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THE MARRIAGE LAW PROJECT
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Glenn Tebbe, Executive Director
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Dear Mr. Tebbe:

Indiana's proposed constitutional amendment to define and protect marriage is coming to the General Assembly for the second time. The proposed amendment builds on Indiana's present statutory policy, but the text is patterned after a proposed amendment to the Constitution of the United States.

The sponsors of the Indiana amendment presumably followed the Federal pattern because they intended to imitate the purposes and effects of that amendment. That being the case, Hoosiers can vote for their amendment without fearing that it will lead to the undesirable consequences alleged by its opponents.

This letter looks at the link between the Indiana amendment and the Federal amendment, and also examines other relevant information. We hope we are providing a useful perspective.

The People of Indiana are entitled to know with reasonable certainty what their proposed amendment means. If comparable language at the national level is any guide, then Indiana's new law will mean just two things:

- First, that marriage in Indiana requires a man and a woman.
- Second, that questions of marital status and benefits must be decided by the elected branches of government, not the judiciary.

Indiana’s Text and Procedure

Indiana’s proposed amendment on marriage is contained in Senate Joint Resolution 7, which would add the following language to the Constitution:

“(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.”

The Indiana Constitution, Article 16, §1, requires a proposed constitutional amendment to pass both houses of the General Assembly *twice* before it is submitted to the People. Last year, the proposed amendment passed both houses. Now, a general election having intervened, the proposal is back before the General Assembly. It passed the Senate a second time on February 12. If it passes the House a second time, it will go to the voters in November 2008.

The Indiana Text, and a Similar Text in Congress

The Indiana text is drawn from similar language that has been debated and voted on in Congress. In Table 1, note the similarities with a text that twice has been on the floor of the United States Senate (S.J.Res. 40 of the 108th Congress, and S.J.Res 1 of the 109th Congress):

Table 1. Proposed Constitutional Texts

U.S. Senate, 2004 & 2006	Indiana 2006-2007
“Marriage in the United States shall consist only of the union of a man and a woman.	“(a) Marriage in Indiana consists only of the union of one man and one woman.
“Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”	“(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.”

Note: In Table 1, the two sentences of each amendment have been separated for readability, but in the original texts the sentences are joined into one paragraph.

The Congressional text and the Indiana text have sprung from the same seed. They have the same source and the same purposes. In our judgment, the two texts must be read together. They address the same subject matter in virtually the same words, and their interpretations can be harmonized. The meaning of the former can lead to an understanding of the latter.

What is the meaning of the proposed amendment that the U.S. Senate voted on? Senator Wayne Allard of Colorado was its chief sponsor, and on the Senate floor on June 5, 2006 he said the following:

“As a result of this coordinated campaign to redefine marriage through the courts, we stand here today, compelled by respect for the democratic process, to publicly debate an amendment to the U.S. Constitution. Again, this amendment simply reads [he then read the text of the amendment]:

* * *

“The first sentence is straightforward: it defines marriage as an institution solely between one man and one woman – just as it has been defined for thousands of years in hundreds of cultures around the world.

“The second sentence simply ensures that the people or their elected representatives, not judges, can decide whether to confer the legal incidents of marriage on people. Citizens remain free to act through their legislatures to bestow whatever benefits to same-sex couples that they choose. It is aimed squarely at the problem of judicial activism.

“Just as important as what it *does* do, is what it does *not* do. I have said it time and time again and I say here again today for the record – the amendment does *not* seek to prohibit, in any way, the lawful, democratic creation of civil unions or domestic partnerships. It does *not* prohibit private employers from offering benefits to same-sex couples. It denies *no* existing rights.

“What our amendment does is to define and protect traditional marriage at the highest level – the U.S. Constitution. Importantly, the consideration of this amendment in the Senate represents the discussion of marriage in America in a democratic body of elected officials. I am not willing to surrender this issue to the courts.” 152 *Congressional Record* S 5409 (daily ed. June 5, 2006) (emphasis added).

Senator Allard's statement is clear and succinct. He says his amendment does just two things, it defines marriage and it protects democratic decision-making.¹ Indiana's leading advocates for the State marriage amendment seem to be striving for the same result.²

Neither house of Congress has passed the proposed amendment to the U.S. Constitution (for one thing, it requires a two-thirds majority vote). The chief objection to the amendment seems to have been that the subject is best left to the States themselves. With S.J.Res. 7, Indiana is responding to that opportunity by proposing to enact an amendment of its own.

Is a Constitutional Amendment Needed in Indiana?

Forty-four States now protect marriage by duly enacted law. Twenty-seven of those States protect marriage in their constitutions. Indiana is one of the 17 that have statutory protections only.

¹ Indiana's Catholic Bishops agreed with Senator Allard's interpretation of the amendment. On July 18, 2004, Bishop William L. Higi of the Diocese of Lafayette, Indiana wrote a "Federal Marriage Amendment Alert" that said, "As proposed, the amendment both defines marriage as between one man and one woman, and leaves legislative decisions on civil unions or domestic partnerships up to state legislatures."

² The Indiana Catholic Conference agrees that S.J.Res. 7 is limited. In writing that the resolution has been reported favorably by the Senate Judiciary Committee on February 1, 2007, the Conference said, "The committee heard testimony from all sides for over 3 hours. Opponents were mostly concerned about the second part of the amendment that prohibits Indiana law from being construed to require marital status for unmarried couples or groups. Most raised concerns that this was vague and would prohibit benefits now offered by employers or what is permitted already by state law such as adoptions by single persons. The proponents maintained that the amendment prohibits only courts from granting rights; it does not prohibit the legislature from conferring or granting rights to unmarried individuals, and it does not change laws protecting individuals and groups already enacted. *ICC [the Indiana Catholic Conference] supports the amendment because it would strengthen Indiana's current law defining marriage and the amendment would not constrict the legislature regarding other laws.*" (emphasis added)

Indiana’s statutory Defense of Marriage Act (“DOMA”) says, “(a) Only a female may marry a male. Only a male may marry a female. (b) 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.” Indiana Code §31-11-1-1 (subsection (a) was enacted in 1986; subsection (b) was enacted in 1997).

If Indiana wants to ensure the continuing health and viability of the policies that are embedded in its marriage statutes, the People of Indiana will amend their constitution. The statute alone is not safe, and it is not sufficient.

A constitutional challenge to subsection (a) of Indiana’s DOMA was defeated in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005), but *Morrison v. Sadler* was *not* decided by the State’s highest court. The litigants in that case, and others who believe that same-sex marriage is a legally enforceable right, have not given up; they are simply waiting for their next opportunity.

The Indiana Civil Liberties Union (ICLU) represented the plaintiffs in *Morrison v. Sadler*. They argued that Indiana’s DOMA violates three separate sections of the Indiana Constitution, Article 1, §23; Article 1, §1; and Article 1§12. The plaintiffs lost in *Morrison v. Sadler*, but the ICLU hasn’t changed its mind about marriage. It still believes that the State cannot constitutionally limit civil marriage to unions of opposite-sex couples.

Morrison v. Sadler was a victory for marriage and for democrat decision-making.³ That decision is tentative, however. Lower courts in Vermont, Massachusetts, and New Jersey all upheld the lawfulness of man-woman marriage, but when the cases were appealed to courts of last resort, the lower courts were reversed. Victories at the appellate courts were temporary; they turned into defeats at the supreme courts. It is naïve to suppose that constitutional challenges to Indiana’s DOMA have ended. Indiana is only between rounds.

³ “What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matters at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. . . .” John H. Hallowell, *THE MORAL FOUNDATION OF DEMOCRACY* 120-21 (Univ. Chicago Press 1954).

Should the Second Sentence Be Dropped?

Most of the controversy about Indiana's proposed amendment is directed at the second sentence. It is tempting, perhaps, to drop that sentence and pray for an end to the controversy. This temptation should be resisted.

To begin with, many of the amendment's opponents would *not* be satisfied even if the second sentence were dropped. They seek full-blown same-sex marriage, and their quibbling about the second sentence is merely a tactic for derailing *both* sentences.

Nor will dropping the second sentence reduce the odds of getting sued. There have been numerous lawsuits filed over the elemental definition of marriage – indeed, *Morrison v. Sadler* was one of them – and dropping Indiana's second sentence will not eliminate the lawsuits. Hoosiers must not think that they will avoid litigation by lopping off sentence two.

Subsection "A" of Oklahoma's marriage amendment⁴ is nearly identical to Indiana's proposal, and the Oklahoma amendment is being attacked as contrary to the Constitution of the United States. The lawsuit is still in its early stages, but that litigation would continue even if the second sentence disappeared. *Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp.2d 1239, 1256 (N.D. Okla. 2006) ("All four plaintiffs desire to marry [a partner of the same sex] in the State of Oklahoma but are prevented from doing so based on the definition of marriage in the Oklahoma Amendment").

The People of Indiana can count on the amendment being challenged no matter how simple and explicit it is, so they might as well make every effort to cover the points that they consider most vital. By using the present text, Hoosiers show that two points are vital to them, the definition of marriage and democratic decision-making.

⁴ Subsection "A" of Oklahoma's amendment reads: "Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Okla. Const. Art 2, §35 (adopted at the election of Nov. 2, 2004).

Could a One-Sentence Amendment Do the Job?

A one-sentence amendment is *not* sufficient to answer the issues that face Indiana (and all of America) today. A one-sentence amendment may safeguard Indiana from the “Massachusetts malady” of having same-sex marriage thrust upon it by a one-judge majority of an over-active court, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), but a one-sentence amendment will *not* safeguard Indiana from the kinds of challenges to marriage and democracy that arose in Vermont and New Jersey.

We must be clear about what happened in Vermont and New Jersey or we will confuse the question that faces Indiana:

The problem in Vermont and New Jersey is *not* that those States *enacted statutes* creating civil unions. No, the problem in those States that is relevant for Indiana is that the Vermont and New Jersey *courts ordered* the legislature and the governor to make those changes.

As we read it, the Indiana amendment will not prohibit the Indiana *legislature* from doing what the Vermont and New Jersey *legislatures* did; the Indiana amendment *will* prohibit the Indiana *courts* from doing what the Vermont and New Jersey *courts* did.⁵

In this regard, Indiana can look to Connecticut and California where the legislatures have created civil unions (Connecticut) and registered domestic partnerships (California). Under the Indiana amendment, such acts appear to be permissible so long as they are performed *by the law-making branches of government*.

Connecticut and California remind us of an irony. Proponents of same-sex marriage will object to Indiana’s second sentence because, they say, it may limit

⁵ The Vermont Supreme Court ordered the legislature to provide same-sex couples with the same benefits and burdens as married couples. *Baker v. State*, 744 A.2d 864 (Vt. 1999). The legislature responded with civil unions. 15 V.S.A. §1201 *et seq.* (added 1999 by law no. 91). In New Jersey, the legislature already had enacted a Domestic Partnership Act, Laws 2003, ch. 246, but the New Jersey Supreme Court told the legislature that domestic partnerships were not enough, *Lewis v. Harris*, 908 A.2d 196 (2006) (4-to-3 decision; the minority would have held that same-sex *marriage* was required by the N.J. constitution). In response to the court’s judgment, the New Jersey legislature and governor enacted a civil unions law, Laws 2006, ch. 103, effective Feb. 19, 2007.

the legislature’s authority to create civil unions. But if the legislature were to create civil unions by statute, these same proponents would file a lawsuit claiming that civil unions are constitutionally inadequate. This is happening now in Connecticut, *Kerrigan v. State*, 909 A.2d 89 (Ct. Super. Ct. 2006), *on appeal*, and California, *In re Marriage Cases*, 49 Cal.Rptr.3d 675 (2006), *pet. for review granted*, 149 P.3d 737 (2006).

A Closer Look at Indiana’s Second Sentence

Indiana’s amendment and the proposed amendment in Congress have sprung from the same seed, but they are not identical. The major difference may be that Indiana’s amendment adds the phrase “or any other Indiana law,” which introduces statutory law into the text, see Table 2.

Table 2. Second Sentences of Proposed Constitutional Texts

U.S. Senate, 2004 & 2006	Indiana 2006-2007
<p>“Neither this Constitution, nor the constitution of any State, shall be <u>construed</u> to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.” (emphasis added)</p>	<p>“(b) This Constitution <i>or any other Indiana law</i> may not be <u>construed</u> to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups.” (emphasis added)</p>

The Phrase “or any other Indiana law.” Indiana’s addition of the term “or any other Indiana law” does *not* amount to a decisive difference between the two amendments because, in our judgment, the key term in both texts is the word “construed,” and not what precedes it. The purpose of both amendments is to protect the powers and prerogatives of the elected branches of government.

The Congressional amendment says that both Federal and State courts are prohibited from “construing” any constitutional provision so as to dilute the privileges of marriage. The Indiana amendment says that Indiana’s courts are prohibited from “construing” any constitutional provision *or any statute* so as to dilute the privileges of marriages. This difference should be regarded as a farseeing strength, not a weakness, for Indiana’s courts will be called upon to interpret both constitutional provisions and statutes.

The Phrase “may not be construed.” As we see it, the second sentence of the Indiana amendment means that the Indiana courts cannot interpret a constitutional provision or a statute to extend marriage or its legal incidents to unmarried couples or groups *unless the legislature or the People have made that decision first and expressed it clearly*. We draw this conclusion, in part, from the way in which Indiana courts interpret statutes. In 2005, the Indiana Supreme Court said:

“The first step in interpreting a statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question. *Rheem Mfg. Co. v. Phelps Heating and Air Conditioning*, 746 N.E.2d 941, 947 (Ind. 2001). When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. *Poehlman v. Feferman*, 717 N.E.2d 578, 581 (Ind. 1999). *Clear and unambiguous statutes leave no room for judicial construction. Id.* However, when a statute is susceptible to more than one interpretation, it is deemed ambiguous and thus open to judicial construction. *Amoco Production Co. v Laird*, 622 N.E.2d 912, 915 (Ind. 1993). And when faced with an ambiguous statute other well-established rules of statutory construction are applicable. One such rule is that our primary goal of statutory construction is to determine, give effect to, and implement the intent of the legislature. *Neal v. DeKalb Co. Div. of Family & Children*, 796 N.E.2d 280, 284 (Ind. 2003).” *Sees v. Bank One*, 839 N.E.2d 154, 157 (Ind. 2005) (emphasis added).

As recently as last month the Indiana Court of Appeals said, “*Where the language of the statute is clear and unambiguous, there is nothing to construe.*” *Maynard v. State*, 859 N.E.2d 1272, 1274 (Ind. App. Jan. 18, 2007) (emphasis added), citing *Pendleton v. Aguilar*, 827 N.E.2d 614, 619 (Ind. App. 2005), *reh’g denied, trans. denied*.

These views go back more than a century, *Eastman v. State*, 10 N.E. 97, 99 (Ind. 1887), and they help answer questions about Indiana’s second sentence:

An enactment that is clear and unambiguous requires no judicial construction; no judicial construing is required or allowed. If the General Assembly or the People enact a law relating to marriage or its legal incidents and the law is clear and unambiguous, there is nothing for the courts to *construe* and the courts can simply apply and enforce the law as written. Indiana’s amendment means that the courts cannot act unilaterally, as they have done in Massachusetts, Vermont, and New Jersey. They must wait for the People or the elected branches of government.

S.J.Res. 7 prohibits all judicial inferences, interpretations, constructions of meaning, and analyses of syntax that would create marital rights where none have been created by democratic processes.

The Phrase “unmarried couples or groups.” The second sentence of the Indiana amendment speaks of “unmarried couples or groups.” This is because the amendment is designed to prohibit imitations of marriage, and counterfeits. It is *not* designed to affect individuals *qua* individuals.

Michigan is deliberating this issue now, and its experience may be instructive for Indiana, although neither Michigan’s constitutional amendment nor cases decided under it can be used as direct precedents for Indiana. The texts are just too different.

Michigan’s constitutional amendment on marriage⁶ was recently construed by an intermediate appellate court to prohibit the granting of certain benefits to same-sex couples *if, and only if*, the benefits were predicated on the couple’s quasi-marital relationship. *National Pride at Work v. Governor of Michigan*, -- N.W.2d --, 2007 WL 313582 (Mich.App. Feb. 1, 2007) (likely to be appealed).

Contrary to what you might have heard, the Michigan decision does *not* mean that a government employer *cannot* give benefits to unmarried employees (including same-sex partners), it only means that such benefits cannot be based on an imitation of marriage. The Michigan court wrote, “The amendment as written does *not* preclude the extension of employment benefits to unmarried partners on a basis *unrelated* to recognition of their agreed-upon relationship.” *Pride at Work, supra*, ¶ at note 20 (emphasis added).

As a result of the Michigan decision, benefits may become *more* widely available to Michigan public employees because governments will have to consider the needs of a greater number of unmarried employees who are in

⁶ “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. 1, §25.

committed (but not sexually intimate) domestic relationships, including employees who are taking care of an elderly parent, employees who share a household with a sibling, and similar arrangements.

The Michigan decision is *not* directly related to Indiana's debate because the constitutional texts are different, but the Michigan decision ought to teach us that a constitutional amendment on marriage can both strengthen marriage and benefit unmarried persons.

Conclusion

Laws are not drafted by angels, and the English language is far more supple than an algebraic equation. It is not surprising, therefore, that questions are being raised about the meaning of the words that have been combined to form Indiana's proposed amendment.

The amendment is not perfect, but coupled with its history, including its close association with the amendment that was before the Congress of the United States, we believe the People of Indiana can vote for it with the confident expectation that it will accomplish just two goals:

- Marriage in Indiana will require a man and a woman.
- Questions of marital status and benefits will have to be decided by the elected branches of government, not the judiciary.

Please let us know if we can provide additional information.

Sincerely,

[S]

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[S]

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Appendix
Statement of Indiana Catholic Conference (January 31, 2007)
On Senate Joint Resolution 7 (SJR 7)
A Proposed Constitutional Amendment to Define and Defend Marriage

“The Catholic Church believes and teaches that marriage is a faithful, exclusive, and lifelong union between one man and one woman, joined as husband and wife in an intimate partnership of life and love. Marriage exists so that the spouses might grow in mutual love and, by the generosity of their love, bring children into the world and serve life fully.” Promote Preserve and Protect Marriage, USCCB [United States Conference of Catholic Bishops] September 2003.

“The Catholic Church shares its definition and concern for preserving marriage as the union of a man and a woman with believers and non-believers, Christians and non-Christians alike. The definition of marriage as a union of a man and a woman is part of the common moral heritage of humanity.

“As a basic human and social institution, marriage, though regulated by civil laws and church laws, did not originate either from the church or the state, but from God. Therefore, neither church nor state can alter the basic meaning and structure of marriage.

“Marriage is a vital institution that supports the well-being of children, families, communities and society itself. It is unique because of its traditional and foundational role in societal structure. Human society affirms marriage which brings men and women together so that society has the next generation it needs to continue and children have mothers and fathers, as they need. The Indiana Court of Appeals decision, *Morrison v Sadler*, [821 N.E.2d 15 (2005),] affirms this position in upholding Indiana’s law defining marriage as between a man and a woman.

“However the debate and effort to redefine marriage continues in our nation and state. Because the institution of marriage has been weakened and eroded by many forces, the Indiana Catholic Conference supports efforts to defend and strengthen the definition of marriage within Indiana. SJR 7 will strengthen Indiana’s law.

“The union of husband and wife becomes, over a lifetime, a great good for themselves, their family, communities, and society. Marriage is a gift to be treasured and protected.” Between Man and Woman, USCCB 2003.

“ICC [the Indiana Catholic Conference] supports SJR 7 and urges passage.” (emphasis in original)