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LEGAL THREATS TO TRADITIONAL MARRIAGE: IMPLICATIONS FOR PUBLIC POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

APRIL 22, 2004

Serial No. 76

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

93–225 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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LEGAL THREATS TO TRADITIONAL MARRIAGE: IMPLICATIONS FOR PUBLIC POLICY

THURSDAY, APRIL 22, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Judiciary Subcommittee on the Constitution. I am Steve Chabot, the Chairman, and I want to welcome everybody here. Good afternoon.

Today, the House Constitution Subcommittee holds its second hearing on the subject of marriage. The purpose of today's hearing is to explore threats posed to traditional marriage, historically understood as the union of one man and one woman, by recent court decisions, including the United States Supreme Court's *Lawrence* decision and the Massachusetts Supreme Judicial Court's *Goodridge* decision.

Despite the authority of Congress to enact the Defense of Marriage Act under clear constitutional provisions, which was the subject of our last hearing, it is unfortunately becoming increasingly common to see once clearly understood constitutional provisions wash away over time following a slowly advancing tide of judicial precedence.

For example, in 1965, the Supreme Court in *Griswold* v. *Connecticut* discovered a constitutional right to contraception rooted in the right to marital privacy. By the time the Court decided *Roe* v. *Wade* in 1973, the right to reproductive privacy was applied to abortion, wholly outside the context of marriage.

In 1986, the Court in *Bowers* v. *Hardwick* refused to create a right of sexual privacy for same-sex couples, but then in 2003, the Court reversed itself in *Lawrence* v. *Texas*. In *Lawrence*, the Court claimed not to have gone so far as to establish a right to same-sex marriage, but then the Massachusetts Supreme Judicial Court prominently used the *Lawrence* decision just a few months later to do just that.

While the Massachusetts court repeatedly cites in its decision the Massachusetts Constitution, nowhere in the *Goodridge* decision did the court state precisely which provisions of the Massachusetts Constitution had been violated by the State's traditional marriage policy. Instead, the Massachusetts court expansively cited *Lawrence* v. *Texas* as establishing a broad right of personal autonomy,

failing to acknowledge the statement in *Lawrence* that "the case does not involve whether the Government must give formal recognition to any relationship that homosexual persons seek to enter," and also failing to acknowledge any of the differences between laws regulating private sexual behavior and laws establishing public family relationships.

The Massachusetts court in *Goodridge* concluded there was "no rational reason" for restricting the benefits of marriage to heterosexual couples. That court thus asserted via what *The Washington Post* editorial page has called a judicial fiat that the three reasons the State of Massachusetts gave for giving preferred status to heterosexual marriage—promoting procreation, encouraging the raising of children in two-parent biological families, and conserving limited State resources—were all wholly irrational and, therefore, beyond the bounds of the law.

To add insult to insult, the Massachusetts court sought to buttress its opinion by internationalizing Massachusetts law and resorting to a citation to a decision by the Ontario, Canada, Court of Appeal, which struck down a same-sex marriage ban under Canadian law in 2003.

A decent respect for democratic self-government should lead courts to defer to popularly enacted laws that embody deeply felt values unless such laws violate clear constitutional commands or clearly specified fundamental rights. It is frivolous to claim that the longstanding marriage laws of every State violate any clear constitutional command.

Even *The Washington Post* was shocked by the Massachusetts judge's usurpation of the legislative function, stating in a recent editorial that, "We are skeptical that American society will come to formally recognize gay relationships as a result of judicial fiats and we felt that the four-to-three majority on the Massachusetts court had stretched to find a right to gay marriage in that commonwealth's 224-year-old Constitution. When moral certainty bleeds into judicial arrogance in this fashion, it deprives the legislature of any ability to balance the interests of the different constituencies who care passionately about the question. Given the moral and religious anxiety many people feel on the subject and the absence of clear constitutional mandates for gay marriage, judges ought to be showing more respect for elected officials trying to make this work through a political process," and again, that was *The Washington Post*.

As President Bush said in his State of the Union Address, "If judges insist on enforcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process."

The *Lawrence* and *Goodridge* decisions may well be the first two waves in a series of judicial precedents that further weaken traditional marriage, despite support for traditional marriage among the American people and their elected representatives, as evidenced by the State legislatures in this country and the United States Congress.

First, it is expected that some same-sex couples will soon marry in Massachusetts and then file lawsuits in other States to force

those other States to recognize the same-sex marriage licenses granted in Massachusetts.

Second, activists can be expected to file new cases similar to *Goodridge* in other States to demand recognition of same-sex marriage as a constitutional right under those States' laws.

Third, same-sex couples who have married in Massachusetts can also be expected to apply for Federal benefits, such as Federal employee health insurance. When such applications are denied under the Federal Defense of Marriage Act (DOMA), such denials can be expected to be challenged in Federal court on the grounds that the Federal DOMA law is unconstitutional as an overly broad interpretation of the Full Faith and Credit Clause and that the Federal definition of marriage in DOMA is unconstitutional under either the Equal Protection Clause or the Due Process Clause.

We look forward to the witnesses which will be testifying in just a few moments here and we look forward to once again exploring the legal threats that are posed to traditional marriage today.

I would now normally yield to the Ranking Member of the Committee for his opening statement——

Mr. SCOTT. Mr. Chairman?

Mr. CHABOT.—but I will defer to Mr. Scott.

Mr. SCOTT. Mr. Chairman, I'd ask unanimous consent that the Ranking Member be authorized to give his statement when he arrives. I believe he is on the way.

Mr. CHABOT. Without objection.

Mr. SCOTT. And I would also ask unanimous consent that Ms. Baldwin, a Member of the full Committee but not a Member of the Subcommittee, be authorized to participate after the Members of the Committee have participated in the questioning.

Mr. CHABOT. Without objection, as well.

Mr. SCOTT. Thank you.

Mr. CHABOT. Okay. There aren't any opening statements on our side at this point? We generally don't do two opening statements, but——

Ms. BALDWIN. I know at the last hearing, every Member was asked about giving an opening statement and did, but if you are not proceeding that way, I will submit it for the record.

Mr. CHABOT. If the gentlelady wouldn't mind submitting it for the record. We generally just have mine and the Ranking Member's——

Ms. BALDWIN. Okay.

Mr. CHABOT. We are kind of stretching to let him come in later and make it at that point, too, but we are willing to do that. But we will allow the gentlelady to ask questions of the witnesses.

Ms. BALDWIN. Thank you.

Mr. CHABOT. Thank you.

I'd like to introduce the witness panel at this time. Our first witness is Dwight Duncan, Professor of Law, Southern New England School of Law. Professor Duncan is an honors graduate of Georgetown University Law Center. He has argued several cases before the Massachusetts Supreme Judicial Court and the Appeals Court and has been the principal author of written briefs in major cases before the United States Supreme Court. Professor Duncan teaches courses in constitutional law, legal ethics religion, religion and the

law, and bioethics. His interests include legal history and legal philosophy and he has written a variety of articles on legal, moral, and religious issues, and we welcome you here this afternoon, Professor.

Our second witness is Stanley Kurtz. Mr. Kurtz is a research fellow at Stanford University's Hoover Institution. He has a doctorate in social anthropology from Harvard University and studies family life and religion across cultures. Mr. Kurtz has taught at Harvard University and at the University of Chicago. His book, *All the Mothers Are One*, on family life and religion in India, was published in 1992 by Columbia University Press. Mr. Kurtz is a contributing editor at *National Review Online* and has been the author of articles in a wide variety of newspapers and magazines and we welcome you here this afternoon, Mr. Kurtz.

Our third witness will be Dr. Jill Joseph. Dr. Joseph received her M.D. from Michigan State University College of Human Medicine and her Ph.D. from the University of California at Berkeley. She is currently the Richard L. Hudson Chair of Health Services and Community Research at the Children's National Medical Center. She has also been a professor of pediatrics and epidemiology, biostatistics, at the George Washington University School of Medicine and we welcome you here this afternoon, Dr. Joseph.

And our first and final witness is Lincoln Oliphant. Mr. Oliphant is a research fellow at the Marriage Law Project, a research organization that is affiliated with the Columbus School of Law at Catholic University. Before joining the project, Mr. Oliphant was for many years the counsel to the Republican Policy Committee in the United States Senate. During his time at the Policy Committee, he worked under Chairman Larry Craig, Don Nickles, Bill Armstrong, and John Tower, and we welcome you here this afternoon, Mr. Oliphant.

At this time, we would recognize the Ranking Member of the Committee, the gentleman from New York, Mr. Nadler, for 5 minutes, and then we will go to the panel.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, today we continue with our second in a series of five hearings on the question of same-sex marriage. Today's hearing is curiously entitled, "Legal Threats to Traditional Marriage."

I've had a difficult time explaining to some people what this hearing is about. Indeed, I was at first perplexed. Would this hearing be about no-fault divorce? Legalized fornication? The failure of States to incarcerate adulterers? No. Evidently, the threat to marriage is—and by the way, those may be amendments to this amendment if we ever get to a markup.

Evidently, the threat to marriage is the fact that there are thousands of people in this country who very much believe in marriage, who very much want to marry, and who may not marry under the laws of this country. That is the threat, allowing people who want to marry the right to marry? It is a good thing Congress has addressed all the civil rights problems in this country so we can consider this sort of threat.

I have been searching in vain for some indication of what might happen to my marriage or to the marriage of anyone in this room if loving couples, including couples with children, are permitted to enjoy the blessings of matrimony. This discriminatory law is being

questioned around the country, not just by one or two judges in a scary place like Massachusetts, but in many communities. Attitudes are changing and perhaps that is a source of some of the hysteria.

The overheated rhetoric we have been hearing is reminiscent of the bellicose fear-mongering that followed the Supreme Court's decision in *Loving* v. *Virginia* in 1967, which struck down State prohibitions against interracial marriage. The Supreme Court, we were told, had overstepped its authority. The Supreme Court had overridden the democratic will of the nation. The Supreme Court had signed a death warrant for all that is good and pure in the nation. Fortunately, we survived as a nation and we are better for it.

In the not-too-distant future, people will look back on these hearings and try to understand what motivated this activity. Why were people so afraid? Of what were they afraid? Why couldn't people understand that the Constitution and the Bill of Rights exists to protect the rights of unpopular minorities against the majority? Why couldn't, at the very least, the Subcommittee on the Constitution grasp this not-so-subtle point?

There are many loving families who deserve the benefits and protections of the law. They don't live just in New York or San Francisco or Boston. They live in every one of the 435 Congressional districts in the United States. They are not aliens. They are not a public menace. They do not threaten anyone. They are our neighbors, our coworkers, our friends, our siblings, our parents, and our children. They deserve to be treated fairly. They deserve to have the same rights as anyone else.

I welcome our witnesses today. I hope they can shed some light on this intransigent hysteria, and I yield back the balance of my time.

Mr. CHABOT. I thank the gentleman.

We've already introduced the panel. Let me just go over one rule. You have probably been informed of this by our staff ahead of time, but we have a lighting system and the green light will be on there for 4 minutes. A yellow light comes on when you have a minute to basically wrap up. And then the red light will come on and we would ask you to try to stay within that time as much as possible. I will give you a little flexibility if you go over, but not a whole lot. So try to stay within that—yes?

Mr. BACHUS. I have an opening statement, I would just like to submit for the record.

Mr. CHABOT. Without objection, we can submit it to the record.

Okay. Professor Duncan, you are recognized for 5 minutes.

STATEMENT OF DWIGHT DUNCAN, ASSOCIATE PROFESSOR OF CONSTITUTIONAL LAW, SOUTHERN NEW ENGLAND SCHOOL OF LAW

Mr. DUNCAN. Thank you for the opportunity to testify before you this afternoon. I teach constitutional law at Southern New England School of Law in North Dartmouth, Massachusetts. My testimony today reflects my knowledge and opinion as a constitutional law professor who has followed the litigation on the subject quite closely, but it doesn't represent the views of my law school or any other organization or person.

The subject of today's hearing is legal threats to traditional marriage. There are several cases decided over the past year that threaten to undermine the age-old consensus of civilization that marriage is uniquely between a man and a woman.

First, there is last November's *Goodridge* case out of Massachusetts, *Goodridge* v. *Department* of Public Health, the bold Massachusetts decision requiring the State to recognize marriage between persons of the same sex, which was decided by the slenderest of margins, four-to-three, which meant that one unelected judge was imposing her values on the commonwealth and, arguably, the nation. The breadth of the holding was inversely related to the slimness of the majority.

Last June, the U.S. Supreme Court decided in *Lawrence* v. *Texas* to make sodomy a constitutional right and thus forbid the criminalization of private sexual activity between consenting adults.

Of course, there was also the Canadian case, *Halpern* v. *Canada*, that basically legalized same-sex marriage in Ontario and British Columbia and Quebec.

Now, as a defensive measure, 38 States and the Federal Government have in the past decade enacted Defense of Marriage Acts. The Federal Defense of Marriage Act, while proclaiming marriage for purposes of Federal law as only male-female couples, attempts to establish this sort of Maginot line. States will not be required under the Full Faith and Credit Clause of the U.S. Constitution to recognize the homosexual marriage permitted in another State, should that State, be it Massachusetts or New Jersey, decide to recognize homosexual marriage.

It's increasingly clear that the Maginot line will not hold. For one thing, homosexual advocacy groups have already announced that couples will flock from the other 49 States and the District of Columbia to the first State that recognizes gay marriage, intending to challenge the Defense of Marriage Act on Federal constitutional grounds as inconsistent with either the Full Faith and Credit or the Equal Protection Clause.

The stronger reason that the Defense of Marriage Act is inadequate to protect the definition of marriage is that it assumes as a practical matter that American society can long endure two incompatible conceptions of marriage, one recognized in 38 States and the Federal Government, which assumes the natural link of marriage to procreation and mother-father parenting, and the other conception, prevalent in a few more liberal jurisdictions like Massachusetts, in which marriage might be defined as a form of friendship recognized by the police.

These are fundamentally incompatible conceptions. Advocates on both sides of this issue are in agreement, I think, that attempts at compromise between them, whether in the form of Vermont-style civil unions or in the form of a patchwork quilt that some jurisdictions have one, other jurisdictions have another, are untenable in the long run. In our national culture, once homosexual marriage is recognized anywhere, there will be enormous pressure to settle for a least common denominator conception of marriage.

In the Massachusetts *Goodridge* case, our Chief Justice found the exclusion from marriage rights for homosexual couples to be incompatible with the constitutional principles of respect for individual

autonomy and equality under the law. As a remedy, the court refined the common law meaning of marriage in light of evolving constitutional standards. The court stayed its judgment for 180 days to permit the legislature to take such action as it may deem appropriate in light of this opinion.

As Justice Robert J. Cordy points out in his dissent, only by assuming that marriage includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the rights of same-sex couples to marry. In other words, Marshall had to first envision marriage as encompassing homosexual couples before she could conclude that their exclusion violated the right to marry or that the exclusion was invidiously discriminatory.

This is a case of Lewis Carroll's Queen of Hearts, "sentence first, verdict afterwards." It turns out that the redefinition of the common law meaning of marriage was not just the remedy, but the basis for the circular conclusion that constitutional rights were violated.

In my written prepared testimony, I go on at length and explain the implications of the *Lawrence* case and why that also, it seems, the logic of it leads to the recognition of same-sex marriage. I also discuss the Canadian case.

In the interest of wrapping up, I will leave it at that. Thank you.

Mr. CHABOT. Thank you very much, Professor.

[The prepared statement of Mr. Duncan follows:]

PREPARED STATEMENT OF PROFESSOR DWIGHT DUNCAN [1]

I thank you for the opportunity to testify before you this afternoon. My name is Dwight Duncan, associate professor of constitutional law at Southern New England School of Law in North Dartmouth, Massachusetts. Over the years, I have participated in litigation as attorney for *amici curiae* in opposition to so-called same-sex marriage in Hawaii, Vermont, Massachusetts and New Jersey. I have also co-authored a law review article on the history of this phenomenon entitled "Follow the Footnote, or the Advocate as Historian of Same-Sex Marriage," in 47 *Catholic University Law Review* 1271–1325 (1998); and I gave expert testimony requested by the Canadian Department of Justice in the Canadian same-sex "marriage" case in 2001. *Halpern et al.* v. *Clerk of the City of Toronto et al.* My testimony today reflects my knowledge and opinion as a constitutional law professor who has followed the litigation on the subject quite closely. It draws heavily on an article I have written entitled "The Federal Marriage Amendment and Rule by Judges," which is scheduled to appear shortly in the *Harvard Journal of Law and Public Policy.* My testimony does not represent the views of my law school, or any other organization or person.

The subject of today's hearing is "Legal Threats to Traditional Marriage." There are several cases, decided over the past year, that threaten to undermine the age-old consensus of civilization that marriage is uniquely between a man and a woman. First, there is last November's *Goodridge* case out of Massachusetts: *Goodridge* v. *Department of Public Health,*[2] the bold Massachusetts decision requiring the state to recognize marriage between persons of the same sex, which was decided by the slenderest of margins (4–3), which meant that one unelected judge was imposing her values on the Commonwealth, and arguably the nation. The breadth of the holding was inversely related to the slimness of the majority. Last June, the U.S. Supreme Court decided in *Lawrence* v. *Texas*[3] to make sodomy a constitutional right and thus forbid the criminalization of private sexual activity between consenting adults. In Canada that same month, the Ontario Court of Appeal legalized gay marriage

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[2] 798 N.E.2d 941 (Mass. 2003).

[3] 123 S.Ct. 2472 (2003).

in *Halpern* v. *Canada,*[4] and the Canadian government elected not to appeal the decision to the Supreme Court of Canada but rather to propose enabling legislation to Parliament. Both these cases were cited favorably by the majority opinion in *Goodridge.* I would like to discuss these three cases, and then talk about the threat to religious freedom that is likely to ensue from the judicial imposition of gay marriage.

We are now at an interesting crossroads in the debate over the marital status of homosexual unions. Up until now, the fight has been largely conducted at the state level, with homosexual advocacy groups like Lambda Legal Defense Fund and Gay and Lesbian Advocates and Defenders ("GLAD") bringing suit in state courts under state constitutional claims, and the state attorney generals and defenders of monogamous, heterosexual marriage trying to counter the state constitutional claims of liberty and equality. When homosexual marriage made progress in the courts, as in Hawaii and Alaska, supporters of traditional marriage successfully put forward referendums on state constitutional amendments, defining marriage as between a man and a woman, which passed overwhelmingly.[5] There is such an amendment pending in Massachusetts which, while reserving the term "marriage" for persons of the opposite sex, would grant all the legal incidents of marriage under state law to same-sex couples united in "civil unions."[6] The earliest it could go into effect, however, would be 2006,[7] and the Massachusetts Supreme Judicial Court in *Goodridge* gave the legislature only 180 days to "take such action as it may deem appropriate in the light of this opinion."[8]

As a defensive measure, thirty-eight states and the federal government have in the past decade enacted Defense of Marriage Acts.[9] The Federal Defense of Marriage Act, enacted in 1996, while proclaiming marriage for the purposes of federal law as only male-female couples, attempts to establish a sort of Maginot Line: states will not be required under the Full Faith and Credit clause of the U.S. Constitution to recognize the homosexual marriage permitted in another state, should that state, be it Massachusetts or New Jersey, decide to recognize homosexual marriage.[10]

The Federal Defense of Marriage Act does not prevent any state from willingly instituting or recognizing homosexual marriage. It purports only to permit the *non*-recognition of another state's marriage, contrary to the usual principle of "married anywhere, married everywhere."[11] The theory was that homosexual marriage could be contained within the few relatively liberal states that might choose to adopt it. It has worked so far. But now Massachusetts' highest court has in effect overruled the framers of its state constitution and recognized homosexual marriage. Perhaps New Jersey will do the same next year.

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[4] 172 O.A.C. 276 (2003).

[5] *See* HAW. CONST. art. I, § 23; ALASKA CONST. art. I, § 25.

[6] On March 11, 2004, the Massachusetts Legislature took up the issue in constitutional convention and advanced a state constitutional amendment that would define marriage as the union of a man and a woman. *Massachusetts Advances Same-Sex Marriage Ban,* CNN.COM (Mar. 11, 2004), *http://www.cnn.com/2004/LAW/03/11/gay.marriage/*.

[7] *See* Ethan Jacobs, *Round Two: Marriage Battle Resumes,* BAY WINDOWS, Mar. 11, 2004, at 14 ("But even if [the] amendment gets on the ballot—in 2006 at the earliest—marriage licenses will have been distributed in Massachusetts for more than two years by then.").

[8] 798 N.E.2d at 970.

[9] *See* ALA. CODE § 30–1–19 (1998); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. § 25–101 (West 2000); ARK. CODE ANN. § 9–11–107 (Michie 2002); CAL. FAM. CODE § 308.5 (West Supp. 2004); COLO. REV. STAT. ANN. § 14–2–104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19–3–3.1 (1999); HAW. REV. STAT. § 572–1 (Supp. 1999); IDAHO CODE § 32–209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE § 31–11–1–1 (1998); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 23–101 (Supp. 2002); KY. REV. STAT. ANN. § 402.040 (Michie 1999); LA. CIV. CODE ANN. art. 89 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19–A, § 701 (West 1998); MICH. COMP. LAWS ANN. § 551.1, .271 (West Supp. 2003); MINN. STAT. ANN. § 517.01 (West Supp. 2004); MISS. CODE ANN. § 93–1–1 (Supp. 2003); MO. REV. STAT. § 451.022 (Supp. 2002) ; MONT. CODE ANN. § 40–1–401 (1997); NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. GEN. STAT. § 51–1.2 (2003); N.D. CENT. CODE § 14–03–01 (Supp. 2003); OHIO REV. CODE § 3101.01 (2004); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. ANN. § 20–1–15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25–1–1 (Michie 1999); TENN. CODE ANN. § 36–3–113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004); UTAH CODE ANN. § 30–1–2 (Supp. 2003); VA. CODE ANN. § 20–45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004); W. VA. CODE ANN. § 48–2–603 (Michie 2001). The author is indebted to Bill Duncan of Brigham Young University for this catalog of state DOMAs.

[10] *See* Defense of Marriage Act, 28 U.S.C. § 1738C, 1 U.S.C. δ7 (2000).

[11] *See e.g.,* Barbara J. Cox, *Same-Sex Marriage & Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?* 1994 WIS. L. REV. 1033, 1064–65 (1995) (noting the "overwhelming tendency" of states to recognize out-of-state marriages).

It is increasingly clear that the Maginot Line will not hold. For one thing, homosexual advocacy groups have already announced that couples will flock from the other forty-nine states and the District of Columbia to the first state that recognizes gay marriage, intending to challenge the Defense of Marriage Act on federal constitutional grounds as inconsistent with either the Full Faith and Credit or the Equal Protection clause.[12] After *Romer* v. *Evans*[13] and *Lawrence* v. *Texas,*[14] such an effort might plausibly succeed. But the stronger reason that the Defense of Marriage Act is inadequate to protect the definition of marriage is that it assumes, as a practical matter, that American society can long endure two incompatible conceptions of marriage: one, recognized in thirty-eight states and the federal government, which assumes the natural link of marriage to procreation and mother-father parenting, and the other conception, prevalent in a few more liberal jurisdictions like Massachusetts in which marriage might be defined as a form of "friendship recognized by the police."[15] These are fundamentally incompatible conceptions. Advocates on both sides of this issue are in agreement, I think, that attempts at compromise between them, whether in the form of Vermont-style civil unions or in the form of a patchwork quilt of some-jurisdictions-have-one, other-jurisdictions-have-another, are untenable in the long run.[16] Nevertheless, when the Massachusetts Senate requested an advisory opinion of the Supreme Judicial Court as to whether civil unions would satisfy the Court,[17] the answer was a definitive "no."[18] But even had the Court answered differently, marriage-in-all-but-name would still most likely be a step on the road to gay "marriage."

In our national culture, once homosexual marriage is recognized anywhere, there will be enormous pressure to settle for a "least-common-denominator" conception of marriage. The protection of a state boundary, even in a state like Utah, will then count for little. We saw something similar with the universal adoption of "no-fault" divorce in the 1970s.[19] Elites in the courts, the bar, the university, and the media are bent on undertaking the social experiment of homosexual "marriage." If they do not ultimately succeed in Massachusetts, given that the decision has yet to be implemented, they will likely succeed in New Jersey. All it takes is a handful of judges who think they know best and that their opinions supersede the settled traditions of our law regarding the nature of marriage. Once they succeed in one jurisdiction in this country, extensive efforts will be made both through the courts and the media to repeat that success throughout the land.

At the beginning of her opinion declaring homosexual marriage to be a state constitutional right, Supreme Judicial Court Chief Justice Margaret H. Marshall notes that there is deep-seated division over "religious, moral, and ethical convictions" regarding marriage and homosexuality, but it turns out that is irrelevant.[20] The court is not following the historical view of marriage and homosexuality, nor the view that "same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors."[21] Marshall says: "Neither view answers the question before us. Our concern is with the Massachusetts

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[12] *See, e.g.,* Evan Wolfson, *The Hawaii Marriage Case Launches the US Freedom-to-Marry Movement for Equality, in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 171 (Robert Wintemute & Mads Andenaes eds., 2001).

[13] 517 U.S. 620 (1996).

[14] 123 S. Ct 2472 (2003).

[15] ROBERT LOUIS STEVENSON, VIRGINIBUS PUERISQUE 10 (1896). The majority opinion in *Goodridge* calls it "the voluntary union of two persons as spouses, to the exclusion of all others." 798 N.E.2d 941, 969 (Mass. 2003).

[16] From quite a different perspective, Akhil Amar predicted in 1996 that "in the long run the nation probably cannot exist half slave and half free on [the question of homosexual marriage]." Akhil Reed Amar, *Race, Religion, Gender, and Interstate Federalism: Some Notes from History,* 16 QUINNIPIAC L. REV. 19, 26 (1996).

[17] *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (2004). In response to *Goodridge*, the Massachusetts legislature asked the following question:

> "Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?"

Id.

[18] *See id.* at 572.

[19] *See, e.g.,* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 188–89 (1989).

[20] *Goodridge,* 798 N.E.2d at 948.

[21] *Id.*

Constitution as a charter of governance for every person properly within its reach. 'Our obligation is . . . not to mandate our own moral code.'"[22]

That claim must be tested. As everyone knows, Marshall found the exclusion from marriage rights for homosexual couples to be "incompatible with the constitutional principles of respect for individual autonomy and equality under law."[23] As a remedy, the court "refined the common-law meaning of marriage . . . in light of evolving constitutional standards."[24] The court stayed its judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."[25]

As Justice Robert J. Cordy points out in his dissent, "only by assuming that 'marriage' includes the union of two persons of the same sex does the court conclude that restricting marriage to opposite-sex couples infringes on the 'right' of same-sex couples to 'marry.'"[26] In other words, Marshall had to first envision "marriage" as encompassing homosexual couples before she could conclude that their exclusion violated the "right to marry" or that the exclusion was "invidiously discriminatory." This is a case of Lewis Carroll's Queen of Hearts: "Sentence first-verdict afterwards."[27] It turns out that the redefinition of the common-law meaning of marriage was not just the remedy but the basis for the circular conclusion that constitutional rights were violated.

Further, changing the common-law definition of marriage is, by its nature, judicial legislation. It is not in the Commonwealth's Constitution. And so we have it: One unelected judge imposing her values on the commonwealth and the nation.

A few years ago, at the time of her confirmation hearing, dissenting Justice Martha B. Sosman testified:

> No one elected me to anything and no one has asked me to run the commonwealth from my courtroom. Making the law . . . is not in my job description. Nothing in our constitution, state or federal, gives Martha Sosman or any other judge the power to inflict her own agenda, political or social, on the people of this commonwealth. I not only believe in judicial restraint, I practice what I preach.[28]

True to her words, Sosman dissented in *Goodridge*. In her dissent, she writes:

> [T]he opinion ultimately opines that the Legislature is acting irrationally when it grants benefits to a proven successful family structure while denying the same benefits to a recent, perhaps promising, but essentially untested alternate family structure. Placed in a more neutral context, the court would never find any irrationality in such an approach.[29]

Now that the Supreme Judicial Court has issued its decree, what's next? Basically, the same recourse as was had in Hawaii and Alaska-amending the state constitution. With this difference: Massachusetts' procedure for state constitutional amendment is cumbersome, requiring repeated votes of the legislature and the public. The state constitution could be amended no earlier than 2006. This process could not be completed before the expiration of the 180-day period that the SJC gave the legislature to "to permit [it] to take such action as it may deem appropriate in light of this opinion."[30] That would require another favorable vote during the next legislative session (2005–2006) from the members of the legislature (both houses convened in constitutional convention) on the Marriage Amendment that was first approved on March 11, 2004, as well as approval from the voters by referendum in November, 2006.[31]

Lawrence v. *Texas,* which the U.S. Supreme Court decided in the summer of 2003, invalidated state anti-sodomy laws on grounds that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."[32] In so ruling the

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[22] 798 N.E.2d at 948 (quoting *Lawrence,* 123 S. Ct. at 2480 (citations omitted)).
[23] *Goodridge,* 798 N.E.2d at 949.
[24] *Id.* at 969.
[25] *Id.* at 970.
[26] *Id.* at 984 (Cordy, J., dissenting).
[27] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 108 (Roger Lancelyn Green ed., Oxford Univ. Press 1971) (1941).
[28] Dwight G. Duncan, *Judicial Restraint in Massachusetts,* 29 MASS. L. WKLY 11 (2000).
[29] 798 N.E.2d at 981 (Sosman, J., dissenting).
[30] *Goodridge* v. *Dep't of Pub. Health,* 798 N.E.2d 941, 970 (Mass. 2003).
[31] *See supra* note 7 and accompanying text.
[32] 123 S.Ct. 2472, 2478 (2003).

Supreme Court overturned its 1986 decision in *Bowers* v. *Hardwick.*[33] Most significantly, the Court held that moral disapproval of homosexuality did not constitute a legitimate state interest: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[34] Even Justice O'Connor, who did not join in the substantive due-process overruling of *Bowers,* agreed with the majority on that point.[35]

Of course, the majority opinion by Justice Kennedy deliberately eschews its implications for marriage: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[36] Justice O'Connor in concurrence goes further: "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."[37]

In dissent, Justice Scalia begs to differ: "But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."[38] He concludes:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. . . . This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.[39]

The majority opinion in *Lawrence* supports Justice Scalia's contention. Early in the majority opinion, Justice Kennedy writes that because the statutes "seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals," the State or a court should not attempt "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[40] This sounds remarkably like John Stuart Mill's harm principle, that limitations on a person's liberty are justified only in order to prevent harm to someone.[41] Of course, there is the additional phrase "or abuse of an institution the law protects." There is no authority given for this dicta, and it has the feel of being rigged for the occasion, to reserve for another day the matter of homosexual marriage.

More tellingly, later on, the opinion magisterially quotes what Scalia calls the "famed sweet-mystery-of-life passage."[42] "At the heart of liberty is the right to define one's own concept of existence, of *meaning,* of the universe, and of the mystery of human life."[43] If states or courts should not attempt "to define the meaning of a relationship," because that interferes with "liberty,"[44] then who is to say what marriage means? Not only can we write our own vows, we can be as creative as we wish. Then the kicker: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[45] "These purposes" refers back to "the most intimate and personal choices a person may make in a lifetime," which in turn refers back to "personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education."[46] As such, Justice Kennedy has implicitly forced the recognition of homosexual marriage.

Gay-marriage advocate Prof. Laurence Tribe of Harvard Law School agrees with Scalia's assessment: "Same-sex marriage, as Justice Scalia predicted in his outraged dissent, is bound to follow; it is only a question of time."[47]

One remarkable feature of the majority decision in *Lawrence* is its reliance on foreign and international precedent. For example, the decision of the European Court

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[33] 478 U.S. 186 (1986).
[34] *Lawrence,* 123 S. Ct. at 2483 (quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)).
[35] *Id.* at 2487 (O'Connor, J., dissenting).
[36] *Id.* at 2484.
[37] *Id* 487–88 (O'Connor, J., concurring).
[38] *Id.* at 2496 (Scalia, J., dissenting).
[39] *Id.* at 2498.
[40] *Id.* at 2478.
[41] JOHN STUART MILL, ON LIBERTY 21–22 (Longmans et al. eds., 1999) (1869).
[42] *Lawrence,* 123 S. Ct at 2489 (Scalia, J., dissenting).
[43] *Id.* at 2481 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)) (emphasis added).
[44] *Id.* at 2478.
[45] *Id.* at 2482.
[46] *Id.* at 2481.
[47] Laurence H. Tribe, "Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name," 117 HARV. L. REV. 1894, 1945 (2004).

of Human Rights in *Dudgeon* v. *United Kingdom,*[48] that laws proscribing sodomy were invalid under the European Convention of Human Rights, is cited to disparage the *Bowers* decision, even though *Bowers* was subsequent to *Dudgeon.*[49] Justice Kennedy also noted that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[50]

Justice Scalia is withering in his criticism of this reliance on foreign authority: "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"[51]

The fact remains that foreign precedent influenced a majority of the U.S. Supreme Court in *Lawrence.* Let us look north at how our closest neighbor is dealing with the issue of recognizing homosexual marriage, for *Goodridge* concurred with the Court of Appeal for Ontario in its remedy of "refin[ing] the common-law meaning of marriage."[52]

On June 10, 2003, the Court of Appeal for Ontario, in the case of *Halpern* v. *Canada,* declared "the existing common law definition of marriage to be invalid to the extent that it refers to 'one man and one woman.'"[53] The Court reformulated "the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others,'" ordered the decision to have immediate effect, and the Clerk of the City of Toronto to issue marriage licenses to the Couples.[54]

The Court of Appeal for Ontario, in reaching this dramatic decision, accepted the holding of a lower court, which found that the definition of marriage was discriminatory under section 15 (1) of the Canadian Charter of Rights and Freedoms in a manner not justified under section 1 of the Charter.[55] Courts of Appeal in both British Columbia and Quebec have reached similar rulings.[56]

For our purposes, one of the most interesting constitutional arguments, made by the intervenor Association for Marriage and the Family in Ontario (the "Association") against recognizing homosexual marriage concerned the meaning of the word "marriage" in the Constitution Act, 1867. The Association argued that because the Canadian federal government was given exclusive jurisdiction over "marriage and divorce," it must follow that "as a constitutionally entrenched term, this definition of marriage can be amended only through the formal constitutional amendment procedures."[57] The Ontario Court of Appeal found this argument "without merit" because, among other reasons, "to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation."[58] The Court continued: "[A Constitution] must . . . be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[59] "In our view," the Court then concluded, 'marriage' does not have a constitutionally fixed meaning. Rather, . . . the term 'marriage' . . . has the constitutional flexibility necessary to meet changing realities of Canadian society without the need for recourse to constitutional amendment procedures."[60]

This is a significant statement, particularly because the manner of "progressive constitutional interpretation" there exemplified is similar to the method employed in *Lawrence,* whose penultimate paragraph reads as follows:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact

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[48] 45 Eur. Ct. H.R. (ser. A) (1981).
[49] *Lawrence,* 123 S. Ct. at 2481.
[50] *Id.* at 2483 (internal citations omitted).
[51] *Id.* at 2495 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring) (denying certiorari).
[52] *Goodridge* v. *Dep't of Pub. Health,* 798 N.E.2d 941, 969 (Mass. 2003).
[53] 172 O.A.C. 276, 308 (2003).
[54] *Id.* at 383.
[55] *See id.*
[56] EGALE Canada Inc. v. Canada, [2003] 13 B.C.L.R.2d 1; *Hendricks* v. *Quebec,* [2002] R.J.Q. 2506
[57] *Halpern,* 172 O.A.C. at 287.
[58] *Id.*
[59] Id. at 288 (quoting Southham Inc. v. Hunter, [1984] S.C.R. 145, 155 (Can.)).
[60] Id.

> serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[61]

If constitutional "liberty" did not *historically* entail sodomy, well, now it does. If marriage in Canada did not *historically* extend to same-sex couples, well, now it does. Of course, Canada's Constitution Act explicitly mentions "marriage." The United States Constitution nowhere mentions "marriage," and the right to marriage has been teased out of the "Due Process Clause."

What about the argument that this matter is best left to state law? Jonathan Rauch, writing in the *Wall Street Journal,* formulated just such a federalism argument:

> For centuries, since colonial times, family law, including the power to set the terms and conditions of marriage, has been reserved to the states, presumably because this most domestic and intimate sphere is best overseen by institutions that are close to home. . . . Same-sex marriage should not be a federal issue.[62]

Rauch's claim of exclusive state jurisdiction over the terms and conditions of marriage is false, however. It runs afoul of *Loving* v. *Virginia,*[63] which said states had no power, under our Federal Constitution, to prohibit interracial marriage. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[64] *Loving* also called marriage "one of the vital personal rights essential to the orderly pursuit of happiness,"[65] thus protecting it from infringement by state law.

In addition to finding the antimiscegenation law a deprivation of liberty without due process, *Loving* found that the law violated the equal protection clause of the Fourteenth Amendment.[66] *Loving*is a favorite case of advocates of same-sex marriage. Just as you should be able to marry the person you love regardless of race, the argument runs, you should be able to marry the person you love regardless of sex or sexual orientation.[67] Of course, if the proponents of this argument are correct in predicting a decision along these lines by the United States Supreme Court, then the right to same-sex marriage will be required by the Federal Constitution, notwithstanding state constitutions or state and federal laws to the contrary. The only way of decisively defeating such an outcome would be by means of a federal constitutional amendment such as the Federal Marriage Amendment.

The claim of exclusive state jurisdiction over the incidents of marriage also is contradicted by *Griswold* v. *Connecticut,*[68] which said that states had no constitutional power to prohibit the use of contraceptives within marriage. It runs afoul of those federal cases that refer to a "fundamental right to marry" and strike down state-imposed conditions on its exercise, such as *Boddie* v. *Connecticut*[69] and *Zablocki* v. *Redhail.*[70] *Zablocki* called the right to marry of "fundamental importance" and a "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[71] While the opinion acknowledged that not all regulation of the incidents of marriage was necessarily subject to "rigorous scrutiny" and that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,"[72] that characterization did not apply to the state-imposed requirement that existing child support obligations be met before a person was allowed to marry, which was declared unconstitutional.[73] Similarly, *Turner* v. *Safley*[74] invalidated on constitutional grounds a state prohibition on prison inmates marrying.

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[61] 123 S. Ct. 2472, 2484 (2003).

[62] Jonathan Rauch, *Leave Gay Marriage to the States,* WALL ST. J., July 27, 2001, at A8.

[63] 388 U.S. 1 (1967).

[64] *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[65] *Id.*

[66] *Id.*

[67] *See e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians & Gay Men is Sex Discrimination,* 69 *N.Y.U. L. Rev.* 197, 284 (1994) (using *Loving's* result to argue by analogy that "[j]ust as interracial couples cannot be made to suffer any legal disadvantage that same-race couples are spared, gay couples cannot be made to suffer any legal disadvantages that heterosexual couples are spared. Lesbians and gay men must be permitted to marry.").

[68] 381 U.S. 479 (1965).

[69] 401 U.S. 371 (1971) (striking down a required divorce filing fee for indigents).

[70] 434 U.S. 374 (1978) (striking down state requirement that child support obligations be met before being allowed to marry).

[71] *Id.* at 384.

[72] *Id.* at 386.

[73] *Id.* at 388 (applying strict scrutiny to the Wisconsin statute at issue).

[74] 482 U.S. 78 (1987).

The Federal Constitution, then, has expanded the circle of those who can legitimately marry under state law (people of opposite races, prisoners, deadbeat dads, those unable to pay courts for a divorce from a previous spouse), while also changing the understanding of what marriage entails (the right to contraception and the unilateral right of the woman to abort[75]). It is at least forty years too late to claim that marriage is exclusively a state matter, or that "the power to set the terms and conditions of marriage . . . has been reserved to the states."[76]

Finally, I would like to note the problematic consequences for religious freedom that will follow the judicial imposition of a new understanding of marriage. In accordance with a legal opinion I co-signed with other law professors regarding the proposed Massachusetts constitutional amendment,[77] to the extent a right to same-sex marriage is read by courts into the Constitution, either state or federal, "it gives wide-ranging license to judges to enforce a new social norm on organizations touched by the law—which, as a practical matter, includes almost all organizations of any significance. Most significantly, churches and other religious organizations that fail to embrace civil unions as indistinct from marriage may be forced to retreat from their practices, or else face enormous legal pressure to change their views. Precedent from our own history and that of other nations suggests that religious institutions could even be at risk of losing tax-exempt status,[78] academic accreditation,[79] and media licenses,[80] and could face charges of violating human rights codes or hate speech laws."[81]

Mr. CHABOT. Mr. Kurtz, you are recognized for 5 minutes.

STATEMENT OF STANLEY KURTZ, HOOVER INSTITUTION, HARVARD UNIVERSITY

Mr. KURTZ. Thanks very much, Mr. Chairman.

The best way to judge the effects of gay marriage is to look at the countries where it already exists. Scandinavia has had a system of marriage-like same-sex registered partnerships for over a decade now. The Netherlands has had a system of registered partnerships for 8 years, and full and formal gay marriage for 3 years. And in every one of these countries, marriage is in crisis.

In Scandinavia, marriage is dying. A majority of children in Sweden and Norway are now born out of wedlock. Sixty percent of

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[75] *Roe* v. *Wade,* 410 U.S. 113 (1973).

[76] Rauch, *supra* note 18.

[77] Memorandum dated March 5, 2004 to Massachusetts Catholic Conference concerning Legal Analysis of the Finneran-Travaglini Amendment. The memorandum was signed by Prof. Mary Ann Glendon of Harvard Law School, myself, Professors Scott FitzGibbon and Thomas Kohler of Boston College Law School, Professor Gerard Bradley of the University of Notre Dame Law School, and Professor Robert Destro of the Columbus School of Law, the Catholic University of America.

[78] *Bob Jones Univ*. v. *U.S.,* 5561 U.S. 574, 586 (1983) ("an institution seeking tax-exempt status must . . . not be contrary to established public policy").

[79] *Trinity Western Univ.* v. *College of Teachers* (British Columbia), 2001 Carswell BC 1016 (Sup. Ct. of Canada) (reversing decision of the College of Teachers to deny accreditation to Trinity Western University based on its code of conduct prohibiting homosexual behavior).

[80] *CKRD re Focus on the Family,* Canadian Broadcast Standards Council, CBSC Decision 96/97–0155 (Dec. 16, 1997) (finding that radio station CKRD-AM violated the Canadian Association of Broadcasters' *Code of Ethics* in broadcasting a segment of the Focus on the Family radio program on Feb. 9, 1997), available at *http://www.cbsc.ca/english/decisions/decisions/1997/971216i.htm.*

[81] *See, e.g.,* Liam Reed, "Legal Warning to Church on Gay Stance," *Irish Times,* at 1 (Aug. 2, 2003) (Irish Council for Civil Liberties warning that Roman Catholic Church teaching on homosexual unions could violate Ireland's 1989 Incitement to Hatred Act); "Gay Group Sues After Sermon," *Washington Post,* at B7 (Jan. 3, 2004) (lawsuit alleging "slander and incitement to discrimination" filed against Cardinal Antonio Maria Ruoco Varela after comment in sermon suggesting that same-sex marriage would bring down the country's social security system); *Levin* v. *Yeshiva,* 754 N.E.2d 1099 (N.Y. 2001) (finding private university housing policy distinguishing between married and unmarried couples to constitute sexual orientation discrimination in violation of city human rights ordinance); *see also Catholic Charities of Sacramento v. Superior Court,* 85 P.3d 67 (Cal. 2004) (ruling that Catholic Charities do not fall within the religious exemption of a statute requiring contraceptive coverage as part of employee health insurance plans and are not constitutionally protected from application of the statute); *Boy Scouts of America* v. *Wyman,* 335 F.3d 80 (2d Cir. 2003) (upholding Connecticut's exclusion of Boy Scouts from state employee workplace charitable campaign due to organization's policy on homosexual scoutmasters).

first-born children in Denmark have unmarried parents. Particularly in the parts of Scandinavia where gay marriage is most fully accepted, marriage itself has almost completely disappeared.

What is happening in Scandinavia is that educated middle-class parents have stopped getting married. Instead, they simply cohabit, and the problem with this is that cohabiting parents break up at two to three times the rate of married couples. So along with the rate of out-of-wedlock births, the family dissolution rate in Scandinavia has been rising.

Now, the collapse of Scandinavian marriage is certainly not entirely due to gay marriage. Scandinavian marriage has been in trouble since the 1960's, just like marriage here in the United States. But gay marriage does seem to be a cause as well as a symptom of the decline of Scandinavian marriage.

Gay marriage separates the idea of marriage from the idea of parenthood, and increasingly, Scandinavians have been treating marriage as something that has nothing to do with children. Scandinavian marriage has turned into a pure celebration of the love of two adults. The idea that marriage is the cement that keeps parents together for the sake of children has been almost totally lost. So now it's common for couples in Scandinavia to wait until they have had two, three, even four or more children before they finally get married, if they get married at all, and couples frequently break up before they have more than one child.

Proponents of gay marriage here in the United States have argued that if gay people get married, it will strengthen the idea of marriage for everyone. But that is not how things are working out in Scandinavia. Instead of spreading the idea that marriage is for everyone, gay marriage seems to be spreading the idea that no kind of family is preferable to any other.

What you are not hearing in Scandinavia are people who say, "Hey, if even gays are getting married, maybe we straight folks ought to start getting married, too. If even gays can get married, then maybe we should get married and create stable families for our children." This is not how people in Scandinavia are talking. Instead, they are saying, "See, if even gay marriage is okay, then it is okay for me to be a single mother."

That is why gay marriage has been encouraging an increase in Scandinavia's out-of-wedlock birth rate, and now the same process has spread to the Netherlands, and please here direct your attention over to the chart. Until the mid-1990's, the Netherlands was famous among demographers for its low out-of-wedlock birth rates. True, since the 1980's, the Dutch have had liberal laws that equalize marriage and cohabitation and the Dutch almost universally cohabit before they get married. Yet up until recently, as soon as a Dutch couple wanted to have children, they got married.

Scholars agree that the low Dutch out-of-wedlock birth rate was not at all what we would ordinarily expect from a European country with such liberal laws and such widespread premarital cohabitation, and scholars also agree that what was keeping the Dutch out-of-wedlock birth rate so unexpectedly low was cultural traditionalism. In effect, the strength of Dutch marriage was based on a kind of cultural capital inherited from the country's strongly religious past.

But beginning in 1996, all that began to change. For the last 7 years, the Dutch out-of-wedlock birth rate has been moving up at a rate of 2 percent per year, twice as fast as the previous rate of increase, and it's very unusual for any country's out-of-wedlock birth rate to sustain a 2-percent per year increase for seven consecutive years. As a rule, that happens when a country is headed toward the Scandinavian system.

Now, the rapid increase in the Dutch out-of-wedlock birth rate coincides exactly with the adoption of registered partnerships and then full and formal gay marriage in the Netherlands. The gay marriage movement in the Netherlands began in 1989. After a loss in the Dutch Supreme Court in 1990, the movement turned from a legal strategy to a public campaign. That involved setting up symbolic marriage registries in sympathetic municipalities and favorable publicity in the mainstream media.

In 1996, when registered partnerships were debated and adopted, the public campaign for gay marriage in the Netherlands went into high gear. That campaign continued right through the adoption of full and formal gay marriage in 2000. And from 1997 through 2003, the Dutch out-of-wedlock birth rate has been moving upward at the remarkably fast clip of 2 percent a year, and the practice of Scandinavian-style parental cohabitation has spread throughout the Netherlands.

In other words, the traditionalist cultural capital that had kept the Dutch out-of-wedlock birth rate unusually low was depleted by a decade-long campaign for gay marriage. In effect, that was a campaign to dissociate the ideas of marriage and parenthood.

So in the four countries with the most extensive experience of marriage-like same-sex partnerships and a full and formal gay marriage, marriage itself is in radical decline and is even on the way to disappearance. For this reason, steps to block same-sex marriage need to be taken in the United States.

Mr. CHABOT. Thank you, Mr. Kurtz.

[The prepared statement of Mr. Kurtz follows:]

PREPARED STATEMENT OF STANLEY KURTZ

My name is Stanley Kurtz. I have a Ph.D. in Social Anthropology from Harvard University (1990). My scholarly work has long focused on the intersection of culture and family life. My book, *All the Mothers Are One* (Columbia University Press, 1992), is about the cultural significance of the Hindu joint-family. I have published in scholarly journals on the subject of the family and psychology in cross-cultural perspective.

I have been a Research Associate of the Committee on Human Development of the University of Chicago, a program that specializes in the interdisciplinary study of the family and psychology. I have also been a postdoctoral trainee with the Culture and Mental Health Behavioral Training Grant (NIMH), administered by the University of Chicago's Committee on Human Development. For two years, I was Assistant Director of the Center for Culture and Mental Health, and Program Coordinator of the Culture and Mental Health Training Grant (NIMH), at the University of Chicago's Committee on Human Development. There I helped train graduate students and postdoctoral fellows. I taught in the "Mind" sequence of the University of Chicago's core curriculum, and also taught a graduate seminar on cultural psychology in the Committee on Human Development. I was also awarded a Dewey Prize Lectureship in the Department of Psychology at the University of Chicago.

For several years, I was also a Lecturer in the Committee on Degrees in Social Studies of Harvard University. Harvard's Committee on Degrees in Social Studies is an interdisciplinary undergraduate major in the social sciences.

I am currently a research fellow at Stanford University's Hoover Institution, a contributor to print journals including *Policy Review* and *The Weekly Standard*, and

a Contributing Editor at National Review Online. The views I put forward in this testimony are my own, and do not represent the views of either the Hoover Institution, or of the venues in which I publish.

In a recently published article, "The End of Marriage in Scandinavia" (*The Weekly Standard*, February 2, 2004), I show how the system of marriage-like same-sex registered partnerships established in the late eighties and early nineties in Scandinavia has contributed significantly to the ongoing decline of marriage in that region. My research on Scandinavia is based on my reading of the demographic and sociological literature on Scandinavian marriage. I have also consulted with Scandinavian scholars, and with American scholars with expertise on Scandinavia.

Shortly, I will be publishing the results of my research on the condition of marriage in yet another country, the Netherlands. That research is based on my reading of the demographic and sociological literature on marriage in the Netherlands, as well as on consultation with scholars and experts on that country. In my forthcoming publications on the Netherlands, I will show that same-sex marriage has contributed significantly to the decline of marriage in that nation.

The research discussed below is drawn from demographic information provided by European statistical agencies, and from scholarly monographs and journal articles by demographers and sociologists expert on the state of the family in Europe. After summarizing the results of my published research on Scandinavian marriage, I shall summarize the results of my soon to be published research on marriage in the Netherlands.

SCANDINAVIA

Marriage in Scandinavia is in serious decline. A majority of children in Sweden and Norway are now born out-of-wedlock, as are sixty percent of first born children in Denmark. In some of the more socially liberal districts of Scandinavia, marriage itself has virtually ceased to exist.

When Scandinavia's system of marriage-like same-sex registered partnerships was enacted in the late 1980's and early 1990's, the rate at which Scandinavian parents married was already in decline. Although many Scandinavians were having children out-of-wedlock, it was still typical for parents to marry sometime before the birth of the second child.

While a number of these out-of-wedlock births were to single parents, most were to cohabiting, yet unmarried, couples. The drawback of this practice is that cohabiting parents break up at two to three times the rate of married parents. A high breakup rate for unmarried parents is found in Scandinavia, and throughout the West. For this reason, rising rates of out-of-wedlock birth—even when such births are to cohabiting, rather than single, parents—mean rising rates of family dissolution.

Since demographers and sociologists take rising out-of-wedlock birthrates as a proxy for rising rates of family dissolution, we know that the family dissolution rate in Scandinavia has been growing. We also have studies that confirm for Scandinavia what we already know for the United States—that children of intact families are significantly better off than children in families that experience parental breakup.

Out-of-wedlock birthrates were already rising in Scandinavia prior to the enactment of same-sex registered partnerships. Those rates have continued to rise since the enactment of same-sex partnerships. While the out-of-wedlock birthrate rose swiftly during the 1970's and 1980's, those rapidly rising rates reflected the "easy" part of the shift toward a system of unmarried parenthood. That is, the common practice in Scandinavia through the 1980's was to have the first child out of wedlock. Prior to the nineties in Norway, for example, a majority of parents—even in the most socially liberal districts—got married prior to the birth of a second child.

During the nineties, however—following the debate on, and adoption of, same-sex registered partnerships—the out-of-wedlock birthrate began to move through the toughest areas of cultural resistance. At the beginning of the nineties, for example, traditionally religious and socially conservative districts of Norway had relatively low out-of-wedlock birthrates. Now those rates have risen substantially, for both first and second-and-above births. In socially liberal districts of Norway, where it was already common to have the first child outside of marriage by the early nineties, a majority of even second-and-above born children are now born out-of-wedlock.

Marital decline in Scandinavia is the product of a confluence of factors: contraception, abortion, women in the workforce, cultural individualism, secularism, and the welfare state. Scandinavia is extremely secular, and its welfare state unusually large. Scandinavian law tends to treat marriage and cohabitation alike. Yet the factors driving marital decline in Scandinavia are present in all Western countries. Scholars have long taken Scandinavian family change as a bellwether for family

change throughout the West. Scholars agree that the Scandinavian pattern of births to unmarried, cohabiting parents is sweeping across Europe. Northern and middle European countries are most affected by the trend, while the southern European countries are least affected. Scholarly debate among comparative students of marriage now centers on the question of whether, and how quickly, the Scandinavian family pattern is likely to spread through Europe and North America.

There is good reason to believe that same-sex marriage, and marriage-like same-sex registered partnerships, are both an effect and a reinforcing cause of this Scandinavian trend toward unmarried parenthood. The increasing cultural separation between the ideas of marriage and parenthood makes same-sex marriage more conceivable. Once marriage is separated from the idea of parenthood, there seems little reason to deny marriage, or marriage-like partnerships, to same-sex couples. By the same token, once marriage (or a status close to marriage) has been redefined to include same-sex couples, the symbolic separation between marriage and parenthood is confirmed, locked-in, and reinforced.

Same-sex partnerships in Scandinavia have furthered the cultural separation of marriage and parenthood in at least two ways. First, the debate over same-sex partnerships has split the Norwegian church. The church is the strongest cultural check on out-of-wedlock birth in Norway, since traditional clergy preach against unmarried parenthood. Yet differences within Norway's Lutheran church on the same-sex marriage issue have weakened the position of traditionalist clergy, and strengthened the position of socially liberal clergy who effectively accept both same-sex partnerships and the practice of unmarried parenthood.

This pattern has been operative since the establishment of same-sex registered partnerships early in the nineties. The phenomenon has lately been most evident in the socially liberal Norwegian county of Nordland, where many churches now fly rainbow flags. Those flags welcome clergy in same-sex registered partnerships, and signal that clergy who preach against homosexual behavior are banned.

When scholars draw conclusions about the causal effects on marriage of various beliefs and practices, they do so by combining statistical correlations with a cultural analysis. For example, we know that out-of-wedlock birthrates are unusually low in traditionally religious districts of Norway, where clergy actively preach against the practice of unmarried parenthood. Scholars reasonably conclude that the low out-of-wedlock birthrates in such districts are causally related to the preaching of these traditionalist clergy.

The judgement that same-sex marriage has contributed to rising out-of-wedlock birthrates in Norway is of exactly the same order as the aforementioned scholarly conclusion. If traditionalist preachers in socially conservative districts of Norway help to keep out-of-wedlock birthrates low, it follows that a ban on conservative preachers in socially liberal districts of Norway removes a critical barrier to an increase in those rates. Since the division within the Norwegian church caused by the debate over same-sex unions has led to a banning of traditionalist clergy (the same clergy who preach against unmarried parenthood), it follows that the controversy over same-sex partnerships has helped to raise the out-of-wedlock birthrate.

In concluding that same-sex registered partnerships have contributed to higher out-of-wedlock birthrates, we do not simply rely on the experience of the Norwegian church. The cultural meaning of marriage-like same-sex partnerships in Scandinavia tends to heighten the separation of marriage and parenthood in secular, as well as religious, contexts. As the influence of the clergy has declined in Scandinavia, secular social scientists have taken on a role as cultural arbiters. These secular social scientists have touted same-sex registered partnerships as proof that traditional marriage is outdated. Instead of arguing that de facto marriage by same-sex couples ought to encourage marriage among heterosexual parents, secular opinion leaders have drawn a different lesson. Those opinion leaders have pointed to same-sex partnerships to argue that marriage itself is outdated, and that single motherhood and unmarried parental cohabitation are just as acceptable as parenthood within marriage.

This socially radical cultural reading of same-sex partnerships was revealed in 2002, when Sweden added the right of adoption to same-sex registered partnerships. During that debate, advocates of the reform associated same-sex adoption with single parenthood. Same-sex adoption was not used to heighten the cultural connection between marriage and parenthood. On the contrary, same-sex adoption was taken to prove that the traditional family was outdated, and that novel social forms—like single parenthood, were now fully acceptable.

The socially liberal districts where Norway's secular intellectuals "preach" this view of the family experience significantly higher out of wedlock birthrates than more traditional and religious districts. Therefore, in the same way that scholars conclude that traditionalist clergy keep out-of-wedlock birthrates low in religious

districts, we can conclude that the advocacy of culturally radical public intellectuals has helped to spread the practice of unmarried parenthood in socially liberal districts. These secular intellectuals have consistently pointed to same-sex registered partnerships as evidence that marriage is outdated, and unmarried parenthood as acceptable as any other family form. In this way, we can isolate the causal effect of same-sex registered partnerships as one among several causes contributing to the decline of marriage in Scandinavia.

In the socially liberal Norwegian county of Nordland, where rainbow flags fly on churches as signs that same-sex registered partnerships are fully accepted, the out-of-wedlock birthrate in 2002 was 67.29 percent—markedly higher than the rate for Norway as a whole. The out-of-wedlock birthrate for first born children in Nordland county in 2002 was 82.27 percent. More significantly, the out-of-wedlock birthrate for second-and-above born children in Nordland county in 2002 was 58.61 percent. In the early nineties, when the debate on same-sex partnerships began, most Nordlanders already bore their first child out-of-wedlock. Yet in 1990, 60.26 percent of Nordland's parents still married before the birth of the second-or-above born child. By 2002, the situation had reversed. Just under sixty percent of Nordlanders now bear even second-and-above born children out-of-wedlock.

That nearly twenty point shift in the out-of-wedlock birthrate for second-and-above born children since 1990 signals that marriage itself is now a rarity in Nordland county. What began as a practice of experimenting with the relationship through the birth of the first child has now turned into a general repudiation of marriage itself.

The figures are similar in the socially liberal county of Nord-Troendelag, which borders on the university town of Trondheim, home to some of the prominent public intellectuals who point to same-sex registered partnerships as proof that marriage itself is outdated and unnecessary. In 2002, 83.27 percent of first born children in Nord-Troendelag were born out-of-wedlock. More significantly, in 2002, 57.74 percent of second-and-above born children were born out-of-wedlock. That compares to 38.12 percent of second-and-above born children born out of wedlock in 1990, just before the debate over marriage-like same-sex partnerships began.

With a clear majority of even second-and-above born children now born out-of-wedlock, it is evident that marriage has nearly disappeared in some socially liberal counties of Norway. In the parts of Norway where de facto gay marriage finds its highest degree of acceptance, marriage itself has virtually ceased to exist. This fact ought to give pause.

THE NETHERLANDS

The situation in the Netherlands confirms and strengthens the argument for a causal contribution of same-sex marriage to the decline of marriage. This is so for two reasons. In the Netherlands, a system of marriage-like registered partnerships open to both same-sex and opposite-sex couples was authorized by parliament in 1996, and took effect in 1998. More recently, in 2000, parliament adopted full and formal same-sex marriage, which took effect in 2001. The experience of the Netherlands shows that not only marriage-like registered partnerships open to same-sex couples, but also full and formal same-sex marriage, contribute to the decline of marriage. The particular cultural situation of marriage in the Netherlands, moreover, makes it easier to isolate the causal effect of same-sex marriage from other contributors to marital decline. In effect, the Netherlands shows how same-sex marriage draws down the "cultural capital" on which the system of married parenthood depends.

Marriage in the Netherlands has long been liberalized in a legal sense. Nearly a decade before the adoption of registered partnerships in the nineties, the Netherlands began to legally equalize marriage and cohabitation. The practice of premarital cohabitation is very widespread in the Netherlands, and in a European context, high rates of premarital cohabitation are generally associated with high out-of-wedlock birthrates.

Yet scholars note that the practice of cohabiting parenthood in the Netherlands has been surprisingly rare, despite the early legal equalization of marriage and cohabitation, and despite the frequency of premarital cohabitation. Most scholars attribute the unexpectedly low out-of-wedlock birthrates in the Netherlands to the strength of conservative cultural tradition in the Netherlands.

Yet the striking fact of the matter is that, ever since Dutch parliamentary proposals for formal gay marriage and/or registered partnerships were first introduced and debated in 1996, and continuing through and beyond the authorization of full and formal same-sex marriage in 2000, the out-of-wedlock birthrate in the Netherlands has been increasing at double its previous speed. The movement for same-sex

marriage in the Netherlands began in earnest in 1989. After several attempts to legalize gay marriage through the courts failed in 1990, a campaign of cultural-political activism was launched. This campaign involved the establishment of symbolic marriage registries—and ceremonies—in sympathetic municipalities (although these marriages had no legal force), and favorable treatment of same-sex marriage in the largely sympathetic mainstream news and entertainment media.

The movement for same-sex marriage picked up steam after the election of a socially liberal government in 1994—a government that for the first time included no representatives of the socially conservative Christian Democratic party. At that point, the movement for same-sex marriage went into high gear, with a series of parliamentary debates and public campaigns running from 1996 through the adoption of full gay marriage in 2000.

In 1996, just as the campaign for gay marriage went into high gear, the unusually low Dutch out-of-wedlock birthrate began to rise at a rate of two percent per year, in contrast to it's earlier average rise of only one percent per year. Dutch demographers are at a loss to explain this doubling of the rate of increase by reference to legal changes, or changes in welfare policy.

Some might argue that the "marriage lite" of registered partnerships—open to both same-sex and opposite-sex couples—can account for the rapid increase in the out-of-wedlock birthrate in the mid-nineties. After all, since the Netherlands allows even heterosexual couples to enter registered partnerships, any children they might have would by definition be born outside of marriage. So it could be argued that had the Netherlands established full and formal gay marriage in the mid-nineties, instead of a system of registered partnerships open to same-sex and opposite-sex couples, out-of-wedlock birthrates would have remained low.

It is important to note, however, that the open aim of the gay marriage movement in the Netherlands was always full and formal marriage. Even at the moment when registered partnerships were authorized in 1996, a majority in the Dutch parliament also called for full and formal gay marriage. The Dutch cabinet demurred at that time, for political reasons. Yet the ultimate goal of full and formal same-sex marriage was affirmed by majority sentiment in parliament—and by the gay marriage movement itself—all along. Moreover, even during the years of registered partnership, the Dutch media continued to treat same-sex unions as marriages. So the symbolic core of the gay marriage movement in the Netherlands was the quest for full and formal marriage—not "marriage lite."

Moreover, Dutch demographers discount the "marriage lite" effect on the out-of-wedlock birthrate. The number of heterosexual couples entering into registered partnerships in the nineties was simply too small to account for the two-fold increase in growth of the out of wedlock birthrate during this period. By the same token, the out-of-wedlock birthrate has continued to climb at a very fast two percent per year since the vote for full and formal gay marriage in 2000. **[See the graph attached to this testimony for an illustration of this process.]** It must be emphasized that it is relatively rare for a country to sustain a two percent per year increase in the out-of-wedlock birthrate for seven consecutive years. As a rule, this only happens when a country is on the way to a Scandinavian style system of nonmarital parental cohabitation.

In light of all this, it is reasonable to conclude that the traditionalist "cultural capital" that scholars agree kept the Dutch out-of-wedlock birthrate artificially low (despite the legal equalization of marriage and cohabitation in the eighties) has been displaced and depleted by the long public campaign for same-sex marriage. Same-sex marriage has increased the cultural separation of marriage from parenthood in the Netherlands, just as it has in Scandinavia.

This history enables us to isolate the causal mechanism in question. Since legal and structural factors affecting marriage had failed to produce high out-of-wedlock birthrates in the Netherlands through the mid-nineties, the scholarly consensus was that cultural factors—and only cultural factors—were keeping the out-of-wedlock birthrates low. It took a new cultural outlook on the connection between marriage and parenthood to eliminate the traditional cultural barriers to unmarried parental cohabitation. Same-sex marriage, along with marriage-like registered partnerships open to same-sex couples, provided that outlook. Now, with the 2003 Dutch out-of-wedlock birthrate at 31 percent, and the practice of cohabiting parenthood on the rise, the Netherlands appears to be well along the Scandinavian path.

AMERICA'S PROSPECTS

The experience of Scandinavia and the Netherlands make it clear that same-sex marriage could widen the separation between marriage and parenthood here in the United States. America is already the world leader in divorce. Our high divorce

rates have significantly weakened the institution of marriage in this country. For all that, however, Americans differ from Europeans in that they commonly assume that couples ought to marry prior to having children. Although the association of marriage and parenthood is relatively weak among the urban poor, it is still remarkably strong in the rest of American society. Scandinavia, in contrast, has no large concentrations of urban poor. The practice of unmarried parenthood is widespread in Scandinavia's middle and upper-middle classes, because the cultural association between marriage and parenthood has been lost in much of Europe.

Yet, the first signs of European-style parental cohabitation are now evident in America. And the prestigious American Law Institute recently proposed a series of legal reforms that would tend to equalize marriage and cohabitation ("The Principles of the Law of Family Dissolution," 2000). As of yet, these harbingers of the Scandinavian family pattern have had a limited effect on the United States. The danger is that same-sex marriage could introduce the sharp cultural separation of marriage and parenthood in America that is now familiar in Scandinavia. That, in turn, could draw out the budding American trends toward unmarried but cohabiting parenthood, and the associated legal equalization of marriage and cohabitation.

Same-sex marriage has every prospect of being even more influential in America than it has already been in Europe. That's because, in Scandinavia, same-sex partnerships came at the tail end of a process of marital decline that centered around unmarried parental cohabitation. In the United States, same-sex marriage would be the leading edge, rather than the tail end, of the Scandinavian cultural pattern. And a combination of the Scandinavian cultural pattern with America's already high divorce rate would likely mean a radical weakening of marriage—perhaps even the end of marriage itself. After all, we are witnessing no less than the end of marriage itself in Scandinavia.

America's concentrations of urban poor compound the potential dangers of importing a Scandinavian-style separation between marriage and parenthood. Scandinavia has no substantial concentrations of urban poverty. America does. A weakening of the ethos of marriage in the middle and upper-middle classes would likely undo the progress made since welfare reform in stemming the tide of single parenthood among the urban poor. This is foreshadowed in Great Britain, where the Scandinavian pattern of unmarried but cohabiting parenthood is rapidly spreading. Britain, like the United States, does have substantial pockets of urban poverty. Since the spread of the Scandinavian family pattern to Britain's middle classes, the rate of births to single teenaged parents among Britain's urban poor has risen significantly.

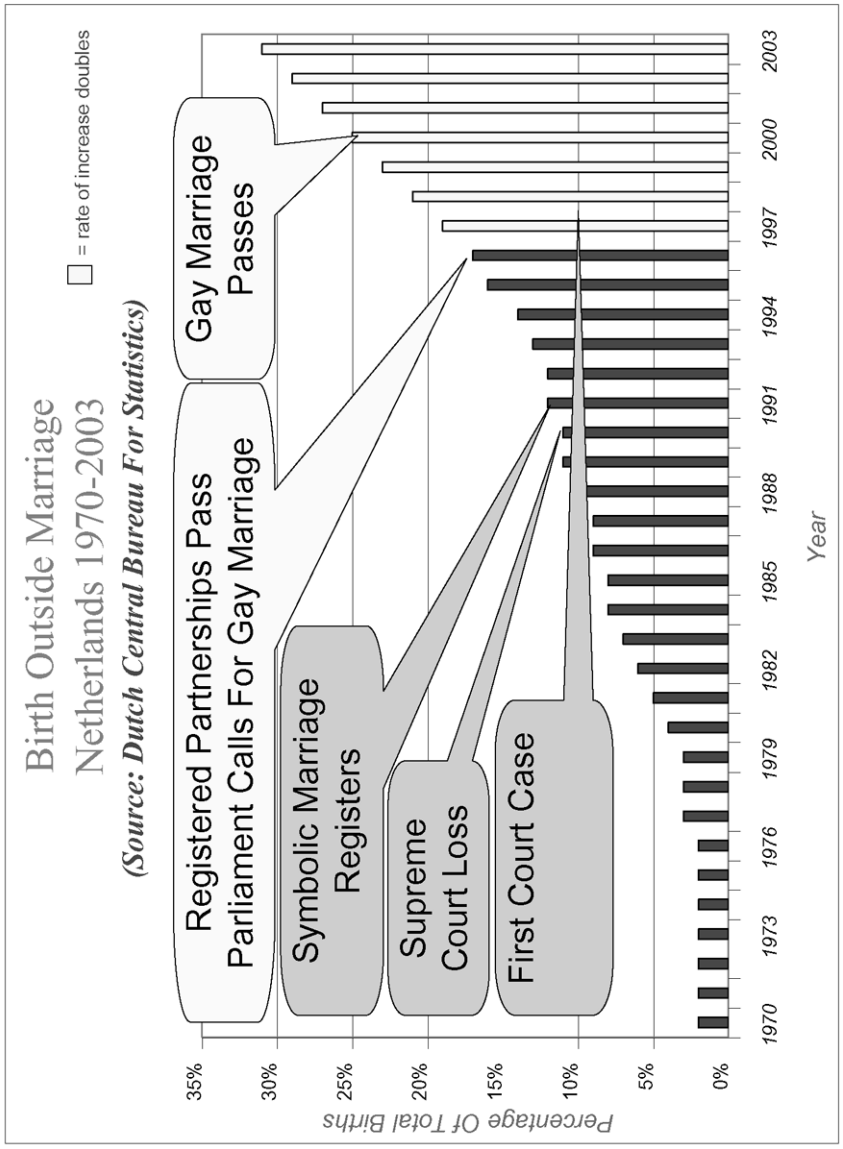
In Scandinavia, a massive welfare state largely substitutes for the family. Should the Scandinavian cultural pattern take root in the United States, with its accompanying effects on the urban poor, we shall be forced to choose between significant social disruption and a substantial increase in our own welfare state. The fate of marriage therefore impacts the broadest questions of governance.

Note also that scholars of marriage widely discuss the likelihood that the Scandinavian family pattern will spread throughout the West—including the United States. And in effect, the spread of the movement for same-sex marriage from Scandinavia to Europe and North America is further evidence that what happens in Scandinavia can and does have every prospect of spreading to the United States. Unless we take steps to block same-sex marriage and prevent the legal equalization of marriage and cohabitation, it is entirely likely that America will experience marital decline of the type now familiar in Scandinavia—and rapidly on the rise in the Netherlands.

In effect, the adoption of same-sex marriage in the Netherlands has prefigured this entire process. The socially conservative Netherlands equalized marriage and cohabitation, then adopted same-sex marriage. The effects of liberalized cohabitation were minimal, at first. After same-sex marriage was added to the mix, however, the traditional connection between marriage and parenthood eroded. In a classic case of "depleted cultural capital," the Netherlands' relative cultural conservatism in the matter of marriage was drawn down. That country is now firmly on the path to the Scandinavian system of unmarried, cohabiting parenthood. And in the Netherlands, same-sex marriage was on the leading edge, rather than the tail end, of marital decline.

In short, since the adoption of same-sex registered partnerships—and of full, formal same-sex marriage—marriage has declined substantially in both Scandinavia and the Netherlands. In the districts of Scandinavia most accepting of same-sex marriage, marriage itself has almost entirely disappeared. I have shown that same-sex marriage contributed significantly to this pattern of marital decline. The social harm in all this is the damage to children. Children will suffer greatly if the Scandinavian pattern takes hold, because the concomitant of the Scandinavian pattern is a rising tide of family dissolution. And a further decline of marriage and family

is sure to bring calls for a major expansion of the welfare state. For all these reasons, steps to block same-sex marriage should be taken.


Birth Outside Marriage
Netherlands 1970-2003
(Source: Dutch Central Bureau For Statistics)
= rate of increase doubles
Registered Partnerships Pass Parliament Calls For Gay Marriage
Gay Marriage Passes
Symbolic Marriage Registers
Supreme Court Loss
First Court Case
35%
30%
25%
20%
15%
10%
5%
0%
Percentage Of Total Births
1970
1973
1976
1979
1982
1985
1988
1991
1994
1997
2000
2003
Year

ATTACHMENT

the weekly Standard

The End of Marriage in Scandinavia
The "conservative case" for same-sex marriage collapses.
by Stanley Kurtz
02/02/2004, Volume 009, Issue 20

MARRIAGE IS SLOWLY DYING IN SCANDINAVIA. A majority of children in Sweden and Norway are born out of wedlock. Sixty percent of first-born children in Denmark have unmarried parents. Not coincidentally, these countries have had something close to full gay marriage for a decade or more. Same-sex marriage has locked in and reinforced an existing Scandinavian trend toward the separation of marriage and parenthood. The Nordic family pattern--including gay marriage--is spreading across Europe. And by looking closely at it we can answer the key empirical question underlying the gay marriage debate. Will same-sex marriage undermine the institution of marriage? It already has.

More precisely, it has *further* undermined the institution. The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher. Instead of encouraging a society-wide return to marriage, Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.

This is not how the situation has been portrayed by prominent gay marriage advocates journalist Andrew Sullivan and Yale law professor William Eskridge Jr. Sullivan and Eskridge have made much of an unpublished study of Danish same-sex registered partnerships by Darren Spedale, an independent researcher with an undergraduate degree who visited Denmark in 1996 on a Fulbright scholarship. In 1989, Denmark had legalized de facto gay marriage (Norway followed in 1993 and Sweden in 1994). Drawing on Spedale, Sullivan and Eskridge cite evidence that since then, marriage has strengthened. Spedale reported that in the six years following the establishment of registered partnerships in Denmark (1990-1996), heterosexual marriage rates climbed by 10 percent, while heterosexual divorce rates declined by 12 percent. Writing in the McGeorge Law Review, Eskridge claimed that Spedale's study had exposed the "hysteria and irresponsibility" of those who predicted gay marriage would undermine marriage. Andrew Sullivan's Spedale-inspired piece was subtitled, "The case against same-sex marriage crumbles."

Yet the half-page statistical analysis of heterosexual marriage in Darren Spedale's unpublished paper doesn't begin to get at the truth about the decline of marriage in Scandinavia during the nineties. Scandinavian marriage is now so weak that statistics on marriage and divorce no longer mean what they used to.

Take divorce. It's true that in Denmark, as elsewhere in Scandinavia, divorce numbers looked better in the nineties. But that's because the pool of married people has been shrinking for some time. You can't divorce without first getting married. Moreover, a closer look at Danish divorce in the post-gay marriage decade reveals disturbing trends. Many Danes have stopped holding off divorce until their kids are grown. And Denmark in the nineties saw a 25 percent increase in cohabiting couples with children. With fewer parents marrying, what used to show up in statistical tables as early divorce is now the unrecorded breakup of a cohabiting couple with children.

What about Spedale's report that the Danish marriage rate increased 10 percent from 1990 to 1996? Again, the news only appears to be good. First, there is no trend. Eurostat's just-released marriage rates for 2001 show declines in Sweden and Denmark (Norway hasn't reported). Second, marriage statistics in societies with very low rates (Sweden registered the lowest marriage rate in recorded history in 1997) must be carefully parsed. In his study of the Norwegian family in the nineties, for example, Christer Hyggen shows that a small increase in Norway's marriage rate over the past decade has more to do with the institution's decline than with any renaissance. Much of the increase in Norway's marriage rate is driven by older couples "catching up." These couples belong to the first generation that accepts rearing the first born child out of wedlock. As they bear second children, some finally get married. (And even this tendency to marry at the birth of a second child is weakening.) As for the rest of the increase in the Norwegian marriage rate, it is largely attributable to remarriage among the large number of divorced.

Spedale's report of lower divorce rates and higher marriage rates in post-gay marriage Denmark is thus misleading. Marriage is now so weak in Scandinavia that shifts in these rates no longer mean what they would in America. In Scandinavian demography, what counts is the out-of-wedlock birthrate, and the family dissolution rate.

The family dissolution rate is different from the divorce rate. Because so many Scandinavians now rear children outside of marriage, divorce rates are unreliable measures of family weakness. Instead, we need to know the rate at which parents (married or not) split up. Precise statistics on family dissolution are unfortunately rare. Yet the studies that have been done show that throughout Scandinavia (and the West) cohabiting couples with children break up at two to three times the rate of married parents. So rising rates of cohabitation and out-of-wedlock birth stand as proxy for rising rates of family dissolution.

By that measure, Scandinavian family dissolution has only been worsening. Between 1990 and 2000, Norway's out-of-wedlock birthrate rose from 39 to 50 percent, while Sweden's rose from 47 to 55 percent. In Denmark out-of-wedlock births stayed level during the nineties (beginning at 46 percent and ending at 45 percent). But the leveling off seems to be a function of a slight increase in fertility among older couples, who marry only after multiple births (if they don't break up first). That shift masks the 25 percent increase during the nineties in cohabitation and unmarried parenthood among Danish couples (many of them young). About 60 percent of first born children in Denmark now have unmarried parents. The rise of fragile families based on cohabitation and out-of-wedlock childbearing means that during the nineties, the total rate of family dissolution in Scandinavia significantly increased.

Scandinavia's out-of-wedlock birthrates may have risen more rapidly in the seventies, when marriage began its slide. But the push of that rate past the 50 percent mark during the nineties was in many ways more disturbing. Growth in the out-of-wedlock birthrate is limited by the

tendency of parents to marry after a couple of births, and also by the persistence of relatively conservative and religious districts. So as out-of-wedlock childbearing pushes beyond 50 percent, it is reaching the toughest areas of cultural resistance. The most important trend of the post-gay marriage decade may be the erosion of the tendency to marry at the birth of a second child. Once even that marker disappears, the path to the complete disappearance of marriage is open.

And now that married parenthood has become a minority phenomenon, it has lost the critical mass required to have socially normative force. As Danish sociologists Wehner, Kambskard, and Abrahamson describe it, in the wake of the changes of the nineties, "Marriage is no longer a precondition for settling a family--neither legally nor normatively. . . . What defines and makes the foundation of the Danish family can be said to have moved from marriage to parenthood."

So the highly touted half-page of analysis from an unpublished paper that supposedly helps validate the "conservative case" for gay marriage--i.e., that it will encourage stable marriage for heterosexuals and homosexuals alike--does no such thing. Marriage in Scandinavia is in deep decline, with children shouldering the burden of rising rates of family dissolution. And the mainspring of the decline--an increasingly sharp separation between marriage and parenthood--can be linked to gay marriage. To see this, we need to understand why marriage is in trouble in Scandinavia to begin with.

SCANDINAVIA has long been a bellwether of family change. Scholars take the Swedish experience as a prototype for family developments that will, or could, spread throughout the world. So let's have a look at the decline of Swedish marriage.

In Sweden, as elsewhere, the sixties brought contraception, abortion, and growing individualism. Sex was separated from procreation, reducing the need for "shotgun weddings." These changes, along with the movement of women into the workforce, enabled and encouraged people to marry at later ages. With married couples putting off parenthood, early divorce had fewer consequences for children. That weakened the taboo against divorce. Since young couples were putting off children, the next step was to dispense with marriage and cohabit until children were desired. Americans have lived through this transformation. The Swedes have simply drawn the final conclusion: If we've come so far without marriage, why marry at all? Our love is what matters, not a piece of paper. Why should children change that?

Two things prompted the Swedes to take this extra step--the welfare state and cultural attitudes. No Western economy has a higher percentage of public employees, public expenditures--or higher tax rates--than Sweden. The massive Swedish welfare state has largely displaced the family as provider. By guaranteeing jobs and income to every citizen (even children), the welfare state renders each individual independent. It's easier to divorce your spouse when the state will support you instead.

The taxes necessary to support the welfare state have had an enormous impact on the family. With taxes so high, women must work. This reduces the time available for child rearing, thus encouraging the expansion of a day-care system that takes a large part in raising nearly all Swedish children over age one. Here is at least a partial realization of Simone de Beauvoir's dream of an enforced androgyny that pushes women from the home by turning children over to the state.

Yet the Swedish welfare state may encourage traditionalism in one respect. The lone teen pregnancies common in the British and American underclass are rare in Sweden, which has no underclass to speak of. Even when Swedish couples bear a child out of wedlock, they tend to reside together when the child is born. Strong state enforcement of child support is another factor discouraging single motherhood by teens. Whatever the causes, the discouragement of lone motherhood is a short-term effect. Ultimately, mothers and fathers can get along financially alone. So children born out of wedlock are raised, initially, by two cohabiting parents, many of whom later break up.

There are also cultural-ideological causes of Swedish family decline. Even more than in the United States, radical feminist and socialist ideas pervade the universities and the media. Many Scandinavian social scientists see marriage as a barrier to full equality between the sexes, and would not be sorry to see marriage replaced by unmarried cohabitation. A related cultural-ideological agent of marital decline is secularism. Sweden is probably the most secular country in the world. Secular social scientists (most of them quite radical) have largely replaced clerics as arbiters of public morality. Swedes themselves link the decline of marriage to secularism. And many studies confirm that, throughout the West, religiosity is associated with institutionally strong marriage, while heightened secularism is correlated with a weakening of marriage. Scholars have long suggested that the relatively thin Christianization of the Nordic countries explains a lot about why the decline of marriage in Scandinavia is a decade ahead of the rest of the West.

Are Scandinavians concerned about rising out-of-wedlock births, the decline of marriage, and ever-rising rates of family dissolution? No, and yes. For over 15 years, an American outsider, Rutgers University sociologist David Popenoe, has played Cassandra on these issues. Popenoe's 1988 book, "Disturbing the Nest," is still the definitive treatment of Scandinavian family change and its meaning for the Western world. Popenoe is no toe-the-line conservative. He has praise for the Swedish welfare state, and criticizes American opposition to some child welfare programs. Yet Popenoe has documented the slow motion collapse of the Swedish family, and emphasized the link between Swedish family decline and welfare policy.

For years, Popenoe's was a lone voice. Yet by the end of the nineties, the problem was too obvious to ignore. In 2000, Danish sociologist Mai Heide Ottosen published a study, "Samboskab, Aegteskab og Foraeldrebrud" ("Cohabitation, Marriage and Parental Breakup"), which confirmed the increased risk of family dissolution to children of unmarried parents, and gently chided Scandinavian social scientists for ignoring the "quiet revolution" of out-of-wedlock parenting.

Despite the reluctance of Scandinavian social scientists to study the consequences of family dissolution for children, we do have an excellent study that followed the life experiences of *all* children born in Stockholm in 1953. (Not coincidentally, the research was conducted by a British scholar, Duncan W.G. Timms.) That study found that regardless of income or social status, parental breakup had negative effects on children's mental health. Boys living with single, separated, or divorced mothers had particularly high rates of impairment in adolescence. An important 2003 study by Gunilla Ringbäck Weitoft, et al. found that children of single parents in Sweden have more than double the rates of mortality, severe morbidity, and injury of children in two parent households. This held true after controlling for a wide range of demographic and socioeconomic circumstances.

THE DECLINE OF MARRIAGE and the rise of unstable cohabitation and out-of-wedlock

childbirth are not confined to Scandinavia. The Scandinavian welfare state aggravates these problems. Yet none of the forces weakening marriage there are unique to the region. Contraception, abortion, women in the workforce, spreading secularism, ascendant individualism, and a substantial welfare state are found in every Western country. That is why the Nordic pattern is spreading.

Yet the pattern is spreading unevenly. And scholars agree that cultural tradition plays a central role in determining whether a given country moves toward the Nordic family system. Religion is a key variable. A 2002 study by the Max Planck Institute, for example, concluded that countries with the lowest rates of family dissolution and out-of-wedlock births are "strongly dominated by the Catholic confession." The same study found that in countries with high levels of family dissolution, religion in general, and Catholicism in particular, had little influence.

British demographer Kathleen Kiernan, the acknowledged authority on the spread of cohabitation and out-of-wedlock births across Europe, divides the continent into three zones. The Nordic countries are the leaders in cohabitation and out-of-wedlock births. They are followed by a middle group that includes the Netherlands, Belgium, Great Britain, and Germany. Until recently, France was a member of this middle group, but France's rising out-of-wedlock birthrate has moved it into the Nordic category. North American rates of cohabitation and out-of-wedlock birth put the United States and Canada into this middle group. Most resistant to cohabitation, family dissolution, and out-of-wedlock births are the southern European countries of Spain, Portugal, Italy, and Greece, and, until recently, Switzerland and Ireland. (Ireland's rising out-of-wedlock birthrate has just pushed it into the middle group.)

These three groupings closely track the movement for gay marriage. In the early nineties, gay marriage came to the Nordic countries, where the out-of-wedlock birthrate was already high. Ten years later, out-of-wedlock birth rates have risen significantly in the middle group of nations. Not coincidentally, nearly every country in that middle group has recently either legalized some form of gay marriage, or is seriously considering doing so. Only in the group with low out-of-wedlock birthrates has the gay marriage movement achieved relatively little success.

This suggests that gay marriage is both an effect and a cause of the increasing separation between marriage and parenthood. As rising out-of-wedlock birthrates disassociate heterosexual marriage from parenting, gay marriage becomes conceivable. If marriage is only about a relationship between two people, and is not intrinsically connected to parenthood, why shouldn't same-sex couples be allowed to marry? It follows that once marriage is redefined to accommodate same-sex couples, that change cannot help but lock in and reinforce the very cultural separation between marriage and parenthood that makes gay marriage conceivable to begin with.

We see this process at work in the radical separation of marriage and parenthood that swept across Scandinavia in the nineties. If Scandinavian out-of-wedlock birthrates had not already been high in the late eighties, gay marriage would have been far more difficult to imagine. More than a decade into post-gay marriage Scandinavia, out-of-wedlock birthrates have passed 50 percent, and the effective end of marriage as a protective shield for children has become thinkable. Gay marriage hasn't blocked the separation of marriage and parenthood; it has advanced it.

WE SEE THIS most clearly in Norway. In 1989, a couple of years after Sweden broke ground by offering gay couples the first domestic partnership package in Europe, Denmark legalized de facto gay marriage. This kicked off a debate in Norway (traditionally more conservative than either Sweden or Denmark), which legalized de facto gay marriage in 1993. (Sweden expanded its benefits packages into de facto gay marriage in 1994.) In liberal Denmark, where out-of-wedlock birthrates were already very high, the public favored same-sex marriage. But in Norway, where the out-of-wedlock birthrate was lower--and religion traditionally stronger--gay marriage was imposed, against the public will, by the political elite.

Norway's gay marriage debate, which ran most intensely from 1991 through 1993, was a culture-shifting event. And once enacted, gay marriage had a decidedly unconservative impact on Norway's cultural contests, weakening marriage's defenders, and placing a weapon in the hands of those who sought to replace marriage with cohabitation. Since its adoption, gay marriage has brought division and decline to Norway's Lutheran Church. Meanwhile, Norway's fast-rising out-of-wedlock birthrate has shot past Denmark's. Particularly in Norway--once relatively conservative--gay marriage has undermined marriage's institutional standing for everyone.

Norway's Lutheran state church has been riven by conflict in the decade since the approval of de facto gay marriage, with the ordination of registered partners the most divisive issue. The church's agonies have been intensively covered in the Norwegian media, which have taken every opportunity to paint the church as hidebound and divided. The nineties began with conservative churchmen in control. By the end of the decade, liberals had seized the reins.

While the most public disputes of the nineties were over homosexuality, Norway's Lutheran church was also divided over the question of heterosexual cohabitation. Asked directly, liberal and conservative clerics alike voice a preference for marriage over cohabitation--especially for couples with children. In practice, however, conservative churchmen speak out against the trend toward unmarried cohabitation and childbirth, while liberals acquiesce.

This division over heterosexual cohabitation broke into the open in 2000, at the height of the church's split over gay partnerships, when Prince Haakon, heir to Norway's throne, began to live with his lover, a single mother. From the start of the prince's controversial relationship to its eventual culmination in marriage, the future head of the Norwegian state church received tokens of public support or understanding from the very same bishops who were leading the fight to permit the ordination of homosexual partners.

So rather than strengthening Norwegian marriage against the rise of cohabitation and out-of-wedlock birth, same-sex marriage had the opposite effect. Gay marriage lessened the church's authority by splitting it into warring factions and providing the secular media with occasions to mock and expose divisions. Gay marriage also elevated the church's openly rebellious minority liberal faction to national visibility, allowing Norwegians to feel that their proclivity for unmarried parenthood, if not fully approved by the church, was at least not strongly condemned. If the "conservative case" for gay marriage had been valid, clergy who were supportive of gay marriage would have taken a strong public stand against unmarried heterosexual parenthood. This didn't happen. It was the conservative clergy who criticized the prince, while the liberal supporters of gay marriage tolerated his decisions. The message was not lost on ordinary Norwegians, who continued their flight to unmarried parenthood.

Gay marriage is both an effect and a reinforcing cause of the separation of marriage and

parenthood. In states like Sweden and Denmark, where out-of-wedlock birthrates were already very high, and the public favored gay marriage, gay unions were an effect of earlier changes. Once in place, gay marriage symbolically ratified the separation of marriage and parenthood. And once established, gay marriage became one of several factors contributing to further increases in cohabitation and out-of-wedlock birthrates, as well as to early divorce. But in Norway, where out-of-wedlock birthrates were lower, religion stronger, and the public opposed same-sex unions, gay marriage had an even greater role in precipitating marital decline.

SWEDEN'S POSITION as the world leader in family decline is associated with a weak clergy, and the prominence of secular and left-leaning social scientists. In the post-gay marriage nineties, as Norway's once relatively low out-of-wedlock birthrate was climbing to unprecedented heights, and as the gay marriage controversy weakened and split the once respected Lutheran state church, secular social scientists took center stage.

Kari Moxnes, a feminist sociologist specializing in divorce, is one of the most prominent of Norway's newly emerging group of public social scientists. As a scholar who sees both marriage and at-home motherhood as inherently oppressive to women, Moxnes is a proponent of nonmarital cohabitation and parenthood. In 1993, as the Norwegian legislature was debating gay marriage, Moxnes published an article, "Det tomme ekteskap" ("Empty Marriage"), in the influential liberal paper Dagbladet. She argued that Norwegian gay marriage was a sign of marriage's growing emptiness, not its strength. Although Moxnes spoke in favor of gay marriage, she treated its creation as a (welcome) death knell for marriage itself. Moxnes identified homosexuals--with their experience in forging relationships unencumbered by children--as social pioneers in the separation of marriage from parenthood. In recognizing homosexual relationships, Moxnes said, society was ratifying the division of marriage from parenthood that had spurred the rise of out-of-wedlock births to begin with.

A frequent public presence, Moxnes enjoyed her big moment in 1999, when she was embroiled in a dispute with Valgerd Svarstad Haugland, minister of children and family affairs in Norway's Christian Democrat government. Moxnes had criticized Christian marriage classes for teaching children the importance of wedding vows. This brought a sharp public rebuke from Haugland. Responding to Haugland's criticisms, Moxnes invoked homosexual families as proof that "relationships" were now more important than institutional marriage.

This is not what proponents of the conservative case for gay marriage had in mind. In Norway, gay marriage has given ammunition to those who wish to put an end to marriage. And the steady rise of Norway's out-of-wedlock birthrate during the nineties proves that the opponents of marriage are succeeding. Nor is Kari Moxnes an isolated case.

Months before Moxnes clashed with Haugland, social historian Kari Melby had a very public quarrel with a leader of the Christian Democratic party over the conduct of Norway's energy minister, Marit Arnstad. Arnstad had gotten pregnant in office and had declined to name the father. Melby defended Arnstad, and publicly challenged the claim that children do best with both a mother and a father. In making her case, Melby praised gay parenting, along with voluntary single motherhood, as equally worthy alternatives to the traditional family. So instead of noting that an expectant mother might want to follow the example of marriage that even gays were now setting, Melby invoked homosexual families as proof that a child can do as well with one parent as two.

Finally, consider a case that made even more news in Norway, that of handball star Mia Hundvin (yes, handball prowess makes for celebrity in Norway). Hundvin had been in a registered gay partnership with fellow handballer Camilla Andersen. These days, however, having publicly announced her bisexuality, Hundvin is linked with Norwegian snowboarder Terje Haakonsen. Inspired by her time with Haakonsen's son, Hundvin decided to have a child. The father of Hundvin's child may well be Haakonsen, but neither Hundvin nor Haakonsen is saying.

Did Hundvin divorce her registered partner before deciding to become a single mother by (probably) her new boyfriend? The story in Norway's premiere paper, Aftenposten, doesn't bother to mention. After noting that Hundvin and Andersen were registered partners, the paper simply says that the two women are no longer "romantically involved." Hundvin has only been with Haakonsen about a year. She obviously decided to become a single mother without bothering to see whether she and Haakonsen might someday marry. Nor has Hundvin appeared to consider that her affection for Haakonsen's child (also apparently born out of wedlock) might better be expressed by marrying Haakonsen and becoming his son's new mother.

Certainly, you can chalk up more than a little of this saga to celebrity culture. But celebrity culture is both a product and influencer of the larger culture that gives rise to it. Clearly, the idea of parenthood here has been radically individualized, and utterly detached from marriage. Registered partnerships have reinforced existing trends. The press treats gay partnerships more as relationships than as marriages. The symbolic message of registered partnerships--for social scientists, handball players, and bishops alike--has been that most any nontraditional family is just fine. Gay marriage has served to validate the belief that individual choice trumps family form.

The Scandinavian experience rebuts the so-called conservative case for gay marriage in more than one way. Noteworthy, too, is the lack of a movement toward marriage and monogamy among gays. Take-up rates on gay marriage are exceedingly small. Yale's William Eskridge acknowledged this when he reported in 2000 that 2,372 couples had registered after nine years of the Danish law, 674 after four years of the Norwegian law, and 749 after four years of the Swedish law.

Danish social theorist Henning Bech and Norwegian sociologist Rune Halvorsen offer excellent accounts of the gay marriage debates in Denmark and Norway. Despite the regnant social liberalism in these countries, proposals to recognize gay unions generated tremendous controversy, and have reshaped the meaning of marriage in the years since. Both Bech and Halvorsen stress that the conservative case for gay marriage, while put forward by a few, was rejected by many in the gay community. Bech, perhaps Scandinavia's most prominent gay thinker, dismisses as an "implausible" claim the idea that gay marriage promotes monogamy. He treats the "conservative case" as something that served chiefly tactical purposes during a difficult political debate. According to Halvorsen, many of Norway's gays imposed self-censorship during the marriage debate, so as to hide their opposition to marriage itself. The goal of the gay marriage movements in both Norway and Denmark, say Halvorsen and Bech, was not marriage but social approval for homosexuality. Halvorsen suggests that the low numbers of registered gay couples may be understood as a collective protest against the expectations (presumably, monogamy) embodied in marriage.

SINCE LIBERALIZING DIVORCE in the first decades of the twentieth century, the Nordic countries have been the leading edge of marital change. Drawing on the Swedish experience,

Kathleen Kiernan, the British demographer, uses a four-stage model by which to gauge a country's movement toward Swedish levels of out-of-wedlock births.

In stage one, cohabitation is seen as a deviant or avant-garde practice, and the vast majority of the population produces children within marriage. Italy is at this first stage. In the second stage, cohabitation serves as a testing period before marriage, and is generally a childless phase. Bracketing the problem of underclass single parenthood, America is largely at this second stage. In stage three, cohabitation becomes increasingly acceptable, and parenting is no longer automatically associated with marriage. Norway was at this third stage, but with recent demographic and legal changes has entered stage four. In the fourth stage (Sweden and Denmark), marriage and cohabitation become practically indistinguishable, with many, perhaps even most, children born and raised outside of marriage. According to Kiernan, these stages may vary in duration, yet once a country has reached a stage, return to an earlier phase is unlikely. (She offers no examples of stage reversal.) Yet once a stage has been reached, earlier phases coexist.

The forces pushing nations toward the Nordic model are almost universal. True, by preserving legal distinctions between marriage and cohabitation, reining in the welfare state, and preserving at least some traditional values, a given country might forestall or prevent the normalization of nonmarital parenthood. Yet every Western country is susceptible to the pull of the Nordic model. Nor does Catholicism guarantee immunity. Ireland, perhaps because of its geographic, linguistic, and cultural proximity to England, is now suffering from out-of-wedlock birthrates far in excess of the rest of Catholic Europe. Without deeming a shift inevitable, Kiernan openly wonders how long America can resist the pull of stages three and four.

Although Sweden leads the world in family decline, the United States is runner-up. Swedes marry less, and bear more children out of wedlock, than any other industrialized nation. But Americans lead the world in single parenthood and divorce. If we bracket the crisis of single parenthood among African-Americans, the picture is somewhat different. Yet even among non-Hispanic whites, the American divorce rate is extremely high by world standards.

The American mix of family traditionalism and family instability is unusual. In comparison to Europe, Americans are more religious and more likely to turn to the family than the state for a wide array of needs--from child care, to financial support, to care for the elderly. Yet America's individualism cuts two ways. Our cultural libertarianism protects the family as a bulwark against the state, yet it also breaks individuals loose from the family. The danger we face is a combination of America's divorce rate with unstable, Scandinavian-style out-of-wedlock parenthood. With a growing tendency for cohabiting couples to have children outside of marriage, America is headed in that direction.

Young Americans are more likely to favor gay marriage than their elders. That oft-noted fact is directly related to another. Less than half of America's twentysomethings consider it wrong to bear children outside marriage. There is a growing tendency for even middle class cohabiting couples to have children without marrying.

Nonetheless, although cohabiting parenthood is growing in America, levels here are still far short of those in Europe. America's situation is not unlike Norway's in the early nineties, with religiosity relatively strong, the out-of-wedlock birthrate still relatively low (yet rising), and the public opposed to gay marriage. If, as in Norway, gay marriage were imposed here by a

socially liberal cultural elite, it would likely speed us on the way toward the classic Nordic pattern of less frequent marriage, more frequent out-of-wedlock birth, and skyrocketing family dissolution.

In the American context, this would be a disaster. Beyond raising rates of middle class family dissolution, a further separation of marriage from parenthood would reverse the healthy turn away from single-parenting that we have begun to see since welfare reform. And cross-class family decline would bring intense pressure for a new expansion of the American welfare state.

All this is happening in Britain. With the Nordic pattern's spread across Europe, Britain's out-of-wedlock birthrate has risen to 40 percent. Most of that increase is among cohabiting couples. Yet a significant number of out-of-wedlock births in Britain are to lone teenage mothers. This a function of Britain's class divisions. Remember that although the Scandinavian welfare state encourages family dissolution in the long term, in the short term, Scandinavian parents giving birth out of wedlock tend to stay together. But given the presence of a substantial underclass in Britain, the spread of Nordic cohabitation there has sent lone teen parenting rates way up. As Britain's rates of single parenting and family dissolution have grown, so has pressure to expand the welfare state to compensate for economic help that families can no longer provide. But of course, an expansion of the welfare state would only lock the weakening of Britain's family system into place.

If America is to avoid being forced into a similar choice, we'll have to resist the separation of marriage from parenthood. Yet even now we are being pushed in the Scandinavian direction. Stimulated by rising rates of unmarried parenthood, the influential American Law Institute (ALI) has proposed a series of legal reforms ("Principles of Family Dissolution") designed to equalize marriage and cohabitation. Adoption of the ALI principles would be a giant step toward the Scandinavian system.

AMERICANS take it for granted that, despite its recent troubles, marriage will always exist. This is a mistake. Marriage is disappearing in Scandinavia, and the forces undermining it there are active throughout the West. Perhaps the most disturbing sign for the future is the collapse of the Scandinavian tendency to marry after the second child. At the start of the nineties, 60 percent of unmarried Norwegian parents who lived together had only one child. By 2001, 56 percent of unmarried, cohabiting parents in Norway had two or more children. This suggests that someday, Scandinavian parents might simply stop getting married altogether, no matter how many children they have.

The death of marriage is not inevitable. In a given country, public policy decisions and cultural values could slow, and perhaps halt, the process of marital decline. Nor are we faced with an all-or-nothing choice between the marital system of, say, the 1950s and marriage's disappearance. Kiernan's model posits stopping points. So repealing no-fault divorce, or even eliminating premarital cohabitation, are not what's at issue. With no-fault divorce, Americans traded away some of the marital stability that protects children to gain more freedom for adults. Yet we can accept that trade-off, while still drawing a line against descent into a Nordic-style system. And cohabitation as a premarital testing phase is not the same as unmarried parenting. Potentially, a line between the two can hold.

Developments in the last half-century have surely weakened the links between American marriage and parenthood. Yet to a remarkable degree, Americans still take it for granted that

parents should marry. Scandinavia shocks us. Still, who can deny that gay marriage will accustom us to a more Scandinavian-style separation of marriage and parenthood? And with our underclass, the social pathologies this produces in America are bound to be more severe than they already are in wealthy and socially homogeneous Scandinavia.

All of these considerations suggest that the gay marriage debate in America is too important to duck. Kiernan maintains that as societies progressively detach marriage from parenthood, stage reversal is impossible. That makes sense. The association between marriage and parenthood is partly a mystique. Disenchanted mystiques cannot be restored on demand.

What about a patchwork in which some American states have gay marriage while others do not? A state-by-state patchwork would practically guarantee a shift toward the Nordic family system. Movies and television, which do not respect state borders, would embrace gay marriage. The cultural effects would be national.

What about Vermont-style civil unions? Would that be a workable compromise? Clearly not. Scandinavian registered partnerships *are* Vermont-style civil unions. They are not called marriage, yet resemble marriage in almost every other respect. The key differences are that registered partnerships do not permit adoption or artificial insemination, and cannot be celebrated in state-affiliated churches. These limitations are gradually being repealed. The lesson of the Scandinavian experience is that even de facto same-sex marriage undermines marriage.

The Scandinavian example also proves that gay marriage is not interracial marriage in a new guise. The miscegenation analogy was never convincing. There are plenty of reasons to think that, in contrast to race, sexual orientation will have profound effects on marriage. But with Scandinavia, we are well beyond the realm of even educated speculation. The post-gay marriage changes in the Scandinavian family are significant. This is not like the fantasy about interracial birth defects. There is a serious scholarly debate about the spread of the Nordic family pattern. Since gay marriage is a part of that pattern, it needs to be part of that debate.

Conservative advocates of gay marriage want to test it in a few states. The implication is that, should the experiment go bad, we can call it off. Yet the effects, even in a few American states, will be neither containable nor revocable. It took about 15 years after the change hit Sweden and Denmark for Norway's out-of-wedlock birthrate to begin to move from "European" to "Nordic" levels. It took another 15 years (and the advent of gay marriage) for Norway's out-of-wedlock birthrate to shoot past even Denmark's. By the time we see the effects of gay marriage in America, it will be too late to do anything about it. Yet we needn't wait that long. In effect, Scandinavia has run our experiment for us. The results are in.

Stanley Kurtz is a research fellow at the Hoover Institution. His "Beyond Gay Marriage" appeared in our August 4, 2003, issue.

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Mr. CHABOT. Dr. Joseph, you are recognized for 5 minutes.

STATEMENT OF JILL G. JOSEPH, M.D., RICHARD L. HUDSON CHAIR, AND DIRECTOR, HEALTH SERVICES AND COMMUNITY RESEARCH, CHILDREN'S NATIONAL MEDICAL CENTER

Dr. JOSEPH. Thank you, Mr. Chairman. I appreciate this opportunity to speak to this Subcommittee as it considers legal threats to traditional marriage. Unlike several of your witnesses today, I carry no expertise in the law and am instead simply a pediatrician and a pediatric researcher.

Why, then, did I agree to testify here this afternoon? It is because I care for and about children. In common with every one of you, the well-being of children is terribly important to me. And, as we all know, some supporters of the Federal Marriage Amendment claim that the welfare of children will somehow be advanced by constitutionally denying the rights of legal marriage to gay and lesbian couples and their families. Frankly, this claim is inconsistent both with my own personal experience in caring for hospitalized children and their families and with a large and growing scientific literature.

Let me tell you a bit about my clinical work. I lead a team of residents, medical students, and other professionals in caring for hospitalized children. As a pediatrician who cares for hospitalized children, I work with families in moments of great distress. Fortunately, from a medical perspective, the crises are usually simple—a broken bone, a bad case of asthma. Only rarely do I have the grim task of explaining how those bruises can be an early sign of leukemia or explaining to the parents of a 2-month-old struggling to breathe that the intensive care unit really will be a better place for them. But every family I treat is a family in distress, anxious, and often, frankly, overwhelmed.

For gay and lesbian families, this situation carries additional and unnecessary stresses. Who has the assured right to take time off from work for a now chronically ill child? If one parent must be home with this child, can the other provide insurance for the entire family? These pressing concerns are complicated by the failure of all of us and of this society to recognize the legitimacy of such families. Every medical form asks for the name of the mother and the father. There is no line on the paper for the names of the two loving mothers waiting for the surgeon, or the two loving fathers taking turns holding the oxygen mask.

Whatever you think about gay and lesbian relationships, and I admit there is a diversity of opinion about this, this Congress must deal with the reality of American families, all families. Like it or not, the 2000 census counted over 600,000 same-sex unmarried partner households, and the real figure is much more likely to be three million. And like it or not, approximately one-quarter of these households include children—adopted children, birth children, stepchildren.

I have already told you I am not a lawyer and I will not attempt to discuss what I am told are the 1,138 Federal protections associated with marriage. However, as a pediatrician, I am too well aware of the need for health insurance, for life insurance, for Social Security benefits, for all the complex custodial arrangements that

we all need in the awful times of illness and disability and death that can afflict us all. And I am very concerned that the Federal Marriage Amendment will cause further harm to children whose parents already face severe legal obstacles in securing the same legal benefits available to children in other two-parent families.

But you shouldn't rely just on my clinical experiences. I also work in a research capacity, and as a professor of biostatistics and epidemiology, I regularly analyze peer-reviewed scientific articles. In preparation for this testimony today, I looked at the scientific evidence regarding the welfare of children in gay and lesbian families. Between 1978 and 2000, there were 23 studies that examined the effects of being raised by lesbian and gay parents. There were a total of 615 children of gays and lesbians, ranging in age from just 18 months to 44 years old. Methods of evaluation were diverse, but standardized, and issues of psychological status, behavioral adjustment, intellectual and cognitive abilities, as well as sexual orientation and stigmatization were examined.

The scientists who comprehensively reviewed this literature, and now I quote, "Children raised by lesbian mothers or gay fathers did not systematically differ from other children on any of the outcomes." There are those who certainly disagree with this conclusion. Perhaps most notably, the name of Paul Cameron may come to mind, who, although expelled by the American Psychological Association and denounced by the American Sociologic Association for willfully misrepresenting research, continues to express contrary views.

But given the scientific evidence, it's not surprising, I think, that the American Academy of Pediatrics supports both joint and second-parent adoptions by gays and lesbians. Thus, the society representing those such as myself, who provide front-line care to America's infants and children, finds no reason to be concerned.

In conclusion, I commend this Committee for its focus on the welfare of families and, thus, of children. Many of us in this country are being challenged, as are you. Each of us must ask if the proposed constitutional amendment prohibiting the marriage of gay parents would support the welfare of all families and all American children, including those of gays and lesbians.

With all due respect, for me as a pediatrician, the answer is clear. The Federal Marriage Amendment will only hurt the well-being of children in this country. Thank you.

Mr. CHABOT. Thank you, Dr. Joseph.

[The prepared statement of Dr. Joseph follows:]

PREPARED STATEMENT OF JILL G. JOSEPH [1]

Good afternoon.

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[1] The views expressed here are those of Dr. Joseph and not meant to represent the policies or opinions of her employer.

This claim is, however, inconsistent with both my own experience in the real world of caring for hospitalized children and their families, and with a large and growing body of scientific studies.

In my clinical work, I lead a team of residents, medical students, and other professionals to care for hospitalized children. In this role I coordinate these efforts with the patient's family so that all children receive high quality, compassionate, family-centered care. As a pediatrician caring for hospitalized children I work with families in moments of great distress. Fortunately, from a medical perspective, the problem is usually simple: a broken bone, a bad attack of asthma. Only rarely do I have to start explaining how bruises can be an early sign of leukemia or how the intensive care unit really is a better place for the tiny 2 month old struggling to breathe. But every family I treat is a family in distress: anxious and often frankly overwhelmed.

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Whatever you may think about gay and lesbian relationships, this Congress must deal with the reality of American families, all families. Like it or not, the 2000 US Census counted over 600,000 same-sex unmarried partner households . . . with the real figure more likely to be 3 million. And like it or not, approximately one-quarter of these households include children: adopted children, stepchildren, birth children.

I have already assured you that I am not a lawyer and I will not attempt to discuss the 1,138 federal protections associated with marriage. However, as a pediatrician, I am all too well aware of the need for health insurance, for life insurance, for Social Security benefits, for all the complex custodial arrangements required during the awful times of illness, disability, and death that can afflict us all. And I am very concerned that the Federal Marriage Amendment will cause further harm to children whose parents already face severe legal obstacles in securing the same legal benefits available to children of all other two-parent families.

But you should not rely solely on my own clinical experiences. In my research capacity as a professor of biostatistics and epidemiology, I regularly analyze peer-reviewed medical studies. In preparation for this testimony, I reviewed the scientific evidence regarding the welfare of children in gay and lesbian families. Between 1978 and 2000, 23 studies examined the effects of being raised by lesbian or gay parents. There were a total of 615 children of gays and lesbians studied, ranging in age from 18 months to 44 years old. Methods of evaluation were diverse but standardized in order to describe their psychological status, behavioral adjustment, intellectual and cognitive abilities, as well as their sexual orientation and experiences of stigmatization. The scientists who comprehensively reviewed this literature concluded, "Children raised by lesbian mothers or gay fathers did not systematically differ from other children on any of the outcomes." There are certainly those who disagree with this conclusion. Perhaps most notably Paul Cameron, although expelled by the American Psychological Association and denounced by the American Sociological Association for willfully misrepresenting research, continues to express contrary views.

But given the scientific evidence, it is not surprising that the American Academy of Pediatrics supports both joint and second-parent adoptions by gay and lesbian parents. Thus, the society representing those such as myself providing front-line care to America's infants, children, and adolescents finds no cause for concern regarding parenting by gays and lesbians, and affirms the importance of ensuring that the legal rights of children extend to both parents

I commend this subcommittee for its focus on the welfare of families and thus of children. Many of us in this country are being challenged. Each of us must ask if the proposed constitutional amendment prohibiting the marriage of gay parents would support the welfare of all families and all American children, including those hundreds of thousands of children whose parents are gay or lesbian. With all due respect, for me as a pediatrician, the answer is clear. The Federal Marriage Amendment will only hurt the well-being of children in this country.

Thank you for your time and the opportunity to speak here today.

Mr. CHABOT. Our final witness this afternoon will be Mr. Oliphant.

STATEMENT OF LINCOLN C. OLIPHANT, RESEARCH FELLOW, THE MARRIAGE LAW PROJECT

Mr. OLIPHANT. Mr. Chairman, thank you very much. Mr. Kurtz's evidence is extremely important for this Committee and for the country. Many people have asked, the Supreme Judicial Court in Massachusetts concluded that there was no harm by extending marriage to a place where it hadn't been extended before. Mr. Kurtz now is providing us with some evidence about the empirical harm to children when marriage is redefined.

With respect to Dr. Joseph's testimony, I am delighted to be on a panel with her. She certainly provides care to children and infants and families that a whole bevy of lawyers don't during the course of a year. But we at the Marriage Law Project are extremely skeptical about the data that she has quoted. We produced this book, which looks at 49 different studies and comes to some conclusions that that science isn't very good. We would be glad to make that available to Members of the Committee.

Now, just in 1996, this Committee, the House, the Senate, and a Democratic President by overwhelming margins supported the Defense of Marriage Act. The Defense of Marriage Act provides that a marriage means a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

This definition, which seems to so many of us as incontrovertible and non-controversial, has now been declared unconstitutional in the State of Massachusetts. If those judges in Massachusetts get a hold of the Defense of Marriage Act, they will strike it down.

Now, it is a Federal act. They are State judges. It is not going to happen quite that way. But if their rationale is used by a Federal court, the act that many of you supported—Mr. Nadler voted against it, but many, a vast, overwhelming majority of this House voted for, will be struck down as unconstitutional, and not only will it be struck down, but if the court throws in some opinions like the Massachusetts court did, they will say that the only reason they can think of why Congress would pass this act is bigotry.

Now, I would encourage the House, the Senate, and other people to come to the defense of the Defense of Marriage Act. Now, if you don't, hundreds of changes are going to be made in the Federal code. In my testimony, I point to four, two of which are in the jurisdiction of this Committee. I point to examples in bankruptcy, immigration, income tax, and veterans' benefits. I use those because we have already had cases in those areas involving same-sex couples.

Now, when I worked on Capitol Hill, I had the opportunity occasionally to study bankruptcy law. I don't know very much about it, but occasionally I had to inform myself. I will bet changes need to be made in bankruptcy law. I will bet there are some families that are being treated unfairly and they ought to be—and Congress ought to change it. But you stand on the threshold of turning those decisions over to a judge who is not going to make a decision based on the wisdom of bankruptcy law or the stability of traditional families. He or she is just going to strike down the definition of marriage and that is going to have tremors throughout the entire Federal code, not to mention the States and localities.

Now, in closing, Mr. Nadler asked about this. I think I am extremely concerned about whether the definition of marriage can be sustained. If it is stricken, if it can no longer be limited to one man and one woman, then there are those of us who don't understand if gender doesn't matter anymore why this number is so important. If man-woman doesn't matter, how come one-one matters? That opens us up to all kinds, not only polygamy, and there have been cases filed already and I cite that in my testimony, but there are lots of polyamorous theories around the country today.

In addition, if it can't be limited to that, why cannot the same benefits of marriage just be extended to any two persons who are close? Now, in my testimony I talk about mother-daughter, there was a bankruptcy case, and so on. So it is extremely hard to know where to draw the line once that line has been dissolved.

Thank you very much.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Oliphant follows:]

PREPARED STATEMENT OF LINCOLN C. OLIPHANT

Mr. Chairman and Members of the Committee:

I wish to start by thanking the highest court in Massachusetts for deciding the *Goodridge* cases.[1] I offer my thanks, not because the Court was right or wise or just—indeed, I regard those opinions as radical[2] and wrong[3]—but because the *Goodridge* cases have alerted us all to the perils that we face.

Had it not been for the *Goodridge* cases (and a related decision by the U.S. Supreme Court[4]), this hearing would not have been held, and the distinguished members of this Committee would not now be thinking about marriage in America. It is those cases that are chiefly responsible for alerting the people of the United States, the Congress of the United States, and the President of the United States to the legal, social, and moral challenges to marriage that lie ahead. If those challenges are not faced squarely and successfully, the status of marriage in this country will be fundamentally changed—to our profound regret, I believe.

I thank the Committee for inviting me to testify on the public policy implications of changing America's marriage laws. I will touch on a handful:

I. THE BIG ISSUES: LEGITIMACY AND MORALITY

The four Massachusetts justices who decided the *Goodridge* cases believe that the Congress of the United States is composed of men and women who have lost their reason, their mental capacity, their rationality. Then, too, they think you are bigots.

Just eight years ago, the 104th Congress (with the concurrence of a Democratic President) enacted (by overwhelming, bipartisan majorities[5]) the Defense of Marriage Act, Public Law 104–199, which says that for purposes of Federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. According to those Massachusetts judges who decided *Goodridge*, these definitions are simply irrational.

If given a chance, those judges would declare DOMA unconstitutional.[6] Why? Because defining marriage as the union of one man and one woman is, according to

[1] *Goodridge* v. *Department of Public Health,* 798 N.E.2d 941 (Mass. 2003) (4-to-3 decision), and *Opinion of the Justices to the Senate,* 802 N.E.2d 565 (Mass. 2004) (4-to-3 decision).

[2] See Appendix A for some of the reasons.

[3] See Appendix B for one of the reasons.

[4] *Lawrence* v. *Texas,* 539 U.S. 558 (2003), overruling *Bowers* v. *Hardwick,* 478 U.S. 186 (1986).

[5] DOMA was reported out of the House Judiciary Committee by vote of 22 to 3. The Act passed the House of Representatives by vote of 342 to 67. It passed the Senate by vote of 85 to 14.

[6] Congress believed that DOMA was eminently constitutional. Indeed, this Committee's own report said "it would be incomprehensible" for a court to decide what the *Goodridge* court decided. The report said, "Nothing in the [U.S. Supreme] Court's recent decision [in *Romer* v. *Evans,* 116 S. Ct. 1620 (1996)] suggests that the Defense of Marriage Act is constitutionally suspect. It would be incomprehensible for any court to conclude that traditional marriage laws are . . . motivated by animus toward homosexuals. Rather, they have been the unbroken rule and

Continued

their opinion in *Goodridge*, so unreasonable that it cannot withstand even the most minimal constitutional scrutiny. As if that were not enough, those judges also opined that since there is no rational basis for restricting marriage to one man and one woman, a legislative body that does so define marriage must have been motivated by prejudice. This is the law and rationale of *Goodridge.*[7]

Today's hearing is about the public policy implications of changing marriage. Congress and all of the Nation's legislatures must understand that *the foremost implication of the current strategy against marriage is to divest elected officials of their long-standing powers to define and protect marriage.* If the *Goodridge* approach is adopted by the Federal courts, Congress will find itself in the same unenviable position as the Massachusetts Legislature.

The State of Massachusetts attempted to defend its marriage laws by pointing to three primary (and a couple of subsidiary) rationales. The *Goodridge* court flatly rejected each. Congress should remember that *the same rationales and arguments were used to justify DOMA.* The chart compares the bases for the two laws:

Column 1. Rationales Presented To the *Goodridge* Court To Justify the Massachusetts Law	Column 2. Massachusetts Court On Constitutional Sufficiency Of Rationales in Column 1	Column 3. Rationales Used by the House Judiciary Committee To Justify DOMA
Procreation (798 N.E.2d, at 962-64)	Irrational & Likely Bigoted (798 N.E.2d, at 968)	Responsible Procreation (*House Report* at 12-15)
Optimal Child-rearing (*Id.*)	Irrational & Likely Bigoted (*Id.*)	Responsible Child-Rearing (*Id.*)
Conserving Scarce Resources (*Id.* 964-7)	Irrational & Likely Bigoted (*Id.*)	Preserving Scarce Resources (*Id.* at 18)
Avoiding Interstate Conflict (*Id.* at 967)	Irrational & Likely Bigoted (*Id.*)	Protecting Sovereignty & Democracy (*Id.* at16-18)
Morality (*Id.*) (suggested by *amici*)	Irrational & Likely Bigoted (*Id.*)	Morality (*Id.* at 15-16)

To repeat, DOMA is doomed if those Massachusetts judges get hold of it[8]—and a Federal court applying the law and reasoning of the Massachusetts court will

tradition in this (and other) countries primarily because they are conducive to the objectives of procreation and responsible child-rearing." H. Rpt. No. 104–664 at 33, 104th Cong., 2d Sess. (1996).

When the U.S. Department of Justice was asked to give its opinion about the constitutionality of DOMA it said it "believe[d] that [DOMA] would be sustained as constitutional." *Id.* at 33–34. After *Romer* v. *Evans* was handed down, the Department was asked if it had changed its mind, and it said no: "The Administration continues to believe that H.R. 3396 [DOMA] would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. As stated by [President Clinton's] spokesman Michael McCurry . . . the Supreme Court ruling in *Romer* v. *Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable), and the President 'would sign the bill if it was presented to him as currently written.'" *Id.* at 34.

[7] "The marriage ban works a deep and scarring hardship on a very real segment of the community *for no rational reason.* The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, *suggests that the marriage restriction is rooted in persistent prejudices against persons who are . . . homosexual. 'The Constitution cannot control such prejudices but neither can it tolerate them.' . . .*" 798 N.E.2d, at 968 (emphasis added; citation omitted).

[8] It is interesting that the Defense of Marriage Act does not appear in the *Goodridge* opinions. Perhaps the Massachusetts court's enthusiasm for following the lead of two Canadian courts (which it cited approvingly a couple of times) caused it to neglect the statutory laws of the United States. One might suppose that the duly enacted laws of our National Government

strike down DOMA (with its "Column 3 rationales") as surely as the Massachusetts court struck down its marriage law (with it "Column 1 rationales").

The *Goodridge* cases have gotten good press, but they were against all precedent (see Appendix A), and Congress and the State legislatures must not get into the habit of thinking that marriage questions belong to the courts. They don't. Marriage does not belong to the courts, and neither does the Constitution.[9]

Legislatures must be willing to defend their constitutional prerogatives. Every Member of Congress swears to protect and defend and uphold the same Constitution that binds the courts. Further, the elected branches have institutional legitimacy—and constitutional wisdom—that is lacking in the courts.

Among elected bodies, the Congress of the United States in particular must not act as if power and legitimacy or wisdom and moral judgment have somehow been transferred elsewhere.

Congress needs to defend democratic processes, and the premises that underlie elected government and majoritarian rulemaking. One scholar put it this way:

> "What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. . . ."[10]

And, because of some language in the *Lawrence* case on the relationship of law and morality (which Justice Scalia found ominous[11]), the Congress needs to ensure that it is not deterred from talking about and acting on the moral views of the American people. Congress would have very little work, and Members very little to say, if moral discourse and judgment were excluded from its deliberations:

> ". . . Men often say that one cannot legislate morality. I should say that we legislate hardly anything else. All movements of law reform seek to carry out certain social judgments as to what is fair and just in the conduct of society. What is an old-age pension scheme but an enforcement of morality? Does not the income tax, for all its encrusted technicality, embody a moral judgment

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would be at least as probative for Massachusetts judges as the decisions of Canada's provincial courts. The Massachusetts court is not formally bound by DOMA, but DOMA is the single best example in the United States of what marriage means and how it fits within the American framework of law, society, and family.

[9] To take but one example that is contrary to *Goodridge*, just six weeks before *Goodridge I* was decided a three-judge Arizona appellate court upheld that State's marriage law. The court said:

> ". . . Petitioners have failed to prove that the State's prohibition of same-sex marriage is not rationally related to a legitimate state interest. We hold that the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest. Even assuming that the State's reasoning for prohibiting same-sex marriages is debatable, or arguably unwise, it is not 'arbitrary or irrational'. Consequently, [the statutes] do not violate Petitioners' substantive due process or explicit privacy rights and must be upheld." *Standhardt* v. *Superior Court,* 77 P.3d 451, 463–64, ¶41 (Ariz. Ct. App, 2003) (citations omitted). (The equal protection argument was rejected on similar reasoning.)
>
> "Consequently, it is for the people of Arizona, through their elected representatives or by using the initiative process, rather than this court, to decide whether to permit same-sex marriages." *Id.* ¶49.

In sum, the Arizona appellate court considered the same arguments that were presented to the Supreme Judicial Court of Massachusetts and came to opposite conclusions.

[10] John H. Hallowell, THE MORAL FOUNDATION OF DEMOCRACY 120–21 (Univ. of Chicago Press, 1954).

[11] "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. See *ante,* at 2480 (noting 'an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives *in matters pertaining to sex*' (emphasis added)). The impossibility of distinguishing homosexuality from other traditional 'morals' offenses is precisely why *Bowers* rejected the rational-basis challenge. 'The law,' it said, 'is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Lawrence* v. *Texas,* 123 S. Ct., at 2490 (Scalia, J., dissenting) (citation and footnote omitted).

about the fairness of allocating the costs of society in accordance with ability to pay? What other meaning can be given to legislation about education and trade unions, betting, public housing, and a host of other problems?" [12]

II. SOME PARTICULAR ISSUES FOR CONGRESS: BANKRUPTCY, IMMIGRATION, INCOME TAX, VETERANS BENEFITS

The words "marriage" and "spouse" appear several thousand times in the United States Code and the Code of Federal Regulations. If those words are redefined, the tremors will be felt throughout Federal law. This section lists four cases that illustrate how a redefinition of marriage would affect Federal law. Two of these cases are in areas that are within the jurisdiction of this Committee.

I do not argue that Federal law should not be changed. If Congress in its wisdom decides a change is required in bankruptcy law or immigration law then the experts on this Committee should begin that process. Those changes can be made, though, without abolishing marriage in the Federal Code, and without having a court issue a decree that may have far-reaching and injurious consequences in such areas as bankruptcy, immigration, income tax, and veterans' affairs:

One. BANKRUPTCY. In *In re Allen,* 186 Bankruptcy Reporter 769, 1995 Bankr. LEXIS 1446 (Bankruptcy Ct. No. Dist. Georgia, 1995), a same-sex couple sought to file a joint bankruptcy petition as debtor and spouse. This was a pre-DOMA case, and although the bankruptcy code used the word "spouse" it did not define it. However, the court held that Congress intended the word to be used according to its common and approved usage, meaning namely a husband or a wife.[13]

This bankruptcy case, *In re Allen,* was about a same-sex couple, but the court discussed several other kinds of family relationships. These are discussed at the end of this section.

Two. IMMIGRATION. In *Adams* v. *Howerton,* 673 F.2d 1036 (9th Cir. 1982), *cert. denied,* 458 U.S. 1111 (1982), a male American citizen brought suit challenging the decision of the Board of Immigration Appeals that his same-sex partner (whom he called a "spouse") was not an "immediate relative" under the immigration act. The partner was not, of course, an American citizen. The district court upheld the decision of the board, 486 F. Supp. 1119 (C.D. Cal.1980.), and the Ninth Circuit affirmed.[14]

Three. INCOME TAX. In *Mueller* v. *Commission of Internal Revenue,* 39 Fed. Appx. 437 (7th Circ. 2002), *cert. denied,* 123 S. Ct. 477 (2002), taxpayer Mueller filed a tax return jointly with his same-sex partner, attempting to be taxed as a married couple filing jointly. Mueller argued that "homosexuals are being taxed in violation of the Equal Protection Clause," and he asked that the Defense of Marriage Act be declared unconstitutional. Id at 437–38. The court rejected his claims. The court did not reach the question of DOMA's constitutionality.

Four. VETERANS BENEFITS. In *McConnell* v. *Nooner,* 547 F.2d 54 (8th Circ. 1976), a veterans who was receiving veterans education assistance attempted to obtain additional benefits for his same-sex partner by claiming the partner as his dependent spouse. The Veterans Administration turned him down.

After making various administrative appeals the two men sued in Federal court. Their entitlement to additional benefits turned on whether they were married. The Federal court held that Minnesota law was dispositive, and since "marriages" between persons of the same sex were prohibited in Minnesota (this is the case dis-

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[12] *Eugene* v. *Rostow,* THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 79 (Yale Univ. Press, 1962).

[13] The petitioners asked the court to approve the following definition of spouse: "[T]wo persons who cohabitate, have a positive mutual agreement that is permanent and exclusive of all other relationships, share their income, expenses and debts, and have a relationship that they deem to be a spousal relationship." 186 *B.R.,* at 772. The court declined to consider the constitutionality of the couple's home State's definition of marriage.

[14] ". . . We hold that Congress's decision to confer spouse status under section 201(b) [of the Immigration and Nationality Act] only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements. . . .

"Congress manifested its concern for family integrity when it passed laws facilitating the immigration of the spouse of some valid heterosexual marriages. This distinction is one of many drawn by Congress pursuant to its determination to provide some—but not all—close relationships with relief from immigration restrictions that might otherwise hinder reunification in this country. In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores. In any event, having found that Congress rationally intended to deny preferential status to the spouse of such marriage, we need not further 'probe and test the justifications for the legislative decision.'" 673 F.2d, at 1042–43.

cussed in Appendix B), the second man was not a "spouse" of the veteran. Benefits were denied.

For as long as there have been veterans' benefits, no Congress has ever anticipated (or budgeted for) same-sex spousal benefits, but Congress can change the law. What Congress must not do is concede its rightful constitutional authority to others.

Perhaps it is time for Congress to direct the GAO to do some cost estimates; however, the future of marriage in American law cannot be reduced to bean-counting.

I do not know of any expertise at GAO for weighing and judging moral claims.

A cost estimate would be based on assumptions about the definition of marriage. However, once the definition of marriage begins to expand beyond one man and one woman, it is difficult (and perhaps impossible) to circumscribe a new definition. This point takes me back to the bankruptcy case, *In re Allen.*

In that case, the bankruptcy judge was asked to approve a petition in which one man sought to claim another man as his lawful spouse. The two were not married, so the judge looked for analogous cases. This is how lawyers and judges reason. The judge found, and cited in his opinion (186 *B.R.,* at 772) three analogous situations: There was the mother-daughter case, *In re Lam;* the mother, father, and son case, *In re Jackson;* and the heterosexual cohabitation case, *In re Malone.*

Many supporters of same-sex marriage say that if same-sex marriages become lawful, judges and legislators still will be able to draw statutory and constitutional lines between the married and the unmarried. Personally, I am skeptical. Once the traditional definition of marriage falls because it is contrary to a generalized principle of equality or an amorphous principle of privacy, how can others with similar claims be refused? To return to the bankruptcy example,[15] whether or not a mother and daughter can marry, they certainly can claim close ties of love and devotion and the sharing of resources. The same with a cohabiting couple. As for combinations of more than two, they soon will be asking how the law can presume to limit their love and companionship to the narrow-minded male-female dualities of an outmoded past.[16]

I urge Congress to protect its prerogatives and precedents, including the Defense of Marriage Act. Don't let others tinker with the fundamental institution of marriage.

I thank the Committee for this opportunity to testify.

APPENDIX A:
THE MASSACHUSETTS COURT WAS RADICAL IN *GOODRIDGE*

For more than 200 years, *marriage* in Massachusetts meant the lawful union of a man and a woman as husband and wife, but the Supreme Judicial Court of that State decreed in the *Goodridge* cases that same-sex couples are entitled to be married.

The Massachusetts decisions are wholly contrary to the entire experience of American law. There is not one case, statute, or vote that supports the *Goodridge* decisions. Even the same-sex "marriage" cases from Hawaii, Alaska, and Vermont are contrary to the Massachusetts decree.

This Appendix briefly surveys cases from other States. Of course, Massachusetts is not obliged to follow the lead of those other decision-makers, but the people of the Bay State and all Americans are entitled to know where the Massachusetts court stands in relation to all other American law: It stands apart and alone.

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[15] One professor of law has said, "As the choice to marry is a non-economic right . . . and bankruptcy laws are designed to regulate a debtor's economic rights, bankruptcy laws should not be used to either promote or reject this private, non-economic choice. While bankruptcy laws are often used to respond to public policy issues, to facilitate debt repayment, and to protect debtors' rights to a fresh start, Congress should grant marital benefits to any type of unit that functions economically like a married couple." Dickerson, "Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status," 67 *Fordham L. Rev.* 69, 112 (1998).

[16] Three consenting adults who desire to intermarry with each other already have filed suit against Utah's polygamy laws. The decision in *Lawrence* v. *Texas* is the impetus, and so the plaintiffs alleged violations of their constitutional rights to privacy, association, and intimate expression, and they also alleged that the laws impinge on their practice of religion. *Bronson* v. *Swensen,* No. 02:04–CV–0021 (D. Utah 2004); "Lawyers Square Off Over Polygamy Case," *The National Law Journal,* Jan. 26, 2004, p. 4. The plaintiffs may eventually lose, but no one should make the mistake of thinking the case is frivolous. Frightening yes, but not frivolous in the aftermath of *Lawrence.*

All of the older cases are against the result in *Goodridge.*[17]

All the newer cases are against *Goodridge*, too.[18]

Nor is there any support for the Massachusetts court in the cases from Hawaii, Alaska, and Vermont that have found their way into the public consciousness about same-sex "marriage."[19] The chart on the next page helps show how the rationale and result in *Goodridge* can find no support in even the most favorable of prior cases:

[17] E.g., *Jones* v. *Hallahan,* 501 S.W.2d 588 (Ky. Ct. App., 1973). *Singer* v. *Hara,* 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *review denied,* 84 Wash.2d 1008 (1974). *Adams* v. *Howerton,* 673 F.2d 1036 (9th Cir. 1982), *cert. denied,* 458 U.S. 1111 (1982). *DeSanto* v. *Barnsley,* 476 A.2d 952, 955–56 (Pa. Super. 1984). *Dean* v. *District of Columbia,* 653 A.2d 307 (D.C. 1995).

[18] *Morrison* v. *Sadler,* Civil Div. No. 49D13–0211–PL–001946, (Marion Co., Indiana, Super. Ct., May 7, 2003) (on appeal). *Standhardt* v. *Superior Court,* 77 P.3d 451, 463–64 (Ariz. Ct. App, Oct. 8, 2003) (on appeal). *Lewis* v. *Harris,* docket no. MER–L–15–03, (Super. Ct., Mercer Co., New Jersey, decided Nov. 5, 2003) (on appeal). See also, *Citizens for Equal Protection* v. *Attorney General,*—F. Supp. -, 2003 WL 22571708 (D. Neb., Nov. 10, 2003) (on appeal) (definition of marriage was unchallenged by plaintiffs).

[19] *Baehr* v. *Lewin,* 583, 852 P.2d 44, 68 (Haw. 1993) (plurality op.) ("reversed" by Haw. Const., Art. I, Sec. 23 (added 1998)); *Brause* v. *Bureau of Vital Statistics,* No. 3AN–95–6562 CI, 1998 WL 88743 (Alaska Super. Ct., 1998) ("reversed" by Alaska Const., Art. I, Sec. 25 (effective 1999)); and *Baker* v. *State,* 744 A.2d 864 (Vt. 1999) (resulting in a far-ranging civil unions law passed by the Legislature, Vt. Stat. Ann. Title 15, δ§ 1201–1207 (Supp. 2001)).

GOODRIDGE COMPARED TO DECISIONS IN HAWAII, ALASKA, AND VERMONT
(AND THESE ARE THE MOST FAVORABLE CASES)

The State Court's Opinion . . .	**HI 1993**	**AK 1998**	**VT 1999**	**MA-*Goodridge* 2003/2004**
Mandated Same-Sex Marriage?	No	No	No	Yes
Excluded State Legislature?	No	No	No	Yes
Was Based on General Principles of "Equal Protection"?	No	No	No	Yes
Was Based on General Principles of "Due Process" (Liberty & Privacy)?	No	No	No	Yes
Rejected Every Rationale for Distinguishing Marriage and Keeping It Unique?	No	No	No	Yes
Was Based on Particular, Perhaps Unique, Provision of State Constitution?	Yes (ERA, added 1972 & 1978)	Yes (Express Privacy Provision, added 1972)	Yes ("Common Benefits Clause" from 18th Century)	No (General "Equal Protection" and "Due Process-Liberty-Privacy" Principles)
Provides Support for *Goodridge*'s Rationale?	NO	NO	NO	---
Provides Support for *Goodridge*'s Result?	NO	NO	NO	---

In sum, the *Goodridge* decisions are radical and extreme. The Massachusetts court stands apart and alone.

APPENDIX B:
ONE REASON THE MASSACHUSETTS COURT WAS WRONG IN *GOODRIDGE*

A reader of the *Goodridge* opinions would *not* know that the United States Supreme Court *disagrees* with the rationale of the Massachusetts court. Indeed, the state court treated the key case with inexcusable indifference.

The majority opinion did cite the key case in footnote 3 of *Goodridge I,* and noted that the U.S. Supreme Court had "dismissed" the appeal of the case; however, the *Goodridge* opinion failed to say *why* the appeal was dismissed and that such a dismissal *constitutes a decision on the merits by the U.S. Supreme Court.*

A casual look at the key case shows a Minnesota decision, *Baker* v. *Nelson,* 191 N.W.2d 185 (Minn. 1971), but that decision was appealed to the U.S. Supreme Court where the "appeal was dismissed for lack of a substantial federal question," 409 U.S. 810 (1972) (mem.). These few words cannot be brushed aside for they denote

that the nation's highest court *rendered a decision on the merits* under the U.S. Constitution. *Hicks* v. *Miranda,*422 U.S. 332, 343–45 (1975).[20]

In *Baker,* two males sought a marriage license from a county clerk who refused to issue it. They sued, alleging violations of their rights under the First Amendment, Eighth Amendment, Ninth Amendment, and Fourteenth Amendment (both due process and equal protection claims) to the U.S. Constitution. The Minnesota Supreme Court rejected all of their arguments, saying in part:

> "These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory. We are not independently persuaded by these contentions and do not find support for them in any decisions of the United States Supreme Court.
>
> "The institution of marriage as a union of a man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942), . . . stated in part: 'Marriage and procreation are fundamental to the very existence and survival of the race.' This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. *The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation."* 191 N.W.2d at 186 (emphasis added).
>
> "The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination. Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* [v. *Connecticut*] rationale, the classification is no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.[21]
>
> "*Loving* v. *Virginia,* 388 U.S. 1 (1967), upon which petitioners additionally rely, does not militate against this conclusion. Virginia's antimiscegenation statute, prohibiting interracial marriages, was invalidated solely on the grounds of its patent racial discrimination. . . ." Id. at 187.

It was the decision just quoted that the U. S. Supreme Court refused to review on direct appeal—and, as explained above, that refusal constitutes *a decision on the merits.*

A few year after *Baker* v. *Nelson,* the same two plaintiffs went to court again (this time in an attempt to get "spousal benefits" under a law providing educational benefits to veterans), but the U. S. Court of Appeals for the Eighth Circuit cited *Baker* v. *Nelson* and *Hicks* v. *Miranda* and held, "The appellants have had their day in court on the issue of their right to marry under Minnesota law *and under the United States Constitution.* They, therefore, are collaterally estopped from relitigating these issues once more." *McConnell* v. *Nooner,*547 F.2d 54, 56 (8th Cir. 1976) (emphasis added) (the "veterans case," *supra*).

The rule of *Hicks* v. *Miranda* has some twists and turns.[22] Nevertheless, it is still a good rule. The Supreme Court's *decision on the merits in Baker* v. *Nelson* may

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[20] *Hicks* v. *Miranda* did not announce a new rule, but restated an old one. In *Hicks,* the Court cited a 1959 opinion of Justice Brennan ("votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case"); the 1969 edition of the leading treatise on Supreme Court practice ("The Court is, however, deciding a case on the merits when it dismisses for want of a substantial question"); and the 1970 edition of perhaps the leading treatise on procedure in federal courts ("Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits"). 422 U.S., at 344.

[21] At this point in its opinion, the Minnesota court inserted a footnote that cited two U.S. Supreme Court cases where that court said, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." 191 N.W.2d, at 187 n. 4.

[22] See, *Metromedia, Inc.* v. *City of San Diego,* 101 S. Ct. 2882, 2888 (1981), and *Washington* v. *Confederated Band & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 478 n. 20 (1979). See especially, *Jurisdictional Statement, Baker* v. *Nelson,* U.S. S. Ct. no. 71–1027 at 3. See also, Lim, "Determining the Reach and Content of Summary Decisions," 8 *Review of Litigation* 165 (1989), and Comment, "The Precedential Effect of Summary Affirmances and Dismissals for

(or may not) be modified in light of more recent developments, but that is no excuse for ignoring the precedent or failing to give it the weight it is due.

Mr. CHABOT. At this point, we are at the time of the hearing where the Members of the panel here will also have 5 minutes to ask questions of the witnesses, and I will begin with myself. I yield myself 5 minutes.

Mr. Kurtz, let me begin with you if I can. Dr. Joseph stated in her written testimony that, "Congress must deal with the reality of American families, all American families." My question is, if the law treats all families, including gay couples and anything under that definition, alike, are we likely to get here in America what is happening in the countries that you have described, namely a weakening of a marriage altogether, and if so, why?

Mr. KURTZ. Well, yes, Mr. Chairman, I think that is exactly what would happen, and the reason is something like this. In the Netherlands, in Europe, cohabiting couples are saying, hey, we are families too. We may not believe in the institution of marriage, we consider that oppressive or we consider that an outdated religious mode of acting, but we are a loving family with children, and when our children are in the hospital, we want to be able to control them and have decisions to make about their medical health. So why shouldn't the Government give us a way to have rights as a cohabiting couple?

And then we had an interesting case up in Canada recently where we had a same-sex lesbian couple and male semen donor asked to be called three parents simultaneously. There has been a case like that in the United States, *LaChapelle* v. *Mitten*, where you had three people simultaneously ask to be parents. The judge in Canada held back on that for fear that if he allowed that, it would open the door to polyamorous relationships, and there are already law professors saying that *LaChapelle* v. *Mitten* sets a precedent for multi-partner marriages. So this is the problem.

Mr. CHABOT. Thank you. Mr. Oliphant, let me shift to you at this point. Can you elaborate on the threat to religious liberty posed by court-imposed same-sex marriage? What pressures will be brought to bear to prohibit religious organizations from practicing their religion in accordance with sincerely held religious beliefs were same-sex marriages made the law of the land?

Mr. OLIPHANT. Well, let me just mention two things. Firstly, picture a sex education class and the rules for a sex education class. Ask yourself what the rules in a sex education class must now be in the Commonwealth of Massachusetts. So Johnny or Jill go into the class. They come from a family that has strong religious beliefs about marriage, and in that class, there can no longer be a preference stated by the State for traditional marriage.

Now, let me just mention one other thing. The *Goodridge* court was convinced that the definition of marriage, the discrimination inherent in the traditional definition of marriage was very much like racism. There were several analogies to the miscegenation cases, not only *Loving* but the case out of California. And to the extent that we move to a belief that treating persons on the basis

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Want of a Substantial Federal Question by the Supreme Court after *Hicks* v. *Miranda* and *Mandel* v. *Bradley*," 64 *Va. L. Rev.* 117 (1978).

of sexual orientation is comparable to treating people on the basis of race, then churches in this country are going to come under enormous pressure, churches that do not accept active homosexuals as members or as priests or that have a doctrine, and it will be comparable to the pressure that came to bear, under quite different circumstances, in my opinion, on churches because of their racial attitudes.

Mr. CHABOT. Thank you. I have got two more questions and about 1 minute to go, so I am going to ask the two questions, one of Professor Duncan and one of Dr. Joseph.

Professor Duncan, do you believe that recognition of civil unions or same-sex marriages could lead to such results as in Canada, where individuals may be punished for merely stating their opposition to homosexuality?

Dr. Joseph, Senator Hillary Clinton has stated that, "The nuclear family consisting of an adult mother and father and the children to whom they are biologically related has proven the most durable and effective means of meeting children's needs over time." Do you disagree or agree with Senator Hillary Clinton's statement on that?

Professor?

Mr. DUNCAN. As far as Canada's experience is concerned, I do think there is grounds for concern about where the forced recognition of civil unions or same-sex marriage would lead in terms of—I know in Canada, for example, there is now proposed a "Bible as hate speech" bill in Parliament. I think there certainly are very significant ramifications for religious freedom down the road here.

Mr. CHABOT. Thank you. And Dr. Joseph?

Dr. JOSEPH. Sir, your question is whether or not I believe the statement of Senator Clinton is correct. I think what I would say is that it is quite clear that the presence of two loving parents appears to be probably the most advantageous for children. I don't know of any studies that would specifically support that statement. Perhaps Senator Clinton was aware of something that I was not. She certainly reflects the popular views of many in this country, as witness the testimony at this Committee, though.

Mr. CHABOT. Thank you very much.

The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you. First of all, let me comment on Mr. Oliphant. Churches in this country have their religious liberty to say, to discriminate on a racial or any other basis that they want. No one questions their ability to do that as long as they are not using Federal funds. So if there exists a church that says, we don't want black ministers, they have the ability to do that and no one questions that right. And so to say that the recognition of same-sex marriage would lead to pressure on churches the way there has been pressure on racial, maybe social pressure, maybe religious, but not legal.

Mr. Kurtz—I am not asking a question, sir. I only have 5 minutes. I am simply correcting what you said.

Mr. Kurtz, you stated, based on experience in Scandinavia, that the institution of marriage is threatened there, that all these terrible things have happened. In 1965, Daniel Patrick Moynihan wrote a book called the—I forget the exact title, but basically the

Negro Family, about social pathologies in the black community and how increasing numbers of kids are born out of wedlock, and he was called a racist for doing that. It turned out it was describing a real social problem.

And I remember back in about 1990 reading that the statistics in the white community were by then worse than they had been in the black community when he described this. The same things were happening. All the things you are citing about Scandinavia were, in fact, happening in the United States as far back in some communities as 1960, certainly by 1990, all without same-sex marriage or any hint of it.

It struck me—I read your paper, I read an op-ed piece you did somewhere, I forget where, you show no causality whatever. You simply assume it. Can you tell me what evidence we have, other than the logical fallacy of these two things are happening at the same time. Therefore, they must be cause. They must be cause and effect.

Mr. KURTZ. Right.

Mr. NADLER. I remember when I was in eighth grade, I read a thing in Scholastic magazine about logical fallacies. Tomato juice is poison. How do I know? I took the goldfish and put them in the tomato juice and they all drowned.

Can you tell me any evidence you have for causality here that same-sex marriage has anything to do with what you are talking about, that it isn't simply other things, for instance, no-fault divorce and the fact that we no longer incarcerate adulterers and so forth, or the fact that women today have their own careers and aren't totally dependent on men for their livelihood, which is probably one of the causal factors here.

Mr. KURTZ. Right. Well, yes, Congressman Nadler, particularly the Netherlands situation, I think, illustrates this, because in the Netherlands, you had all of these factors. You had divorce. You had liberalized regimes of birth control and abortion. You haven't had any market change in the 1990's in the number of women in the workforce in full-time jobs. There has been a slight raise of women in the workforce in part-time jobs.

But I can tell you that I have been in touch with the demographers in the Netherlands, and using the traditional explanations of the kind that you just ticked off, and looking at the laws that were passed in the 1990's and the changes in the welfare regime, they cannot explain this doubling of the out-of-wedlock birth rate, and——

Mr. NADLER. Well, wait, wait. Even if that is true——

Mr. KURTZ. Yes?

Mr. NADLER.—we cannot explain the fact that the universe isn't expanding as fast as it ought to on the basis of what we observe, it doesn't mean that a particular other explanation is the case.

Mr. KURTZ. Right, but at that point, you have to make a case, and this is what social scientists do. It is true that correlation does not prove causation. It is equally true that if you challenge someone's explanation, you have got to come up with a better alternative explanation. People usually leave that part out. And what I am doing is making a systematic argument that when you look—since the demographers and sociologists agree that it was cultural

factors that was keeping marriage strong in the Netherlands, if you look at what has been happening in the last decade culturally in the Netherlands, it's all about gay marriage. and so there is——

Mr. NADLER. Wait, wait, wait. When you say it's all about gay marriage——

Mr. KURTZ. Yes.

Mr. NADLER.—they've repealed their laws allowing—they've repealed the laws? Women don't work anymore in the Netherlands?

Mr. KURTZ. No, no, but those factors have not changed in the period where this upping, this doubling of the out-of-wedlock births——

Mr. NADLER. No, but the——

Mr. KURTZ. All the other factors——

Mr. NADLER. The cumulative effects continue to happen.

Mr. KURTZ. You only change to the mix when everyone agreed to begin with that it was cultural factors that was keeping the out-of-wedlock birth rate low, because everything else should have——

Mr. NADLER. Dr. Joseph, can you comment on this?

Dr. JOSEPH. I presented these data to a colleague, because I had them in advance from the Netherlands. I'm not an expert nor am I a cultural anthropologist. He pointed out that there is increasing marriage among retired couples who are also unable to have children. Could one plausibly imagine that these non-procreative couples and their marriages are leading to the dilution of marriage as we know it? It's an implausible explanation. My point is simply that if it another factor that is co-occurring with aging population. It correlates.

Mr. NADLER. Thank you. Let me ask Mr. Kurtz one more question. Why should we not, in view of these various social pathologies, make adultery a Federal felony, prohibit divorce, and do these other things that the society has decided not to do in the last 30 or 40 years, since they are clearly—and, by the way, prohibit women from working and make them dependent on men again for their livelihood? That would certainly get the marriage rate up.

Mr. KURTZ. Right. I think that you are correct, Congressman Nadler, to point out that there is a trade-off. There is a trade-off between a lot of the changes we have had since the 1960's and the strength of marriage. If society wants to go ahead and legalize same-sex marriage, knowing that we are facing another such trade-off, well, then that is up to society. What I am trying to do is to say that there is a trade-off here, that this isn't strictly an analogy to civil rights, where skin color has nothing to do with marriage. This is something where the fate of marriage is really at stake. Now, with eyes wide open, if we want to go ahead and strike another blow against marriage, then that's up to——

Mr. NADLER. Let me ask one more.

Mr. CHABOT. The gentleman's time has expired, but by unanimous consent, he is granted another minute.

Mr. NADLER. I certainly don't agree or think that you or anybody else has shown any causation here, but let me ask one question. You might make the case that the lack of, certainly they try to make the case—I don't think it's valid there, but that was the rhetoric in the bankruptcy law—the lack of social stigma has caused

more bankruptcy applications. You might make the case that the lack of stigma of divorce has caused more divorces. The lack of financial catastrophe from divorce has caused more divorces and so forth and so on, and there is probably some validity to those things.

What you haven't done, aside from showing causation, is show how—is show a methodology of causation. If the increasing lack of marriage and of out-of-wedlock children is somehow connected to the recognition that Henry and Steve can get married, and therefore—how does that—given a society which allows Ellen and Henry to get married at the age of 80——

Mr. KURTZ. Right.

Mr. NADLER.—how does that cause anything, any problem?

Mr. KURTZ. I'd like to answer that——

Mr. CHABOT. The gentleman's time has expired, but you can answer the question.

Mr. KURTZ. Okay. The answer is that during this whole decade, there was an ongoing debate in the Netherlands, just like we're having now, about what marriage really meant. One side was saying, marriage is really fundamentally tied up with parenthood, not in every case, there are exceptional cases, but that's the core meaning. And the other side was saying, no, that's not what marriage is at all. Marriage is about the companionship of two adults. And one side one, and that huge cultural event of the debate over that decade created a new meaning for marriage, and that is what is linked to the idea of people not getting married even when they are parents.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I think initially I would respond to Mr. Nadler's remarks, too, with regard to why does this matter, and I would say this. Look to the generation that follows us, those that will be born 20 years from now who will be born into a society of moral relativism where it'll be taught in the schools, if we go forward with this policy, that marriage is an alternative. So is civil union. So is homosexual marriage. So is bigamy. So is polygamy. So are all the group marriages and all the things that have come out here.

You lay that out on the menu of life for somebody that's going to be born in the year 2025, educated in a multi-cultural, politically correct environment funded by our taxpayers, and tell those children there is no values difference here. You choose from this menu of life. You are going to see all kinds of behaviors out here that this society hasn't seen and Europe hasn't seen. That is my answer to that.

But I also have recognized that Mr. Oliphant had a remark that he would like to respond to as regard to Mr. Nadler's remarks, and I will say religious discrimination with regard to homosexuality.

Mr. OLIPHANT. Mr. Nadler is right as long as you don't stray very far from the altar. If you stay within a couple of feet of the altar, yes, the church has a high protection. But at least since the *Bob Jones University* case and the *Georgetown University* case, we know that churches who run colleges, university, day care centers, newspapers, lots of other things, come under enormous legal pressure to end discrimination.

Now, the question is, what kind of discrimination is it? And if we are going to treat sexual orientation the way we are going to treat race, then the results in sexual orientation cases against universities run by schools are going to be the same as in *Bob Jones* and in *Georgetown*.

Mr. KING. Thank you, Mr. Oliphant.

I direct my question then to Dr. Joseph, and it would be this. Dr. Joseph, in your opinion, should homosexual rights be a civil right, and if so, under what grounds and how would you then identify those people that would qualify?

Dr. JOSEPH. Mr. King, I am going to have to disappoint you. I am not an attorney and I don't feel competent to answer that question. I would be happy to talk about the well-being of children and address to my area of expertise.

Mr. KING. I ask you then maybe to comment on my response to that question that I pose, and that is that we do have protection for different classifications of people in title VII of the Civil Rights Act and those characteristics are, outside of religion and creed, all immutable characteristics, characteristics that can be independently identified and verified by—and not characteristics that can only be identified by behavior, in fact, self-alleged behavior.

So if we go down that path and we grant a civil right to self-alleged behavior, then would you, in your understanding of human nature, be able to respond to the question of where would we draw the line?

Dr. JOSEPH. Well, first of all, I am very glad I didn't try to answer your question, given your response, Mr. King. Let me bring you back to the world that I work in. As I understand it, you were talking about protections accorded to everyone, and let me make absolutely clear that for the gay and lesbian families that I know about, these protections are not so clear-cut. I don't draw some hierarchy of disadvantage and prejudice and discrimination in civil rights. I will talk about one particular group, not contrasting them with anyone else.

Let me provide you a specific example. In my neighborhood, a woman was killed at the Pentagon on 9/11. Her partner had great difficulty obtaining the benefits that accrued to a Government employee. I am not going to do a legal analysis of that. Let me tell you that I am, in another capacity, helping to evaluate the responses of families who were afflicted by 9/11. Some of those, not surprisingly, are gay and lesbian families. They, too, have had some experiences that suggest that perhaps the protections are not as uniform as I understand as a lay person your comments make.

Mr. KING. Thank you, Dr. Joseph, and I would point out with regard to that, too, that we are here obligated to drive public policy with our heads as well as our hearts. I would point out that we provide a marriage license, and a license is a permit to do something which is otherwise not permitted or otherwise illegal. We do that to discriminate, yes, to discriminate in favor of marriage because all of human history supports the concept of a man and a woman in a home raising children, passing along our work ethic, our cultural values, our religious values and procreating in that fashion. Six thousand or more years of human history support that.

So we are going to have discrimination and Government policy should promote the very best things to continue on this culture and this civilization. The fact that that license is not available to other arrangements for those reasons doesn't discriminate except it discriminates in favor of the most favorable relationship we have, but not against those relationships that we disfavor.

Thank you, Mr. Chairman. I see my time is up.

Mr. CHABOT. Thank you. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, the title of this hearing is "Legal Threats to Traditional Marriage: Implications for Public Policy." I would like the witnesses to remind me what threat there is to traditional marriage, those who are now in or want to get into the traditional marriage. How does anything that's pending affect the present traditional marriage, or does it?

Mr. KURTZ. I'll speak to that Congressman Scott. As I see it, if same-sex couples marry, it will transform the meaning of marriage. It will help——

Mr. SCOTT. How does it affect a marriage? If someone is married today——

Mr. KURTZ. Yes.

Mr. SCOTT.—how would they affect it if someone else formed some legal entity——

Mr. KURTZ. What is really happening in Europe is that it's not affecting people who are already married, but it's stopping people after that from getting married. By changing the meaning of marriage——

Mr. SCOTT. I'm sorry. The people will not get married because gay people can get married?

Mr. KURTZ. Indeed——

Mr. SCOTT. Is that your testimony?

Mr. KURTZ. As marriage and parenthood become separate, the marriage—the rate of parents who get married decreases. That is what we are literally seeing in Europe.

Mr. SCOTT. So your testimony is that people will not get married when they see gay people get married?

Mr. KURTZ. My testimony is that the further away the idea of marriage is separated from parenthood, the less likely it is for parents to get married——

Mr. SCOTT. The marriage has nothing to do—legal marriage has nothing to do with parenthood and——

Mr. KURTZ. Well, I believe that it does. I believe that's what the man-woman aspect of marriage——

Mr. SCOTT. And therefore, it is your testimony that men and women will be less likely to marry because gays can marry?

Mr. KURTZ. Well, look at the Netherlands. This is what's happening. These are unmarried parents that are——

Mr. SCOTT. You have this chart. Didn't the out-of-wedlock marriage rate go up in the United States since the 1950's?

Mr. KURTZ. Sure. There are a lot of factors that can influence that rate. What we've got in the Netherlands is a case where none of those other factors are present. You can peel them all away. The big change——

Mr. SCOTT. Okay. Well, let me ask anybody else. Does anybody else think that a present traditional marriage will be threatened if gays get married? Mr. Oliphant?

Dr. JOSEPH. I just want to make clear that what we are talking about are people who want, who have worked hard to reconstitute as much as they can of the rights of legal marriage as they are raising children and who want——

Mr. SCOTT. No, no. We are not talking about—we're talking about "traditional marriage" now.

Dr. JOSEPH. Right. And what I'm saying——

Mr. SCOTT. How is that threatened by someone else——

Dr. JOSEPH. I'm suggesting that it is not.

Mr. SCOTT. It doesn't have any effect on someone getting married under the traditional laws?

Dr. JOSEPH. I'm suggesting that I see no way in which that association is true.

Mr. SCOTT. Okay. Does anybody else think that those in a traditional marriage will be threatened by any constitutional amendment that's pending? Well, other than Mr. Kurtz.

Mr. CHABOT. Could the gentleman repeat his statement? I think you misspoke there.

Mr. SCOTT. Well, a constitutional amendment—if gays can get married, how does that threaten a traditional marriage?

Mr. OLIPHANT. I think Mr. Kurtz pointed out that it threatens the formation of traditional marriages and I agree with him.

Mr. SCOTT. That men and women will be less likely to get married if two men can get married?

Mr. OLIPHANT. That's right.

Mr. SCOTT. That they will be threatened?

Mr. OLIPHANT. That's right. [Laughter.]

Mr. SCOTT. I'm sorry. Well——

Mr. OLIPHANT. Would you like me to respond to that?

Mr. SCOTT. To my laugh or to the question?

Mr. OLIPHANT. No, to your reaction.

Mr. SCOTT. Yes, to my reaction. Yes, sir.

Mr. OLIPHANT. The reaction is the Defense of Marriage Act. Now, you and people behind me think that it's funny, my conclusion. The House of Representatives does not. They think that, gathering from the DOMA vote, that setting up a legal structure for marriage and maintaining it and keeping its integrity is important to the future of young people in this country.

Mr. SCOTT. The constitutional amendment prohibits the legal incidence thereof. Would that invalidate California's domestic partnership law, if the Musgrave constitutional amendment were to pass?

Mr. OLIPHANT. Not in my opinion.

Mr. SCOTT. Does anybody think that the domestic partnership—well, what does incidence of marriage, what does that mean in the Musgrave amendment?

Mr. OLIPHANT. Well, I'm not sure I'm the best person to answer that. I think you had a hearing on that, and, of course, you didn't——

Mr. SCOTT. Neither the Constitution nor the——

Mr. CHABOT. The previous hearing that we had was on the Defense of Marriage Act. We have got a series of five hearings. The next one is on the Musgrave amendment, constitutional amendment.

Mr. SCOTT. And she will be here, I assume?

Mr. CHABOT. That's correct, yes. The gentleman's time has expired.

The gentleman from Alabama is recognized for 5 minutes.

Mr. BACHUS. Thank you. Let me ask this panel, and the panel may not have treated this subject, but I've seen some information from the GAO and the CBO which say that one of the main determinants of Federal benefits—in fact, 1,138 Federal statutory provisions under the U.S. Code benefits or are dependent upon a marriage status, and there are estimates that recognition of same-sex marriages would increase Federal benefits by several billion dollars. Are any of you all aware of those provisions or the impact of those, apparently disability benefits, food stamps, welfare, employment benefits, Medicare, Medicaid?

And even Barney Frank asked the GAO to score, or the Congressional Research Service to score his bill recognizing same-sex couples for benefits just in a restricted area, and there are some estimates of several billion dollars for the cost of that bill. Would any of you like to comment on that, and could that create an impetus for people simply to go out and form a marriage for benefits? Mr. Kurtz?

Mr. KURTZ. Well, Congressman Bachus, let me answer this way. I do believe that the many Federal benefits available to married couples does provide a lever——

Mr. CHABOT. Ignore all the noise. We have got a vote on the floor, but you may continue.

Mr. KURTZ. It does provide a lever for people to claim that marriage as currently constituted is discriminatory. It is the benefits that lead to the claim that it is discriminatory. But if you think about it, who is not married? Same-sex couples are not married. Sexual groups are not married. And single people are not married.

And what we see now is that all of these groups are pointing to the benefits and saying, it is discriminatory for us not to have those benefits. There was an op-ed in the New York Times shortly after the President's State of the Union Address saying, you know, those couples in Massachusetts who said that they were being discriminated against by not receiving benefits, they are absolutely right. But single people are discriminated against in exactly the same way.

So this benefit situation, it isn't just a question of the cost. It's going to provide a lever. Once we accept the principle that it's discriminatory to give benefits to one sort of family but not others, we're going to have to define marriage out of existence because there will be no stopping point.

Dr. JOSEPH. Thank you, Representative. I do not want to sort of further the impression that I have a good heart and no head. However, I want to make very clear that it is exactly those benefits, not the cost of the benefits, that I am concerned about. It is the absence of those benefits that I feel adversely affects children, like it or not.

I understand Members of this Committee have concerns about the future. There have been many fantasies stretched out here. But right now, we have one-quarter of all these gay and lesbian families with children and they are affected by the absence of the benefits. Frankly, I do not know the costs and it is of less concern to me than the children.

Mr. BACHUS. Well, now, let me ask you this. If we fund Medicare and Medicaid, we started paying benefits to all these couples, whether they are 50 or 60 years old, wouldn't that drain billions of dollars from Medicare and Medicaid and have an adverse effect on children?

Dr. JOSEPH. Sir, there's many——

Mr. BACHUS. Children are already eligible for——

Dr. JOSEPH. Children are not accorded the legal rights of marriage by their parents if they're in gay and lesbian relationships.

Mr. BACHUS. No. What I'm saying is that children today already receive Medicare and Medicaid benefits. We're talking about extending these benefits, and I don't see how giving food stamps to elderly gay couples, giving disability benefits to the widow of a same-sex marriage, how that helps children. You are talking about billions of dollars worth of new benefits, Social Security benefits, not going to children but going to spouses of same-sex couples.

Dr. JOSEPH. So let's talk about that.

Mr. BACHUS. Seventeen percent of Social Security payments today go to widows. Would you create more widows?

Dr. JOSEPH. I have a response, but perhaps—would you like me to try and respond?

Mr. BACHUS. Sure.

Dr. JOSEPH. Let's take the case, for example, of survivor benefits. If the child—the children—so there's a couple, lesbian or gays. They have children. They've been raising them together. If the individual who dies is not married, if the children live in States where they have not been able to be legally adopted by that individual, those children, in spite of having been in that family and raised by those two people, have no survivor benefits for the person who has died.

Mr. CHABOT. The gentleman's time has expired. I think Mr. Oliphant has indicated that he would like to respond to the question, as well.

Mr. OLIPHANT. I just want to say, Mr. Bachus, that almost certainly, the number of children in single-parent households in the United States is many times greater than the number in same-sex households. So Dr. Joseph wants to expand it to the first group of children. The second group of children have exactly the same problem and it's up to Congress to figure out how to get the benefits to the children without having to redefine marriage.

Mr. CHABOT. The gentleman's time has expired.

The bells that you heard before indicates we have a vote on the floor. We actually have two. There is a 15-minute vote, then a 5-minute vote, and there could be up to 20 minutes of debate, maybe a little longer, and then two final votes. So I think I would request the Committee to come back after these two votes and we may be able to——

Mr. NADLER. Ten minutes or 20 minutes for the motion to——

Mr. CHABOT. They indicated 20, because then you're looking at—they said up to 20 minutes, is what they indicated to me.

We will come back. We may be able to wrap it up then before—otherwise, we are going to be over there for the recommit plus another 15-minute vote and 5-minute on that. The bottom line is what we're saying up here is we'll be back here probably in about 20 minutes, 25 minutes, and we'll take up where we left off and hopefully wrap up before the final votes. We will be right back. Thank you.

[Recess.]

Mr. CHABOT. We will come back to order. We want to thank the witnesses for their patience. We believe we have somewhere between 20 and 30 minutes before the next series of votes and I would assume that we should have sufficient time to wrap up the hearing between now and then.

The next panelist up here who has the opportunity to ask questions is the gentlelady from Wisconsin, who is recognized for 5 minutes.

Ms. BALDWIN. Thank you, Mr. Chairman.

I received in my office an advance copy of an article that is to be printed in the next issue of the *New Republic*. The title of the article is, "Quack Gay Marriage Science," and a significant portion of this article focuses on the arguments presented by Mr. Kurtz. I wanted to focus in on a couple of those criticisms.

First of all, one of the criticisms is the loose language with regard to this, and we heard you actually slip into that today. Does Scandinavia have a same-sex marriage or registered partnerships, Mr. Kurtz?

Mr. KURTZ. Scandinavia has registered partnerships.

Ms. BALDWIN. Okay. And so but you've used registered partnerships and then you've talked about the impact on birth rate, out-of-marriage, and you've indicated in your testimony earlier today that gay marriage—there's sort of a cause and a symptom, yet you're studying a series of countries that don't have gay marriage.

Secondly, I'm wondering——

Mr. KURTZ. May I comment on that?

Ms. BALDWIN. Well, I just wanted to point out that this is one of the criticisms in this article, and you slide back and forth between a precise characterization of the laws there and an imprecise characterization.

Mr. KURTZ. May I comment on what you've said?

Ms. BALDWIN. You'll get a chance in a moment.

Mr. KURTZ. Okay.

Ms. BALDWIN. Secondly, I'm wondering what years did your research of Scandinavia cover? What was your last year of looking at the data and talking with the analysts?

Mr. KURTZ. Well, I've been speaking—I consulted with people in Scandinavia and did the core of my research, I'd say for a six- to 9-month period before the actual publication of the article.

Ms. BALDWIN. Okay. And what was the publication date?

Mr. KURTZ. I think it was February of 2003, but you'll have to double-check it.

Ms. BALDWIN. So you're familiar with the 2002 data in, say, Norway, for example?

Mr. KURTZ. Oh, I'm sure I looked at 2002 data, yes.

Ms. BALDWIN. Okay. And do you recall in Norway how many same-sex partnerships were registered in the year 2002?

Mr. KURTZ. I couldn't give you the figure off the top of my head.

Ms. BALDWIN. If I were to say 183, does that ring a bell?

Mr. KURTZ. Well, I know that the figure is very low and I emphasized that in my article.

Ms. BALDWIN. And do you know the number of marriages that were recognized in Norway that year?

Mr. KURTZ. I'm sure it was substantially larger than that.

Ms. BALDWIN. Does the figure 25,776 sound about right?

Mr. KURTZ. It probably is. Again, in my article, I stressed this very fact.

Ms. BALDWIN. So it's about point-one percent. I think another thing that——

Mr. KURTZ. Yes. I think that's a very important fact and it tells against——

Ms. BALDWIN. And another thing that this article that's coming out on Monday discusses——

Mr. KURTZ. Can you tell me who the author of that article is?

Ms. BALDWIN. Yes. Nathaniel Frank is the author of that article.

Mr. KURTZ. Thank you.

Ms. BALDWIN. The second point is the failure to compare to counterpart countries, perhaps in the region, that don't have registered partnership laws or same-sex marriage laws. And, in fact, some individuals have done that and have found interestingly that in, I think it's European Union countries plus Switzerland, that do not recognize same-sex partners or same-sex marriage, that the increase in non-marital births is actually higher than the countries that you examine in your underlying research, and it seems to me that that's an important comparison to make.

Mr. KURTZ. May I comment on that?

Ms. BALDWIN. Just a moment. I'm wondering if there are any couples, gay couples in Scandinavia who are raising children. Do you know?

Mr. KURTZ. Sure.

Ms. BALDWIN. And would they be counted among those people in your study who are non-married, or who have children outside of the marital context?

Mr. KURTZ. The number of gay couples raising children is extremely small, too small to have materially affected that rate. I do not believe that the children in those relationships would have been included in the out-of-wedlock—I mean, I believe that they would—they would not be considered children within marriages according to the statistics——

Ms. BALDWIN. So they would be considered children out-of-wedlock——

Mr. KURTZ. Yes——

Ms. BALDWIN.—even if they had a committed partner?

Mr. KURTZ. Yes, but the number is extremely——

Ms. BALDWIN. And they would have no legal way to change that because Scandinavia doesn't recognize same-sex marriage, correct?

Mr. KURTZ. Well, they would have a legal way to change that in that Sweden is now debating the full name change to same-sex

marriage, and in 2002, Sweden gave adoption rights to these same-sex——

Ms. BALDWIN. But they don't at this time?

Mr. KURTZ. They have adoption rights, but they don't have the name "marriage" yet in Sweden, yes.

Mr. CHABOT. The gentlelady's time has expired. Would she like to ask for an additional minute?

Ms. BALDWIN. In fact, I would, indeed.

Mr. CHABOT. The gentlelady is recognized for an additional minute.

Ms. BALDWIN. We'll see how much I can fit into that last minute. In Mr. Oliphant's testimony, he indicated and showed a publication that he has reviewed some of the science that Dr. Joseph has reviewed in her testimony to come to the conclusion that children have very satisfactory and sometimes exceptional outcomes when raised by two adults that are committed to them and basically said that science isn't very good. That's the notes that I took as you said that.

Dr. Joseph, what do you know of the credibility of the science that you reviewed and the literature that you reviewed? Is it peer reviewed? Is this something that we should pay attention to?

Dr. JOSEPH. Thank you very much.

Mr. CHABOT. The gentlelady's time has expired, but Dr. Joseph can answer the question.

Dr. JOSEPH. Thank you, Mr. Chairman. I think the question you raise is an important one. Certainly when advocates review a literature, it's not surprising that the conclusions that they come to often reflect their advocacy position on one side or another.

However, as an epidemiologist, what I spend my time doing is worrying about things like statistical significance, confounding and biased study design, and those are exactly the issues, for example, that the American Academy of Pediatrics subgroup took on in assembling peer-reviewed literature, being very attentive to questions about how the participants were identified, whether it was a snapshot view, what we call a cross-sectional study, or a long-term view. I'm actually quite confident.

The nice thing about middle-of-the-road solid science is that it is middle-of-the-road solid science, really, without the inevitable and perhaps even unconscious biases that can be introduced on either side of an argument that brings strong and passionate opinions.

Mr. CHABOT. The gentlelady's time has expired.

Mr. Kurtz, I think you had been asked a couple of questions, if you would like to respond to the questions that were asked.

Mr. KURTZ. I'd like to. Thank you, Mr. Chairman. The first thing I would say is that you have to remember that some of the most prominent advocates of same-sex marriage—I'm thinking here in particular of Andrew Sullivan and William Eskridge—have pointed to Scandinavia for some time as an excellent test case for gay marriage. In fact, Andrew Sullivan called these registered partnerships de facto gay marriage. So I was picking up on Sullivan's language in my article and saying, all right, if you say that this is a legitimate test case, let's look at it.

Now, I have never denied—on the contrary, I have emphasized that there are many other factors, many factors that can account

and do account for increases in out-of-wedlock birth rates. My point is that gay marriage is an additional and important factor.

As far as the rate of increase in other countries go, A) I haven't denied that those rates can go up for a variety of reasons, and B) the rate increases in Scandinavia are of particular interest, and I'd have to see this article to see what other countries he's talking about, but in Scandinavia, they went through the easy part, I would say, of the rate increase right away. That is to say they stopped having their first child within marriage. But parents still tended to get married before the birth of the second child or the third or the fourth child.

What's happening recently in Scandinavia is that the hard part is coming. That is to say, instead of getting married before the second child, they're no longer getting married even when the second and third child comes along, and also, the religious and traditional districts which used to resist this trend toward out-of-wedlock birth rates are starting to shift.

So to some degree, it's apples and oranges and one needs to look, and I'd have to look at the article, what other countries are being talked about and at what point, what type of out-of-wedlock births we're dealing with. But again, I don't deny for a moment that there are many factors that push the rates up.

It's this Netherlands' example which I think is particularly useful in isolating things, and, of course, the other thing about the Netherlands is we now have full-fledged gay marriage in the Netherlands. And as you see, the pattern is absolutely consistent, straight up from registered partnerships through full and formal gay marriage.

Mr. CHABOT. Thank you, Mr. Kurtz.

The gentleman from New York is recognized for 1 minute to ask one additional question.

Mr. NADLER. Thank you. You really haven't answered the question, I think, the gentlelady from Wisconsin asked, which really follows up what I was saying before. The crux of everything that you're talking about is do you show a causation relationship or don't you? The fact is, in the Netherlands, they allow for use of marijuana. Maybe that's what's causing all these problems in marriage. I mean, who knows? [Laughter.]

The point is, there are a lot of independent variables.

Mr. KURTZ. Sure.

Mr. NADLER. The gentlelady—or maybe it's other things, maybe the fact that they don't have a draft or they do have a draft. I don't know.

In any event, the gentlelady asked a crucial question which I don't think you really addressed and that is this. You pointed out all these various things that are happening to marriage, that people aren't getting married, that people with children aren't getting married, and so forth. I pointed out that that was happening before gay marriage, that that's happening in this country. Perhaps we're behind the curve. Maybe we're 20 years behind what's happened in Europe, but Pat Moynihan talked about it, in part of the population in 1965, by 1990 was in the rest of the population. It's happening here, too, although not nearly——

Mr. CHABOT. The gentleman's time has expired, if the gentleman could finish his question.

Mr. NADLER. The real question is, can you show a causal relationship, and you never really showed it. You said, well, it's happening.

Mr. KURTZ. Congressman——

Mr. NADLER. Let me ask you this. The gentlelady then asked, well, in other countries in Europe where there is no gay marriage, the incidence of children being born out-of-wedlock is even higher. That would seem to indicate that whatever is calling it, it's something else.

Mr. KURTZ. It's not—the incidence isn't higher. I question that. There are high rates of increase at points in other countries.

Mr. NADLER. Okay.

Mr. KURTZ. In any case, I want to emphasize that all of these other factors which you and everyone else, quite rightly, are happy to agree cause increased out-of-wedlock birth rates—birth control, abortion, women in the workforce, welfare regulations, and the whole series of sorts—the kind of arguments I am making and will be making in the case of the Netherlands in even more detail than in my testimony are in exactly the same order.

People showed the correlation and then they tried to show the logical reasons why that correlation should be considered to be causal. I have argued, first of all, that the demographers in the Netherlands have not been able to come up with any alternative explanation.

Secondly, I have argued that the gay marriage debate in the Netherlands specifically entailed an argument about whether parenthood was at the core of marriage, and the conclusion that the people of the Netherlands drew was that it was not.

And thirdly, demographers and sociologists of the Netherlands agree, no matter what side of the political spectrum they are on, that the out-of-wedlock birth rate in the Netherlands was quite low, artificially low, for the way everything else was there and they all attributed it to a kind of left-over cultural capital, a kind of cultural conservatism there.

So if the only cause that was uniformly agreed to was cultural traditionalism, and then you have a decade-long debate where everyone is saying, well, marriage really doesn't have to be all about parenthood, that is no more or less reasonable than the logic behind all of these other causes. So I'm saying, just as there are many other causes, this has now come on line as being yet another cause.

Mr. NADLER. But if you show that ten things are happening in Country A and out-of-wedlock births are going up and all the other things you said are happening——

Mr. KURTZ. Yes.

Mr. NADLER.—and 11 things are happening in Country B and exactly the same things are happening——

Mr. KURTZ. But in the——

Mr. NADLER.—then that eleventh reason cannot be the major cause.

Mr. KURTZ. Well, it's not the major cause——

Mr. NADLER. Thank you.

Mr. KURTZ.—in Scandinavia. But in the Netherlands, it is the core cause. In the Netherlands, everyone agrees that none of these other reasons explain that doubling.

Mr. CHABOT. Mr. Oliphant is recognized here, and this will be the final——

Mr. OLIPHANT. Mr. Chairman, just a word. It is always dangerous when lawyers do science, even social science, and what is being asked here is something that is not demanded of Congress in any other area.

Mr. Nadler mentioned marijuana. There are lots of statutes in this country against marijuana based on the reasonable supposition that the use of marijuana has consequences that legislatures wish to address. We don't have to wait until there is definitive hard science, causality, with respect to marijuana, and that is the responsibility of a legislative body.

What is happening here is we are in danger of taking this issue to a court and a court asks their witness, is there causality, and he says, no, and she strikes it down as unconstitutional, and that is not a position in which the Congress of the United States wants to find itself. You can act based on reasonable supposition, based on what we know about human nature, humankind, and the way we get along in society. Thank you.

Mr. CHABOT. Thank you very much. That concludes the hearing this afternoon.

I think the gentleman would like to make a motion. The gentleman is recognized for the purpose——

Mr. NADLER. Mr. Chairman, I have two motions, actually. I ask unanimous consent that the American Academy of Pediatrics paper on same-sex parents and adoption be admitted into the record.

Mr. CHABOT. Without objection, so ordered.

Mr. NADLER. Thank you.

May I ask unanimous consent that all Members have five legislative days to revise and extend their remarks and submit additional material for the record.

Mr. CHABOT. Without objection, so ordered.

I want to thank all four of the panel members for their very helpful testimony this afternoon. It will be taken into consideration as Congress moves forward on this. This is the second of five hearings that we will be having on marriage. Thank you very much.

[Whereupon, at 3:56 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

DOCUMENTS SUBMITTED BY THE HONORABLE MARILYN MUSGRAVE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

A Citizen's Guide To Protecting Marriage

By MITT ROMNEY, ***governor of Massachusetts***
February 5, 2004

No matter how you feel about gay marriage, we should be able to agree that the citizens and their elected representatives must not be excluded from a decision as fundamental to society as the definition of marriage. There are lessons from my state's experience that may help other states preserve the rightful participation of their legislatures and citizens, and avoid the confusion now facing Massachusetts.

In a decision handed down in November, a divided Supreme Judicial Court of Massachusetts detected a previously unrecognized right in our 200-year-old state constitution that permits same-sex couples to wed. I believe that 4-3 decision was wrongly decided and is deeply mistaken.

Contrary to the court's opinion, marriage is not "an evolving paradigm." It is deeply rooted in the history, culture and tradition of civil society. It predates our Constitution and our nation by millennia. The institution of marriage was not created by government and it should not be redefined by government.

Marriage is a fundamental and universal social institution. It encompasses many obligations and benefits affecting husband and wife, father and mother, son and daughter. It is the foundation of a harmonious family life. It is the basic building block of society: The development, productivity and happiness of new generations are bound inextricably to the family unit. As a result, marriage bears a real relation to the well-being, health and enduring strength of society.

Because of marriage's pivotal role, nations and states have chosen to provide unique benefits and incentives to those who choose to be married. These benefits are not given to single citizens, groups of friends, or couples of the same sex. That benefits are given to married couples and not to singles or gay couples has nothing to do with discrimination; it has everything to do with building a stable new generation and nation.

It is important that the defense of marriage not become an attack on gays, on singles or on nontraditional couples. We must recognize the right of every citizen to live in the manner of his or her own choosing. In fact, it makes sense to ensure that essential civil rights, protection from violence and appropriate societal benefits are afforded to all citizens, be they single or combined in nontraditional relationships.

So, what to do?

- *Act now to protect marriage in your state.* Thirty-seven states -- 38 with recent actions by Ohio -- have a Defense of Marriage Act. Twelve states, including Massachusetts, do not. I urge my fellow governors and all state legislators to review and, if necessary, strengthen the laws concerning marriage. Look to carefully

delineate in the acts themselves the underlying, compelling state purposes. Explore, as well, amendments to the state constitution. In Massachusetts, gay rights advocates in years past successfully thwarted attempts to call a vote on a proposed constitutional amendment banning gay marriage. This cannot happen again. It is imperative that we proceed with the legitimate process of amending our state constitution.

- *Beware of activist judges.* The Legislature is our lawmaking body, and it is the Legislature's job to pass laws. As governor, it is *my* job to carry out the laws. The Supreme Judicial Court decides cases where there is a dispute as to the meaning of the laws or the constitution. This is not simply a separation of the branches of government, it is also a balance of powers: One branch is not to do the work of the other. It is not the job of judges to make laws, the job of legislators to command the National Guard, or my job to resolve litigation between citizens. If the powers were not separated this way, an official could make the laws, enforce them, and stop court challenges to them. No one branch or person should have that kind of power. It is inconsistent with a constitutional democracy that guarantees to the people the ultimate power to control their government.

With the *Dred Scott* case, decided four years before he took office, President Lincoln faced a judicial decision that he believed was terribly wrong and badly misinterpreted the U.S. Constitution. Here is what Lincoln said: "If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." By its decision, the Supreme Judicial Court of Massachusetts circumvented the Legislature and the executive, and assumed to itself the power of legislating. That's wrong.

- *Act at the federal level.* In 1996, President Clinton signed the Defense of Marriage Act. While the law protects states from being forced to recognize gay marriage, activist state courts could reach a different conclusion, just as ours did. It would be disruptive and confusing to have a patchwork of inconsistent marriage laws between states. Amending the Constitution may be the best and most reliable way to prevent such confusion and preserve the institution of marriage. Sometimes we forget that the ultimate power in our democracy is not in the Supreme Court but rather in the voice of the people. And the people have the exclusive right to protect their nation and constitution from judicial overreaching.

People of differing views must remember that real lives and real people are deeply affected by this issue: traditional couples, gay couples and children. We should conduct our discourse with decency and respect for those with different opinions. The definition of marriage is not a matter of semantics; it will have lasting impact on society however it is ultimately resolved. This issue was seized by a one-vote majority of the Massachusetts Supreme Judicial Court. We must now act to preserve the voice of the people and the representatives they elect.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release February 24, 2004

REMARKS BY THE PRESIDENT
The Roosevelt Room

THE PRESIDENT: Good morning. Eight years ago, Congress passed, and President Clinton signed, the Defense of Marriage Act, which defined marriage for purposes of federal law as the legal union between one man and one woman as husband and wife.

The Act passed the House of Representatives by a vote of 342 to 67, and the Senate by a vote of 85 to 14. Those congressional votes and the passage of similar defensive marriage laws in 38 states express an overwhelming consensus in our country for protecting the institution of marriage.

In recent months, however, some activist judges and local officials have made an aggressive attempt to redefine marriage. In Massachusetts, four judges on the highest court have indicated they will order the issuance of marriage licenses to applicants of the same gender in May of this year. In San Francisco, city officials have issued thousands of marriage licenses to people of the same gender, contrary to the California family code. That code, which clearly defines marriage as the union of a man and a woman, was approved overwhelmingly by the voters of California. A county in New Mexico has also issued marriage licenses to applicants of the same gender. And unless action is taken, we can expect more arbitrary court decisions, more litigation, more defiance of the law by local officials, all of which adds to uncertainty.

After more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization. Their actions have created confusion on an issue that requires clarity.

On a matter of such importance, the voice of the people must be heard. Activist courts have left the people with one recourse. If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America. Decisive and democratic action is needed, because attempts to redefine marriage in a single state or city could have serious consequences throughout the country.

The Constitution says that full faith and credit shall be given

in each state to the public acts and records and judicial proceedings of every other state. Those who want to change the meaning of marriage will claim that this provision requires all states and cities to recognize same-sex marriages performed anywhere in America. Congress attempted to address this problem in the Defense of Marriage Act, by declaring that no state must accept another state's definition of marriage. My administration will vigorously defend this act of Congress.

Yet there is no assurance that the Defense of Marriage Act will not, itself, be struck down by activist courts. In that event, every state would be forced to recognize any relationship that judges in Boston or officials in San Francisco choose to call a marriage. Furthermore, even if the Defense of Marriage Act is upheld, the law does not protect marriage within any state or city.

For all these reasons, the Defense of Marriage requires a constitutional amendment. An amendment to the Constitution is never to be undertaken lightly. The amendment process has addressed many serious matters of national concern. And the preservation of marriage rises to this level of national importance. The union of a man and woman is the most enduring human institution, honoring -- honored and encouraged in all cultures and by every religious faith. Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society.

Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all. Today I call upon the Congress to promptly pass, and to send to the states for ratification, an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife. The amendment should fully protect marriage, while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage.

America is a free society, which limits the role of government in the lives of our citizens. This commitment of freedom, however, does not require the redefinition of one of our most basic social institutions. Our government should respect every person, and protect the institution of marriage. There is no contradiction between these responsibilities. We should also conduct this difficult debate in a manner worthy of our country, without bitterness or anger.

In all that lies ahead, let us match strong convictions with kindness and goodwill and decency.

Thank you very much.

END

Order Code RL31994

CRS Report for Congress
Received through the CRS Web

Same-Sex Marriages: Legal Issues

Updated April 7, 2004

Alison M. Smith
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Same-Sex Marriages: Legal Issues

Summary

Currently neither federal nor any state law affirmatively allows gay or lesbian couples to marry. However, this may change depending on how the Massachusetts legislators act in response to a recent court decision which construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of others. This report discusses the Defense of Marriage Act (DOMA), P.L. 104-199, which prohibits federal recognition of same-sex marriages and allows individual states to refuse to recognize such marriages performed in other states, as well as the potential legal challenges to the DOMA. Moreover this report summarizes the legal principles applied in determining the validity of a marriage contracted in another state; surveys the various approaches employed by states to prevent same-sex marriage; and discusses the recent House and Senate Resolutions introduced proposing a constitutional amendment (H.J.Res. 56, S.J.Res. 26 and S.J.Res. 30).

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Same-Sex Marriages: Legal Issues

Currently neither federal law nor any state law affirmatively allows gay or lesbian couples to marry.[1] On the federal level, Congress enacted the Defense of Marriage Act (DOMA) to prohibit recognition of same-sex marriages for purposes of federal enactments. States, such as Alaska, Hawaii, Nebraska and Nevada have enacted state constitutional amendments limiting marriage to one man and one woman. Thirty-eight other states have enacted statutes limiting marriage in some manner.[2] A chart summarizing these various approaches is included at the end of this report.

Defense of Marriage Act (DOMA)[3]

In 1996, Congress enacted the DOMA "[t]o define and protect the institution of marriage." It allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of any other jurisdiction that designates a relationship between individuals of the same sex as a marriage. In part, DOMA states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[4]

Furthermore, DOMA goes on to declare that the terms "marriage" and "spouse," as used in federal enactments, exclude homosexual marriage.

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one

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[1] This may change depending on how the Massachusetts Legislature responds to the Supreme Judicial Court's ruling in *Goodridge v. Dept. of Public Health*, 2003 WL 22701313 (Supreme Judicial Ct. Nov. 18, 2003). On February 3, 2004, The Massachusetts Supreme Judicial Court ruled that civil unions are not the constitutional equivalent of civil marriage. The court's decision was delivered in an advisory opinion sought by the state Senate.

[2] These states are: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

[3] P.L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

[4] 28 U.S.C. §1738C.

> woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[5]

Potential Constitutional Challenges to DOMA[6]

Full Faith and Credit Clause. Some argue that DOMA is an unconstitutional exercise of Congress' authority under the full faith and credit clause of the U.S. Constitution.[7] Article IV, section 1 of the Constitution, the Full Faith and Credit Clause states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Opponents argue that, while Congress has authority to pass laws that enable acts, judgments and the like to be given effect in other States, it has no constitutional power to pass a law permitting States to deny full faith and credit to another State's laws and judgments.[8] Conversely, some argue that DOMA does nothing more than simply restate the power granted to the States by the full faith and credit clause.[9] While there is no judicial precedent on this issue, it would appear that Congress' general authority to "prescribe...the effect" of public acts arguably gives it discretion to define the "effect" so that a particular public act is not due full faith and credit. It would appear that the plain reading of the clause would encompass both expansion and contraction.

Equal Protection. Congress' authority to legislate in this manner under the full faith and credit clause, if the analysis set out above is accepted, does not conclude the matter. There are constitutional constraints upon federal legislation. One that is relevant is the equal protection clause and the effect of the Supreme Court's decision

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[5] 1 U.S.C. § 7.

[6] It should be noted that a court has yet to determine the constitutionality of the DOMA. In a federal tax-evasion case, the defendant claimed that he and his domestic partner were "economic partners" who should be afforded filing status equivalent to that of a married couple, and argued that DOMA was unconstitutional. The Seventh Circuit refused to consider the claim, holding that DOMA "was not in effect during the 10-year period for which Mueller was assessed deficiencies and, thus, is not at issue here." *Mueller v. Commissioner*, 2001 WL 522388, at 1 (7th Cir. Apr. 6, 2001). Mueller later raised the same challenge in a dispute over a tax return when DOMA was in effect, but the Seventh Circuit held that the law did not apply because "Mr. Mueller did not try to have his same-sex relationship recognized as a marriage under Illinois law..." *Mueller v. Commissioner*, No. 4743-00, 2002 WL 1401297, at *1 (7th Cir. June 26, 2002).

[7] U.S. Const. art. IV, § 1.

[8] See 142 Cong. Rec. S5931-33 (June 6, 1996) (statement introducing Professor Laurence H. Tribe's letter into the record concluding that DOMA "would be an unconstitutional attempt by Congress to limit the full faith and credit clause of the Constitution.").

[9] See Paige E. Chabora, Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 Neb. L. Rev. 604, 621-35 (1997).

in *Romer v. Evans*,[10] which struck down under the equal protection clause a referendum-adopted provision of the Colorado Constitution, which repealed local ordinances that provided civil-rights protections for gay persons and which prohibited all governmental action designed to protect homosexuals from discrimination. The Court held that, under the equal protection clause, legislation adverse to homosexuals was to be scrutinized under a "rational basis" standard of review.[11] The classification failed to pass even this deferential standard of review, because it imposed a special disability on homosexuals not visited on any other class of people and it could not be justified by any of the arguments made by the State. The State argued that its purpose for the amendment was two-fold: (1) to respect the freedom of association rights of other citizens, such as landlords and employers) who objected to homosexuality; and (2) to serve the state's interest in conserving resources to fight discrimination against other protected groups.

DOMA can be distinguished from the Colorado amendment. DOMA's legislative history indicates that it was intended to protect federalism interests and state sovereignty in the area of domestic relations, historically a subject of almost exclusive state concern. Moreover, it permits but does not require States to deny recognition to same-sex marriages in other States, affording States with strong public policy concerns the discretion to effectuate that policy. Thus, it can be argued that DOMA is grounded not in hostility to homosexuals but in an intent to afford the States the discretion to act as their public policy on same-sex marriage dictates.

Substantive Due Process (Right to Privacy). Another possibly applicable constitutional constraint is the Due Process Clause of the Fourteenth Amendment and the effect of the Supreme Court's decision in *Lawrence v. Texas*,[12] which struck down under the due process clause a state statute criminalizing certain private sexual acts between homosexuals. The Court held that the Fourteenth Amendment's due process privacy guarantee extends to protect consensual sex between adult homosexuals. The Court noted that the Due Process right to privacy protects certain personal decisions from governmental interference. These personal decisions include issues regarding contraceptives, abortion, marriage, procreation, and family relations.[13] The Court extended this right to privacy to cover adult consensual homosexual sodomy.

It is currently unclear what impact, if any, the Court's decision in *Lawrence* will have on legal challenges to laws prohibiting same-sex marriage. On the one hand, this decision can be viewed as affirming a broad constitutional right to sexual privacy. Conversely, the Court distinguished this case from cases involving minors and "whether the government must give formal recognition to any relationship that

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[10] 517 U.S. 620 (1996).

[11] *Id.*

[12] No. 02-102, 2003 U.S. LEXIS 5013 (June 26, 2003). For a legal analysis of this decision, refer to CRS Report RL31681, *Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in Lawrence v. Texas* by Jody Feder.

[13] *Lawrence v. Texas*, No. 02-102, 2003 U.S. LEXIS 5013, at *28 (June 26, 2003).

homosexual persons seek to enter."[14] Courts may seek to distinguish statutes prohibiting same-sex marriage from statutes criminalizing homosexual conduct. Courts may view the preservation of the institution of marriage as sufficient justification for statutes banning same-sex marriage. Moreover, courts may view the public recognition of marriage differently than the sexual conduct of homosexuals in the privacy of their own homes.

Interstate Recognition of Marriage

DOMA opponents assume that the Full Faith and Credit Clause would obligate States to recognize same-sex marriages contracted in States in which they are authorized. This conclusion is far from evident as this clause applies principally to the interstate recognition and enforcement of judgments.[15] It is settled law that final judgments are entitled to full faith and credit, regardless of other states' public policies, provided the issuing state had jurisdiction over the parties and the subject matter.[16] The Full Faith and Credit Clause has rarely been used by courts to validate marriages because marriages are not "legal judgments."

As such, questions concerning the validity of an out-of-state marriage are generally resolved without reference to the Full Faith and Credit Clause. In the legal sense, marriage is a "civil contract" created by the States which establishes certain duties and confers certain benefits.[17] Validly entering the contract creates the marital status; the duties and benefits attached by a State are incidents of that status. As such, the general tendency, based on comity rather than on compulsion under the Full Faith and Credit Clause, is to recognize marriages contracted in other States even if they could not have been celebrated in the recognizing State.

The general rule of validation for marriage is to look to the law of the place where the marriage was celebrated. A marriage satisfying the contracting State's requirements will usually be held valid everywhere.[18] Many States provide by statute that a marriage that is valid where contracted is valid within the State. This "place of celebration" rule is then subject to a number of exceptions, most of which are narrowly construed. The most common exception to the "place of celebration" rule is for marriages deemed contrary to the forum's strong public policy. Several States,

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[14] *Id.* at *36.

[15] See H.R. Rep. 104-664, 1996 U.S.C.C.A.N. 2905 (stating that "marriage licensure is not a judgment."). See also, 28 U.S.C. § 1738 (defining which acts, records and judicial proceeding are afforded full faith and credit).

[16] *Restatement (Second) of Conflict of Laws* § 107.

[17] On the state level, common examples of nonnegotiable marital rights and obligations include: distinct income tax filing status; public assistance such as health and welfare benefits; default rules concerning community property distribution and control; dower, curtesy and inheritance rights; child custody, child agreements; name change rights; spouse and marital communications privileges in legal proceedings; and the right to bring wrongful death, and certain other, legal actions.

[18] See 2 Restatement (Second) of Conflict of Laws § 283.

such as Connecticut,[19] Idaho,[20] Illinois,[21] Kansas,[22] Missouri,[23] Pennsylvania,[24] South Carolina,[25] Tennessee[26] and West Virginia,[27] provide an exception to this general rule by declaring out-of-state marriages void if against the State's public policy or if entered into with the intent to evade the law of the State. This exception applies only where another State's law violates "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[28]

Section 283 of the Restatement (Second) of Law provides:

> (1) The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) 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.

Pending State Litigation

Massachusetts, unlike thirty-eight States and the federal government, has not adopted a "defense of marriage statute" defining marriage as a union between a man and woman.[29] On April 11, 2001, a Boston-based, homosexual rights group, Gay Lesbian Advocates and Defenders (GLAD) filed suit against the Massachusetts

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[19] Conn. Gen Stat. Ann. § 45a-803-4.

[20] Idaho Code § 32-209.

[21] 750 Ill. Comp. Stat. 5/201.

[22] Kan. Stat. Ann. § 23-101.

[23] Mo. Rev. Stat. § 451.022.

[24] Pa. Stat. Ann. tit. 23 § 1704.

[25] S.C. Code Ann. § 20-1-10.

[26] Tenn. Code Ann. § 36-3-113.

[27] W. Va. Code § 48-2-603.

[28] *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918)(defining public policy as a valid reason for closing the forum to suit); see e.g. *Langan v. St. Vincent Hosp.*, 2003 N.Y. Misc. LEXIS 673 (stating that New York adheres to the general rule that "marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes."); *Shea v. Shea*, 63 N.E.2d 113 (N.Y. 1945)(finding that a common law marriage validly contracted in another state should not be recognized as common law marriage in New York as it was prohibited by statute).

[29] It should be noted that in *Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993), the Supreme Judicial Court has interpreted "marriage" to mean "the union of one man and one woman."

Department of Public Health on behalf of seven same-sex couples. The plaintiffs claimed that "refusing same-sex couples the opportunity to apply for a marriage license" violates Massachusetts' law and various portions of the Massachusetts Constitution. GLAD's brief argued the existence of a fundamental right to marry "the person of one's choosing" in the due process provisions of the Massachusetts Constitution and asserted that the marriage laws, which allow both men and women to marry, violate equal protection provisions.[30]

The Superior Court rejected the plaintiffs' arguments after exploring the application of the word marriage, the construction of marriage statutes and finally, the historical purpose of marriage. The trial court found that based on history and the actions of the people's elected representatives, a right to same-sex marriage was not so rooted in tradition that a failure to recognize it violated fundamental liberty, nor was it implicit in ordered liberty.[31] Moreover, the court held that in excluding same-sex couples from marriage, the Commonwealth did not deprive them of substantive due process, liberty, or freedom of speech or association.[32] The court went on to find that limiting marriage to opposite-sex couples was rationally related to a legitimate state interest in encouraging procreation.[33]

On November 18, 2003, the Massachusetts Supreme Judicial Court overruled the lower court and held that under the Massachusetts Constitution, the Commonwealth could not deny the protections, benefits, and obligations attendant on marriage to two individuals of the same sex who wish to marry.[34] The court concluded that interpreting the statutory term "marriage" to apply only to male-female unions, lacked a rational basis for either due process or equal protection purposes under the state's constitution. Moreover, the court found that such a limitation was not justified by the state's interest in providing a favorable setting for procreation and had no rational relationship to the state's interests in ensuring that children be raised in optimal settings and in conservation of state and private financial resources.[35] The court reasoned that the laws of civil marriage did not privilege procreative heterosexual intercourse, nor contain any requirement that applicants for marriage licenses attest to their ability or intention to conceive children by coitus. Moreover, the court reasoned that the state has no power to provide varying levels of protection to children based on the circumstances of birth. As for the state's interest in conserving scarce state and private financial resources, the court found that the state failed to produce any evidence to support its assertion that same-sex couples were less financially

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[30] *Hilary Goodridge v. Dept. of Public Health*, No. 01-1647-A, 2002 Mass. Super LEXIS 153 (Suffolk County, Super. Ct. May 7, 2002).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Hillary Goodridge v. Dept. of Public Health*, 2003 WL 22701313 (Supreme Judicial Court. Nov. 18, 2003).

[35] *Id.* at *14 (stating that it "cannot be rational under our laws, and indeed is not permitted, to penalize children by depriving them of state benefits because the state disapproves of their parents' sexual orientation.")

interdependent than opposite-sex couples. In addition, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other.[36] As this decision is based on the Commonwealth's constitution, it is not reviewable by the U.S. Supreme Court. The court stayed its decision for 180 days to give the Legislature time to enact legislation "as it may deem appropriate in light of this opinion."[37]

On February 3, 2004, the court ruled, in an advisory opinion to the state senate, that civil unions are not the constitutional equivalent of civil marriage.[38] The court reasoned that the establishment of civil unions for same-sex couples would create a separate class of citizens by status discrimination which would violate the equal protection and due process requirements of the Constitution of the Commonwealth.[39]

While the aforementioned opinions deal exclusively with a state constitution, an Arizona Court of Appeals exercising its discretion to accept jurisdiction based on the issue of first impression, held that the fundamental right to marry protected by the Fourteenth Amendment as well as the Arizona Constitution did not encompass the right to marry a same-sex partner.[40] Moreover, the court found that the state had a legitimate interest in encouraging procreation and child rearing within the marital relationship and limiting that relationship to opposite-sex couples.

In light of the Supreme Court's recent decision in *Lawrence*, the petitioners argued that the Arizona statute prohibiting same-sex marriages violated their fundamental right to marry and their right to equal protection under the laws, both of which are guaranteed by the federal and state constitutions. The court rejected the petitioners' argument that the Supreme Court in *Lawrence* implicitly recognized that the fundamental right to marry includes the freedom to choose a same-sex spouse.[41] The court viewed the *Lawrence* language as acknowledging a homosexual person's "right to define his or her own existence, and achieve the type of individual fulfillment that is the hallmark of a free society, by entering a homosexual relationship."[42] However, the court declined to view the language as stating that such a right includes the choice to enter a state-sanctioned, same-sex marriage.[43]

As such, the court reviewed the constitutionality of the challenged statutes using a rational basis analysis and found that the state has a legitimate interest in

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[36] *Id.* at 15.

[37] *Id.* at *18.

[38] The state Senate asked the court whether it would be sufficient for the legislature to pass a law allowing same-sex civil unions that would confer "all of the benefits, protections, rights and responsibilities of marriage."

[39] Opinions of the Justices to the Senate, SJC-01963 (Supreme Judicial Ct. Feb. 3, 2004).

[40] *Standhardt v. Superior Court of the State of Arizona*, 77 P.3d 451 (Ariz. Ct. App. 2003).

[41] *Id.* at 457.

[42] *Id.*

[43] See also, *Lewis v. Harris*, 2003 WL 2319114 (N.J.Super.L. Nov. 5, 2003)(holding that the right to marry does not include a fundamental right to same-sex marriage).

encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest. Moreover, the court said that while the state's reasoning is debatable, it is not arbitrary or irrational. Consequently, the court upheld the challenged statutes.

Pending Federal Legislation

On May 21, 2003, H.J.Res. 56, a proposed constitutional amendment was introduced. The companion bill, S.J.Res. 26 was introduced in the Senate on November 25, 2003.[44] The text of the proposed constitutional amendments is as follows:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

While uniformity may be achieved upon ratification of such an amendment, States would no longer have the flexibility of defining marriage within their borders. Moreover, States may be prohibited from recognizing a same-sex marriage performed and recognized outside of the United States.[45] It appears that this amendment would not impact a State's ability to define civil unions or domestic partnerships and the benefits conferred upon such.

However, an issue may arise regarding the time in which an individual is considered a man or a woman. As the first official document to indicate a person's sex, the designation on the birth certificate "usually controls the sex designation on all later documents."[46] Some courts have held that sexual identity for purposes of marriage is determined by the sex stated on the birth certificate, regardless of subsequent sexual reassignment.[47] However, some argue that this method is flawed,

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[44] S.J.Res. 30 was introduced on March 22, 2004 with technical changes to S.J.Res. 26. The text of S.J.Res 30 is as follows:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

[45] It appears that the Netherlands, Belgium and Ontario, Canada are the only international jurisdictions that sanction and/or recognize a same-sex union as a "marriage," per se.

[46] Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265,309 (1999) (discussing biological characteristics and sexual identity).

[47] See e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App. 1999); but see, *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976)(determining an individual's sexual classification for the purpose of marriage encompasses a mental component as well as an anatomical component).

as an infant's sex may be misidentified at birth and the individual may subsequently identify with and conform his or her biology to another sex upon adulthood.[48]

Conclusion

States currently possess the authority to decide whether to recognize an out-of-state marriage. The Full Faith and Credit Clause has rarely been used by States to validate marriages because marriages are not "legal judgments." With respect to cases decided under the Full Faith and Credit Clause that involve conflicting State statutes, the Supreme Court generally examines the significant aggregation of contacts the forum has with the parties and the occurrence or transaction to decide which State's law to apply. Similarly, based upon generally accepted legal principles, States routinely decide whether a marriage validly contracted in another jurisdiction will be recognized in-State by examining whether it has a significant relationship with the spouses and the marriage.

Congress is empowered under the Full Faith and Credit Clause of the Constitution to prescribe the manner that public acts, commonly understood to mean legislative acts, records, and proceedings shall be proved and the effect of such acts, records, and proceedings in other States.[49]

The Supreme Court's decisions in *Romer v. Colorado* and *Lawrence v. Texas* may present different issues concerning DOMA's constitutionality. Basically *Romer* appears to stand for the proposition that legislation targeting gays and lesbians is constitutionally impermissible under the Equal Protection Clause unless the legislative classification bears a rational relationship to a legitimate State purpose. Because same-sex marriages are singled out for differential treatment, DOMA appears to create a legislative classification for equal protection purposes that must meet a rational basis test. It is possible that DOMA could survive constitutional scrutiny under *Romer* inasmuch as the statute was enacted to protect the traditional institution of marriage. Moreover, DOMA does not prohibit States from recognizing same-sex marriage if they so choose.

Lawrence appears to stand for the proposition that the zone of privacy protected by the Due Process Clause of the Fourteen Amendment extends to adult, consensual sex between homosexuals. *Lawrence's* implication for statutes banning same-sex marriages and the constitutional validity of the DOMA are unclear.

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[48] If a mistake was made on the original birth certificate, an amended certificate will sometimes be issued if accompanied by an affidavit from a physician or a court order.

[49] It should be noted that only on five occasions previous to the DOMA has Congress enacted legislation based upon this power. The first, passed in 1790 (1 Stat. 122, codified at 28 U.S.C. § 1738), provides for ways to authenticate acts, records and judicial proceedings. The second, dating from 1804 (2 Stat. 298, codified at 28 U.S.C. 1738), provides methods of authenticating non-judicial records. Three other Congressional enactments pertain to modifiable family law orders (child custody, 28 U.S.C. § 1738A, child support (28 U.S.C. § 1738B) and domestic protection (18 U.S.C. § 2265)).

Table 1. State Statutes Defining "Marriage"

State	Statute	Marriage definition[a]	Non-Recognition
Alabama	ALA. CODE § 30-1-19 (2003)	X	X
Alaska	ALASKA STAT. § 25.05.011 (2003)	X	
Arizona	ARIZ. REV. STAT. § 25-101 (2003)		X
Arkansas	ARK. CODE ANN. § 9-11-109 (2003)	X	
California	CAL. FAM. CODE § 300 (2003)	X	
Colorado	COLO. REV. STAT. § 14-2-104 (2003)	X	
Connecticut	Judicial Interpretation		X[b]
Delaware	DEL. CODE ANN. tit.13 § 101 (2002)		X
Florida	FLA. STAT. Ch. 741.04 (2002)	X	
Georgia	GA. CODE ANN. § 19-3-3.1 (2002)		X
Hawaii	HAW. REV. STAT. ANN. § 572-1 (2003)	X	
Idaho*	IDAHO CODE § 32-209 (2003)	X	
Illinois*	750 ILL. COMP. STAT. 5/201 (2003)	X	X
Indiana	IND. CODE ANN. § 31-11-1-1 (2003)	X	X
Iowa	IOWA CODE § 595.2 (2003)	X	
Kansas*	KAN.. STAT. ANN. § 23-101 (2002)	X	
Kentucky	KY. REV. STAT. ANN. § 402.020 (2002)		X
Louisiana	LA. CIV. CODE art. 86 (2003)	X	
Maine	ME. REV. STAT. ANN. tit. 19, § 701 (2003)		X
Maryland	MD. CODE ANN. FAM. LAW § 2-201 (2002)	X	

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State	Statute	Marriage definition[a]	Non-Recognition
Massachusetts	Judicial Interpretation	X[c]	
Michigan	MICH. COMP. LAWS § 551.1 (2003)	X	X
Minnesota	MINN. STAT. § 517.01 (2002)	X	
Mississippi	MISS. CODE ANN. § 93-1-1 (2003)		X
Missouri*	MO. REV. STAT. § 451.022 (2003)		X
Montana	MONT. CODE ANN. § 40-1-103 (2002)	X	
Nebraska	NEB. REV. STAT. ANN. art. 1, § 29 (2002)		X
Nevada	NEV. REV. STAT. ANN. §122.020 (2003)	X	
New Hampshire	N.H. REV. STAT. ANN. § 457:2 (2002)		X
New Jersey	Judicial Interpretation	X[d]	
New Mexico	N.M. STAT. ANN § 40-1-1 (2002)	X[e]	
New York	Judicial Interpretation	X[f]	
North Carolina	N.C. GEN. STAT. § 51-1.2 (2003)		X
North Dakota	N.D. CENT. CODE § 14-03-01 (2002)	X	
Ohio*	OHIO REV. CODE ANN. §3101	X[g]	X
Oklahoma	OKLA. STAT. tit. 43 § 3.1 (2003)		X
Oregon	OR. REV. STAT. § 106.010 (2001)	X[h]	
Pennsylvania*	PA. STAT. ANN. tit. 23 § 1704 (2002)		X
Rhode Island	R.I. GEN. LAWS § 15-1-1 (2002)	X[i]	
South Carolina*	S.C. CODE ANN. § 20-1-10 (2002)		X
South Dakota	S. D. CODIFIED LAWS § 25-1-1 (2002)	X	
Tennessee*	TENN. CODE. ANN. § 36-3-113 (2003)	X	

State	Statute	Marriage definition[a]	Non-Recognition
Texas	TEX. FAM. CODE ANN. § 2.001 (2002)	X	
Utah	UTAH CODE ANN. § 30-1-2 (2003)		X
Vermont	VT. STAT. ANN. tit. 15 § 8 (2003)	X	
Virginia	VA. CODE ANN. § 20-45.2 (2003)		X
Washington	WASH. REV. CODE ANN. § 26.04.010 (2003)	X	
West Virginia*	W. VA. CODE § 48-2-603 (2003)		X
Wisconsin	WIS. STAT. § 765.01 (2002)	X[j]	
Wyoming	WYO. STAT. § 20-1-101 (2003)	X	
Puerto Rico	P.R. LAWS ANN. tit. 31, § 221 (2002)	X	

* denotes statute establishing same-sex union as violation of state's public policy

a. Marriage consists of a contract between one man and one woman.

b. Since nothing in the statute, legislative history, court rules, case law, or public policy permitted same-sex marriage or recognized the parties' Vermont civil union as a marriage, the trial court lacked jurisdiction to dissolve the union.

c. The Supreme Judicial Court has interpreted "marriage," within Massachusetts' statutes, "as the union of one man and one woman." *Adoption of Tammy*, 619 N.E.2d 315 (1993). However, in *Goodridge v. Dept. of Public Health*, 2003 WL 22701313 (Supreme Judicial Ct. Nov. 18, 2003), the court construed the term "marriage" to mean the voluntary union of two persons as spouses, to the exclusion of all others.

d. Although no specific language in this statute or other New Jersey marriage statutes prohibits same-sex marriages, the meaning of marriage as a heterosexual institution was so firmly established that the court could not disregard its plain meaning and the clear intent of the legislature. *Rutgers Council v. Rutgers State University*, 689 A.2d 828 (1997).

e. Marriage is a civil contract requiring consent of parties

f. Marriage has been traditionally defined as the voluntary union of one man and one woman as husband and wife. See e.g., *Fisher v. Fisher*, 250 N.Y. 313, 165 N. E. 460 (1929). A basic assumption, therefore, is that one of the two parties to the union must be male and the other must be female. On the basis of this assumption, the New York courts have consistently viewed it essential to the formation of a marriage that the parties be of opposite sexes. However, in *Langan v. St. Vincent Hosp.*, 2003 N.Y. Misc. LEXIS 673, the court found that New York's statutes did not prohibit recognition of a same-sex union nor was such a union against New York's public policy on marriage. As such, the court recognized the same-sex partner as a spouse for purposes of New York's wrongful death statute.

g. Effective May 7, 2004.

h. Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.1

i. Men are forbidden to marry kindred.

j. Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.

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THE CENTER FOR MARRIAGE LAW, INC.

Fax

To: Mr. John Hedley

From: Lisa Pignatello

Assistant to Vincent McCarthy

Fax: 202-225-5870 Pages: 14

Date: January 7, 2003

Re: Nebraska Memorandum and Order

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

Attached please find a copy of the Memorandum and Order.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CITIZENS FOR EQUAL PROTECTION INC., NEBRASKA ADVOCATES FOR JUSTICE AND EQUALITY, INC. and ACLU NEBRASKA,	)	4:03CV3155
Plaintiffs,	)	**MEMORANDUM AND ORDER**
v.	)	
ATTORNEY GENERAL JON BRUNING and GOVERNOR MICHAEL O. JOHANNS,	)	
Defendants.	)	

Introduction

This matter is before the court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Filing No. 22. Defendants contend that this case should be dismissed as the plaintiffs lack standing, the case lacks ripeness, and the cause of action for bill of attainder should be dismissed. I have carefully reviewed the record, briefs in support of and in opposition to the motion, and the relevant case law. I conclude that the motion to dismiss should be denied.

Background

Guyla Mills headed a petition drive, known as Initiative 416. Nebraska voters adopted Initiative 416 in 2000. On December 7, 2000, Governor Johanns signed the Initiative into law as Article 1, Section 29 of the Nebraska Bill of Rights. Section 29 states: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two

persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."

The plaintiffs, Nebraska organizations that have lesbian, gay, and bisexual members, contend the second sentence of Section 29 should be declared unconstitutional as it prohibits lesbian, gay, and bisexual persons from accessing the political process to attempt to obtain legal protections, virtually barring legal protection of any kind to same-sex relationships. Plaintiff Citizens for Equal Protection is a nonprofit membership organization whose mission is to stop discrimination based on sexual orientation through legislation and education. Plaintiff Nebraska Advocates for Justice and Equality is a nonprofit organization that was created in response to the anti-gay campaign for Initiative 416. Both plaintiffs lobby for legislation that is designed to protect the needs of its members. Plaintiff ACLU is a nonprofit entity that advocates for the protection of civil liberties for all persons.

Plaintiffs argue that they are unable to, at the very least, seek legislation to provide legal protections for those in same-sex relationships. In support of their argument, plaintiffs note that they approached Senator Nancy Thompson and asked her to draft legislation concerning domestic partnerships and, in particular, language that relates to health, funeral, hospital and organ donations. Senator Thompson proposed a bill on January 22, 2003, to allow both same-sex and different-sex couples to make decisions regarding funeral arrangements and organ donations. Filing No. 1, Ex. A. Senator Thompson submitted a request to Nebraska Attorney General Bruning asking him to issue an opinion as to the constitutionality of such legislation. On March 10, 2003, the Attorney General issued an opinion determining that the proposed bill would violate Section 29. Filing No. 1, Ex. B.

Plaintiffs also have a draft bill entitled "Financial Responsibility and Protection for Domestic Partners Act" which would allow same-sex couples to formalize their responsibilities to each other and would allow private companies to offer certain benefits to domestic partners. Filing No. 1, Ex. C. However, because of Section 29 and the recent opinion of the Attorney General, plaintiffs will not have the opportunity to present this legislation to the Unicameral. They argue they are no longer permitted to lobby members of the Unicameral regarding health care decisions, living expenses, funeral arrangements, and hospital visitations.

Section 29 is the only law of its kind in the United States. According to the plaintiffs, over 150 local governments offer same-sex health benefits; a number of states and municipalities offer domestic partner registries; and over 5,000 companies recognize same-sex couples domestic partnerships. Filing No. 1, ¶ 20.

In this lawsuit, plaintiffs are seeking an equal opportunity to lobby their elected representatives regarding legal protections for same-sex relationships. They are not asking this court for any particular remedies relating to marriage, civil unions, or domestic partnerships.

Standard of Review

Fed. R. Civ. P. 12(b)(1)

For the court to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the complaint must be successfully challenged either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In a facial challenge to jurisdiction, all of the factual allegations regarding jurisdiction would be presumed

true and the motion could succeed only if the plaintiff had failed to allege an element necessary for subject matter jurisdiction. *Id.*

If a plaintiff lacks standing, the district court has no subject matter jurisdiction. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 800 (8th Cir. 2002). Therefore, a standing argument implicates Rule 12(b)(1). To establish standing, a plaintiff must show that it is likely that the remedy sought can redress the injury. *Id.* A threat of injury must be both real and immediate, not conjectural and hypothetical. *Id.*

Fed. R. Civ. P. 12(b)(6)

In reviewing a complaint on a Rule 12(b)(6) motion, the court must consider all of the facts alleged in the complaint as true and construe the pleadings in a light most favorable to the plaintiff. *See, e.g., Brotherhood of Maint. of Way Employees v. BNSF R.R.*, 270 F.3d 637, 638 (8th Cir. 2001). A dismissal is not lightly granted. "A complaint shall not be dismissed for its failure to state a claim upon which relief can be granted unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). When accepting the facts of the complaint as true, a court will not, however, "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (8th Cir. 1987)). A dismissal under Rule 12(b)(6) is therefore granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 (8th Cir. 1999).

such as a misleading allegation about an element necessary to obtain relief or an affirmative defense or other bar. *Doe v. Hertz*, 134 F.3d 1339, 1341 (8th Cir. 1998). The court does not determine whether the plaintiff will ultimately prevail, but rather whether the plaintiff is entitled to present evidence in support of his claim. *Doe v. Norwest Bank*, 909 F. Supp. 668, 670 (D. Minn. 1995).

Discussion

Standing

Defendants argue that plaintiffs lack standing to challenge the constitutionality of Section 29. Plaintiffs contend that they have already been injured by the defendants and do in fact have standing to pursue this lawsuit. In order to establish standing, the plaintiffs in this case must show (1) an injury in fact where there is harm, either actual or imminent, (2) causation that connects the plaintiffs' injury with the conduct of the defendant; and (3) redressability - whether the requested relief will actually address the injury. *Northeastern Fla. Chapter of the Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663 (1993). With regard to the initial factor, defendants argue first that there is no injury, as plaintiffs could try to amend the constitution and second, because plaintiffs did not have any rights under Nebraska law prior to the passage of Section 29.

Plaintiffs argue that they do have injury-in-fact, as Section 29 is a barrier that prevents them from proposing and passing legislation. Plaintiffs rely on *Northeastern Fla. Chapter of the Assoc. Gen. Contractors* wherein the court held that the injury-in-fact required for standing in "an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666. The court

further stated that "when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* Plaintiffs also rely on the fact that they have alleged an equal protection violation in this lawsuit on the basis similar to that which was found to be unconstitutional in *Romer v. Evans*, 517 U.S. 620, 621 (1996) (disqualification of a class from seeking legal protections held to violate equal protection).

In the case at hand, Senator Thompson introduced Legislative Bill 671, but following the opinion of the Attorney General, she took no further action. It is obvious that Section 29 acts as a barrier to the ability of the plaintiffs to obtain support for the introduction and passage of legislation. I conclude that Section 29 acts as a barrier to plaintiffs' participation in the political process, and thus as a result plaintiffs have established injury for purposes of the standing requirement.

Defendants argue the second prong, causation, is not proven as the plaintiffs can pursue other avenues to redress their grievances and to obtain the benefits they want. Plaintiffs argue that the conduct of the defendants has caused them to be unable to even produce bills for legislative review. I agree. Plaintiffs' inability to access the legislative system is directly caused by the passage of Section 29. Consequently, I determine that plaintiffs have established causation for purposes of the standing requirement.

With regard to prong three, redressability, defendants contend that plaintiffs would only receive emotional gratitude if they overturn Section 29, as they have not received any real injury. They argue that such "psychic satisfaction is not an acceptable Article III remedy

because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). Plaintiffs have alleged an equal protection violation in their complaint. Filing No. 1. If plaintiffs were to win on the merits of the case, and if Section 29 is found to be unconstitutional, then plaintiffs would receive the relief they have requested, namely, access to the legislative process. Consequently, I determine that plaintiffs have established redressability for purposes of the standing requirement.

Ripeness

Ripeness "is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (citations omitted). To be ripe for decision, a case must satisfy two elements: (1) the issues must be fit for judicial decision, and (2) there must be hardship to the parties by withholding the court's consideration. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, __ U.S. __, 123 S. Ct. 2026, 2036 (2003). If "front-desking" occurs, then the case is more likely ripe for judicial decision. *Reno v. Catholic Soc. Serv., Inc.*, 509 U.S. 43, 61-63 (1993) (illegal aliens were having their applications rejected before a determination of their eligibility for legalization, called "front-desking," and thus ripe for review). Plaintiffs argue that front-desking is occurring in this case. Defendants argue that no action has yet been taken against an individual or group that is cognizable by the court. Defendants seem to argue that plaintiffs must first get legislation passed and have it invalidated by the court before injury occurs. As plaintiffs point out, the defendants have missed the point of plaintiffs' argument in this regard. Plaintiffs have tried to submit legislation, through Senator Thompson, to the Unicameral. There is a barrier

hindering their ability to even present the proposed legislation. Consequently, I determine that plaintiffs have established sufficient injury so as to conclude that the claim in this case is ripe for review. I further conclude that this is the type of decision that should be decided by the court, that the issue is not premature, and that further hardship will occur if plaintiffs are not permitted to seek judicial intervention.

Bill of Attainder

Plaintiffs allege in their complaint that the actions by the defendants constitute a bill of attainder. To be considered a bill of attainder the legislative act must (1) apply to named individuals or easily ascertainable members of a group, (2) inflict punishment, and (3) be without judicial trial. *United States v. Lovett*, 328 U.S. 303, 315 (1946). The bill of attainder clause is "to be read in light of the evil the Framers had sought to ban: legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965).

A. *Named Individual or Easily Ascertainable Group*

The legislative act should in general name persons to be punished or by described terms of conduct. *Selective Serv. Sys. v. Minn. Public Interest Research Group*, 468 U.S. 841 (1984) (applied to group of people who failed to register for the draft). The specificity requirement is met when the law applies to "easily ascertainable members of a group." *Brown*, 381 U.S. at 448-49. As the court points out, it was not that unusual for the English bills of attainder "to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name." *Brown*, 381 U.S. at 461. In the case before me, Article 1 Section 29 names both specific groups and also describes them in terms of their conduct.

Section 29 names the specific group of "civil unions" and "Domestic Partners" and describes their conduct as "the uniting of two persons of the same sex." Consequently, I conclude that plaintiffs have shown Section 29 applies to an easily ascertainable group.

B. Without Judicial Trial

A reading of Section 29 establishes that there is no judicial trial before preventing the legal recognition of same-sex relationships. All parties appear to concede this issue, and upon a review of the statute and the record, I conclude that Section 29 does not provide for a judicial trial.

C. Infliction of Punishment

In deciding whether a legislative act inflicts punishment, the Supreme Court has recognized three necessary inquiries: (1) whether the challenged legislation falls within the historical meaning of legislative punishment, (2) whether the statute can be said to further nonpunitive legislative purposes, and (3) whether the legislative record shows a congressional intent to punish. *Selective Serv. Sys.*, 468 U.S. at 852; *Planned Parenthood v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999).

Historical Meaning

Historically, bills of attainder imposed the death penalty, but lesser penalties have also been included. *Selective Serv. Sys.*, 468 U.S. at 852. The court in discussing these changes has stated: "the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employment or professions." *Id.* *See also Brown*, 381 U.S. 437 (Communist Party members barred from labor union); *United States v. Lovett*, 328 U.S. 303 (1946) (salary cuts for three government

employees); *Cummings v. Missouri*, 4 Wall. 277 (1867) (priest disqualified from practicing as clergy); and *Garland*, 4 Wall. 333 (1867) (lawyers barred from practice of law). Alexander Hamilton talked about this issue and stated with regard to prohibiting the bill of attainder:

> [O]f this kind is the doctrine of disqualification, disenfranchisement, and banishment by the acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disenfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or oligarchy . . .

United States v. Brown, 381 U.S. at 444, (quoting III (John C.) Hamilton, *History of the Republic of the United States*, p. 34 (1859)) (quoting Alexander Hamilton). As discussed in *Brown*, that the legislature of the United States passed statutes to single out the Tories and restrict their ability to resist the revolution, and as the legislature did against Communist Party membership, plaintiffs argue Section 29 is directed at gay, lesbian, bisexual and transsexual people to prohibit their political ability to effectuate changes proposed by the majority. *Id.* at 442.

Clearly, plaintiffs have made an initial case that the law in question operates as a legislative bar for their specified groups. Accordingly, I find that the challenged legislation falls within the historical meaning of the term punishment.

Legislative Purpose/Intent to Punish

Because the arguments are overlapping in some respects with regard to these two inquires, I shall address them simultaneously. Defendants argue that the purpose of Section 29 is to retain the traditional meaning of the word "marriage," i.e., as being between a man and a woman. Thus, they argue, Section 29 does not punish or prohibit any conduct

Defendants rely on the case in which the court concluded that the "Don't Ask, Don't Tell" policy was not a bill of attainder. *Richenberg v. Perry*, 97 F.3d 256, 264 (8th Cir. 1996).

Plaintiffs argue that "Section 29 imposes punishment by depriving lesbian, gay and bisexual people of their civil and political rights to attempt to persuade their governmental representatives and employers to protect their intimate relationships and by singling them out for moral censure." Filing No. 30, Brief of Plaintiffs, at 32. Plaintiffs first argue that Section 29 disenfranchises lesbian, gay and bisexual people as they no longer can petition their representatives and city government for legislative change. Prior to Section 29, they had the right to use the political process. Plaintiffs argue that this type of disenfranchisement is the equivalent of punishment. Further, contend the plaintiffs, Section 29 prohibits government employers from offering benefits, such as family health insurance and retirement benefits, to cohabiting gay, lesbian, bisexual and transsexual employees. Plaintiffs argue that this constitutes punishment. Third, plaintiffs argue that "[t]he vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction. . . ." *Brown*, 381 U.S. at 449 n 23. The same is applicable in this case, urge plaintiffs, as Section 29 is intended to deny constitutional rights to gay, lesbian and bisexual persons. Plaintiffs argue that there is no nonpunitive reason for passage of Section 29.

Plaintiffs also contend that the passage of Section 29 was motivated purely to prevent gays and lesbians from accessing the political system and rendering them second class citizens. *See* Filing No. 1, ¶ 21 (comments by Guyla Mills, who led the petition drive that Section 29 was to make known that homosexual and heterosexual marriages are not

equivalents and that homosexual relationships are morally inferior). This is further evidence, argue plaintiffs, of the intent to punish same-sex couples.

As stated by the Supreme Court, legislation that "identifies persons by a single trait and then denies them protection across the board," resulting in "disqualification of a class of persons from the right to seek specific protections from the law is unprecedented. . . ." *Romer*, 517 U.S. at 633. Laws "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* The court further stated that such a law will "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

This is unlike the cases wherein the courts decided that statutes served nonpunitive purposes and, therefore, were valid. *See, e.g., Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) (removal of funding for abortion services deemed to support nonpunitive purpose of removing State's approval from abortion services); *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (denial of financial aid to males who would not register for draft not punishment where goal was to make males register); and *United States v. O'Brien*, 391 U.S. 367 (1968) (conviction for burning selective service card not punitive where nonpunitive goal was to continue availability of selective service certificates).

Section 29 does not just withhold a benefit, it actually prohibits same-sex relationship couples from working to obtain governmental benefits. If the purpose, as offered by the defendants, of Section 29 is merely to maintain the common law definition of marriage, there

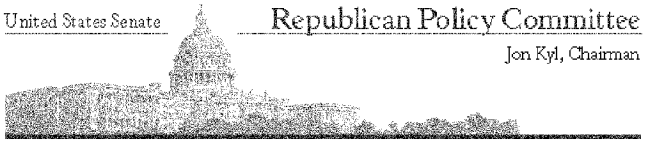
would be no need to prohibit all forms of government protection or to preclude domestic partnerships and civil unions. I conclude that the plaintiffs have met the legal requirements for stating a claim of bill of attainder.

THEREFORE, IT IS ORDERED that defendants' motion to dismiss, Filing No. 22, is denied.

DATED this 10th day of November, 2003.

BY THE COURT

s/Joseph F. Bataillon
United States District Judge



July 29, 2003

Massachusetts Court Expected to Legalize Same-Sex Marriage

The Threat to Marriage from the Courts

Commentators from across the political spectrum agree that the Massachusetts Supreme Judicial Court is likely to rule very soon that same-sex couples have a constitutional right to marry in Massachusetts. Gay marriage activists have filed lawsuits in other States demanding court-imposition of same-sex marriage and have pledged to challenge the federal Defense of Marriage Act and similar laws enacted by 37 States. This paper discusses the background of the issue and the public policy options available to respond to court rulings that advance same-sex marriage.

Introduction and Executive Summary

Activist lawyers and their allies in the legal academy have devised a strategy to override public opinion and force same-sex marriage on society through pliant, activist courts. Those activists would score their biggest victory to date if the Massachusetts court decides in *Goodridge v. Massachusetts Dep't of Public Health* that persons of the same sex can marry each other as a matter of state constitutional law. That decision is expected to be released any day. A pro-same-sex marriage ruling surely will spur more lawsuits to force that result on unwilling States — like those cases already pending in New Jersey, Indiana, and Arizona.

The U.S. Supreme Court gave aid and comfort to the activists' court strategy in its recent homosexual sodomy decision, *Lawrence v. Texas*.[1] Although the majority justices claimed that the decision did not formally affect marriage,[2] that decision could provide support for future court rulings changing the marriage institution. *First*, the Court held that homosexuals, like heterosexuals, have the right to "seek autonomy" in their relationships and cited "personal decisions relating to marriage" as an important area of personal autonomy.[3] *Second*, the Court held that whether a majority of the public opposes "a particular practice as immoral is not a sufficient reason for upholding a law prohibiting that practice."[4] These statements do not *mandate* the recognition of same-sex marriage as a constitutional right, but they could serve as valuable tools for gay marriage activists as they push their cases nationwide.

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[1] 539 U.S. __, 123 S.Ct. 2472 (2003). All citations are to slip opinion available at http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf.

[2] Slip Op. at 18.

[3] Slip Op. at 13.

[4] Slip Op. at 17.

This campaign through the courts runs directly counter to public opinion. A majority of Americans — between 53 percent and 62 percent, depending on the poll — favor preserving marriage as it has been practiced throughout history: the union of a man and a woman.[5] (The public is evenly divided on the question of whether lesser legal recognitions of same-sex relationships are appropriate.[6]) If marriage is redefined in the foreseeable future, it will not be because of democratic decisions, but because of a few judges who, in response to a carefully crafted activist agenda, take upon themselves the power to do so.

Recognizing an even stronger societal consensus at the time (68 percent opposition to same-sex marriage[7]), Congress overwhelmingly passed the Defense of Marriage Act ("DOMA") in 1996. The bill passed the Senate 85-14, including the "yes" votes of 62 current Senators.[8] DOMA did two things. *First*, it recognized the traditional definition of marriage as between one man and one woman for all aspects of federal law. *Second*, it ensured that no State is obligated to accept another State's non-traditional marriages (or civil unions) by operation of the Constitution's Full Faith and Credit Clause (art. IV, sec. 1). Thirty-seven States have passed constitutional amendments or statutes commonly known as "state DOMAs" that further protect traditional, heterosexual marriage.[9]

Since federal DOMA was passed, academics and activists alike have crafted a plethora of legal arguments claiming that the federal and state DOMAs are unconstitutional. Insofar as the *Lawrence* decision and the anticipated *Goodridge* result broaden general constitutional principles of substantive due process and equal protection, the possibility of a court declaring federal DOMA unconstitutional and mandating same-sex marriage is more likely today than ever before. Gay marriage activists can be expected to pursue several court strategies:

- Full Faith & Credit Challenges. Same-sex couples will "marry" in Massachusetts and then file lawsuits in other States to force those States to recognize the Massachusetts marriage. They likely will argue that federal DOMA is unconstitutional as an overly broad interpretation of the Full Faith and Credit clause and as inconsistent with principles of equal protection and substantive due process.
- *Goodridge* Copycat Cases. Activists will file new cases similar to *Goodridge* in other States and demand recognition of same-sex marriage as a constitutional right under state law. The Massachusetts decision will serve as persuasive precedent for other courts interpreting parallel provisions in their state constitutions.

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[5] See Pew Center poll, July 2003 (53% oppose "allowing gays and lesbians to marry legally"); Andres McKenna poll, July 2003 (53% oppose "idea of marriages between homosexuals"); Gallup poll, June 2003 (55% believe "marriages between homosexuals" should not be "recognized by law as valid, with the same rights as traditional marriage"); Time/CNN poll, July 2003 (60% believe "marriages between homosexual men or between homosexual women" should not "be recognized as legal by the law"); WirthlinWorldwide poll, February 2003 (62% agree that "only marriage between a man and a woman should be legally valid and recognized in our country"). All polls on file with RPC; see also *AEI Studies in Public Opinion: Attitudes About Homosexuality* (updated July 11, 2003), available at http://www.aei.org/publications/pubID.14882/pub_detail.asp (hereinafter "AEI Studies").

[6] A June 2003 Gallup poll showed 49 percent support for "civil unions" for same-sex couples. See AEI Studies, supra note 5.

[7] See Gallup poll, March 1996 (68% oppose "marriages between homosexuals"), available at AEI Studies.

[8] Only seven sitting Senators voted against that law: Senators Akaka, Feingold, Feinstein, Inouye, Kennedy, Kerry, and Wyden. Senate Vote #280, 104th Cong., 2nd Sess. (Sept. 10, 1996). Senators Durbin and Schumer voted for DOMA while they were House members. House Vote #316, 104th Cong., 2nd Sess. (July 12, 1996).

[9] Only Connecticut, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming have failed to enact state DOMAs.

- The Supreme Court Strategy. Same-sex couples who have "married" in Massachusetts (or who have civil unions, as some do in Vermont) will apply for federal benefits such as federal employee health insurance, and under federal DOMA those requests will be denied. They may then sue in federal court and argue that the definition of marriage in DOMA (for federal purposes) is unconstitutional as a matter of federal equal protection and substantive due process. Such a case could end up in the Supreme Court.

This proliferation of lawsuits could well produce additional victories for gay marriage advocates.

Additional legislation is unlikely to be effective in stopping attempts to remake marriage through the courts. Some have suggested that Congress should attempt to strip the courts of jurisdiction to review DOMA or that Congress refuse to give welfare monies to States that refuse to protect traditional marriage. These approaches are incomplete solutions to the threat to marriage from the courts, and present their own set of legal and political difficulties. Most importantly, a court that is willing to strike down DOMA may be at least as willing to entertain challenges to other federal legislation aimed at preventing the spread of same-sex marriage.

These lawsuits will continue until Congress and the States adopt a constitutional amendment to protect traditional marriage. Such a constitutional amendment would have to validate DOMA and provide that the Constitution cannot be construed to change the traditional definition of marriage. It could, but need not, deal with the related issues of legal benefits that should be available to same-sex couples.

One proposal with significant and growing support is the Federal Marriage Amendment ("FMA"). Introduced in the House by a bipartisan coalition of Representatives,[10] the FMA reads:

> "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

This proposed amendment would provide a single definition of marriage in the United States and prevent any federal or state court from imposing any other definition of marriage. At the same time, the FMA would protect the ability of state *legislatures* to create "civil unions" or otherwise grant legal benefits to same-sex couples, while preventing courts from forcing a State to recognize the benefits granted in another State.

The Recent Activity in the Courts

The need to consider a constitutional amendment relating to marriage is driven by the threat that state or federal courts will change the traditional definition of marriage on their own. Congress enacted the Defense of Marriage Act in 1996 after a Hawaii state court mandated recognition of same-sex marriage in that State.[11] This issue has reemerged because of the U.S. Supreme Court's

[10] The original co-sponsors of H.J. Res. 56 include Collin Peterson (D-MN), Mike McIntyre (D-NC), Ralph Hall (D-TX), Marilyn Musgrave (R-CO), Jo Ann Davis (R-VA), and David Vitter (R-LA). As of July 29, 2003, a total of 75 Representatives were cosponsoring the FMA.

[11] See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Hawaii amended the state constitution to reverse the appellate court's decision in 1998.

decision in *Lawrence* and the anticipated Massachusetts decision in *Goodridge*. At the same time, Canada already has begun to legalize same-sex marriage, prompting many American homosexual couples to travel there to be "married" and then return to the United States.[12]

The Goodridge Case: the Massachusetts Court's Looming Decision

Due any day is a decision from the Massachusetts Supreme Judicial Court in the case of *Goodridge v. Massachusetts Dep't of Public Health*. In that case, seven same-sex couples sued Massachusetts and argued that they have a constitutional right to receive marriage certificates under the state constitution's Declaration of Rights, akin to the federal constitution's Bill of Rights. The trial court ruled that Massachusetts had the right to regulate marriage and that the legislature had a rational basis for restricting the institution to opposite-sex couples, i.e., the encouragement of orderly and healthy procreation.[13] The trial court further urged the plaintiffs to pursue through the legislature, not the court system, their desire to be married.[14] The plaintiffs quickly appealed this decision to the Massachusetts Supreme Judicial Court.

Most observers expect the Massachusetts high court to reverse the lower court and rule that the Massachusetts constitution mandates recognition of same-sex marriage. The plaintiffs have argued that civil marriage is a fundamental right under the state constitution; that denying civil marriage to same-sex couples violates their right to equal treatment based on sex and sexual orientation; and that the state can offer no justification for excluding these couples from the institution of marriage.[15] Any or all of these arguments could form the basis for the court's decision.

The arguments put forth in the Massachusetts case rely on state constitutional provisions that, in substance, appear in other state constitutions and in the U.S. Constitution. As such, the gay marriage advocates who created the Massachusetts lawsuit — the plaintiffs' attorneys are from the nationally-active group known as Gay and Lesbian Advocates & Defenders — will be able to export many of the same arguments to other States. Moreover, under traditional rules of construction, every other court considering like challenges (such as those pending so far in Arizona, New Jersey, and Indiana) likely will look to the Massachusetts court's reasoning and analysis when interpreting their own States' constitutions. In other words, the Massachusetts decision will create a persuasive precedent that other courts may well choose to follow.

Lawrence: the U.S. Supreme Court Opens the Door to Same-Sex Marriage

The Supreme Court in *Lawrence* held that persons have a fundamental constitutional right to engage in sodomy. On its face, *Lawrence* does not directly address whether persons of the same sex have a constitutional right to marry. However, those pushing same-sex marriage in the courts gained valuable support for their legal arguments through this decision.

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[12] See, e.g., S.J. Komarnitsky, *Canadian Vows: Two Couples Are Among The First to Take Advantage of Same-Sex Marriage Law*, Anchorage Daily News, July 27, 2003; Sheri Venema, *New Borders for Marriage*, The Oregonian, July 7, 2003.

[13] *Goodridge v. Massachusetts Dep't of Public Health*, No. 2001-1647-A (Suffolk Cnty. Super. Ct. May 7, 2002), slip op. at 24-25, available at http://www.marriagewatch.org/cases/ma/goodridge/trial/trialop.pdf.

[14] *Id.* at 25-26.

[15] See Brief of Plaintiff/Appellants available at http://www.glad.org/GLAD_Cases/Appellants_Brief.pdf.

The Supreme Court's decision helps the activists advance that agenda in two primary ways. First, the Court stated that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and it states that the Constitution demands respect for "the autonomy of the person in making these choices."[16] The Court then quoted its abortion decision in *Planned Parenthood v. Casey*, when it asserted, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[17] In *Lawrence*, the Court then held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[18] Gay marriage advocates can be expected to argue that *Lawrence* requires recognition of same-sex marriages because the Court declared that homosexuals are equally entitled to "seek autonomy" for the same "purposes" as heterosexuals.

Second, the *Lawrence* Court held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[19] While many secular, morally neutral reasons exist for opposing same-sex marriage, it is certainly true that the public's opposition is *in part* related to fundamental moral beliefs about homosexual conduct.[20] Yet as the dissenting Justices declared, "[t]his [decision] effectively decrees the end of all morals legislation."[21] Gay marriage advocates are likely to argue that opposition to same-sex marriage is, at bottom, an expression only of society's moral disapproval of homosexual conduct, and then point to the Court's decision in *Lawrence* as evidence that such reasons are constitutionally illegitimate.

Gay marriage advocates can be expected to argue that the *Lawrence* decision points towards ultimate recognition of same-sex marriage. The majority Justices in *Lawrence* stated that the case "does not involve whether the government must give formal *recognition* to any relationship that homosexual persons seek to enter."[22] It is true that the case does not directly address same-sex marriage, but the reasoning certainly bears on future consideration of that question. As the dissenting Justices wrote, "[t]his case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[23]

The Next Wave of Lawsuits to Impose Same-Sex Marriage

Gay marriage activists have developed a coordinated, nationwide strategy to force legal recognition of same-sex marriage. The long-time leader of the *Marriage* Project at LAMBDA Legal, Evan Wolfson, has formed "Freedom to Marry," a legal advocacy firm solely devoted to spreading same-sex marriage throughout the nation, in large part through litigation. Joining that group's efforts are the Gay & Lesbian Advocate Defenders, the American Civil Liberties Union, LAMBDA Legal, the NOW Legal Defense and Education Fund, Human Rights Watch, and many other activist groups. In Massachusetts, the state bar association also filed a brief in support of the

[16] Slip Op. at 13 (emphasis added).
[17] 505 U.S. 833, 851 (1992).
[18] Slip Op. at 13.
[19] Slip Op. at 17 (quoting and adopting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).
[20] Over half the public believes that sexual relations between two adults of the same sex is immoral, and more than 30 percent of the public continues to believe that the conduct should be illegal. See AEI Studies, supra note 5.
[21] Scalia Dissent at 15 (joined by Chief Justice Rehnquist and Justice Thomas).
[22] Slip Op. at 18.
[23] Scalia Dissent at 20.

plaintiffs' claim. The gay marriage activists have a zealous leadership, a sincere belief in the justice of their cause, and more than adequate funding to continue to push their claims in the courts. They have a simple goal: the legitimization and constitutionalization of same-sex marriage, and no state or federal DOMA will dissuade them from this effort.

Strategy #1: Exporting Massachusetts Marriages and Challenging DOMA

As soon as the *Goodridge* decision is announced, some same-sex couples will marry in Massachusetts. When gay marriage advocates deem it appropriate strategically, one or more of those couples will seek recognition of a Massachusetts marriage in *another* State. Activists already have made clear that this will be their strategy.[24] When these suits are filed, the activists will challenge as unconstitutional States' preexisting right not to recognize other States' marriages under the "public policy" doctrine, federal DOMA, and the state DOMAs passed by 37 States.

The fate of the activists' constitutional challenges is uncertain. It is a well-established principle of law that a marriage valid in the jurisdiction where performed shall be valid in other States. However, it is equally well established that a jurisdiction may *refuse* to *recognize* a marriage from another State if doing so would conflict with a strong local public policy. In part to ensure that their States' "public policy" on marriage was clear, 37 States have enacted "state DOMAs" that define marriage as between a man and a woman.[25] And the public policy doctrine does not *depend* on a clear statement of policy via state DOMAs; it is quite possible that every state court in a State *without* same-sex marriage would conclude that a strong public policy barred recognition of another State's same-sex marriage.[26]

Congress was aware of the public policy doctrine when it enacted DOMA,[27] but determined that the doctrine should be bolstered through federal legislation. This was because the Full Faith and Credit clause of the U.S. Constitution requires States to recognize the "public Acts, Records, and judicial Proceedings of every other State."[28] Thus, to remove any doubt about the reach of the Full Faith and Credit clause and any possible conflict with the public policy doctrine, Congress enacted DOMA pursuant to its authority — also under the Full Faith and Credit clause — to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Section 2 of DOMA provides that States are not *required* to recognize "a relationship between persons of the same sex that is treated as a marriage" in another State "or a right or claim arising from such relationship."[29]

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[24] See Angela Couloumbis, *All Sides Await a State's Ruling on Gay Marriage*, Philadelphia Inquirer, July 22, 2003 (quoting Harry Knox, program director for activist group "Freedom to Marry" as explaining that "a victory in Massachusetts would prompt couples to go there to marry, then return to their home states and demand that those governments — as well as the federal government — recognize the new marriage licenses"). Indeed, the founder of the largest gay church in the nation, the Fellowship of Metropolitan Community Churches, has pledged to attempt to get his *Canadian* marriage recognized and to challenge federal DOMA. See Mary Ellen Peterson, *Troy Perry to Launch Court Action to Have his Marriage Recognized*, 365Gay.com Newsletter, July 24, 2003, available at http://www.365gay.com/newscontent/072403perrymarriage.htm.

[25] See statutes and constitutional amendments collected at http://www.marriagewatch.org/states/doma.htm.

[26] See generally David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

[27] See speeches of Senator Barbara Boxer, Diane Feinstein, and Russell Feingold, *Congressional Record*, Sept. 10, 1996, and Judiciary Committee testimony included at S-10112 and S-10118 of the *Congressional Record* on the same day.

[28] U.S. Const., art. IV, sec. 1.

[29] P.L. 104-199, 110 Stat. 2419 (1996). Some prominent scholars also believe that another State's marriage need not be recognized under the Full Faith and Credit clause because a marriage is not akin to a "public Act, Record, or

As noted above, 37 States have also passed their own DOMAs. The reach of each DOMA varies, but all have the effect of establishing the "public policy" of each State. Four States — Alaska, Hawaii, Nebraska, and Nevada — have enacted state constitutional *amendments* that prevent recognition of same-sex marriages.[30] The remaining States passed statutes that made clear the State's refusal to permit same-sex marriage in those States and the States' refusal to recognize those marriages (and in some cases, lesser "civil unions") from other States. No state supreme court has considered whether any of the *statutory* state DOMAs comply with the *State's* constitution, however. In other words, most of these state DOMAs survive solely at the whim of state supreme courts.

Defenders of traditional marriage and of DOMA have several arguments to respond to gay marriage advocates' lawsuits, but these arguments are not foolproof. Since same-sex marriage became a national issue in the mid-1990s, proponents and their allies in the legal academy have been working to devise ways to force States to recognize other States' same-sex marriages. One widely cited article in the *Yale Law Journal* argues that the public policy doctrine is unconstitutional and States do not have the right to refuse to recognize another State's valid marriage.[31] Others have argued that if the public policy exception is applied only to exclude same-sex marriages, then the Equal Protection clause may be implicated.[32] Although most state DOMAs were passed for the express purpose of ensuring that the public policy of the State was made clear, those laws will face similar challenges. Finally, federal DOMA, often seen as a backup to the state protections, may be challenged either under the theory that Congress lacked the authority to limit the scope of the Full Faith and Credit clause, or that it violates the Equal Protection clause.[33] The Equal Protection argument would be weak under current understandings of the Constitution because only Justice O'Connor adopted such an analysis in *Lawrence*. Whether courts will seek to expand that jurisprudence in light of Justice O'Connor's concurring opinion in *Lawrence* and the Supreme Court's earlier decision in *Romer v. Evans*[34] remains to be seen.

It is difficult to predict the success of these challenges to federal DOMA, state DOMAs, and the public policy doctrine. Even the Clinton Justice Department opined that DOMA was constitutional. But through careful forum shopping, gay marriage activists can put these arguments before activist judges throughout the country. To rely solely on DOMA ultimately is to trust that *all* judges will uphold that law.

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judicial Proceeding" and because forcing recognition is inconsistent with the underlying purpose of the clause. See, for example, David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

[30] See http://www.marriagewatch.org/states/doma.htm.

[31] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997).

[32] See, e.g., Mark Strasser, *Legally Wed: Same Sex Marriage and the Constitution*, at pp. 138-140 (Cornell Univ. Press 1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev 1 (1997).

[33] Harvard Law Professor Lawrence Tribe, for example, made the former argument at the time of DOMA's consideration in 1996. See Tribe letter made part of *Congressional Record* by Senator Kennedy on June 6, 1996.

[34] 517 U.S. 620 (1996) (holding unconstitutional a Colorado state constitutional amendment barring enactment of anti-discrimination laws aimed at benefiting homosexuals).

Strategy #2: Filing Copycat Suits and Reproducing Goodridge

Every state constitution contains the same basic constitutional protections found in the Massachusetts Constitution, including those provisions that the plaintiffs in *Goodridge* argue mandate a right to same-sex marriage. While other States' courts are not bound to follow *Goodridge*, it takes little imagination to recognize that some judges — especially those protected from the wrath of voters — could be tempted to use their power to invent a new constitutional right.

Gay marriage advocates have already filed such lawsuits in Arizona, Indiana, and New Jersey, and more cases can be expected after *Goodridge* is announced. It is impossible to predict how these other state courts will rule. Many can be expected to dismiss these lawsuits as frivolous, but the results are unlikely to be uniform. After all, it was the New Jersey Supreme Court that in 1999 wrote the expansive opinion mandating that the Boy Scouts accept homosexual Scout Leaders.[35] For the 46 States that lack a state constitutional amendment barring same-sex marriage, the future of the marital institution currently resides in the state supreme courts, not in the legislatures. If the *Goodridge* case is decided as anticipated, the activists will have a "model case" upon which to rely in those other States' courts.

Strategy #3: Filing Federal Lawsuits Using the Lawrence Decision

Gay marriage advocates have yet another avenue to pursue. Homosexual federal employees surely will include those who marry in Massachusetts post-*Goodridge*. At some point, one of those employees will apply for spousal benefits such as health insurance or pension benefits. Because federal DOMA defines marriage as between a man and a woman for the purposes of all federal laws and regulations, the benefit claim will be denied. Thus, the same-sex "spouse" would have no rights as a "spouse," even if Massachusetts or another State believed otherwise.

The federal employee and his or her partner will then sue in federal court, arguing that the federal definition of marriage in DOMA is unconstitutional as a matter of federal Equal Protection and Substantive Due Process law. The plaintiffs also may argue that Congress lacks the power to "regulate" the terms of marriage because marriage is conventionally a State matter, citing the Supreme Court's recent federalism jurisprudence as support. Although federal courts should reject such claims and uphold DOMA's definition of marriage for federal purposes, it is well known that some federal jurisdictions are more activist than others. Insofar as advocates will be able to pick their courts — for example, by filing suit in San Francisco subject to review by the famously-liberal Ninth Circuit Court of Appeals — their prospects for success (even if temporary) expand dramatically. Just as with the eventual challenges to DOMA's Full Faith and Credit provision and the efforts to impose same-sex marriage through state courts, judges hold the final power absent any constitutional amendment. And in the case of any federal court challenge such as the one contemplated here, the judges are unelected, lifetime appointees. None of the political constraints that exist with most state court judges will apply.

[35] *Boy Scouts of America v. Dale*, 734 A. 2d 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).

The Willingness of the Courts to Take Pro-Same-Sex Marriage Positions

Despite public opposition to same-sex marriage, it is reasonable to expect more than a few judges will accede to the gay marriage activists' court campaign. The legal profession itself is predisposed to support a remaking of marriage. The dissenting Justices in *Lawrence* charged that the Supreme Court itself has become imbued with the "law profession's anti-anti-homosexual culture,"[36] and argued that the Court had dismissed mainstream values throughout the nation. Some members of the Supreme Court increasingly rely upon European laws and norms when crafting their opinions, as was apparent in the *Lawrence* decision.[37] Although most state court judges do face the ballot in some fashion,[38] they still went to the same law schools where professors treat the advancement of homosexual rights as the next logical step in the civil rights movement. They and their young law clerks still read the same legal scholarship that so overwhelmingly advocates recognition of same-sex marriage and labors to craft ways to convince those courts to invent the right thereto. To expect *all* judges to follow popular opinion and strictly to adhere to the Constitution is an act of faith.

Ultimately the Supreme Court will rule on same-sex marriage, but that may not occur until several States and even some federal courts have altered the institution and thousands of couples have gained legal status as a result. Nor should the Supreme Court's intervention be seen as a panacea. The Supreme Court itself has shown that it will show little regard for public opinion when it takes sides in cultural divisions that emerge in society. The Court persists in upholding abortion laws that 60 percent of the public wants tightened.[39] In 2002, the Supreme Court held the execution of the mentally retarded was inconsistent with current "standards of decency" even though only 18 of the 38 capital punishment States had acted to ban the practice.[40] And the Court recently approved the University of Michigan's racial preferences regime, despite the fact that 69 percent of those polled believe that every applicant should be admitted "solely" based on merit.[41] These examples illustrate what should be obvious to any student of the Supreme Court: insofar as the Supreme Court considers public opinion at all, it considers that of the elites to the exclusion of all Americans collectively. And it is the elites who scorn traditional views on sexual orientation and who are most likely to favor same-sex marriage.[42]

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[36] Scalia Dissent at 19.

[37] Slip Op. at 12; see also, for example, *Atkins v. Virginia* 536 U.S. 304 (2002) (relying on foreign law in evaluating American death penalty jurisprudence).

[38] Eighty-seven percent of state court judges face elections of some sort. See *Justice for Hire: Improving Judicial Selection*, at p. 1 (Committee for Economic Development 2002), available at http://www.ced.org/docs/report/report_judicial.pdf.

[39] See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down ban on partial birth abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade*); see also January 2003 CBS/NY Times poll showing 60 percent of public wants abortion availability to be tightened, or for abortion to be outlawed altogether, available at http://www.pollingreport.com/abortion.htm.

[40] *Atkins v. Virginia* 536 U.S. 304 (2002).

[41] See June 2003 Gallup poll, available at http://www.pollingreport.com/race.htm.

[42] See polls by Gallup showing that urban, liberal Democrats are most likely to favor same-sex marriage, and polls conducted by National Opinion Research Center showing that wealthy urban white liberal Democrats are least likely to oppose gay sexual relations on moral grounds. See AEI Studies, supra note 5.

The Time to Act is Now

When same-sex marriage is legalized in Massachusetts, thousands of homosexual couples from in and out of that Commonwealth will rush to marry. Any later attempts to "react" to the growth of same-sex marriage will then be construed as an effort to deprive those homosexual couples of their legal status. A constitutional amendment to ban same-sex marriage would be taking away a right that has been invented and granted by a court. It is imperative that Congress not allow the institution to spread before Congress acts; otherwise, homosexual couples will rely upon the court edicts and remake their lives accordingly. The legal complications that will ensue, as well as the risk that society will be less willing to confront the question itself when faced with the reality of thousands of same-sex marriages, argue strongly in favor of prompt action to confront this issue.

It is important also to recognize that same-sex marriages in Massachusetts inevitably will impact the legal and social life of other States. Homosexual couples that marry in Massachusetts would have all the benefits of married couples in that Commonwealth. Many will buy property in and out of the State, adopt and rear children, get divorced, incur child support and alimony obligations, and enmesh themselves in the same kinds of legal obligations that most traditionally married couples do. It is inevitable, though, that many of those homosexual couples will move out of Massachusetts and seek to enforce those legal obligations in other States' courts. For example, it is easy to anticipate issues relating to child support, alimony, and property division at the time of divorce spilling over into other States.

What will the other State's courts do when asked to adjudicate disputes grounded in Massachusetts same-sex marriages? A complex body of law known as "choice of law" has evolved to address these matters in the context of traditional marriages. Moreover, federal and state statutes have been enacted to regularize the treatment of these kinds of obligations across State lines. In the context of same-sex marriage, where 37 States have indicated their opposition to the institution, judges may refuse to apply these statutes. (Recall that federal DOMA defines "marriage" and "spouse" for purposes of all federal laws and regulations.) But no state court will be able to put its head in the sand for long because the practical legal and human problems will proliferate — problems of children in need of child support payments, of custody disputes for divorced homosexual couples, of homosexual former spouses being denied benefits rightfully theirs under Massachusetts law, and so forth. All the efforts to craft uniform solutions to matters of family law over the past half-century could prove useless in the context of homosexual couples who have left Massachusetts. Nor is it a sufficient response to say that these couples should not leave that Commonwealth, because such a solution would threaten the right to travel among the States as recognized by the Supreme Court.[43]

Given our integrated national economy and the mobility of the nation's citizenry, same-sex marriages in Massachusetts will end up affecting the laws and cultures of all other States. As the States struggle to react, the risk of Supreme Court intervention to create a uniform standard (or at the least to permit recognition of out-of-state homosexual unions) will only increase.

[43] See *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

The Need for a Constitutional Response

The Massachusetts court is expected to break down traditional marriage — to redefine its most historic and natural characteristic and ask society simply to hope that the institution endures. If this is the ruling, it cannot help but remake the social infrastructure of an entire State. The question that Congress must ask is whether it is willing to allow the *courts* to redefine the marital institution based on conclusions of a few judges, or whether the people's strong preference to preserve traditional marriage should be respected and preserved.

Additional Statutes Will Not Be Enough to Stop the Courts

Constitutional amendments ought to be rare — employed only when no other legislative response will do the job. However, no statutory solution appears to be available to address the current campaign through the courts. Congress already has passed DOMA, but as discussed above, its effectiveness in the face of strenuous challenges in the courts remains to be seen. Some have suggested that Congress pass a "Super DOMA" — a repeat of DOMA coupled with an effort to deprive the federal courts of jurisdiction to review it under article III, section 2 of the Constitution. But such a strategy would not prevent state courts from creating same-sex marriage, and litigants surely would challenge such a dramatic effort by Congress to deny litigants the chance to have their purported fundamental rights (be they due process, equal protection, or otherwise) reviewed in federal court. Similarly, some have suggested that Congress should deny States funds unless they protect marriage through a state DOMA. Such an option would also face constitutional challenges and would have the policy effect of harming many Americans in their greatest time of need. If Congress is to prevent the courts from undoing its work and, once and for all, ensure the preservation of traditional marriage, then it should begin to consider constitutional options.

Principles to Govern the Constitutional Response

Any effort to amend the Constitution should emphasize the following principles:

Federal DOMA must be defended from the courts. DOMA ensures that (a) the traditional man-woman marriage standard governs for all federal law, and (b) States' right to deny recognition of other States' untraditional legal relationships remains intact. As discussed above, the *Goodridge* and *Lawrence* developments demonstrate that neither of these provisions is immune from constitutional challenge.

The U.S. Constitution should not be construed to change the traditional definition of marriage. The premise of this paper is that most Americans believe, and it should be United States policy, that no court — from the U.S. Supreme Court down through all federal, state, and territorial courts — should have the power to change the traditional definition of marriage. Neither the original Constitution nor any of its amendments was adopted with such an intention.

States should retain the right to grant some legal benefits to same-sex couples. The Constitution should not limit the ability of States, through their elected representatives or by popular will, to address the question of whether homosexual couples (as couples) should enjoy certain benefits, such as a right to file joint state tax returns, access to medical records, access to pension or other state employment benefits of homosexual partners, inheritance rights, or a variety of other civil benefits.

An Existing Proposal: The Federal Marriage Amendment

There exists at present a vehicle to pursue the above principles, a constitutional amendment proposed in the House called the Federal Marriage Amendment ("FMA"). H.J. Res. 56 provides:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

This amendment would create a uniform national definition for "marriage" for purposes of federal and state law, and would prevent any state from creating same-sex marriage. However, the amendment is designed to preserve the ability of state *legislatures* to allocate civil benefits within each State. State *courts* (like Massachusetts) would not be able to create this new right. In addition, no court at any level would be able to rely upon a state or federal constitution to mandate recognition of another State's distribution of benefits (the "legal incidents of marriage") to non-traditional couples.

The Federal Marriage Amendment is the only proposed constitutional amendment presently pending before Congress to address the likely ramifications of the *Goodridge* and *Lawrence* decisions. The FMA has bipartisan support in the House, but it also has been criticized from both ends of the political spectrum. Some social conservative groups, such as the Concerned Women for America, oppose the FMA in part because it still permits state legislatures to create civil unions.[44] In contrast, some legal scholars have questioned whether the text of the FMA *would* in fact permit civil unions.[45] And some FMA opponents argue that questions relating to marriage should be left to the States altogether, with no federal role.[46] The Senate should examine these and other questions about the details of this amendment in timely hearings in the Judiciary Committee.

Conclusion

The pace of the gay marriage activists' campaign through the nation's courts is uncertain, but it is not at all certain that DOMA or other legislation will stop determined activists and their judicial allies from pursuing this agenda — only a constitutional amendment can do that. The Senate should evaluate the Federal Marriage Amendment seriously and consider whether it, or any other constitutional amendment, is the appropriate response.

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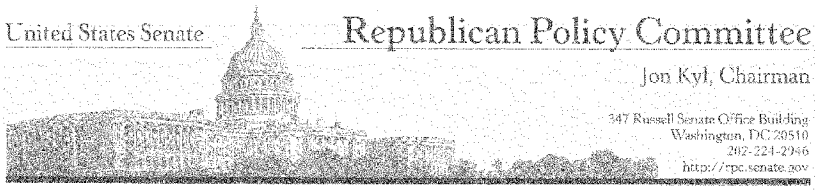
[44] See http://www.cwfa.org/articles/1190/CWA/family/index.htm.

[45] See, for example, analysis of Professor Eugene Volokh at UCLA Law School at http://volokh.com/2003_07_06_volokh_archive.html - 1057884638112491 90, and debate referenced therein.

[46] See, for example, http://www.aclu.org/news/NewsPrint.cfm?ID=12718&c=101.



February 11, 2004

Same-Sex Marriages Legal in Massachusetts on May 17

Judicial Activism Forces Same-Sex Marriage on the Nation

A 4-3 majority of the Supreme Judicial Court of Massachusetts ruled last November in *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003), that the state's refusal to issue marriage licenses to same-sex couples violated the state constitution. The court concluded that to insist on traditional marriage was to engage in "invidious" discrimination that the court would not tolerate. The majority, therefore, ruled that marriage must be open to same-sex couples, and delayed the decision for 180 days so that the state legislature could pass laws it "deemed necessary" in light of the decision. (*Id.* at 969-970.)

In response, the Massachusetts Senate crafted legislation to provide all the protections, benefits, and obligations of marriage to same-sex couples, but created a new parallel institution called "civil unions." This legislation would preserve traditional marriage while granting virtually all the legal benefits of marriage to same-sex couples. Because of ambiguities in the original *Goodridge* decision, the state Senate then asked the high court for its constitutional opinion of the proposed law — would civil unions that provided *all* the rights, duties, obligations, and privileges of marriage to same-sex couples satisfy the court?

The court's answer, released on February 3, was an emphatic "no." The same four-judge majority declared it would not tolerate a parallel system of "civil unions" (akin to what exists in Vermont), even though the legal arrangement would be identical to marriage itself. Thus, without any vote of the legislature or the citizens themselves, the core of the marital institution — that it shall be a union of a man and a woman — will be eliminated in Massachusetts. The only remedy the citizens of Massachusetts have for this judicial activism is a constitutional amendment process that can be completed no earlier than 2006. In the meantime, same-sex marriage licenses are expected to be issued in Massachusetts beginning on May 17.

The Massachusetts Court's Rejection of Traditional Marriage

The *Goodridge* court last November court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a

person of the same sex violates the Massachusetts Constitution." (798 N.E. 2d at 969.) Particular highlights from the decision follow (with all emphasis added).

- Barring same-sex civil marriage "works a deep and scarring hardship on a very real segment of the community **for no rational reason**." (*Id.* at 968.)

- Support for traditional marriage "is rooted in **persistent prejudices** against persons who are (or who are believed to be) homosexual." (*Id.*)

- There is "**no rational relationship** between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child-rearing unit." (*Id.* at 962.)

- "Civil marriage is an **evolving paradigm**" subject to redefinition by courts. (*Id.* at 967.)

- Defenders of traditional marriage failed "to identify **any relevant characteristic** that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex." (*Id.* at 968.)

- "[I]t is **circular reasoning**, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." (*Id.* at 961 n.23.)

- The court's role is to **limit the influence of "historical, cultural, [and] religious … reasons**" that the State may rely upon in attempting to preserve traditional marriage. (*Id.* at 965 n.29.)

- "The continuous maintenance of this **caste-like system** is irreconcilable with, indeed, totally repugnant to the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'" (*Id.* at 972 (Greaney, J., concurring).)

- To note the long history of traditional marriage is to rely on nothing more than a **"mantra of tradition."** (*Id.* at 973 (Greaney, J., concurring).)

Three justices dissented from the decision, arguing that only the state legislature has the authority to make such a dramatic change to the civil marriage institution, and lamenting the majority's claim that the State's opposition to same-sex marriage was irrational.

- "It is surely pertinent to the inquiry to recognize that this proffered change affects not just a load-bearing wall of our social structure but the very cornerstone of that structure." (*Id.* at 981 (Sosman, J., dissenting).)

- The majority stripped the elected representatives of their right to evaluate the "consequences of that alteration, [and] to make sure that it can be done

safely, without either temporary or lasting damage to the structural integrity of the entire edifice." (*Id.* at 982 (Sosman, J., dissenting).)

- The majority justices instead imposed their will under the assumption "that there are no dangers and that it is safe to proceed, … an assumption that is not supported by anything more than the court's blind faith that it is so." (*Id.*)

The Court Insists on "Marriage" and Rejects a Civil Union Option

The Massachusetts Senate's subsequent drafting of a "civil unions" bill was designed to satisfy the court's edict while preserving traditional marriage. To ensure its constitutionality, the state Senate requested an advisory opinion from the Massachusetts court. Despite the fact that all legal rights and benefits were provided in the civil unions legislation, the court rejected this alternative legislation, insisting that marriage itself must be redefined. *Opinions of Justices to the Senate,* SJC 09163 (Feb. 3, 2004), available at www.state.ma.us/courts/opinionstothesenate.pdf. Highlights from that decision follow.

- The proposed law granting all the rights, benefits, and privileges of marriage through "civil unions" suffers from "**defects in rationality**." (*Id.* at 8.)

- "For **no rational reason**, the marriage laws of the Commonwealth discriminate against a defined class; **no amount of tinkering with language can eradicate that stain**." (*Id.* at 11.)

- "The bill would have the effect of maintaining and fostering a **stigma of exclusion** that the [Massachusetts] constitution prohibits." (*Id.* at 11.)

- Any attempt to preserve traditional marriage is little more than "**invidious discrimination**." (*Id.* at 10.)

- The court indicates that the elimination of civil marriage altogether is constitutionally preferable to the preservation of traditional marriage. (*Id.* at 11 n.4.)

In light of the court's refusal to entertain a solution that granted all benefits and privileges of marriage through civil unions, Massachusetts is expected to issue marriage licenses to same-sex couples on May 17, 2004.

How the Massachusetts Decision Affects Other States

Same-sex couples from across the United States intend to travel to Massachusetts this summer, marry, and then return to their home states to settle.[1] While Massachusetts law appears to prohibit the issuance of marriage licenses to non-resident same-sex couples who intend to return to

[1] The press reports that Massachusetts wedding planners and town clerks are fielding calls "from as far away as Alaska and Hawaii" from same-sex couples who intend to marry this summer in Massachusetts. Thomas Caywood, "Clerks getting pre-wedding jitters," *Boston Herald*, 6 Feb. 2004. See also articles discussing American same-sex couples marrying in Canada and returning to United States to live. *E.g.*, Sarah Robertson, "Mining the Gold in Gay Nuptials," *New York Times*, 19 Dec. 2003.

states where such "marriages" are illegal, see Mass. G.L. 207 §§ 11-13, the fate of that law is uncertain and press reports make clear that many non-Massachusetts citizens intend to marry there and return to their home states. And Massachusetts same-sex residents who marry there can, of course, later move to other states. In both instances, those same-sex couples may seek recognition of their Massachusetts marriages in other states so that they can receive all the privileges, benefits, and rights that each state gives to married couples.

These Massachusetts marriages will serve as the gateway to additional judicial activism throughout the United States. Some same-sex couples will ally themselves with homosexual-rights activists and challenge both provisions of federal DOMA (the "Defense of Marriage Act") — 1) the section that prevents same-sex married couples from accessing federal benefits such as joint tax filing privileges, Social Security spousal payments, and federal employee spousal eligibility, and 2) the section that bolsters the ability of states to refuse recognition of out-of-state same-sex marriages. Other activists will follow the Massachusetts model and demand that state supreme courts redefine marriage by judicial fiat, as plaintiffs have urged recently in New Jersey, Arizona, Indiana, Alaska, Hawaii, and Vermont.[2]

As these activist-driven state court cases are filed, they will confront resistance in the 38 states that have passed some form of a "State DOMA" that enshrines in state law support for traditional marriage.

States with "DOMAs"
(constitutional amendments marked with *)

Alabama	*Georgia*	*Louisiana*	*Nevada**	*Tennessee*
*Alaska**	*Hawaii**	*Maine*	*North Carolina*	*Texas*
Arizona	*Idaho*	*Michigan*	*North Dakota*	*Utah*
Arkansas	*Illinois*	*Minnesota*	*Ohio*	*Virginia*
California	*Indiana*	*Mississippi*	*Oklahoma*	*Washington*
Colorado	*Iowa*	*Missouri*	*Pennsylvania*	*West Virginia*
Delaware	*Kansas*	*Montana*	*South Carolina*	
Florida	*Kentucky*	*Nebraska**	*South Dakota*	

Only Alaska, Hawaii, Nebraska, and Nevada have state constitutional amendments that prevent a state supreme court from ruling these "State DOMAs" unconstitutional. And, of course, no State DOMA can prevent a federal court from striking down a state constitutional amendment under *federal* constitutional standards. (The Nebraska state constitutional amendment has been challenged in federal court and is now awaiting trial. *Citizens for Equal Protection, Inc. v. Bruning*, 290 F. Supp. 2d 1004 (2003).) So far, state court lawsuits are pending in Arizona, Indiana, and

[2] See *Lewis v. Harris*, No. MER-L-03, 2003 WL 2319114 (N.J. Super. L. Nov. 5, 2003) (denying plaintiffs' demand for marriage license; case now pending appeal); *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003) (affirming denial of marriage license to plaintiffs; case pending petition to Arizona Supreme Court); *Morrison v. Stadler*, No. 49D13-0211-PL 001946 (Marion County (Indiana) Super. Ct.) (relief denied to plaintiff; on appeal to Indiana Court of Appeals); *Brause v. State, Dep't of Health*, 21 P.3d 357 (Alaska 2001) (affirming dismissal on mootness grounds due to state constitutional amendment barring same-sex marriage recognition); *Baehr v. Miike*, 1996 WL 694235 (Hawaii Cir. Ct. Dec. 3, 1996) (superseded by constitutional amendment); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (causing legislature to enact civil unions law).

New Jersey, each of which asks the state courts to rule that the state constitutional equal protection and/or due process provisions require imposition of same-sex marriage.

Many same-sex couples do not wish to be litigious, but it is inevitable that many of them will challenge state marriage laws through the regular course of living in their home states. For example, courts in Texas, Iowa, and New York have already confronted cases addressing the reach of Vermont civil unions in the case of "divorces" and the right to sue on behalf of a deceased "spouse."[3] Thus, while the conscious campaign for judicial imposition of same-sex marriage through the courts is well documented,[4] that campaign ultimately may pale in comparison to the opportunities for judicial activism that will arise when same-sex couples settle in states where their marriages are not recognized.

Conclusion

President Bush said in his State of the Union address, "If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process." That constitutional process begins when each house of Congress proposes a constitutional amendment and presents it to the American people for ratification through their state legislatures.[5] The recent judicial activism in Massachusetts, especially when seen in the context of the ongoing campaign in the courts, would certainly justify the Judiciary Committee holding hearings on the propriety of proposing an appropriate constitutional amendment. Ultimately, the future of marriage should be decided by the American people, not by activist courts.

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[3] The unpublished Texas decision relating to dissolution of a Vermont civil union (which was later reconsidered) is discussed at http://www.washtimes.com/national/20031215-110146-5298r.htm. The Iowa decision regarding the same, also reconsidered, is discussed at http://desmoinesregister.com/news/stories/c4788993/22995747.html. The full text of the New York decision regarding the right to sue as a surviving spouse if one is in a Vermont civil union is available at http://www.marriagewatch.org/cases/ny/langan/trial/sj_opinion.pdf.

[4] See, for example, Senate Republican Policy Committee, "The Threat to Marriage from the Courts" (July 29, 2003), available at http://rpc.senate.gov/releases/2003/jd072903.pdf.

[5] U.S. Constitution, art. V.

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

PATRICIA M. LINK and
SHEILA A. CHAMBERS
on behalf of themselves and
all others similarly situated,

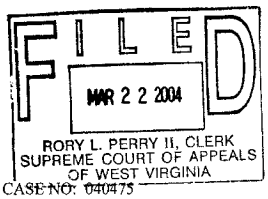
Petitioners,

v.

ALMA Y. KING,
Clerk of the Kanawha County
Commission,

Respondent

David E. Shumate, Michael "Andy"
Ragland, J. Wade Davis, and Jamie
A. Bailey, Intervenors



CASE NO: 040475

BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS

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ISSUE STATEMENT

Should the Court order Respondent to issue marriage licenses to same-gender couples?

I. INTRODUCTION

"Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society." *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (2003). Petitioners are same-gender couples who seek to affirm their commitment to each other by marrying. The couples have been denied a marriage license by the Clerk of the Kanawha County Commission. The church of a minister who wishes to solemnize marriages of same gender couples that will be recognized by the State of West Virginia has a pending petition to intervene.

Petitioners urge the Court to order respondent to issue marriage licenses to otherwise-qualified same-gender couples so that they may join their partners in marriage just as opposite-gender couples may. They ask that they be accorded equal protection of the laws, and that they no longer be deprived of the rights to liberty and happiness guaranteed to all West Virginians by the state constitution.

This Court now has the opportunity to recognize, as did the Massachusetts Supreme Court in *Goodridge,* that denial of civil marriage licenses to same-gender couples is fundamentally wrong. To do so need not impinge upon the rights of individuals who hold contrary beliefs. It will, however, remove the restrictions placed upon petitioners' right to marry that have been imposed upon them by the beliefs of others. In its recent decision holding unconstitutional a Texas law prohibiting persons of the same sex from engaging in certain intimate sexual conduct, the United States Supreme Court reaffirmed its conviction that "[o]ur obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas,* 123 S. Ct. 2472, 2480 (2003), citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S.

833, 840 (1992). Let this be the guide to ensuring the rights of every one of West Virginia's citizens to marry the person of his or her choice.

II. STATEMENT OF FACTS

Two sections of the West Virginia Code restrict the marriage relationship to opposite-gender couples. Section 48-2-104 (c) requires that "[e]very application for a marriage license must contain the following statement: 'Marriage is designed to be a loving and lifelong union between a man and a woman.' West Virginia Code Section 48-2-603 states that "[a] public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state."

Respondent Alma King, Clerk of the Kanawha County Commission, has refused to issue marriage licenses to the same-gender petitioners.

Petitioners in this case are Patricia M. Link and Sheila A. Chambers, a same gender couple wishing to be married; J. Wade Davis and Jamie A. Bailey, a same gender couple wishing to be married; David E. Shumate and Michael A. Ragland, a same gender couple wishing to be married; and the Appalachian Metropolitan Community Church. (*See* Affidavits attached).

Patricia M. Link and Sheila A. Chambers

Patricia M. Link and Sheila A. Chambers have been together for 23 years, were married in a church, celebrated a civil union in Vermont, and were legally married in Canada. Ms. Link and Ms. Chambers seek to be married in West Virginia. They have suffered serious deprivation of rights guaranteed to legally married opposite-gender couples solely because they cannot be

married in West Virginia. They have been required to pay thousands of dollars for legal documents that only partially guarantee them some rights. Although they are spouses in every way, they are prevented legally from obtaining civil recognition of their status.

Ms. Link and Ms. Chambers are burdened by a government that forces them to file tax returns as single individuals and by a society that persists in perceiving them as single individuals, denying them the rights and the status enjoyed by married couples. Ms. Chambers worked 30 years in a factory and can provide no benefits or pension to her chosen life mate. When Ms. Chambers had an occupational accident and was hospitalized in critical condition, hospital staff denied Ms. Link access to her life partner, who she feared was dying.

David E. Shumate and Michael A. Ragland (Andy)

David Shumate and Andy Ragland are a same gender couple who have lived together as spouses for 12 years. Mr. Shumate is a retired teacher, with 31 years of teaching experience and a pension that he cannot bestow upon Mr. Ragland. They both require separate health insurance coverage.

Like Ms. Link and Ms. Chambers, they desire to be married because they are a couple in every other manifestation and are single only because the law does not recognize their loving relationship.

J. Wade Davis and Jamie A. Bailey

Mr. Davis and Mr. Bailey are a couple who have been together for several years in a committed relationship. They own a home together. Mr. Davis has two sons who interact as family with Mr. Bailey. Like the other petitioners, they are deprived of the many benefits available to families in which the adult partners are joined in a civil marriage.

All of the above couples and many others throughout this state are deprived of rights granted to opposite gender couples and are denied the full benefits of the laws which protect opposite gender couples.

Appalachian Metropolitan Community Church

The church is a member of a Christian community of faith with a membership of over 43,000 and over 300 churches in 22 countries and 48 states. It serves and ministers to same gender couples among other groups. The church's motion to intervene is pending.

Reverend Michael E. Shields is the local minister. Although his religion would not deny marriage to petitioners and the law accords him the right to perform marriage ceremonies, he cannot legally join petitioners in a civil marriage recognized by the State of West Virginia.

Reverend Shields has seen how the law has impacted committed same gender couples when they are denied critical-care decisions and access to the bedside of dying partners. He has seen life partners suffer grievous emotional harm because their relationships are not legally sanctioned.

As a result of respondent's refusal to issue marriage licenses to same gender couples, Petitioner Shields is denied the right, accorded him under the law with regard to opposite-gender couples, to join in marriage otherwise-qualified same-gender couples who wish to obtain civil, as well as religious, recognition of their commitment to each other.

Petitioners seek only to receive marriage licenses so that as human beings they can enjoy the full rights accorded to opposite gender life mates.

III. ARGUMENT

A. Mandamus is a Proper Remedy Because Petitioners Have a Clear Legal Right to Marry, Respondent Has a Duty to Issue Them a Marriage License, and There Is No Other Remedy Available To Them.

Mandamus is a proper remedy because petitioners' request satisfies the three coexisting elements this Court requires in order for a writ of mandamus to issue: " (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *State ex rel. Bierne v. Smith*, 591 S.E. 2d 329, 333 (W. Va. 2003); Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

1. Petitioners Have A Clear Legal Right to Marry.

Three state supreme courts in the last dozen years have reached the conclusion that denying same-gender couples' marital rights violates their respective constitutions. *See Goodridge, supra*; *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993). Each of these courts has used a different analysis but reached the same result. Notably, each of the state constitutional provisions invoked by these courts has a counterpart in the West Virginia constitution that has been interpreted similarly by this Court.

a. West Virginia recognizes the fundamental right to marry.

In *In the Matter of Kilpatrick,* 180 W.Va. 162, 164 n.5, 375 S.E.2d 794, 796 (1988), the Court refers to "recognition of the right to marry" as a given, citing *Zablocki v. Redhail*, 434 U.S. 374, 383-86, 98 S. Ct. 673, 679-81, 54 L.Ed.2d 618, 628-31 (1978), *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L.Ed.2d 1010, 1018 (1967), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965). In an earlier case, *Whitener v. W.Va. Board of*

Embalmers and Funeral Directors, 169 W.Va. 513, 517, 288 S.E.2d 543, 545 (1982), the Court noted that "[l]aws affecting constitutional rights must satisfy the difficult compelling state interest test," referring to *Zablocki* as setting forth the "right to marry."

b. Petitioners' liberty interest in their right to marry is protected by the due process clause.

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citations omitted). The *Loving* Court held that "the Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." *Id.* The Court held that "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* Because the *Loving* Court relied also on the liberty interest protected by the Due Process Clause, and not only on the Equal Protection Clause's strict scrutiny afforded racial classifications, the infringement on Petitioners' "freedom of choice to marry" embodied in W.Va. Code 48-2-104 and 48-2-603 must also fail.

It is well recognized that the law affords "constitutional protection to personal decisions relating to marriage" and to "family relationships." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). "Our precedents have respected 'the private realm of family life which the state cannot enter' . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* (citations omitted)

West Virginia's tradition of protecting fundamental rights is even stronger. "[T]his Court has determined repeatedly that the West Virginia Constitution's due process clause is more protective of individual rights than its federal counterpart." (citations omitted) *Women's Health Center of West Virginia, Inc. v. Panepinto*, 191 W.Va. 436, 442, 446 S.E.2d 658, 664 (1993).

The *Panepinto* Court cited numerous cases holding that West Virginia gives greater protection under the due process clause than does the federal constitution, both in its recognition of what constitutes a fundamental right and in its guarding of those rights.

This Court has frequently cited the right to marry as fundamental, holding that laws infringing such rights "must satisfy the difficult compelling state interest test. "*Whitener v. W. Va. Bd. of Embalmers and Funeral Directors*, 169 W.Va. 513, 517, 288 S.E.2d 543, 545 (1982) (specifically citing right to marry) (citations omitted); *Townshend v. Board of Educ. of County of Grant*, 183 W.Va. 418, 422, 396 S.E.2d 185, 189 (1990) ("We also note that the freedom to marry is recognized as a vital personal right") (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *In the Matter of Kilpatrick*, 180 W.Va. 162, 164, 375 S.E.2d 794, 796 n.5 (1988) ("The United States Supreme Court has recognized the right to marry as a fundamental right in an equal protection context, subjecting legislation regulating this right to a strict scrutiny level of protection.") (citations omitted). The *Townshend* Court upheld an anti-nepotism policy because it "does not deny Mr. Townshend the right to marry, but does deny him the right to be a teacher under the supervision of his wife." *Townshend*, 183 W.Va. at 422, 396 S.E.2d at 189. Here, by contrast, West Virginia has denied gays and lesbians the right to marry and thus infringed a fundamental right.

This Court has astutely recognized that protection of one's liberty interest in family relationships cannot turn on whether the family is "traditional." The *Roy Allen S.* Court held that a putative father's liberty interest in his relationship with his potential offspring is not premised "on the maintenance of rights within the traditional family unit" but instead on the relationship, "regardless of whether the setting is traditional." *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 632, 474 S.E.2d 554, 562 (1996) (citations omitted). "In our opinion, the strength of a

parent's bond with his or her child is not dependent upon some official or traditional arrangement; rather, the strength derives from the parent's personal and emotional investment and the relationship that develops from that investment." *Id.* Indeed, this Court recognized the fallacy of protecting *only* "traditional" families, because those families generally do not endure the type of infringements on their liberty interests to which nontraditional families may be subjected, and because such an approach does not respect diversity and individualism:

> We are, therefore, in obvious disagreement with Justice Scalia's contention, which was joined in by only one other justice, that liberty interests should be defined only at the most specific level of our society's traditions. Such a reading runs contrary to the holdings of many cases, fails to accord proper respect to diversity and individualism, and pretty much protects only those liberties that rarely need judicial protection.

Roy Allen S., 196 W.Va. at 632-33, 474 S.E.2d at 562-63 (footnote and citations omitted).

This Court wisely recognized that concerns about judicial activism, while valid at some level, cannot be allowed to perpetuate an injustice. *Id.* ("We recognize Justice Scalia's argument that his reading minimizes judicial intervention into political choices. We are not convinced, however, that confining liberty to the most specific level of a tradition will either effectively limit judicial discretion (what 'traditions' qualify and what is their most specific level of questions that do not produce self-evident answers) or achieve just results.")

An argument based on tradition (same-gender couples should not be granted marriage licenses because they have traditionally been denied civil marriage) fails as irrational. As Justice Greany said in his concurrence in *Goodridge*, 798 N.E.2d 941, at 972-73 "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of

those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide."

c. Petitioners have a right to marry because West Virginians have a constitutional right to pursue and obtain happiness.

Unlike the federal constitution, West Virginia's constitution guarantees the right to pursue and obtain happiness. W. Va. CONST. art. 3, § 1; *see Panepinto*, 191 W.Va. at 441, 446 S.E.2d at 663. It is difficult to imagine a greater destruction of this right than to deny one the right to marry the person he or she loves. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *see generally Goodridge v. Department of Public Health*, 440 Mass. 309, 326, 798 N.E.2d 941, 957 (2003) (citing *Loving, supra*); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (Liberty guaranteed by the Fourteenth Amendment includes the right "to marry . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.")

North Dakota recognized that its constitutional guarantee of the pursuit of happiness applied specifically to enjoying domestic relations and one's family life. *Hoff v. Berg*, 595 N.W.2d 285, 289 (N.D. 1999) ("The pursuit of happiness guaranteed by N.D. Const. art. I, § 1, includes 'the right to enjoy the domestic relations and the privileges of the family and the home ... without restriction or obstruction ... except in so far as may be necessary to secure the equal rights of others.'") Here, petitioners' right to happiness in marrying those that they love does not conflict with the equal rights of others; thus, this right must prevail.

Because petitioner there did not invoke the right to pursue and obtain happiness in that case, the *Roy Allen S.* Court relied only on the liberty interest in a parent-child relationship. However, the Court did cite the pursuit of happiness clause in analyzing petitioner's rights there.

State ex rel. Roy Allen S. v. Stone, 196 W.Va. 624, 632, 474 S.E.2d 554, 562[1] Moreover, the Court did specifically state that a contention that the pursuit of happiness and safety was "unenforceable" would be "contrary to our conclusion in *Panepinto.*" *Roy Allen S.*, 196 W.Va. at 633 n.18, 474 S.E.2d at 563 n.18.

d. Petitioners have a right to marry because West Virginia's Constitution mandates that government is for the common benefit of all citizens.

The West Virginia Constitution provides that "[g]overnment is instituted for the common benefit, protection and security of the people, nation or community." W.Va. CONST. art. 3, § 3; *see Panepinto*, 191 W.Va. at 441, 446 S.E.2d at 663. This Court has noted that this provision provides greater protections for West Virginians than does the federal constitution, which includes no such provision. *Id.* ("The federal constitution is devoid of any language stating that the federal government is instituted for the 'common benefit' . . . of its citizens.") "[O]ur state constitution's 'common benefit' provision serves important equal protection objectives; . . . [o]ne of these objectives is fundamental fairness, a concept which is inherent to equal protection." *United Mine Workers of America Intern. Union by Trumka v. Parsons*, 172 W.Va. 386, 398, 305 S.E.2d 343, 354 (1983).

The Vermont Supreme Court held that denying same-gender couples marital benefits violated Vermont's "common benefit" constitutional provision. *See Baker v. State*, 170 Vt. 194, 744 A.2d 864 (Vt. 1999). In noting the tradition of such "common benefit" provisions in states across the country, *Baker* specifically noted that West Virginia "has relied on the Common Benefits clause to hold that the state constitution provides greater individual protection than the United States Constitution." *Id.* at 877 n.9, citing *UMW v. Parsons, supra.* Notably, the

[1] "The 'liberty' of the Due Process Clause is grounded in protecting those concerns, such as parenting, that are vital to an individual's self-fulfillment and not in preserving formalities. *See also* W. Va. CONST. art. 3, § 1 ('[a]ll men ...

Vermont Constitution's common benefit provision is substantively identical to West Virginia's. *See* Vt. CONST., ch. I, art. 7 ("The government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.") Thus, as was the case in Vermont, there is also in West Virginia "a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that [state] law provides opposite-sex married couples." *Baker*, 170 Vt. at 224, 744 A.2d at 886. The *Baker* Court so ruled because "none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples" from the common benefits of marriage law. *Id.*

e. Petitioners' right to be issued a marriage license is protected by the guarantees of the equal protection clauses of the West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

Same-gender couples in West Virginia are denied an array of rights granted to opposite gender couples, including but not limited to payment of annuities from judges' retirement funds to surviving spouse (W.Va. Code § 51-9-6b), first preference as administrator of estate when a persons dies intestate (W.Va. Code § 44-1-4), spousal support (W.Va. Code § 48-8-101), ability to make a loan to a candidate toward election expenses (loans may only be made by the candidate, his or her spouse, or a lending institution) (W.Va. Code § 3-8-5F), dependent coverage under West Virginia's Public Employees Insurance Act (W.Va. Code § 5-16-13), return of pension contributions of municipal employees, police officers or fire fighters (W.Va. Code § 8-22-9), use of personal leave days by surviving spouse of county employee (W.Va. Code § 18A-4-10d), relief from liability when spouse substantially understates tax (W.Va. Code

have certain inherent rights, of which, ... they cannot ... deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means ... of pursuing and obtaining happiness and safety.'"

§ 11-10-11(k)), monthly benefits to surviving spouses of West Virginia State Police (W.Va. Code § 15-2A-35), awards and benefits to dependents of member who dies in performance of duty (W.Va. Code § 15-2A-12), automatic revocation of bequests to former spouse if testator is divorced or marriage is annulled (W.Va. Code § 41-1-6), right of election of surviving spouse to elective share against will or intestate share (W.Va. Code § 42-3-1), right to consent to autopsy when there is no medical power of attorney representative (W.Va. Code § 16-4B-1), right of surviving spouse to continue to use deceased spouse's license plates (*e.g.* "attack on Pearl Harbor," honourably discharged marine corps league, special military organization, and honourably discharged veterans license plate) (W.Va. Code §17A-3-14).

Under W.Va. Code §§ 48-2-104(c) and 48-2-603, petitioners are denied equal protection based on their gender. The equal protection of the laws is guaranteed them under West Virginia Constitution Article 3, Section 10.

(1) Respondent's refusal to issue marriage licenses to same-gender couples should be subjected to intermediate scrutiny, because gays and lesbians constitute a suspect class under West Virginia constitutional principles.

This Court has never directly addressed the issue of whether sexual orientation is a suspect class for equal protection analysis. However, the principles espoused by this Court lead ineluctably to the conclusion that sexual orientation is a suspect class.

This court thoroughly analyzed what constitutes a suspect class in *Peters v. Narick*, 165 W.Va. 622, 270 S.E.2d 760 (1980).[2] Gays and lesbians share the characteristics of a permanent

[2] *Peters* was subsequently modified to reduce the level of scrutiny for gender discrimination from strict scrutiny to intermediate scrutiny (*see Israel by Israel v. West Virginia Secondary School Activities Com'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989)). However, its analysis of what constitutes a suspect class is still good law, as is its holding that "[s]tates have the power to interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees. (citations omitted)" *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W.Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998), quoting *Peters*, 165 W.Va. at 628, n.13, 270 S.E.2d at 768 n.13.

and immutable condition that defines the class, and a history of past discrimination that the *Peters* court emphasized in determining suspect class status.

"Classifications based upon a characteristic that is permanent, immutable, or a condition of birth have been held to be suspect." *Id.* at 631, 765. The law recognizes that sexual orientation is an immutable characteristic. "Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them . . . . Sexual identity is inherent to one's very identity as a person. (citations omitted) . . . '[H]omosexuality is as deeply ingrained as heterosexuality.... [E]xclusive homosexuality probably is so deeply ingrained that one should not attempt or expect to change it. Rather, it would probably make far more sense simply to recognize it as a basic component of a person's core identity.' (citations omitted)" *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093-94 (9th Cir. 2000).

"Likewise, a history of past discrimination and political powerlessness is significant of suspectness." *Peters, supra.* The history of discrimination against gays and lesbians militates strongly in favor of suspect class status. *See Tanner v. Oregon Health Sciences University*, 157 Or. App. 502, 524, 971 P.2d 435, 447 (Or. App. 1998) (". . . [C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.")

(2) Respondent's refusal to issue marriage licenses to same-gender couples constitutes gender discrimination and must be subjected to intermediate scrutiny.

Under W.Va. Code §§ 48-2-603 and 48-2-104(c), petitioners are denied the equal protection of the laws because their rights are being denied them based on their gender. The equal protection of the laws is guaranteed them under West Virginia's Constitution (Article 3,

Section 10). See *Peters* and *Israel*, respectively, for this Court's analysis of what constitutes a protected class and its decision to subject gender discrimination to intermediate scrutiny.

Although refusal to issue marriage licenses to same-gender couples has been questioned with regard to the refusal's constituting gender discrimination, the analogy developed by the plaintiffs in *Goodridge* shows how the discrimination occurs.

Patricia Link was denied a license to marry Sheila Chambers because Patricia is a woman. A man *can* marry Sheila, and if Patricia were a man, *she* could marry Sheila. A trial court in Alaska gave the following example:

> If twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex classification can hardly be more obvious.

Brause v. Bur. of Vital Statistics, 1998 WL 88753 (Alaska Super. No. 3AN-95-6562 Cl, Feb. 27, 1998).

Before the state can deny petitioners a marriage license based on their gender, it must demonstrate that the denial serves an important governmental objective and is substantially related to the achievement of that objective.

The Hawaii Supreme Court held that the refusal to let men marry men and women marry women was unconstitutional sex discrimination. *See Baehr v. Lewin*, 74 Haw. 530, 852 p.2d 4 (Haw. 1993) The court dismissed the argument that the denial was based on the nature of marriage itself – and not on sex – as "tortured and conclusory sophistry." *Baehr,* 74 Haw. at 571, 852 P.2d at 63.

West Virginia's constitutional law is the same in recognizing that a statute defining eligibility based on gender must pass a high level of scrutiny. "Statutory classifications which distinguish between males and females" must be scrutinized under West Virginia's equal

protection guarantee. *Flack v. Sizer*, 174 W.Va. 79, 82, 322 S.E.2d 850, 853 (1984). *Israel* did slightly modify *Peters*' holding regarding the level of scrutiny due gender discrimination, holding that gender classifications will be "upheld only if the classification serves an important governmental objective and is substantially related to the achievement of that objective." *Israel,* 182 W.Va. at 461-62, 388 S.E.2d at 487-88. However, even while modifying *Peters*, the court stressed that the difference was minor: "It is apparent that the two tests are substantially equivalent. For this reason, we do not view the new gender-based equal protection rule to provide any less protection." *Israel*, 182 W.Va. at 462, 388 S.E.2d at 488.

(3) Even under rational basis analysis, the refusal to issue marriage licenses to same-gender couples fails.

Petitioners maintain that the marriage ban must be subjected to intermediate scrutiny because it constitutes gender discrimination and because sexual orientation is a suspect class. However, intermediate scrutiny is not necessary to strike down the marriage ban, as the state cannot demonstrate that the ban is rationally related to a legitimate state interest. Indeed, the Massachusetts Supreme Judicial Court struck down the marriage ban there on rational basis review. *Goodridge*, at 331 ("Because the [marriage] statute does not survive rational basis review, we do not consider plaintiffs' argument that this case merits strict judicial scrutiny.")

While the Supreme Court has applied what it terms "rational basis" review to sexual orientation classifications, it is apparent that the exact scrutiny employed differs from the rational basis review applied to basic economic regulations. *Romer v. Evans*, 517 U.S. 620, 633 (1996). This Court has held that a classification that imposes "invidious discrimination" on the "members of a natural class" in a manner that "bears no reasonable relationship to the purpose of the act" violates equal protection. *Lepon v. Tiano*, 181 W.Va. 185, 187, 381 S.E.2d 384, 386 (1989). The West Virginia Legislature's ban on same-gender marriage, like the referendum in

Romer, was based on nothing more than hostility to a particular group. This is not a legitimate purpose. *Lepon* comports with the principle set forth in *Romer* that "[I]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Romer*, 517 U.S. at 633 (citations omitted).

2. Respondent, the Clerk of the Kanawha County Commission, has a duty to issue a marriage license to petitioners.

West Virginia Code § 48-2-101, *Necessity of marriage license*, states that "every marriage in this state must be solemnized under a marriage license *issued by a clerk of the county commission* in accordance with the provisions of this article." (emphasis added) The Code authorizes no other person to issue marriage licenses. Clearly, it is Respondent's duty to do so.

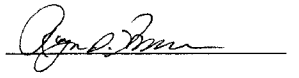
3. There is no other remedy through which Petitioners can obtain the marriage licenses they seek.

A marriage license is required before a civil marriage can be performed in West Virginia. *See* W.Va. Code § 48-2-101. Only the clerk of the county commission can issue marriage licenses. *Id.* Under present West Virginia Code § 48-2-603, any marriage entered into in any other "state, territory, possession, or tribe" will not be given effect in West Virginia. Therefore, petitioners' only remedy is this court's recognition of their right to marriage and the issuance of the writ.

IV. SUMMARY

Petitioners have demonstrated herein that under West Virginia's Constitution they have a clear legal right to marry, respondent has a legal duty to issue them marriage licenses, and they have no other remedy available to them to

obtain marriage licenses. Therefore, this court should issue a writ of mandamus, ordering respondent to issue marriage licenses to petitioners.



PETITIONERS BY COUNSEL

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I am Patricia Link, a West Virginian deserving of all rights and privileges guaranteed every West Virginian by our State Constitution. My partner and I, Sheila Chambers, have asked the West Virginia Supreme Court to uphold our constitutional right to marry. We have been together for 23 years in a loving, committed relationship and should not be denied our right to marry. In the beginning of our relationship we were married by a Unitarian Universalist minister then again, on our twentieth anniversary we were joined together by a Justice of the Peace in a Vermont civil union ceremony, and yet again, in October of 2003, we were married in Ontario, Canada. What we want most is to be married where we live and where we make our home... in West Virginia.

Same gender couples have the power to provide only partial protection for each other against unwanted interference from outsiders. We must pay thousands of dollars for documents such as Durable Powers of Attorney, Advance Medical Directives, wills and other similar documents. In addition, we are unable to provide survivor benefits for our loved ones from Social Security and from pension benefits and many same gender reciprocal wills are contested by blood relatives of deceased partners.

One of our greatest financial concerns as a couple is that we are forced to file taxes each year as "single" individuals. There are no protections nor deductions for us. Our relationship is not recognized. Sheila recently retired from her factory job and we are now faced with a new set of problems - no survivor benefits. If Sheila were she to pass away I would not be entitled to her pension or Social Security benefits as her surviving spouse. She has paid the same amount into these accounts as her co-workers and their surviving spouses are entitled to benefits but I am not. Likewise, if something were to happen to me there are no surviving spouse payments for Sheila from my pension and Social Security benefits. Sheila worked more than 30 years in a chemical factory and that work has taken a toll on her health. I worry that if something were to happen to me she would not be provided for if she were to become unable to work. She and I have been through family births, deaths, and marriages, we have vacationed together and with family and friends. We both have loving supportive families and our extended family grows larger every day. We are a couple now, have always been a couple, and will remain a couple forever and a day. That is how long we have pledged our commitment to each other and that is how long we will believe the West Virginia Constitution guarantees our right to equality...forever and a day.

Marriage is a basic human right, an individual personal choice and the state should not interfere with a couple who chooses to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage. We believe the West Virginia Constitution guarantees equal treatment for every West Virginia resident and that it does not discriminate on any basis.

PATRICIA M. LINK

March 13, 2004

County of Kanawha,
State of West Virginia, to-wit:
Taken, subscribed and sworn to before me this 13th day of March, 2004.
My Commission expires January 3, 2010.

Teresa A. Stone
Notary Public

I am Sheila Chambers and my partner of 23 years is Patricia Link. We live in Charleston, West Virginia and are seeking the right to marry. We have asked that the West Virginia Supreme Court uphold our constitutional right to marry after Kanawha County officials denied our access to a marriage license. I retired in 2003 and that was when we were faced with the reality of our inequality. I worked and paid the same amount into my pension, Social Security, etc...as my co-workers did. But, when I retire there are no survivor benefits for my partner and my co-workers are able to provide for their loved ones. Years ago, after being together for about 15 years, I had a work-related accident and was overcome with chlorine gas. I was rushed to the emergency room and was not expected to live. When Pat was called to the hospital, the ICU workers would not allow her to come in to see me because she was not, in their definition, "family". Luckily we had a good friend who worked at that hospital who got Pat in to see me-eventually. We should not have to suffer because our relationship is not recognized. We have been together through family births, deaths, weddings, reunions, you name it. Our constitutional rights are just as important as every other West Virginian's.

SHEILA A. CHAMBERS 3-12-04

County of Kanawha;
State of West Virginia, to-wit:
Taken, subscribed and sworn to before me this 12th. day of March, 2004.
My Commission expires January 3, 2010.

Teresa S. Stone
Notary Public

I am Michael A. Ragland (Andy) and my life partner is David E. Shumate. We are a gay couple, and have been living together in the same house in a committed relationship in Charleston for the last twelve years. Our real property and automobiles are joint owned and titled. We do everything together financially, socially, spiritually, etc. We go to the same United Methodist Church. The only reason we are not married now is that our government does not allow it. We are living the vow "until death do us part." David is a retired WV high school teacher with 31 years teaching experience. He has paid into the retirement system the same as any other teacher but does not have the opportunity to protect me, his spouse, with survivorship benefits without a legal civil marriage. I will be in the same situation when I retire given the current legal environment. We both must have separate health benefit programs, because our status as a couple is not recognized as married and therefore neither of our health programs will allow us to cover our spouses. Both of us would like to be able to be unencumbered by discriminatory laws that truly inhibit our real pursuit of happiness. We face gender discrimination pure and simple. West Virginia's state constitution says it guarantees residents the right to pursuit of happiness. As mature (61 and 47 years old) residents who have struggled with the issues surrounding our own identities as gay persons, we have come to realize that OUR happiness is best pursued together as a couple. It is unjust and unconstitutional that solely because of our orientation we cannot provide survivor benefits for our partners as our co-workers are easily able to, simply because they are in opposite sex marriages. Additionally, in order to be considered the same as family for other legal benefits like crisis mode hospital visitation access rights we must have costly legal documents drawn up and filed, and keep copies of them on our persons at all times. Even with appropriate documentation, there are many cases of hospital staff ignoring legal documentation that supposedly is sufficient. Preparing and filing these various protective documents is very expensive, and even then does not give the full gamut of privileges afforded opposite sex couples via the simple and convenient course of civil marriage. There are other similar family protection issues involved with these discriminatory statutes concerning protecting our children that are fortunately somewhat less pressing now that our children are all grown. Nevertheless the inequities still exist.

David E. Shumate

Michael A. Ragland

State of West Virginia,
County of Kanawha, To-Wit:
Taken, subscribed and sworn to before me this 15th. day of March, 2004.
My commission expires January 3, 2010.
Teresa L. Stone
Notary Public

March 15, 2004

I, J. Wade Davis, and I, Jamie A. Bailey, are both citizens and residents of Charleston, Kanawha County, West Virginia. We are in a committed relationship and have recently purchased a home in the Charleston area.

I, Jeremy, am the proud parent of two young boys, both of whom know and trust Jamie like a member of their family. Jamie in return treats them as a part of his own.

We are both currently employed and have both been with our respective employers for a period of more than five years. However, only one of our employers' offer benefits that are beneficial to him and his "family". Our State legislators have defined "family," in the marital sense, as man and woman. As a result, the benefits that are extended to our co-workers are not extended between us because we are of the same sex. Although we both are taxed the same or more than our co-workers, we are denied the same rights and exemptions that they are entitled to.

We firmly believe that the West Virginia Constitution was established to offer protections and liberties to the people of our State regardless of race, sex, religion, etc… Refusal to grant us a license to marry and be entitled to the same rights and benefits as others within this State is contrary to this Constitutional right.

J. Wade Davis **Jamie A. Bailey**

State of West Virginia,

County of Kanawha, to wit:

I, Lana R. Leake, a notary public of said county, do certify that J. Wade Davis and Jamie A. Bailey, whose names are signed to the above-writing, did this day appear before me and acknowledge said writing.

Given under my hand this 15th day of March, 2004.

Notary Public

My commission expires: September 27, 2005.

On behalf of Appalachian Metropolitan Community Church, I am writing to try to explain the importance of our joining this action. We are a Christian community of faith that is part of a worldwide denomination known as the Universal Fellowship of Metropolitan Community Churches. We are a Christian denomination with a main ministry that serves the gay, lesbian, bisexual and transgendered communities throughout the world. Our denomination was founded by a Minister who was defrocked by a mainstream community of faith simply for the fact that he was gay. Realizing that God's love is universal and all inclusive, he started a church which would be open to all who wished to worship no matter who they were and what their particular sexual orientation might be. From the humble beginning in the living room of his apartment in California grew a denomination that encircles the globe with a worldwide membership of over 43,000 with over 300 churches in 22 countries and 48 states of the United States

We are a local community of faith located in Charleston, West Virginia. Our congregation is a small but growing group of gay, lesbian, bisexual, transgendered, and heterosexual individuals committed to building a stronger community in central West Virginia. As Minister of this congregation, I serve a segment of the community that is directly affected by the state code passed by the West Virginia Legislature during Governor Underwood's administration that prohibits the issuance of marriage licenses to same-gender couples.

In my role as Minister, I have had the pleasure of getting to know and serve many same-gender couples who have fallen in love and wished to have their relationships blessed and recognized. There are many congregants who are in long-term, loving relationships–anywhere from 2 years to 10, 15, and beyond. In my role as Minister I am able to legally marry heterosexual couples but then not allowed to perform the same service for my same-gender congregants. This is heartbreaking to me and my congregants knowing there is still a segment of community life in which we are not allowed to fully participate. We are allowed to do all the things that other churches do–social service to the community, outreach, cooperative efforts. Yet when it comes to the basic building block of community–civil marriage–we are excluded.

We do perform ceremonies that recognize the love and commitment of the couples, but there is the longing of these couples to be able to have more in that they wish to be able to enter fully into all the rights and privileges extended to heterosexual couples. Civil marriage is one of society's foundations of equality: it provides at least 1,138 protections, benefits and responsibilities, including economic rights, medical decision-making for a loved one, parenting rights, access to insurance, inheritance protections, and immigration rights. Yet my congregants have to bear the pain of discrimination knowing these same basic rights afforded to the majority of West Virginians are denied them because of the person whom they love. Until same gender couples have the freedom to enter into civil marriage, discrimination in civil marriage will remain a barrier to our nation's promise of equality for all citizens.

I have had to minister at the time of death of couples of long-term relationships. I have had to stand with one of the partners only to see what has been built together in a life of mutuality and equality ripped apart because there is not the legal recognition of the surviving partner. I have watched as life partners are denied the right of important critical-care decisions or have end of life directives ignored simply because they are not recognized as a legal family member. I have seen life partners denied access to the bedside of a dying loved one due to the fact that the current laws do not recognize them as a "legal" family member and the family members of the dying deny them access to their loved one. I have watched as family members of the deceased are given precedent under the law simply because the surviving partner is not recognized as family under current laws. It has been hard and heartbreaking for me to watch a life of joy turned into a life of despair that is crushed because of the continued inequality of American citizens because of laws that continue to perpetuate subtle forms of discrimination. Ministering in any community of faith is difficult enough. And yet with the current laws not allowing the same protections under law for same-gender couples that are afforded to heterosexual couples makes the role as Minister doubly hard. It is harder to minister to same gender couples when that segment of the community is denied legal marriage and the rights and protections under the law provided by civil marriage.

Like most people in the community, I believe in our nation's promise of equality and I embrace our founding affirmation that all Americans are created equal. Yet, based solely on our same-gender relationships or sexual orientation, many of my congregants and I are denied equal rights under the marriage laws. If we as a society believe that marriage helps build strong families, and that strong families in turn build strong communities, why not allow all couples willing to take on the commitment and responsibilities to do so? If marriage is good for non-same-gender people, why wouldn't it be good for same gender people? Isn't that what equality is all about?

Without the right to marry or the right to choose marriage, our faith community is excluded from the full range of human experience and denied full protection of the law. Recognizing the right of an individual to marry someone of the same gender will not diminish the validity or dignity of opposite-gender marriage. The marriage ban works a

deep and scarring hardship on a very real segment of the community and our community of faith for no rational reason. Extending civil marriage to same gender couples reinforces the importance of marriage to individuals and communities.

It's time for the law to address and protect the rights of same-gender families, and it can do so on solid legal precedent.

In 1948, the California Supreme Court in Perez v. Lippold, 32 Cal.2d 711, held "The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Indeed, We are dealing here with legislation which involves one of the basic civil rights....legislation infringing such rights must be based upon more than prejudice and must be free from oppressive discrimination to comply with the constitutional requirements of due process and equal protection of the laws."

In that case, the California Supreme Court nullified statutes that outlawed interracial marriages noting that "the right to marry is the right to join in marriage with *the person of one's choice*."(emphasis mine) The court understood that marriage involves the most fundamental civil right: the freedom of individual choice.

Anything less than full marriage equality is second-class status for same-gender couples.

Therefore, on behalf of the congregation of Appalachian Metropolitan Community Church, I join this action.

Reverend Michael E. Shields, Pastor

Appalachian Metropolitan Community Church
P.O. Box 2285
Charleston, WV 25328

Phone: (304) 727-7270
E-mail: amccrev@yahoo.com

Reverend Michael E Shields
Signature

March 16, 2004
Date

Reverend Michael E. Shields
Printed

County of Kanawha,
State of West Virginia, to-wit:
Taken, subscribed & sworn to before me on this 16th day of March, 2004.
My commission expires June 13, 2012.

Susan C Lansdale
Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
SUSAN C. LANSDALE
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HURRICANE, WV 25526
My commission expires June 13, 2012

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

PATRICIA M. LINK and
SHEILA A. CHAMBERS
on behalf of themselves and
all others similarly situated,

Petitioner,

vs. NO: 040475

ALMA Y. KING,
Clerk of the Kanawha County
Commission,

Respondent

CERTIFICATE OF SERVICE

I, Roger D. Forman, as counsel for the plaintiff(s) do hereby certify that true and correct copies of the foregoing BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR WRIT OF MANDAMUS was served upon counsel of record herein by placing true and correct copies thereof in properly addressed envelopes and by placing said envelopes in the regular course of the United States Mail on the 22nd. day of March, 2004, addressed as follows:

Darrell McGraw, Attorney General
State of West Virginia
Capitol Complex
1900 California Avenue, East
Charleston, WV 25305

Michael T. Clifford
Kanawha County Prosecuting Attorney
550 Eagan Street
Charleston, WV 25301

ROGER D. FORMAN

PREPARED STATEMENT OF THE HONORABLE SPENCER BACHUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Thank you Chairman Chabot for holding this very important hearing today on the Legal Threats to Traditional Marriage. I would also like to thank the witnesses for giving their time to be here today. You should know that this an issue that is personally important to me, as well as to many of my constituents.

It seems that some in our society have moved from believing that marriage is a sacred institution to seeing it as nothing more than a contract between two people. That school of thought is demeaning not only to the institution of marriage but also to the men and women who have made and will make a spiritual commitment to support and honor each other within those bonds. It is also insulting to the children who are reared in that commitment. While not all marriages are good, and most are certainly not perfect, the institution itself is both.

I believe that marriage is a sacred commitment between a man and woman and that it is this commitment that is the foundation of all families. Children deserve to be raised and nurtured by parents who are spiritually devoted

to one another through more than words on a piece of paper. It is important that we remember that the consequences of legally recognizing same-sex marriage extend beyond health care insurance, pensions, and taxes.

It is becoming abundantly clear that this view of marriage as a sacrament is under assault today by many forces, including the courts. Congress, as an elected body of the people, has a duty to defend marriage against these assaults. We have a duty to the people who elected us to this position to defend their rights. It is my fear that a few judges through recent court decisions are redefining for all Americans the institution of marriage. Why should a state court in Massachusetts have the legal authority to redefine the sacrament of marriage for a couple living in Alabama. They should not.

What is right and just will not always prevail simply because it is right and just. Such things must be eternally defended. It has often been noted that all good and perfect things stand moment by moment on the razor's edge of danger and must be fought for. A few courts in a America have pushed us to that razor's edge and I am prepared to defend what I believe is right and just.

AMERICAN ACADEMY OF PEDIATRICS ARTICLE SUBMITTED BY THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

AMERICAN ACADEMY OF PEDIATRICS

Committee on Psychosocial Aspects of Child and Family Health

Coparent or Second-Parent Adoption by Same-Sex Parents

ABSTRACT. Children who are born to or adopted by 1 member of a same-sex couple deserve the security of 2 legally recognized parents. Therefore, the American Academy of Pediatrics supports legislative and legal efforts to provide the possibility of adoption of the child by the second parent or coparent in these families.

Children deserve to know that their relationships with both of their parents are stable and legally recognized. This applies to all children, whether their parents are of the same or opposite sex. The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.[1–9] When 2 adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition.

Children born or adopted into families headed by partners who are of the same sex usually have only 1 biologic or adoptive legal parent. The other partner in a parental role is called the "coparent" or "second parent." Because these families and children need the permanence and security that are provided by having 2 fully sanctioned and legally defined parents, the Academy supports the legal adoption of children by coparents or second parents. Denying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychologic and legal security that comes from having 2 willing, capable, and loving parents.

Several states have considered or enacted legislation sanctioning second-parent adoption by partners of the same sex. In addition, legislative initiatives assuring legal status equivalent to marriage for gay and lesbian partners, such as the law approving civil unions in Vermont, can also attend to providing security and permanence for the children of those partnerships.

Many states have not yet considered legislative actions to ensure the security of children whose parents are gay or lesbian. Rather, adoption has been decided by probate or family courts on a case-by-case basis. Case precedent is limited. It is important that a broad ethical mandate exist nationally that will guide the courts in providing necessary protection for children through coparent adoption.

Coparent or second-parent adoption protects the child's right to maintain continuing relationships with both parents. The legal sanction provided by coparent adoption accomplishes the following:

1. Guarantees that the second parent's custody rights and responsibilities will be protected if the first parent were to die or become incapacitated. Moreover, second-parent adoption protects the child's legal right of relationships with both parents. In the absence of coparent adoption, members of the family of the legal parent, should he or she become incapacitated, might successfully challenge the surviving coparent's rights to continue to parent the child, thus causing the child to lose both parents.
2. Protects the second parent's rights to custody and visitation if the couple separates. Likewise, the child's right to maintain relationships with both parents after separation, viewed as important to a positive outcome in separation or divorce of heterosexual parents, would be protected for families with gay or lesbian parents.
3. Establishes the requirement for child support from both parents in the event of the parents' separation.
4. Ensures the child's eligibility for health benefits from both parents.
5. Provides legal grounds for either parent to provide consent for medical care and to make education, health care, and other important decisions on behalf of the child.
6. Creates the basis for financial security for children in the event of the death of either parent by ensuring eligibility to all appropriate entitlements, such as Social Security survivors benefits.

On the basis of the acknowledged desirability that children have and maintain a continuing relationship with 2 loving and supportive parents, the Academy recommends that pediatricians do the following:

- Be familiar with professional literature regarding gay and lesbian parents and their children.
- Support the right of every child and family to the financial, psychologic, and legal security that results from having legally recognized parents who are committed to each other and to the welfare of their children.
- Advocate for initiatives that establish permanency through coparent or second-parent adoption for

The recommendations in this statement do not indicate an exclusive course of treatment or serve as a standard of medical care. Variations, taking into account individual circumstances, may be appropriate.

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children of same-sex partners through the judicial system, legislation, and community education.

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PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

As we begin this hearing on legal threats to marriage, we all know the real question is whether this Committee and this Congress will pass an amendment enshrining discrimination into the Constitution. Such a move is not only unnecessary, it is divisive and extreme.

The amendment is unnecessary because each state is free to reach its own policy determination on this issue. President Bush set off the alarm bells on this issue in February when he said there is a grave risk "that every state would be forced to recognize any relationship that judges in Boston . . . choose to call a marriage." This statement is totally false, and the President knows that.

Throughout American history, disputes over marriage, divorce, and adoption have all been dealt with on a state-by-state basis. *Any first-year law student can tell you that the full faith and credit clause does not force one state to recognize a marriage from another state that conflicts with the first state's public policy. In fact, perhaps we should have a first-year law student testify at these hearings.*

The President also completely misunderstands Massachusetts law. The law specifically voids any marriage performed in Massachusetts if the couple is not eligible to be married in their home state. It is impossible for out-of-state residents to use a Massachusetts same sex marriage to circumvent their home state laws.

It is also inappropriate to argue that Congress has been forced into this position by virtue of "activist judges," as the President has done. Anyone who has followed this debate knows that those in San Francisco, Portland, and New York who have pressed this issue are elected officials, not judges. As a matter of fact, it is judges in California who have stopped the licenses from being issued. For the President to suggest otherwise is not only disingenuous but dishonest.

The amendment is divisive because it pits our citizens against each other on something that should be left to individual couples and to the states. The reason our founders developed our system of federalism is to permit the states to experiment on matters of policy such as this. We don't need a one-size-fits-all rule that treats people in San Francisco and New York in the same way as people in Grand Rapids. Doing so is more likely to inflame our citizens rather than placate them.

The amendment is misguided because it would, for the first time in our nation's history, write intolerance into our Constitution. *We have had debates about civil rights in our nation before, but those were about ending slavery, liberating women, safeguarding freedom of religion, and protecting the disabled. We have even survived a debate over interracial marriage. But never until this day have we sought to legislate discrimination into our nation's most sacred charter as the Musgrave amendment would do.*

As a side note, I think the title of this hearing is laughable. I have no idea how one couple's marriage can be threatened by another marriage, and no one has yet been able to explain it to me. I can only conclude that this theory of "threats to marriage" is a concoction of the far right. Perhaps those who have troubled marriages should look within themselves rather than blame the sexual orientation of another couple.

In closing, I have a proposal. If this Committee wants to legislate on gay and lesbian rights, we ought to pass a federal law that bans hate crimes or that protects these individuals against employment discrimination. I wait with baited breath to see if the President and my colleagues across the aisle will take me up on this offer.

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