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“The Tyranny Of The Majority Is No Myth”: Its Dangers For Same-Sex Couples

*Barbara J. Cox*¹

Despite historic election victories in Maine, Maryland, Minnesota, and Washington,² my life as a married woman in a same-sex relationship³ remains a legal quagmire. This quagmire is a result of the “tyranny of the majority” that has turned the U.S. into disjointed states with different laws for married, same-sex couples and those in domestic partnerships or civil unions. With discrimination against same-sex marriages written into 30 state constitutions and statutes prohibiting those marriages in another 11 states,⁴ my confidence that I can rely on my marital status wavers every time I leave California and cross state boundaries.⁵ Is this

¹ Clara Shortridge Foltz Professor of Law, California Western School of Law. I also chair the Board of Directors of the national Freedom to Marry organization. Thanks to Carrie A.R. Hedayati, CWSL '13, for her research assistance; Sasha Sappanos Wells for discussing this article with me; and my spouse, Peg Habetler, for her inspiration and support.

² See Molly Ball, *The Marriage Plot: Inside This Year's Epic Campaign for Gay Equality* (Dec. 11, 2012, 7:05 AM), available at <http://theatlantic.com/politics/print/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/>) (discussing the role of Freedom to Marry in these election victories).

³ We were married in Windsor, Canada, on July 18, 2003.

⁴ See Maura Dolan and Alana Semuels, *Gay Marriage Victories May Signal Larger Shift*, L.A. TIMES (Nov. 8, 2012), available at latimes.com/news/nationworld/nation/la-na-gay-marriage-20121108,0,1260230.story; see also *State Laws Prohibiting Recognition of Same-Sex Couples Relationships*, NATIONAL GAY AND LESBIAN TASKFORCE (Nov. 7, 2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_11_7_12.pdf.

⁵ California recognizes my Canadian marriage, according to CAL. FAM. CODE § 308(b) (West 2010), which states: “Notwithstanding any other provisions of law, a marriage between two persons of the same sex contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was

election the turning point in achieving marriage equality for same-sex couples or just a shining moment in these battles across our country?⁶

The laws adopted by voters in 30 states have real and negative consequences for married same-sex couples. As I followed the ambulance carrying my spouse down a two-lane road in rural Wisconsin in November 2012 on its way to a hospital over an hour away, unsure whether an MRI would show that she had bleeding in her brain, I worried about whether she was having a stroke. But, despite 30 years fighting to secure legal rights for same-sex couples, I also worried about whether the Wisconsin hospital would recognize my status as her spouse and allow me to make medical decisions if she were unable to do so. I was distressed that I did not have copies of our California “Power of Attorney for Healthcare” documents with me. Although we were married in Canada, are recognized as married in California, and are registered domestic partners in California and in Madison, Wisconsin,⁷ I was unconvinced that my marital or partnered status would be recognized in the small-town Wisconsin emergency room where my spouse might be facing neuro-surgery. I called attorneys in both California and Wisconsin, trying to figure out whether our forms could be faxed to the hospital⁸ or would be accepted by the Wisconsin hospital.⁹ When I should have been focusing on how

contracted is valid in this state if the marriage was contracted prior to November 5, 2008.”

⁶ See Megan Garvey, *Gay Marriage Chronology*, L.A. TIMES (Nov. 9, 2012, 1:29 PM). See graphics.latimes.com/usmap-gay-marriage-chronology/ for a map that shows same-sex relationship recognition and prohibition over a graphically changing timeline from 1/1/00 through 11/6/12.

⁷ We are unsure whether that registration would be recognized throughout Wisconsin since we are not registered under the state-wide system. See WIS. STAT. ANN. §§ 770.01-18 (West 2009-10). It appears that § 770.01(1) requires individuals to be county residents where they register. Although we live in Wisconsin 3-4 months each year, we are residents of California.

⁸ No, the hard copies were in San Diego but not in my current attorney’s files or my computer hard drive.

⁹ Yes. See WIS. STAT. ANN. § 155.70(10) (West 2011) (stating that forms executed in other jurisdictions are valid and enforceable in Wisconsin and

best to support my spouse who was in medical distress and might have to undergo a life-threatening medical procedure, I was worrying instead about how the constitutional amendment in Wisconsin, adopted by voters in 2006,¹⁰ would impact my ability to care for her.¹¹

These worries are ones that different-sex married couples seldom encounter. Their marriages are recognized throughout the U.S. if they were valid where celebrated,¹² and those couples travel or move around the country without wondering whether their marital status will change when they cross state lines. These problems arise for married same-sex couples because the federal Defense of Marriage Act permits states to refuse to recognize the valid marriages of same-sex couples from other states and limits federal rights to only married different-sex couples.¹³ Additionally, state laws and constitutional amendments void the marriages of or

authorize the health care agent to make the same decisions that a health care agent in Wisconsin could make). Ironically, our marriage does not receive similar recognition in Wisconsin.

¹⁰ WIS. CONST. art. XIII, § 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.”) The Wisconsin Supreme Court upheld the validity of the amendment, adopted by the voters by a 59% vote, in *McConkey v. Van Hollen*, 783 N.W.2d 855, 859 (Wis. 2010).

¹¹ She was transferred from one ER to another in the largest nearby town because a CT scan indicated she might be bleeding in her brain. An MRI indicated that she was not bleeding and was declared healthy after additional medical care. Fortunately, my employer, California Western School of Law, provides health care benefits to same-sex couples who are married or in domestic partnerships.

¹² *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283(2) (1971) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage”).

¹³ The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Section 2 is codified at 28 U.S.C. § 1738C (conflicts of law) and Section 3 is codified at 1 U.S.C. § 7 (federal definition of marriage). Section 3 has been held to be unconstitutional by several courts (*see, e.g.*, *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307)).

limit the rights provided to married or legally recognized same-sex couples. While the November 2012 electoral victories expanded the freedom to marry for same-sex couples to three additional states and resulted in the first state preventing a constitutional amendment banning marriage of same-sex couples,¹⁴ it did not end the discrimination that occurs when married same-sex couples travel or move between states. This hodgepodge of state laws has primarily been caused by the majority's electoral decisions limiting the rights of same-sex couples while preserving them for different-sex couples.

This article has three sections. Section 1 explains that sexual minorities, consisting of lesbian, gay, bisexual, transgendered, and queer people (LGBTQ),¹⁵ comprise a small number of people within the U.S. and describes the current laws granting and prohibiting legal rights to married or partnered same-sex couples. Thus, the LGBTQ community is dependent on the non-LGBTQ community to decide its rights when those rights are debated at the ballot box, a bad public policy in and of itself.¹⁶ Section II considers the question posed by this symposium: is the tyranny of the majority a danger to minority communities or is it a myth? Using sources such as Alexis de Toqueville, the Federalist papers,

¹⁴ See, e.g., Dolan and Semuels, *supra* note 4. For an in-depth discussion of how Minnesota became the first to reject a constitutional amendment, see Eric Ringham and Sasha Aslanian, *Eighteen Months to History: How the Minnesota Marriage Amendment was Defeated*, MINNESOTA PUBLIC RADIO (Nov. 9, 2012), available at <http://minnesota.publicradio.org/display/web/2012/11/09/marriage-how/>.

¹⁵ I use "sexual minorities" and LGBTQ interchangeably throughout this article. These terms are more inclusive than the more common acronym, LGBT. I use "LGBT" at some points because the research cited refers to LGBT individuals and may not include those who identify as "queer" or "intersexual." This article includes those other individuals within the "sexual minorities" or "LGBTQ" framework.

¹⁶ Individual rights should never be determined by popular vote. See Ball, *supra* note 2 (quoting Evan Wolfson: "It's very hard for a minority to turn to the majority and say, 'Please vote to end discrimination.' . . . The American idea is that certain protections can't be voted away, and the majority must accord equal terms to the minority.").

and prior U.S. court cases, this section concludes that majority tyranny is a threat to minority communities and has long been recognized as a danger inherent in governments founded on democracy. Section III describes the negative impact that the tyranny of the majority has on married same-sex couples. It also explains why the historic victories in November 2012 may establish that the majority has begun to understand the harm they cause to same-sex couples when they enshrine discrimination into state constitutions and statutes.

I. The LGBTQ Community And Relationship Recognition In The U.S.

Although this symposium posed the question as whether the tyranny of the majority is “a danger or myth,” there is no question that the majority decided ballot measures like those in Minnesota, Maryland, Maine, and Washington in November 2012 concerning the legal rights of same-sex couples. The only question before those elections was whether each state’s majority would tyrannize its sexual minorities.

Numbers released in October 2012 indicate that 3.4% of adults in the US identify as LGBT.¹⁷ What worries many who oppose marriage equality for same-sex couples is that these numbers are increasing among younger people. While only 1.9% of those 65 and older so identify, 6.4% of those who are 18-29 and 3.2% of those who are 30-49 self-identify as LGBT.¹⁸

Why the difference? Younger people have grown up in a world that still discriminates against them, but sexual minorities are no longer excluded from society as we once were. No longer does being open about one’s sexuality necessarily cause a lifetime of pain, discrimination, and loneliness. But this seemingly tolerant world has also adopted laws preventing marriage equality for same-sex couples. Many still oppose a society where freedom to express

¹⁷ Sharon Jayson, *New Survey: 3.4% of U.S. adults are LGBT*, U.S.A. TODAY, Oct. 19, 2012, at A3.

¹⁸ *Id.*

one's sexual orientation and gender identity is acceptable. As this survey established, people who have become adults in the last three decades are more open about their sexuality.

But LGBTQ individuals and couples are still subject to significant discrimination. In 29 states, a person can be fired simply for being LGBTQ and have no legal recourse (although this is not true in Minnesota, one of the first states to prohibit both sexual orientation and gender identity discrimination) and there continues to be no federal protection against this discrimination.¹⁹ After the November 2012 election, in 9 states and the District of Columbia, same-sex couples may formalize our relationships through marriage (while 8 others have broad relationship recognition laws and 5 have limited relationship recognition laws).²⁰ Despite this progress, 41 states do not allow same-sex couples to marry and 28 states provide no legal recognition of these relationships. States that permit marriage represent 14 percent of the U.S. population and 11 percent of the same-sex couples,²¹ and states that have civil union, domestic

¹⁹ *State Nondiscrimination Laws in the U.S.*, NATIONAL GAY AND LESBIAN TASKFORCE (Jan. 20, 2012), available at www.theTaskForce.org/reports/issue_maps/non_discrimination_1_12.pdf. In 1993, Minnesota amended its Human Rights Act, which prohibits discrimination based on sexual orientation in employment, housing, public accommodations, public service, education, credit, and business. MINN. STAT. § 363A.02(a).

²⁰ *Relationship Recognition for Same-Sex Couples in the U.S.*, NATIONAL GAY AND LESBIAN TASK FORCE (Nov. 7, 2012), available at www.theTaskForce.org/reports/issue_maps/rel_recog_11_7_12.pdf. Washington, Maryland, and Maine joined Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), District of Columbia (2010), and New York (2011) in allowing same-sex couples to marry. *Id.* Marriages in Washington began on December 6, 2012, in Maine on December 29, 2012, and in Maryland on January 1, 2013. *Id.* As this article was going to print, Rhode Island was poised to become the 10th state to allow marriage, effective August 1, 2013, after the Governor signs the final bill. Tina Susman, *Rhode Island set to become 10th state to allow gay marriage*, available at latimes.com/news/nation/nationnow/la-na-nn-rhode-island-gay-marriage-20130424,0,1411798.story.

²¹ Jennifer C. Pizer and Sheila James Kuehl, *Same-Sex Couples and Marriage: Model Legislation for Allowing Same-Sex Couples to Marry or All Couples to Form a Civil Union*, THE WILLIAMS INSTITUTE 1 (August 2012), available at

partnership, or have marriage following the 2012 election comprise 41.6% of the U.S. population and 48.6% of same-sex couples.²²

Although LGBTQ individuals have made progress, we remain a minority, dependent on the non-LGBTQ majority to decide ballot initiatives affecting our rights. The non-LGBTQ majority in Minnesota should take pride in becoming the first voters to reject a ballot initiative enshrining discrimination into their constitution.²³

According to census figures for Minnesota, there were approximately 5,379,139 people in Minnesota as of 2012,²⁴ including 3.06 million registered voters in Minnesota.²⁵ There are 1,082,905 different-sex married couples in Minnesota,²⁶ but only 10,207 same-sex couples who self-identified in the 2010 Census.²⁷ As of June 2008, there were an estimated 175,611 LGB individuals living in Minnesota.²⁸ Twenty percent of same-sex couples in Minnesota are raising children, amounting to about 5,500 children

<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Kuehl-Model-Marriage-Report.pdf>.

²² *Id.* at 2-3 (including Washington, Maryland, Maine, California, Nevada, Oregon, Colorado, Illinois, and Hawaii).

²³ *See* Ball, *supra* note 2, at 3 (voters had adopted all 31 initiatives affecting marriage rights for same-sex couples).

²⁴ *State & County QuickFacts*, UNITED STATES CENSUS BUREAU, available at <http://quickfacts.census.gov/qfd/states/27000.html> (last visited Apr. 29, 2013).

²⁵ *Number of Registered Voters by County, as of August 26, 2012*, MINNESOTA SECRETARY OF STATE, available at <http://www.sos.state.mn.us/index.aspx?page=531>.

²⁶ *Selected Social Characteristics in the United States: 2011 American Community Survey 1-Year Estimates*, UNITED STATES CENSUS BUREAU, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP02&prodType=table (last visited Nov. 28, 2012).

²⁷ Gary J. Gates & Abigail M. Cooke, *Minnesota Census Snapshot: 2010*, THE WILLIAMS INSTITUTE, available at <http://escholarship.org/uc/item/9ns871hv> (last visited July 17, 2013).

²⁸ Adam Romero, Clifford J. Rosky, M.V. Lee Badgett, & Gary J. Gates, *Census Snapshot: Minnesota*, THE WILLIAMS INSTITUTE 1 (June 2008), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MinnesotaCensus2000Snapshot.pdf>. (estimating that there were 16,081 same-sex couples in Minnesota).

and more than 4% of Minnesota's adopted children live with a lesbian or gay parent.²⁹

It is hard to imagine how allowing the marriages of 10,207 same-sex couples or even 175,000 individuals in Minnesota could harm the 5.3 million people or the 1.066 million different-sex married couples in Minnesota. But the ban against marriage seriously affects these LGBTQ individuals. It is hard to imagine a rational public policy for excluding them from any "reasonable prospect of marriage in their lives."³⁰ Since no one proposes to remove the 5,500 children from their parents who are in same-sex relationships, it is again bad public policy to exclude their parents from the legal recognition and rights that come from marriage and thereby strengthen and protect those children's families.

Marriage today has numerous problems, with high divorce rates, births outside of marriage, and little respect for marriage, but these existed long before same-sex couples began to marry.³¹ Allowing approximately 10,000 same-sex couples to marry in Minnesota could not possibly affect the marriages of over a million different-sex couples. Furthermore, radical changes have occurred within different-sex marriages that affect all married couples, such as no-fault divorce and women's equality.³² Thus, worrying that marriage will be harmed by allowing same-sex couples to marry is disingenuous, when traditional marriage has changed drastically in the last 40 years, having nothing to do with same-sex couples.

²⁹ *Id.* at 2.

³⁰ Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 96 (2008-09). Carpenter notes that U.S. law creates a strange asymmetry for sexual minorities. After *Lawrence v. Texas*, 539 U.S. 558 (2003), states cannot criminalize the sexual practices of sexual minorities but may still prevent them from entering into legally-recognized relationships. *Id.* at 99. Sexual minorities are "pushed aside, marginalized, ostracized, and made to feel alien from traditional values and institutions." *Id.* at 103. Instead, they should be integrated into society and allowed to marry, which is "the most important social institution for encouraging, recognizing, and reinforcing loving relationships." *Id.*

³¹ *Id.* at 100.

³² *Id.* at 101.

Currently, Minnesota is one of eleven states whose “legislatures could open marriage to same-sex couples by amending their marriage statutes,” as people become increasingly comfortable with the need for legal recognition of same-sex relationships.³³ Its citizens refused to become the 31st state to harden public policy by constitutionally limiting marriage to different-sex couples, thereby allowing change to occur as public opinion evolves.³⁴ The majority of Minnesotans rejected the amendment, realizing it was unwise to end this discussion. Perhaps this means that these ballot initiatives have finally run their course. But it also proves that majority tyranny against sexual minorities has occurred in the 30 other states where voters adopted these amendments.

II. The Tyranny Of The Majority Has Long Been Recognized As A Danger In Democratic Societies

Having established that sexual minorities are dependent on the majority when constitutional amendments prohibiting marriage equality are on the ballot, this section explores the numerous writers who have understood that majority tyranny is not a myth. Although democratic government has numerous benefits for society, such as providing broad voting rights to most people, that very breadth prevents minorities from receiving justice when the majority chooses to restrict their rights. These restrictions are particularly troubling when they are contained in constitutional amendments. This section discusses the dangers of majority tyranny recognized by such diverse writers as Alexis de Toqueville, James Madison in the *Federalist Papers*, and judges in U.S. courts.

³³ Pizer & Kuehl, *supra* note 21, at 7.

³⁴ *Id.* at 7 n.18; *see also generally* Ringham & Aslanian, *supra* note 14.

A. Alexis de Toqueville

Alexis de Tocqueville, in his book *Democracy in America*, coined the phrase “the tyranny of the majority.”³⁵ Much of what he wrote about the dangers of democracy underscores why allowing voters to decide the issue of individual rights for minorities is such a bad idea.

de Toqueville wrote that “[a] general law, which bears the name of justice, has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. The rights of every people are therefore confined within the limits of what is just.”³⁶ He explained that majority rule can be “harmful in itself and dangerous for the future” because “no obstacles exist which can impede or even retard its progress, so as to make it heed the complaints of those *whom it crushes upon its path*.”³⁷ He recognized that “[t]here are communities in which the members of the minority can never hope to draw the majority over to their side, because they must then give up the very point that is at issue between them.”³⁸

de Toqueville continued: “When I see that the right and the means of absolute command are conferred on any power whatever, be it called a people or a king, an aristocracy or a democracy, a monarchy or a republic, I say there is the germ of tyranny,”³⁹ According to de Tocqueville, “the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their irresistible strength.”⁴⁰ Recognizing that the majority in the U.S. would likely oppress the minority, he expressed “alarm” over the

³⁵ Alexis de Toqueville, *Democracy in America* (1835), available at http://xroads.viginia.edu/~HYPER/DETOC/1_ch 15.htm.

³⁶ *Id.*

³⁷ *Id.* (emphasis added).

³⁸ *Id.* This quote is especially apt given the vocal criticism that marriage equality opponents use against sexual minorities.

³⁹ *Id.*

⁴⁰ *Id.*

inadequate securities which one finds there against tyranny. [If] an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority and serves as a passive tool in its hands.⁴¹

The remedy for de Tocqueville was a government where the legislature would represent the majority without being “a slave to its passions, an executive so as to retain a proper share of authority, and a judiciary so as to remain independent of the other two powers. . . .”⁴² Then, and only then, “a government would be formed which would still be democratic while incurring scarcely any risk of tyranny.”⁴³

de Tocqueville recognized that controversial public policy discussions must be allowed to continue as long as possible, explaining that “as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent” because the majority can conquer all opposition.⁴⁴ Minnesota voters seemingly rejected the attempt to amend their constitution because it would prematurely harden public policy while this discussion needed to continue. Between 2004-2011, support for marriage equality has increased by 16 percentage points, and 75% of that increase has come from people

⁴¹ *Id.*

⁴² The judiciary often fulfills this protective role for minorities when they strike down laws adopted by the majority that target minorities. *See e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir.), *cert. granted sub nom. Hollingsworth v. Perry*, 133 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144). “By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause. We hold Proposition 8 to be unconstitutional on this ground.”

Id.

⁴³ de Toqueville, *supra* note 35, at 5.

⁴⁴ *Id.*

changing their minds.⁴⁵ Minnesota's statute currently prohibits marriages by same-sex couples and refuses to recognize marriages from other jurisdictions.⁴⁶ By not amending its constitution, Minnesota's voters have shown their willingness to permit change to happen when the state becomes ready to do so.

de Toqueville was prescient in recognizing that the majority has the power to pass laws leaving minorities unable to resist. According to de Tocqueville, it is as if the majority were saying the following to the minority:

'You are free to think differently from me and to retain your life, your property, and all you possess; but you are henceforth a stranger among your people. You may retain your civil rights, but they will be useless to you, for you will never be chosen by your fellow citizens if you solicit their votes; and they will affect to scorn you if you ask for their esteem. You will remain among [society], but you will be deprived of the rights of mankind. Your fellow creatures will shun you like an impure being; and even those who believe in your innocence will abandon you, lest they should be shunned in their turn. Go in peace! I have given you your life, but it is an existence worse than death.'⁴⁷

In 30 previous elections, this is essentially what the majority said to same-sex couples seeking marriage equality. Sexual minorities may be constitutionally protected in our sexual practices, but most of us

⁴⁵ Gregory B. Lewis & Lanae Erickson Hatalsky, *The Big Shift: Changing Views on Marriage for Same-Sex Couples*, THIRD WAY 1 (Oct. 2012), available at <http://www.thirdway.org/publications/600>.

⁴⁶ MINN. STAT. § 517.03(a) (stating "The following marriages are prohibited: . . . (4) a marriage between persons of the same sex."); MINN. STAT. § 517.03(b) (stating "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 marriage or its termination are unenforceable in this state.").

⁴⁷ de Toqueville, *supra* note 35, at 7.

remain legal strangers to our partners. We may live in society, but we may never attain society's most favored legal status.

B. James Madison

Similar concerns were raised by James Madison in *The Federalist Papers*.⁴⁸ In Federalist No. 10, he wrote about the danger caused by majority factions, recognizing they could not be prevented in a democracy. He explained that majority factions can “sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.”⁴⁹ Thus, securing the public good and the private rights of the minority “against the danger of such a faction” was necessary to ensure justice within the new democracy.⁵⁰

In Federalist No. 51, Madison reiterated the need to “guard one part of the society against the injustice of the other part.”⁵¹ He continued: “If a majority be united by a common interest, the rights of the minority will be insecure.”⁵² Madison stated that “[i]n a free government, the security for civil rights must be the same as for religious rights.”⁵³ Continuing, he wrote:

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.⁵⁴

⁴⁸ Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* (Garry Wills ed., 1982)(1787). James Madison is the author of both No. 10 and No. 51. *Id.* at xxv-xxvi.

⁴⁹ The Federalist No. 10, at 45 (James Madison) (Garry Wills ed., 1982).

⁵⁰ *Id.*

⁵¹ The Federalist No. 51, at 264 (James Madison) (Garry Wills ed., 1982).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 265.

Justice requires that the majority protect the minority so that they receive justice as valued members of civil society.

C. U.S. Courts Recognize The Danger Caused By The Tyranny Of The Majority

These dangers are not merely the concerns of political theorists. In *United States v. Carolene Products*, the United States Supreme Court wrote that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”⁵⁵ Professors Jesse Choper and John Yoo, when applying the analysis from *Carolene Products* to marriage equality for same-sex couples, stated that membership in the group of couples excluded from marriage is “perceived as a stigma of inferiority and a badge of opprobrium.”⁵⁶ They went on to explain that the “cost of a prohibition is the restriction of the liberty of two individuals of the same sex who seek the same legal status for an intimate relationship that is available to individuals of different sexes.”⁵⁷ They recognized the benefits of marriage to same-sex couples (such as stable relationships producing more personal income, less demand on welfare and unemployment benefits, better conditions for raising children, and encouraging families to save and invest for the future).⁵⁸ Against these benefits, they found “no evidence that marriage of same sex couples produces tangible, direct harm to anyone in marriages or outside of marriages.”⁵⁹ In fact, their

⁵⁵ 304 U.S. 144, 153 n.4 (1938).

⁵⁶ Jesse H. Choper & John C. Yoo, *Can the Government Prohibit Gay Marriage?*, 50 S. TEX. L. REV. 15, 31 (2008).

⁵⁷ *Id.* at 33.

⁵⁸ *Id.* at 34.

⁵⁹ *Id.*

research determined that, contrary to opponents' arguments, societies that permit marriage equality do not find a decrease, but rather find an increase, in respect for marriage.⁶⁰ The only damage that comes is that marriage provides legitimacy to gay and lesbian relationships, and this is offensive to some.⁶¹ But being offensive to some members of society, however, is not a legitimate reason to restrict same-sex couples from the hundreds of state rights and more than a thousand federal rights that come with marriage equality.

More recently, the Second Circuit Court of Appeals held that section 3 of the federal Defense of Marriage Act⁶² was unconstitutional because it required the surviving spouse of a same-sex marriage to pay \$363,053 in estate taxes that would not have been owed had she been the survivor of a different-sex marriage.⁶³ The Court held that classifications based on sexual orientation must be subjected to heightened scrutiny, similar to classifications based on alienage, illegitimacy, national origin, and gender.⁶⁴ Relevant to this discussion, the Court explained that "minorities may be unable to protect themselves from discrimination at the hands of the majoritarian political process."⁶⁵ The Court questioned whether sexual minorities have the political strength to protect ourselves from wrongful discrimination, likening us to the position that women held in 1973 when the Supreme Court began using heightened scrutiny when considering legislative classifications based on gender.⁶⁶ The Court concluded that sexual minorities, like women at that time, have improved our legal position "markedly" but "still 'face pervasive, although at time more subtle,

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 1 U.S.C. § 7 (1996) defines "marriage" as "only a legal union between one man and one woman as husband and wife," and "spouse" as "a person of the opposite sex who is a husband or a wife."

⁶³ *Windsor v. U.S.*, 699 F.3d 169, 173 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-307).

⁶⁴ *Id.* at 181.

⁶⁵ *Id.* at 184.

⁶⁶ *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

discrimination . . . in the political arena.”⁶⁷ The Court concluded that heightened scrutiny was appropriate because sexual minorities “are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public.”⁶⁸ Therefore DOMA’s definition of “spouse” and “marriage” excluding married same-sex couples violated the plaintiff’s Equal Protection rights.⁶⁹

Clearly, these writers understood majority tyranny to be an expected, although unfortunate, result of democracy. It is this tyranny that underscores why minority rights must not be decided at the ballot box. But the majority in Minnesota withstood these pressures and refused to exclude sexual minorities from the protections in its state constitution.

III. The Majority Must Prevent Harm To Sexual Minorities

Minnesota voters apparently recognized the harm that would be caused to same-sex couples by enshrining discrimination against our relationships in their state constitution. This election did not involve a theoretical vote in support of traditional marriage, but rather one that would have harmed sexual minorities in same-sex relationships. This section explores two issues: the real harm caused to individuals excluded from marriage and the danger of enshrining discrimination into state constitutions.

A. Harm Caused When Voters Exclude Same-Sex Couples From Marriage

This section uses my personal experience to illustrate the harm married same-sex couples encounter when states prohibit marriage. My spouse and I have been together as a couple for 22 years, and we had a private commitment ceremony more than 20 years ago in Madison, WI. If we were a different-sex couple who could marry, then as of 1992, we would have done so, and our

⁶⁷ Windsor, 699 F.3d at 184 (citing *Frontiero*, 411 U.S. at 685-86).

⁶⁸ *Id.* at 185.

⁶⁹ *Id.* at 188.

status as a married couple would have remained the same when we moved to California and anywhere we traveled or lived throughout the world. But, as a same-sex couple, our path has been much more difficult as we sought legal recognition for our relationship.

We registered as domestic partners in Madison in 1991 and in California in 1999, although both of these registrations provided limited rights.⁷⁰ We were married in Windsor, Canada in 2003, but California discriminated against our marriage, refusing to recognize it because a constitutional amendment, adopted by California voters, limited recognition to those marriages between one man and one woman.⁷¹ Finally, our marriage became valid in California in 2008 after the California Supreme Court held that Proposition 22 was unconstitutional and the refusal to recognize valid marriages from other jurisdictions was sexual orientation discrimination.⁷² Unfortunately, Proposition 8, adopted by California voters on 11/4/2008, again prevented legal recognition of our marriage. The 9th Circuit Court of Appeals struck down Proposition 8 as unconstitutional, and the Supreme Court has granted certiorari.⁷³ Finally, in 2009, the California Legislature revised the marriage recognition statute to provide that marriages of same-sex couples performed in other jurisdictions before November 4, 2008 were valid in California, while those entered into after November 4, 2008 would be treated as domestic partnerships with all rights but not the societal recognition that comes from marriage.⁷⁴

More than 17 years after we were privately married, we are finally considered to be legally married in California. We now have access to hundreds of state rights, but continue to be denied over 1,100 federal rights and privileges provided to married couples due

⁷⁰ See MADISON, WI., CODE § 39.03(11)(2010); CA DOMESTIC PARTNERSHIP ACT, 1999 Cal. Legis. Serv. Ch. 588.

⁷¹ The voters of California adopted Proposition 22 on March 8, 2000. That section was codified as CAL. FAM. CODE § 308.5 (2000).

⁷² See *In Re Marriages Cases*, 183 P.3d 384, 453 (Cal. 2008).

⁷³ *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir.), *cert. granted sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144).

⁷⁴ CAL. FAM. CODE § 308(b),(c).

to the federal DOMA.⁷⁵ And every time we leave California, our marital status again becomes unclear.

We live four months of the year in southwestern Wisconsin where discrimination against our marriage is imposed every September when we return there. Wisconsin treats us as though we are legal strangers. Limited domestic partnership rights in Wisconsin may be available to us given our marital status, but most of those we enjoy in California are lost when we move to our second home.⁷⁶

Even those limited rights end when we drive to Minnesota. Minnesota Statute § 517.03(4) limits marriage to those between one man and one woman, and § 517.04(6) voids the marriages of same-sex couples and makes contractual rights arising from those marriages unenforceable.⁷⁷

My stepdaughter, Sasha Wells; her husband, James; and their children, Myah and Luke; live in Stillwater, Minnesota. My spouse, “Grandma Peggy,” and I visit them frequently, and they visit us in Wisconsin and California. When we travel to Minnesota, we are stripped of our marital status and treated as legal strangers. But when Sasha and James visit us, their marital status travels with

⁷⁵ Pizer and Kuehl, *supra* note 21, at 12-13 (referring to health insurance and other family benefits provided through employment; better access to insurance and better rates outside of employment; preferred treatment under state tax laws, such as property transfer tax exemptions and non-taxability of employer-provided health insurance; standing to pursue tort claims for wrongful death and loss of consortium; unemployment compensation when one’s spouse must relocate; legal presumptions that property is jointly owned, that parties have mutual duties of support for their children; and availability of state courts to arrange for property division and child support and visitation upon dissolution). Additionally, numerous studies have shown positive health benefits for married couples and negative consequences for sexual minorities who are excluded from marriage. *Id.* at 13-14. Among the negative consequences are the stress and stigma that come from antigay campaigns and public debates where voters, like those in Minnesota, are discussing whether to ban same-sex couples from marrying. *Id.* at 14. Over 1,138 federal rights and privileges would become available following federal recognition of our marriage. See Gill v. Office of Personnel Management, 699 F.Supp.2d 374, 395 (D. Mass. 2010).

⁷⁶ See WIS. STAT. ANN. §§ 770.01-18 (West 2009-10).

⁷⁷ MINN. STAT. §§ 517.03(4), 517.03(6) (2012).

them and, wherever they go, they are recognized as married. This is sexual orientation discrimination when our marriages are treated so differently, based on this single difference between us.

If I were to be killed by a drunk driver while driving between Wisconsin and Minnesota, my spouse of 22 years would not be able to sue for wrongful death. If I were hospitalized, she could not make legal decisions for me as my spouse, except for the written documents we signed giving her authority to do so. But it takes money and effort to replicate some of the rights that married couples receive simply by marrying. Voters must realize that they not only discriminate against same-sex couples when they refuse to recognize our marriages, but they are also discriminate against low-income people who cannot afford to use legal documents to replicate some of the rights they otherwise would have received from their marriages.

B. Discrimination Must Not Be Enshrined Into State Constitutions

Voters must also consider whether the constitution should be used to limit marriage equality. None of the previous proposed amendments to the Minnesota constitution attempted to limit individual rights.⁷⁸ Minnesota already has a statute that limits marriage to one man/one woman: legislation telling the 10,207 same-sex couples and their children in Minnesota that their relationships are so odious that they must not be legally recognized. This is harmful. Those couples have no legal rights toward each other, unless they take the expensive route of trying to replicate rights through writing documents.

But even if Minnesota's citizens believe such a restriction is appropriate, it was vitally important that they refused to enshrine that restriction in its constitution.

It is quite difficult to amend a constitution. Consider the interracial marriage bans inserted into many state constitutions. In

⁷⁸ Mary Jane Morrison, *Amending Minnesota's Constitution: The Process and Some Examples*, symposium presentation, at 1-2.

1967, in *Loving v. Virginia*, the United States Supreme Court considered the constitutionality of Virginia's interracial marriage ban that prevented Mildred (an African-American woman) and Richard Loving (a white man), who had married in DC, from living in Virginia as a married couple.⁷⁹ They were arrested after returning home to Virginia following their honeymoon, for the crime of being married to a person of a different race and given the choice of one year in jail or twenty-five years in exile from their home state.⁸⁰ They left the state and challenged "one of the last remaining vestiges of America's legal apartheid system."⁸¹ The Supreme Court struck down those limitations—nation-wide—in 1967, finding that laws preventing interracial couples from marrying violated both the Equal Protection clause of the federal Constitution and the fundamental right to marry.⁸² That decision came 19 years after the California Supreme Court became the first in the nation to find an interracial marriage ban to be unconstitutional in *Perez v. Sharp*.⁸³

Neither court was supported by the majority of voters when they issued their decisions. When the California Supreme Court issued its opinion in 1948, polls showed that 90% of the public opposed marriage equality for interracial couples; when the United States Supreme Court issued its opinion in 1967, 72% of Americans

⁷⁹ 388 U.S. 1 (1966).

⁸⁰ *Id.* at 2-3.

⁸¹ Barbara J. Cox, *The 40th Anniversary of Loving v. Virginia: Its Enduring Vitality*, LOS ANGELES DAILY JOURNAL, June 12, 2007 (reprinted in *Res Ipsa* 20-21, March 2008).

⁸² *Loving*, 388 U.S. at 2.

⁸³ I have argued elsewhere that those same constitutional protections should be invoked to strike down the bans against marriage for same-sex couples. See Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1042-61. The Supreme Court may decide this question in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144).

opposed marriage by interracial couples.⁸⁴ “Despite this, the Court encountered little public resistance to *Loving*, nor was there a serious move to amend the Constitution.”⁸⁵ Not until 1991 did those opposing interracial marriage constitute only a minority of adults in the U.S.⁸⁶ In contrast, as of June 2012, “[p]olls now consistently show that a majority of Americans support marriage for gay couples. . . .”⁸⁷

Despite interracial marriage bans being unconstitutional since 1967, it was not until 1998 that South Carolina voters finally removed such a ban from their state constitution.⁸⁸ Ironically, this was the same year that bans against marriages by same-sex couples were first added to Hawaii’s and Alaska’s constitutions.⁸⁹ Alabama voters were the last to remove this ban, doing so in 2001 by only 60% of the vote.⁹⁰

More than 30 years after such bans were found to violate the U.S. Constitution, these provisions remained in South Carolina’s and Alabama’s constitutions because constitutions are, by their very design, difficult to amend. This same difficulty has occurred in Minnesota, where voting restrictions for those with “Indian blood” were not removed until 1960 and voting restrictions for women

⁸⁴ *Conflict over inter-racial marriage in the U.S.: Miscegenation laws*, 9th Cir. 2012), RELIGIoustOLERANCE.ORG, available at http://www.religioustolerance.org/hom_mar14.htm (last visited Apr. 29, 2013).

⁸⁵ Cox, *supra* note 81, at 21.

⁸⁶ Religious Tolerance, *supra* note 84.

⁸⁷ Lanae Erickson Hatalsky, *The State of Relationship Recognition in 2012* 4 (June 2012), available at <http://www.thirdway.org/publications/534>.

⁸⁸ Amendment 4, repealing Section 33, Article III of the South Carolina Constitution, was adopted on November 3, 1998 by 62% of the vote. See http://scvotes.org/statistics/election_results_from_primaries_and_general_elections_statewide. (last visited Dec. 12, 2012).

⁸⁹ See NATIONAL GAY AND LESBIAN TASKFORCE, *State Laws Prohibiting Recognition of Same-Sex Couples Relationships* (Nov. 7, 2012), available at http://www.thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_11_7_12.pdf.

⁹⁰ *Alabama Interracial Marriage, Amendment 2 (2000)*, BALLOTPEDIA, [http://ballotpedia.org/wiki/index.php/Alabama_Interracial_Marriage,_Amendment_2_\(2000\)](http://ballotpedia.org/wiki/index.php/Alabama_Interracial_Marriage,_Amendment_2_(2000)) (last visited Apr. 29, 2013).

were not removed until 1964.⁹¹ If Minnesota had amended its state constitution, it might have taken another 30 years to remove that amendment, once these bans are declared to be unconstitutional, as they surely will be.

IV. Conclusion

Let me end by quoting Alan L. Goldblum who is the President and CEO of Children's Hospitals and Clinics of Minnesota, where my step-daughter, Sasha Wells, is a pediatrics emergency room nurse in the St. Paul hospital. In an October 2012 article in the Minneapolis Star Tribune, he wrote that more than "25 years of research have documented that there is no relationship between parents' sexual orientation and any adverse measure of a child's emotional, psychosocial, and behavioral adjustment," and on that basis, the Minnesota Chapter of the American Academy of Pediatrics voiced its opposition to this amendment.⁹² Sasha, who would be considered by any standard to have a successful life and a wonderful family, is a clear example of how children are not harmed from being raised by lesbian or gay parents.⁹³

At the end of his article, Doctor Goldblum concluded, "Ultimately, this amendment isn't about law or politics. It's about people. Constitutions should be used to enshrine freedoms, not limit them. Minnesota has an opportunity to be on the right side of history in this important vote." He urged Minnesota voters to vote no. They did and established that, while majority tyranny often occurs at the ballot box, some majorities recognize that they must not harm the minorities living in their midst. Minnesota became the first state whose voters refused to enshrine discrimination against

⁹¹ Morrison, *supra* note 78, at 7. In fact, only 63% of voters ratified the proposed amendment to "eliminate obsolete provisions governing the franchise of persons of Indian blood." *Id.*

⁹² Alan L. Goldblum, *Marriage Vote: Family's Love Matters more than its form*, STAR TRIBUNE (Oct. 16, 2012), available at <http://www.startribune.com/opinion/commentaries/174479351.html>.

⁹³ Sasha's father, Steve Sappanos, was also an influential presence in her life until his death.

same-sex couples into their state constitution and its citizens should be proud that their state refused to do so. Now they must remove the statutes banning marriage and refusing to recognize marriages from other states, thereby opening the state to marriage equality.

