LRB-0595

1999 DRAFTING REQUEST

Assembly Joint Resolution

Received: **10/16/98**

Received By: **dykmapj**

Wanted: **As time permits**

Identical to LRB:

For: **Marlin Schneider (608) 266-0215**

By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **dykmapj**

May Contact:

Alt. Drafters:

Subject: **Constitutional Amendments**

Extra Copies: **JEO**
JTK
RAC

Pre Topic:

No specific pre topic given

Topic:

Privacy

Instructions:

1997 AJR 44 (privacy advocate) plus a right to privacy

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	dykmapj 12/17/98	gilfokm 12/17/98	lpaasch 12/17/98	_____ _____ _____ _____ _____ _____	lrb_docadmin 12/18/98 lrb_docadmin 12/18/98 lrb_docadmin 12/18/98		
/1	dykmapj 03/1/99	gilfokm 03/1/99	hhagen 03/1/99	_____ _____	lrb_docadmin 03/1/99	lrb_docadmin 03/11/99	

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1-3-1-99 kmg

FE Sent For:

<END>

1999 DRAFTING REQUEST

Assembly Joint Resolution

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/P1	dykmapj	/P1-12-17 KMG	12-17 LP	12-17 LD JE	P/1 - Not Submitted		

FE Sent For:

<END>

Submit P/1 per PJD w/Drafters Note.

1987 ASSEMBLY JOINT RESOLUTION 95

February 23, 1988 - Introduced by Representatives CLARENBACH, BOCK, FORTIS, WILLIAMS, S. COGGS, NOTESTEIN, GRUSZYNSKI, BECKER, CARPENTER, BLACK, BELL, SEERY, M. COGGS and YOUNG, cosponsored by Senator RISSER. Referred to Committee on State Affairs.

To amend section 1 of article 1 of the constitution, relating to establishing the right of privacy as an inherent right of the people (first consideration).

Analysis by the Legislative Reference Bureau

This constitutional amendment, proposed to the 1987 legislature on "first consideration", establishes the right of privacy as one of the constitutionally protected inherent rights of the people.

Placing the right of privacy among the inherent rights enumerated in the Wisconsin constitution parallels sec. 1 of art. I of the constitution of the state of California, in which the right of privacy has been enumerated as an inalienable right since November of 1972.

In Wisconsin, the right of privacy is recognized by statute law (s. 895.50, stats.) and survives as an action at common law (s. 895.01, stats.). This right of privacy is founded on the prohibition of unreasonable searches and seizures under sec. 11 of art. 1 of the constitution; see, e.g., Watkins v. State, 59 Wis. 2d 514 (1973) and State v. Douglas, 123 Wis. 2d 13 (1985); see also federal cases under art. IV of the amendments to the U.S. constitution, e.g., Rakas v. Illinois, 439 U.S. 128 (1978), New York v. Belton, 453 U.S. 454 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984), which are cited in the 1985-86 edition of the Wisconsin statutes as annotations to sec. 11 of art. I of the Wisconsin constitution.

In a recent California civil suit for damages based on emotional distress resulting from sexual harassment -- Vinson v. Alameda, 43 Cal. 3d 833, 740 Pa. 2d 404 (1987) -- the supreme court of California held that "California accords privacy the constitutional status of an 'inalienable right', on a par with defending life and possessing property. California's privacy protection .... embraces sexual relations." Further, the court stated that "while the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such 'waiver' must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities."

As a constitutional amendment, the proposal requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 1 of article I of the constitution is amended to read:

[Article I] Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty, privacy and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(End)

10/25/90

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0306/1dn
HRT:kmg:...

Prepared for:

Pat Shannon c/o Rep. CLARENBACH

Your instructions were to redraft AJR–95 of the 1987 session for 1991 consideration. In the 1987 resolution, the amended section looked as follows:

[Article I] Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty, privacy and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

For the 1991 redraft, I have change the sequence of the affected phrase to "life, liberty and the pursuit of happiness and privacy". The new sequence preserves the often quoted "life, liberty and the pursuit of happiness" which is found both in the Wisconsin constitution and in the 2nd paragraph of the declaration of independence.

The new sequence is also more faithful to the text of sec. 1 of art. I of the California constitution, which served as the model for the Wisconsin proposal:

[Article I] Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, *and pursuing* and obtaining safety, *happiness, and privacy* [emphasis supplied].

Dr. H. Rupert Theobald
Chief, Leg. Reference Bureau
266–3561

1991-92 Legislature STATE OF WISCONSIN LRB-0306/1
HRT:kmg:...

1991 ASSEMBLY JOINT RESOLUTION 47

March 21, 1991 - Introduced by Representatives CLARENBACH, MOORE, SCHNEIDER, CARPENTER, BOCK, KRUG and BOYLE, cosponsored by Senators RISSER, ULICHNY and FEINGOLD. Referred to Committee on Elections and Constitutional Law.

To amend section 1 of article I of the constitution, relating to establishing the right of privacy as an inherent right of the people (first consideration).

Analysis by the Legislative Reference Bureau

This constitutional amendment, proposed to the 1991 legislature on "first consideration", establishes the right of privacy as one of the constitutionally protected inherent rights of the people.

Placing the right of privacy among the inherent rights enumerated in the Wisconsin constitution parallels sec. 1 of art. I of the constitution of the state of California, in which the right of privacy has been enumerated as an inalienable right since November of 1972.

In Wisconsin, the right of privacy is recognized by statute law (s. 895.50, stats.) and survives as an action at common law (s. 895.01, stats.). This right of privacy is founded on the prohibition of unreasonable searches and seizures under sec. 11 of art. I of the constitution; see, e.g., Watkins v. State, 59 Wis. 2d 514 (1973), State v. Fillyaw, 104 Wis. 2d 700 (1981), State v. Stevens, 123 Wis. 2d 303 (1985), State v. Amos, 153 Wis. 2d 257 (Ct. App. 1989) and State v. Murdock, 155 Wis. 2d 217 (1990); see also federal cases under art. IV of the amendments to the U.S. constitution, e.g., U.S. v. Miller, 425 U.S. 435 (1976), Rakas v. Illinois, 439 U.S. 128 (1978), New York v. Belton, 453 U.S. 454 (1981), Hudson v. Palmer, 468 U.S. 517 (1984), California v. Ciraolo, 476 U.S. 207 (1986) and California v. Greenwood, 486 U.S. 35 (1988), which are cited in the 1989-90 edition of the Wisconsin statutes as annotations to sec. 11 of art. I of the Wisconsin constitution.

In a 1987 California civil suit for damages based on emotional distress resulting from sexual harassment -- Vinson v. Alameda, 43 Cal. 3d 833, 740 Pa. 2d 404 (1987) -- the supreme court of California held that "California accords privacy the constitutional status of an 'inalienable right', on a par with defending life and possessing property. California's privacy protection .... embraces sexual relations." Further, the court stated that "while the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such 'waiver' must be narrowly rather than expan-

sively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities."

As a constitutional amendment, the proposal requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 1 of article I of the constitution is amended to read:

[Article I] Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness and privacy; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(End)

ASSEMBLY SUBSTITUTE AMENDMENT 1,

TO 1991 ASSEMBLY JOINT RESOLUTION 47

March 28, 1991 - Offered by Representative CLARENBACH.

To amend section 1 of article I of the constitution, relating to establishing the right of privacy as an inherent right of the people (first consideration).

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 1 of article I of the constitution is amended to read:

[Article I] Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty, privacy and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(End)

Dykman, Peter

From: debbie.haskins@state.co.us
Sent: Friday, November 20, 1998 4:36 PM
To: LegalSERV-L@NCSL.ORG
Cc: debbie.haskins@smtpgate.ganotes.state.co.us
Subject: Constitutional Right to Privacy

I have researched this for a proposed constitutional amendment to Colorado's constitution (ours failed). This is what I found last year when I researched this. There are 10 states that have right to privacy provisions in their state constitutions. Alaska, Florida, Hawaii, Montana, and Arizona have separate provisions that specifically declare a right to privacy. Alaska and Hawaii constitutions state that the legislature can further implement the constitutional right to privacy. Illinois, Louisiana, and South Carolina include a statement about invasion of privacy in their clauses that deal with unreasonable searches and seizures. Washington has a statement that no person shall be disturbed in his private affairs. California has a provision listing inalienable rights, including "pursuing and obtaining safety, happiness, and privacy". The Colorado draft would have added privacy to our list of inalienable rights similar to California's approach, but it was defeated due to worries about how the courts would interpret right to privacy, especially concerns re: expansion of abortion rights. The theory behind doing a state right to privacy is that the federal constitution and U.S. Court decisions represent the "floor" for privacy rights; and a state constitution with a right to privacy represents the ceiling, thus depending upon how the state supreme court defines privacy for that state. It gives your citizens greater privacy protections. See Kam v. State, 748 P. 2d 372 (Hawaii 1988) for a good discussion of this principle. Hope that helps. -- Debbie Haskins, Office of Legislative Legal Services, Colorado - debbie.haskins@state.co.us

Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision. We hold that our state constitution provides an independent basis on which to decide this case.[7]

III. STANDARD OF REVIEW

[2]

We will apply the compelling state interest/least restrictive alternative test to our review of this claim that Wis. Stat. § 347.245(1), as applied to the eight Amish respondents, violates freedom of exercise and freedom of conscience under Art. I, § 18 of the Wisconsin Constitution. Succinctly stated, under this analysis, the challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

This test evolved from the decisions of the United States Supreme Court in *Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (state must not only show compelling interest but must "demonstrate that no alternative forms of regulation would [serve the state's interest] without infringing First Amendment rights"), *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise

[7] This conclusion parallels that reached by the Supreme Court of Minnesota, which found that their state constitution supplied an "independent and adequate" basis for determining a similar challenge brought by the Old Order Amish to a slow-moving vehicle statute. *State v. Hershberger*, 462 N.W.2d 393, 396-97 (Minn. 1990).

served can overbalance legitimate claims to the free exercise of religion"), and *Thomas v. Review Board, Ind. Emply. Sec. Div.*, 450 U.S. 707, 718 (1981) ("state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest").

[3]

However, in 1990, the United States Supreme Court repudiated use of the compelling state interest standard in claims based solely on the Free Exercise Clause of the First Amendment. *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).[8] *Smith*, like *Sherbert*, involved a challenge to the denial of unemployment benefits based on free exercise grounds. After the *Smith* claimants were fired for ingesting the hallucinogenic drug peyote, the Oregon Department of Human Services denied them unemployment compensation despite the claimants' showing that they used the peyote in a religiously inspired sacrament of the Native American Church. The United States Supreme Court specifically concluded that a state is not barred by the Free Exercise

[8] The *Smith* Court concluded, however, that the compelling state interest test was still applicable in "hybrid" cases involving claims of infringement of other constitutionally protected rights in addition to a free exercise claim. *Employment Div., Oregon Dep't of Human Resources v. Smith*, 494 U.S. 872, 881-882 (1990). Thus, the Respondents urge that the *Sherbert* analysis can be applied to their challenge to the SMV statute under the First Amendment because the statute infringes upon the rights of freedom of travel and assembly, as well as the free exercise of their religious beliefs. Although this position may have merit, we do not need to resolve the appropriate standard of review under the United States Constitution because, as stated earlier in this opinion, we conclude that our decision today is firmly grounded on the Wisconsin Constitution alone.

Clause from prohibiting sacramental peyote use and therefore can deny unemployment benefits for such use. In its opinion, the Court rejected the *Sherbert* test and instead found that neutral, generally applicable state laws which are not aimed at regulation of religious belief and which do not implicate other constitutional protections are permissible under the First Amendment even if they interfere with conduct based on religious convictions. *Smith*, 494 U.S. at 882. The United States Congress responded in 1993 with passage of the Religious Freedom Restoration Act which implicitly rejected *Smith* and statutorily adopted the four-step *Sherbert* test for analysis of free exercise based challenges.[9]

[4]

Despite the Court's revision of the test applicable to federal claims, we concur with the logic of the Minnesota Supreme Court in a post-*Smith* review of a similar Amish buggy case:

> while the terms "compelling state interest" and "least restrictive alternative" are creatures of federal doctrine, concepts embodied therein can provide guidance as we seek to strike a balance under the [state] Constitution between freedom of conscience and the state's public safety interest.

State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990). In assessing previous free conscience and free exercise challenges, this court, and the court of appeals, have utilized the principles and analytical

[9] Because we conclude that the statutory requirement for display of the SMV symbol violates this state's guarantee of freedom of conscience, we need not further address the federal issues raised in this appeal. Specifically, we do not reach the issue of the constitutionality or applicability of RFRA.

framework developed by the United States Supreme Court in *Sherbert, Yoder*, and *Thomas*. *See State v. Yoder*, 49 Wis. 2d 430, 182 N.W.2d 539, *aff'd sub. nom Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Kollasch v. Adamany*, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1981), *rev'd on other grounds*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981); *State v. Peck*, 143 Wis. 2d 624, 422 N.W.2d 160 (Ct. App. 1988). We conclude that the guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims and see no need to depart from this time-tested standard.

IV. APPLICATION OF THE COMPELLING INTEREST/LEAST RESTRICTIVE ALTERNATIVE TEST

The State concedes that the Respondents' challenge to Wis. Stat. § 347.245(1), is based on sincerely held religious beliefs. As members of the Old Order Amish, the eight Respondents live "separate and apart from the world" in a community in which religion permeates every aspect of their lives. The United States Supreme Court noted in *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972), that "the Old Order Amish religion pervades and determines the entire mode of life of its adherents."

The local church district formulates rules, or Ordnung, which set the religious parameters for permissible behavior. The Ordnung governing Respondents' community prohibits the use of "loud colors" and "worldly symbols." The buggy used by the Amish is a plain black four-sided box on wheels which is horse-drawn. It is not only their mode of transporta-

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-0595/P1
PJD...:

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1999 ASSEMBLY JOINT RESOLUTION

To create section 26 of article I of the constitution; **relating to:** creating an independent right of privacy of individuals (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 1999 legislature on first consideration, establishes an independent right of privacy of individuals, which may not be infringed by law or by any person.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 26 of article I of the constitution is created to read:

[Article I] Section 26. Every individual shall have a right of privacy, which may not be infringed by law or by any person.

SECTION 2. Numbering of new provision. The new section 26 of article I of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of

the amendment proposed in this joint resolution, any other ratified amendment has created a section 26 of article I of the constitution of this state. If one or more joint resolutions create a section 26 of article I simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0595/P1
PJD...:.....

December 18, 1998

This joint resolution creates an independent right of privacy. I did not amend Article I, section 1 or 11, of the Wisconsin Constitution, which is the approach taken by some other states, because the right of privacy might then be limited just to criminal matters or just to governmental action or just to the protection granted under the 14th amendment to the U.S. constitution or just to the protection granted under all amendments to the U.S. constitution.

By creating the right of privacy in the constitution it becomes a fundamental right. However, no fundamental right is absolute. The various rights must be balanced against competing interests. Often, when engaged in the balancing, the courts will use a standard of review that requires a statute that impacts a fundamental right to have a compelling state interest and be the least restrictive alternative. Of the ten states that have an explicit constitutional right of privacy, only Montana places the standard of review in the constitution. Because other provisions of our constitution do not set forth the standard of review, because only one state constitution sets it forth, and because I believe the Wisconsin Supreme Court will use this standard of review as they did in State v. Miller, 202 Wis2nd 56 (1996), I did not include the standard of review in this draft of the amendment.

Atty. Peter J. Dykman
Deputy Chief
266–7098

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0595/P1dn
PJD:kmg:lp

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Deputy Chief
266–7098

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FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0595/~~P1~~1dn
PJD:kmg:lp

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Deputy Chief
266–7098

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-0595/P1
PJD:kmg:lp

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1999 ASSEMBLY JOINT RESOLUTION

D-NOTE

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the amendment proposed in this joint resolution, any other ratified amendment has created a section 26 of article I of the constitution of this state. If one or more joint resolutions create a section 26 of article I simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0595/1dn
PJD:kmg:hmh

March 1, 1999

This joint resolution creates an independent right of privacy. I did not amend Article I, section 1 or 11, of the Wisconsin Constitution, which is the approach taken by some other states, because the right of privacy might then be limited just to criminal matters or just to governmental action or just to the protection granted under the 14th Amendment to the U.S. Constitution or just to the protection granted under all amendments to the U.S. Constitution.

By creating the right of privacy in the constitution it becomes a fundamental right. However, no fundamental right is absolute. The various rights must be balanced against competing interests. Often, when engaged in the balancing, the courts will use a standard of review that requires a statute that impacts a fundamental right to have a compelling state interest and be the least restrictive alternative. Of the ten states that have an explicit constitutional right of privacy, only Montana places the standard of review in the constitution. Because other provisions of our constitution do not set forth the standard of review, because only one state constitution sets it forth, and because I believe the Wisconsin Supreme Court will use this standard of review as they did in *State v. Miller*, 202 Wis2nd 56 (1996), I did not include the standard of review in this draft of the amendment.

Atty. Peter J. Dykman
Deputy Chief
266–7098

SUBMITTAL FORM

LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 3/1/99

To: Representative Schneider

Relating to LRB drafting number: LRB-0595

Topic
Privacy

Subject(s)
Constitutional Amendments

1. **JACKET** the draft for introduction MW

   in the **Senate** ____ or the **Assembly** ____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

   A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

   If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Attorney Peter J. Dykman, Deputy Chief
Telephone: (608) 266-7098