

A LETTER CONCERNING
THE PROPOSED
MARRIAGE PROTECTION AMENDMENT
TO THE INDIANA CONSTITUTION

January 17, 2008

Dear Members of the Indiana General Assembly,

The undersigned are law professors at three institutions of higher learning in Indiana: The Indiana University Law School at Bloomington, The Indiana University Law School at Indianapolis, and the Valparaiso Law School in Valparaiso. We wish to express our significant shared concerns to the members of the Indiana General Assembly over the “Marriage Protection Amendment”, commonly known as SJR-7, which would amend Article I (“Bill of Rights”) of the Indiana Constitution.

For your convenience, the language of SJR-7 is set out here:

“Marriage in Indiana consists only of the union of one man and one woman. This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups.”

Although we may not be unanimous in our views concerning the religious and cultural issues surrounding same-sex marriage or civil unions, we are concerned with issues of fundamental fairness and equal treatment of Indiana citizens that may arise because of the hasty and inartful drafting of the proposed constitutional amendment. We have serious reservations concerning the wisdom of addressing these controversial and complex matters in the Indiana Constitution. SJR-7’s constitutional approach may lead to unanticipated judicial interpretations. Such undesired and unintended consequences are considerably harder to remedy than those of ordinary legislation.

We share a fundamental concern that the language appearing in SJR-7 fails to meet reasonable and commonly accepted standards for legislative enactments, let alone constitutional amendments. Although we realize that no language drafted to govern human affairs can be perfect, the text of the proposed Indiana amendment presents needless uncertainty. In particular, the second sentence contains a number of vague and undefined words and phrases, over which reasonable legal minds significantly disagree. We note the irony that this amendment, which purports to rein in what some describe as an “activist judiciary”, leaves to that same branch of government the task of resolving the matters left unclear because of poor drafting.

The language of SJR-7 is closely patterned after a proposal before the U.S. Congress, known commonly as the “Federal Marriage Amendment”. Certain revisions made by proponents of that measure described by them as providing clarification never made their way into the Indiana version. Clarifying measures that would have addressed some of the language problems were specifically rejected as SJR-7 moved through the 2005 and 2007 sessions of the General Assembly.

Specifically, the undefined term “legal incidents of marriage” creates significant ambiguity and the potential for needless litigation over a wide variety of matters. For instance, protection from domestic violence and eligibility for domestic partner benefits are issues that have been affected in other states. Although the language of each state's proposal varies, the fact of unintended consequences does not.

Disagreement over the meaning and application of the term “construe” and the phrase “construed to require” as it applies to provisions of Indiana law has also caused confusion about the various roles of courts and the legislature. SJR-7 proponents claim that the measure clearly limits only the judiciary (as the sole body that “construes” law), leaving the legislature free to enact civil union legislation or lesser rights, benefits, or obligations related to marriage. However, cogent and reasonable contrary arguments are equally persuasive, given that any such legislated benefits would require construction by the courts.

The impact of adding SJR-7 to Article I of the Indiana Constitution is uncertain and invites additional litigation. In particular, Section 23 of that Article, commonly termed Indiana’s Privileges and Immunities Clause, is a variation of the federal Equal Protection and Due Processes Clauses. Over the years the Indiana Supreme Court and other courts have interpreted it to establish certain principles of treating different groups of Indiana citizens equally. It is unclear how the addition of SJR-7 to Article I would affect these principles.

Some have urged that since reasonable legal minds disagree, SJR-7 should simply be approved by the current session of the Indiana General Assembly and passed to the electorate to decide. Although the people of Indiana must ultimately determine the contents of their Constitution, it would be a serious abdication of the Legislature’s responsibility to send a poorly drafted, ill conceived proposal to the public. In fact, doing so would contravene Article 16 of the Indiana Constitution, which imposes upon lawmakers the duty to screen all proposed amendments. Our Indiana Legislators owe the people of Indiana the clearest and best possible language, so as to make it as evident as humanly possible what public policy choices Hoosiers make when they vote to enshrine them into the Indiana Constitution.

We are deeply concerned that the current language of SJR-7 fails to meet that standard. We therefore urge that Indiana lawmakers reject the current version of SJR-7. In fulfillment of its role, our legislative bodies must subject the language of this and any proposed constitutional amendment to the highest levels of scrutiny, examining each term

carefully to make sure that it clearly spells out what is intended, and leaving as little as humanly possible to be misunderstood, misinterpreted, and producing results that are unanticipated and unintended.

The people of Indiana deserve no less.

Respectfully,

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