


January 2005

Note: Minnesota's Proposed Same-sex Marriage Amendment: A Flamingly Unconstitutional Violation of Full Faith and Credit, Due Process, and Equal Protection

JoLynn M. Schlichting

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

 Part of the [Civil Rights and Discrimination Commons](#), [Conflict of Laws Commons](#), [Constitutional Law Commons](#), [Human Rights Law Commons](#), [Legislation Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Schlichting, JoLynn M. (2005) "Note: Minnesota's Proposed Same-sex Marriage Amendment: A Flamingly Unconstitutional Violation of Full Faith and Credit, Due Process, and Equal Protection," *William Mitchell Law Review*: Vol. 31: Iss. 4, Article 10. Available at: <http://open.mitchellhamline.edu/wmlr/vol31/iss4/10>

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

© Mitchell Hamline School of Law

**NOTE: MINNESOTA'S PROPOSED SAME-SEX MARRIAGE
AMENDMENT: A FLAMINGLY UNCONSTITUTIONAL
VIOLATION OF FULL FAITH AND CREDIT, DUE
PROCESS, AND EQUAL PROTECTION**

JoLynn M. Schlichting[†]

I. INTRODUCTION.....	1650
II. A HISTORY OF MARRIAGE INEQUALITY: PROTECTING THE STATUS QUO	1654
A. <i>Preserving Racial Integrity</i>	1654
B. <i>The Scope of Loving: Minnesota Addresses the Issue of Same-Sex Marriage Rights</i>	1655
C. <i>One Step Forward, Two Steps Back</i>	1656
III. MINNESOTA'S PROPOSED MARRIAGE AMENDMENT	1657
A. <i>The Language of the Amendment</i>	1657
B. <i>The Amendment Process</i>	1658
1. <i>Passing the Amendment</i>	1658
2. <i>The Last Word: Supreme Law of the Land</i>	1659
IV. THE FULL FAITH AND CREDIT CLAUSE	1660
A. <i>History</i>	1660
B. <i>The Effects Clause: Limits on Congressional Power</i>	1662
C. <i>Judicial Interpretation of the Full Faith and Credit Clause</i> . 1662	
1. <i>Full Faith and Credit to Public Acts, Statutes, and State Constitutions</i>	1662
2. <i>Conflict of Laws Generally</i>	1663
3. <i>Conflict of Laws Regarding Marriage</i>	1663
D. <i>Defense of Marriage Act: A Clear Violation of Full Faith and Credit</i>	1665
E. <i>Unconstitutionality of Minnesota's Proposed Constitutional Amendment</i>	1666
V. FEDERAL DUE PROCESS.....	1667
A. <i>Marriage Under the Fourteenth Amendment</i>	1667

[†] J.D. Candidate 2006, William Mitchell College of Law; B.A., Psychology, College of St. Benedict, 2000.

1650	WILLIAM MITCHELL LAW REVIEW	[Vol. 31:4
	<i>B. Marriage as a Fundamental Right</i>	1667
	<i>C. Marriage as a Right of Privacy</i>	1668
	<i>D. Standard of Review Concerning Fundamental Rights</i>	1669
	<i>E. Proposed Marriage Amendment a Violation of Due Process</i>	1670
VI.	EQUAL PROTECTION CLAUSE	1671
	<i>A. Does Equal Protection for Gender Extend to Same-Sex</i>	
	<i>Marriages?</i>	1671
	<i>B. Equal Application of a Classification</i>	1672
	<i>C. Equal Protection as Applied to Same-Sex Marriage</i>	1673
VII.	FURTHER COMPLICATIONS: THE MARRIAGE PROTECTION	
	ACT	1674
	<i>A. Does Congress have the Authority to Strip all Federal</i>	
	<i>Courts of Jurisdiction to Hear Cases?</i>	1674
	<i>B. Impact if MPA is Deemed Constitutional</i>	1675
VIII.	CONCLUSION	1676

I. INTRODUCTION

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.¹

During March and April 2001, seven same-sex couples in Massachusetts attempted to obtain marriage licenses from their city or town clerk's office.² Each couple, as required by Massachusetts law, completed notices of intention to marry and presented these forms, along with the required health forms and marriage license fees, to a town or city clerk.³ In each instance, the clerk either refused to accept the notice of intention to marry or outright denied the license based on Massachusetts' law that failed to recognize same-sex marriage.⁴ Instead of acquiescing in the denial of their marriage rights, the couples took legal action.

On April 11, 2001, fourteen individuals, including named

1. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

2. *Id.*

3. *Id.* at 949–50.

4. *Id.* at 950.

Plaintiffs Hillary and Julie Goodridge, filed suit in Superior Court against the Department of Public Health, stating that the department's denial of their right to marry violated state laws.⁵ Of the seven couples, four had families with at least one child at the time they filed the lawsuit.⁶

The complaint alleged various circumstances in which the absence of civil marriage has harmed the couples.⁷ For instance, when Julie Goodridge gave birth to the couple's daughter, her partner Hillary had difficulty gaining access to both Julie and their infant.⁸ The complaint also listed (a) the inability to obtain partner insurance benefits and (b) limited options in providing for partner beneficiaries in pension plans, both as harms suffered from denial of the couples' marriage rights.⁹

The Superior Court dismissed the plaintiffs' claim that exclusion from marriage rights violated Massachusetts law.¹⁰ The Supreme Judicial Court of Massachusetts granted direct appellate review, and in its November 18, 2003 decision, held that Massachusetts may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."¹¹ After a 180-day stay of entry of judgment, same-sex marriage became legal in Massachusetts on May 17, 2004.¹² This landmark day in achieving equality for gay and lesbian citizens prompted a debate over what many believe to

5. *Id.* at 949.

6. *Id.*

7. *Id.* at 950 n.6.

8. *Id.*

9. *See, e.g., id.*

10. *Id.* at 951. Plaintiffs alleged violation of the laws of the Commonwealth, including rights guaranteed under articles 1, 6, 7, 10, 12, and 16, and Part II, c. 1, §1, art. 4, of the Massachusetts Constitution. *Id.* at 950. Two provisions which seem particularly applicable to the plaintiffs' claim are outlined in Article 1 and Article 10. Article 1 states, "[a]ll people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . . that of seeking and obtaining their safety and happiness." MASS. CONST. art. I, *amended by* MASS. CONST. amend. CVI. Article 1 further states, "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." *Id.* Article 10 states, "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." MASS. CONST. art. X.

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

12. Fran Fifis & Rose Arce, *Same-sex Couples Exchange Vows in Massachusetts*, CNN.COM (May 17, 2004), at <http://www.cnn.com/2004/LAW/05/17/mass.samesex.marriage/> (last visited Feb. 23, 2005).

be the last great civil rights battle in United States history.¹³

As newspapers and television stations broadcasted stories of gay and lesbian weddings in Massachusetts, another movement was taking place across the nation. In an effort to prevent similar court rulings, over thirty-five states introduced legislation defining marriage as a union between a man and a woman.¹⁴ Of these states, thirty-one proposed amendments to their state constitutions banning marriage or its legal equivalent between same-sex couples.¹⁵ Minnesota is one of these states.

On March 4, 2004, a bill for an act proposing an amendment to the Minnesota Constitution defining marriage as between one man and one woman was read for the first time in the state House of Representatives.¹⁶ On March 24, 2004, the bill passed in the House by a vote of 88 to 42.¹⁷ On March 25, 2004, the Minnesota Senate received the bill from the House of Representatives.¹⁸ The Senate, however, adjourned on May 14, 2004 without voting on the

13. See Alan Maass, *Who's Standing in the Way of Gay Marriage?* SOCIALIST WORKER ONLINE (Mar. 19, 2004), at <http://www.socialistworker.org/2004-1/491/49105BackofBus.shtml> (last visited Mar. 16, 2005).

14. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG (Oct. 6, 2004, updated Nov. 3, 2004), at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576> (last visited Mar. 16, 2005).

15. *Id.* Eleven states voted to adopt anti-same-sex marriage amendments to their state constitutions in the November, 2004 general election. Mississippi, Montana and Oregon specified only the definition of marriage, limiting it to unions of one man and one woman. *Id.* The amendments in Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma and Utah go one step further by prohibiting civil unions and other partnership benefits. *Id.* Currently, eighteen states have adopted anti-same-sex marriage amendments. Michael Foust, *Marriage Amendment Passes Easily in Kansas, 70-30 Percent; Pro-Amendment Church Survives Pre-Election Arson Attempt*, P.B. NEWS (Apr. 6, 2005), at <http://www.baptistpress.org/bpnews.asp?ID=20530> (last visited Apr. 9, 2005).

16. Journal of the House, 83d Leg., 4900 (Minn. Mar. 4, 2004) available at <http://ww3.house.leg.state.mn.us/cc/journals/2003-04/J0304070.htm#4900> (last visited Mar. 17, 2005). The 2004 version of the proposed amendment would have added a section to Article XIII of Minnesota's Constitution, reading in part, "[o]nly the union of one man and one woman shall be valid or recognized as a marriage in Minnesota. Any other relationship shall not be recognized as a marriage or its legal equivalent." H.F. 2798, 83d Leg., Reg. Sess. (Minn. 2004).

17. Journal of the House, 83d Leg., 5635 (Minn. Mar. 24, 2004) available at <http://ww3.house.leg.state.mn.us/cc/journals/2003-04/J0324078.htm#5635> (last visited Mar. 17, 2005).

18. Journal of the Senate, 83d Leg., 4900 (Minn. Mar. 25, 2004) available at <http://www.senate.leg.state.mn.us/journals/2003-2004/32504079.pdf#Page95> (last visited Mar. 17, 2005).

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1653

matter.¹⁹

On January 6, 2005, just two days after the start of the 84th Legislative Session, the marriage amendment bill was once again introduced in the Minnesota House of Representatives.²⁰ The House passed the bill on March 31, 2005.²¹ The Minnesota Senate received the bill on April 4 and referred it to the Judiciary Committee.²² On April 7, 2005 a motion to place the bill on General Orders was made but did not prevail.²³ Currently, the bill is in the Minnesota Senate Judiciary Committee.²⁴ Minnesotans appear divided on the issue. In a February 2004 poll by Minnesota Public Radio and the St. Paul Pioneer Press, forty-nine percent of respondents opposed a state constitutional amendment defining marriage as between one man and one woman, while forty-three percent favored such an amendment.²⁵

This note examines the constitutionality of Minnesota's proposed marriage amendment. The note begins with a description of the recent national events leading up to the amendment's proposal, followed by a discussion of the history of marriage in Minnesota, including passage of the Defense of Marriage Act in May 1997.²⁶ Next, the note examines the language of Minnesota's proposed marriage amendment and briefly addresses the process of amending state constitutional provisions.²⁷ It then analyzes the proposed amendment's constitutionality under

19. See *supra* note 14.

20. H.F. 0006, S.F. 1691, 84th Leg., Reg. Sess. (Minn. 2005) at http://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=House&f=HF006&ssn=0&y=2005 (last visited Mar. 30, 2005).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Tom Scheck, *Poll: Most Minnesotans Opposed to Gay Marriage*, MINNESOTA PUBLIC RADIO, (Feb. 5, 2004), at http://news.minnesota.publicradio.org/features/2004/02/05_scheckt_gaymarriagepoll/ (last visited Apr. 10, 2005). The poll included 625 voters, with a margin for error of plus or minus four percentage points. *Id.*

26. See *infra* Part II; Patricia Lopez Baden, *Gay Marriage Ban Passes Easily Despite Spear's Plea*, STAR TRIB. (Minneapolis), May 17, 1997, at 1B. Although arguments exist which call into question the constitutionality of state defense of marriage laws, this article discusses the constitutionality of the United States Defense of Marriage Act (DOMA) as the grounds for DOMA's unconstitutionality also pertain to state defense of marriage laws and to the article's overall objective in concluding that Minnesota's proposed marriage amendment is unconstitutional. See *infra* Parts IV.D–E.

27. See *infra* Part III.

the Full Faith and Credit Clause, the Due Process Clause, and the Equal Protection Clause of the United States Constitution.²⁸ Finally, the note discusses Congress's proposal of a Marriage Protection Act and the implications this would have on federal courts' ability to review same-sex marriage controversies.²⁹

II. A HISTORY OF MARRIAGE INEQUALITY: PROTECTING THE STATUS QUO

A. *Preserving Racial Integrity*

The history of marriage is replete with discrimination. As of 1949, thirty states maintained legislation outlawing interracial marriages.³⁰ The purpose of anti-miscegenation laws was, according to one court, "to preserve the racial integrity of its citizens," so as not to create "a mongrel breed of citizens."³¹ Another court opined:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.³²

It was not until 1967 that the United States Supreme Court declared anti-miscegenation laws unconstitutional under the Due Process and Equal Protection Clauses of the Constitution.³³ Despite *Loving v. Virginia*, many of these laws remained written into state provisions until quite recently. It was not until 2000 that the last remaining state, Alabama, repealed its constitutional ban on

28. See *infra* Parts IV–VI.

29. See *infra* Part VII.

30. See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967); *Baehr v. Lewin*, 852 P.2d 44, 62 (Haw. 1993). Minnesota was not one of the thirty states to enact legislation prohibiting interracial marriage. See *Loving*, 388 U.S. at 6 n.5.

31. *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955). Miscegenation is defined as "[a] marriage between persons of different races." BLACK'S LAW DICTIONARY 811 (7th ed. 2000).

32. *Loving*, 388 U.S. at 3 (quoting the trial judge). This lower court's holding was reversed by the United States Supreme Court. *Id.* at 12.

33. *Id.* The Supreme Court rejected the reasoning of the Virginia Supreme Court of Appeals, which upheld Virginia's anti-miscegenation law based on its 1955 ruling in *Naim*. *Id.* at 7. See also *supra* text accompanying note 28.

interracial marriages.³⁴

B. The Scope of Loving: Minnesota Addresses the Issue of Same-Sex Marriage Rights

In 1971, Minnesota rejected an application of *Loving* that would compel same-sex marriage rights.³⁵ The appellants in *Baker v. Nelson*, Richard Baker and James McConnell, argued that state statutes authorized same-sex marriage, and that additionally, the United States Constitution required state authorization.³⁶ The Minnesota Supreme Court dismissed the first contention by citing statutory language indicating that the drafters intended marriage to be between persons of the opposite sex, and by referencing non-legal and legal definitions of marriage.³⁷

The court further concluded that the state's authorization of only certain classes to marry does not violate the Equal Protection Clause of the Fourteenth Amendment, stating, "[t]here is no irrational or invidious discrimination [T]here is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."³⁸ The court failed to outline, however, what this "clear distinction" was. While the court recognized that marriage is a "fundamental freedom," and found denial of marriage based on racial classification "directly subversive of the principle of equality" and "sure[] to deprive all the State's citizens of liberty without due process of law," it never explained how or why denying same-sex marriage does not deprive gay and lesbian citizens of liberty and equality.³⁹ For reasons explained throughout the remainder of this note, the Minnesota Supreme Court's ruling in *Baker* should no longer be viewed as correct, if it ever was.

34. See ALA. CONST. amend. 667 (2000) (repealing amendment 102 which stated that "the legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.").

35. *Baker v. Nelson*, 291 Minn. 310, 314–15, 191 N.W.2d 185, 187 (1971).

36. *Id.* at 310, 191 N.W.2d at 185.

37. *Id.* at 311–12, 191 N.W.2d at 185–86. The court quoted Webster's International Dictionary, which defines marriage as "the state of being united to a person of the opposite sex as husband or wife," and Black's Law Dictionary, which reads in part that "[m]arriage . . . is the civil status, condition, or relation of one man and one woman united in law for life . . ." *Id.* at 186 n.1.

38. *Id.* at 313–15, 191 N.W.2d at 187.

39. *Id.* at 314, 191 N.W.2d at 187.

C. One Step Forward, Two Steps Back

Since *Baker*, other state courts, including Hawaii and Vermont, have done much to afford same-sex couples the right to marriage or its equivalent.⁴⁰ In response to the Hawaii court decision, Congress passed the Defense of Marriage Act (DOMA), which became law on September 21, 1996.⁴¹ Likewise, the Hawaii legislature took measures to prevent same-sex marriages before the court's ruling took effect.⁴² In Vermont, however, the legislature upheld a decision of that state's highest court by legalizing same-sex civil unions.⁴³

40. See *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (holding that Hawaii law restricting marriage to a male and a female denies same-sex couples access to marital status and its rights and benefits, thus "implicating the equal protection clause of [the Hawaii Constitution]."). Interestingly, the Hawaii court also held that there is no fundamental constitutional right to same-sex marriage. *Id.* at 57. Yet, the court went on to cite the Hawaii Constitution that, "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." *Id.* at 60. The court referenced the Black's Law Dictionary definition of "civil rights" as synonymous with "civil liberties." *Id.* (quoting BLACK'S LAW DICTIONARY 246 (6th ed. 1990)). Because civil liberties are "[p]ersonal, natural rights guaranteed and protected by the Constitution," the court held that these could not be taken away on the bases of race, religion, sex or ancestry without also violating the right to equal protection of Hawaii's laws. *Id.*; see also *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that same-sex couples are entitled under the Common Benefits Clause of the Vermont Constitution to the benefits and protections available to opposite-sex couples). The Common Benefits Clause reads in part, "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community . . ." VT. CONST. ch. I, art. VI, amended by VT. CONST. ch. II, § 76). The amendment did not alter the meaning of the constitutional provision, but substituted "person" and "persons" for "man" and "men." *Id.* The court left it to the legislature to establish an appropriate means for fulfilling this constitutional mandate. *Baker*, 744 A.2d at 886.

41. 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996). DOMA enables states to disregard same-sex marriages validly performed in other states, and defines marriage as between one man and one woman. *Id.*

42. See Evan Wolfson, *Silver Lining in Disappointing End for Hawaii Case*, LAMBDA LEGAL (Feb. 1, 2000), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=597> (last visited Feb. 22, 2005). A 1998 amendment to the Hawaii Constitution removed the same-sex marriage issue from the ambit of Hawaii's equal protection clause, thereby ending any chance that *Baehr* might legalize same-sex marriages in Hawaii. *Id.*

43. See VT. STAT. ANN. tit. 15, §§ 1201, 1202 (2004). Civil unions entitle partners of the same-sex to "receive the benefits and protections" afforded to spouses, and also require that same-sex couples "be subject to the responsibilities of spouses." *Id.*

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1657

Many states, including Minnesota, have passed legislation echoing DOMA, defining marriage as between one man and one woman, prohibiting same-sex marriage and recognition of same-sex marriages performed in other states or foreign jurisdictions.⁴⁴ In light of the recent Massachusetts decision in *Goodridge v. Department of Public Health* legalizing same-sex marriage,⁴⁵ Minnesota has taken action in an attempt to prevent its supreme court from similarly ruling that Minnesota's anti-same-sex marriage laws are unconstitutional. The result of this action has culminated in a proposal to amend the Minnesota State Constitution.

III. MINNESOTA'S PROPOSED MARRIAGE AMENDMENT

A. *The Language of the Amendment*

The proposed marriage amendment has two sections. The first section, entitled "Constitutional Amendment Proposed," states, [a]n amendment to the Minnesota Constitution is proposed to the people. If the amendment is adopted, a section shall be added to article XIII, to read: Sec. 13. Only a union of one man and one woman shall be valid or recognized as a marriage in Minnesota. Any other relationship shall not be recognized as a marriage or its legal equivalent by the state or any of its political subdivisions.⁴⁶

Section 2 outlines the question to be submitted to voters, which reads, "Shall the Minnesota Constitution be amended to provide that the state and its political subdivisions shall recognize marriage or its legal equivalent as limited to only the union of one man and one woman?"⁴⁷

44. MINN. STAT. § 517.01 (2004); MINN. STAT. § 517.03 (2004). Minnesota Statutes section 517.01 reads in part, "[m]arriage, so far as its validity in law is concerned, is a civil contract between a man and a woman Lawful marriage may be contracted only between persons of the opposite sex" MINN. STAT. § 517.01. Section 517.03 was amended to prohibit "a marriage between persons of the same sex," and states, "[a] marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state." MINN. STAT. § 517.03 (1997).

45. 798 N.E.2d 941 (Mass. 2003).

46. H.F. 006, S.F. 1691, 84th Leg., Reg. Sess. (Minn. 2005).

47. *Id.* The amendment in its 2004 form proposed submission to the people of Minnesota in the 2004 general election. H.F. 2798, 83d Leg., Reg. Sess. (Minn.

B. *The Amendment Process*

1. *Passing the Amendment*

The Minnesota Constitution may be amended in one of two ways. First, a majority of persons elected to each house of the legislature may propose a constitutional amendment. Once a proposed amendment has passed through both the House of Representatives and the Senate, it is submitted to state electors at a general election for their approval or rejection.⁴⁸ Amendments will only be added to the Constitution if a majority of electors votes to ratify the amendment.⁴⁹

The Minnesota Constitution may also be amended through a Constitutional Convention. This process requires that two-thirds of persons elected to each house of the legislature approve submission to electors at a general election the question of whether to call a convention to revise the Constitution.⁵⁰ If a majority of electors vote for a convention, the legislature will call a convention at its next session.⁵¹ Once the convention has revised the proposal, the revision is submitted to the people at the next general election.⁵² Three-fifths of voters on the issue must ratify the revision to adopt the language as a new Minnesota Constitution.⁵³

State supreme courts have the authority to conduct post-amendment review to ensure that amendment procedures adhere to state constitutional requirements.⁵⁴ Courts may not, however,

2004). The current version proposes submission to Minnesotans at the 2006 general election. H.F. 006, S.F. 1691, 84th Leg., Reg. Sess. (Minn. 2005).

48. MINN. CONST. art. IX, § 1. Constitutional amendments are published with session laws. *Id.*

49. *Id.* A majority of electors voting in the election, and not just a majority who vote on the amendment provision, must approve the amendment in order for it to be added to the Constitution. *Id.*

50. MINN. CONST. art. IX, § 2.

51. *Id.* Conventions must be composed of the same number of members as there are in the house of representatives, and must be chosen in the same manner as members of the house of representatives are chosen. *Id.* The delegates must convene within three months following their appointment to the convention. *Id.*

52. MINN. CONST. art. IX, § 3. The general election must be held at least 90 days after submission of the revised Constitution. *Id.*

53. *Id.*

54. See *Graham v. Jones*, 3 So.2d 761, 767 (La. 1941) (stating, “the judicial department of the government invariably has the right to consider whether the legislative department and its agencies have observed constitutional requirements

judge the wisdom of an amendment or consider whether it conflicts with existing state law.⁵⁵ Therefore, once adopted, the Minnesota Supreme Court may only invalidate an amendment if it finds that the amendment process in some way violated constitutional requirements.

2. *The Last Word: Supreme Law of the Land*

For a state constitutional provision to be enforceable, it must not contravene the United States Constitution.⁵⁶ When determining whether an amendment violates the Constitution, every reasonable presumption must be entertained in favor of the amendment's validity.⁵⁷

It is only in the most extreme circumstances that a supreme court will invalidate a state constitutional amendment.⁵⁸ Unless a

in attempting to amend the Constitution and may set aside their acts in case they have not done so."); New Mexico *ex rel.* Clark v. State Canvassing Board, 888 P.2d 458, 460 (N.M. 1995) (concluding that a proposed state constitutional amendment, despite its approval by voters, was an unconstitutional violation of the procedural requirements for amending New Mexico's Constitution).

55. Duggan v. Beermann, 544 N.W.2d 68, 75 (Neb. 1996); *see also* Omaha National Bank v. Spire, 389 N.W.2d 269, 278 (Neb. 1986) ("conflict' with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. . . . When a newly adopted amendment does conflict with preexisting constitutional provisions the new amendment necessarily supersedes the previous provision." (quoting Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337, 341-42 (Fla. 1978))). Nor may courts interfere with the amendment process before the adoption of new provisions on the basis that such provisions are unconstitutional. Grose v. Firestone, 422 So.2d 303, 306 (Fla. 1982); State *ex rel.* Slemmer v. Brown, 295 N.E.2d 434, 435-36 (Ohio Ct. App. 1973).

56. U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* *See also* Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956) (holding that states "have a right to change, abrogate or modify [state constitutional provisions] in any manner they see fit so long as they [k]eep within the confines of the Federal Constitution."); *In re* Advisory Opinion to the Governor, 612 A.2d 1, 15 (R.I. 1992) (stating that the right to amend state Constitutions is only checked by limits imposed by the U.S. Constitution).

57. *See e.g.*, Smith v. Bd. of Supervisors of Des Moines County, 320 N.W.2d 589, 592 (Iowa 1982); Andrews v. Governor of Maryland, 449 A.2d 1144, 1146-47 (Md. 1982); Opinion of the Justices, 261 A.2d 250, 254 (Me. 1970); Opinion of the Justices, 430 A.2d 188, 190 (N.H. 1981); Southern Ry. Co. v. Fowler, 497 S.W.2d 891, 895 (Tenn. 1973).

58. *See State ex rel.* Rhodes v. Brown, 296 N.E.2d 538, 540 (Ohio 1973).

constitutional amendment is “plainly and palpably” invalid, it should be upheld.⁵⁹ An amendment that takes away or contradicts rights guaranteed by the United States Constitution meets these criteria.⁶⁰ Thus, while state constitutions may expand federal constitutional rights, if ever a state constitutional provision takes away rights guaranteed under the United States Constitution, the Federal Constitution will supersede state law and reign as the “Supreme Law of the Land.”⁶¹

IV. THE FULL FAITH AND CREDIT CLAUSE

A. *History*

Even before the adoption of the United States Constitution, the values underlying the Full Faith and Credit Clause were already apparent in United States history. The Articles of Confederation, agreed to by Congress on November 15, 1777 and ratified by the states on March 1, 1781, contained a clause stating, “Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.”⁶² Inclusion of this provision in the Articles of Confederation, which upheld considerably looser relations among states, indicates the importance of such a provision to the endurance of a successful Union.⁶³

When the framers of the United States Constitution first proposed the language of the Full Faith and Credit Clause, the wording of the clause differed from the wording later adopted into the Constitution.⁶⁴ As originally proposed, the Full Faith and

59. See e.g. *Barnhart v. Herseth*, 222 N.W.2d 131, 136 (S.D. 1974) (quoting *State ex rel. Adams v. Herried*, 72 N.W.93, 97 (S.D. 1897)).

60. See *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (stating that state laws which conflict with federal law are without effect); *In re Rourke v. N.Y. Dept. of Corr. Servs.*, 603 N.Y.S.2d 647, 650 (N.Y. 1993) (asserting that while states may supplement federal constitutional guarantees, they may not circumscribe them); *Houston Chronicle Publ'g Co. v. Crapitto*, 907 S.W.2d 99, 106 (Tex. 1995) (holding that state constitutions cannot subtract from rights guaranteed by the United States Constitution).

61. U.S. CONST. art. VI, cl. 2.

62. ARTICLES OF CONFEDERATION art. IV (U.S. 1781).

63. ANASTAPLO, GEORGE, *THE CONSTITUTION OF 1787*, at 168 (1989).

64. See James M. Patten, *The Defense of Marriage Act: How Congress Said “No” to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939, 946–47 (1998).

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1661

Credit Clause read,

Full Faith and Credit *ought* to be given in each state to the public acts, records, and judicial proceedings, of every other state; and the legislature *shall*, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect which judgments obtained in one state shall have in another.⁶⁵

However, upon proposal by James Madison, the language was later changed to substitute “shall” for “ought to” and “may” for “shall”.⁶⁶ The result of this shift in language created a document that unambiguously demanded each state to recognize public acts, records, and judicial proceedings performed in any other state of the Union. Further, such recognition is so absolute that the framers deemed total control by the legislature to prescribe the manner in which this provision be enacted unnecessary; instead, the legislature is left with the ability, but not the unequivocal duty, to ordain the manner in which states are to grant full faith and credit to the acts, records, and proceedings of all other states.⁶⁷

The Full Faith and Credit Clause, as adopted into the United States Constitution of 1787, states,

Full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings, of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.⁶⁸

As one commentator stated in interpreting the meaning behind this Clause,

[a] motive of a higher kind must naturally have directed [the framers] to the provision. It must have been, “to form a more perfect union,” and to give to each State a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all.⁶⁹

Not only did the framers provide for faith and credit to the

65. MEIGS, WILLIAM MONTGOMERY, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 256 (1987) (emphasis added).

66. *Id.*

67. See Patten, *supra* note 64, at 947.

68. U.S. CONST. art. IV, § 1.

69. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION*, 190 (1994).

acts, records and judicial proceedings of each state, they gave them *full* faith and credit, leaving them with “positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied”⁷⁰ The Full Faith and Credit Clause, as adopted, leaves no question but that full faith and credit be given to acts, records, and judicial proceedings of each and every state.

B. The Effects Clause: Limits on Congressional Power

The second sentence of the Full Faith and Credit Clause is known as the Effects Clause. The object of this sentence is “to introduce uniformity in the rules of proof,” regulating not *which* acts, records, and judicial proceedings are to be given full faith and credit, but the *manner* in which *proof* of these are to be presented.⁷¹ Any other interpretation would be “wholly senseless” because it would give Congress the power to nullify the purpose under which the Full Faith and Credit Clause was adopted.⁷² Therefore, although the Effects Clause grants Congress the power to dictate the manner in which full faith and credit is to be afforded, the Constitution also limits this power by mandating absolute full faith and credit to the acts, records, and judicial proceedings of each state.

C. Judicial Interpretation of the Full Faith and Credit Clause

1. Full Faith and Credit to Public Acts, Statutes, and State Constitutions

Courts have frequently reiterated the importance of lending full faith and credit to laws and rulings of sister states.⁷³ Courts have also upheld the extension of full faith and credit to public acts within the legislative jurisdiction of an enacting state.⁷⁴ Further,

70. *Id.* at 191.

71. *Id.* at 192.

72. *Id.* at 193.

73. See *Newman v. Worcester Cty. Dep't of Soc. Servs. (In re L.C.)*, 659 N.E.2d 593, 602 (Ind. Ct. App. 1995) (granting full faith and credit to a Maryland court ruling removing a child from custody of an Indiana family); *LeBlanc v. United Eng's & Constructors, Inc.*, 584 A.2d 675, 677–78 (Me. 1991) (stating that Maine could only exercise jurisdiction where awards were previously granted in another state if the exercise of jurisdiction did not reflect hostility toward the laws of a sister state or threaten the system of cooperative federalism).

74. See *Biddy v. Blue Bird Air Serv.*, 30 N.E.2d 14, 17 (Ill. 1940).

the United States Supreme Court has stated that statutes are public acts within the meaning of the Full Faith and Credit Clause.⁷⁵ Finally, courts afford state Constitutions full faith and credit according to the same standards that mandate full faith and credit of public acts, records, and judicial proceedings.⁷⁶

2. *Conflict of Laws Generally*

Courts have addressed conflicts arising from policy differences between states' laws. In *Hirson v. United Stores Corp.*, the New York Supreme Court, Appellate Division, stated that local policy "may not over-ride the constitutional requirement of full faith and credit."⁷⁷ In contrast, federal courts have held that there is room for some negotiation concerning conflicting state policies in the effect and operation of the Full Faith and Credit Clause.⁷⁸ This "room" for negotiation, however, is narrow.⁷⁹ While the Full Faith and Credit Clause does not compel a state to substitute another state's conflicting laws for its own,⁸⁰ it does compel states "to recognize and respect rights acquired by private individuals under the laws of other states, though such laws may differ from its own and vary from its policy."⁸¹

3. *Conflict of Laws Regarding Marriage*

The general rule regarding conflicts between states' laws concerning marriage is that the law of the state in which the marriage is contracted or celebrated determines the validity of a marriage.⁸² However, there is one exception to this rule. If

75. See *Carroll v. Lanza*, 349 U.S. 408, 411 (1955); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 183 (1936); *Broderick v. Rosner*, 294 U.S. 629, 644; *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154-55 (1932).

76. See *People v. Zuccaro*, 108 N.Y.S.2d 97, 100 (N.Y. 1951).

77. *Hirson v. United Stores Corp.*, 34 N.Y.S.2d 122, 127 (N.Y. App. Div. 1942).

78. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935); *Alaska Packers Ass'n v. Indus. Acc. Com'n*, 294 U.S. 532, 547 (1935); *Broderick*, 294 U.S. at 642.

79. *Broderick*, 294 U.S. at 642; *Hannah v. Gen. Motors Corp.*, 969 F. Supp. 554, 557 (1996).

80. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *Durham v. Ark. Dept. of Human Servs.*, 912 S.W.2d 412, 414 (Ark. 1995).

81. *Roller v. Murray*, 76 S.E. 172, 175 (W.Va. 1912).

82. *Lembcke v. United States*, 181 F.2d 703, 704-05 (2nd Cir. 1950); *Rogers v. Sullivan*, 795 F. Supp. 761, 764 (E.D.N.C. 1992); *In re Mortenson's Estate*, 316 P.2d 1106, 1107 (Ariz. 1957); *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn.

recognition of a marriage performed outside a forum state is contrary to the public policy of the forum, such marriage may be deemed invalid.⁸³ To date, marriages that were valid where performed have been invalidated only in violation of “a strong policy of the state where at least one of the spouses was domiciled at the time of the marriage and where both made their home immediately thereafter.”⁸⁴

Until now, court precedent disallows for full faith and credit to marriages based only on limited and specific policy concerns. Acceptable policy concerns historically have been limited to protecting individuals who are parties to the marriages and to upholding formalized marriage procedures.⁸⁵ This limitation also includes non-recognition of a marriage where a previous marriage has not yet ended, where one of the parties is of minority age, where one party to the marriage was mentally incompetent, where the marriage was incestuous, or where the marriage union was established by common law.⁸⁶

1961); *Fisher v. Toombs County Nursing Home*, 479 S.E.2d 180, 182–83 (Ga. Ct. App. 1996); *Ma v. Ma*, 483 N.W.2d 732, 735 (Minn. Ct. App. 1992) (citing *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 655–56 (Minn. 1979).

83. *Metro. Life Ins. Co. v. Chase*, 294 F.2d 500, 503–04 (3rd Cir. 1961) (applying the law of the party’s domicile at the time an alleged common law marriage took place, thereby invalidating the marriage, despite its validity in the state where it took place); *In re Mortenson’s Estate*, 316 P.2d at 1108 (holding invalid a marriage between first cousins who were residents of and intended to live within Arizona, even though the marriage was valid in the state in which it was contracted); *Catalano*, 170 A.2d at 728 (invalidating a marriage legally performed in Italy between a Connecticut resident and his niece); *Beddow v. Beddow*, 257 S.W.2d 45, 48 (Ky. Ct. App. 1953) (invalidating a marriage performed outside of Kentucky between Kentucky residents, one of whom had been adjudged insane prior to the marriage).

84. RESTATEMENT (SECOND) OF CONFLICT : CONFLICT OF LAWS § 283 cmt. j. (1971).

85. Robert L. Cordell II, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247, 267–68 (1994).

86. *Id.* at 267. For decisions invalidating marriage when a previous marriage had not ended, see *Parker v. Parker*, 270 A.2d 94, 96 (Conn. 1970); *K v. K*, 393 N.Y.S.2d 534, 535 (N.Y. Fam. Ct. 1977); *Bolinski v. Bolinski*, 122 N.Y.S.2d 16, 19 (N.Y. City Ct. 1953). In *Wilkins v. Zelichowski*, the court held that a marriage performed and valid in Indiana was void in New Jersey because the wife’s minority at the time of the marriage violated New Jersey’s public policy. 140 A.2d 65, 69 (N.J. 1958); see also *Cunningham v. Cunningham*, 99 N.E. 845, 848 (N.Y. 1912) (holding that a marriage valid in New Jersey between an adult husband and a wife not of legal age to consent was invalid in New York because it was repugnant to New York’s public policy). Marriages performed when one party was mentally incompetent have also been denied full faith and credit based on policy reasons.

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1665

Court precedent does not justify denial of same-sex marriage rights, since denying recognition of such marriages is intended neither to protect same-sex individuals nor to uphold formalized marriage procedures. On the contrary, denying full faith and credit to same-sex marriages damages same-sex couples' rights by removing protections afforded to them in the forum state as soon as they leave the confines of that state. Further, this denial undermines the importance of formalized marriage procedures, which courts have continually emphasized, because it fails to hold *all* United States citizens to the same societal standard in legalizing their relationships.

D. Defense of Marriage Act: A Clear Violation of Full Faith and Credit

Although the focus of this article is on Minnesota's proposed constitutional amendment regarding marriage, it is worth noting that the federal Defense of Marriage Act (DOMA)⁸⁷ is also a violation of the Full Faith and Credit Clause of the United States Constitution.⁸⁸ The Act grants states the latitude to deny full faith and credit to same-sex marriages performed under the laws of another state, as well as the latitude to deny recognition of any right or claim arising from such marriages.⁸⁹ The Effects Clause of the United States Constitution, however, prohibits this type of amendment.⁹⁰ In enacting DOMA, Congress overstepped its constitutional authority by regulating *which* acts deserve full faith and credit. In doing so, Congress perverted the language of the Constitution, which grants Congress only the limited power to create laws to carry out the constitutional guarantee of full faith and credit, but not the power to regulate when or if states may

See First Nat'l Bank v. N.D. Workmen's Comp. Bureau, 68 N.W.2d 661, 664 (N.D. 1955) (holding that marriages between persons of unsound mind are voidable). Frequently, courts also rule that states need not recognize the validity of incestuous marriages performed legally outside the forum state. *See In re Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953). Finally, common law marriages, although valid in the state in which they were performed, have been invalidated by courts on the grounds that they violate a states' public policy. *See Stein v. Stein*, 641 S.W.2d 856, 857-58 (Mo. Ct. App. 1982). *But see Netecke v. State ex. rel Dept. of Transp. and Dev.*, 715 So.2d 449, 450 (La. Ct. App. 1998) (extending full faith and credit to common law marriages performed in other states while failing to discuss possible policy exceptions). *See also* cases cited *supra* note 80.

87. 28 U.S.C. § 1738C.

88. *See* U.S. CONST., art. IV, § 1.

89. 28 U.S.C. § 1738C.

90. *See infra* Part. IV.B (discussing the Effects Clause).

apply full faith and credit. Furthermore, DOMA bypasses case precedent concerning a justifiable policy rationale for denying full faith and credit to marriage relationships.⁹¹

E. Unconstitutionality of Minnesota's Proposed Constitutional Amendment

Although the language of Minnesota's proposed marriage amendment does not explicitly proscribe recognition of marriage laws of other states, this effect is inevitable.⁹² As such, the amendment will violate the Full Faith and Credit Clause of the United States Constitution. The Minnesota legislature has no power under the Effects Clause of the United States Constitution.⁹³ Further, although state case precedent falls short of binding the legislature, the legislature has disregarded court-related history regarding acceptable policy justifications for non-recognition of marriage laws of other states.⁹⁴ If the legislature enacts the marriage amendment, Minnesota courts will likely strike down the amendment because no case precedent supports a justifiable policy reason for failing to recognizing same-sex marriage.⁹⁵ Therefore, under the Full Faith and Credit Clause of the United States Constitution, the proposed Minnesota marriage amendment is unconstitutional.

V. FEDERAL DUE PROCESS

A. Marriage Under the Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution

91. See *infra* Parts IV.B and C.3; see also Cordell, *supra* note 85, at 264–71 (elaborating on the unconstitutionality of the federal Defense of Marriage Act).

92. The language, “[o]nly the union of one man and one woman shall be valid or recognized as marriage,” is not limited in its scope to merely denying same-sex couples Minnesota marriage licenses, but will also lead to the invalidation and non-recognition of same-sex marriages legally performed in other states. See H.F. 006, 84th Leg., Reg. Sess. (Minn. 2005) available at <http://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H0006.0&session=ls84> (last visited Mar. 16, 2005).

93. See *infra* Part IV.B.

94. See *supra* Part IV.C.3.

95. See *infra* Part IV.C.3. Based on case precedent, there are no viable policy arguments for non-recognition of same-sex marriages. Non-recognition is aimed neither at protecting an individual who is a party to the marriage nor upholding formalized marriage procedures. See *infra* Part IV.C.3.

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1667

reads in part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law”⁹⁶ A state constitutional amendment prohibiting a specific class of individuals from the right to marry is a denial of liberty under the Due Process Clause.⁹⁷ Because such an amendment violates a federally protected right, the United States Constitution supersedes the states’ ability to deny marriage to same-sex couples.⁹⁸

B. Marriage as a Fundamental Right

Although history abounds with instances of marriage discrimination, it also establishes an undisputable basis for classifying marriage as a fundamental right. As far back as the late 1800s, courts recognized the importance of the institution of marriage.⁹⁹ In 1888, the United States Supreme Court stated that marriage creates “the most important relation in life”¹⁰⁰ and “is the foundation of the family and of society, without which there would be neither civilization nor progress.”¹⁰¹

The United States Supreme Court has since continued to regard marriage as a central part of American life. In *Meyer v. Nebraska*, the Court asserted that the right “to marry, establish a home and bring up children” is “essential to the orderly pursuit of happiness by free men,” and is a vital aspect of liberty protected by the Due Process Clause.¹⁰² Again, in *Skinner v. Oklahoma*, the Court defined marriage as “one of the basic civil rights of man,” fundamental to our very existence.¹⁰³

In *Loving v. Virginia*, the United States Supreme Court eliminated racial marriage discrimination and upheld its previous decisions stating that the right to marry is a fundamental liberty protected by the Due Process Clause of the United States Constitution.¹⁰⁴ In *Zablocki v. Redhail*, the U.S. Supreme Court

96. U.S. CONST. amend. XIV, § 1.

97. See *infra* Part V.B.

98. See *supra* Part III.B.2.

99. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

100. *Id.*

101. *Id.* at 211.

102. 262 U.S. 390, 399–400 (1923).

103. 316 U.S. 535, 541 (1942).

104. 388 U.S. at 12. In *Loving*, the Supreme Court reiterated the conviction set forth in *Skinner* that marriage is a fundamental right. 388 U.S. 1, 12 (1967). The Court held that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men

again stated that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth [Amendment].”¹⁰⁵ The right to marry is thus a federally pronounced, fundamental right.

C. *Marriage as a Right of Privacy*

Not only has the United States Supreme Court classified marriage as a fundamental right, but it has also held that the marriage relationship lies “within the zone of privacy” created by the Constitution.¹⁰⁶ Although the text of the Constitution grants no right of privacy, the Supreme Court has repeatedly held that one aspect of liberty afforded constitutional protection under the Due Process Clause is the right of privacy.¹⁰⁷

The link between marriage rights, the right to privacy, and the Fourteenth Amendment’s protection of “liberty” becomes even more important in view of the United States Supreme Court’s decision in *Lawrence v. Texas*.¹⁰⁸ In *Lawrence*, the Supreme Court counseled “against attempts by the State, or a court, to define the meaning of [a personal] relationship or to set its boundaries absent

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.* The court went on to say that “[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious . . . discriminations. Under our Constitution, the freedom to marry, or not marry, a person . . . resides with the individual and cannot be infringed by the State.” *Id.*

105. 434 U.S. 374, 384 (1978). Since *Loving* and *Zablocki*, federal courts have continued to uphold marriage as a civil right. See *Cruzan by Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 304 (1990); *Perez-Oropeza v. I.N.S.*, 56 F.3d 43, 45 (9th Cir. 1995); *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 763, 739 (9th Cir. 1986); *Wise v. Bravo*, 666 F.2d 1328, 1336 (10th Cir. 1981); *Bradbury v. Wainwright*, 538 F. Supp. 377, 378 (M.D. Fla. 1982).

106. See *Griswold v. Conn.*, 381 U.S. 479, 485 (1965). The Court stated in part: [w]e deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486. Subsequent cases have emphasized the Supreme Court’s unequivocal respect for the right to privacy in the marriage relationship. See *Zablocki*, 434 U.S. at 384–86; *Loving*, 388 U.S. at 12.

107. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684 (1977); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

108. 539 U.S. 558 (2003).

injury to a person or abuse of an institution the law protects.”¹⁰⁹ The Court emphasized that persons are entitled to respect for their private lives, and that the right to liberty under the Due Process Clause gives individuals the full right to engage in private sexual acts without intervention of the government.¹¹⁰

While *Lawrence* centralizes its holding on individual liberty to engage in private sexual conduct, the holding is important because marriage rights also fall within the zone of privacy impliedly protected by the Due Process Clause of the Fourteenth Amendment.¹¹¹ *Lawrence* notes that the right to privacy protects not only “sexual acts,” but also recognizes the importance of the relationship between persons engaging in sexual acts.¹¹² Because *Lawrence* holds that the right to liberty entitles persons to respect for their private lives, free from state laws that violate human dignity, and because the Supreme Court has held that marriage is a fundamental right protected by the Constitution, the Due Process Clause should also protect marriage rights for same-sex couples.

D. Standard of Review Concerning Fundamental Rights

“Critical examination” of state interests is required when such interests interfere with a fundamental right, such as the right to marry.¹¹³ Rigorous scrutiny is not required for state regulations that do not significantly interfere with decisions to enter into marital relationships.¹¹⁴ However, when state regulations interfere directly and substantially with the right to marry, strict scrutiny is required.¹¹⁵

In *Zablocki*, the Court held that because a Wisconsin statute absolutely excluded a specific class of persons from marriage, the statute did not have a minimal impact and therefore required evaluation based on strict scrutiny.¹¹⁶ The Court concluded that

109. *Id.* at 567.

110. *Id.*

111. *See Griswold*, 381 U.S. at 485–86.

112. *See Lawrence*, 539 U.S. at 567. The Court stated that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.” *Id.*

113. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

114. *Id.* at 386–87.

115. *See id.*

116. *Id.* at 387–88. The statute barred any persons from marriage who were

“[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”¹¹⁷ The Court stated that “even those who can be persuaded to meet the statute’s requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.”¹¹⁸ Despite legitimate and substantial state interests, the Supreme Court did not sustain the Wisconsin statute in *Zablocki* because the means by which the state chose to achieve those interests unnecessarily impinged on the right to marry.¹¹⁹

The proposed marriage amendment to the Minnesota Constitution likewise prevents an entire class of persons from access to marriage rights.¹²⁰ Therefore, should its constitutionality come into question, the amendment would properly be evaluated based on strict scrutiny.

E. Proposed Marriage Amendment a Violation of Due Process

If Minnesota’s proposed marriage amendment makes its way through both houses of the legislature and the people of Minnesota adopt it, the amendment will inevitably end up before the courts, which will have the power to conclude that it violates the Fourteenth Amendment Due Process Clause of the United States Constitution.¹²¹ Precedent establishes not only that marriage is a fundamental right but also secures marriage as a “right of privacy” protected under the constitutional guarantee of liberty.¹²² The Supreme Court also declared sexual intimacy and sexual acts as rights to liberty under the Due Process Clause.¹²³ Just as the Court has protected rights of sexual intimacy between same-sex couples, it should also protect same-sex marriage as a right of

behind in child-support payments or whose children were likely to become public charges. *Id.* at 375.

117. *Id.* at 388.

118. *Id.* at 387.

119. *Id.* at 388.

120. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (referring to same-sex couples as “an entire, sizeable class . . . who have absolutely no access to civil marriage and its protection because they are forbidden from procuring a marriage license”).

121. *See supra* Part III.B (describing the state amendment process).

122. *See supra* Parts V.B–C.

123. *See supra* text accompanying note 107.

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1671

privacy protected by the constitutional guarantee of liberty under due process. A strict scrutiny evaluation of the amendment requires its nullification.¹²⁴ As the United States Supreme Court once stated, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”¹²⁵ Should questions regarding the validity of the marriage amendment arrive before the Supreme Court, Minnesotans can be hopeful that the Court will extend the Constitutional guarantee of due process to same-sex couples by striking down the amendment, once again upholding the principle of liberty as it did in *Lawrence*.

VI. EQUAL PROTECTION CLAUSE

A. *Does Equal Protection for Gender Extend to Same-Sex Marriages?*

The Equal Protection Clause states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹²⁶ This guarantee prohibits discrimination based on sex.¹²⁷ For a valid equal protection claim, the law must in some way classify an individual.¹²⁸ The argument that denial of same-sex marriage rights violates equal protection centers on the fact that a person who wishes to marry someone of the same sex is prohibited from doing so based solely on his or her gender classification. This gender classification thereby leads to gender discrimination, which presumptively leads to a violation of equal protection.

124. Sufficiently important state interests do not support the amendment, although states might assert an important interest in regulating marriage laws. *See supra* Part V.D. Even so, case precedent justifies such regulation only if its aim is to protect individuals who are a party to the marriage or to uphold formalized marriage procedures. *See supra* Part IV.C.3. Since regulation of same-sex marriage rights furthers neither one of these interests, there is no precedent establishing it as a viable state interest. Further, the impact of the proposed amendment would not affect only the state’s interest to regulate marriage, but would also affect the right of individuals to marry, which courts have long recognized as a fundamental right. *See supra* Parts V.B and D.

125. *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

126. U.S. CONST. amend. XIV, § 1.

127. *See, e.g., Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994) (holding that female employees have a right under the Equal Protection Clause to be free from gender discrimination in the workplace).

128. *Phelps v. Phelps*, 446 S.E.2d 17, 20 (N.C. 1994) (citing *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978)) (Stewart, J., concurring).

B. *Equal Application of a Classification*

If it is to withstand constitutional challenge under the Equal Protection Clause, a gender classification must be supported by an important governmental objective and must substantially relate to achievement of that objective.¹²⁹ Proponents of the proposed marriage amendment may argue that the amendment is not a violation of equal protection based on gender, since the amendment would apply equally to men and women. In countering this argument, it is important to examine the Court's ruling in *Loving v. Virginia*.¹³⁰ In *Loving*, the plaintiffs challenged a Virginia law that, in part, automatically voided any marriages between Caucasian and African American persons without any judicial proceedings.¹³¹ The state argued that since the law applied equally to both races, the statute, despite its reliance on racial classifications, did "not constitute an invidious discrimination based upon race."¹³²

The state's position in *Loving* closely parallels the potential argument for the marriage amendment. The Court in *Loving*, however, rejected the State's reasoning and held that mere equal application of a statute containing racial classifications did not remove the classifications from protection under the Fourteenth Amendment.¹³³ In light of the Supreme Court's holding, mere equal application of denial of marriage rights based on gender classifications is not enough to remove such classifications from constitutional protection.

However, there is one major difference between the racial discrimination in *Loving* and the gender discrimination arising from the marriage amendment. In *Loving*, the purpose of the laws prohibiting interracial marriages was to preserve the integrity of the white race, as opposed to preserving the integrity of the races in general.¹³⁴ The proposed marriage amendment may not create a similar imbalance between men and women. Despite this

129. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

130. 388 U.S. 1 (1967).

131. *Id.* at 5.

132. *Id.* at 8.

133. *Id.*

134. *Id.* at 11 & n.11. The Court does not address this contention, concluding that such discussion is unnecessary because the classifications themselves are repugnant to the Fourteenth Amendment. *Id.* at 11 n.11.

difference, if one focuses on the Court's holding that equal application does not remove a racial classification from constitutional protection, there remains a vital parallel to gender classifications in the marriage amendment situation.

C. Equal Protection as Applied to Same-Sex Marriage

In *Baehr v. Lewin*, the Hawaii Supreme Court held that the state statute limiting marriage to a man and a woman would be deemed unconstitutional unless the defendant was able to prove that the statute met strict scrutiny requirements.¹³⁵ Prior to remanding the case, the Hawaii Supreme Court referenced *Loving*, stating that if the word "sex" were substituted for the word "race," and "Article I, Section 5" for "the Fourteenth Amendment," it would yield "the precise case before us together with the conclusion that we have reached."¹³⁶ On remand, the circuit court concluded that the sex-based classification in the state's marriage statute is an unconstitutional violation of the state's equal protection clause.¹³⁷

Although the Fourteenth Amendment does not name specific suspect classifications, courts have consistently held that sex is a quasi-suspect class protected under the amendment.¹³⁸ This fact, coupled with *Baehr's* extension of *Loving* to same-sex marriage rights, lends strong support to the argument that denial of same-sex marriage rights violates the Fourteenth Amendment of the United States Constitution. Minnesota's proposed marriage amendment, which both on its face and through its application would deny recognition of same-sex marriages, is a violation of the

135. 852 P.2d 44, 67 (Haw. 1993).

136. *Id.* at 68. The result of these substitutions would read, "[W]e reject the notion that the mere 'equal application' of a statute containing [sex] classifications is enough to remove the classifications from [Article I, Section 5's] proscription of all invidious [sex] discriminations In the case at bar . . . we deal with statutes containing [sex] classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which [Article I, Section 5] has traditionally required of state statutes drawn according to [sex]." *Loving*, 388 U.S. at 8-9.

137. *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997). Article I of the Hawaii Constitution states in part, "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. I, § 5.

138. *See supra* note 126 and accompanying text.

United States Constitution's Equal Protection Clause.

VII. FURTHER COMPLICATIONS: THE MARRIAGE PROTECTION ACT

A. *Does Congress Have the Authority to Strip all Federal Courts of Jurisdiction to Hear Cases?*

On July 22, 2004, the House of Representatives passed a bill entitled the Marriage Protection Act (MPA).¹³⁹ Proponents of this bill intend that, by denying federal courts jurisdiction to hear constitutional challenges to both DOMA and the MPA, the bill will prevent federal courts from requiring states to recognize same-sex marriages performed in other states.¹⁴⁰ Currently, the 2005 version of the MPA is in the U.S. House of Representatives and has been referred to the House Committee on the Judiciary.¹⁴¹

Article III of the United States Constitution states that, “[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority”¹⁴² and that the “supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”¹⁴³ In *Ex parte McCordle*, the Supreme Court held that under Article III, Congress has the authority to stipulate exceptions to and regulations of its appellate jurisdiction.¹⁴⁴ Proponents of the MPA would argue that based on *Ex parte McCordle*, Congress has the authority to deny federal

139. H.R. 3313, 108th Cong. (2004).

140. See Vikram David Amar, *The Marriage Protection Act Bill Passed by the House of Representatives: Trying to Make Sense of the Nonsensical*, FINDLAW'S LEGAL COMMENTARY (Aug. 6, 2004), at <http://writ.news.findlaw.com/amar/20040806.html>. The bill states, “[n]o court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1738C of this section.” H.R. 3313, 108th Cong. (2004). The 2005 version of the MPA is identical to the 2004 version. H.R. 1100, 109th Cong. (2005).

141. Bill Summary for the 109th Congress, H.R. 1100, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01100:@@X>.

142. U.S. CONST. art. III, § 2, cl. 1.

143. U.S. CONST. art. III, § 2, cl. 2.

144. 74 U.S. 506, 514 (1868). In this case, Congress did not completely limit federal courts' appellate power to hear cases of *habeas corpus*. Rather, Congress's adoption of the Act of 1868 limited only appeals from circuit courts. The Act did not exclude federal jurisdiction over *habeas* cases in courts other than circuit court appeals. 74 U.S. at 514–15.

2005] PROPOSED SAME-SEX MARRIAGE AMENDMENT 1675

jurisdiction of cases under DOMA and the MPA. However, one problem with this contention is that the MPA would strip *all* federal courts of *all* jurisdiction to hear such cases.

In his article, law professor and legal scholar Vikram David Amar asserts that

[b]ecause Article III says federal jurisdiction “shall” extend to “all” such cases, it strongly implies – and many scholars have concluded – that there must be some federal court open to hear any case arising under a federal law, which would include MPA and DOMA cases. That means that, even if Congress has broad powers to strip the jurisdiction of lower federal courts or the Supreme Court, it cannot do both at once.¹⁴⁵

Thus, one rebuttal to the validity of the MPA is that it violates Article III by removing all federal jurisdiction over DOMA and MPA cases.¹⁴⁶

B. Impact if MPA is Deemed Constitutional

Even if courts determine that the MPA is constitutional, it is not likely to prevent federal courts from ruling on same-sex marriage issues. Same-sex couples who would seek federal jurisdiction over a case concerning their marriage rights could still allege violation of the Fourteenth Amendment's Due Process and Equal Protection Clause, and of the Full Faith and Credit Clause of Article IV.¹⁴⁷ Federal courts would thus have jurisdiction to hear such cases, since they do not involve review of either DOMA or the MPA. Ironically, it is the opponents of same-sex marriage, and not same-sex couples, who would attempt to invoke interpretation of DOMA to bolster their argument that states need not recognize

145. Amar, *supra* note 140.

146. Another legal commentator has questioned the validity of the Marriage Protection Act based on constitutional separation of powers principles. See Joanna Grossman, *The Proposed Marriage Protection Act: Why it May be Unconstitutional*, FINDLAW'S LEGAL COMMENTARY (July 27, 2004), available at <http://writ.news.findlaw.com/grossman/20040727.html>. “[J]urisdiction-stripping takes power from the Courts, and leaves it with Congress” or with state legislatures. *Id.* This creates an imbalance between the legislative and judicial branches, because it enables the controlling party in Congress to pass laws stripping courts of the right to review certain laws whenever Congress does not approve of how courts are handling those issues. *Id.* The ability of Congress to so act may undermine the general constitutional allocation of power among the branches of government. *See id.*

147. See *supra* Parts IV.C–E, V.E.

same-sex marriages performed in other states.¹⁴⁸ Federal courts would not have jurisdiction to hear defenses based on DOMA, but would still be able to review federal constitutional challenges to state marriage amendments.

VIII. CONCLUSION

Nearly one year has passed since the first legal same-sex marriage license was granted. As Julie Goodridge herself commented, the sun still rose on May 18th, 2004, Massachusetts did not erupt into flames, and no heterosexual couples fell apart simply because same-sex couples got married.¹⁴⁹ Instead, because of the Massachusetts Supreme Court ruling, some people are now just “a little more equal.”¹⁵⁰ The Minnesota Marriage Amendment has risen for the second time in the legislature. If it succeeds in the Senate, and if Minnesotans adopt it into their Constitution, we must look to the judiciary to uphold the values of the United States Constitution in striking down the amendment.

As *Baehr* states, sometimes constitutional law mandates, against the will of the majority, “that customs change with an evolving social order.”¹⁵¹ The proposed marriage amendment violates the Full Faith and Credit Clause and the Due Process Clause of the United States Constitution.¹⁵² Strong arguments exist that it also violates the United States Constitution’s Equal Protection Clause.¹⁵³ Even if Congress passes the Marriage Protection Act, it is likely that federal courts will be able to exercise jurisdiction to address the constitutional issues raised by state marriage amendments.¹⁵⁴ In conclusion, if federal courts truly uphold the “constitutional principles of respect for individual autonomy and equality under law,”¹⁵⁵ then they must invalidate state amendments barring same-sex marriages and mandate equal access to marriage rights for same-sex couples.

148. Amar, *supra* note 140.

149. Julie Goodridge, Keynote Address at the Minneapolis National Coming-Out Day Luncheon (October 15, 2004).

150. *Id.*

151. 852 P.2d at 63.

152. *See supra* Parts VI, V.

153. *See supra* Part VI.

154. *See supra* Part VII.B

155. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).