

OVERREACHING ON GAY MARRIAGE? AMENDMENT VOTE MAY BACKFIRE ON THE GOP THIS FALL

CHARLES J. SYKES

Legislative Republicans thought they had an electoral magic bullet when they voted to put an amendment banning gay marriage on the November general election ballot. The constitutional amendment would allow them to highlight a popular issue, motivate a big conservative turnout, and help Republicans up and down the ballot stem what appears to be a Democratic tide in 2006.



Amendment supporters also underestimated the financial and organizational resources of gay marriage supporters. While conservative and moderates seem somewhat lukewarm, the opposition has been able to raise more than a \$1 million and has launched both a well-organized grassroots effort and television ad campaign. Polls show the public evenly

divided on the issue.

But it increasingly looks as if the GOP miscalculated, making at least three major strategic errors:

- First, they overreached, by making the amendment far broader than it had to be, including a ban on civil unions and perhaps on an array of other domestic benefits.
- Second, they miscalculated the degree to which the amendment would motivate and mobilize the left. While many on the left may be lukewarm about turning out to support beleaguered Democrat Jim Doyle, they seem unified and passionate in opposition to the amendment; and its presence on the ballot may actually end up boosting Democratic turnout in November.

- Third, the defeat of the amendment at the polls—the first defeat of a ban on gay marriage anywhere in the country—could actually embolden Wisconsin’s courts to do what conservatives most feared: legislate it from the bench.

The Second Sentence

The constitutional amendment on the November 7 ballot reads:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of mar-

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riage for unmarried individuals shall not be valid or recognized in this state.

Had Republicans stopped at the first sentence, the debate would have been squarely and unambiguously on the issue of gay marriage, and the amendment likely would have passed easily. But they didn't, and that decision has shaped the current debate and changed the political dynamic. While the public strongly opposes gay marriage, polls have shown far more support for civil unions: the amendment takes on both. But there are other problems as well.

While the first sentence is clear, straightforward, and quite specific, the second sentence is far more sweeping and ambiguous, lending itself to a wide range of interpretations. The language seems to ban civil unions but does it also extend to other benefits as well? And if so, which ones?

Opponents have seized on the vagueness. A "Talking Points" memo put out by the leading opposition group, Fair Wisconsin, urges opponents not to refer to the amendment as the "marriage amendment" or the "defense of marriage amendment," but rather as the "ban on civil unions and marriage" or the "civil unions and marriage ban."

They have built much of their campaign, including a well-funded television ad campaign, around the theme that the ban simply goes too far, threatening health care benefits, jeopardizing hospital visits and medical decisions, and denying pensions for all married couples. The tag line of the TV ad says: "So when you hear this ban is about gay marriage remember, it's about a whole lot more."

The opponents point to Ohio, where they say that at least fifteen domestic violence charges against unmarried defendants have been dismissed because the Ohio ban bars the extension of legal benefits to unmarried couples. In Michigan, the attorney general ruled that municipal domestic partner benefits could not be renewed under the state's new amendment.

Amendment supporters scoff at such alarmist claims, noting that Kentucky passed an amendment with the same wording in 2004, without any of the dire warnings about hospital visits, health benefits or pensions coming true.

One of the lead authors of the amendment, State Representative Mark Gundrum (R-New Berlin) insists that the second sentence "was designed to prevent activist judges from doing what they did in Vermont," where they simply dictated the recognition of marriage under a different name. "That's all its intended to do."

But here we tread into the swamps of irony. UW law professor and centrist blogger Ann Althouse notes that the second sentence "goes beyond what is needed to satisfy traditionalists and takes a gratuitous swipe at benefits currently enjoyed by real families here in the state." Supporters will argue that they don't mean to do that, and that we should "trust the courts to interpret the language of the amendment so that it won't mean the bad thing the gay rights groups are saying it will mean."

But, as Althouse notes:

The argument for the amendment was that we can't trust the courts not to find rights for gay people in the unamended state constitution.

And that is precisely the strongest argument for the amendment: marriage will be redefined one way or another—either by black-robed activists or by the public. So it's a problem if the public is unclear what the definition actually means and if it gets thrown back to the courts anyway.

This problem was underlined in August, when the attorney general's office issued its formal "explanatory" statement on the amendment, noting:

The constitution would not further specify what is, or what is not, a legal status identical or substantially similar to marriage. Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be pro-

hibited by this amendment would be left to further legislative or judicial determination.

Amendment supporters were quick to note that Attorney General Peg Lautenschlager was an outspoken opponent of the amendment and accused her of bias. But the statement seems to accurately reflect the amendment's uncertainty.

But there is another, somewhat more subtle, choice as well: marriage will be redefined either through evolutionary or revolutionary means. Society will either gradually change its attitudes in response to the sorts of relationships that develop in its midst, or the change will be rammed down its throat by court order or government dictate.

Does the amendment—which seeks to avoid a judicial mandate—itsself veer too far in the opposite direction, by freezing both social and legal policy and removing it from the give and take of legislative compromise and social evolution? Conservatives also believe that, as a rule, constitutions should limit the powers of government, not of individuals.

On the other hand, the supporters of gay marriage are clearly being disingenuous on the status of current law. One of the Fair Wisconsin ads points out that the amendment banning gay marriage is unnecessary because it is already banned by Wisconsin state statute. Governor Doyle made a similar argument when he vetoed a bill defining marriage as being between a man and a woman. There is no serious attempt to change the law through legislative action, but amendment opponents make no secret of the fact that they would welcome court rulings that would overturn such statutory language.

Activist Courts

It is precisely the specter of such activist courts that haunts the debate. The ruling by

the Massachusetts Supreme Court legalizing gay marriage also radicalized the debate.

The Massachusetts decision was sweeping: only full gay marriage was acceptable. Neither legislators nor politicians had any choice in the matter; the issue would no longer be a matter for political debate or the give and take of political compromise. There would be no room for a dialogue between churches, advocates, elected representatives, because the issue was settled.

But by whom? Not by the vote of any elected body. Not by the authors of the constitution, who neither intended nor even envisioned such an outcome. And not by social consensus.

Instead, the decision was made by four judges, who declared that gay marriage was a non-negotiable constitutional mandate. In effect, the judges were saying that society as expressed through its representative bodies and lawmaking institutions no longer had any substantive role to play in defining the meaning of "marriage."

While opponents of gay marriage are now routinely called "divisive," it was an activist judiciary that added gay marriage to abortion as a wedge of cultural division.

Prior to the decision, polls suggested that some progress was being made and that Americans were moving toward greater tolerance and recognition of the inequities suffered by gays and lesbians in the area of hospital visitation and the inheritance of property. But the Massachusetts court effectively eliminated the possibility of gradual reform and change, insisting instead that 5,000 years of Western tradition—historical, religious, secular—had to be scrapped immediately.

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The blowback has been intense, as state after state has passed bans on gay marriage. Recent court decisions in New York and Washington have upheld the limits.

But Wisconsin could be a different story, especially if voters turn down the November amendment.

As previous articles here have discussed ("Wisconsin's Activist Court," *WI: Wisconsin Interest* Fall, 2005), Wisconsin's Supreme Court has emerged as one of the most liberal in the country. In a series of rulings on both civil and criminal cases, the court's activist majority has shown that it is fully prepared to:

- Substitute its own judgment for that of the legislature, in effect acting like a super legislature, (see its decision invalidating medical malpractice caps);
- Overturn its own precedents, even of recent decisions (see its reversal of its position on Indian gaming);
- Create rights and rules that go far beyond those recognized by any other state (see decisions in product liability, and lead paint cases);
- Ignore rulings of the U.S. Supreme Court by reading rights into the state constitution that the high court says do not exist in the Bill of Rights. (This is called the "New Federalism" and is now embraced by at least four of the seven justices.)

This is the court that could be called upon to rule on the constitutionality of gay marriage in the next few years. It is by no means inconceivable that in the absence of a new amendment, it could read a right to gay marriage into the state constitution.

A lower state court has already raised red flags for gay marriage opponents when it ruled that a state law that declares that marriage is "the foundation of the family and society" should not be read as elevating marriage over other intimate relationships.

The 2nd District Court of Appeals handed down its ruling in a criminal case involving a

man who had lead police on a high-speed chase. During the man's sentencing, the defendant asked for leniency, citing his devotion to his family.

Racine County Judge Dennis Barry questioned his commitment, given the fact that he had never married the mother of his children. Said Barry:

"[Y]ou're here telling me how committed you are to your children. That's one of the arguments you're making to me about you and about your sentence, and I guess my question is I wonder how committed to your children you are and especially this woman when you're not willing to make the commitment of marriage, which at least the legislature recognizes is a very important institution in our society. I guess I'm wondering about your credibility."

He sentenced the man to 18 months in prison, followed by 18 months of "extended supervision."

The Appeals Court reversed the sentence, ruling that the law cited by Judge Barry does not hold up marriage as being superior or preferable to "any other type of familial or intimate relationship."

This, however is the actual text of the state statute in question:

Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. . . . The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. . . . "

Despite the plain language of the law, the judges on the Appeals Court ruled:

As we read the statute, it merely underscores the positive contribution of marriage to society; it does not attempt to privilege marriage over other intimate relation-

ships. The legislature did not intend to suggest that a single parent cannot be as committed to his or her children and the other parent as a married parent.

While the ruling was in the context of a criminal case (and therefore somewhat limited in its scope), gay marriage opponents have been quick to point out its significance.

Lorri Pickens, a spokesman for the "Vote Yes for Marriage" group, said:

They are beginning to go down the path of doing exactly what happened in Massachusetts. They are beginning to go down that road of redefining marriage.

A potentially more serious challenge is posed by the case of *Helgeland vs. State of Wisconsin*, in which six lesbians are asking the courts to award them domestic partner benefits from the state based on the Equal Protection Clause of the State Constitution. In Massachusetts, the high court cited the same clause to throw out the traditional definition of marriage in that state. In *Helgeland*, the plaintiffs are not asking for the legalization of gay marriage directly, perhaps because they knew it would result in the quick passage of the amendment. Still, the case is pending.

As one amendment supporter notes:

If they get a favorable decision, however (which is likely) not only will the taxpayers be screwed, but the courts will have ruled that equal protection requires the state to provide these benefits. Once that happens, there will be no logical reason to not rule that equal protection also requires same sex couples to be granted marriage licenses in the state of Wisconsin. And trust me . . . that lawsuit will come quickly on the heels of a liberal victory in *Helgeland*.

Supreme Court justices, like others in pub-

lic life, have been known to follow election results closely and a victory for supporters of gay marriage at the polls in November could encourage an already creative judiciary to go even further.

In Wisconsin, activist judges do not need much encouragement.

Endgame

A poll by Wispolitics.com in June found the public evenly divided over the constitutional amendment. Forty-nine percent of voters said they favored the ban on gay marriage; 48% opposed it. The poll did not screen for likely voters, so it may not reflect the senti-

ments of voters who will actually go to the polls in November, but it suggested that the issue was far from a sure thing.

Since the poll was released, Fair Wisconsin, which opposes the amendment, reported that it had raised \$1.3 million in the first six months of 2006, and had \$1.1 million on hand at the end of June. In contrast, the "Vote Yes" group raised \$2,454 in the same period and was left with less

than \$2,000 on hand.

Meanwhile, organized labor has lined up strongly against the amendment, arguing that it would "break deals and take away rights and protections" from unmarried working people. The state's two largest teacher's unions have contributed \$30,000 to defeating the amendment.

Opponents have also launched a sophisticated web site and blog; have begun running three different television spots in key media markets; and trained more than 1,600 volunteers to campaign against the amendment. So far, they have avoided using incendiary rhetoric accusing supporters of the ban of being bigots or homophobes; instead they have

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gone out of their way to reach out to conservative and moderate commentators—including bloggers—for support and online debates. In terms of organization, supporters of the amendment have not yet shown anything comparable. My own survey earlier this year found conservative bloggers about evenly

divided on the question. There is no such division on the left.

That leaves the outcome of the referendum vote very much up in the air. It should have been a slam-dunk.