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# How a Marriage Discrimination Amendment Would Disrespect Democracy in Minnesota

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# How a Marriage Discrimination Amendment Would Disrespect Democracy in Minnesota

## **Abstract**

The proposed marriage discrimination amendment to the Minnesota Constitution is profoundly anti-democratic. It is extremely wide-ranging in its scope, it obliterates the opportunity of the LGBT community to legislatively advance its interests in the area, it falsely assumes characteristics of the state judiciary that do not in fact exist, and it is drafted with language that is particularly hostile to LGBT concerns and democracy in general. It was a triumph for reason and democracy that this amendment was defeated in 2006. It should never be introduced again. In the unfortunate event that it is introduced again, it should be resoundingly defeated.

## **Keywords**

Minnesota law, gay marriage, same sex marriage, civil unions, domestic partnerships, lesbian and gay rights, human rights ordinances

## **Disciplines**

Civil Rights and Discrimination | Family Law | Sexuality and the Law

## HOW A MARRIAGE DISCRIMINATION AMENDMENT WOULD DISRESPECT DEMOCRACY IN MINNESOTA

Anthony S. Winer<sup>†</sup>

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In April 2006, the Judiciary Committee of the Minnesota Senate defeated a proposed amendment<sup>1</sup> to the state constitution.<sup>2</sup>

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<sup>†</sup> Professor of Law, William Mitchell College of Law. Thanks are due to my research assistant, Elizabeth Dwyer. Appreciation is also expressed to Professor Eileen Scallen and Philip Duran, Staff Attorney for OutFront Minnesota, for their helpful comments and notes. Special thanks are also in order to Ann DeGroot, Executive Director of OutFront Minnesota. Any faults or misjudgments herein are exclusively my own.

1. H.F. 6, 84th Leg., Reg. Sess. (Minn. 2005).

2. The State Senate Judiciary Committee defeated the proposal, through a four-to-five vote, on April 4. See Tom Scheck, Committee Defeats Marriage Amendment (Apr. 4, 2006), <http://minnesota.publicradio.org/display/web/2006/04/04/marriagehearing/>.

This amendment would have permanently affixed sexual orientation discrimination into the text of that document. Its proponents tried to advance it as a “marriage” amendment, but its effects would have extended far beyond formal marriage. It would have foreclosed the recognition of same-sex civil unions and domestic partnerships as well.<sup>3</sup> Most probably, it also would have been interpreted to prohibit other civil protections for lesbian and gay couples, such as joint health insurance benefits—especially for public employees.

In spite of this proposal’s defeat last year, some are still trying to keep alive the prospect of adopting such an amendment in the future.<sup>4</sup> This effort should be resisted. As noted above, the amendment had much more wide-ranging effects than was commonly realized at the time. But the obtrusively broad scope of this amendment is only part of what makes it so pernicious. The main issue for confrontation is the amendment’s deeply anti-democratic nature.<sup>5</sup>

Using a constitutional amendment to try to resolve a compelling issue in political discourse is inherently anti-democratic. Any issue that is made the subject of a constitutional amendment is thereby placed outside the sphere of democratic decision making. If a constitutional amendment on any particular issue is adopted, it no longer matters thereafter what either the popular or legislative will is or may become on that issue. The resolution of the issue is foreclosed by the permanence of the constitutional amendment.

This deadening effect on democracy would be especially preclusive in the field of lesbian and gay rights in Minnesota. Even if one is not predisposed to be sympathetic to lesbian and gay rights, one can observe clear trends in recent Minnesota legal and political history demonstrating that lesbian and gay rights have been the subject of vibrant and dynamic public discussion.<sup>6</sup> The treatment of lesbian and gay rights in this state has been very much a subject of democratic debate and majoritarian consideration.

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3. See *infra* Part I.

4. E.g., Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029 (2007).

5. See Dale Carpenter, *Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 89 (2004) (providing an analogous point regarding proposed amendments to the Federal Constitution).

6. See *infra* Parts II, III.

Historically, Minnesota has allowed the Lesbian, Gay, Bisexual and, Transgender (“LGBT”) community to pursue its aims in the marketplace of public ideas.<sup>7</sup> Sometimes the LGBT community has won the democratic debate, and sometimes it has lost.<sup>8</sup> But the debate has always been open. On those occasions when the LGBT community has lost, it has always had the option to return to the public forum and once again press its claims in the democratic arena. A constitutional amendment of this type would fly in the face of this tradition and cut off legislative debate on this centrally important issue.

The Minnesota Legislature—and its electorate—has thus been open, to varying degrees over time, to the concerns of the LGBT community.<sup>9</sup> The same is really not quite as true concerning the most significant actions of the Minnesota courts.<sup>10</sup> In general, the most cogent actions of the more senior and influential Minnesota courts in recent years have demonstrated a notable coolness to the interests of the LGBT community.<sup>11</sup> The one definitive state court ruling that sided wholly with the state’s LGBT community was issued by a mere county trial court,<sup>12</sup> had limited direct effects, and was, in any event, quickly superseded by federal case law.<sup>13</sup> In general, our state courts have been notably slow to come to the aid of the LGBT community outside the legislative process.<sup>14</sup>

Accordingly, there is no good reason to suppose that any action would be forthcoming from Minnesota courts to judicially alter the majoritarian character of the debate. The potential for court action therefore presents no adequate basis for a constitutional amendment in this area.

But even if Minnesota courts (contrary to past behavior) were to become more actively in favor of the LGBT community in this area—and even if concern over this trend encouraged a constitutional amendment—any amendment could serve its aims just as effectively after any such judicial determination as before it. The eagerness of some activists to rush to amendment—even

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7. *See infra* Part II.

8. *See infra* Part II.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part III.

12. *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001); *see infra* Part III.D.

13. *See infra* Part III.D.

14. *See infra* Part III.

before any state court has given any credible indication of an expansionary trend in this area—betrays those advocates' distrust for the democratic process.

Furthermore, the text of the specific amendment that pro-discrimination activists are advancing is so broad that their real aim cannot be consistent with the protection of legislative democracy. Rather, the extreme breadth of their proposal strongly indicates a disdain—rather than a respect—for the democratic process.

In summary, respect for legislative democracy—quite apart from any preconceived notions about the value of same-sex relationships—requires the rejection of any constitutional amendment intended to discriminate against such relationships.

#### I. THE BROAD SCOPE OF THE PROPOSED AMENDMENT

Before proceeding further with discussions concerning the proposed amendment, it is appropriate to briefly examine its text and comment on its extreme breadth. It is phrased so broadly that it almost certainly precludes same-sex civil unions, as well as formal marriages. And it might also prevent certain private arrangements, such as employer-provided health insurance for the same-sex partners of employees. The sheer breadth of the proposal is in itself a strong reason for disapproving it. The proposed language reads as follows:

“Only the union of one man and one woman shall be valid or recognized as a marriage in Minnesota. Any other relationship shall not be recognized as a marriage or its legal equivalent.”<sup>15</sup>

The remarkable breadth of the language emanates chiefly from its second sentence, which declares that “[a]ny other relationship shall not be recognized” as the “legal equivalent” of marriage.<sup>16</sup> One of the primary characteristics of civil unions—as they have developed in states such as Vermont<sup>17</sup> and Connecticut<sup>18</sup>—is precisely that they are the exact equivalent, in terms of statutory rights and responsibilities, of formal marriage.<sup>19</sup>

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15. S.F. 1691, 84th Leg., Reg. Sess. (Minn. 2005) (containing the language of the most recent bill). Professor Collett cites identical language in an earlier bill. Collett, *supra* note 4, at 1048.

16. Minn. S.F. 1691.

17. VT. STAT. ANN. tit. 15, §§ 1201–07 (2002 & Supp. 2006).

18. CONN. GEN. STAT. ANN. §§ 46b-38aa to 46b-38pp (Supp. 2006).

19. Indeed, one aspect of the opinion of the Vermont Supreme Court in

Their appeal and acceptability to many gay-rights activists lies principally in this equivalence.

The proposal declares that no relationship, other than between a man and a woman, can be the “legal equivalent” of marriage.<sup>20</sup> By its terms, this language would seem to preclude a civil-union regime in which the partners to a civil union receive the equivalent rights and undertake the equivalent obligations of marriage.

The probable effects of this language extend far beyond the disavowal of civil unions and domestic partnerships. Several courts around the country have already interpreted language such as this in recently adopted state constitutional amendments. Many have interpreted these provisions to prohibit virtually any type of recognition of same-sex couples for any governmental purpose.

The most recent example is a ruling from the Michigan Court of Appeals holding that Michigan’s amendment—broadly similar to the Minnesota proposal—precludes any grant of same-sex domestic partner benefits to any employees of the state or its governmental subdivisions.<sup>21</sup> An example from last year is from an Ohio appellate court holding that Ohio’s constitutional amendment prevented that state’s domestic violence statute from protecting unmarried couples—even those in different-sex relationships.<sup>22</sup> Each of the state constitutional amendments varies from the others at least slightly in some particulars,<sup>23</sup> and other courts have reached

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*Baker v. State* was that civil unions would be an acceptable mode of relief under the court’s decision only to the extent that civil unions provided for the same rights and responsibilities as formal marriage. 744 A.2d 864, 886 (Vt. 1999).

20. Minn. S.F. 1691.

21. Nat’l Pride at Work v. Michigan, No. 265870, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007). The Michigan amendment reads as follows: “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.” *Id.* at \*1 n.2 (quoting MICH. CONST. art. 1, § 25). The court of appeals reversed the trial court. *Id.* at \*1.

22. *State v. Ward*, 849 N.E.2d 1076, 1082 (Ohio Ct. App. 2006). *Contra State v. Burk*, 843 N.E.2d 1254 (Ohio Ct. App. 2005).

23. The Ohio amendment reads as follows:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

OHIO CONST. art. XV, § 11; *see also Burk*, 843 N.E.2d at 1255 (quoting OHIO CONST. art. XV, § 11).

different conclusions.<sup>24</sup> But there is no shortage of examples for the very broad application of these kinds of amendments.

Furthermore, the Minnesota proposal language goes on to suggest that it may prohibit private arrangements that provide marriage-like considerations for same-sex couples or families.<sup>25</sup> The proposal states that “[a]ny other relationship shall not *be* recognized as a marriage or its legal equivalent.”<sup>26</sup> The language does not say that the State of Minnesota shall not recognize such a relationship; rather, it says that no such relationship shall “*be*” recognized.<sup>27</sup> The State of Minnesota is not stated as the party whose recognition is precluded, but instead the broader phrase—using the word “*be*”—is deployed.<sup>28</sup> The inference is entirely plausible, even reasonable, that no one in the state having the capacity through contractual means (or any other means) shall recognize an alternative relationship as a marital equivalent.<sup>29</sup>

This could apply in a broad variety of contexts: from those as relatively minor as “family” gym club memberships to those as major as “family” coverage or “domestic partner” coverage in employee health benefit programs. Clearly the gym clubs and employee benefit plans are in some sense “recognizing” the same-sex relationships in these contexts as something approximating a marital relation. It would be open to a reviewing court to interpret

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24. *E.g.*, Nat'l Pride at Work v. Granholm, No. 05-368-CZ, 2005 WL 3048040, at \*7 (Mich. Cir. Ct. Sept. 27, 2005) (holding that Michigan's constitutional amendment did not preclude public employers from recognizing same-sex domestic partners for purposes of providing medical insurance benefits), *rev'd sub nom.* Nat'l Pride at Work v. Michigan, No. 265870, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007); *Burk*, 843 N.E.2d at 1258 (holding “that Ohio's domestic violence statute, insofar as it defines ‘family or household member’ to include unmarried individuals who live as spouses, is constitutional and coexists in harmony” with Ohio's constitutional amendment).

25. *See* S.F. 1691, 84th Leg., Reg. Sess. (Minn. 2005).

26. *Id.* (emphasis added).

27. *Id.* (emphasis added).

28. *Id.*

29. *See id.* The inference is all the more foreseeable since an alternative bill was introduced at broadly the same time as the language favored by Professor Collett. *See* Collett, *supra* note 4, at 1048. The language of that alternative bill indeed limited its effect to non-recognition “by the state or any of its subdivisions.” H.F. 6, 2d Engrossment, 84th Leg., Reg. Sess. (Minn. 2005). Assuming the language favored by Professor Collett was adopted as an amendment, a reviewing court could easily draw the conclusion that—since the language is broader than the earlier version limited to the state government for its effects—the broader language in the amendment should not be so limited in the way that the earlier (unadopted) language was limited.

the proposed constitutional language to preclude these private relationships, as well as government sanctions.

## II. LGBT RIGHTS IN MINNESOTA LEGISLATIVE ACTION

The history of legislation concerning Minnesota's LGBT community presents a varying pattern of victories and defeats over time. The first advances for the community were recorded at the level of municipal legislation in the state's two largest cities. The history of these municipal legislative efforts was somewhat tumultuous in St. Paul—at least in the early years—but has been somewhat less eventful in Minneapolis.

### A. *The Minneapolis and St. Paul Human Rights Ordinances*

The Minneapolis Civil Rights ordinance was amended in 1974 to include protection on the basis of “affectional or sexual preference.”<sup>30</sup> At that time, the ordinance prohibited discrimination in employment, labor relations, real property transactions, public accommodations, public services, and banking.<sup>31</sup> Protected categories that had previously been included were race, color, creed, religion, ancestry, national origin, and sex.<sup>32</sup> The addition of a sexual orientation category to a civil rights ordinance was a substantially progressive act in 1974.<sup>33</sup> Since this amendment took effect, there has been little agitation for any alteration to its text or effects.

In St. Paul, the legislative situation has been somewhat more lively over the years. The City of St. Paul had an anti-discrimination ordinance in place as early as 1956.<sup>34</sup> At that time, the subject area chiefly covered was employment discrimination.<sup>35</sup> The classifications initially protected were race, color, religious creed,

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30. Minneapolis, Minn., Ordinance 99-68 (1974) (amending MINNEAPOLIS, MINN., CODE OF ORDINANCES ch. 945 (relating to Civil Rights)).

31. *Id.* § 3.

32. *Id.* §§ 1–4.

33. The amendment defined “affectional or sexual preference” as “having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.” *Id.* § 2.

34. ST. PAUL, MINN., LEGIS. CODE § 74.01 (1956).

35. *E.g.*, *id.* § 74.01(2) (providing that “discrimination in employment tends unjustly to subject groups of inhabitants of any city to depressed living conditions thereby causing injury to the public safety, general welfare, and good order of any city and endangers the public health thereof”).

national origin, and ancestry.<sup>36</sup> The City Council amended the law in 1974, adding “affectional preference” to the list of protected classifications.<sup>37</sup> This generally corresponded in time and effect to the amendment in Minneapolis.

The St. Paul amendment was not met with universal enthusiasm by the political community.<sup>38</sup> During the late 1970s, the singer Anita Bryant was leading a national campaign to oppose the nascent gay rights movement.<sup>39</sup> Her campaign used the moniker, “Save Our Children.”<sup>40</sup> Largely as a result of this campaign’s efforts in St. Paul, a popular referendum repealed the 1974 “affectional preference” amendment in 1978.<sup>41</sup>

The issue was reawakened in 1990 when the City Council once again added “sexual or affectional orientation” to the list of protected classes in the ordinance.<sup>42</sup> This time, the definition employed in the St. Paul ordinance was noteworthy. During this period, the phrase “sexual orientation” was generally considered to apply to affective orientation, and, accordingly, to comprise homosexual, heterosexual, or bisexual orientation. State statutes in effect at this time were broadly consistent with this view of the meaning of “sexual orientation.”<sup>43</sup>

The St. Paul ordinance took the definitional step of attempting to include transgender persons as well.<sup>44</sup> The definition included not only homosexuality, heterosexuality, and bisexuality, but also “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or one’s biological femaleness.”<sup>45</sup> This was one of the earliest legislative efforts to specifically include transgender persons in civil rights protections based on sexual orientation.

Then, in 1991, anti-gay activists again agitated for repeal of the

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36. *Id.* § 74.01(1).

37. Telephone Interview by Elizabeth Dwyer with Ann DeGroot, Executive Director, OutFront Minnesota, in Minneapolis, Minn. (Feb. 15, 2007).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. ST. PAUL, MINN., LEGIS. CODE § 183.01 (1990).

43. For example, the 1993 version of the Wisconsin state anti-discrimination law defined “sexual orientation” as “having a preference for heterosexuality, homosexuality, or bisexuality, having a history of such a preference or being identified with such a preference.” WIS. STAT. § 111.32(13)(m) (1993).

44. *See* ST. PAUL, MINN., LEGIS. CODE, § 183.02(26).

45. *See id.*

civil rights protections for LGBT persons—again using the mechanism of a popular initiative.<sup>46</sup> In response, activists of the LGBT community organized a vibrant “No Repeal” campaign.<sup>47</sup> This “No Repeal” campaign was successful,<sup>48</sup> and the coverage of sexual orientation—with its relatively comprehensive definition—has remained undisturbed in the St. Paul ordinance ever since.<sup>49</sup>

*B. The Minnesota Hate Crime Statute*

The Minnesota legislature enacted a comprehensive hate crime statute in 1989.<sup>50</sup> This was a statute of the sentence-enhancement variety that provided for enhanced punishment of those convicted defendants who had perpetrated certain violent crimes “because of” the particular societal group(s) to which the victims belonged.<sup>51</sup> The passage of this statute was contemporaneous with an active national movement in almost all states to pass sentence-enhancement statutes of this kind.<sup>52</sup>

Not all of these state statutes contained express protections for members of the LGBT community, and some still do not. The Minnesota statute, however, has expressly included “sexual orientation” in its list of protected classifications from its inception.<sup>53</sup>

Accordingly, in the adoption of the state’s first comprehensive sentence-enhancement hate crime statute, the legislature demonstrated its interest in helping to secure the personal safety of members of the state’s LGBT community. There has never been any serious effort to amend or repeal the hate-crime protections of

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46. Jim Ragsdale, *Gay-Rights Issue May Be Decided by Voter Turnout*, ST. PAUL PIONEER PRESS (Minn.), Nov. 1, 1991, at 1A.

47. *Id.*

48. *Id.*

49. See ST. PAUL, MINN., LEGIS. CODE, § 183.02(26).

50. Act of May 25, 1989, ch. 261, 1989 Minn. Laws 892.

51. *Id.*

52. See generally Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 419–27 (1994) (providing a background on the general movement to enact hate crime statutes in the late twentieth century).

53. The current hate crimes act is codified at a variety of statutory sections. E.g., MINN. STAT. § 609.595, subdvs. 1a, 2, 3 (2006) (criminal damage to property in the second-, third-, and fourth-degrees); § 609.749, subd. 3 (aggravated violations of harassment and stalking); § 609.2231, subd. 4 (assaults motivated by bias); § 626.5531 (reporting of crimes motivated by bias). Each of these sections includes “sexual orientation” as a protected classification.

this statute for LGBT Minnesotans.

*C. The Minnesota Civil Rights Act*

Minnesota adopted the predecessor of its current Civil Rights Statute in 1967.<sup>54</sup> The law in force at that time prohibited discrimination in employment, housing and real property, public accommodations, public services, and education<sup>55</sup> on the basis of race, color, creed, religion, or national origin.<sup>56</sup> Over the years, the categories of people protected from discrimination increased. The current categories are: race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.<sup>57</sup>

The legislature added sexual orientation as a protected classification in 1993.<sup>58</sup> This legislative change substantially improved the legal position of LGBT people in the state, because for the first time they were legally protected statewide from being fired, evicted, or refused business based on their LGBT status.<sup>59</sup> There was opposition to this legislation while the legislature was considering it. Indeed, the proponents of the legislation were required to include—as part of the statutory modification—assurances that the inclusion of sexual orientation did not express approval of homosexuality, bisexuality, or any equivalent lifestyle; did not authorize affirmative action with respect to “homosexuality or bisexuality;” and did not authorize same-sex marriage.<sup>60</sup>

Thus, although many LGBT people justly viewed the passage of statewide-civil-rights protections as a victory, the victory was acquired at some cost. The popular uneasiness at the time with the issue of sexual orientation caused the legislature to insert additional language that many might feel to be irrelevant and disrespectful. But in the give-and-take of legislative debate, this was the text of the law that the legislature ultimately adopted.

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54. Act of May 25, 1967, ch. 897, 1967 Minn. Laws 1932.

55. *Id.* §§ 10 (housing), 11 (education), 12 (employment), 13 (real property), 14 (public accommodations), 15 (public services), 16 (educational institution).

56. *E.g., id.* § 13.

57. MINN. STAT. § 363A.08.

58. Act of April 2, 1993, ch. 22, § 19, 1993 Minn. Laws 142.

59. *See generally id.* ch. 22, 1993 Minn. Laws 121.

60. *Id.* § 7, 1993 Minn. Laws 126 (codified at MINN. STAT. § 363A.27 (2006)). *Cf.* MINN. STAT. § 609.293, subdiv. 5 (2006) (criminal prohibition of sodomy), *invalidated by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

*D. The Minnesota State DOMA*

Another enactment by the state legislature during the 1990s was more uniformly negative for the LGBT community. In 1997, the legislature passed the state's so-called "Defense of Marriage Act" ("DOMA").<sup>61</sup> This was also part of a national trend that followed closely upon the 1993 decision of the Hawaii Supreme Court in *Baehr v. Lewin*.<sup>62</sup>

In *Baehr*, the state supreme court held that Hawaii's ban on same-sex marriage discriminated on the basis of sex, and therefore needed to satisfy strict scrutiny in order to withstand attack under the equal rights amendment contained in that state's constitution.<sup>63</sup> This first *Baehr* opinion thus did not definitively require the state to recognize same-sex marriages, but only required the state to demonstrate on remand that the exclusion of same-sex couples satisfied strict scrutiny.<sup>64</sup> Nevertheless, the shock waves felt throughout the country were enough to set off a wave of state "Defense of Marriage Acts" in the next few years.<sup>65</sup>

The Minnesota DOMA actually amended a variety of statutes. The law's most central provisions added to the list of prohibited marriages "a marriage between persons of the same sex,"<sup>66</sup> and then added this language to the statutory section listing the types of prohibited marriages:

"A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state."<sup>67</sup>

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61. Act of June 2, 1997, art. 10, 1997 Minn. Laws 1857 (codified at MINN. STAT. §§ 517.01, .03, .08, .20 (2006)).

62. 852 P.2d 44 (Haw. 1993).

63. *Id.* at 63–68.

64. *Id.* at 68 ("On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that [the same-sex marriage exclusion] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.").

65. Charles E. Mauney, Jr., *Landmark Decision or Limited Precedent: Does Lawrence v. Texas Require Recognition of a Fundamental Right to Same-Sex Marriage?*, 35 CUMB. L. REV. 147, 153 n.27 (2005) (listing "[s]tates with statutes or state constitutional amendments prohibiting same-sex marriage").

66. MINN. STAT. § 517.03, subdiv. 1(a)(4) (2006).

67. *Id.* § 517.03, subdiv. 1(b).

This DOMA—which is still in force among the Minnesota statutes today—is of course a purely statutory prohibition, rather than a constitutional one. It is completely appropriate that, if Minnesota is to have a law restricting same-sex marriage, it take the form of a statute rather than a constitutional amendment. Given the fluidity of Minnesota legislative activity on the position of LGBT people in society, it is appropriate that the popular opinion not be fettered in this area by a constitutional prohibition.

*E. Health Care Benefits Under the Minneapolis Domestic Partner Ordinance*

In 1993, the Minneapolis City Council adopted two distinct resolutions that had the combined effect of making health insurance more available to domestic partners of city employees. The first authorized “limited reimbursement to city employees for health care insurance costs for same sex domestic partners,”<sup>68</sup> while the second extended “health care coverage for the partners of employees in same-sex domestic partnerships.”<sup>69</sup> These “domestic partner” resolutions were intended to provide the domestic partners of city employees with benefits more comparable to those received by the married spouses of similarly situated city employees.

These Minneapolis City Council resolutions were invalidated in two successive state court rulings. First—in an opinion notable for its hostility to lesbian and gay perspectives<sup>70</sup>—the state district court determined that the two resolutions were *ultra vires*.<sup>71</sup> Next,

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68. See *Lilly v. Minneapolis (Lilly II)*, 527 N.W.2d 107, 109 (Minn. Ct. App. 1995) (describing Res. 93R-106, Minneapolis City Council (Minn. April 2, 1993) (enacted)).

69. City Council Res. 93R-342, Minneapolis, Minn. (August 27, 1993), *quoted in Lilly II*, 527 N.W.2d at 109.

70. For example, as one of its purported “conclusions of law,” the district court stated that

[h]omosexual marriage is an oxymoron since homosexuals are defined as those ‘whose desire for sexual relations is directed to a person of the same sex,’ and marriage is defined as the union of ‘one man and one woman . . . whose association is founded on the distinction of sex.’

*Lilly v. Minneapolis (Lilly I)*, No. MC 93-21375, 1994 WL 315620, at \*4 (Minn. Dist. Ct. June 3, 1994). As an additional “conclusion of law,” the district court offered the view that “[r]edefining family relationships is not a proper subject for municipal regulation.” *Id.* Although both of these quotations were based in prior Minnesota court opinions, they remain expressions of judicial opinion, rather than objective fact.

71. *Lilly I*, 1994 WL 315620, at \*6.

this opinion was affirmed by the state court of appeals<sup>72</sup> in language that was somewhat more moderate, but no more receptive to lesbian and gay concerns.<sup>73</sup>

*F. Overview of the Recent History of Legislation in Minnesota*

This brief overview of the recent history of legislation in Minnesota demonstrates that the status of the LGBT community has been continually a subject of legislative consideration and deliberation. It has been incremental and dynamic.

It has been incremental in two senses. First, it has been incremental because it has proceeded from one locality to the next, rather than becoming effective in all localities at once. Minneapolis adopted its LGBT-protective civil rights ordinance in 1974.<sup>74</sup> After one legislative false start, Saint Paul effectively amended its human rights ordinance sixteen years later in 1990. Then three years later, the State of Minnesota amended its Human Rights Act to include anti-discrimination protection on the basis of sexual orientation.<sup>75</sup> This occurred in a step-by-step fashion over a period of years, rather than in one instance throughout the state.

It has also been incremental because it proceeded from one subject matter to the next—rather than applying to all areas affecting LGBT people at the same time. There are various respects in which state laws impact LGBT people. In Minnesota, each of these contexts has been addressed separately over time, rather than all of them simultaneously. The earliest of these actions was the Minneapolis LGBT-inclusive civil rights ordinance in 1974.<sup>76</sup> Then the Minnesota Legislature adopted its hate crime statute in 1989, which included sexual orientation as a protected category from its inception.<sup>77</sup> Marriage for same-sex couples was statutorily foreclosed in 1989 with the Minnesota DOMA,<sup>78</sup> and in

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72. *Lilly II*, 527 N.W.2d at 108.

73. The insistence by the court of appeals in its opinion that sexual orientation discrimination is a “statewide problem,” coupled with the court’s interpretation of a statute in such a way as to assure that the problem remains unaddressed, may be narrowly defensible as a matter of judicial strategy, but could hardly be said to be responsive to the issue of discrimination itself. *See id.* at 108 (referencing a statewide problem).

74. *See supra* Part II.A.

75. *See supra* note 58.

76. *See supra* notes 30–33.

77. *See supra* note 50.

78. *See supra* notes 61, 66–67.

1993, the Minneapolis City Council attempted to provide health care benefits for Minneapolis domestic partners.<sup>79</sup> These events demonstrate a step-by-step pattern of legislative enactment, rather than an all-at-once approach.

It has also been dynamic in the very evident sense that the resulting policies have varied greatly in their perceived effects on the LGBT community. Some of these legislative actions, such as the early city civil-rights protections and the state hate-crime statute, have been positive. Others, such as the state DOMA, have been more completely negative. The members of the Minnesota LGBT community have needed to withstand a significant number of “highs” and “lows” over the years at the hands of the state and local legislatures.

But in almost every case of legislation specifically addressing the LGBT community,<sup>80</sup> it has been the will of the relevant legislature that has prevailed. With an amendment to the state constitution permanently prohibiting recognition of same-sex unions, the opponents of the LGBT community on this issue would be making an “end run” around the democratic process. This would be unfair to the LGBT community, which in the past has always been required to run the legislative gauntlet of popular opinion. Now—to the extent that the LGBT community may actually in the future convince the legislature that same-sex civil unions, domestic partnerships, or even marriage would be advisable or appropriate—opponents would be removing the democratic mechanism from the LGBT community’s reach just as it may serve to benefit them.

### III. THE RECORD OF LGBT RIGHTS LITIGATION IN MINNESOTA COURTS

The record of major cases decided by Minnesota state courts in the field of LGBT rights is by no means one-sided or partisan in favor of advancing the LGBT cause. Indeed, over the years, in several major cases specifically touching on LGBT status issues, Minnesota courts have been notably cool to the expansion of LGBT protections. It is accordingly unwarranted to assume that state

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79. See *supra* notes 68–69.

80. The exception would be the result in the *Lilly* cases, in which the lower court invalidated key provisions of the Minneapolis domestic partners ordinance. See *supra* notes 68–73 and accompanying text.

courts will rush to mandate same-sex marriage.

#### A. *Baker v. Nelson*

As is frequently noted,<sup>81</sup> Minnesota was one of the first jurisdictions whose courts addressed issues of same-sex marriage. In the 1971 case of *Baker v. Nelson*, the Minnesota Supreme Court held that the statutory exclusion of same-sex couples from marrying did not violate the U.S. Constitution.<sup>82</sup>

In this decision, the Minnesota high court was not the least bit receptive to the concept of same-sex marriage. First, the court held that Minnesota state marriage statutes—which used arguably gender-neutral language, at least in places—nevertheless did not authorize marriage between persons of the same sex.<sup>83</sup> Second, in holding that the Federal Constitution did not require a different arrangement, the court was unequivocal.<sup>84</sup> The unanimous opinion recognized the petitioners' arguments based on such broad U.S. Supreme Court precedents as *Loving v. Virginia*<sup>85</sup> and *Griswold v. Connecticut*,<sup>86</sup> but narrowly construed these to support constitutional protection only for marital couples comprising one man and one woman.<sup>87</sup>

Although the *Baker* opinion is over thirty-five years old, it is still the law in Minnesota, and has never been seriously questioned by the state supreme court. The continued applicability of the rule in *Baker* seems, at the very least, inconsistent with an alarmist assertion

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81. For example, Professor Collett makes this reference in her article. See Collett, *supra* note 4, at 1039.

82. 291 Minn. 310, 191 N.W.2d 185 (1971). The other major state court case of the era was from Washington state. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *appeal denied*, 84 Wash.2d 1008 (1974). The holding in *Singer* was broadly to the same effect.

83. *Baker*, 291 Minn. at 312, 191 N.W.2d at 186.

84. *Id.* at 315, 191 N.W.2d at 187.

85. 388 U.S. 1 (1967), *cited in Baker*, 291 Minn. at 314, 191 N.W.2d at 187.

86. 381 U.S. 479 (1965), *cited in Baker*, 291 Minn. at 313, 191 N.W.2d at 186.

87. For example, the *Baker* opinion correctly cites the majority opinion in *Griswold* for Justice Douglas's observation that the statute at issue in that case "operates directly on an intimate relation of husband and wife." *Baker*, 291 Minn. at 313, 191 N.W.2d at 186 (citing *Griswold*, 381 U.S. at 482). But the *Baker* court also went on to cite additional language in *Griswold* of potentially broader scope, without acknowledging its potential applicability ("[T]he very idea of [the *Griswold* statute's] enforcement by police search of 'the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship.'" *Id.* (quoting *Griswold*, 381 U.S. at 485).

that the Minnesota judiciary is poised to impose a constitutional requirement of same-sex marriage availability.

*B. The Lilly Cases*

As noted earlier in this essay,<sup>88</sup> the Minneapolis City Council in 1993 attempted to provide certain health benefits for the same-sex domestic partners of its employees. Both the state district court and the court of appeals ruled against Minneapolis and invalidated the benefits.<sup>89</sup>

The argument advanced by the plaintiff in the cases concerned a Minnesota statute that limited the ability of cities to pay health benefits to the family members of their employees.<sup>90</sup> The statute only permitted benefits to spouses, minor unmarried children, and dependent students under age twenty-five.<sup>91</sup> Both the state district court<sup>92</sup> and the court of appeals<sup>93</sup> accordingly held that the city's action in paying benefits to family members other than those specified in the statute was invalid under the statute.

But as the dissenting judge in the court of appeals decision pointed out, the status of Minneapolis as a home rule charter city (as opposed to a statutory city) made it eminently arguable that the authorization statute did not apply.<sup>94</sup> To meet this point, the court of appeals determined that Minneapolis' decision on how to compensate its own employees was not a "matter of municipal concern," but rather a "statewide problem."<sup>95</sup> Given that determination, the court of appeals then relied on Minnesota

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88. See *supra* notes 68–73 and accompanying text.

89. See *supra* notes 68 and 71.

90. MINN. STAT. § 471.61, subdiv. 1 (2006); cited in *Lilly I*, *passim*; quoted in *Lilly II*, 527 N.W.2d at 110.

91. MINN. STAT. § 471.61, subdiv. 1, 1a.

92. *Lilly v. Minneapolis (Lilly I)*, No. MC 93-21375, 1994 WL 315620, at \*5 (Minn. Dist. Ct. Minn. June 3, 1994) ("Defendant's Council's Resolutions 93R-106 and 93R-342 provide insurance benefits to persons not authorized to receive benefits by [Minnesota Statute section] 471.61.").

93. *Lilly v. Minneapolis (Lilly II)*, 527 N.W.2d 107, 113 (Minn. Ct. App. 1995) ("The City of Minneapolis cannot expand the statute with respect to persons who may receive medical benefits and premiums paid at the request of a city employee when the legislature by clear definition has made the subject matter one of statewide concern and has defined who may receive such benefits.").

94. *Id.* at 114 (Schumacher, J., dissenting) ("There is no basis to conclude that the legislature intended to preempt a home rule charter city's power to provide compensation to its employees in the form of taxable healthcare benefits.").

95. *Id.* at 111 (majority opinion).

Supreme Court authority to the effect that if local legislation “involve[s] a statewide problem,” courts should “narrowly construe” the local legislature’s power to enact the legislation.<sup>96</sup>

It probably suffices to note that a city’s decision about its own compensation of its own employees, paid for by its own residents, will seem to many to be a “matter of municipal concern.”<sup>97</sup> It will also seem to many that a municipal decision to provide health benefits to employees’ families, for which the city’s own taxpayers are more than willing to pay, can be viewed as not being a “statewide problem” at all. Indeed, many might assert that it is not a *problem* of any kind—but rather simply a local determination of appropriate compensation to local officials.

In any event, whichever interpretation one believes is more reasonable, the point still remains that the *Lilly* decisions provide no support at all for the assertion that Minnesota courts are poised to strike down the same-sex marriage exclusion. Quite to the contrary, the indications are largely that there is no basis for such an expectation.

### C. *The Goins Cases*

Another example concerns the pair of decisions issued by the Minnesota appellate courts in 2000 and 2001 regarding the employment discrimination claims of a male-to-female transgender employee at a major Minnesota-based publishing company.<sup>98</sup>

The Minnesota Human Rights Act (“MHRA”) is one of the few in the United States that is designed to prohibit discrimination on the basis of transgender identity.<sup>99</sup> But the language the MHRA technically uses to describe transgender status is somewhat awkward and ambiguous. The element of the definition of the term “transgender” in the MHRA that corresponds to transgender status is that portion of the definition providing that “sexual

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96. *Id.* (citing *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984) in stating that “[m]ost significantly . . . if the local legislation involves a statewide problem, we must apply the supreme court’s most recent directive to ‘narrowly construe’ the city’s power to act ‘unless the legislature has expressly provided otherwise.’”).

97. *See id.* at 111.

98. *Goins v. West Group (Goins II)*, 635 N.W.2d 717 (Minn. 2001); *Goins v. West Group (Goins I)*, 619 N.W.2d 424 (Minn. Ct. App. 2000).

99. *See supra* note 44 (concerning St. Paul’s city ordinance which includes transgender identity). The Minnesota state statute’s language, referenced in the following text, is similar.

orientation” includes “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”<sup>100</sup>

In these cases, the employee had wanted to use the female restroom that was nearest to her workspace.<sup>101</sup> But the employer instead required the employee to use one of two single-occupancy restrooms at more remote locations.<sup>102</sup> In this type of situation, the language of the statute can be treated in a number of different ways. For example, the employee—whose self-image is female but whose external morphology may be male—is being treated differently from employees whose self-image is female but whose biological morphology is also female. On this construction, the employer’s behavior could be seen as discriminatory. This was in line with the perspective adopted by the Minnesota Court of Appeals.<sup>103</sup>

On the other hand, the employer could simply be said to be assigning the male restroom for all employees with male external genital morphology and the female restroom to all employees with female external genital morphology. This is more in line with the perspective adopted by the state supreme court.<sup>104</sup> The supreme court’s approach, in order to be credible, must be viewed with a willingness in mind to discount or even ignore an employee’s transgender status. This approach treats a non-operative, male-to-female transgender person as though the person were male for all relevant purposes; it treats the transgender female as though she were essentially male.

The supreme court’s choice to do this could hardly be said to evince respect or solicitude for members of the transgender or LGBT communities. This opinion by the Minnesota Supreme Court was ultimately authoritative, and (for better or worse) remains the law in Minnesota today. Like *Baker* before it, this example of judicial action provides no basis for discerning a

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100. MINN. STAT. § 363A.03, subdiv. 44 (2006).

101. *Goins II*, 635 N.W.2d at 721.

102. *Id.*

103. *Goins I*, 619 N.W.2d at 429 (“Goins has made a prima facie case of direct discrimination under the MHRA by showing that she was denied the use of a workplace facility based on the inconsistency between her self-image and her anatomy.”).

104. *Goins II*, 635 N.W.2d at 723 (“[T]he traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender.”).

Minnesota judiciary that is predisposed to rule in favor of LGBT claims of discrimination.

*D. Doe v. Ventura*

In 2001, the District Court for the Fourth Judicial District in Hennepin County invalidated Minnesota's criminal sodomy statute as a violation of the right to privacy guaranteed by the Minnesota Constitution.<sup>105</sup> The decision was a victory for the state's LGBT community, but the circumstances of its issuance counseled restraint in the community's satisfaction. The State did not appeal the district court's ruling to the court of appeals, so it remained a somewhat less prominent trial court decision. It was, for example, not docketed for official publication, and remains available chiefly through commercial electronic databases. There was accordingly no statewide declaration of invalidity on the merits of the case.

Two short years later, the U.S. Supreme Court decided *Lawrence v. Texas*,<sup>106</sup> which invalidated all state laws of this type throughout the country under the Due Process Clause of the Federal Constitution's Fourteenth Amendment. This, for better or worse, probably had the effect of eclipsing the *Doe* decision in Minnesota. The issue is now resolved at the federal level, under the Federal Constitution.<sup>107</sup> Therefore, the situation currently in Minnesota—in which the state criminal sodomy law cannot be enforced in any part of the state—is more prominently the result of federal activity than state judicial action.

The district court's action in *Doe* was both welcomed and appreciated by the state's LGBT community at the time it was issued. But it cannot be taken as an indication of a general tendency on the part of Minnesota judges to make broad rulings expanding LGBT rights.

#### IV. THE FORM OF THE PROPOSED AMENDMENT AND ITS IMPACT ON DEMOCRACY

This essay has demonstrated that the proposed constitutional

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105. *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734, at \*1 (Minn. Dist. Ct. May 15, 2001).

106. 539 U.S. 558 (2003).

107. *Id.* *Lawrence* struck down as unconstitutional "a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Id.* at 562.

amendment would have very wide-ranging consequences, and that these would have a profoundly anti-democratic effect on the public consideration of LGBT rights. It has also shown that this anti-democratic move is especially unjustified, given the historically unsympathetic character of the state judiciary's treatment of LGBT causes.<sup>108</sup>

But this proposed amendment is anti-democratic in a further respect as well. As already shown earlier in this essay, the mechanism of a constitutional amendment in this context is inherently anti-democratic because it cuts off the legislative process in this area. And this particular proposal is drafted in such a way that the anti-democratic effects are especially firmly assured. Not only is the mechanism of the amendment anti-democratic, but its very language seems calculated to maximize its anti-democratic effects.

As noted earlier, what appears to be the most authoritative text of the proposed amendment reads as follows:

“Only the union of one man and one woman shall be valid or recognized as a marriage in Minnesota. Any other relationship shall not be recognized as a marriage or its legal equivalent.”<sup>109</sup>

This language takes the form of an affirmative prohibition of legislative activity. Even if the state legislature at some later point determines that it wants to authorize civil unions, or domestic partnerships, or same-sex marriage, this amendment anti-democratically forecloses that possibility—contrary to the then-effective legislative will.

Another linguistic formulation would avoid this sharply preclusive effect. An alternative version of such an amendment could read as follows:

No provision of this Constitution shall be interpreted by any court to require that marriage be applicable to any relationship other than that between one man and one woman.

This language would foreclose the possibility that judges could interpret the state constitution to require that marriage be available to same-sex couples. On the other hand, it would still preserve the potential that a future state legislature could enact same-sex

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108. *See supra* Part III.

109. *See supra* note 15 and accompanying text.

marriage, civil unions, or domestic partnerships. Since this amendment would work by restricting the interpretive discretion of judges, it could be described as using an “interpretational approach” to the issue.

The most active proponents of a constitutional amendment in Minnesota have not used an interpretational approach, instead opting for an affirmative prohibition, as shown by the first-quoted language above.<sup>110</sup>

The interpretational approach is well known in constitutional discourse. The Eleventh Amendment to the United States Constitution is phrased using the interpretational approach.<sup>111</sup> Even one of the final versions of the unsuccessful federal constitutional amendment partially used the interpretational approach.<sup>112</sup> LGBT activists would still generally be opposed to an amendment using the interpretational approach, since it still implicitly devalues LGBT relationships. But it at least has the virtue of not foreclosing the democratic process and potentially frustrating the will of future legislatures.

But the Minnesota anti-LGBT activists have not opted for this

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110. See *supra* note 15 and accompanying text.

111. The Eleventh Amendment reads as follows: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.” U.S. CONST. amend. XI. In this provision, the “shall not be construed” language is the key phrase that, as written at least, determines the way in which the Eleventh Amendment was designed to work. It also uses an interpretational approach, because the limitation on “construing” the power of the United States is a limitation on the interpretive discretion of judges.

112. The so-called “Federal Marriage Amendment” was rejected by the Senate, by a vote of forty-nine to forty-eight, on June 6, 2006. 152 CONG. REC. S5441-42 (daily ed. June 6, 2006). The text of that amendment reads as follows:

“Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any state, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”

S.J. Res. 40, 108th Cong., 2d Sess. (July 8, 2004). Although this bill was introduced in 2004, the Senate voted on its adoption in 2006. The second sentence of the bill was cast using the interpretational approach, but the first sentence was not. The result of this bifurcated structure was that the bill affirmatively prohibited formal marriage for same-sex couples, but relied on the interpretational approach for its treatment of alternative arrangements, such as civil unions and domestic partnerships. Obviously, it would be more respectful of LGBT relationships (if one were to have such an amendment at all) to use the interpretational approach for the entirety of the proposal.

more democratic approach. In choosing the linguistic pattern that maximizes the anti-democratic potential of their amendment, they betray not only the extent of their animosity to the concerns of LGBT people, but also their callousness to the workings of democracy.<sup>113</sup>

## V. CONCLUSION

The proposed marriage discrimination amendment to the Minnesota Constitution is profoundly anti-democratic. It is extremely wide-ranging in its scope, it obliterates the opportunity of the LGBT community to legislatively advance its interests in the area, it falsely assumes characteristics of the state judiciary that do not in fact exist, and it is drafted with language that is particularly hostile to LGBT concerns and democracy in general. It was a triumph for reason and democracy that this amendment was defeated in 2006. It should never be introduced again. In the unfortunate event that it is introduced again, it should be resoundingly defeated.

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113. In her foregoing essay, Professor Collett complains that some pro-LGBT commentators ascribe bigotry or homophobia to those who oppose same-sex marriage. Collett, *supra* note 4, at 1052–53. It is not my purpose in this essay to ascribe bigoted or homophobic motivations to anyone. But proponents of a constitutional amendment against same-sex marriage should recall that they have purposely chosen the linguistic pattern for their amendment that maximizes the amendment's anti-democratic effects, as indicated in the text above. This linguistic choice, also as explained above, maximizes the restrictive effects on the LGBT community. Proponents of this amendment in particular, drafted the way it has been, should therefore be able to understand why some in the LGBT community might distrust their motives, given that the amendment's proponents had readily available other linguistic models with more moderate effects.