

2007

Constitutional Confusion: The Case for the Minnesota Marriage Amendment

Teresa Stanton Collett

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Collett, Teresa Stanton (2007) "Constitutional Confusion: The Case for the Minnesota Marriage Amendment," *William Mitchell Law Review*: Vol. 33: Iss. 3, Article 9.

Available at: <http://open.mitchellhamline.edu/wmlr/vol33/iss3/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

CONSTITUTIONAL CONFUSION: THE CASE FOR THE MINNESOTA MARRIAGE AMENDMENT

Teresa Stanton Collett[†]

I.	INTRODUCTION.....	1029
II.	THE CURRENT ATTACK ON THE LAW.....	1033
	A. <i>The Situation in the Courts</i>	1033
	B. <i>Cause for Continuing Concern</i>	1037
	C. <i>The History and Limits of Baker v. Nelson</i>	1039
	D. <i>The Minnesota Sodomy Case</i>	1041
	E. <i>Civil Disobedience by City and County Officials</i>	1045
III.	DEFINING CIVIL MARRIAGE IN MINNESOTA	1047
	A. <i>Who Should Define Civil Marriage for Minnesota?</i>	1047
	B. <i>What Should that Definition Be?</i>	1048
	C. <i>Alternative Arrangements Remain Available for Same-Sex Couples</i>	1051
IV.	MINNESOTA MARRIAGE AMENDMENT	1052
	A. <i>The Marriage Amendment Is About the Nature of Marriage, Not Discrimination</i>	1052
	B. <i>Silencing the Opposition</i>	1053
V.	CONCLUSION	1057

I. INTRODUCTION

Widespread agreement exists that marriage is a unique relationship between one man and one woman.¹ Minnesota

[†] Professor of Law, University of St. Thomas School of Law (Minneapolis).

1. Opinion polls have consistently revealed that Americans oppose same-sex marriage by significant margins. See Jennifer Harper, *More Americans Oppose Gay "Marriage," Poll Finds*, WASH. TIMES, Apr. 2, 2005, at A1 ("When asked whether they thought same-sex 'marriages' should be recognized by the law as valid and come with the same rights as traditional marriages, 68% of the respondents in the CNN/USA Today/Gallup poll said they should not. Twenty-eight percent said same-sex 'marriages' should be valid and 4 percent had no opinion."); John Leo, *Gay Rights, Gay Marriages*, U.S. NEWS & WORLD REP., May 24, 1993, at 19 (explaining that opinion polls show a large majority of Americans reject the idea of gay marriage); Dana Blanton, *Majority Opposes Same-Sex Marriage*, FOX NEWS, Aug. 26,

statutory law currently reflects this view stating, “[l]awful marriage may be contracted only between persons of the opposite sex.”² A 2006 poll conducted at the request of Equality Minnesota found that seventy-five percent of the respondents supported the current state law that defines marriage as a union between a man and a woman, while nineteen percent opposed the law.³

2003, <http://www.foxnews.com/story/0,2933,95753,00.html> (indicating that 62% of respondents in a national opinion poll opposed same-sex marriage and 26% favored same-sex marriage, while 58% favored a constitutional amendment defining marriage as being between a man and a woman and only 34% expressed opposition to such an amendment); David Morris & Gary Langer, *Most Oppose Same-Sex Marriage, but Balk at Amending the Constitution*, ABC NEWS, Jan. 21, 2004, <http://abcnews.go.com/images/pdf/945a2GayMarriage.pdf> (noting that 55% of those responding to a national poll believe that same-sex marriage should be illegal and 58% believe that each state should make its own law regarding same-sex marriage); Humphrey Taylor, *Attitudes to Gays and Lesbians Have Become More Accepting, but Most People Still Disapprove of Single-Sex Marriages and Adoption by Same Sex Couples*, HARRIS INTERACTIVE, Feb. 9, 2000, http://www.harrisinteractive.com/harris_poll/index.asp?PID=1 (reporting on key trends displayed in a Harris Poll, including a 63% opposition rate and 11% approval rate to same-sex marriage in 1996, as compared to a 55% opposition rate and 16% approval rate for same-sex marriage in 2000); *Poll: Few Favor Same-Sex Marriage*, CBS NEWS, Mar. 15, 2004, <http://www.cbsnews.com/stories/2004/03/15/opinion/polls/main606453.shtml> (“A constitutional amendment that would allow marriage only between a man and a woman has the support of nearly six in ten Americans.”); *Pragmatic Americans Liberal and Conservative on Social Issues*, PEW RES. CTR., Aug. 3, 2006, <http://peoplepress.org/reports/display.php3?ReportID=283> (reporting that a majority of Americans continue to oppose allowing gay and lesbian couples to marry legally and concluding that opinion poll “figures are largely unchanged over the past several years”); *Traditional Views of Marriage Tops in Voters’ Minds*, RASMUSSEN REP., July 19, 2006, <http://www.rasmussenreports.com/2006/June%20Dailies/sameSexMarriage.htm> (stating that 68% of likely voters define marriage in traditional terms as the union of a man and a woman, while only 29% believe marriage can be the union of any two people).

2. MINN. STAT. § 517.01 (2006). This provision was passed as part of the 1997 Omnibus Health and Human Services Appropriations Act. MINNESOTA HOUSE OF REPRESENTATIVES, HOUSE RESEARCH: ACT SUMMARY (1997), <http://www.house.leg.state.mn.us/hrd/as/97-98as/a203a.pdf>.

3. Mike Fitzpatrick, *Senate Committee Kills Minnesota Anti-Gay Amendment*, QUEST NEWS, Apr. 13, 2006, available at <http://www.quest-online.com/NewFiles/QuestXIII6.html>. This is ten percentage points higher than the results of a similar poll conducted in 2005 at the request of the Minnesota Family Research Council. Patricia Lopez, *Poll Finds Most Oppose Same-Sex Marriage*, STAR TRIB. (Minneapolis), Mar. 16, 2005, at 4B (polling found that 65% of Minnesotans surveyed opposed same-sex marriage and nearly that percentage would support a constitutional ban on such unions). Another poll conducted by the *St. Paul Pioneer Press* and Minnesota Public Radio found that 65% of Minnesotans surveyed opposed legalizing same-sex marriage, while only 27% supported it. Tom Scheck, *Poll: Most Minnesotans Opposed to Gay Marriage*, Feb. 5, 2004, http://news.minnesota.publicradio.org/features/2004/02/05_scheckt_gaymarriagepoll/.

Minnesota is not unique. Forty-four states have laws defining marriage as the union of one man and one woman.⁴ Twenty-seven states define marriage in their state constitutions.⁵ Sixteen states also ban state governments from creating civil unions or partnership benefits similar to marriage for same-sex couples.⁶ Hawaii's constitutional amendment prohibits state courts from requiring recognition of same-sex unions as marriages, but would allow the state legislature to do so.⁷

For the past three years, Minnesota legislators have debated whether to allow citizens to constitutionally define marriage.⁸ The Minnesota House of Representatives has voted twice to put the issue before the people, and twice Senate leadership has refused to allow a floor vote on the matter.⁹ The turmoil surrounding this issue embroiled former Senate Majority Leader Dean Johnson and members of the Minnesota Supreme Court in hearings arising from Senator Johnson's claim that members of the court had assured him that the court would not declare the state's statutory definition of marriage unconstitutional.¹⁰ Following these hearings, the

4. HERITAGE FOUNDATION, *Marriage in the 50 States*, <http://www.heritage.org/Research/Family/Marriage50/>. Six states do not have laws defining marriage as the union of one man and one woman: Connecticut, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. *Id.* But New York's highest court has rejected constitutional claims that the state must issue marriage licenses to same-sex couples. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

5. The twenty-seven states that define marriage in their state constitutions are Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. HERITAGE FOUNDATION, *supra* note 4 (publishing the texts of state constitutional amendments defining marriage).

6. The sixteen states are Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wisconsin. *Id.*

7. HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

8. See S.F. 2734, 2006 Leg., 85th Sess. (Minn. 2006); H.F. 1909, 2006 Leg., 85th Sess. (Minn. 2006); H.F. 0006, 2005 Leg., 84th Sess. (Minn. 2005) (subsequent motions to place on the General Orders Calendar of the Senate were unsuccessful); H.F. 2798, 2004 Leg., 83rd Sess. (Minn. 2004).

9. John Helmerger, *Fighting the Good Fight*, MINNESOTA FAMILY COUNCIL, (2005), <http://www.mfc.org/contents/article.asp?id=1454>.

10. At a meeting of local Minnesota clergy, Minnesota Senator Dean Johnson was recorded arguing against the need for a state constitutional amendment banning gay marriage. *Johnson Comments Ignite Smoldering Marriage Amendment Debate*, MINN. PUB. RADIO, Mar. 17, 2006, <http://minnesota.publicradio.org/display/web/2006/03/16/marriage/>. Senator Johnson stated:

Minnesota Board of Judicial Standards determined that no conversation had taken place between Senator Johnson and any judge.¹¹ But Senator Johnson, who recently lost his bid for reelection to the state senate, disputes this conclusion:

I'll put my hand on the Bible—there were meetings in the Senate majority leader's office that included gay marriage and DOMA [Defense of Marriage Act]. I have no reason to lie. I'm not trying to get even with anyone. I'm just telling the truth of what happened. The judges can deny it, but at some point in time they will have to confess to their makers about the truth.¹²

I have had a number of visits with [Minnesota Supreme Court Justices] about our law and all of them every one of them including the lady who just stepped down, Kathleen Blatz, who was my seatmate for four years, she was the chief justice. You know what her response was, "Dean, we all stand for election too, every six years." She said, "We are not going to touch it[.]"

Id.

These statements were made as support for Senator Johnson's argument that an amendment would not be necessary because the Minnesota Supreme Court would not overturn the existing state law requiring marriage be between a man and a woman. *Id.* Both former Chief Justice Kathleen Blatz and sitting Chief Justice Russell Anderson emphatically deny that any justice had discussed the possibility of a constitutional challenge to the state's statute defining marriage. *Id.* Senator Johnson later apologized and said that "he embellished his description of a brief conversation he had one day at the Capitol." Laura McCallum, *Johnson Apologizes for Gay Marriage Remarks*, MINN. PUB. RADIO, Mar. 17, 2006, <http://minnesota.publicradio.org/display/web/2006/03/17/johnsonapology/>.

Following a Senate investigation, a bipartisan Senate Special Subcommittee on Ethical Conduct failed to determine whether conversations between Senator Johnson and Minnesota Supreme Court justices occurred, instead entering into a settlement agreement that found if such conversations had occurred, the talks would violate Senate rules. Based on this determination, the subcommittee required Senator Johnson "to make a public apology on the Senate floor . . . and give a written apology to the person who convened the pastors [sic] meeting." See Pat Doyle & Patricia Lopez, *Johnson Must Apologize to Senate*, STAR TRIB. (Minneapolis), Mar. 25, 2006, at B1.

Based on Senator Johnson's statements, the Minnesota Board on Judicial Standards opened an inquiry to determine if any Minnesota Supreme Court justice made a promise, commitment, or prediction as to how the court might rule on a constitutional challenge to the state statute defining marriage. See Pat Doyle, *Justices Cleared of Ethical Lapses in Johnson Case: A Panel Found No Evidence that Members of the High Court Discussed Same-Sex Marriage Laws with Sen. Johnson*, STAR TRIB. (Minneapolis), June 28, 2006, at A1.

11. Press Release, Minn. Bd. on Jud. Standards, RE: Minnesota Supreme Court Judges (June 27, 2006), <http://www.bjs.state.mn.us/0624-3032-35BrdDecision.pdf>.

12. Patricia Lopez, *Johnson Reignites Controversy: Outgoing Senate Leader Insists that He Has Told the Truth and Jurists Lied*, STAR TRIB. (Minneapolis), Nov. 22, 2006,

The purpose of this article is to set out the arguments in favor of defining marriage as the union of one man and one woman within the Minnesota Constitution.¹³ Proponents of this change must answer two fundamental questions: first, whether the legal definition of marriage is a proper subject for a constitutional amendment, and second, assuming a constitutional amendment is desirable, whether the proposed language is appropriate.¹⁴

II. THE CURRENT ATTACK ON THE LAW

A. *The Situation in the Courts*

Marriage has become a question of state constitutional law through the unrelenting attacks on marriage statutes in the courts.¹⁵ Based upon assorted theories of equal protection, privacy, and sex discrimination, judges in Hawaii,¹⁶ Alaska,¹⁷ Vermont,¹⁸ Oregon,¹⁹ Washington,²⁰ New York,²¹ Maryland,²² Indiana,²³

at A1.

13. See *infra* Part III.B.

14. See *infra* Part IV.

15. The long-standing nature of this effort is evidenced by *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971) (defining marriage as requiring one man and one woman was held to be constitutional), and *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974) (holding that the definition of marriage as between one man and one woman is constitutionally permissive).

16. See *Baehr v. Lewin*, 852 P.2d 44, 59–64 (Haw. 1993) (indicating that the state equal protection clause requires a state to show a compelling interest in restricting marriage to one man and one woman).

17. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (finding the state's constitutional right of privacy requires recognition of same-sex marriage), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, marriage may exist only between one man and one woman.”)

18. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding common benefits clause requires recognition of same-sex unions).

19. *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004), *rev'd*, 110 P.3d 91, 102 (Or. 2005) (holding that statutory law predating a voter-initiated amendment to the Oregon Constitution “limited and continues to limit the right to obtain marriage licenses to opposite-sex couples.”).

20. *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *overruled by Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

21. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 358–59 (N.Y. App. Div. 2005) (“Since it is not within the judicial province to redefine terms given clear meaning in a statute, [a] plaintiff's sole recourse [in such instance] lies in legislative action.”).

California,²⁴ Massachusetts,²⁵ and New Jersey²⁶ have ordered legal recognition of same-sex unions. Trial courts in Iowa²⁷ and Oklahoma²⁸ currently have the issue before them. In Hawaii and Alaska, the people responded by amending their state constitutions.²⁹ The people of Vermont wanted the same opportunity, but the Vermont legislature resisted,³⁰ instead passing Act 91, “An Act Relating to Civil Unions,”³¹ providing all the benefits and obligations of marriage to same-sex couples except the title of “marriage.” The Supreme Court of New Jersey adopted a similar stance, finding no fundamental right to the recognition of same-sex unions as marriages under the state constitution,³² but requiring the state legislature to create a legal status affording the same rights, privileges, and duties comparable to those available to

22. Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006).

23. Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

24. *In re Marriage Cases*, Nos. A110449, A110450, A110451, A110463, A110651, A110652 (Cal. Ct. App. 2006), <http://www.telladf.org/UserDocs/Prop22opinion.pdf>. See also *In re Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. 2005).

25. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

26. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

27. Complaint, Varnum v. Brien, No. CV-5965 (Iowa Dist. Ct. 2006), available at <http://www.domawatch.org/stateissues/iowa/varnumvbrien.html> (follow “Complaint” hyperlink).

28. Bishop v. Okla. *ex rel.* Edmondson, 447 F. Supp. 2d 1239 (N.D. Okla. 2006) (explaining that Oklahoma’s state constitutional provision defining marriage as the union of one man and one woman did not violate the privileges and immunities clause of the United States Constitution; nonetheless, briefing was ordered on equal protection and substantive due process claims).

29. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 20 (2000) (documenting the ratification of a state amendment reserving marriage to opposite-sex couples); Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 215 (1999) (providing the history of an Alaskan constitutional amendment defining marriage as a relationship between a man and a woman).

30. See Cary Goldberg, *Vermont Senate Votes for Gay Civil Unions*, N.Y. TIMES, Apr. 11, 2000, at A12. “No opinion poll run by a neutral organization has asked specifically whether Vermonters support civil unions, but the vast majority of towns that discussed the issue in town meetings last month opposed the idea, and past polls show that a majority although a shrinking one, opposed gay marriage.” *Id.* See also David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 70–78 (2000).

31. 2000 Vt. Adv. Legis. Serv. 91 (LexisNexis) (codifying sections of VT. STAT. ANN. tit. 15, § 23 (2000)), available at <http://www.leg.state.vt.us/docs/2000/acts/ACT091.htm>.

32. Lewis v. Harris, 908 A.2d 196, 210 (N.J. 2006).

heterosexual couples under the state's guarantee of equal protection.³³ Courts of last resort in Oregon,³⁴ Washington,³⁵ and New York³⁶ have ruled that there is no requirement under their state constitutions to redefine marriage to include relationships other than the union of one man and one woman. Lower court opinions in Connecticut,³⁷ California,³⁸ and Maryland³⁹ remain under appellate review.

Only Massachusetts has judicially mandated acceptance of same-sex unions as marriages. In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court declared that state's marriage laws to be unconstitutional by a vote of four to three.⁴⁰ Finding no rational reason supporting the traditional definition of marriage, Chief Justice Margaret Marshall gave the legislature 180 days to "take appropriate action" in light of the opinion.⁴¹ This conclusion was widely interpreted as an order to legally recognize gay marriage. On February 3, 2004, the Massachusetts Court advised the state senate that enacting a law permitting civil unions, similar to that of Vermont, would not satisfy the equal protection and due process provisions of the state's constitution.⁴² Marriage licenses were first issued to same-sex couples in Massachusetts on May 17, 2004.⁴³

33. *Id.* at 220-24. The New Jersey court pointed out that its equal protection analysis is a more "flexible" test than the "more rigid, three-tiered federal equal protection methodology." *Id.* at 212 n.13.

34. *See* *Li v. Oregon*, 110 P.3d 91, 100-02 (Or. 2005).

35. *See* *Andersen v. King County*, 138 P.3d 963, 970 n.3 (Wash. 2006).

36. *See* *Hernandez v. Robles*, 855 N.E.2d 1, 5 (N.Y. 2006).

37. *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006). For additional information regarding case background and status, see State of Connecticut, Judicial Branch, *Case Detail*, Mar. 19, 2007, http://www.jud2.ct.gov/civil_inquiry/DispDetail.asp?DocNum=NNH-CV-04-4001813-S.

38. *In re Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. 2005). The six consolidated cases were later heard by the California Court of Appeals, First Appellate District, Division 3. *See In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev. granted and superseded by In re Marriage Cases*, 149 P.3d 737 (Cal. 2006).

39. *Deane v. Conaway*, No. 24-C-03-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *cert. granted* (Md. 2006), *available at* <http://www.courts.state.md.us/cio/pdfs/ConawayvDeane.pdf>.

40. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

41. *Id.* at 970.

42. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004) (advisory opinion rejecting civil unions).

43. Ken MaGuire, *Marriage License Applications Given to Same-Sex Couples in Massachusetts*, POST-GAZETTE.COM (Pittsburgh), May 17, 2004, <http://www.post-gazette.com/pg/04138/317600.stm>.

Although a Massachusetts statute prohibited the issuance of marriage licenses to non-residents whose home states would not recognize their unions,⁴⁴ out-of-state couples flocked to Massachusetts to be married.⁴⁵ This was due, in part to the announcement by several town clerks that they would disregard the “archaic law”⁴⁶ and issue licenses without regard to residency.⁴⁷ One of the first Massachusetts marriage licenses was issued to a same-sex couple from Minnesota that described their relationship as an “open marriage,” saying the concept of permanence in marriage was “overrated.”⁴⁸

Thirteen government clerks from Massachusetts filed suit seeking to enjoin enforcement of the statute, which prohibited issuing marriage licenses to non-resident, same-sex couples.⁴⁹ A separate lawsuit to enjoin the statute was filed by eight non-resident couples.⁵⁰ A preliminary injunction was denied on the basis that no irreparable harm had been shown.⁵¹ Massachusetts marriage licenses of questionable validity were issued to out-of-state residents until the state attorney general issued a letter to communities known to be violating the residency requirement, advising them of criminal penalties for such conduct.⁵²

44. MASS. GEN. LAWS ch. 207, §§ 11–12 (1998).

45. Ken MaGuire, *supra* note 43.

46. See DOMA Watch, <http://www.domawatch.org/stateissues/massachusetts/index.html> (last visited Mar. 21, 2007).

47. See, e.g., *Issuance of Marriage Licenses in the Town of Provincetown*, Town of Provincetown, May 10, 2004, <http://www.provincetowngov.org/marriage.html>; *Massachusetts Marriage/Relationship Recognition Law*, Human Rights Campaign, <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=21686&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Mar. 20, 2007) [hereinafter Human Rights Campaign].

48. Franci Richardson, *Bay State Gays Ring in New Era: P'town Ready for the 'Big Day'*, BOSTON HERALD, May 17, 2004, at 4 (“The couple who expect to be the first to receive a marriage application here on this landmark day is from Minnesota, and despite legal obstacles the governor has tried to enforce, they plan to marry around noon.”)

49. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 634 (Mass. 2006).

50. *Id.* at 633–34. Citizens opposing marriage between same-sex couples also sought their day in court when two private citizens filed suit to enjoin the issuance of marriage licenses to such non-residents. See DOMA Watch, <http://www.domawatch.org/stateissues/massachusetts/flynnjohnstone.html> (posting motions and memoranda of the *Flynn v. Johnstone* case in Massachusetts).

51. *Cote-Whiteacre*, 844 N.E.2d at 634 (noting that the municipal clerk’s motion for an injunction was denied both on the basis that they had failed to show a likelihood of success and on the basis that there was no irreparable harm).

52. Human Rights Campaign, *supra* note 47 (stating that the Massachusetts Attorney General sent “cease and desist” letters to the four jurisdictions on May 21,

2007]

MINNESOTA MARRIAGE AMENDMENT

1037

The Massachusetts Supreme Judicial Court ultimately upheld the statute, rendering void the licenses issued to residents from states that do not recognize same-sex unions as marriages.⁵³ While ameliorating the worst of the mischief done by the clerks' disregard of Massachusetts law, the opinion left open the validity of licenses issued to residents of states having no clear declaration regarding the legal status of same-sex unions.⁵⁴ On September 29, 2006, a Massachusetts trial court ruled that same-sex couples from Rhode Island could legally obtain Massachusetts marriage licenses due to the absence of any prohibition on same-sex marriage in that state's law.⁵⁵

Efforts are underway in Massachusetts to pass a constitutional amendment defining marriage as the union of one man and one woman. Responding to the *Goodridge* opinion, supporters of traditional marriage gathered over 120,000 signatures to place the constitutional amendment before the legislature.⁵⁶ On the last possible day, legislators approved placing the amendment on a statewide ballot.⁵⁷ Massachusetts law requires that the amendment receive a second positive vote sometime during 2007 or 2008 from the legislature.⁵⁸

B. *Cause for Continuing Concern*

Opponents and proponents of a marriage amendment in

2004, asking the clerks to stop issuing licenses to out-of-state couples).

53. *Cote-Whitacre*, 844 N.E.2d at 636.

54. *Id.* at 637–38.

55. *Cote-Whitacre v. Dep't. of Pub. Health*, No. 04-2656, slip op. at 8–9 (Mass. Dist. Ct. Sept. 29, 2006), *available at* http://www.glad.org/marriage/Cote-Whitacre/9_29_06.pdf. The Attorney General of Rhode Island has issued an opinion reaching the same result. R.I. Op. Att'y Gen. (Feb. 21, 2007) <http://www.riag.ri.gov/public/pr.php?ID=844>. In contrast, the Attorney General of Connecticut has opined that Massachusetts' marriages of same-sex couples will not be recognized in Connecticut. Conn. Op. Att'y Gen. (Sept. 20, 2005) <http://www.ct.gov/ag/cwp/view.asp?A=1770&Q=302438>.

56. *Doyle v. Sec'y of the Commonwealth*, 858 N.E.2d 1090, 1092 (Mass. 2006) (stating that while the legislature has a duty to vote on a proposed constitutional amendment, the court lacks the authority to compel a legislative vote).

57. Journal of the House of Representatives of the Commonwealth of Massachusetts in Joint Session (Jan. 2, 2007) <http://www.mass.gov/legis/journal/hj010207.pdf>.

58. MASS. CONST. art. 48 (governing initiative petitions) *available at* <http://www.mass.gov/legis/const.htm#cart048.htm>.

Minnesota agree that the definition of marriage has become a question of constitutional concern.⁵⁹ At this time, California,⁶⁰ Connecticut,⁶¹ Iowa,⁶² Oklahoma,⁶³ and Maryland⁶⁴ are defending their marriage laws in the courts. Hawaii,⁶⁵ Alaska,⁶⁶ Vermont,⁶⁷ Arizona,⁶⁸ Oregon,⁶⁹ Washington,⁷⁰ New York,⁷¹ Nebraska,⁷² Texas,⁷³ New Jersey,⁷⁴ and West Virginia⁷⁵ have judicially responded to activists' overreaching on this issue. Massachusetts remains

59. MASSACHUSETTS UNCORRECTED PROOF OF THE JOURNAL OF THE SENATE IN JOINT SESSION (Mar. 11, 2004), <http://www.mass.gov/legis/journal/jsj031104.htm>.

60. See, e.g., *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev. granted and superseded by In re Marriage Cases*, 149 P.3d 737 (Cal. 2006).

61. *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006). For further information on the case background and status, see *Case Summary*, State of Connecticut, Judicial Branch, http://www.jud2.ct.gov/civil_inquiry/DispDetail.asp?DocNum=NNH-CV-04-4001813-S (last visited Mar. 22, 2007).

62. Complaint, *Varnum v. Brien*, No. CV-5965 (Iowa Dist. Ct. 2006), *available at* <http://www.domawatch.org/stateissues/iowa/varnumvbrien.html> (follow "Complaint" hyperlink).

63. *Bishop v. Okla. ex rel. Edmondson*, 447 F. Supp. 2d 1257 (N.D. Okla. 2006) (holding that the Oklahoma state constitutional provision defining marriage as the union of one man and one woman did not violate the privileges and immunities clause of U.S. Constitution). Briefing was ordered on equal protection and substantive due process claims. *Id.* at 1259.

64. *Deane v. Conaway*, 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *cert. granted*, (Md. Ct. Spec. App. Sept. 2005), *available at* <http://www.courts.state.md.us/cio/pdfs/ConawayvDeane.pdf>.

65. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (explaining that the equal protection clause requires the state to show compelling interest in restricting marriage to one man and one woman).

66. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (noting that the state's constitutional right of privacy requires recognition of same-sex marriage).

67. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that the common benefits clause requires recognition of same-sex unions).

68. *Standhardt v. Super. Ct. ex rel. Maricopa*, 77 P.3d 451 (Ariz. Ct. App. 2003) (rejecting constitutional challenge to state definition of marriage).

69. *Li v. Oregon*, 110 P.3d 91 (Or. 2005).

70. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

71. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

72. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

73. See Molly McDonough, *Quickie Undivorce: Texas Judge Rescinds Gay Marriage Dissolution*, A.B.A. J. E-Report, Apr. 11, 2003, at 5 (discussing an action seeking the dissolution of a Vermont civil union entered into by Texas residents Russell Smith and John Anthony).

74. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

75. Motion to Intervene, *State ex rel. Link v. King*, No. 040475, (W. Va. Apr. 2, 2004), *available at* <http://www.state.wv.us/wvsc/clerk/cases/SERLinkvKing/SquirrelPartyAmicusMotion.pdf> (discussing order refusing a writ of mandamus to compel the Kanawha County Clerk to issue marriage licenses to same-sex couples).

embroiled in a political fight to return the issue to the people,⁷⁶ and the citizens of New Jersey are just beginning to respond to their supreme court's demand that same-sex unions be afforded legal recognition.⁷⁷ Almost half of the country's marriage laws are or have been under attack by a small group who want to force their will on the people in the guise of constitutional adjudication. In response, the citizens of twenty-seven states have preempted judicial intervention in this cultural debate by amending their state constitutions.⁷⁸

C. *The History and Limits of Baker v. Nelson*

Minnesota courts were among the first to address federal constitutional demands for recognition of same-sex marriage.⁷⁹ The history surrounding Minnesota's case, which resolved the federal claim, illustrates the persistence of same-sex marriage advocates. In May, 1970, J. Michael McConnell and his partner, Richard John Baker, applied for a marriage license in Hennepin County.⁸⁰ Their application was denied by the county clerk upon order from the district court.⁸¹ The couple then applied for a writ of mandamus directing the county clerk to issue a marriage

76. On November 30, 2006, Massachusetts Supreme Judicial Court Justice Judith A. Cowin heard arguments arising from Governor Mitt Romney's request for the court to order Senate President Robert Travaglini to hold a vote of the combined House and Senate when the constitutional convention reconvened and if the vote is not held, to direct the Secretary of State to place the question on the ballot. Andrew Ryan, *SJC Justice Hears Romney's Argument in Gay Marriage Case*, BOSTON GLOBE, Nov. 30, 2006, available at http://www.boston.com/news/globe/city_region/breaking_news/2006/11/sjc_justice_hear_2.html; see also David Weber, *Romney Asks State High Court to Force Vote on Gay Marriage*, BOSTON GLOBE, Nov. 24, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/11/24/romney_asks_court_to_force_gay_marriage_question_onto_2008_ballot/?p1=MEWell_Pos5. For further explanation of Governor Romney's argument, see Complaint, *Doyle v. Galvin*, (Mass. Nov. 24, 2006), available at http://www.domawatch.com/cases/massachusetts/doylevgalvin/Romney_Doyle_Galvin_SJC_Complaint.pdf.

77. See David Chen, *In Trenton, a Move to Define Marriage*, N.Y. TIMES, Nov. 28, 2006, at B5.

78. See *supra* text accompanying note 5.

79. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (concluding that a definition of marriage as a union between one man and one woman does not violate the federal guarantee of equal protection).

80. *Id.*

81. *Id.*

license.⁸²

While that case was pending, Mr. McConnell adopted Richard Baker who then changed his name to Pat Lynn McConnell.⁸³ Mr. McConnell then applied for and received a marriage license from the Clerk of District Court in Blue Earth County, Minnesota.⁸⁴ On September 3, 1971, the couple participated in a marriage ceremony.⁸⁵ On October 15, 1971, the Minnesota Supreme Court issued its opinion in *Baker v. Nelson*, holding that Minnesota law “does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited.”⁸⁶

Five years later, Mr. McConnell commenced a suit in federal court, unsuccessfully pursuing claims for federal benefits based on his purported marriage.⁸⁷ Most recently, on May 14, 2004, he filed suit seeking a federal income tax refund, based on the assertion that he was validly married during the year 2000.⁸⁸ Specifically, the complaint alleged that Mr. McConnell had applied for and received a license to marry an adult male from a Blue Earth County Clerk.⁸⁹ It also stated that a credentialed minister before two witnesses properly solemnized Mr. McConnell’s marriage to his male partner.⁹⁰ Further, the complaint claimed that Mr. McConnell’s marriage comported with Minnesota’s then-existing law,⁹¹ and that “no State or federal statute, no opinion of the Minnesota Attorney General, and no decision of the Minnesota Supreme Court specifically disenfranchised marriages between two persons of the same sex.”⁹² The federal district court rejected these claims, stating that “claim preclusion bars McConnell from relitigating claims against the IRS related to facts that were in existence at the time” when McConnell initially filed suit.⁹³

82. *McConnell v. United States*, No. 04-2711, 2005 WL 19458 at *1 (D. Minn. Jan. 3, 2005) (providing a summary of the actions brought by Mr. Baker and Mr. McConnell, following their application for mandamus in *Baker v. Nelson*).

83. *Id.*

84. Complaint ¶¶ 9–10, *McConnell v. United States*, 2004 WL 3011998 (D. Minn. 2004) (No. 04-2711).

85. *Id.* ¶ 11.

86. *Id.* (citing *Baker v. Nelson*, 291 Minn. 310, 312, 191 N.W.2d 185, 186 (1971)).

87. *Id.* (citing *McConnell v. Noonan*, No. 4-75-355 (D. Minn. Apr. 19, 1976), *aff’d per curiam*, 547 F.2d 54, 55 (8th Cir. 1976)).

88. *Id.*

89. *Id.* ¶¶ 9-10.

90. *Id.* ¶ 11.

91. *Id.* ¶ 12.

92. *Id.* ¶ 8.

93. *McConnell v. United States*, No. 04-2711, 2005 WL 19458, at *3 (D. Minn.

Notwithstanding the numerous times various courts have dealt with Mr. McConnell's argument that he is married to his male partner, the fact remains that all of the cases responded only to claims based on a federal constitutional right.⁹⁴ While there is some question of the continuing viability of the ruling as a matter of federal law,⁹⁵ state constitutional claims for recognition of same-sex marriage have yet to be heard, and there is some basis in Minnesota law to believe such claims would receive a warmer reception.

D. The Minnesota Sodomy Case

Minnesota courts have increasingly interpreted the state constitution to prohibit the state's legislative authority in cases where such authority is recognized under the federal constitution.⁹⁶ Approximately forty years ago, the Minnesota Supreme Court began to reevaluate the use of United States Supreme Court precedent while deliberating on issues implicating the Minnesota Constitution.⁹⁷ Accordingly, the Minnesota Supreme Court gave authority to the following contention:

When we apply our state due process clause, we are not bound to follow any interpretive relaxation of the inhibitions of the Fourteenth Amendment made by the Supreme Court of the United States. We are bound by the decisions of that court as to what the due process clause of the Fourteenth Amendment prohibits; but, in interpreting our own clause, we are not bound to follow what that court says is not a violation of the Fourteenth Amendment. We should exercise our own judicial

Jan. 3, 2005).

94. *See* McConnell v. United States, 188 F. App'x. 540, 542 (8th Cir. 2006) (“[T]he Minnesota Supreme Court clearly stated that same-sex marriage is prohibited in Minnesota and that this prohibition does not offend the United States Constitution.”).

95. *In re Kandu*, 315 B.R. 123, 136–38 (Bankr. W.D. Wash. 2004). “The supreme court's approach to the constitutional analysis of same-sex conduct, however, at least arguably appears to have shifted.” *Id.* at 138. *Cf.* Wilson v. Ake, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005) (discussing *Baker v. Nelson* as binding precedent).

96. *Kahn v. Griffin*, 701 N.W.2d 815, 825–26 (Minn. 2005).

97. *Id.* at 826 (pointing to *State v. Oman*, 261 Minn. 10, 110 N.W.2d 514 (1961), where the Minnesota Supreme Court interpreted due process provisions under the Minnesota and United States Constitutions and acknowledged that federal precedent does not bind the state's interpretation of its own constitution).

judgment as to what we deem a violation of our own constitution.⁹⁸

The Minnesota Supreme Court subsequently noted that it had independently interpreted and applied the Minnesota Constitution⁹⁹ to such issues as search and seizure,¹⁰⁰ equal protection,¹⁰¹ right to counsel,¹⁰² privacy,¹⁰³ and freedom of conscience.¹⁰⁴

Of particular relevance to questions surrounding same-sex unions is Minnesota's jurisprudence regarding the crime of sodomy. In *State v. Gray*,¹⁰⁵ the Minnesota Supreme Court was presented with a claim that the right to privacy protected sodomy between an adult male and a sixteen-year-old minor who had misrepresented his age as eighteen.¹⁰⁶ The two had met at a public park frequented by prostitutes,¹⁰⁷ and the adult had provided

98. *State v. Oman*, 261 Minn. 10, 110 N.W.2d 514 (1961) (quoting *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 265, 21 N.W.2d 792, 800 (1946) (Loring, J., dissenting)).

99. *Kahn v. Griffin*, 701 N.W.2d 815, 827 (Minn. 2005).

100. *Id.* at 827 n.6; *see, e.g.*, *State v. Fort*, 660 N.W.2d 415 (Minn. 2003) (concluding that an extended detention during a routine traffic stop constitutes a seizure); *State v. Cripps*, 533 N.W.2d 388 (Minn. 1995) (discussing the seizure of an underage patron in a bar); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994) (discussing sobriety checkpoints to stop motor vehicles); *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979) (holding a warrant that authorized the search of an attorney's office to be invalid under both federal and state constitutions).

101. *Kahn*, 701 N.W.2d at 827 n.7; *see, e.g.*, *State v. Garcia*, 683 N.W.2d 294 (Minn. 2004) (providing jail credit for time served in custody for an Extended Jurisdiction Juvenile); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) (funding of public education); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (noting the statutory distinctions between quantities of crack cocaine and powder cocaine).

102. *Kahn*, 701 N.W.2d at 827 n.8; *see, e.g.*, *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991) (discussing right to counsel in context of chemical testing for blood alcohol to determine possible charge for driving under the influence violation).

103. *Kahn*, 701 N.W.2d at 827 n.9; *see, e.g.*, *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (commenting on public funding of abortion); *Jarvis v. Levine*, 418 N.W.2d 139 (Minn. 1988) (holding that forcible administration of neuroleptic drugs without prior judicial approval violated right to privacy under state constitution); *State v. Gray*, 413 N.W.2d 107 (Minn. 1987) (concluding that sodomy with a prostitute is not afforded constitutional protection under state constitution).

104. *Kahn*, 701 N.W.2d at 827 n.10; *see, e.g.*, *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (involving display of slow-moving vehicle emblem on Amish defendant's vehicle).

105. 413 N.W.2d 107 (Minn. 1987).

106. *Id.* at 113 n.5.

107. *Id.* at 113-14.

2007]

MINNESOTA MARRIAGE AMENDMENT

1043

money to the minor after each of their three meetings.¹⁰⁸ The court found that the facts “would sustain a charge of prostitution against either Gray or the complainant, and the lack of a charge does not erase from our review the fact of its occurrence.”¹⁰⁹ This finding was decisive in the court’s ruling, “we decline the invitation to expand our state constitutional protection by way of creating a fundamental right of privacy which protects those who engage in commercial sex; accordingly, as applied to Gray, section 609.295, subdivision 5, does not violate the right of privacy.”¹¹⁰

The Court went on to explain the role of the Federal Constitution in Minnesota’s analysis of privacy rights:

We emphasize that nothing in the court’s opinion, either expressly or impliedly, expands the individual’s right of privacy under the Minnesota Constitution beyond the parameters established for that right by the United States Supreme Court under our Federal Constitution. Today’s decision is limited to a holding that any asserted Minnesota constitutional privacy right does not encompass the protection of those who traffic in commercial sexual conduct. Whether the scope of any privacy right asserted under the Minnesota Constitution should be expanded beyond federal holdings remains to be resolved in future cases wherein the issue is properly raised.¹¹¹

“The parameters established for that [privacy] right by the United States Supreme Court under our Federal Constitution”¹¹² were those articulated in *Bowers v. Hardwick*,¹¹³ which excluded the claim that there was a fundamental right of homosexuals to engage in sodomy.¹¹⁴

Yet only four years later, a Minnesota state district court held the Minnesota law criminalizing sodomy “to be unconstitutional, as applied to private, consensual, non-commercial acts of sodomy by consenting adults, because it violates the right of privacy guaranteed by the Minnesota Constitution.”¹¹⁵ The holding of *Doe*

108. *Id.* at 108–09.

109. *Id.* at 114.

110. *Id.*

111. *Id.*

112. *Id.*

113. 478 U.S. 186 (1986).

114. *Id.* at 190–91.

115. *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734, at *9 (Minn. Dist. Ct. May 15, 2001).

v. Ventura appears to adopt the plaintiffs' reasoning *in toto*.¹¹⁶ This is easily explained by referring to the state's response to the challenge. The Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment was seven paragraphs, including the one-paragraph introduction and the one-paragraph statement of the facts.¹¹⁷ The three paragraphs that purported to defend the anti-sodomy statute could have as easily been authored by plaintiffs' counsel:

[In *State v. Gray*, the Minnesota] Supreme Court acknowledged that consensual, non-commercial sexual conduct may well be protected by the Minnesota Constitution's right of privacy. ("Today's decision is limited to a holding that any asserted Minnesota constitution privacy right does not encompass the protection of those who traffic in commercial sexual conduct.") The Supreme Court has subsequently extended the state constitutional right of privacy to other contexts, including a mentally-ill person's ability to refuse neuroleptic medication in non-emergency situations.

The *Gray* decision and its progeny certainly reflect a trend that the Minnesota Supreme Court is willing to read broadly the right of privacy under the Minnesota Constitution. However[,] the Minnesota Supreme Court has not yet had the opportunity to decide squarely the issue of whether the state constitutional right of privacy extends to consensual, non-commercial sex. Accordingly, the Court must adjudicate that issue, which is determinative of whether section 609.293 is valid under the Minnesota Constitution.¹¹⁸

After the district court entered its judgment declaring the statute unconstitutional, the State never appealed.¹¹⁹ Representatives of

116. *See id.* In 2002, the Minnesota federal district court issued a published opinion following *Doe v. Ventura*. *See Devescovi v. Ventura*, 195 F. Supp. 2d 1146 (D. Minn. 2002) (stating that *Doe v. Ventura* precluded the county attorney from enforcing the state sodomy law against adult participants engaged in voluntary sexual acts).

117. Defendant's Memorandum in Response to Plaintiff's Motion for Summary Judgment, *Doe v. Ventura* (Minn. Dist. Ct. May 15, 2001) (No. MC 01-489) available at <http://www.sodomylaws.org/usa/minnesota/doeventurareponse.htm> [hereinafter *Ventura's Memo*].

118. *Id.* at 2 (citations omitted).

119. *In re Hatch*, 628 N.W.2d 125, 126 (Minn. 2001) (holding that the Attorney General's failure to defend the constitutionality of a sodomy statute did not meet the constitutional standard for removal from office).

the State were quoted as saying an appeal would be “lacking in merit.”¹²⁰ The Chief Deputy Attorney General stated, “[w]e just think the legal principles of the court are soundly based.”¹²¹ The district court subsequently certified a statewide plaintiff class to ensure that the benefits of its decision would be available to all proposed class members.¹²²

All these opinions predate the United States Supreme Court ruling that consensual sodomy between adults is protected as a matter of privacy under the Due Process Clause of the Constitution.¹²³ More importantly, these cases illustrate the possible threat of a single district court judge striking down Minnesota’s statute defining marriage as between a man and a woman.

E. Civil Disobedience by City and County Officials

Acts of civil disobedience by city and county officials in other states reinforce the concern that Minnesota’s statutory definition of marriage will be attacked. For example, in February, 2004, San Francisco Mayor Gavin Newsom decided that a California law limiting marriage to a man and a woman was unconstitutional and directed county officials to “determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation.”¹²⁴ During the following month, San Francisco county officials performed ceremonies and issued documents that purported to be marriage certificates to 4,037 same-sex couples from forty-six states,¹²⁵ including couples from Minnesota.¹²⁶ After

120. Pam Louwagie, *State Won’t Appeal Class-Action Sodomy Ruling*, STAR TRIB. (Minneapolis), Sept. 1, 2001, at B3.

121. *Id.*

122. See Sodomy Laws, <http://www.sodomylaws.org/usa/minnesota/minnesota.htm> (last visited Mar. 21, 2007). For additional discussion of this case, see Aimée D. Dayhoff, Comment, *Sodomy Laws: The Government’s Vehicle to Impose the Majority’s Social Values*, 27 WM. MITCHELL L. REV. 1863 (2001).

123. See *Lawrence v. Texas*, 539 U.S. 558, 566–74 (2003).

124. Letter from Gavin Newsom, Mayor of San Francisco, to Nancy Alfaro, San Francisco County Clerk (Feb. 10, 2004), available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/glrts/sfmayor21004ltr.pdf>.

125. Suzanne Herel et al., *Numbers Put Face on a Phenomenon: Most Who Married Are Middle-Aged, Have College Degrees*, S.F. CHRON., Mar. 18, 2004, at A1.

126. Lorna Benson, *Gay Marriage Amidst National Debate on Same-Sex Unions*, MINN. PUB. RADIO, Feb. 26, 2004, <http://news.minnesota.publicradio.org/>

the California Supreme Court ordered San Francisco to stop issuing licenses, some couples altered their travel plans and went to Oregon, where lower courts initially refused to stop county officials from issuing documents that purported to be marriage licenses while the legality of such actions were considered.¹²⁷

Absent civil disobedience by government officials, challenges to state marriage laws are typically initiated after a same-sex couple is denied a marriage license¹²⁸ or state officials refuse to recognize a marriage license from another state issued to a same-sex couple.¹²⁹ In her closing remarks during the Minnesota House of Representatives floor debate of Bill H.F. 2798, during the 2004–2005 legislative session, Representative Holberg disclosed that a Minnesota state employee requested spousal benefits for a same-sex partner based on a license issued in another state.¹³⁰ The state agency had the request under consideration at the time of her remarks. Such actions are predicates to a new lawsuit challenging Minnesota's definition of marriage.

At least one member of the Minnesota judiciary has publicly expressed support of arguments redefining traditional family roles and the law concerning same-sex partners. In June of 2005, Hennepin County Family District Court Judge Bruce Peterson publicly advocated permitting same-sex couples to marry and raise children.¹³¹

Open support of same-sex unions by a member of the bench is troubling for at least two reasons. First, it undermines the confidence defenders of the traditional definition of marriage have in judicial impartiality.¹³² Second, such statements suggest a forum

features/2004/02/26_bensonl_married/. The Supreme Court of Oregon later declared that all licenses issued in Oregon to same-sex couples were to be void at the time they were issued. *Li v. Oregon*, 110 P.3d 91, 99–102 (Or. 2005).

127. Typh Tucker, *Gay Weddings Draw Many from Beyond State Lines*, STATESMANJOURNAL.COM, Mar. 20, 2004, <http://news.statesmanjournal.com/article.cfm?i=77355>.

128. *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

129. *See, e.g.*, McDonough, *supra* note 73, at 5.

130. H.F. 2798, 2004 Leg., 83rd Sess. (Minn. 2004).

131. *See* Bruce A. Peterson & John B. Gordon, *Single Parenting Is Riskier for Kids than Gay Marriage*, PRYHILLS: LIVING IN WHOLLY MATRIMONY, June 13, 2005, <http://www.acepryhill.com/archives/000897.html> (asserting that “opposition to gay marriage really is often grounded in moral disapproval of homosexuality”).

132. Open support by a member of the judiciary for a particular position may result in violation of appropriate judicial conduct. *See* MINN. CODE OF JUD. CONDUCT, Canon 3 A(D)(1)(a) (2006) (“A judge shall disqualify himself or herself in a proceeding in which . . . the judge has a personal bias or prejudice

2007]

MINNESOTA MARRIAGE AMENDMENT

1047

in which arguments supporting gay marriage may be particularly well received.¹³³ Both effects are disturbing, particularly with an issue as divisive as this one.

III. DEFINING CIVIL MARRIAGE IN MINNESOTA

A. *Who Should Define Civil Marriage for Minnesota?*

The fear that Minnesota courts will redefine marriage to include same-sex unions is justified by the history of Minnesota's sodomy statute¹³⁴ and the actions of government officials in other states.¹³⁵ If a redefinition occurs, as a matter of state constitutional interpretation, the ability of citizens to correct any judicial overreaching would be compromised.¹³⁶

The ability to alter, modify, or reform government by a vote of the people is a fundamental right, recognized by both the federal and state constitutions.¹³⁷ "Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify, or reform government whenever required by the public good."¹³⁸ As the Minnesota Supreme Court has noted, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined.' 'The right to vote . . . is a fundamental and personal right essential to the preservation of self-government.'"¹³⁹

The right of Minnesotans to decide whether to constitutionalize the current definition of marriage has been thwarted by procedural maneuverings of state senate leadership. "The test of republican or democratic government is the will of the

concerning a party.") *But cf.* Roatch v. Puera, 534 N.W.2d 560, 564 (Minn. Ct. App. 1995) (explaining that judge was not disqualified by the general statement that a case "might set a precedent").

133. *Cf.* Murray v. Timmons, No. C1-97-5261-R, 1999 WL 305224 (Minn. T.C. 1999) (describing forum shopping as a practice subject to court sanction).

134. Minnesota Statutes section 609.293 (2000) was recognized as unconstitutional in *In re Hatch*, 628 N.W.2d 125, 126 (Minn. 2001). *See also* Dayhoff, *supra* note 122.

135. *See* Dayhoff, *supra* note 122.

136. This is evidenced by the continuing battle in Massachusetts. *See* MASS. GEN. LAWS ch. 272, § 34 (2006).

137. Kahn v. Griffin, 701 N.W.2d 815, 830 (Minn. 2005).

138. MINN. CONST. art. I, § 1.

139. Erlandson v. Kiffmeyer, 659 N.W.2d 724, 729-30 (Minn. 2003) (citations omitted).

people, expressed in majorities, under the proper forms of law.”¹⁴⁰ Fear that the people may not wisely exercise their rights is no basis for denying them their constitutional rights.¹⁴¹

B. What Should that Definition Be?

Assuming the people of Minnesota should vote on a constitutional definition of marriage, the definition proposed in Minnesota House File 2798 is a good one. “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.” Civil marriage should be recognized as only the union of one man and one woman.¹⁴²

Only the union of a man and a woman may involve the unique physical act from which children are created, and children best flourish when raised by their biological mother and father who are united in marriage.¹⁴³ The legal institution of marriage has historically been the societal mechanism channeling men and women into permanent, exclusive sexual relationships to insure that the partners who participate in the creation of the child

140. *Hopkins v. City of Duluth*, 83 Minn. 189, 83 N.W. 536 (1900).

141. *See Roos v. State*, 6 Minn. 428, 1861 WL 1878, at *10 (1861) (Atwater, J., dissenting) (“[The judiciary’s] business is to declare and interpret the law, and not to limit, or render it inoperative, from fear that the people may not wisely exercise their rights under it.”)

142. Reasons for rejecting polyamory are beyond the scope of this paper since legal recognition of such arrangements is not currently being considered in Minnesota. For a brief explanation of why marriage should be an exclusive union between two people, see Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245 (1998).

143. Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002) [hereinafter Gallagher, *What Is Marriage For?*]; Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225 (2004); Maggie Gallagher & Joshua Baker, *Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being*, IMAPP POLICY BRIEF, (Inst. for Marriage & Pub. Pol’y, Manassas, VA) Feb. 27, 2004, <http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf>; *see also* WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 6 (2002); PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997); SARAH McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); Kristin Anderson Moore et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?*, CHILD TRENDS, June 2002, <http://www.childtrends.org/files/MarriageRB602.pdf>.

provide both material and personal support to the child.¹⁴⁴

There is a growing consensus in the social science literature that clearly establishes that children do best when they are raised by both biological parents who are married to each other.¹⁴⁵ Some have argued that defining marriage as between a man and a woman is an outdated and overly restrictive view of marriage. As evidence of this, opponents might point to the absence of any marriage-entry requirement of procreative ability or intention by heterosexual couples.¹⁴⁶ It is true that that the state recognizes marriages between elderly or infertile couples unable to conceive, or younger couples intending to avoid conception through the use of contraception. But these arguments ignore the importance of the modeling to be achieved by encouraging all heterosexual couples to marry, as well as the legitimate self-imposed privacy limits a state may observe in its regulation of the matter.

In the case of couples using contraceptives, the obvious response is that human intentions do not define fertility. According to the Minnesota Department of Health, depending on age, approximately one-third to three-quarters of all pregnancies are unintended.¹⁴⁷ Most people can confirm this from their own experience related to “oops babies.” It is appropriate, indeed necessary, to encourage these couples to marry if the state is to achieve its objective of encouraging childbearing within marriage.

As for the young infertile couples, many do not know of their condition at the time they apply for a marriage license. Certainly it is within the proper constitutional boundaries for the state to assume the fertility of all individuals, rather than require intrusive testing or the revelation of such private information. In the case of elderly couples, where an assumption of fertility seems

144. Charles J. Reid, *Perspectives on Institutional Change*, (Univ. of St. Thomas Legal Studies, Research Paper No. 06-05, 2005), available at <http://ssrn.com/abstract=877635>.

145. Elizabeth Marquardt, *Institute for American Values, The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs*, at 19, (2006), <http://www.americanvalues.org/pdfs/parenthood.pdf> (citing Blaine Hardin, “2-Parent Families Rise After Change in Welfare Laws,” N.Y. TIMES, Aug. 12, 2001).

146. Gallagher, *What Is Marriage For*, *supra* note 143, at 776 (quoting Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex, or Not at All?*, 34 FAM. L.Q. 271, 276 (2000)).

147. MINN. DEP'T. HEALTH, *Goal 3: Reduce Unintended Pregnancy*, in HEALTHY MINNESOTANS: PUBLIC HEALTH IMPROVEMENT GOALS 2004 I (Fall 2002), <http://www.health.state.mn.us/strategies/unintended.pdf>.

counterfactual—at least as to the women—it is proper for the state to include such couples within the marriage laws to enhance the modeling and channeling functions of the law. When a young person sees an elderly couple, the person does not know if the couple has been married thirty minutes or thirty years. If the societal norm is to be that men and women marry, preferably for life, such conduct should be modeled extensively throughout society.

The current relationship of marriage to procreation is perhaps best understood through examination of the paternity laws of the state. Minnesota statutory law provides:

A man is presumed to be the biological father of a child if:
(a) He and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 280 days after the marriage is terminated by death, annulment, declaration of invalidity, dissolution, or divorce, or after a decree of legal separation is entered by a court.¹⁴⁸

The existence of this presumption of parentage based upon marriage is found in every state.¹⁴⁹ But such a presumption makes no sense in the context of same-sex couples, since it is physically impossible that both partners are biological parents of the child.¹⁵⁰ The complications that could arise from simply substituting “spouse” for husband and wife in determinations of paternity is illustrated by the possible pregnancy of a bisexual woman who is married to a woman under Massachusetts law, yet was impregnated by a male lover. Automatic termination of the lover's parental rights, based upon the presumption that the spouse is the father makes no sense in terms of the biological connection to the child. Nor does the commitment to support a marital partner necessarily

148. MINN. STAT. § 257.55 (2006).

149. 41 AM. JUR. 2D *Illegitimate Children* § 16 (2006) (“The principle that children born in wedlock are presumed to be legitimate is universally recognized.”). See generally Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1 (2004); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125 (2006).

150. But see Susan Mayor, *UK Team Hopes to Create a Human Embryo from Three Donors*, BRIT. MED. J. 591, 591 (Sept. 17, 2005). Cf. A.A. v. B.B., 2007 ONCA 2 (2007) available at <http://www.ontariocourts.on.ca/decisions/2007/january/2007ONCA0002.htm> (stating that lesbian partner of biological mother entitled to be recognized as third parent, in addition to biological mother and father).

extend to children that a partner may bring to the marriage. Step-parents are not assumed to have undertaken a duty to support step-children once the marriage to the children's biological parent ends.¹⁵¹ Why should the result differ for a homosexual couple?

After his state legalized same-sex marriages, Massachusetts Governor Mitt Romney became entangled in a media frenzy when he suggested that hospitals should cross out the word father on birth certificates when a child is born into a same-sex marriage and write in the phrase "second parent."¹⁵² The concern expressed by city and town clerks was that such an alteration could make the birth certificates invalid for federal purposes such as passports.¹⁵³ When a child is born, only a very few essential pieces of information are recorded on their birth certificate including their name, date of birth, gender, and the names of the mother and father. Changing these forms to recognize "Parent A" and "Parent B" is reflective of the growing confusion as to who will play what role in a family. A child cannot be conceived without both male and female genetic material, therefore there must be a mother and a father. While two persons of the same gender may be able to raise and nurture a child, they could not have both contributed to the child's genetic make-up.

C. *Alternative Arrangements Remain Available for Same-Sex Couples*

Preserving the traditional institution of marriage need not eliminate any legal status for mutually supportive couples. Loving, committed relationships exist not only between same-sex couples, but also between many other individuals who are not sexually intimate. The civil institution of marriage should focus on insuring the well-being of children,¹⁵⁴ but it is possible to create other legal

151. June Carbone, *The Legal Definition of Parentage, Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1311–12 (2005).

152. See Michael Levenson, *Birth Certificate Policy Draws Fire*, BOSTON GLOBE, July 22, 2005, at B1.

153. *Id.* The consistent understanding of parentage and marriage, as well as the possible conundrum involved with identifying "second parents," can be seen in many federal and general business forms that ask for specific information about a "mother" and a "father." See, e.g., Free Application for Federal Student Aid, 2007, available at <http://www.fafsa.ed.gov>; Application for a Social Security card, 2007, available at <http://www.ssa.gov/online/ss-5.pdf>. Banks and credit card companies also regularly ask customers to verify their identity by using their mother's maiden name.

154. Gallagher & Baker, *supra* note 143.

arrangements to take care of the diversity of human relationships found in contemporary society. Creation of a reciprocal beneficiary status, like that found in Hawaii, is a viable and reasonable alternative to recognizing same-sex unions as marriage.

Under Hawaii's law, any two persons who may not legally marry may enter into a legally recognized relationship that affirms their mutually supportive partnership and provides many of the benefits that a marriage would, including mandatory inclusion in some health insurance plans.¹⁵⁵ Hawaii's system does not require the reciprocal beneficiaries to live together or have a sexual relationship.¹⁵⁶ It includes adult individuals who share a close blood-relationship, such as parent and child, or siblings.¹⁵⁷

Creation of such a status would untangle the questions of sex and gender identity from the more vital questions of economic and emotional support, while simultaneously preserving the current definition of marriage that a majority of Minnesotans support. The unique purpose of marriage being procreative, nurturing, and supportive of child-rearing would not be disturbed.¹⁵⁸ Creation of such a legal status has the additional benefit of not imposing a false consensus regarding the morality of sexual intimacy by members of the same-sex on all of the state's citizens.

IV. MINNESOTA MARRIAGE AMENDMENT

A. *The Marriage Amendment Is About the Nature of Marriage, Not Discrimination*

One of the great difficulties in conducting any debate on this issue is the emotional tenor of the discussion. Both sides believe that the protection of their families is at stake, and so both are given to emotional rhetoric. This is understandable. What is not understandable, and should not be tolerated in the civil discourse, is the constant charge that prejudice and bias motivate those who believe the legal institution of marriage is and should remain focused on insuring that children are raised by their biological mother and father.

155. HAW. REV. STAT. §§ 431:10A, 572C-4 (2006).

156. *Id.* § 572C-4.

157. *Id.*

158. For a more complete discussion of the purposes and unique qualities of heterosexual marriage, see Collett, *supra* note 142.

In *Goodridge v. Department of Public Health*, notwithstanding the court's admission that its decision "marks a change in the history of our marriage laws,"¹⁵⁹ the court equated those who support traditional marriage with racists, stating "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."¹⁶⁰ Marriage has been defined as a union between a man and a woman in the United States since long before the recent debate regarding homosexual marriage. Nowhere in the history of American marriage is there any evidence which suggests the heterosexual institution of marriage was as an attempt to oppress homosexuals vis-à-vis the anti-miscegenation laws that were the subject of *Loving v. Virginia*.¹⁶¹

The attribution of malice to defenders of traditional marriage is both wrong and dangerous. The National Association for the Advancement of Colored People (NAACP) is unwilling to equate defense of traditional marriage with race discrimination,¹⁶² as are other prominent civil rights leaders.¹⁶³ The willingness of a majority in the legislature, just a few short years ago, to vote for the Minnesota statute defining marriage as the union of a man and a woman does not equate with bigotry. Any attempt to equate the two constitutes activist attempts to cut off public debate.

B. *Silencing the Opposition*

The morality of sexual acts between same-sex partners is deeply contested in American society. To many people, acts of anal

159. 798 N.E.2d 941, 948 (Mass. 2003).

160. *Id.* at 968 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

161. 388 U.S. 1 (1967).

162. *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before Comm. on the Judiciary, Subcomm. on the Const., Civil Rights and Property Rights*, 108th Cong. (2004) (statement of Hilary Shelton, Director Washington Bureau, NAACP), http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3076. "The NAACP recognizes that the issue of marriage rights for same-sex couples is a difficult and sensitive one, and people of good will can and do have heartfelt differences of opinion on the matter. The NAACP has not taken a position on this question." *Id.*

163. See Cheryl Wetzstein, *Blacks Angered by Gays' Metaphors*, WASH. TIMES, Mar. 2, 2004, at A3. Congressman Artur Davis of Alabama, a member of the Congressional Black Caucus, said, "I do not compare the gay marriage movement to the civil rights amendment." David Espo, *Frank Slams Possible Ban on Gay Marriage*, ASSOCIATED PRESS ONLINE (Mar. 23, 2004).

intercourse are unnatural and degrading. Opponents argue that these acts treat the human body as a mere instrument for selfish pleasure and fail to express any meaningful union of persons.¹⁶⁴

While proponents of same-sex unions disavow any intention of demanding that religious bodies recognize or participate in solemnizing these unions, defenders of traditional marriage have cause to worry. In the Fall of 2004, at Outfest, a gay-pride event in Philadelphia, eleven religiously motivated protestors were arrested for their attempts to “witness” to attendees.¹⁶⁵ Upon the protestors’ arrival, they were surrounded by a group of counter-demonstrators identified as the “Pink Angels.”¹⁶⁶ The “Pink Angels” encircled the protestors and held up large insulation boards to block both the protestors and their signs from the view of bypassers.¹⁶⁷ When the protestors attempted to communicate their message verbally, the “Pink Angels” blew loud whistles.¹⁶⁸ The local police, who were present during the entire encounter between the two groups, ultimately demanded that the protestors move away from the event.¹⁶⁹ The protestors refused and were arrested and charged with various crimes.¹⁷⁰ If they had been convicted on all counts, they could have been sentenced to serve up to forty-seven years in jail.¹⁷¹ The court eventually dismissed the case against the protestors on the basis that they were exercising their rights to free speech.¹⁷²

Protestors have not been the only targets of those trying to protect the traditional definition of marriage. David Parker, the

164. See Robert P. George & Gerard P. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

165. Jason McKee, *Judge Tosses Charges Against Marcavage*, DEL. COUNTY TIMES, Feb. 18, 2005, available at http://www.delcotimes.com/site/news.cfm?BRD=1675&dept_id=18171&newsid=13987075&PAG=461&rft=9.

166. See Repent America Archived Videos: Eleven Christians with Repent America Arrested at OutFest on Oct. 10, (2004), available at <http://www.repentamerica.com/index.php>. [hereinafter Repent America]. Compare McKee, *supra* note 165, with *The Arrest of 11 Demonstrators at Outfest 2004*, PHILLY PRIDE PRESENTS, <http://www.phillypride.org/news.html>.

167. Repent America, *supra* note 166.

168. *Id.*

169. *Id.*

170. *Id.*

171. Gil Spencer, *The Door to Free Speech Opens Both Ways*, DEL. COUNTY TIMES, Feb. 18, 2005, available at http://www.zwire.com/site/news.cfm?newsid=13987074&BRD=1675&PAG=461&dept_id=18168&rft=6.

172. Larry Eichel, *Charges Against “Philadelphia 4” Tossed*, PHILA. INQUIRER, Feb. 18, 2005 at A01.

2007]

MINNESOTA MARRIAGE AMENDMENT

1055

father of a six-year-old in Massachusetts, was arrested for criminal trespass while trying to prevent the local school system from teaching his son that families consisting of heterosexual couples and homosexual couples are equivalent.¹⁷³ Mr. Parker was arrested at a school board meeting where he requested that his child be removed from any pre-planned discussion of sexuality, exercising parental discretion by teaching his child in a manner consistent with the beliefs of his family.¹⁷⁴ Though charges against Mr. Parker were ultimately dropped,¹⁷⁵ his story highlights growing opposition to those recognizing a traditional definition of marriage.

Even the voice of the Catholic Church has been silenced in Massachusetts. In order to comply with state anti-discrimination laws, Catholic Charities is forced to place children with homosexual couples who wish to adopt a child.¹⁷⁶ This practice is in direct conflict with a declaration by the Vatican that such placements are immoral.¹⁷⁷ As a result, Catholic Charities Boston has ended their century-old adoption services.¹⁷⁸

Academics have already begun to postulate on the ways in which proponents of same-sex marriage will attack both Protestant and Catholic churches, including attempts to have their tax-exempt status revoked. Many see a coming storm of constitutional conflict between anti-discrimination laws and religious freedom.¹⁷⁹ As recently as the 2006 midterm elections, the Wisconsin Democracy Campaign (WDC) leveled accusations against a Catholic bishop for "electioneering."¹⁸⁰ The bishop had distributed a document to his parishioners explaining the Catholic Church's teaching on same-

173. Wendy McElroy, *Parental Rights vs. Public Schools*, FOX NEWS, Aug. 10, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,165253,00.html.

174. *See id.*

175. Jim Brown, *Courts Drop Charge Against Parker; Schools' No Trespass Order Stands*, AM. FAM. ASS'N ONLINE, Oct. 21, 2005, <http://headlines.agapepress.org/archive/10/afa/212005a.asp>. Mr. Parker's subsequent case for violation of his constitutional right to direct the upbringing of his child was unsuccessful. *Parker v. Hurley*, ___ F. Supp. ___, 2007 WL 543017 (D. Mass. 2007).

176. Patricia Wen, *Church Reviews Role in Gay Adoptions*, BOSTON GLOBE, Nov. 4, 2005, at B2.

177. *The Children Come First*, BOSTON GLOBE, Jan. 9, 2006, at A14.

178. Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

179. Jonathan Last, *One Last Thing—Conservatives Must Regroup*, PHILA. INQUIRER, June 11, 2006 (on file with *William Mitchell Law Review*).

180. *See* Gudrun Schultz, *Wisconsin Bishop Says Attack on Marriage Teaching an "Intimidation" Attempt*, LIFESITENEWS.COM, Oct. 20, 2006, <http://www.lifesite.net/ldn/2006/oct/06102007.html>.

sex marriage shortly before the issue was to be voted on as a ballot measure in the election.¹⁸¹ The WDC claimed that the Church would have to register and report to the state election board, implying that it had violated the Internal Revenue Service's restrictions on political activity and non-profits.¹⁸²

Events in other parts of the world are even more disturbing. A pastor in Sweden was sentenced to one month in jail based on a sermon opposing homosexual conduct, though the verdict was ultimately reversed on appeal.¹⁸³ In Canada, there have been criminal convictions under hate-speech laws for publication of an advertisement opposing same-sex marriage that merely cited Bible verses without quoting them.¹⁸⁴ The Irish Council on Civil Liberties publicly threatened priests and bishops who distributed a Vatican publication regarding homosexual activity with prosecution under "incitement to hatred legislation."¹⁸⁵ In Spain, Madrid's Cardinal Varela gave a sermon condemning gay marriage.¹⁸⁶ He has been sued by the Popular Gay Platform for "slander and an incitement to discrimination" on the basis of sexual orientation.¹⁸⁷ In England, self-defense was denied to a pastor who defended himself when assaulted by several attackers while carrying a sign citing Bible verses regarding homosexual conduct.¹⁸⁸ An Anglican bishop in England was investigated under hate-crime legislation and reprimanded by the local chief constable for observing that some people can overcome homosexual inclinations and "reorientate" themselves.¹⁸⁹ In Belgium, an eighty-year-old cardinal was sued over

181. *Id.*

182. *See id.*

183. *Swedish Pastor Sentenced to One Month's Jail for Offending Homosexuals*, ECUMENICAL NEWS INT'L, June 30, 2004, <http://www.eni.ch/highlights/news.shtml?2004/06>; Mattias Karen, *Sweden: Pastor Acquitted Over Hate Speech*, GAY.COM, Feb. 11, 2005, http://www.gay.com/news/article.html?coll=news_articles&sernum=2005/02/11/4&page=1.

184. John-Henry Westen, *Religious Persecution Next?*, CATH. WORLD NEWS, Nov. 1, 2003, <http://www.cwnews.com/news/viewstory.cfm?recnum=26363>.

185. Liam Reid, *Legal Warning to Church on Gay Stance*, IRISH TIMES, Aug. 2, 2003, <http://www.ireland.com/newspaper/front/2003/0802/720611077HM1POPE.html>.

186. Religion News Service, *Gay Group Sues After Sermon*, WASH. POST, Jan. 3, 2004, at B7.

187. *Id.*

188. *See* Robert Knight, *When You Hear of 'Civil Unions,' Recall Czechoslovakia, Sweden*, WORLDNETDAILY.COM, Mar. 3, 2004, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=37410.

189. Richard Alleyne, *Bishop's Anti-gay Comments Spark Legal Investigation*, LONDON DAILY TELEGRAPH, Nov. 10, 2003, at 2.

2007]

MINNESOTA MARRIAGE AMENDMENT

1057

his comments regarding homosexuality.¹⁹⁰ In each of these countries, what began with demands for tolerance has transformed into demands for acceptance at the price of religious liberty. These events suggest that what is at stake is not benefits or neutrality, but rather approval and coerced affirmation is the goal.

V. CONCLUSION

The reality is that activists are aggressively seeking out judges who are willing to disregard the text of the laws, as well as the political will of the people, in efforts to remake the institution of marriage to suit their particular political views. Minnesotans have already had one state law declared unconstitutional by the judgment of a single district court judge.¹⁹¹ They have watched their elected representatives refuse to publicly vote on the people's ability to decide whether to adopt a constitutional definition of marriage.¹⁹² This is not the proper process to be followed in a democratic republic. It is the people who should determine the meaning and structure of marriage through the process of political debate and democratic voting.

190. *Rights Group Sues Cardinal over 'Gay' Pervert Comment*, EXPATICA, Jan. 26, 2004, http://www.expatica.com/source/site_article.asp?subchannel_id=48&story_id=4015.

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

192. *See* S.F. 2734, 2006 Leg., 85th Sess. (Minn. 2006); H.F. 1909, 2006 Leg., 85th Sess. (Minn. 2006); H.F. 0006, 2005 Leg., 84th Sess. (Minn. 2005) (subsequent motions to place on the General Orders Calendar of the Senate were unsuccessful); H.F. 2798, 2004 Leg., 83rd Sess. (Minn. 2004).