INDIANA PROPOSED DEFENSE OF MARRIAGE AMENDMENT: WHAT WILL IT DO AND WHY IS IT NEEDED

MELISSA B. NEELY*

INTRODUCTION

Same-sex marriage has become one of the political and legal hot buttons of our time. Prior to 1993, only seven states had statutes that prohibited marriage between members of the same sex.[1] Now, forty-five states either have statutes or constitutional amendments that ban same-sex marriage.[2] With the passage of its Defense of Marriage Act in 1997, Indiana became one of those forty-five states.[3] In the November 2006 elections, eight states had initiatives for Defense of Marriage Amendments to their state constitution.[4] Seven of the eight states passed the amendments.[5] All seven of these states already had a Defense of Marriage statute.[6] In February 2004, Indiana State Senator Brandt Hershman proposed an amendment to the Indiana Constitution to ban same-sex marriage.[7] One year later, the proposed amendment passed its first step on its way to adoption within the state constitution.[8]

This Note examines the potential effects and the purpose of Indiana's Defense of Marriage Amendment. Part I of the Note reviews the history of the same-sex marriage movement in the United States generally and Indiana in particular. Part II of the Note examines how passage of the amendment would affect current Indiana law and the potential deprivation of benefits that same-sex couples would likely suffer. Part II also examines the effect the amendment would have on Indiana's future passage of a Vermont-style civil union statute. Part III of the Note discusses the rationale behind the ban on same-sex marriage and questions whether it is rationally related to the state's interest in marriage.

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* J.D. Candidate, 2008, Indiana University School of Law—Indianapolis; B.S., 1984, West Virginia University.

1. RICHARD A. LEITER, ANNULMENT AND PROHIBITED MARRIAGE (2005), State Stat. Surveys Annulment (Westlaw).

2. The Heritage Foundation, Outline of State Laws, http://www.heritage.org/Research/Family/Marriage50/Dataforall50states.cfm (last visited Jan. 6, 2007) [hereinafter Heritage].

3. IND. CODE § 31-11-1-1 (2004).

4. Thomas Frank, *Voters' Ballots Inundated with Divisive Measures; State Amendments Include Laws on Abortion Rights, Same-Sex Marriage*, USA TODAY, Nov. 8, 2006, at 11A; *Selected Statewide Referendums*, USA TODAY, Nov. 8, 2006, at 13A.

5. Thomas Frank, *Liberals Mark Big Victories with Some Ballot Initiatives*, USA TODAY, Nov. 9, 2006, at 13A, *available at* http://www.usatoday.com/news/politicselections/vote2006/2006-11-08-ballot-initiatives_x.htm.

6. Heritage, *supra* note 2 (identifying Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, and Virginia as having a Defense of Marriage Statute).

7. Press Release, State Senator Brandt Hershman, Senate Passes Resolution to Protect Marriage (Feb. 5, 2004), http://www.in.gov/S7/2-5-04.htm [hereinafter Hershman Press Release].

8. GayIndy.Org, The Marriage Discrimination Amendment, http://www.gayindy.org/amendment (last visited Jan. 28, 2007).

The Note concludes that the amendment is not needed to protect the existing Indiana Defense of Marriage Statute and does not protect the state's interest in traditional marriage.

I. HISTORY OF THE SAME-SEX MARRIAGE MOVEMENT

Webster's Dictionary defines marriage as "the social institution under which a man and woman establish their decision to live as husband and wife by legal commitments."[9] A second definition provides that marriage is "a relationship in which two people have pledged themselves to each other in the manner of husband and wife, without legal sanction."[10] There are over half a million same-sex couples whose relationship would fit this second definition of marriage.[11] Over the last three decades, gay couples have litigated to achieve recognition of their relationship as marriage. The purpose of the litigation for same-sex marriage has been the legal recognition of these unions.[12]

A. American History

The first litigated case in which a same-sex couple sought the right to marry began in Minnesota in 1970.[13] A same-sex couple filed an application for a marriage license which was denied.[14] The couple filed suit in state court.[15] The plaintiffs challenged "that the absence of an express statutory prohibition against same-sex marriage evince[d] a legislative intent to authorize such marriages."[16] The Supreme Court of Minnesota, utilizing both standard and legal dictionary definitions of marriage as a heterosexual union and interpreting the marriage statute drafter's intent, held that the state marriage statute did not authorize same-sex marriage even though the statute did not specify that a marriage required an opposite sex couple.[17] The plaintiffs also asserted that the Minnesota statute was

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9. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1179 (1996).

10. *Id.*

11. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSES BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1, *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. Five hundred and ninety four thousand households self-identified as same-sex couples sharing living quarters and a close personal relationship. *Id.*

12. Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Baker v. State, 744 A.2d 864, 867 (Vt. 1999); Singer v. Hara, 522 P.2d 1187, 1187 (Wash. Ct. App. 1974).

13. *Baker*, 191 N.W.2d at 185; William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 624 (2004).

14. *Baker*, 191 N.W.2d at 185.

15. *Id.*

16. *Id.*

17. *Id.* at 186.

a violation of Due Process and Equal Protection under federal law.[18] The court held that the statute did not violate the Fourteenth Amendment of the United States Constitution.[19] Although "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious marital discriminations," the court said that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[20]

In 1972, the plaintiffs appealed their case to the United States Supreme Court.[21] The Court did not deny certiorari, but rather dismissed the appeal for "want of a substantial federal question."[22] The Court's dismissal of the case created binding precedent that "state bans on same-sex marriage do not violate the United States Constitution."[23] The Court has stated that a dismissal of an appeal for want of a substantial federal question is a disposition on the merits of the case.[24] Thus, until the Supreme Court indicates otherwise, lower courts should treat challenges to state marriage statutes, based on a violation of the Fourteenth Amendment of the United States Constitution, as not raising a substantial federal question.[25]

A handful of other cases followed during the next two decades, mostly in state courts.[26] The plaintiffs did not prevail in any of the cases.[27] That changed in 1993, however, when the Supreme Court of Hawaii made their ruling in *Baehr v. Lewin*.[28]

In 1990, three same-sex couples filed suit contesting Hawaii's marriage statute.[29] Following the dismissal of the case by the lower court, the couples

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18. *Id.*

19. *Id.* at 187.

20. *Id.*

21. Baker v. Nelson, 409 U.S. 810, 810 (1972).

22. *Id.*

23. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005); *see also* Duncan, *supra* note 13, at 625.

24. Hicks v. Miranda, 422 U.S. 332, 344 (1975); *see also* Ohio v. Price, 360 U.S. 246, 247 (1959).

25. Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 (2d Cir. 1967); Duncan, *supra* note 13, at 625.

26. Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); Duncan, *supra* note 13, at 624-29.

27. *Dean*, 653 A.2d at 310; *Adams*, 673 F.2d at 1038; *Jones*, 501 S.W.2d at 590; *De Santo*, 476 A.2d at 952; *Singer*, 522 P.2d at 1197; Duncan, *supra* note 13, at 624-29.

28. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Duncan, *supra* note 13, at 631.

29. Duncan, *supra* note 13, at 630. The statute at that time provided:

> In order to make valid the marriage contract, it shall be necessary that:
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> (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, *brother and sister* of the half as well as to

appealed to the Supreme Court of Hawaii.[30] The Supreme Court of Hawaii held that the state marriage statute was a sex based classification and, thus, was subject to a "strict scrutiny" test under the Equal Protection Clause.[31] Under Hawaiian law, the strict scrutiny test presumes the statute to be at odds with Hawaii's constitution unless the State can show compelling state interests justifying the statute.[32] The case was remanded because the lower court did not utilize a strict scrutiny test.[33]

On remand, the State was unable to overcome the presumption of unconstitutionality, and the marriage statute was declared unconstitutional by the circuit court.[34] The State appealed, but before the appeal could be heard by the Supreme Court of Hawaii, a state constitutional amendment was passed reserving the authority to define marriage to the legislature.[35] Thus, the marriage statute was no longer unconstitutional because the legislature had the authority to define marriage. The challenged statute, as it exists today, designates marriage as a union between a man and a woman.[36]

In the aftermath of *Baehr*, a virtual flood of state legislation occurred throughout the United States. Prior to 1993, only seven states had statutes that

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the whole blood, *uncle and niece*, *aunt and nephew*, whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];

(3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

Baehr, 852 P.2d at 49 n.1 (quoting HAW. REV. STAT. § 572-1 (1985)).

30. *Baehr*, 852 P.2d at 48; Duncan, *supra* note 13, at 630.

31. *Baehr*, 852 P.2d at 64-65.

32. *Id.*

33. *Id.* at 68.

34. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

35. Duncan, *supra* note 13, at 632-33.

36. HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005).

prohibited marriage between members of the same sex.[37] Within five years, however, twenty-six additional states passed either a statute or constitutional amendment barring same-sex marriage.[38] Additionally, the United States Congress passed the Defense of Marriage Act of 1996[39] defining marriage as the union of a male and a female.[40] Now, forty-five states have either statutes or constitutional amendments that ban same-sex marriages.[41]

Vermont was the first state to grant same-sex couples legal recognition of their relationship.[42] In a case brought by three same-sex Vermont couples seeking the right to marry, the Supreme Court of Vermont held that the Vermont state government was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[43] The court further noted that such legal recognition could be done by "inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."[44] Vermont, while maintaining the definition of marriage as "the legally recognized union of one man and one woman,"[45] enacted legislation allowing same-sex couples to obtain "civil unions," granting them the same state protections and benefits extended to

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37. *See* LEITER, *supra* note 1 (citing KAN. STAT. ANN. § 23-101 (1995); MD. CODE ANN., FAM. LAW. § 2-201 (West 2006); N.H. REV. STAT. ANN. §§ 457:1-:2 (LexisNexis 2007); OKLA. STAT. ANN. tit. 43, § 3 (West 2001); OR. REV. STAT. § 106.010 (2005); UTAH CODE ANN. § 30-1-2 (1998 & Supp. 2007);VA. CODE ANN. § 20-45.2 (2004)).

38. *Id.* (citing ALASKA CONST. art. 1, § 25; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.011 (2006); ARIZ. REV. STAT. ANN. § 25-101 (2007); ARK. CODE ANN. § 9-11-109 (West 2004); FLA. STAT. ANN. § 741.212 (West 2005); GA. CODE ANN. § 19-3-3.1 (West 2003); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005); IDAHO CODE ANN. § 32-201 (2006); 750 ILL. COMP. STAT. 5/212 (West 1999 & West Supp. 2007); IND. CODE § 31-11-1-1 (2004); IOWA CODE § 595.2 (West 2001); KY. REV. STAT. ANN. § 402.005 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 19-A, § 701 (1998); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. ANN. § 517.03 (West 2006); MISS. CODE ANN.§ 93-1-1 (West 2007); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401 (2007); N.C. GEN. STAT.§ 51-1.2 (2005); N.D. CENT. CODE § 14-03-01 (2004); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Supp. 2006); S.D. CODIFIED LAWS § 25-1-1 (2004); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. § 2.001 (Vernon 2006); WASH. REV. CODE ANN. § 26.04.020 (West 2005)).

39. Pub L. No. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738 (2000)).

40. Heritage, *supra* note 2.

41. *Id.* The five states having neither a statute nor constitutional amendment banning same-sex marriage are New Jersey, New Mexico, New York, Rhode Island, and Massachusetts. *Id.* Connecticut's civil union statute defines marriage as union of a man and a woman. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

42. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

43. *Baker*, 744 A.2d at 867.

44. *Id.* at 867-68.

45. VT. STAT. ANN. tit. 15, § 1201 (2002).

married couples.[46]

Massachusetts is currently the only state in which same-sex marriages are legal.[47] In 2001, seven Massachusetts same-sex couples, four of which had children, filed suit seeking the right "to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children."[48] The Supreme Judicial Court of Massachusetts declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[49]

In 2005, Connecticut passed civil union legislation that, like Vermont, provides same-sex couples a means of legalizing their union.[50] The Connecticut statute provides that a same-sex couple with a civil union "shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[51] The same statute defines marriage as "the union of one man and one woman."[52]

Most recently, in a suit brought against various New Jersey state officials by seven long-term, same-sex couples seeking the right to marry, the Supreme Court of New Jersey found that there was no fundamental right for same-sex marriage.[53] The court stated that for a right to be considered fundamental it must be "deeply rooted in the traditions, history, and conscience of the people" and then determined that same-sex marriage is not part of the tradition and history of the people of New Jersey.[54] However, the court also found that "the unequal

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46. *Id.* §§ 1201-1207; Phyllis G. Bossin*, Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*, 40 TULSA L. REV. 381, 394 (2005). A civil union is "[a] marriage-like relationship, often between members of the same sex, recognized by civil authorities within a jurisdiction." BLACK'S LAW DICTIONARY 264 (8th ed. 2004). A Vermont statute provides a "nonexclusive list of legal benefits, protections and responsibilities" granted to married spouses that apply in like manner to parties to a civil union. VT. STAT. ANN. tit. 15, § 1204 (2002). Some of these benefits are laws pertaining to acquisition, ownership, or transfer of real or personal property, including holding property as tenants by the entirety; actions for wrongful death, emotional distress, and loss of consortium; probate and non-probate transfers; adoption law; insurance for state employees; spousal abuse programs; victim's compensation rights; worker's compensation benefits; laws relating to medical care and treatment, hospital visitation, and notification; family leave benefits; public assistance benefits; tax laws; spousal privilege; laws pertaining to loans to veterans; and the definition of the family farmer. *Id.*

47. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Elisabeth Salemme, *The State of Gay Marriage*, TIME, Aug. 7, 2006, at 17.

48. *Goodridge*, 798 N.E.2d at 948.

49. *Id.* at 969.

50. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

51. *Id.*

52. *Id.*

53. Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006).

54. *Id.* at 210-11.

dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution."[55] The court held that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee" of the New Jersey Constitution.[56] The Supreme Court of New Jersey ordered that "the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples."[57] Subsequently, the New Jersey Legislature passed civil union legislation granting same-sex partners in a civil union the same responsibilities and protections afforded to a married couple.[58]

B. Indiana History

Like many other states in the wake of *Baehr v. Lewin*, the Indiana state legislature enacted a ban on same-sex marriage in 1997.[59] The statute declared that: "Only a female may marry a male. Only a male may marry a female."[60] The statute further declared that "[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."[61]

In August 2002, three long-term same-sex couples, who had obtained Vermont civil unions, sought an injunction to have marriage licenses issued to them by Indiana's Hendricks and Marion county clerks.[62] The couples maintained that the Indiana Defense of Marriage Act ("DOMA") violated several provisions of the state constitution, specifically sections 1, 12, and 23 of article I.[63] The state filed a motion to dismiss on grounds of failure to state a claim upon

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55. *Id.* at 200.

56. *Id.*

57. *Id.* at 224.

58. N.J. STAT. ANN. § 37:1-29 (West 2007) (defining a civil union as "the legally recognized union of two eligible individuals of the same sex"). The statute provides that "[p]arties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage." *Id.*; *see also* Robert Schwaneberg, *Civil Union Benefits to End at State Line: Many Federal Rights Are Still Not Granted*, STAR-LEDGER (Newark, N.J.), Jan. 2, 2007, at 1, *available at* 2007 WLNR 52111 [hereinafter Schwaneberg, *Civil Union Benefits*].

59. IND. CODE § 31-11-1-1 (2004).

60. *Id.*

61. *Id.*

62. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005).

63. *Id.* The first of the challenged provisions concerned equality for Indiana residents. *Id.* at 21. Article I, section 23 provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art 1, § 23. The second of the challenged provisions regards the natural rights of citizens. *Id.* at 31. Article I, section 1 states:

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the

which relief may be granted, and the court dismissed the claim.[64]

The plaintiffs also lost their appeal.[65] The court decided that "the Indiana Constitution does not require the governmental recognition of same-sex marriage."[66] The court reasoned that "because opposite-sex marriage furthers the legitimate state interest in encouraging opposite-sex couples to procreate responsibly and have and raise children within a stable environment" it did not violate sections 12 and 23 of article I of the Indiana Constitution.[67] The court went on to say that "[r]egardless of whether recognizing same-sex marriage would harm this interest, neither does it further it."[68] The statute was held not to violate article I, section 1 as marriage, let alone same-sex marriage, was not contemplated as a "core value"[69] by the framers of the provision.[70]

In 2004, Indiana State Senator Brandt Hershman introduced an amendment to the Indiana Constitution to prohibit same-sex marriages.[71] The proposed amendment provides: "(a) Marriage in Indiana consists only of the union of one man and one woman. (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[72] Although the resolution was passed overwhelmingly by the Senate, it did not make it to a vote in the State House of Representatives.[73] One year later, the resolution easily passed both the Senate and House of Representatives.[74]

Ratification of the amendment requires passage in both houses of the

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> pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

IND. CONST. art 1, § 1. The third challenged provision concerned the openness of the courts to the populace. *Id.* at 34. Article I, section 12 provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay." IND. CONST. art 1, § 12.

64. *Morrison*, 821 N.E.2d at 19.

65. *Id.* at 35.

66. *Id.*

67. *Id.*

68. *Id.*

69. The court stated that "a 'core value' under the Indiana Constitution is arguably the rough equivalent to a 'fundamental right' under the federal or other state constitutions." *Id.* at 32. Furthermore, the court said that determination of whether an item "amounts to a constitutional 'core value' is a judicial question that depends on the purpose for which a particular constitutional guarantee was adopted and the history of Indiana's constitutional scheme." *Id.* at 33.

70. *Id.* at 33-34.

71. Hershman Press Release, *supra* note 7.

72. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

73. Hershman Press Release, *supra* note 7; GayIndy.Org, *supra* note 8.

74. GayIndy.Org, *supra* note 8.

legislature without revision in two consecutive general assemblies and then approval by Indiana voters as a referendum in a general election.[75] The amendment passed the Indiana Senate by a 39-10 vote.[76] The House Committee on Rules and Legislative Procedure deadlocked on this issue; thus, the amendment will not appear before the Indiana House in 2007.[77] The amendment could still be considered for a vote in the 2008 sessions.[78]

II. THE EFFECT OF PASSAGE OF THE DEFENSE OF MARRIAGE AMENDMENT

The proposed amendment to the Indiana Constitution to defend traditional marriage consists of two separate yet related clauses: "(a) Marriage in Indiana consists only of the union of one man and one woman. (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[79] The first clause restricts marriage to a union between one man and one woman. The second clause bans the recognition of marital status to all but a married heterosexual couple and further bans the application of "legal incidents of marriage" to all but married heterosexual couples. To understand the potential ramifications of the passage of the amendment, each clause must be considered separately.

A. Definition of Marriage

The first part of the proposed amendment defines a marriage as "the union of one man and one woman."[80] This language essentially paraphrases the current Indiana DOMA, which states that: "Only a female may marry a male. Only a male may marry a female."[81] Both definitions restrict marriage to a heterosexual couple. Under either the statute or the proposed amendment, a same-sex couple would be unable to marry in Indiana. There appears to be no legal difference between the two statements.

The main legal effect of incorporation of this definition of marriage into the Indiana Constitution would be the preemption of the Indiana Supreme Court from ruling that the current DOMA is unconstitutional and possibly granting marital recognition to same-sex couples. Without the amendment, it would be possible for the Indiana Supreme Court or the Indiana Court of Appeals to declare the

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75. IND. CONST. art 16, § 1.

76. Bryan Corbin, *Same-Sex Measure Appears Dead*, EVANSVILLE COURIER & PRESS, Apr. 4, 2007, at B1; Niki Kelly, *General Assembly: Gay Union Ban Earns Senate Nod; Amendment Goes to House*, FORT WAYNE J. GAZETTE, Feb. 13, 2007, at 1C; Bill Ruthhart, *Marriage Amendment, Round 2; Lawmakers Revisit Divisive Effort to Solidify State's Same-Sex Ban*, INDIANAPOLIS STAR, Jan. 31, 2007, at A1 [hereinafter Ruthhart, *Round 2*].

77. Corbin, *supra* note 76.

78. *Id.*

79. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

80. *Id.*

81. IND. CODE § 31-11-1-1 (2004).

statute unconstitutional. The Indiana Court of Appeals for the Second District has already declared that the statute was not at odds with the state constitution in a suit challenging the statute.[82] Furthermore, the stated purpose of the amendment is: "An amendment to the Indiana Constitution would prevent Indiana courts from taking any action to recognize same sex marriages."[83]

B. Banning Recognition of Incidents of Marriage

The second part of the proposed amendment may have the most impact on Indiana law. It states that "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[84] The legislature does not define "a legal incident of marriage," but for the purposes of this paper it will be taken as rights, benefits, or privileges granted to a person who is legally married. The United States Supreme Court used the term when referring to government benefits and property rights associated with marriage.[85] Additionally, debaters of the proposed amendment are using the term to refer to marriage benefits and laws applicable to married couples.[86]

Opponents of the amendment voice concern that the new amendment will be used to deprive unmarried couples, same-sex and heterosexual, of domestic partner health benefits.[87] Opponents also fear that the amendment will be used to prevent application of domestic violence statutes to unmarried heterosexual couples.[88] The amendment could also have a major impact on future legal recognition of same-sex couples, such as the enactment of Indiana civil unions for same-sex couples or the recognition of out-of-state civil unions. Should civil union legislation be enacted in Indiana, the amendment could affect the application of many state laws to the parties of the civil union, including inheritance, property rights, death benefits, and domestic relations laws.

1. Health Benefits.—Health insurance coverage provided by an employer for their employee and the employee's spouse is one of the benefits of marriage for many couples in today's society. Some progressive private companies, universities, and municipalities also offer health insurance coverage for domestic partners, including same-sex partners.[89] Opponents of the proposed amendment

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82. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005).

83. Hershman Press Release, *supra* note 7.

84. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

85. Turner v. Safley, 482 U.S. 78, 96 (1987).

86. Ruthhart, *Round 2*, *supra* note 76; Bill Ruthhart, *Same-Sex Marriage Ban Passes Committee; Senate Panel Approves Amendment 7-4; Activists Protest at Statehouse*, INDIANAPOLIS STAR, Feb. 1, 2007, at A1 [hereinafter Ruthhart, *Committee*].

87. *See* Ruthhart, *Round 2*, *supra* note 76.

88. *Id.*

89. In Indiana, health benefits for the same-sex partner of an employee are offered by Indiana University, DePauw University, Ball State University, Butler University, Purdue University, City of Bloomington, Conesco Inc., Guidant Corp., Cummins Inc., WellPoint Inc., Eli Lilly & Co., and

fear that the domestic partners of some public or university employees will lose their health benefits if the amendment is adopted.[90] The amendment's opponents contend that the health insurance provided by the public employer could be considered a government benefit generally allowed only to married couples and therefore an incident of marriage.[91] Thus, domestic partner health insurance would be banned in Indiana by the proposed amendment as an "incident of marriage," thereby depriving domestic partners of the health benefits they were receiving from their partner's employer.[92] Opponents cite litigation in Michigan as supporting their concerns.[93]

In the summer of 2006, opponents of same-sex marriage filed a lawsuit in Michigan to stop Michigan State University from offering health insurance benefits to the partners of gay and lesbian university employees.[94] The plaintiffs in the suit contended that the university was violating the state's constitution.[95] Additionally, National Pride at Work, Inc., a non-profit constituency group of the American Federation of Labor-Council of Industrial Organizations (AFL-CIO), sought a declaratory judgment that the Michigan Constitution did not "prohibit public employers from conferring health benefits to same-sex domestic partners of employees."[96] The trial court granted the summary disposition sought by National Pride at Work.[97] The Governor of Michigan appealed the trial court's decision.[98]

The Michigan public employers that offered domestic partner health benefits required the employee to have entered into a domestic-partnership agreement to receive the benefits.[99] The Michigan Court of Appeals reasoned that "[b]y officially recognizing a same-sex union through the vehicle of a domestic-partnership agreement, public employers give same-sex domestic couples status similar to that of married couples."[100] The court further reasoned that the

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fourteen other smaller private employers. Human Rights Campaign, http://www.hrc.org/issues/4785.htm (lasted visited Jan. 7, 2007).

90. *See* Ruthhart, *Round 2*, *supra* note 76.

91. *See id.*; Ruthhart, *Committee*, *supra* note 86.

92. *See* Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

93. *See* Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

94. David Eggert, *Group Sues to Halt Same-Sex Benefits*, BOSTON.COM, July 5, 2006, http://www.boston.com/news/nation/articles/2006/07/05/group_sues_to_halt_to_same_sex_benefits/.

95. *Id.*

96. Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 145 (Mich. Ct. App. 2007). The Michigan Constitution provides: "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." MICH. CONST. art. I, § 25.

97. *Nat'l Pride at Work*, 732 N.W.2d at 147.

98. *Id.*

99. *Id.* at 151.

100. *Id.* at 150.

amendment "invalidates the recognition of *'union[s]' 'similar'* to marriage *'for any purpose.* "[101] The court held that the domestic partner benefit plans violated the "plain language of the amendment."[102]

It is difficult to forecast whether suits seeking to bar Indiana universities and public employers from offering domestic partner benefits will be filed. However, should such a suit be filed in Indiana, it is unlikely to succeed. The pertinent part of the Indiana amendment states "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[103] This is in distinct contrast to the Michigan amendment which provides that heterosexual marriage "shall be the only agreement recognized as a marriage or similar union *for any purpose*."[104] The Indiana amendment would apply to situations where Indiana law would require the conferring of health benefits to domestic partners; whereas, the Michigan amendment bars the recognition of domestic partnerships for any purpose.

2. Domestic Violence Statutes.—Another area of concern among opponents to the amendment is the potential loss of application of Indiana's domestic violence statute to unmarried couples.[105] In 2004, Ohio amended its state constitution to bar same-sex marriage.[106] Since then there have been several challenges regarding the constitutionality of application of the Ohio domestic violence statute to unmarried couples.[107] The Ohio courts divided on this issue.

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101. *Id.* at 151 (quoting MICH. CONST. art. I, § 25) (alteration in original).

102. *Id.*

103. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

104. MICH. CONST. art. I, § 25 (emphasis added).

105. *See* Ruthhart, *Committee*, *supra* note 86.

106. OHIO CONST. art. XV, § 11. The Ohio Constitution Defense of Marriage Amendment states:

> 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.

Id.

107. State v. Hampton, No. 2005CA00292, 2006 WL 3290799, at *2 (Ohio Ct. App. Nov. 13, 2006); State v. Ramirez, No. C-050981, 2006 WL 3040638, at *2 (Ohio Ct. App. Oct. 27, 2006); State v. Rodriguez, No. H-05-020, 2006 WL 1793688, at *7 (Ohio Ct. App. June 30, 2006); Gough v. Triner, No. 05 CO 33, 2006 WL 1868330, at *5 (Ohio Ct. App. June 28, 2006); State v. Logsdon, No. 13-05-29, 2006 WL 1585447, at *6 (Ohio Ct. App. June 12, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); State v. Steineman, No. 2005-CA-46, 2006 WL 925166, at *1 (Ohio Ct. App. Apr. 7, 2006); State v. Ward, 849 N.E.2d 1076, 1077 (Ohio Ct. App. 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); City of Cleveland v. Voies, No. 86317, 2006 WL 440341, at *1 (Ohio Ct. App. Feb. 23, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007). The Ohio domestic violence statute provides that "[n]o person shall knowingly

Some of the courts held that there was no constitutional violation,[108] because as noted by one court, "the domestic-violence statute does not create a legal status that approximates the design, qualities, significance, or effect of marriage."[109] However, other Ohio appellate courts held the statute was in violation of the Ohio Defense of Marriage Act[110] because the statute recognizes a quasi-marital relationship for cohabitating unmarried couples.[111] The Supreme Court of Ohio resolved the issue for Ohio by holding that the domestic violence statute did not "create or recognize a legal relationship that approximates the designs, qualities or significance of marriage," and thus the statute was not unconstitutional.[112]

Like the Ohio domestic violence statute, the Indiana domestic violence statute addresses violence against the offender's spouse or a person living as the offender's spouse.[113] Because the Indiana statute addresses violence within a marriage, courts could construe application of the statute to unmarried couples at odds with the proposed amendment because it creates a marriage like status for couples living as spouses.

Although the Ohio appellate cases involved unmarried heterosexual couples,[114] domestic violence is not limited to opposite sex couples.[115] Despite the myth that domestic violence is non-existent among same-sex couples, approximately twenty-five percent of same-sex partners will experience domestic violence in their lifetime.[116]

3. Medical Decisions.—The ability to make medical decisions for an incapacitated spouse is a statutory right of married couples in Indiana.[117] Some fear that passage of the proposed marriage amendment could prevent doctors and hospitals from allowing a gay man or lesbian to make decisions for his or her

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cause or attempt to cause physical harm to a family or household member." OHIO REV. CODE ANN. § 2919.25(a) (LexisNexis 2006). The statute further defines that a "[f]amily or household member" includes, among other things, a "person living as a spouse." *Id.* § 2919.25(F)(1)(a)(I).

108. *Hampton*, 2006 WL 3290799, at *2; *Ramirez*, 2006 WL 3040638, at *2; *Rodriguez*, 2006 WL 1793688, at *7; *Gough*, 2006 WL 1868330, at *5.

109. *Ramirez*, 2006 WL 3040638, at *2.

110. *Logsdon*, 2006 WL 1585447, at *6; *Steineman*, 2006 WL 925166, at *1; *Ward*, 849 N.E.2d at 1077.

111. *Ward*, 849 N.E.2d at 1082.

112. State v. Carswell, 871 N.E.2d 547, 554 (Ohio 2007).

113. IND. CODE § 35-42-2-1.3 (Supp. 2006); OHIO REV. CODE ANN. § 2919.25 (LexisNexis 2006).

114. *Hampton*, 2006 WL 3290799, at *2; *Ramirez*, 2006 WL 3040638, at *2; *Rodriguez*, 2006 WL 1793688, at *7; *Gough*, 2006 WL 1868330, at * 5; *Logsdon*, 2006 WL 1585447, at *6; *Ward*, 849 N.E.2d at 1077; City of Cleveland v. Voies, No. 86317, 2006 WL 440341, at *1 (Ohio Ct. App. Feb. 23, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007).

115. Christine Lehmann, *Domestic Violence Overlooked in Same-Sex Couples*, PSYCHIATRIC NEWS, June 21, 2002, at 22.

116. *Id.*

117. IND. CODE § 16-36-1-5 (2004).

incapacitated partner.[118] Decisions for medical treatment on behalf of the incapacitated partner would have to be made by a relative or appointee of the court unless the patient had appointed his or her partner as a health care representative.[119] Indiana law allows an adult to appoint another to act as their health care representative if this authorization is in writing, signed by the patient or a designee in the patient's presence, and "witnessed by an adult other than the representative."[120] With this authorization, the patient's partner would be able to make medical decisions for the incapacitated partner regardless of the amendment, as Indiana law allows this authorization to be given to any adult regardless of their relationship to the patient.[121]

4. Preventing Civil Unions in Indiana.—In 2000, the Vermont legislature passed Vermont Act 91, which rendered it the first state to establish civil unions for same-sex couples.[122] Since July 2000, 1286 Vermont couples and more than 8058 out-of-state couples have been joined in civil union.[123] The Vermont Civil Union Act states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[124] Vermont civil unions grant the same benefits, protections, and responsibilities to same-sex couples as those granted to married spouses. Those include property rights, probate and non-probate transfers, laws relating to medical care and treatment, adoption law, state tax laws, and spousal privilege.[125]

In April 2005, Connecticut approved civil unions for same-sex couples.[126] The Connecticut civil union statute provides that same-sex couples in a civil union "shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[127] New Jersey became the third state to offer civil unions to same-sex couples in December 2006.[128] The New Jersey law granted

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118. Carrie Ritchie, *Democrats to Allow Vote on Indiana Gay Marriage Ban*, WASH. WK., Nov. 27, 2006, http://www.pbs.org/weta/washingtonweek/voices/200611/1127local0.htm.

119. IND. CODE § 16-36-1-5.

120. *Id.* § 16-36-1-7.

121. *Id.*

122. DEBORAH L. MARKOWITZ, VERMONT SECRETARY OF STATE, THE VERMONT GUIDE TO CIVIL UNIONS (2006), http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html.

123. *Id.*

124. VT. STAT. ANN. tit. 15, § 1204 (2002).

125. *Id.*

126. Sarah Schweitzer, *Conn. Approves Gay Civil Unions; Advocates and Opponents Criticize Compromise Law*, BOSTON GLOBE, Apr. 21, 2005, at A1, *available at* 2005 WLNR 6212225.

127. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

128. Robert Schwaneberg, *Gays Get Marriage Without the Name: Corzine Signs Bill Creating Civil Unions*, STAR-LEDGER (Newark, N.J.), Dec. 22, 2006, at 1, *available at* 2006 WLNR 22387994 [hereinafter Schwaneberg, *Gays Get Marriage*].

to same-sex couples the same rights, benefits, and responsibilities (estimated at more than 800) that are granted to married couples by the state.[129] These incidents of marriage include hospital visitation, health insurance benefits for civil union partners through employers, alimony, and child support.[130]

The Vermont, Connecticut, and New Jersey civil union statutes all grant same-sex couples the ability to enjoy the same legal privileges, benefits, and responsibilities as married heterosexual couples.[131] Civil unions are considered a compromise position, granting recognition and the legal benefits of marriage without going as far as allowing gay marriage.[132] From a legal standpoint, marriage and civil unions in Vermont, Connecticut, and New Jersey appear to be equivalent, as all of the benefits, responsibilities, and rights associated with marriage are granted to the parties to a civil union.[133]

Opponents of same-sex marriage contend that civil unions are same-sex marriage by another name.[134] However, Americans appear to perceive some difference between the two; recently published polls show that although approximately 56% of Americans oppose same-sex marriage, 54% support civil unions.[135] Additionally, although polls reflect little change in opposition to same-sex marriage over the last three years, support for civil unions has grown.[136] Opinions on same-sex marriage appear to be related to religion, political ideology, and age; older Americans, conservatives, and those who consider themselves religious are the most opposed to same-sex marriage.[137]

If Indiana were to pass the proposed Defense of Marriage amendment, a future civil union statute would be unconstitutional because the amendment provides that any Indiana law may not confer marital status upon unmarried couples.[138] A civil union statute similar to Vermont's, Connecticut's, or New Jersey's grants parties to a civil union a status legally equivalent to marriage.[139] Additionally, the amendment prohibits any Indiana law from conferring on

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129. *See id.*

130. Schwaneberg, *Civil Union Benefits*, *supra* note 58.

131. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

132. *See* Schwaneberg, *Gays Get Marriage, supra* note 128; Schweitzer, *supra* note 126.

133. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15 § 1204 (2002).

134. Schweitzer, *supra* note 126.

135. *By the Numbers: The Public and Gay Rights*, THE ADVOCATE, Sept. 12, 2006, at 20.

136. THE PEW RESEARCH CENTER, MOST WANT MIDDLE GROUND ON ABORTION; PRAGMATIC AMERICANS LIBERAL *AND* CONSERVATIVE ON SOCIAL ISSUES (2006), *available at* http://people-press.org/reports/display.php3?ReportID=283 (showing opposition to same-sex marriage—53% in July, 2003, 60% in August 2004, 53% in July 2005, 56% in July 2006; showing support of civil unions—45% in October, 2003, 48% in August 2004, 53% in July 2005, 54% in July 2006).

137. *Id.*

138. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

139. CONN. GEN. STAT. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

unmarried couples the legal incidents of marriage.[140] The United States Supreme Court stated that government benefits conferred to married couples, property rights, and inheritance rights were incidents of marriage.[141] The granting of the rights and benefits accorded to a married couple is precisely what a civil union statute does for the parties to a civil union.[142] An Indiana civil union statute intended to give same-sex couples an equivalent legal status as a married couple would be unconstitutional.

Assuming that a civil union statute like those in Vermont, Connecticut, and New Jersey was enacted in Indiana despite its patent unconstitutionality, the impact the amendment would have on the parties to such a civil union in Indiana would be both widespread and profound. Married couples in Indiana have many legal rights and benefits by virtue of their marriage, including inheritance, property ownership, and domestic relations law (divorce, child support and custody, property division, etc.) among others.[143]

a. Inheritance.—The amendment has several implications for inheritance. For example, assume Joan and Sue have been together for ten years and are raising Sue's eleven year old daughter. Joan is a physician, and Sue is a part-time school teacher. The couple is among the first to obtain a civil union under Indiana's new civil union statute. Some time later, Joan is killed in a car accident on her way to work. Joan is survived by her partner Sue and an estranged first-cousin, Larry. Joan has no other family.

As Joan died without a will, her estate will be distributed per Indiana's intestacy statute.[144] As parties to an Indiana civil union which grants the parties the same legal status as a married couple, Sue would be considered Joan's surviving spouse and should inherit all of Joan's estate.[145] Larry challenges Sue's right to inherit, wanting Joan's sizable estate for himself. He contends that the Indiana Defense of Marriage Amendment (enacted in 2008) bars Sue from inheriting any of Joan's estate. The amendment provides, "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the

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140. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

141. Turner v. Safley, 482 U.S. 78, 96 (1987).

142. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

143. IND. CODE § 29-1-2-1 (Supp. 2006); IND. CODE § 29-1-3-1 (Supp. 2006); IND. CODE § 31-15-7-1 (2004); IND. CODE § 31-15-7-2 (2004); IND. CODE § 31-15-7-4 (2004); IND. CODE § 32-17-2-1 (2004); IND. CODE § 32-17-3-1 (2004).

144. IND. CODE § 29-1-2-1 (Supp. 2006). The statue provides that

> the surviving spouse shall receive the following share: (1) One-half (1/2) of the net estate if the intestate is survived by at least one (1) child or by the issue of at least one (1) deceased child. (2) Three-fourths (3/4) of the net estate, if there is no surviving issue, but the intestate is survived by one (1) or both of the intestate's parents. (3) All of the net estate, if there is no surviving issue or parent.

Id.

145. *Id.*

legal incidents of marriage be conferred upon unmarried couples or groups."[146] Despite Joan and Sue's civil union, Sue would be barred from inheriting because the inheritance statute considers marital status, and Larry would inherit Joan's estate leaving Sue without a home or funds.

Indiana law also protects a surviving spouse who is purposely or inadvertently left out of the testator's will or receives only a small bequest by providing the spouse an elective share.[147] For example, assume that Joan did not die intestate but had a will from nine years ago, when her relationship with Sue was new and her estate much smaller. In this will, Joan bequeathed $20,000 to Sue and the remainder of her estate to the Indiana Cancer Society. At the time the will was written, the bequest to Sue represented approximately twenty percent of Joan's estate; currently it is less than one percent, as Joan's estate is valued at slightly over two million dollars. Under the provisions of the elective share, Sue would be entitled to half of Joan's estate or one million dollars.

The Indiana Cancer Society (ICS), dismayed at losing over one million dollars, brings suit claiming that the Indiana Defense of Marriage Amendment (enacted in 2008) bars Sue taking an elective share. ICS maintains that the elective share statute provides its protection to the surviving spouse of a married couple and is thus a legal incident of marriage. The second clause of the Indiana Defense of Marriage Amendment prohibits the conferring of marital status or a legal incident of marriage on an unmarried couple.[148] Joan and Sue were partners in a civil union and were not married; therefore, Sue is not entitled to take an elective share. The court, having little choice in the matter, rules in favor of the ICS leaving Sue and her daughter with the $20,000 bequest.

b. Property rights.—Property can be held by a couple in one of three ways: as tenancy in common, as a joint tenancy, or as tenancy by the entireties.[149] In a tenancy in common, the parties each hold "equal or unequal undivided shares" giving them an "equal right to possess the whole property."[150] A joint tenancy is one where the co-owners each have an identical interest in the property that was acquired at the same time with the same instrument.[151] A joint tenancy differs from a tenancy in common in that a joint tenant also has a right of survivorship.[152] This right of survivorship grants the entire property to the surviving joint tenant upon the death of their co-owner.[153] Unless the conveyance is specifically a joint tenancy, the parties will hold the property as tenants in

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146. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

147. IND. CODE § 29-1-3-1 (Supp. 2006). The statute provides "[t]he surviving spouse, upon electing to take against the will, is entitled to one-half (1/2) of the net personal and real estate of the testator." *Id*.

148. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

149. IND. CODE §§ 32-17-2-1, -3-1 (2004).

150. BLACK'S LAW DICTIONARY 1478 (7th ed. 1999).

151. *Id.* at 1477.

152. *Id.*

153. *Id.* at 1326; JAMES L. WINOKUR ET AL., PROPERTY AND LAWYERING 351 (2002).

common.[154]

Tenancy by the entireties is reserved exclusively for married couples.[155] Tenancy by the entireties, like joint tenancy, includes the right of survivorship.[156] In Indiana, a conveyance of property to a married couple is presumed to be a tenancy by the entireties unless it is specific that it is a tenancy in common.[157] A conveyance of property to an unmarried couple, on the other hand, is presumed to be a tenancy in common unless it is specific that it is a joint tenancy.[158]

For example, assume that shortly after obtaining their civil union, Joan and Sue purchase a new home together. Their new home is in the same neighborhood as their good friends, Mark and his wife Christy. Mark and Christy have been married for five years and purchased their current home two years into their marriage. Mark and Joan are carpooling together to work when the traffic accident occurs killing them both.

Because Mark and Christy purchased their home as a married couple, they owned their home as a tenancy by the entirety.[159] When Mark died, Christy maintained sole possession of the home as if the home had been in her name only the entire three years.[160]

Sue is not as fortunate as Christy with regard to the home she and Joan purchased together. The Indiana statutes regarding property ownership restricts tenancy by the entireties to a married couple to be considered as a legal incident of marriage.[161] The Indiana Defense of Marriage Amendment prohibits the conferring of marital status or a legal incident of marriage on an unmarried couple.[162] Thus, under current law, Joan and Sue could not hold their property as a tenancy by the entireties. Unless, Joan and Sue specifically established that the property was a joint tenancy and would go to the survivor in the event of either of their deaths, the property would be held as a tenancy in common.[163] If Sue and Joan had not done this, then Sue would not take sole possession of the house by right of survivorship, but rather Joan's half interest in the home would become part of Joan's estate. In this case, Joan's half interest in the home would be passed on to either the beneficiaries of her will or her heirs at law in the event she died intestate.

Another key difference between a tenancy by the entirety and a joint tenancy or tenancy in common is that the interest of either party in a tenancy by the

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154. IND. CODE § 32-17-2-1 (2004).

155. *Id.* § 32-17-3-1.

156. *Id.*; Sharp v. Baker, 96 N.E. 627, 628 (Ind. App. 1911).

157. IND. CODE § 32-17-3-1 (2004).

158. *Id.*

159. *Id.*

160. *Id.* The statute provides that "[u]pon the death of either party to the marriage, the survivor is considered to have owned the whole of all rights under the contract from its inception." *Id.*

161. *Id.*; Turner v. Safley, 482 U.S. 78, 96 (1987).

162. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

163. IND. CODE § 32-17-2-1 (2004).

entirety is not severable during the marriage.[164] For example, Steve and Milly purchased a home after they were married. By Indiana law, Steve and Milly hold their home as a tenancy by the entirety because a conveyance to a married couple defaults to a tenancy by the entirety.[165] A colleague of Steve's proposes a business venture that Steve feels is too good to pass up, Steve proceeds to try to raise the capital for the venture by mortgaging his share of the family home. Because Milly and Steve have their home as a tenancy by the entirety and the interest of either party is not severable during the marriage, Steve is unable to do so, and the home is protected from Steve's creditors.[166]

However, if Steve and Milly were Steve and Adam who had purchased the home after obtaining their civil union, Adam would not have the same protection by the law as Milly does. As examined above, a tenancy by the entirety is an incident of marriage and would be barred from application to parties to a civil union under Indiana's Defense of Marriage Amendment.[167] A joint tenancy and tenancy in common do not have the same severability protection afforded to the holder of a tenancy in the entirety.[168] Therefore, Steve and Adam's home is not protected from Steve's creditors as would be the case for Steve and Milly.

c. Domestic relations law: divorce, child support and custody, property division.—Indiana law provides for the just and reasonable division of property during a divorce.[169] The court will divide the property regardless of whether it was owned prior to the marriage, acquired only in one spouse's name during the marriage, or acquired jointly.[170] Parties to a civil union would not be protected by this statute at the dissolution of their union as are spouses during a divorce because the Indiana Defense of Marriage Amendment bars the application of marital status or the legal incidents of marriage to an unmarried couple.[171]

The courts may also order one party in the divorce to provide maintenance support to his or her ex-spouse following a divorce.[172] The Indiana Defense of Marriage Amendment would have a profound impact on parties to a civil union being dissolved with regard to maintenance support. For example, consider John and Marsha who married two years ago during a vacation in Las Vegas. Their relationship is troubled, and the couple decides to divorce. Marsha seeks maintenance support under Indiana law, as she is undergoing chemotherapy for cancer and is unable to work due to the debilitating effects of the treatment.[173] Indiana statutory law would allow the court to require John to provide maintenance support to Marsha while she is unable to work. However, if Marsha

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164. *Id.* § 32-17-3-1.
165. *Id.*
166. *Id.*
167. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).
168. IND. CODE §§ 32-17-2-1, -3-1 (2004).
169. *Id.* § 31-15-7-4.
170. *Id.*
171. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).
172. IND. CODE §§ 31-15-7-1 (2004).
173. *Id.*

were Martin, he would be unable to obtain maintenance support from John at the dissolution of their civil union. The Indiana Defense of Marriage Amendment would bar the application of the maintenance support statute to their situation as an incident of marriage.[174]

For married couples with children, traditionally if one parent dies, custody of minor children goes to the surviving parent.[175] This right is based on the marital status of the parents.[176] The Indiana Defense of Marriage Amendment prohibits any Indiana law from being construed to confer marital status on an unmarried couple.[177] Thus, parties to a civil union could not be considered "married" per this amendment.[178] In contrast to the surviving spouse of a married couple with children, if one party to a civil union dies, then the survivor would not automatically have custody of any of the couple's children. Thus, in the event of the death of the biological parent, custody of the child could be awarded to a relative of the biological parent, or the child could become a ward of the state, despite the child having a living parent who is unable to obtain custody because he or she is of the same sex as the biological parent. To avoid losing custody of any children in the event of the death of the biological, the non-biological parent would have to adopt the child. Current Indiana law permits the non-biological parent to adopt their partner's child.[179] However, even this law might be declared unconstitutional under the Indiana Defense of Marriage Amendment, because by allowing the same-sex partner of the biological parent to adopt the child, it is construing the couple's relationship as having a marriage-like status, which is barred by the amendment.[180]

5. Summary of Effect of Proposed Amendment on Indiana Law.—Opponents of the proposed Indiana amendment fear that it will eliminate domestic partner health benefits offered by some Indiana employers, prevent application of domestic violence statutes to unmarried couples, and bar domestic partners from making medical decisions for an incapacitated partner.[181] The proposed amendment should not bar the voluntary offering of domestic partner benefits by universities and other public employers because there is no statute requiring public employers to offer health benefits to their employees' domestic partners. Application of domestic violence statutes could be declared unconstitutional should the proposed amendment be enacted.[182] However, this will depend on

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174. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

175. Brown v. Beachler, 68 N.E.2d 915, 916 (Ind. 1946) ("Of course parents if not divorced have the natural right to the custody of their children, and in case either parent dies this right goes to the survivor.").

176. *Id.*

177. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

178. *Id.*

179. *In re* Adoption of K.S.P, 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004).

180. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

181. *See* Ritchie, *supra* note 118; Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

182. IND. CODE § 35-42-2-1.3 (Supp. 2006).

whether Indiana courts view the protection offered by the statute as an incident of marriage or as conferring a quasi-marital status, as did some of the Ohio appellate courts.[183] Same-sex couples can easily maintain the ability to make decisions for an incapacitated partner by designating each other as health care representatives under Indiana statutory law.[184]

A significant effect of passage of the amendment would be the pre-emption of future enactment of civil union legislation. The amendment bars the conferring of marital status or the legal incidents of marriage to unmarried couples.[185] Passage of the amendment would also prevent Indiana courts from declaring the current DOMA as unconstitutional and requiring Indiana to recognize or grant civil unions.[186]

III. WHY HAVE A DEFENSE OF MARRIAGE AMENDMENT?

With Indiana already having a DOMA that has withstood constitutional challenge, one wonders why an amendment to the Indiana Constitution is needed.[187] Proponents of the amendment claim that it is needed to prevent Indiana courts from declaring the Indiana DOMA unconstitutional and allowing same-sex couples to wed.[188] Additionally, in the words of its author, State Senator Brandt Hershman, the amendment "is an effort to preserve existing law, religious tradition and thousands of years of history from a carefully orchestrated attack by liberal special interests."[189] Thus, the reasons for enacting such an amendment are two-fold, much like the amendment itself, and each needs to be analyzed separately.

A. Protection of DOMA

Proponents of the Defense of Marriage Amendment maintain that the amendment is "essential to prevent activist judges from redefining marriage."[190] The amendment's author, Senator Hershman said "'[i]f interest groups are successful in their court challenge in Indiana as they have been in Massachusetts, an amendment to the Indiana Constitution will be the only means available to

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183. State v. Logsdon, No. 13-05-29, 2006 WL 1585447, at *6 (Ohio Ct. App. June 12, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); State v. Steineman, No. 2005-CA-46, 2006 WL 925166, at *1 (Ohio Ct. App. Apr. 7, 2006); State v. Ward, 849 N.E.2d 1076, 1077 (Ohio Ct. App. 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007).

184. IND. CODE § 16-36-1-7 (2004).

185. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

186. IND. CODE § 31-11-1-1 (2004); S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

187. IND. CODE § 31-11-1-1 (2004); Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

188. *See* Ruthhart, *Round 2*, *supra* note 76; Hershman Press Release, *supra* note 7.

189. Hershman Press Release, *supra* note 7.

190. *See* Ruthhart, *Committee*, *supra* note 86.

protect traditional marriage.'"[191] At the time that Senator Hershman made the above statement, a legal challenge was underway to the Indiana DOMA.[192] The special interest group that Senator Hershman referred to consists of three same-sex Indiana couples who challenged the Indiana DOMA after obtaining civil unions in Vermont.[193] These couples were "attacking" traditional marriage by asking that their civil unions be recognized as marriages in Indiana, thus seeking the benefits and responsibilities accorded to married heterosexual couples.[194]

The couples challenged the constitutionality of the DOMA with regard to three provisions of the Indiana Constitution: sections 1, 12, and 23 of article I.[195] The Indiana Court of Appeals held that the DOMA did not violate the Indiana Constitution.[196] Lower courts are bound to follow this ruling under the doctrine of stare decisis which has long been followed in Indiana.[197]

In *Collins v. Day*,[198] the Supreme Court of Indiana established a two part test for determining whether a statute is at odds with article I, section 23 of the Indiana Constitution.[199] The first part of the test provides that

> where the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.[200]

The second part of the test requires that the "preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[201] Courts must employ substantial deference to the legislature in considering the challenge, and the statute is presumed to be constitutional.[202] The burden is on the challenger "to overcome the presumption of constitutionality and to establish a constitutional violation."[203]

The *Collins* test established a difficult barrier for the challengers to overcome. The challengers had to go beyond showing that same-sex marriage would not directly harm traditional marriage; per the *Morrison* court, the challengers had to show that allowance of same-sex marriage would promote the

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191. Hershman Press Release, *supra* note 7.
192. *Morrison*, 821 N.E.2d at 15.
193. *Id.* at 19.
194. *Id.*
195. *Id.*
196. *Id.* at 33-35.
197. Cromie v. Bd. of Tr. of the Wabash & Erie Canal, 71 Ind. 208 (Ind. 1880).
198. Collins v. Day, 644 N.E.2d 72, 78-80 (Ind. 1994).
199. *Id.* at 78-80.
200. *Id.* at 78-79.
201. *Collins*, 644 N.E.2d at 79; *Morrison*, 821 N.E.2d at 21.
202. *Collins*, 644 N.E.2d at 80.
203. *Morrison*, 821 N.E.2d at 21.

state interests in heterosexual marriage, including procreation.[204] If the allowance of same-sex marriage does not promote these interests, "then limiting the institution of marriage to opposite-sex couples is rational and acceptable under [a]rticle I, [section] 23 of the Indiana Constitution."[205] This level of burden on the challengers to the constitutionality of the Indiana DOMA would make it extraordinarily difficult to overcome the presumption of constitutionality. It would be very unlikely under these rules for the statute to be declared unconstitutional. Indeed, as noted by the *Morrison* court, "[n]o statute or ordinance has ever been declared facially invalid under the *Collins* test."[206] The proposed amendment is not necessary to prevent the Indiana DOMA from being declared unconstitutional.

B. Protection of Traditional Marriage

How does allowing same-sex couples to marry or form a marriage equivalent civil union harm heterosexual marriage? One of the goals of the proposed Indiana Defense of Marriage Amendment, according to its author, State Senator Brad Hershman, is to protect traditional marriage.[207] Advocates of traditional marriage may have cause for concern as studies have shown that the marriage rate in the United States declined 50% since 1970, from "76.5 per 1000 unmarried women to 39.9."[208] However, connecting the decline of heterosexual marriage to same-sex marriage or civil unions appears to be very tenuous. Massachusetts is the only state allowing same-sex marriage, and it did not begin to do so until 2004.[209] Only three states allow civil unions for same-sex couples: Vermont began granting civil unions in 2000, Connecticut in 2005, and New Jersey in 2007.[210] Although marriage rates fell in the majority of states between 2000 and 2002, the rate of decrease in Vermont was less than the average of the other states with decreasing rates.[211] Marriage rates in the United States were in decline prior to the legalization of same-sex unions.

Although the legal recognition of same-sex unions is both a recent and localized development in the United States, several countries in western Europe

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204. *Id.* at 23.

205. *Id.*

206. *Id.* at 21.

207. Hershman Press Release, *supra* note 7.

208. Sharon Jayson*, Divorce Declining, but so Is Marriage*, USA TODAY, July 18, 2005, at 3A, *available at* 2005 WLNR 11229128.

209. Yvonne Abraham & Rick Klein, *Free to Marry; Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1, *available at* 2004WLNR 3562416.

210. MARKOWITZ, *supra* note 122.

211. U.S. CENTER FOR DISEASE CONTROL, MARRIAGE AND DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2002, http://www.cdc.gov/nchs/data/nvss/mar&div.pdf (last visited Jan. 14, 2007). Vermont had a decrease of 0.3 marriages per 1000 population between 2000 and 2002 versus an average decrease of 0.56 for the other thirty-seven states (excluding Nevada). *Id.*

have legally recognized same-sex unions for several years. One can look to these countries to determine if allowance of same-sex marriage really harms traditional opposite-sex marriage. Denmark enacted a registered partnership law in 1989 granting same-sex couples most of the rights and responsibilities of marriage.[212] Norway adopted a similar law in 1993, Sweden in 1994, and Iceland in 1996.[213] The Netherlands granted marriage to same-sex couples in 1998.[214] Since the granting of these rights to same-sex couples, the divorce rates have not risen and the marriage rates have remained stable or increased in these countries.[215] The experience in these countries has shown that granting same-sex couples a marriage like legalized partnership has not had a negative impact on heterosexual marriage.[216]

From a legal standpoint, the various litigated cases seeking recognition of same-sex marriage convey the state's (or states') interest in preserving marriage as procreation[217] and providing the best environment for rearing children.[218]

1. Procreation.—Procreation is viewed by some as the natural result of marriage.[219] "[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."[220] "This is true even though married couples are not required to become parents."[221] The *Morrison* court noted that the state "may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse."[222]

However, many marriages are childless; U.S. Census data for 2005 indicates that approximately 21% of married couples between fifteen and forty-four do not have children.[223] The ability to procreate is not a requirement for marriage in

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212. M. V. LEE BADGETT, WILL PROVIDING MARRIAGE RIGHTS TO SAME-SEX COUPLES UNDERMINE HETEROSEXUAL MARRIAGE? EVIDENCE FROM SCANDINAVIA AND THE NETHERLANDS (2004), http://www.iglss.org/media/files/briefing.pdf.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036, 1125 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

218. *Baker*, 191 N.W.2d at 186; *Singer*, 522 P.2d at 1195-97.

219. Duncan, *supra* note 13, at 661.

220. *Singer*, 522 P.2d at 1195.

221. *Id.*

222. Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

223. U.S. Census Bureau, *Family Households, by Type, Age of Own Children, Educational Attainment, and Race and Hispanic Origin of Householders Under 45 Years of Age: 2005*, http://www.census.gov/population/socdemo/hh-fam/cps2005/tabF3-all.csv [hereinafter U.S. Census Bureau] (last visited Feb. 4, 2007).

Indiana.[224] Yet, same-sex couples are denied marriages because of their inability to procreate.[225] Judge Friedlander, in his concurring opinion in *Morrison* noted that in utilizing the *Collins* analysis,

> disparate treatment between classes is permissible so long as the treatment is reasonably related to the inherent characteristic that distinguishes the unequally treated classes . . . . [T]hat means the prohibition against same-sex marriage is justifiable because the purpose of the DOMA legislation is to encourage responsible procreation, and same-sex couples cannot procreate through sexual intercourse.[226]

Judge Friedlander went on to note that based on this rationale, the state could prohibit opposite-sex couples that were unable to have children due to either fertility problems or age from marrying.[227] Judge Friedlander continued that the Indiana DOMA's "narrow focus is to prohibit marriage among only one subset of consenting adults that is incapable of conceiving in the traditional manner—same-sex couples. Such laser-like aim suggests to me that the real motivation behind [the Act] might be discriminatory."[228]

2. Rearing Children.—Opponents of same-sex marriage argue that children will be harmed by the granting of marriage rights to homosexual couples.[229] These opponents argue that children do best when raised by heterosexual married couples and that they are "healthier both emotionally and physically, even thirty years later, than those not so blessed by traditional parents."[230] However, this contention is contradicted by other research.

A recent article in *Pediatrics*, stated that "[m]ore than [twenty-five] years of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment."[231] Research has revealed no disparity in adolescents' psychosocial adjustment between children raised by same-sex couples and children raised by opposite-sex couples.[232] Studies conducted with the children of lesbian mothers found that the children did not differ from other children with regard to

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224. IND. CODE § 31-11-1-5 (2004).

225. *Singer*, 522 P.2d at 1195. "Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'" *Id.*

226. *Morrison*, 821 N.E.2d at 36 (Friedlander, J., concurring).

227. *Id.*

228. *Id.* at 37.

229. James C. Dobson, *Eleven Arguments Against Same-Sex Marriage*, May 23, 2004, http://www.citizenlink.org/FOSI/marriage/A000004753.cfm.

230. *Id.*

231. James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 361 (2006), *available at* http://www.pediatrics.org/cgi/content/full/118/1/349.

232. Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886, 1892 (2004).

emotional and behavioral adjustment, cognitive functions, and did not suffer negative psychological consequences due to being raised by a same-sex couple.[233]

Although same-sex couples only comprise about 1% of households in the United States, approximately 25% of these couples are raising children, which equates to at least 148,000 children.[234] Based on the research, denying these children and their parents the protections afforded to married heterosexual couples and their families based on opinions that children are best reared by traditionally married couples seems groundless. Indeed, it would be in the state's (or states') interest to provide children a suitable environment for development by allowing same-sex couples to marry or at least engage in civil unions with all the legal benefits and protections of marriage.

CONCLUSION

The stated goals of the proposed Indiana Defense of Marriage Amendment is to prevent courts from ruling the Indiana DOMA unconstitutional and to protect traditional marriage.[235] Senator Hershman asserts that the amendment "'is an effort to preserve existing law, religious traditions and thousands of years of history from a carefully orchestrated attack by liberal special interests.'"[236] The implication is that the proponents of gay marriage seek to destroy the institution of marriage and that this is being done by advocating for the legal right to partake in that institution.

Opponents of gay marriage maintain that allowing same-sex couples to marry will harm traditional marriage.[237] It is difficult to imagine how legally recognizing the union of a same-sex couple would harm anyone's marriage. Although there is insufficient data from the United States regarding what, if any, effect civil unions have had on marriage, several countries in western Europe have legally recognized same-sex unions for a number of years.[238] The experience in these countries has shown that legal recognition of same-sex unions has not had a negative impact on heterosexual marriage.[239] There does not appear to be any evidence that civil unions or same-sex marriage will in any way harm heterosexual marriages.

States litigating on the side in opposition to same-sex unions have sought to reserve marriage for heterosexual couples by virtue of the state's interest in propagation of the human race and providing the best environment for

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233. Norman Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents. A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCHOL. 335, 349 (2002); Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEV. PSYCHOL. 20, 30 (2003).

234. Pawelski et al, *supra* note 231, at 361; U.S. Census Bureau, *supra* note 223.

235. Hershman Press Release, *supra* note 7.

236. *Id.*

237. *See* Ruthhart, *Round 2*, *supra* note 76.

238. BADGETT, *supra* note 212 (recognizing same-sex unions in Denmark since 1986, Norway since 1993, Sweden since 1994, Iceland since 1996, and the Netherlands since 1998).

239. *Id.*

children.[240] However, Indiana does not restrict marriage to opposite-sex couples of childbearing age.[241] Additionally, studies have shown that sexual orientation of a child's parents has no negative impact on the child's development into a healthy adult.[242] In fact, by not allowing their same-sex parents to legalize their unions, the families of thousands of children are being deprived of legal protection afforded to families with opposite-sex married parents. Is it truly in the best interest of families to deny these children those legal protections simply because their parents are not of opposite genders?

Opponents of the proposed Indiana constitutional amendment fear the impact the amendment could have on domestic partner benefits from public employers and application of the domestic violence statute to unmarried couples.[243] It appears that domestic partner benefits offered by universities and public employers would be unaffected by the amendment, as they are not mandated by statute, but are rather voluntarily offered by the employer. The Indiana domestic violence statute could be affected by the amendment depending on whether the courts perceive the statute as conferring a marriage-like status or incidents of marriage to an unmarried couple.

The overall affect of the amendment on current Indiana law would be minimal; same-sex marriage is already statutorily prohibited in Indiana by DOMA.[244] This statute has already withstood constitutional challenge.[245] The analysis method dictated by the Indiana Supreme Court creates a presumption that legislation is constitutional and requires the challenger to overcome this presumption.[246] As noted by the *Morrison* court, "[n]o statute or ordinance has ever been declared facially invalid under the *Collins* test."[247] Thus, the amendment is not needed to protect the Indiana DOMA.

If the amendment is not needed to protect the Indiana DOMA nor the institution of traditional marriage, what then will the amendment do? The most significant aspect to the proposed amendment is that it is a preemptive strike against the allowance of civil unions in Indiana. The language of the amendment would render any civil union statute that seeks to give same-sex couples the same rights and benefits as a married couple unconstitutional.[248] There appears to be no reason for denying same-sex couples the same rights as granted to married opposite-sex couples, except that gays and lesbians comprise a socially unpopular

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240. Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036, 1125 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

241. IND. CODE § 31-11-1-5 (2004).

242. Anderssen et al., *supra* note 233, at 349; Golombok et al., *supra* note 233, at 30; Pawelski et al., *supra* note 231, at 361; Wainright et al., *supra* note 232, at 1892.

243. *See* Ruthhart, *Round 2*, *supra* note 76.

244. IND. CODE § 31-11-1-1 (2004).

245. Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

246. *Id.* at 21.

247. *Id.* at 22.

248. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

minority.

Eventually, Indiana, along with the rest of the United States, will grant legal status to same-sex couples either in the form of civil unions or marriage. Polls show that support for civil unions has grown from 45% in 2003 to 54% in 2006.[249] Additionally, 53% of Americans between eighteen to twenty-nine support gay marriage.[250] The question then will be whether the people of Indiana can look at their constitutional history without shame.

249. THE PEW RESEARCH CENTER, *supra* note 136.

250. *Id.*