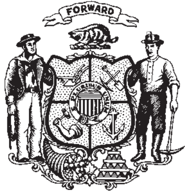

Wisconsin Briefs

from the Legislative Reference Bureau

Brief 06–12 September 2006

CONSTITUTIONAL AMENDMENT AND ADVISORY REFERENDUM TO BE CONSIDERED BY WISCONSIN VOTERS, NOVEMBER 7, 2006

Introduction

One proposal to amend the Wisconsin Constitution and one advisory referendum will be submitted to Wisconsin voters on November 7, 2006. The constitutional amendment relates to providing that only a marriage between a man and a woman shall be recognized in Wisconsin, and that a legal status identical or substantially similar to marriage for unmarried individuals shall not be recognized. The advisory referendum relates to the enactment of the death penalty in Wisconsin.

Section Created	Resolution	Subject
Article XIII, Sec. 13	2003 Assembly Joint Resolution 66 (Enrolled Joint Resolution 29) 2005 Senate Joint Resolution 53 (Enrolled Joint Resolution 30)	Marriage

Amendment Process

Article XII, Section 1, of the Wisconsin Constitution requires that every constitutional amendment must be adopted by two successive legislatures and ratified by the electorate before taking effect. A proposed change is introduced in the legislature for "first consideration" in the form of a joint resolution that must pass both houses but does not have to be submitted to the governor for approval. It must be published for three months before the next election. If the resolution is adopted on first consideration, a new joint resolution embodying the identical constitutional text must be approved on "second consideration" by the next legislature. The second joint resolution specifies the wording of the ballot question and sets the referendum date. The third and final step involves submitting the question to a statewide referendum vote where a majority of those casting ballots must ratify the amendment.

MARRIAGE

Ballot Question

The question will appear on the ballot in this form:

> **Marriage.** Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

Prepared by Michael J. Keane, Senior Legislative Analyst **Reference Desk: (608) 266-0341**
Web Site: www.legis.state.wi.us/lrb

Proposed Language

Section 13 of article XIII of the constitution is created to read: [Article XIII] Section 13. 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 marriage for unmarried individuals shall not be valid or recognized in this state.

Legislative Reference Bureau Analysis

The Legislative Reference Bureau analysis of 2003 AJR-66 states:

> This proposed constitutional amendment, proposed to the 2003 legislature on first consideration, provides that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Attorney General's Explanatory Statement

Attorney General Peggy A. Lautenschlager has provided the following explanatory statement of the effect of the proposed amendment as required by Section 10.01 (2)(c), Wisconsin Statutes:

> Under present Wisconsin law, only a marriage between a husband and a wife is recognized as valid in this state. A husband is commonly defined as a man who is married to a woman, and a wife is commonly defined as a woman who is married to a man.
>
> A "yes" vote would make the existing restriction on marriage as a union between a man and a woman part of the state constitution, and would prohibit any recognition of the validity of a marriage between persons other than one man and one woman.
>
> A "yes" vote would also prohibit recognition of any legal status which is identical or substantially similar to marriage for unmarried persons of either the same sex or different sexes. 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 prohibited by this amendment would be left to further legislative or judicial determination.
>
> A "no" vote would not change the present law restricting marriage to a union between a man and a woman nor impose restrictions on any particular kind of domestic relationship, partnership or agreement between unmarried persons.

Background

The issue of same-sex marriage has come into prominence in recent years because of several court decisions using state constitutional requirements mandating equality to require that same-sex couples be recognized by state governments, either through existing marriage laws, or through the creation of "civil union" statutes.

State Actions. Among the earliest cases dealing with same-sex marriage was *Baehr v. Lewin* (852 P. 2nd 44), a 1993 Hawaii case in which the state supreme court required that the legislature justify its distinction between opposite-sex and same-sex couples. During litiga-

tion, Hawaii passed a constitutional amendment giving the legislature the authority to limit marriage to opposite-sex couples. The court later ruled that the adoption of the 1998 amendment decided the issue without further action by the legislature.

In a 1999 Vermont case, *Baker v. State* (744 A. 2nd 864), the state supreme court found that denying same-sex couples the "benefits and protections that flow from marriage," violated the state constitution. The court gave the legislature the task of deciding how this would be accomplished, requiring only that "[W]hatever system is chosen . . . must conform with the constitutional imperative to afford all Vermonters the common benefits, protection, and security of the law." In response, the legislature passed 2000 Act 91, creating a civil union framework open to same-sex couples.

A Massachusetts case in 2003 took the issue a step further by requiring that marriage itself be available to same-sex couples. In *Goodridge v. Dept. of Public Health* (SJC-08860) the Supreme Judicial Court of Massachusetts ruled that the state could not deny same-sex couples a marriage license, finding that "civil marriage is an evolving paradigm." In language close to that used by an Ontario court in a similar case five months earlier, the court found that current marriage laws were in violation of principles of liberty and equality found in the Massachusetts Constitution, declaring that "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others." The court gave the legislature 180 days to remedy the situation. Legislation to create a civil union statute similar to Vermont's was unsuccessful, and on May 17, 2004, the court ordered the state to begin issuing marriage licenses to same-sex couples.

A relevant federal case was also decided in 2003. In *Lawrence v. Texas* (123 S. Ct. 2472), the U.S. Supreme Court ruled that state laws prohibiting sodomy were in violation of the due process clause of the U.S. Constitution's XIVth Amendment. The Court specifically declined to extend its ruling to include the issue of same-sex marriage. Nevertheless, some of its language placing homosexual acts outside the realm of state regulation, specifically: "The state cannot demean their existence by making their private sexual conduct a crime . . .", raises the question of whether this logic may in the future be extended to overturn state laws regarding marriage.

The emergence of this issue in some states has led others to examine the status of marriage and to enact legislation defining marriage as a union between a man and a woman. This has largely been driven by the concern that Article IV, Section 1, of the U.S. Constitution, requiring that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" may compel every state to recognize same-sex marriages contracted in other states.

In response to this concern, Congress in 1996 passed Public Law 104-199, the Defense of Marriage Act. The act states that no state can be required to recognize a same-sex marriage contracted in another state. The act also defines marriage as a "legal union between one man and one woman" and spouse as "a person of the opposite sex who is a husband or a wife." It is not clear whether this statutory remedy would actually shield states from the constitutional requirements of the "full faith and credit" clause.

The increased interest in the issue of same-sex marriage is reflected in the fact that a number of states have held ballot referenda on the subject. In 2004, 13 states (Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah) placed the question before their voters. While the ballot questions were not identical, all had the effect of defining marriage as between one man and one woman. Each of these measures was approved by the voters, with the largest majority being in Missis-

sippi (86%) and the smallest in Michigan (58.6%). In nine of the 13 states, the question was approved by more than two-thirds of those voting. In all, 19 states have adopted constitutional amendments defining marriage as between a man and a woman. At least 13 have included language prohibiting a status similar or identical to traditional marriage. Six states in addition to Wisconsin are considering marriage amendments in 2006.

The Issue in Wisconsin. The issue of defining marriage is not a new one in Wisconsin. Beginning in the 1971 session of the legislature, and continuing through the 1977 session, 10 bills were introduced permitting either same-sex marriage, polygamy, or group marriages. Most of these bills were introduced by Representative Lloyd A. Barbee of Milwaukee. None of them emerged from committee, although three received public hearings.

The issue was resurrected in Wisconsin about the same time it became a prominent issue nationally. In 1995, a bill was introduced by Representative Lorraine Seratti to prohibit same-sex marriage. It was the first of its kind in at least 100 years. Over the next three sessions, four other, similar bills were introduced. None became law. In 2001, Representative Frank Boyle introduced a bill permitting same-sex domestic partnerships. In 1997, James Doyle, then Attorney General, issued an informal opinion advising that the prevailing marriage law, Section 765.001 (2), Wisconsin Statutes, which stated that "marriage is a legal relationship between 2 equal persons, a husband and wife," was already sufficiently clear to make same-sex marriage illegal in Wisconsin.

During the 2003-04 session, Representative Boyle introduced AB-955, providing a domestic partnership law for Wisconsin. Representative Mark Pocan introduced a bill authorizing same-sex marriages. Neither bill passed. Bills requiring that marriage be between one man and one woman were introduced by Representative Mark Gundrum (AB-475) and Senator Scott Fitzgerald (SB-233). On October 21, 2003, Attorney General Peggy Lautenschlager reiterated Doyle's 1997 opinion that current law already prohibited same-sex marriage. AB-475 passed the Assembly 68-29 on October 23, and the Senate 22-10 on November 5. The bill was vetoed by Governor Doyle on November 10, and an Assembly override attempt fell short of the required two-thirds vote, 63-33, on November 12.

Legislative Action

2003 Assembly Joint Resolution 66, the "first consideration" resolution, which, as a constitutional amendment, did not require action by the governor, was introduced on February 9, 2004, by Representative Mark Gundrum and 44 coauthors and cosponsors. AJR-66 was adopted by the Assembly on March 4 and the Senate on March 11. It was enrolled on April 6 as Enrolled Joint Resolution 29.

2005 Senate Joint Resolution 53, the "second consideration" resolution, was introduced on November 22, 2005, by Senator Scott Fitzgerald and 53 coauthors and cosponsors. It was adopted by the Senate on December 6, 2005, and the Assembly on February 28, 2006. It was enrolled on March 22 as Enrolled Joint Resolution 30.

ADVISORY REFERENDUM ON THE DEATH PENALTY

Ballot Question

The question will appear on the ballot in this form:

> Should the death penalty be enacted in the State of Wisconsin for cases involving a person who is convicted of first-degree intentional homicide, if the conviction is supported by DNA evidence?

Attorney General's Explanatory Statement

Attorney General Peggy A. Lautenschlager has provided the following explanatory statement of the effect of the proposed amendment as required by Section 10.01 (2)(c), Wisconsin Statutes:

> This is an advisory referendum only. Neither a "yes" nor a "no" vote will directly make any change in the law. The Legislature and the Governor are not legally bound by the results of this advisory referendum.
>
> The present penalty for first-degree intentional homicide is life in prison. The court imposing a life sentence may also prohibit the defendant from ever being released from prison. This is commonly referred to as life without the possibility of parole.
>
> A "yes" vote would advise members of the Legislature that you want them to change the penalty for first-degree intentional homicide so that the penalty would be death when a person is convicted of first-degree intentional homicide, and the conviction is supported by DNA evidence. The referendum question does not suggest what level of DNA evidence would be sufficient.
>
> A "no" vote would advise members of the Legislature that you do not want them to change the present penalty for first-degree intentional homicide at this time.

Background

Since 1848, the Wisconsin Legislature has submitted 20 advisory referenda to the voters covering a broad range of topics. Ten have been approved and 10 have been rejected. Most recently, in 1993 the legislature submitted five questions to the voters on various aspects of gambling. Questions on casino restrictions, pari-mutuel betting, and the continuance of the state lottery were approved by the voters; questions relating to casino excursion vessels and video poker were rejected. It was the only time more than two advisory questions were submitted to the people at one time.

Legislative Action

Wisconsin abolished the death penalty in 1853. Numerous bills have been introduced to restore the death penalty since its abolition. None have passed. The question of the death penalty has never been submitted to the people before.

2005 Senate Joint Resolution 5 was introduced by Senator Alan Lasee on February 15, 2005. He was joined by 18 coauthors and cosponsors. Senate Amendment 3, recommended by the Committee on Judiciary, Corrections and Privacy, was adopted 19-13 on March 7. Senate Amendment 5, offered by Senator Lasee, was adopted 20-13, also on March 7. SJR-5 was adopted 20-13. Assembly Amendment 1, offered by Representative Frank Lasee, was adopted on a voice vote on May 4. The Assembly concurred in SJR-5 on May 4 by a vote of 47-45. The Senate concurred in Assembly Amendment 1 on May 16, 18-15. The joint resolution was enrolled as Enrolled Joint Resolution 58 on May 18.