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State Judicial Interpretations of Super-DOMAs

My book *Gay Rights and American Law* (2003) analyzed how federal and state appellate courts treated the civil rights claims of lesbians and gay men between 1981 and 2000, examining 1,439 votes by 849 appellate judges in 398 decisions and opinions from 87 courts in all federal jurisdictions and 47 states. In the final chapter, I concluded the following:

> [L]esbian and gay litigants experienced substantially greater success in state courts than in federal fora, with the former deciding sexual minority rights cases more than twice as favorably, on average, as the latter. In particular, state appellate courts interpreting their own state constitutions enhanced the rights and liberties of lesbians and gay men far more than federal and state decisions construing the federal Constitution, with a state supreme court rate two and a half times more favorable than that of the U.S. Supreme Court. The results provide empirical support for the notion that a new judicial federalism has been at work in the nation. Accordingly, those interest groups pursuing litigative campaigns to secure rights – for either homosexuals or other beleaguered minorities – are best advised to work at the state level, in great contrast to the best strategies during the civil rights era of the 1960s and '70s. (Pinello 2003, 145)

Accordingly, I begin this investigation into the implementation and effects of Super-DOMAs – the sine qua nons of America's war on same-sex couples and their families – by surveying how state courts interpreted and applied these constitutional amendments. In truth, both state supreme courts and intermediate appellate courts serve as consequential implementation agents for state constitutions, permitting judges the opportunity to flesh out the meanings of these foundational government documents through the resolution of discrete factual disputes, in the same way that federal appellate courts apply the U.S. Constitution. This chapter examines how state appellate courts made sense of Super-DOMAs and thereby ascertains the evolving legal frameworks that regulated the daily lives of same-sex couples and their families.

I canvassed appellate-court decisions construing marriage amendments in the study's six states, as well as in Alabama, Florida, Louisiana, South Carolina, and Virginia, which complete the group of Super-DOMA jurisdictions within the nation's twenty-five most populous states. Two general findings emerged from the inquiry.

First, few state appellate-court decisions comprehensively and conclusively interpreted the meanings of Super-DOMAs as applied to same-sex pairs and their children. Relevant courts of last resort issued a total of just three pertinent rulings. Notably, these state supreme courts, from Michigan, Ohio, and Wisconsin, have justices chosen through nonpartisan popular elections.[1]

Second, despite the limited number of decisions, the variety of state judicial readings of the constitutional amendments was remarkable. Although courts across all jurisdictions found that gay and lesbian pairs could not enter the institution of civil marriage, the tribunals reached a hodgepodge of outcomes over what the balance of the Super-DOMAs required.

For example, the Supreme Court of Wisconsin, in *Appling* v. *Walker* (2014), unanimously ruled that the Badger State's Super-DOMA,[2] adopted by Wisconsin voters in November 2006, did not prohibit a system of domestic partnerships, passed by the state legislature in 2009, awarding same-sex couples forty-three enumerated rights, such as inheriting a partner's estate in the absence of a will, visiting a partner admitted to a hospital, and accessing family medical leave to care for a sick partner.

In contrast, the Supreme Court of Michigan, by a five-to-two vote in *National Pride at Work, Inc.* v. *Governor of Michigan* (2008), held that the last six words of the Wolverine State's Super-DOMA[3] required the denial of employer-provided health insurance benefits to the same-sex partners of all public employees – a much more restrictive judicial interpretation than that reached in Wisconsin. Thus, judicial mediation in the Badger State made the lives of lesbian and gay pairs far better there than in Michigan.

Equally noteworthy is how some courts in Super-DOMA states dealt with the issue of gay divorce. Two branches of the Texas Court of Appeals, for instance, reached opposite conclusions. In *In the Matter of the Marriage of J.B. and H.B.* (2010), the Dallas arm of the intermediate appellate tribunal ruled

[1] The judicial selection is nonpartisan in the sense that candidates' political-party affiliations do not appear on the ballot. Nonpartisan elections, however, do not necessarily mean that parties have no influence in the choice of judges. In Michigan, for example, supreme-court candidates may be nominated at political-party conventions. In Ohio, judicial candidates are put forward in partisan primary elections and are endorsed by political parties.

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

[3] "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."

that the Lone Star State's constitutional amendment[4] prevented judges from granting divorces to lesbian or gay couples who were legally married elsewhere, because to do so would force judicial recognition of such marriages in the first place. Yet, in *In re Divorce of Naylor and Daly* (2011), the Austin branch of the same court awarded a divorce to a lesbian couple married in Massachusetts. In June 2015, the Texas Supreme Court dismissed the attempt by the State of Texas to intervene in the *Naylor and Daly* proceeding because the state's attorneys had waited too long to step in and contest the trial judge's divorce action (*Texas* v. *Naylor and Daly*). Consequently, the Lone Star State's court of last resort never addressed the merits of whether same-sex pairs legally married elsewhere could divorce in Texas.

I next discuss the substantive state-supreme-court actions in chronological order, drawing on interview commentary to supplement the analysis.

OHIO STATE-COURT ACTION REGARDING ISSUE 1

Once the November 2004 popular vote added Issue 1 to the Ohio Constitution as Article 15, Section 11, both the immediate and enduring question for same-sex couples and their families in the state became: What did it mean? The first sentence, unambiguously defining marriage as "[o]nly a union between one man and one woman," made it abundantly clear that lesbian and gay couples were excluded from the civil institution. But what about the amendment's second sentence?[5] What did it signify?

Carol Ann Fey is an attorney who has served the greater Columbus LGBT community for more than a quarter-century. She is one of the best known gay-friendly lawyers in Ohio. When asked about the meaning of Issue 1's second sentence, Fey offered this opinion:

> Ohio doesn't recognize common-law marriage. So unless a couple's gone through a formal marriage ceremony and obtained a marriage certificate from the state, they're not married. There isn't any approximation of marriage to be had.
>
> Couples can do things to protect the relationship they have through executing various legal documents like wills and powers of attorney, and thereby set up circumstances to take them partway to the kinds of rights and responsibilities they would receive if they could get married and were married. But there's nothing about that process that approximates marriage.
>
> It's like pregnancy. You're either pregnant or you're not. In similar fashion, you're either married or you're not, for purposes of that relationship.

[4] "Marriage in this state shall consist only of the union of one man and one woman. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."

[5] "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

We asked the drafters of Issue 1 about its second sentence at the time they wrote it, and they never provided a clear answer. I think its sponsors were concerned about getting language out there, really, that was political, that got people out to vote.

I understand our community's concern since 2004. There's a constitutional provision that appears to affect us, and we have to give it some kind of significance. So what does the second sentence mean? Well, I'm at a loss to know.

Phil Burress of Citizens for Community Values addressed the same issue this way:

Q: What is your understanding of the meaning of that second sentence?

A: It did exactly what I told our lawyers to do. When we were sitting here [at the CCV office], I told them what I meant. I wanted the institution of marriage protected, and also intended to make sure that nothing was done that emulated marriage, whether it be domestic partnerships or anything else. Taxpayer money should not be used to do an end run around the marriage amendment, and just call it marriage by a different name. That's what I told them. They're the ones that came up with the language.

I thought it was pretty clear. But a lot of people tried to say it was confusing. Obviously, and because of the court cases, city councils and everyone else are not doing anything about domestic partnerships in Ohio now.

As Burress's comments suggest, state courts would be in the best position to interpret Issue 1's meaning in actual disputes that came before such tribunals. Thus, a good way to begin teasing out the impact of the Buckeye State's Super-DOMA is through a review of Ohio court rulings about its application to specific factual settings.

However, because Article 15, Section 11 of the Ohio Constitution was the brainchild of an interest group, and not the product of the state legislature (as Ohio's statutory DOMA of 2003 was), judges faced a serious interpretive challenge: no public record existed concerning the process by which the words of Issue 1 were developed. For legislatively crafted statutes and referenda, there is typically a record of public hearings and debates that lead up to the legislative action. As a result, courts can subsequently draw on such accounts to seek guidance on what ends the creative body intended its language to achieve. In short, there is no "legislative history" for citizen initiatives like Issue 1. Rather, the primary indication of what the constitutional amendment meant were its words alone.

State v. *Carswell*

Remarkably, in the eleven years after the passage of Issue 1, the Buckeye State's court of last resort, the Ohio Supreme Court, authoritatively adjudicated the meaning of Article 15, Section 11 just once, and in a dispute having no LGBT parties. Instead, *State* v. *Carswell* (2007) involved the criminal prosecution of a

man who was indicted for violation of a domestic violence statute, which provided, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." The alleged victim was a woman to whom Carswell was not married. The state intended to present evidence that Carswell's alleged victim had been "living as a spouse" with Carswell and that she was therefore a "family or household member" under the statute. Carswell's attorney argued that the Ohio domestic violence law was illegally applied to his client because the statute recognized a legal status similar to marriage for unmarried persons, in violation of Article 15, Section 11.

In a six-to-one vote among the justices, the state supreme court rejected the defendant's claim and held that the domestic violence statute did not violate the state constitution. The majority concluded,

> [T]he second sentence of the amendment means that the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage – a marriage substitute ....
>
> It is clear that the purpose of Issue 1 was to prevent the state, either through legislative, executive, or judicial action, from creating or recognizing a legal status deemed to be the equivalent of a marriage of a man and a woman. The first sentence of the amendment prohibits the recognition of marriage between persons other than one man and one woman. The second sentence of the amendment prohibits the state and its political subdivisions from circumventing the mandate of the first sentence by recognizing a legal status similar to marriage (for example, a civil union). (114 Ohio St. 3d at 213)

Yet, as the *Carswell* dissent pointed out quite convincingly,

> [Bearing all of the attributes of marriage – a marriage substitute] is not what the disputed [constitutional] sentence says. The legal status prohibited [there] is a legal status "that intends to approximate" *any one* of four attributes – "the design, qualities, significance *or* effect" of marriage. The series is disjunctive, not conjunctive ....
>
> Using the term "living as a spouse" within the definition of "family or household member" clearly expresses an intent to give an unmarried relationship a legal status that approximates the "effect of marriage." The constitutional problem in this case does not arise because cohabitating unmarried persons are included as one of the several groups to whom the domestic violence statutes apply. Instead, the problem is definitional: by using the term "living as a spouse" to identify persons whom the statutes protect and against whom prosecution may be instituted, the General Assembly inherently equates cohabitating unmarried persons with those who are married and extends the domestic violence statutes to persons because their relationship approximates the significance or effect of marriage ....
>
> [W]e must interpret [Issue 1] according to its text, not as we speculate it may have been intended. Insofar as [the domestic violence statute] recognizes as a "family or household member" a person not married to the offender but "living as a spouse" with the offender, it is, in my view, unconstitutional beyond a reasonable doubt. (114 Ohio St. 3d at 217, 219–220; emphasis in original)

Hence, despite what the actual words of Issue 1 signified, the *Carswell* majority took the practical approach that the voters who approved the amendment

could not have intended to invalidate the state's otherwise constitutionally sound domestic violence laws, at least as they were applied to cohabitating unmarried opposite-sex couples. Men who assaulted the women with whom they lived, but to whom they were not married, would not walk scot free on a legal technicality in Ohio.

Thus, the *Carswell* decision appeared to limit the meaning of Issue 1 to something less expansive than what its own words suggested, and this judicially implied restriction would have seemed to be a blessing for the LGBT community in Ohio. But even this simple point was not necessarily true, as explained by Timothy J. Downing, a prominent Cleveland attorney and gay-rights activist.

DOWNING: *Carswell* was a totally results-oriented decision, where the Ohio Supreme Court tied itself in knots to get to the outcome it wanted, by claiming that it gleaned from a vote what the intent of the voters was.

I don't know how they do that without legislative history, for which there was none. The language of the amendment is clear, and that's all anyone could look at.

The majority said, "Well, in the domestic violence circumstance, we're going to have this carve-out of the amendment, because we don't want to have a situation where a victim of domestic violence who's not married can't go to a prosecutor to get help." They looked at the case from the position of its result, not from what logic required. The judge who wrote the dissent talked about that. I think the *Carswell* majority was simply wrong in the way they interpreted Issue 1.

Had the state supreme court not decided the case the way it did, had it upheld Issue 1 as written, that outcome could have led to a groundswell whereby people would say, "Wait a minute. We didn't ever expect this to be the result of Issue 1. We need to do something, at least to change that second part, the benefits-of-marriage section."

And that was a big disappointment. Everyone else believed it was great the court decided the case the way it did. I thought just the opposite. *Carswell* cemented Issue 1 politically, and the gay community got really screwed in the process.

Q: I interviewed a professor at the Ohio State University College of Law who believes *Carswell* limited the second sentence of Issue 1 to apply only to a prohibition of Vermont-style civil unions, but nothing short of that.

DOWNING: I disagree. The case concerned a domestic violence statute, and that's all it was about. Anyone who says *Carswell* goes beyond its own specific factual setting hasn't read the majority opinion carefully enough. It had nothing to do with civil unions. It was about whether Issue 1 prohibited prosecutions under domestic violence statutes that apply to more than married couples. That's plain and simple what it was about. Nothing else.

Echoing Downing's assessment, CCV's Phil Burress offered this comment about the *Carswell* precedent:

Q: Do you agree with the outcome of the Ohio Supreme Court's *Carswell* decision?

A: It's a double-edged sword. David Langdon [CCV's principal attorney and the author of Issue 1] told me that he thinks the outcome of the case could weaken Issue 1.

But the way it came down sounded pretty good to me. I didn't want this guy to go free. He beat this woman, and that made me angry.

I've never really understood the argument that this ruling somehow weakened Issue 1. I just wanted this guy to go to jail.

So when it came down the way it did, I was happy. But the lawyers weren't.

Accordingly, whether the solitary Issue 1 interpretation by Ohio's court of last resort indeed constrained the application of that constitutional amendment to same-sex couples and their families was an open question.

The Legal View in Ohio from Below

Perhaps more instructive of Issue 1's legal impact on gay and lesbian pairs and their children was the perspective on the ground of attorneys who represent LGBT litigants regularly in the trial courts of the Buckeye State, where most actual legal disputes there are resolved. Again, Carol Ann Fey:

FEY: I've practiced law for over twenty-five years. Long ago, when I first started, if I were working a divorce with a litigant who decided that they were lesbian or gay, the other side would frequently come into court thinking that they could yell, "But that person is a lesbian!" or "That person is a gay man!" They thought their clients would get custody of children and would get child support and could walk away and not have to work very hard.

Now that isn't any longer the case. It wasn't even very much the case then. But there were lots and lots of litigants and opposing counsel who really believed they could do that and it would be just that simple.

Today [2010] I think Issue 1 is a similar matter. It's not whether or not Issue 1 is relevant, but whether or not counsel can throw it in with the kitchen sink of their arguments, to color them as though it were, and say, "How can you possibly allow these women to share child custody? After all, we have Issue 1, and don't you know, judge, that gay people have no rights?" There are otherwise intelligent and learned attorneys who will say that kind of thing.

Q: How have the courts responded to those arguments?

FEY: So far, they haven't followed them. We've not had any such outcomes.

But these Issue 1 arguments make the cases tremendously more expensive and highly contentious.

If Carol Ann Fey represented the first generation of gay-friendly attorneys in central Ohio, LeeAnn M. Massucci was among the second such cohort. Indeed,

Massucci had served as co-counsel with Fey and elaborated on Fey's comment about the expense of litigation:

Child-custody litigation can be horrendously expensive. I estimate that in one case, both parties' attorney's fees have been somewhere around a quarter of a million dollars so far. And this case went up to the Ohio Court of Appeals and down twice before I got involved.

The biological mother is herself an attorney. She hired David Langdon – the lawyer who wrote Issue 1 – to represent her. Langdon has now [2010] brought what's called a writ of prohibition in the Ohio Supreme Court, saying in essence that the Franklin County Court of Common Pleas [in Columbus] doesn't have the basic jurisdiction to rule on these cases at all. He's saying that the trial court doesn't have authority over the children who are the subject of the disputes.

Langdon is a very smart attorney, but he's misstating the law. Langdon sued the trial court, saying that those judges don't have authority to put temporary child-custody orders in place. Langdon always figures out a way to thread in, first, the statutory DOMA [of 2003], saying that the Ohio legislature never intended for this kind of relationship to be recognized. Then he brings in the constitutional amendment as further proof of his argument. So, "Your honors, not only the legislature, but also the citizens of Ohio strongly voted that language in."

We continue to say in reply that, as problematic as the DOMAs are, they don't affect these cases. Because DOMAs involve only adults, while child custody concerns a relationship between a child and an adult.[6]

Massucci also offered an interesting commentary on a judicial trend involving same-sex couples that was emerging in 2010.

MASSUCCI: We're now starting to file for the divorces of same-sex couples. Trial courts here [in Columbus] have said that, if lesbian and gay couples have been married in another state, and they come here and want a dissolution, we will divorce them. Because, jurisdictionally, people have a right as Ohio citizens to have access to the courts. So we can divorce you, although we can't marry you.

Q: There are rulings to that effect?

MASSUCCI: Those of us who practice in this area have taken an informal poll of trial judges, and have said to them, "If we present you with a divorce, will you do it?" And they've said that they think they have to. Local judges believe that Franklin County citizens should have access to their own courts.

However, I don't think that would happen if it were a disputed divorce. I'm not sure our judges would actually allow a contested divorce to go forward.

But would they sign off on an uncontested divorce or dissolution? I believe so. To my knowledge, so far there are two that have been filed, and I'm preparing a third one right now. Although I didn't file the first two myself, I'm told that they're being signed off on.

[6] The Ohio Supreme Court ultimately rejected Langdon's argument and determined that Buckeye State trial courts did have authority to issue temporary custody orders pending final judgments (*Rowell* v. *Smith* 2012).

Q: So there will be divorce decrees?

MASSUCCI: Yes.

Location, Location, Location

Michael D. Bonasera is a distinguished Columbus attorney who specializes in estate planning and wealth management. In a lengthy interview, he addressed how Issue 1 did not greatly much affect his legal advocacy on behalf of gay and lesbian clients. One exchange from that conversation is especially noteworthy.

Q: Let me play the devil's advocate. You have clients who are a same-sex couple, with children or not, as the case may be. They've done everything you've asked them to do in terms of estate and financial planning. And some catastrophe happens. So they have to rely upon the legal documents you've created for them.

Imagine further that there's an antagonist out there who wants to attack your clients for whatever personal motivation he or she may have. This adversary makes the following argument to an Ohio court: "Article 15, Section 11 of the Ohio Constitution reads in relevant part, 'This state and its political subdivisions shall not create or recognize any status or relationship of unmarried individuals that intends to approximate the design, quality, significance, or effect of marriage.' And you know, judge, what happened here? This couple went to a fancy lawyer, and he put all these documents together for them. And what occurred here was an intention to approximate the effect of marriage! And that, Your Honor, *violates* the Ohio Constitution."

How do you respond to that argument?

A: It's total crap. And I'm highly confident about that response. With trust planning, the law doesn't contemplate to require any type of legal relationship at all among the various parties: fiduciaries, beneficiaries, or otherwise. And it happens frequently among non-LGBT families that trusts are used to care and pass money to and from other family members, but as often, nonfamily members, too.

To construe a trust as an instrument that in any way seeks to include certain definitional relationships, such as a class of married persons, is false on its face. Total strangers at arm's length can create legal trusts.

So my answer to the adversary's argument would be, "Judge, Issue 1 is a red herring here. It's completely immaterial to the dispositional wishes of the individuals involved. Article 15, Section 11 is totally irrelevant to this case."

And I'm very confident that our judges in Franklin County [Columbus] would not bat an eye.

Q: What about outside Franklin County?

A: I don't know. I don't know.

Q: Have you had any LGBT clients from elsewhere in Ohio?

A: No. None. I'm aware of them and frankly am amazed they live out there. I don't know how they do it. They have to be stronger folk than I am.

Because it's not pretty, even within some of the state's urban areas, like down in Cincinnati, which is affectionately referred to as the northern-most southern city. Opinions regarding gay and lesbian marriages might have changed since 2004, but I tell you what, the Mason-Dixon line has come a lot farther north. That city is not very gay friendly, despite being an urban environment. You'd think that it would be more progressive. But, man, you might as well be in the Deep South down there.[7]

So, I don't know. The legal argument regarding Issue 1 would go the same way. And while I'm 100 percent sure that my answer is the right one, I've seen crazier things done by judges.

So I'm not as confident outside Franklin County and its contiguous counties: Licking, Delaware, Madison, Morrow. I'm not as certain outside that small blue island that your hypothetical antagonist's argument might not carry more weight.

In fact, the other Ohio attorneys I interviewed for this study were also less sanguine about the success of their legal arguments on behalf of same-sex clients in courts outside the greater Cleveland and Columbus metropolitan areas. Thus, the three most important factors for determining the legal rights of same-sex couples and their families in Ohio may well have been "location, location, location."

In sum, the Ohio court of last resort mediated Issue 1 effects only at the margins of legal and political activity within the Buckeye State, quite unlike much more dramatic high-court interventions in other Super-DOMA jurisdictions such as Michigan and Wisconsin, as the next sections explain.

At the same time, Ohio's trial courts largely reflected their local legal and political cultures, with significant judicial resistance to Article 15, Section 11's apparent mandate occurring within some urban environments and more dutiful observance of the constitutional provision in suburban and rural venues.

MICHIGAN STATE-COURT ACTION REGARDING PROPOSAL 2

National Pride at Work was the nation's first unequivocally authoritative court-of-last-resort interpretation of a Super-DOMA that affirmed and documented a specific grassroots impact on lesbian and gay couples. In that ruling, the Michigan Supreme Court interpreted the words "or similar union for any purpose"

[7] Cf. Stolberg (2015).

of Proposal 2 to require the denial of health insurance benefits to the same-sex partners of state employees. The high court's five-member majority opinion determined that the constitutional language was unambiguous and thus prevailed:

> The trial court held that providing health-insurance benefits to domestic partners does not violate the marriage amendment because public employers are not recognizing domestic partnerships as unions similar to marriage, given the significant distinctions between the legal effects accorded to these two unions. However, given that the marriage amendment prohibits the recognition of unions similar to marriage "for any purpose," the pertinent question is not whether these unions give rise to all of the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage "for any purpose." Recognizing this and concluding that these unions are indeed being recognized as similar unions "for any purpose," the Court of Appeals reversed. We affirm its judgment. That is, we conclude that the marriage amendment, which states that "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," prohibits public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners. (481 Mich. at 86–87)

In short, the Michigan Supreme Court applied the Super-DOMA's language literally. Indeed, the bulk of the ruling parsed the constitutional amendment into individual words or word groups and then used a 1991 edition of *Webster's Dictionary* to define each such word or word set. What is more, the Michigan majority explicitly rejected consideration of any extrinsic evidence of what might have happened in the voters' minds when they approved Proposal 2 in 2004: "When the language of a constitutional provision is unambiguous, resort to extrinsic evidence is prohibited, and, as discussed earlier, the language of the marriage amendment is unambiguous" (481 Mich. at 80).

Thus, what the Michigan Supreme Court majority did in *National Pride at Work* was diametrically opposed to the Ohio Supreme Court's approach in *Carswell*. In the latter decision, the majority did not apply Issue 1's words literally. Only the sole dissenting Ohio justice advocated that formulation. Instead, the Ohio majority in effect invoked extrinsic evidence they presumed existed (but which the justices never produced in their opinion) that indicated the voters never intended the result explicitly required by the constitutional language they approved.

What is even more remarkable when comparing the Michigan and Ohio high-court rulings is the quantity and quality of extrinsic evidence that the *National Pride at Work* majority chose to ignore. As the two dissenting Michigan justices explained,

> [T]he Michigan Christian Citizens Alliance commenced an initiative to amend the Michigan Constitution to bar same-sex marriage. The alliance formed the Citizens for the Protection of Marriage committee (CPM) "in response to the debate taking place across the country over the definition of marriage." The committee's stated goal was to

place the issue of same-sex marriage on the ballot so that Michigan voters would have the ultimate say in the matter.

During CPM's campaign, concerns arose regarding exactly what the amendment would prohibit. CPM attempted to address these concerns at an August 2004 public certification hearing before the Board of State Canvassers. Specifically, CPM addressed whether the amendment, which it had petitioned to place on the ballot, would bar public employers from providing benefits to their employees' same-sex domestic partners. CPM's representative, attorney Eric E. Doster, assured the board that it would not. Mr. Doster stated:

> [T]here would certainly be nothing to preclude [a] public employer from extending [healthcare] benefits, if they so chose, as a matter of contract between employer and employee, to say domestic dependent benefits . . . [to any] person, and it could be your cat. So they certainly could extend it as a matter of contract . . . .
>
> [A]n employer, as a matter of contract between employer and employee, can offer benefits to whomever the employer wants to. And if it wants to be my spouse, if it wants to be my domestic partner – however that's defined under the terms of your contract or my cat, the employer can do that . . . .

Mr. Doster reiterated this point several times throughout the proceedings.

> I'd hate to be repetitive, but again, that's a matter of contract between an employer and employee. And if the employer wanted to do that, offer those benefits, I don't see how this language affects that. If the language just said "marriage" or "spouse," then I would agree with you. But there's nothing in this language that I would interpret that would say that that somehow would go beyond that.

In its campaign to win over voters, CPM made a number of additional public statements that were consistent with Mr. Doster's testimony before the Board of State Canvassers. For example, Marlene Elwell, the campaign director for CPM, was quoted in *USA Today* as stating that "[t]his has nothing to do with taking benefits away. This is about marriage between a man and a woman." Similarly, CPM communications director Kristina Hemphill was quoted as stating that "[t]his Amendment has nothing to do with benefits . . . . It's just a diversion from the real issue."

CPM also made clear on its webpage that it was "not against anyone, [CPM is] *for* defining *marriage as the union of one man and one woman. Period.*" Instead, CPM contended that its reason for proposing the amendment was its belief that "[n]o one has the right to redefine marriage, to change it for everyone else. Proposal 2 will keep things as they are and as they've been. And by amending Michigan's constitution, we can settle this question once and for all."

CPM even distributed a brochure that asserted that the amendment would not affect any employer health-benefit plan already in place. The brochure stated:

> Proposal 2 is *Only* about Marriage
>
> Marriage is a union between a husband and wife. Proposal 2 will keep it that way. This is not about rights or benefits or how people choose to live their life. This has to do with family, children and the way people are. It merely settles the question once and for all what marriage is – for families today and future generations.

It can be assumed that the clarifications offered by CPM, the organization that successfully petitioned to place the proposal on the ballot, carried considerable weight with the public. Its statements certainly encouraged voters who did not favor a wide-ranging ban to vote for what they were promised was a very specific ban on same-sex marriage.

And a poll conducted shortly before the election indicates that CPM's public position was in line with public opinion. The poll results indicated that, whereas the public was in favor of banning same-sex marriage, it was not opposed to employer programs granting benefits to same-sex domestic partners.

In an August 2004 poll of 705 likely voters, 50 percent of respondents favored the amendment while only 41 percent planned to vote against it. But 70 percent specifically disapproved of making domestic partnerships and civil unions illegal. Sixty-five percent disapproved of barring cities and counties from providing domestic-partner benefits. And 63 percent disapproved of prohibiting state universities from offering domestic-partner benefits.

Accordingly, the circumstances surrounding the adoption of the amendment indicate that the lead proponents of the amendment worked hard to convince voters to adopt it. CPM told voters that the "marriage amendment" would bar same-sex marriage but would not prohibit public employers from providing the benefits at issue. It is reasonable to conclude that these statements led the ratifiers to understand that the amendment's purpose was limited to preserving the traditional definition of marriage. And it seems that a majority of likely voters favored an amendment that would bar same-sex marriage but would go no further. Therefore, this Court's majority errs by holding that the amendment not only bars same-sex marriage but also prohibits the benefits at issue. (481 Mich. at 91–96; emphasis in original)

The dissenting Michigan justices concluded their analysis by excoriating the prevailing opinion's effect:

[B]y proceeding as it does, the majority condones and even encourages the use of misleading tactics in ballot campaigns by ignoring the extrinsic evidence available to it. CPM petitioned to place the "marriage amendment" on the ballot, telling the public that the amendment would not prohibit public employers from offering health benefits to their employees' same-sex domestic partners. Yet CPM argued to this Court that the "plain language of Michigan's Marriage Amendment" prohibits public employers from granting the benefits at issue. Either CPM misrepresented the meaning of the amendment to the State Board of Canvassers and to the people before the election or it misrepresents the meaning to us now. Whichever is true, this Court should not allow CPM to succeed using such antics. The result of the majority's disregard of CPM's preelection statements is that, in the future, organizations may be encouraged to use lies and deception to win over voters or the Court. This should be a discomforting thought for us all. (481 Mich. at 102)

Thus, a substantial majority of the Michigan Supreme Court bent over backward to apply the language of Proposal 2 literally, while every bit as large a number of Ohio Supreme Court justices went out of their way to avoid an equally exact usage of Issue 1's words. Why the striking differences in judicial approach to constitutional amendments whose ultimate policy goals seemed so

similar? I think the most satisfying way to harmonize the Michigan and Ohio cases is to look at their outcomes politically, rather than legally or logically.

As Timothy Downing observed, the *Carswell* majority opinion made Issue 1 palatable to most Ohioans when the Buckeye State Super-DOMA was applied to opposite-sex couples. Had the Ohio Supreme Court espoused the dissenting justice's literal analysis of the marriage amendment, the high tribunal would have invalidated domestic violence statutes en masse, at least with regard to abuse among unmarried heterosexual pairs. Downing surmised that, had the dissenting opinion's approach won the day, the resulting disruption to domestic violence law would have prompted a backlash against Issue 1. But an equally, if not more, plausible public reaction would have been political repercussions against the justices themselves. Indeed, disturbing domestic relations statutes for opposite-sex couples so dramatically would have placed the Ohio judges in an untenable political posture, especially given that Chio jurists are elected to six-year terms of office, the shortest in the nation for courts of last resort.

In contrast, the Michigan Supreme Court majority faced no comparable public outcry in utilizing Proposal 2 word for word against the best interests of same-sex pairs and their families. The Wolverine State jurists were politically free to follow wherever *Webster's Dictionary* led them.

In any event, the clearest example of an actual, tangible, Super-DOMA-based *statewide* loss for gay and lesbian couples was that, as a result of the *National Pride at Work* precedent, the same-sex partners of public employees could not receive domestic-partner benefits in Michigan. This development was particularly troublesome for such partners who did not themselves have jobs providing comparable health-insurance coverage.

Of even greater concern was the circumstance where partners were the biological or adoptive parents of minor children being raised by the couples, because Proposal 2 also effectively eliminated the availability of second-parent adoptions for same-sex pairs in the Wolverine State. Trial-court judges who had been willing to grant such adoptions before passage of the Super-DOMA declined to do so afterward. Consequently, lesbian and gay public employees in that setting were not even able to provide health coverage for their children.

Further, in March 2009, Blue Cross/Blue Shield of Michigan announced that, because of the *National Pride at Work* ruling, it was withdrawing same-sex partner benefits from public-employee health plans that it underwrote in Michigan; this action principally touched smaller employers with non-self-funded plans ("Court Decision Prompts Domestic Partner Policy Revision" 2009).

However, as a result of the *National Pride at Work* litigation, some large public employers with self-funded health plans, including the University of Michigan and Michigan State University, revised personnel programs to eliminate partnership status for employment benefits and to replace it with "Other Designated Beneficiary" or similar alternative eligibility criteria (Smith 2011). In

other words, these employers substantially enlarged the categories of employees receiving benefits to include virtually all unmarried couples, the considerable portion of whom were heterosexual. This expansion of the eligibility pool significantly increased such employers' health-insurance costs.

A Litigator's Perspective

Yet, the ultimate *National Pride at Work* impact might have been far more substantial for Michigan's lesbian and gay pairs and their families, as Jay Kaplan, the staff attorney for the LGBT Project of the ACLU of Michigan, noted in January 2009:

> Michigan's highest court has interpreted Proposal 2 as broadly as possible.
>
> The Michigan Supreme Court is an incredibly political and conservative bench. The majority in the *National Pride at Work* decision clearly wanted to reach a certain result, and they were going to go about it anyway they could. This court doesn't like same-sex relationships or anything else they consider to constitute alternative families.
>
> In terms of legal reasoning, the *National Pride at Work* decision was so flawed. The majority consists of justices who are members of the Federalist Society.[8] They're strict constructionists of the law. But there's no mention of domestic-partnership benefits or anything like them in the body of Proposal 2. So the judges had to find a 1991 dictionary definition of the word "similar" to fit what they wanted to achieve in rendering that decision.
>
> What does it say about our democratic process when the court majority held that lying to voters in an initiative election doesn't mean anything? We want citizens to be well informed. And if some apparently authoritative person says, "You're voting for the color black," when in fact the proponent's purpose is for the intended color to be white, and after the ambiguous language passes, the author says, "Now it means white" – to believe all of that doesn't mean anything as a legal matter is a very sad state of affairs.
>
> But the really scary aspect is that we don't know how far the *National Pride at Work* decision will be interpreted. What's its reach going to be? Consider a last will and testament that refers to a beneficiary as a "domestic partner" or "partner for life." If the decedent's legal next of kin disputes the will as violating Proposal 2, will Michigan courts now invalidate the otherwise legal will?

[8] The website of the Federalist Society describes the organization's purpose as follows:

> The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.
>
> This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.

After all, the constitutional amendment is in the passive voice ["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"]. It doesn't talk about *who* is doing the recognizing. So not only government is swept up into Proposal 2's prohibition, but third parties could be too. Thus, the ban might also cover private agreements between same-sex couples. We just don't know how far it's going to go. *National Pride at Work* is one of those precedents that depend entirely upon the goodwill of judges who later interpret it.

The ACLU of Michigan is involved in a case now between two formerly coupled lesbian women. They broke up and are disputing child custody, including bouts of abduction of the kids. The mom we're representing went into court and filed for custody. This was in a small, rural county, in western Michigan, where the trial court in effect said this:

> We'll recognize the fact that the women adopted these three children. We'll give full faith and credit to the adoptions.
>
> But their relationship to the children involved the nature of the women's relationship to each other when they lived together at the time. So we can't allow them to use Michigan law to enforce their rights as parents, because that would violate the marriage amendment.
>
> Therefore, we're dismissing the petition for custody. The two women cannot use Michigan state courts and will have to settle the dispute privately between themselves.

Neither woman was a birth mother. So both parents were out of luck. Neither one could utilize Michigan statutory law to enforce their rights as parents. It's an outrageous judicial result.

There's another case we heard about where a Michigan judge refused to enforce a business agreement between two people who at one time had been in a personal relationship. But this was explicitly an agreement about commercial business. The judge said she couldn't enforce it because at the time they signed the document, they were a couple. So to recognize the business agreement would violate the marriage amendment.

Thus, who knows how far this is going to go? Look at what the Michigan Supreme Court opinion said was in common with marriage. The fact that people have to be of certain genders, the fact that they can't be related by blood – all of that was enough for the court to say that such circumstances were "similar" to marriage in the meaning of the Proposal 2 ban. That's how far these judges were willing to go to reach their desired outcome.

So I worry that challenges to estate-planning or other documents between same-sex couples might be successful under this amendment as interpreted by the state supreme court. *National Pride at Work* did a great deal of damage.

A Michigan Couple's View

Michael, age forty-two, and Robert, forty-seven, have been together for fifteen years and have executed all the legal documents they thought necessary to protect themselves as a couple.

Q: In light of Proposal 2, with which you're so familiar, how confident are you that your documents will be honored when needed?

ROBERT: I have to be honest with you. I've never even thought of that issue before. And you're scaring me as I contemplate it. I'm amazed I hadn't addressed it earlier.

MICHAEL: I feel confident. It's all legally binding stuff. It's not based on anything except us saying, "This is the person I want to have this responsibility or power." I don't feel apprehensive about it at all.

ROBERT: One difference between Michael and me is that I really followed the court case thoroughly. I've read all of the opinions, and followed the reasoning very carefully.

What scares me about the *National Pride at Work* decision is, as I read it, I'm not sure what the judges were thinking about when they reached to make those last six words of Proposal 2 mean so much. One doesn't have to do a stretch any greater than that to start questioning things, perhaps like some of these legal documents we have.

For instance, we have health care powers of attorney that say each of us has decision-making authority for the other. But a Michigan hospital could respond that acknowledging such a right would recognize an agreement similar to marriage.

So I can imagine things getting bad enough that even well-meaning nurses and doctors might think, "Oh well, we don't want to get sued. Maybe we're better off with just the legal next of kin getting to make medical-care decisions for our patients."

I think that approach is definitely possible in some parts of this state, although not where we live in Ann Arbor, which is pretty progressive on LGBT rights.

WISCONSIN STATE-COURT ACTION REGARDING REFERENDUM 1

As the chapter introduction indicated, in *Appling* v. *Walker*, the Wisconsin Supreme Court unanimously upheld the constitutionality of the statewide domestic-partner registry, which was a significant boon to same-sex couples. The Badger State case is a stark contrast to *National Pride at Work*.

Two factors explain the disparate rulings. First, unlike Proposal 2 – an initiative of the Citizens for the Protection of Marriage committee that began with its circulation of petitions to collect voter signatures to place the matter on the Michigan ballot – Referendum 1 was the progeny of the Wisconsin legislature itself and therefore had a legislative history to guide justices as to the amendment's intended meaning. In fact, the Wisconsin Supreme Court opinion has an entire section labeled "What Information Was Given to Voters during the Constitutional Debates and Ratification Process?" which included this discussion:

> We . . . examine the relevant public statements made by the Amendment's framers and other proponents that were intended to persuade voters during the ratification process. During the process, the question of the effect on the rights of same-sex couples was a matter of intense debate. A newspaper article dated July 30, 2006, stated, "Although there's not much dispute that the proposed constitutional amendment on marriage in Wisconsin would bar same-sex unions, there is deep disagreement about what the wording might mean for civil unions and domestic-partner benefits." In one letter to the

editor of the *Milwaukee Journal Sentinel*, taking issue with an opponent's statements, Rep. Mark D. Gundrum characterized opponents as "continu[ing] the effort . . . to deceive people about the impact the man-woman marriage constitutional amendment will have in Wisconsin" and flatly rejected the notion that it would "seriously jeopardize any legal protections for unmarried couples – gay or straight." Proponents made numerous statements on that issue as the following facts demonstrate.

A January 28, 2004, press release on the letterhead of the Wisconsin Legislature by legislative sponsors who spearheaded the effort to pass the Amendment, Rep. Mark D. Gundrum and Sen. Scott Fitzgerald, stated:

> The proposed amendment, while preserving marriage as one man-one woman unions, would also preclude the creation of unions which are substantially similar to marriage. "Creating a technical 'marriage,' but just using a different name, to massage public opinion doesn't cut it," Gundrum said . . . . Significantly though, the language does not prohibit the legislature [and other entities] . . . from extending particular benefits to same-sex partners as those legal entities might choose to do.

In December 2005, Sen. Scott Fitzgerald was quoted as follows in media accounts of legislative debates when the Senate was preparing to vote: "The second [sentence] sets the parameters for civil unions. Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could."

A November 2006 statement issued by the office of Sen. Scott Fitzgerald struck back at opponents of the Amendment and said they were "intentionally mislead[ing] the public about the amendment." Contrary to those "misleading" representations, the statement said,

> Nothing in the proposed constitutional amendment would affect the ability of same-sex individuals from visiting a sick partner in the hospital or mak[ing] medical decisions for their partners as [prescribed] by a medical power of attorney. The non-partisan Legislative Council has written that the proposed amendment does not ban civil unions, only a Vermont-style system that is simply marriage by another name. If the amendment is approved by the voters . . . the legislature will still be free to pass legislation creating civil unions if it so desires.

An article written by Sen. Scott Fitzgerald and published in the *Wisconsin State Journal* stated, "Contrary to claims from . . . liberal activists, the proposed constitutional amendment would not prohibit state or local governments . . . from setting up a legal construct to provide privileges or benefits such as health insurance benefits, pension benefits, joint tax return filing or hospital visitation to same-sex or unmarried couples."

The Family Research Institute of Wisconsin, a group that advocated for the Amendment (it defined itself as seeking to preserve "traditional one-man/one-woman marriage in Wisconsin"), issued a six-page publication dated August 2006, listing 13 questions and answers about the meaning of the Amendment. In that publication, the organization stated, "The second sentence [of the Amendment] doesn't even prevent the state legislature from taking up a bill that gives a limited number of benefits to people in sexual relationships outside of marriage, should the legislature want to do so."

An article authored by Julaine Appling, a named plaintiff in this case, published Dec. 13, 2005, stated, "Contrary to the message being consistently given by opponents of the amendment, the second phrase does not 'ban civil unions.' . . . Nor does this phrase

threaten benefits already given to people in domestic partnership registries by companies or local units of government."

In an Associated Press article dated Dec. 7, 2005, Julaine Appling was quoted as saying, "Nothing in the second sentence prohibits [legislative grants of adoption or inheritance rights]. Nor does it in any way affect existing benefits given by local governments or the private sector."

This representative sampling of messages, publicized by some of the most prominent and prolific advocates of the Amendment, makes clear that in response to concerns about what exactly the Amendment would prohibit, such advocates answered directly that the Amendment would not preclude a legislative decision to create a legal mechanism giving unmarried couples in intimate relationships specific sets of rights and benefits. The message was also clearly given that the Amendment would not diminish rights in existing domestic partnerships. Same-sex partners were specifically included in such answers. (358 Wis.2d at 157–160)

In other words, exactly the same kind of extrinsic evidence that the Michigan Supreme Court rejected out of hand as unworthy of consideration in *National Pride at Work*, the Wisconsin Supreme Court welcomed to guide its understanding of Referendum 1's meaning in *Appling*. But the fact that the nature of the proof in the latter case was legislative history, as opposed to the oral and published statements of the interest-group sponsors of Proposal 2, made all the difference.

A second important reason for the disparate outcomes of the two judicial decisions had to do with timing. In 2008, when the Michigan high court acted, there was absolutely no indication anywhere in the nation that state courts would not be the final arbiters of Super-DOMA-based disputes for the foreseeable future. However, by July 31, 2014, when the Wisconsin Supreme Court rendered *Appling*, the national legal landscape on who might have the final say over state marriage amendments had changed radically, as discussed at length in Chapter 6. By then, in fact, astute judicial observers clearly saw the writing on the wall. Federal judges were invalidating state gay-marriage bans from coast to coast. In Wisconsin itself, a federal district judge struck down Referendum 1 in June 2014, more than a month before the *Appling* decision came down; one of the state supreme court's concurring opinions made specific reference to that ruling. Thus, there was little, if any, practical incentive for the Wisconsin justices to take the kind of hard line against same-sex couples that their Michigan counterparts had done six years earlier.

In any event, the Wisconsin Supreme Court had no consistent history as a Midwestern bulwark against antigay action. In *Angel Lace M.* v. *Terry M.* (1994), for example, the Badger State high court denied second-parent adoptions to same-sex couples, a precedent that plagued lesbian and gay parents until the federal judiciary stepped in twenty years later. In contrast, at roughly the same time the Wisconsin bench rendered *Angel Lace*, other state courts of last resort, such as the Massachusetts Supreme Judicial Court (in

Adoption of Tammy 1993) and the New York Court of Appeals (*Matter of Jacob* 1995), authorized either joint adoptions or second-parent adoptions for families headed by same-sex partners.

OTHER STATE-COURT ACTION

The only other Super-DOMA-related litigation to reach state supreme courts involved whether the initiatives and referenda addressed multiple subject matters and thereby violated the common state constitutional rule that amendments could speak to just a single topic. Super-DOMA opponents argued that the proposed bans touched marriage and civil unions and domestic partnerships, as well as the respective benefits to same-sex couples from each relationship-recognition form. However, no court of last resort among the twenty-five most populous states upheld such a challenge. Each permitted the measures to proceed. (*Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, Florida 2006; *Perdue* v. *O'Kelley*, Georgia 2006; *McConkey* v. *Van Hollen*, Wisconsin 2010).

State intermediate appellate courts, however, did make some important Super-DOMA interpretations, most notably surrounding disputes involving children. The Michigan Court of Appeals, for instance, held that parents who were not biologically related to the children they helped raise and who had not formally adopted such children had no legal standing to seek child custody once same-sex couples separated and disputed the issue (*Harmon* v. *Davis* 2010; *Stankevich* v. *Milliron* 2013). In contrast, the Florida Court of Appeals suggested that the best interests of the child, and not standing rules, should be dispositive in such a case (*T.M.H.* v. *D.M.T.* 2011). The liberally minded Austin branch of the Texas Court of Appeals refused to invalidate an adoption jointly granted to a same-sex pair (*Goodson* v. *Castellanos* 2007), whereas the Alabama Court of Civil Appeals prevented second-parent adoptions in that state (*In re Adoption of K.R.S.* 2012).

With regard to property rights, the Houston branch of the Texas Court of Appeals held that the surviving same-sex partner of a decedent was not entitled to any part of the latter's estate without a specific bequest in a valid will (*Ross* v. *Goldstein* 2006).

Both the Louisiana Court of Appeal (*Ralph* v. *City of New Orleans* 2009) and the Ohio Court of Appeals (*Cleveland Taxpayers* v. *Cleveland* 2010) upheld municipal domestic-partner registries that did not confer consequential legal rights to gay and lesbian couples.

Lastly, adding to the confusion referenced at the chapter's start over whether same-sex pairs legally married in other places might seek divorce in Texas, the Ohio Court of Appeals turned down that option for such couples (*McKettrick* v. *McKettrick* 2015), while the Florida Court of Appeals gave a thumbs up (*Brandon-Thomas* v. *Brandon-Thomas* 2015).

UNDERSTANDING THE LACK OF FURTHER STATE-COURT SUPER-DOMA LITIGATION

As the preceding case inventory indicates, three substantive and three procedural rulings from courts of last resort and another dozen holdings from intermediate appellate courts constitute the entire corpus of state appellate decisions implementing the eleven Super-DOMAs among the twenty-five most populous American states. Thus, the supreme courts of three jurisdictions in this study (Georgia, North Carolina, and Texas) rendered no opinions on the fundamental meanings of their marriage amendments.[9] And as suggested earlier, Ohio's *State* v. *Carswell* may not really have been about what rights, if any, LGBT people had under Issue 1. Moreover, Wisconsin's *Appling* v. *Walker* arrived very late in the event chronology. Accordingly, only Michigan's *National Pride at Work* can truly be considered a meaningful and enduring state-supreme-court Super-DOMA implementation.

I was aware of this legal scenario when my interview field trips began in January 2009. Indeed, I chose Michigan for the first of my seven journeys because of *National Pride at Work*'s prominence.

My second field trip was to Georgia in 2010, where I discovered that, unlike in the Wolverine State, at least six or seven counties and municipalities did in fact explicitly provide benefits to the same-sex partners of their employees. In other words, I learned that some lesbian and gay pairs were substantially better off legally in the Deep South than their counterparts in the Midwest, which struck me as counterintuitive.

Jeff Graham, executive director of Georgia Equality, the leading LGBT interest group in the Peach State, emphasized the absence of Question 1's practical impact on the extension of benefits to the domestic partners of public and quasi-public employees.

> Grady Health Systems, a nonprofit health care organization that had been a governmental authority up until about a year and a half ago, recently adopted domestic-partner benefits with no conversation or controversy whatsoever.
>
> Georgia Equality went to them with some Grady employees, and made our case about why this was fair, and how other hospital systems in the metro Atlanta area had implemented domestic-partner benefits. They had some key employees who were gay or lesbian, and so they felt it was the right thing to do. And they did it.
>
> Grady isn't technically now a governmental or municipal agency. But it's a huge entity that's very much tied into the politics of both the metro area and the state legislature, where so much of their funding does come from.
>
> But none of their board members or administrators ever raised a legal question when we went to them with this. In fact, the only concern that has ever come up with municipalities and the like is whether the change would cause a financial strain on their budgets. That's the only pushback we get.

[9] In fairness, I note that North Carolina's Amendment 1 was in effect for less than two years, thus not permitting sufficient opportunity for appeals to reach the Tar Heel high bench.

No one has ever brought up Question 1. And all of this has occurred during the last two years.

Accordingly, I pointedly asked the most knowledgeable people in Atlanta why some judgment like *National Pride at Work* had not occurred in Georgia. After all, the Peach State Super-DOMA passed at the same time as Proposal 2 in Michigan and had more than three times the number of words (136 vs. 42). So Question 1's language was arguably more limiting on its face.

Jeff Graham of Georgia Equality was the first person to offer an explanation for the absence of consequential judicial action in the Peach State.

GRAHAM: There haven't been any court cases addressing Question 1's significance that I'm aware of. So from that perspective, I don't know there's a lot of meaning to it from a practical point of view.

Two or three years ago, we addressed civil unions. In a statewide poll, 60 percent of respondents favored them. We've also done local polling in specific jurisdictions around employment nondiscrimination.

Georgia Equality's concern is not allowing our actions to inadvertently set off legal proceedings we may not be prepared to fight. So we react very cautiously, not reporting any of our poll findings in the media as an intentional choice.

Our worry has been that, say, if a municipality limited domestic benefits only to the unmarried partners of homosexuals, its action would spark litigation under Question 1. We try to avoid triggering lawsuits in the work we do.

Q: Yet Question 1 neither negated the existing county and municipal domestic-partner programs nor the creation of new ones in other places?

GRAHAM: Yes, that's correct.

Q: And apparently no one has seriously made the argument that these public employers are violating Question 1?

GRAHAM: No.

Q: Not even any conservative interest groups like the Georgia Christian Coalition?

GRAHAM: No.

Q: Why is that, do you think?

GRAHAM: That's a good question.

At the end of the day, I think the real motivation for the amendment was political. It was intended to facilitate Republican control of both the House and Senate in the state legislature, which they did. So the politics were about getting out the vote for the Republican Party, and securing a win for George W. Bush in his second term. I believe that was the true motive, more so than trying to disrupt families.

So in one sense, thank goodness for that.

It may also be that the thought hasn't occurred to them.

To be honest, although I'm happy to talk with you, as I'm sure everyone else in the Atlanta LGBT community is, frankly, there's a part of me that gets a little nervous bringing up this issue. I don't want anyone to give our opposition any ideas. "Oh my goodness, we can actually file lawsuits and overturn things?"

So we may have just been lucky.

My conversation with Debbie Seagraves, the executive director of the ACLU of Georgia, reinforced Jeff Graham's comments. After introducing Michigan's Super-DOMA implementation story, I asked Seagraves, "Why hasn't the same kind of judicial action happened in Georgia, in terms of test cases being brought against the City of Atlanta or Fulton County or whatever the circumstance may be?" In response, she raised a finger to her mouth and went, "*Sshhh*," to halt the question. "I don't know. Maybe they just don't want a court case."

Next came Gregory Nevins, the supervising senior staff attorney of the southern regional office of Lambda Legal, a national LGBT legal, education, and advocacy organization:

NEVINS: Question 1 put a chill on the prospect for any broad-based domestic partnership legislation anywhere in Georgia. So it has the effect of taking some things off of the table.

But as a practical matter in a state that doesn't have any nondiscrimination laws or even hate-crimes prohibitions, I don't know how realistic it would have been to get any relationship rights off the ground in the first place.

Yet the really outlandish Super-DOMA enforcement effects have come to pass only in places like Michigan and Ohio.

Q: So Question 1 served mainly as a preemptive strike against future benefits?

NEVINS: Correct. I don't know the whole impetus of where the Michigan decision came from, but it's always been my thought that the full ugliness of these amendments hasn't appeared yet because the idea is to get as many of them passed as can be. Proponents don't want people thinking about what other negative effects might occur.

In Virginia, there was a long-standing attorney general's opinion that said same-sex couples weren't protected by domestic violence statutes. Then when the marriage amendment was proposed and people started talking about domestic violence issues in Ohio, the Virginia attorney general's opinion shifted 180 degrees. And all of a sudden, those couples were covered by it.

Q: I find it interesting that so many counties and municipalities here offer domestic-partner benefits to the same-sex partners of their employees.

In Michigan, as you know, the state supreme court in 2008 became the first one nationally to authoritatively interpret the meaning of a Super-DOMA as applied to same-sex couples. It ruled that the public employees of the state cannot receive benefits for their same-sex domestic partners.

So there's a disconnect here in Georgia in terms of the constitutional language and what's really happening on the ground across various local jurisdictions.

NEVINS: So far, I think there's a handy legal answer for that discrepancy. Georgia went through that cycle before 2004. There were two decisions by the Georgia Supreme Court, one in 1995, and the other in 1997, about Atlanta's ability to offer domestic-partner benefits.

So the concept of providing for one's dependents seems to been addressed by the Georgia Supreme Court. No further challenge has been launched since 2004.

Nevins was absolutely correct about *City of Atlanta* v. *McKinney* (1995) and *City of Atlanta* v. *Morgan* (1997), in which the Georgia Supreme Court ultimately adjudicated that Atlanta's Domestic Partnership Benefits Ordinance of 1996 was consistent with state law. Nonetheless, a highly motivated attorney like David Langdon, the author and protector of Ohio's Issue 1, could have made a compelling legal argument that, by authorizing the adoption of Georgia's Question 1, Peach State voters in 2004 intended to overturn any prior state-court precedent to the contrary. To be sure, amendments to the federal constitution for the purpose of overriding U.S. Supreme Court precedents have occurred. So why not at the state level as well?

At any rate, no sweeping high-court judgments like *National Pride at Work* came up in Georgia and the other Super-DOMA states. I think the key to understanding the variation in this state judicial landscape is the role of interest groups. As Gregory Nevins pointed out, "[T]he really outlandish Super-DOMA enforcement effects have come to pass only in places like Michigan and Ohio." And what common denominator did those two Midwestern states have that other jurisdictions did not? The answer: vigorous, well-funded private organizations with vested policy interests in protecting and implementing the Super-DOMAs they had struggled long and hard to place on the ballot and had catapulted to popular approval. This and other chapters chronicle the tenacity of Ohio's Citizens for Community Values in using Issue 1 in state court whenever possible. CCV's lead attorney, David Langdon, a highly experienced litigator,[10] was always available to invoke the Buckeye State's marriage amendment before the Ohio bench. A similar story of dogged enforcement of Proposal 2 by the American Family Association of Michigan and its Wolverine State legal affiliates could be recounted.

In contrast, the Super-DOMAs in Georgia, North Carolina, Texas, and Wisconsin were all referenda placed on the ballot by state legislatures. Thus, the authors and sponsors of Question 1, Amendment 1, Proposition 2, and Referendum 1 were state legislators primarily motivated by local politics and a desire to increase the turnout of conservative voters (Biggers 2014, 86–87). Accordingly, once their referenda passed on Election Day, lawmakers went on to address other matters on their political agendas and were not concerned

[10] A 2015 search of the LexisNexis legal database from 2004 onward revealed that David Langdon appeared as counsel of record in more than thirty Ohio state-court decisions. He did not represent Citizens for Community Values in all such cases, nor did those judicial rulings necessarily address Issue 1. Instead, this datum confirms Landgon's extensive experience as a litigator.

about enforcing their constitutional progeny in state court the way that the Michigan and Ohio amendment proponents were. The adage "out of sight, out of mind" pertained to Super-DOMA implementation in Georgia, North Carolina, Texas, and Wisconsin, whereas Proposal 2 and Issue 1 were always in the consciousness of their Michigan and Ohio interest-group guardians. Moreover, these citizen-initiative champions had the legal resources to seek judicial protection of their constitutional offspring.

CONCLUSION

Wisconsin's court of last resort was the only high bench to alleviate unambiguously the legal disabilities inflicted by Super-DOMAs, but only near the very end of America's war on same-sex couples and their families, when federal salvation from the state-law onslaught appeared manifestly on the horizon. In contrast, early in the country's campaign of hostility against LGBT communities, the Michigan Supreme Court strove mightily to exacerbate the constitutionally based deprivations levied on gay and lesbian pairs, despite clear and convincing evidence that most Michiganders did not intend such a harsh result. No other state supreme courts, however, took decisive measures one way or the other.

When state intermediate appellate courts acted, most of their decisions failed as well to ease the heavy legal burdens placed on the shoulders of same-sex couples. Typically, only judges who owed political allegiance to local bastions of social tolerance, such as in the Austin branch of the Texas Court of Appeals or the Franklin County trial courts in Ohio, offered any legal respite to lesbian and gay families.

In short, in contrast to *Gay Rights and American Law*'s findings for the last two decades of the twentieth century, the judicial officials who followed and were selected in large measure by the same local forces that chose state lawmakers were generally no more disposed to treat beleaguered sexual minorities with compassion than the proponents who put Super-DOMAs on the books in the first place.[11]

[11] See also Hume (2013) and Lewis, Wood, and Jacobsmeier (2014).