

**Q & A on the recent decision of the Iowa Supreme Court concerning Marriage
by Attorney Kerry Lee Morgan, April 9, 2009**

On April 3, 2009, the Iowa Supreme Court declared that Iowa's law providing that "Only a marriage between a male and a female is valid" was unconstitutional, contrary to the equal privileges clause of Iowa's Constitution. What does this opinion mean? How should we think about it? What should be do? The opinion may be found at:

http://msnbcmedia.msn.com/i/msnbc/sections/news/090403_Iowa_Gay_Marriage_Ruling.pdf

What did the Court actually say?

The Court only declared Iowa law, section 595.2 unconstitutional. That section provided that "Only a marriage between a male and a female is valid." The court said this requirement was unconstitutional because it did not treat homosexual persons and heterosexual persons the same in terms of marriage. The Court said that Iowa's Constitution requires the law to treat and protect both persons equally.

Is the Court's decision itself, Constitutional?

Article XII, Section 1 of the Iowa Constitution. says that: "This constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void." The Iowa Supreme Court has the judicial power to declare section 595.2 void. The Court's decision may be wrong, but it still has the judicial power to declare state laws void which are contrary to the Constitution of Iowa.

Is any part of the Courts's opinion Unconstitutional?

Yes. The judicial power of the Iowa Supreme Court does not include the power to require the "remaining statutory language" of Iowa's marriage licensing act to be "interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage." (Opinion, p. 68). That part of the opinion is dicta, meaning it is not necessary for the opinion. But more importantly, that part of the opinion usurps the Constitutional power of the Governor. The local Polk County Board of Commissioners and/or Governor has the power to interpret and apply the "remaining statutory language," not the Supreme Court. The State Legislature has the Constitutional power to enact laws including the power to decide if it will alter or modify the licensing of marriage in Iowa. The Supreme Court of Iowa does not possess this legislative power. It does not have the Constitutional or judicial power to make law.

By usurping the Constitutional power of the Governor and Legislature, and commandeering the authority of the Polk County Board of Commissioners, the Supreme Court of Iowa acted unconstitutionally. It acted contrary to the separation of powers doctrine which is designed to prevent any branch from exercising the power of any other branch. As such, neither the Governor nor the Legislature are bound to take any notice whatsoever, of this part of the Court's "opinion."

What should I encourage the Governor to do?

The Governor ought not follow the Court's unconstitutional directive that "gay and lesbian people" are entitled to "full access to the institution of civil marriage." He has a Constitutional duty to defend his branch of the Iowa government from the usurpation of the Iowa Supreme Court. It does not matter what he believes about homosexual persons and marriage *in this context*. What is important on this point, is that he defend the Constitutional principle of separation of powers and that he defend his branch of government from the Supreme Court's usurpation thereof.

But What Should He Do about Homosexual Marriage?

If he is not willing to defend his Constitutional authority to interpret and apply the law, then he probably will not be willing to grab this hot potato. We must recover the rule of law first if we are to ever hope to recover particular rules such as those governing marriage. Yet, if he believes, after his own independent Constitutional analysis, that the Court's decision voiding section 595.2 is a legal error, then he should announce that while the decision binds the parties, the Governor will not lend any of his office or branch to enforce that erroneous decision. Since the Court depends entirely on the executive branch to enforce its decisions, the effect of the Governor's statement is that the opinion becomes unenforceable and merely a legal oddity. Marriage remains as it was before the decision of the Court.

On the other hand, if the Governor agrees with the Court's opinion that section 595.2 violates the Iowa Constitution, then his branch should implement that decision (not the unconstitutional aspect thereof noted above). He would say, "OK, I agree with the Court that section 595.2 violates the Iowa Constitution and I will not enforce any marriage licensing law that is limited to a man and women." He would also say that the opinion binds the parties, which in this case is the Polk County Register/Clerk.

Of course, he should also declare that the core and foundation of Iowa's entire marriage licensing statute is, in fact and law, the proposition that marriage is by definition between a male and female. Since the Court has voided that foundation and core, he cannot see how any marriage license can be issued and the whole licensing scheme is now in doubt. As such, he should declare that Iowa has no authority to issue a marriage license to anyone at all and call upon the Legislature to decide what it will do if anything in response.

Yet, if the Governor thinks he has no power in this area, then it may fall to the Polk County Board of Commissioners and County Lawyers to run with the ball. They should file a motion to reconsider and clarify in the 21 day period. They should challenge the authority of the Iowa Supreme Court to require the issuance of a marriage license as stated in its opinion under remedies.

Well, then, how can someone get married in either Polk County or in Iowa?

People can get married as they have always gotten married. Persons desiring to be married may be married in other states, foreign states, or publicly hold themselves out in Iowa as married

according to the common law which is limited to marriage between a man and women. The Court's decision has nothing to do with common law marriage and its “independent research” on this question (Opinion, p. 68) suggesting that no other basis exists for civil marriage is both dicta, as well as beyond the power of a Court as noted above. Courts do not undertake independent research of legal questions. That is a legislative and executive function. (Nor does Iowa's reliance on common law marriage implicate footnote 24 of the Court's opinion). As a matter of fact, Iowa already recognizes common law marriages. They are called “Nonstatutory Solemnization of Marriage”

OK, What Is a Nonstatutory Solemnization of Marriage?

I am glad you asked. In rendering its decision, the Court took no position concerning any other section of Iowa's marriage licensing law. It let stand the State's claim that marriage is a civil contract and may impose age requirements. But most importantly, the Court never addressed Iowa Code section 595.11 which preserves the common law basis for marriage.

That section states:

“595.11 NONSTATUTORY SOLEMNIZATION -- FORFEITURE.

Marriages solemnized, with the consent of parties, in any manner other than that prescribed in this chapter, are valid; but the parties, and all persons aiding or abetting them, shall pay to the treasurer of state for deposit in the general fund of the state the sum of fifty dollars each; but this shall not apply to the person conducting the marriage ceremony, if within fifteen days after the ceremony is conducted, the person makes the required return to the county registrar.”

Note that the law refers to “marriages solemnized.” It does not refer to civil unions. Section 595.11 is clearly intended to preserve and protect the common law means of marrying;, i.e, marrying without a license from the State or requiring that the parties register the marriage.

Thus, at least in Polk County Iowa, persons may marry pursuant to the common law and if they desire the state to recognize that marriage, they may at their discretion, register their marriage. But we must remember it is a marriage that is being registered. It is a marriage solemnized according to the common law.

Can Homosexuals Have a Solemnized Marriage?

No. Why not? We must naturally inquire if homosexual persons may enter into a solemnized marriage and thus have the ability to register that arrangement with the County Register or Clerk. The answer is that common law marriages are recognized according to the rules of the common law. The rules of the common law are a function of the “laws of nature and of nature's God” as that legal term is employed in our Declaration of Independence. That document, in turn establishes that the legal basis of all American Statehood, and equally of Iowa's statehood, its Constitution and law, are all likewise grounded in the law of nature. It is this law of nature—rules binding over the globe, under all circumstances and through all time—that reflects the legal basis of section 595.11 Non-statutory Solemnization of Marriages. It is also this law of nature, that

reflects the institution of marriage, pre-existing Iowa's codification of marriage licensing rules into its law.

The law of nature established from the beginning of time as an incontrovertible legal rule, that marriage is valid only between a male and female. Since the law of nature was adopted as a legal proposition by the original thirteen colonies to form the basis of state constitution and law, the proposition that marriage is valid only between a man and woman is likewise the law of the land. And of course, Iowa's admission into the Union on equal footing with the original states, renders these propositions binding on the people and government of Iowa, as a matter of law.

Thus, if homosexual persons purport to enjoy Iowa's recognition of a Nonstatutory Solemnization of Marriage under section 595.11, the law of nature laid down at the founding of the Country and upon which Iowa itself as a state is admitted, is itself the legal justification for the differing treatment between homosexual and heterosexual persons. It is, by rough analogy, the legal equivalent of the "legislature's rationale" justifying the difference.

Won't the Iowa Supreme Court just void section 595.11 the same way they voided section 595.2? While it is true that a Tyrant respects no law other than its own, the question is rather, does any of the Court's equal privileges logic concerning section 595.2 apply to section 595.11? The answer is "No." How can that be?

The Varnum Court made much ado about the legislature's rationale in voiding section 595.2. This does not concern us here. It does not concern us because there can be no equal privileges challenge to Iowa's recognition of a Nonstatutory Solemnization of Marriage under section 595.11 which itself is grounded on the law of nature and which by definition acknowledges only the male and female eligibility of that marriage. To litigate an Iowa equal privileges claim against section 595.11 in the same manner and fashion as against 595.2, is to maintain that the Iowa equal privileges clause can be used to strike down the cornerstone of Iowa statehood and Iowa law itself. It is also an effort to strike down a law—the common law of marriage—a law not created by the legislature, nor justified by any legislative rationale, by striking down the law of nature regarding marriage itself.

Whatever power a Court might possess, even a State Supreme Court, it does not possess the power to invalidate the organic law upon which a state, its constitution, and its laws are based or upon which they must be derived. No possible valid construction of the equal privileges clause can, consistent with the law of nature foundation upon which it is grounded, lead a Court to find or declare that said clause requires the foundation itself to be set aside.

Why discuss all this legal "mumbo-jumbo?" Why not just say that God opposes homosexual marriage?

The legal foundations of this county are not legal mumbo-jumbo. Our ignorance of them and the Christian legal and Clerical profession's embarrassment over pleading or preaching those legal foundations, have lead us to the sorry state in which we now find ourselves.

Though God himself has declared that only a man and women are eligible for the institution of marriage, it is not this fact which concerns us as a matter of law. What concerns us, is the undeniable historical and legal fact that the colonies and state governments of this country, recognized, acknowledged and established the law of nature as a binding legal proposition, when they first declared their independence and appealed to it--the laws of nature and of nature's God--as the legal foundation upon which the constitutions and governments of these united States shall operate. It must follow, therefore, that no state that desires to remain in the Union and be governed accordingly, can deny the foundation upon which it is created. It must follow that no state, nor any branch of that state's government, be it a Supreme, appellate or inferior Court of that state, has jurisdiction to interpret or construe a constitutional clause in such a way as to nullify, set aside or countermand that foundational law of nature.

Thus, any effort by homosexual persons to qualify their relationship as a Nonstatutory Solemnization of Marriage under section 595.11 must fail as a matter of law. If Iowans need direction on how to proceed, they should tell their elected officials that section 595.11 controls and that as such Iowa does not recognize homosexual marriage. Since nothing in the Varnum case discuss this law, the Court's decision is irrelevant.

What else can the Governor do?

He may call upon the legislature to reaffirm by Resolution Iowa's historical commitment to common law marriage between a man and women and revise the laws of Iowa to recognize the common law in relevant cases, tying the objects stated in footnote 19 of the opinion to the common law's recognition of marriage. He can ask the legislature to carefully articulate the law of nature basis upon which marriage is grounded and Iowa's obligation as a State in the Union to ensure that its laws conform to the law of nature as adopted by the Declaration of Independence. He can affirm that the law of nature is an independent grounds not discussed by the Court, nor one which could be lawfully discussed by the Iowa Supreme Court in the Varnum case.

Finally, the Governor can call upon the people of Iowa to make its views know to the legislature and to defend the separation of powers doctrine against Judicial usurpation.

What about the Legislature?

As noted above, the legislature can do nothing. Or it can do the right thing and reaffirm by Resolution Iowa's historical commitment to common law marriage between a man and women and revise the laws of Iowa to recognize the common law in relevant cases, tying the legislative benefits of marriage stated in footnote 19 of the Court's opinion, to the common law's recognition of marriage. The legislature can also hold hearings for the purpose of carefully articulate the law of nature basis upon which marriage is grounded and Iowa's obligation as a State in the Union to ensure that its laws conform to the law of nature as adopted by the Declaration of Independence.

The legislature can do one thing in addition. It can hold hearings on the separation of powers. It can receive testimony to the effect that Courts do not have the power to make laws of general

applicability or bind the people. They only have power to declare the law of the case with regard to the parties before it. The fact that the decision is wrong does not change this effect with regard to the parties. There are remedies for a wrong opinion. The judiciary, while the weakest, is still an equal, independent and coordinate branch of the state government. In short, the Court's effort on page 68 of its opinion to commandeer the legislative and executive branches into accepting the Court's rewrite of the statute is in and of itself a violation of the separation of powers for which the Court may ultimately be held accountable by the legislature under Article III, sections 19 and 20 permitting impeachment for "malfeasance in office." The Legislature can determine if the Impeachment power ought to be used in this case.

What can the Polk County Board of Commissioners do?

The Polk County Board of Commissioners should file a motion to reconsider and clarify in the 21 day period. They should challenge the authority of the Iowa Supreme Court to require the issuance of a marriage license as stated in its opinion under remedies. They should direct the County Sheriff to not enforce the Court's opinion upon the County Register or Recorder.

What can the Media do?

The media and Amicus of record, should stop declaring that the Varnum case legalizes gay marriage in Iowa. Noting could be further from the truth or more contrary to the limited nature of judicial power.

Why haven't I heard others make any of these obvious points?

Ask them, and don't give them any more money until they answer you satisfactorily.