blood, the majority established a low threshold for finding the requisite similarity.<sup>41</sup> Indeed, the majority in effect ruled that the sharing of these two attributes is sufficient to make a relationship “similar” to marriage.<sup>42</sup> In contrast, the dissent articulated a higher threshold for finding the requisite similarity, noting that a relationship must also involve a number of state-conferred “benefits, rights, and responsibilities” that are comparable to those of marriage for the two to be “similar.”<sup>43</sup>

These divergent understandings of what attributes make a relationship “similar” to marriage are both reasonable. The majority observed that the individuals’ sex and the absence of a close blood connection are “core” criteria that distinguish marriage from all other types of relationships recognized under Michigan law, such as debtor-creditor and landlord-tenant relationships.<sup>44</sup> Accordingly, the sharing of these essential attributes may be sufficient to distinguish a relationship from these other types of relationships and thus render it “similar” to marriage. But the dissent’s view that a relationship must include a num-

<sup>38</sup> See *id.* at 540 (majority opinion).

<sup>39</sup> *Id.* at 540 n.21 (quoting *Lansing Mayor v. Pub. Serv. Comm’n*, 680 N.W.2d 840, 847 (Mich. 2004)) (emphasis omitted).

<sup>40</sup> Compare *id.* at 533–34 (noting that a union, such as marriage, is formed “when two people join together . . . and legal consequences arise from that relationship”), with *id.* at 549–50 (Kelly, J., dissenting) (noting that marriage is a private bond that is “affected with a public interest and by a public policy” in the form of hundreds of “rights, benefits, and responsibilities” that the law confers upon married individuals (quoting *Hess v. Pettigrew*, 247 N.W. 90, 91 (Mich. 1933)) (internal quotation mark omitted)).

<sup>41</sup> See *id.* at 536–37 (majority opinion).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 550 (Kelly, J., dissenting).

<sup>44</sup> *Id.* at 536–37 (majority opinion).

ber of benefits, rights, and responsibilities comparable to those of marriage in order to be “similar” to marriage is also reasonable. Such a view recognizes that what makes marriage unique among the various kinds of intimate relationships is that only in marriage does the law “step[] in and hold[] the parties to various obligations and liabilities.”<sup>45</sup> On this view, an intimate relationship is therefore “similar” to marriage only if it entails a number of benefits, rights, and responsibilities. Thus, the majority’s and dissent’s divergent views of the term “similar” reflect a deeper disagreement about what are the most “important” attributes of marriage.<sup>46</sup>

The amendment does not indicate, however, which qualities of marriage are the most important and thus which understanding of the term “similar” is more reasonable. Indeed, it does not define the term “similar.” Moreover, the dictionary definition on which the majority relied fails to resolve the debate. By merely indicating that “similar” means “having qualities in common,”<sup>47</sup> the definition does not specify *which* and *how many* qualities a relationship must have in common with marriage in order to be “similar” to marriage. Under these circumstances, one cannot but conclude that the term “similar” is “equally susceptible” to different understandings and that this renders the amendment’s operative clause indeterminate.<sup>48</sup> The majority therefore erred in its analysis; it should have found the text of the amendment’s operative clause ambiguous and, accordingly, taken the additional step of examining the amendment’s history.<sup>49</sup>

In this regard, the majority could have followed the dissent’s approach in analyzing the amendment’s history and asked, “What was

<sup>45</sup> *Id.* at 550 (Kelly, J., dissenting) (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)) (internal quotation mark omitted).

<sup>46</sup> Compare *id.* at 536 (majority opinion) (noting that the individuals’ sex and lack of blood relation are “obviously important” qualities of marriage), with *id.* at 550 (Kelly, J., dissenting) (noting that state-conferred benefits, rights, and responsibilities are “important components of marriage”).

<sup>47</sup> *Id.* at 536 (majority opinion) (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 1248 (1991)) (internal quotation mark omitted).

<sup>48</sup> Cf. J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What’s a Constitution For?*, 56 DUKE L.J. 545, 577 (2006) (noting that the term “similar to marriage,” like other terms that appear in various marriage amendments, is inherently ambiguous).

<sup>49</sup> The majority implicitly conceded that once language is deemed ambiguous, extrinsic evidence should be assessed to resolve the textual ambiguity. See *Nat’l Pride at Work*, 748 N.W.2d at 540. The majority also noted that it is a “well-established rule” for the court to consider a preambular clause once an operative clause is found ambiguous. *Id.* at 539 n.20. As the opinions of the majority and the dissent demonstrate, however, the amendment’s preambular clause is unhelpful because the key term “benefits of marriage” is also facially ambiguous. Compare *id.* at 539 n.18 (noting that the term “benefit of marriage” may imply either “an *exclusive* benefit or merely a *typical* benefit”), with *id.* at 551 (Kelly, J., dissenting) (implying that a benefit of marriage is one that must be exclusive to married couples). This second ambiguity makes consideration of extrinsic evidence all the more important.

the intent of those who voted in favor of the amendment with respect to domestic-partnership benefits?”<sup>50</sup> This question could not have been satisfactorily answered, however. As critics of intentionalism would approvingly note,<sup>51</sup> the amendment’s history indicates that two different factions coalesced behind the measure and that, therefore, there was no singular intent with respect to domestic-partnership benefits.<sup>52</sup> The majority should thus have asked a different question in examining the amendment’s history: “What would Michigan voters have said had they been squarely presented with the question of whether domestic-partnership benefits should be banned?”<sup>53</sup> As the

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<sup>50</sup> See *id.* at 545 (Kelly, J., dissenting) (noting that “our task is a search for intent”); *id.* at 548 (concluding that “the amendment’s purpose was limited to preserving the traditional definition of marriage”).

<sup>51</sup> See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>52</sup> As the dissent noted, CPM, the organization responsible for placing the marriage amendment on the ballot, repeatedly told the public that the amendment would not ban domestic-partnership benefits. See *Nat’l Pride at Work*, 748 N.W.2d at 546–47 (Kelly, J., dissenting). However, as the majority pointedly observed, one organization that was in favor of the amendment publicly voiced the contrary view. See *id.* at 541 n.22 (majority opinion). Thus, the proponents of the marriage amendment sent out mixed signals about the possible impact of the measure. This likely reflected the building of a tenuous coalition. As the dissent noted, a poll conducted shortly before the vote indicated that around two-thirds of likely voters did not want to ban domestic-partnership benefits. *Id.* at 548 (Kelly, J., dissenting). As a result, the proponents of the marriage amendment had to win the support of those who were against same-sex marriage but not against domestic-partnership benefits. At the same time, the contrary message suggests that the amendment’s proponents also sought to rally or reassure those who sought a comprehensive ban on the legal recognition of same-sex relationships. Indeed, nearly 30 percent of likely voters were in favor of prohibiting domestic-partnership benefits. *Id.* at 548 nn.32 & 33. The ambiguity of the amendment’s text enabled the proponents to send out these conflicting signals. See Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 535 (2008) (“[A] constitutional provision addressing a deeply controversial subject can only hope to be enacted when it is drafted with highly ambiguous language so that . . . it appeals to disparate factions with divergent understandings of its terms.”).

<sup>53</sup> As Professor Einer Elhauge has argued in the analogous context of the interpretation of statutes passed by legislatures, when a court finds that its preferred interpretive technique — whether it is textualism or intentionalism — is unavailing, the court should examine legislative history to determine “what the legislative government would have chosen given its political preferences.” Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2049 (2002). By thus estimating what the enactable preference was and which interpretation best reflects that preference, a court can ensure that its decision “maximize[s] expected political satisfaction.” EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 116 (2008). Because this interpretive approach examines legislative history only to ascertain the distribution of preferences among the relevant actors, it does not involve the problematic exercise that intentionalism entails — that of imputing a singular intent to a factious coalition. See *id.* at 119–23.

Some scholars have posited a different approach toward the interpretation of ambiguous ballot initiatives. In particular, they have argued that to counter the structural deficiencies of the contemporary forms of direct democracy — including the ease with which they allow a majority to target a minority group — courts should adopt a “narrowing” principle under which they narrowly construe ambiguous ballot initiatives. See Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 156–59 (1995); see also

Michigan Supreme Court has long observed, the interpretation of a constitutional provision should be consistent with “the prevailing sentiments of the people” at the time that the provision was adopted.<sup>54</sup>

In this case, the history of the amendment indicates that the “prevailing sentiment” among Michigan voters was one of opposition to the idea of banning domestic-partnership benefits. Indeed, as the dissent noted, around two-thirds of likely voters said in a poll shortly before the vote that they were opposed to banning domestic partnerships and domestic-partnership benefits.<sup>55</sup> Moreover, as the dissent observed, the significant efforts made by the amendment’s proponents to win the support of those who *did not* want to prohibit domestic-partnership benefits further suggest that only a minority of voters in Michigan sought an absolute ban on the legal recognition of same-sex relationships.<sup>56</sup> Thus, it appears certain that if the issue of domestic-partnership benefits had been squarely presented to the voters, a majority would have rejected the idea that public employers should be prohibited from providing healthcare benefits to the same-sex domestic partners of their employees. In other words, a majority of Michigan voters would have rejected the ban that the court announced.

In sum, the reasoning and conclusion of the majority’s opinion are both flawed. The majority erroneously found the text of the amendment unambiguous. More importantly, in light of the amendment’s history, the majority’s conclusion appears to be in sharp conflict with the views of a majority of Michiganders. By delivering such an opinion, the Michigan Supreme Court thus seems to have strayed from its duty to be the faithful interpretive agent of the people of Michigan. Courts that are to face a similar task — that of interpreting a marriage amendment without reviewing it for its constitutionality — should refrain from making the same mistake.

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Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 514–15 (noting that a “narrowing” approach may be appropriate to resolve “important subsidiary issues” concerning ballot measures); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 49–53 (endorsing the “narrowing” interpretive techniques that Professors Schacter and Frickey propose). This “narrowing” principle would also support the dissent’s conclusion in this case. *See id.* at 50.

<sup>54</sup> *Durant v. State*, 566 N.W.2d 272, 279 (Mich. 1997) (quoting *People v. Harding*, 19 N.W. 155, 156 (Mich. 1884)).

<sup>55</sup> *See Nat’l Pride at Work*, 748 N.W.2d at 547–48 (Kelly, J., dissenting).

<sup>56</sup> *See id.* at 546–49.