AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 108–717

JUDICIAL ACTIVISM VS. DEMOCRACY: WHAT ARE THE NATIONAL IMPLICATIONS OF THE MASSACHUSETTS GOODRIDGE DECISION AND THE JUDICIAL INVALIDATION OF TRADITIONAL MARRIAGE LAWS?

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

MARCH 3, 2004

Serial No. J–108–59

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

96–924 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
LARRY E. CRAIG, Idaho
SAXBY CHAMBLISS, Georgia
JOHN CORNYN, Texas

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
JOHN EDWARDS, North Carolina

BRUCE ARTIM, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

JOHN CORNYN, Texas, *Chairman*

JON KYL, Arizona
LINDSEY O. GRAHAM, South Carolina
LARRY E. CRAIG, Idaho
SAXBY CHAMBLISS, Georgia

RUSSELL D. FEINGOLD, Wisconsin
EDWARD M. KENNEDY, Massachusetts
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

JAMES C. HO, *Majority Chief Counsel*
ROBERT F. SCHIFF, *Demdcratic Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Cornyn, Hon. John, a U.S. Senator from the State of Texas 1
prepared statement 88
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois 45
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin 4
prepared statement 117
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, prepared statement 132
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts ... 41
Kyl, Hon. Jon, a U.S. Senator from the State of Arizona 38
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement and letter 165

WITNESSES

Brilmayer, R. Lea, Howard M. Holtzmann Professor of International Law, Yale University School of Law, New Haven, Connecticut 21
Bruning, Hon. Jon, Attorney General, State of Nebraska, Lincoln, Nebraska .. 24
de Leon, Reverend Daniel, Sr., Alianza de Ministerios Evangelicos Nacionales, and Pastor, Templo Calvario, Santa Ana, California 12
Gallagher, Maggie, President, Institute for Marriage and Public Policy, New York, New York 26
Muth, Chuck, President, Citizen Outreach, Washington, D.C. 17
Richardson, Reverend Richard W., Assistant Pastor, St. Paul African Methodist Episcopal Church, Director fo Political Affairs, The Black Ministerial Alliance of Greater Boston, and President and CEO, Children's Services of Roxbury, Boston, Massachusetts 10
Shelton, Hilary, Director, Washington Bureau, National Association for the Advancement of Colored People, Washington, D.C. 15

QUESTIONS AND ANSWERS

Responses of R. Lea Brilmayer to questions submitted by Senator Cornyn 54

SUBMISSIONS FOR THE RECORD

Abbott, Greg, Attorney General of Texas, Austin, Texas, letter 57
Allard, Hon. Wayne, a U.S. Senator from the State of Colorado, letter 58
Alons, Dwayne, Iowa State Representative, Hull, Iowa, letter 59
American Academy of Pediatrics, Chicago, Illinois, news release 60
American Civil Liberties Union, Legislative Communications Unit, Washington, D.C., news release 62
Brilmayer, R. Lea, Howard M. Holtzmann Professor of International Law, Yale University School of Law, New Haven, Connecticut, prepared statement and attachment 63
Bruning, Hon. Jon, Attorney General, State of Nebraska, Lincoln, Nebraska, prepared statement and letter 77
Cahill, Sean, Ph.D., Director, National Gay and Lesbian Task Force Policy Institute, New York, New York, statement 81
Chin, Steven J., Rev., Senior Pastor, Boston Chinese Evangelical Church, Boston, Massachusetts, letter 84
Cizik, Richard, Rev., Vice President for Governmental Affairs, National Association of Evangelicals, Washington, D.C., letter and attachment 85

Page

de Leon, Daniel, Sr., Pastor, Alianza de Ministerios Evangelicos Nacionales, and Pastor, Templo Calvario, Santa Ana, California, prepared statement 91
Detroit Free Press:
February 25, 2004, editorial 94
October 29, 2001, opinion 95
Dobson, James C., Ph.D., Founder and Chairman, Focus on the Family, Colorado Springs, Colorado, letter 97
Economist, New York, New York, February 28, 2004, article 99
Eskridge, William N., Jr., Author, *The Case for Same-Sex Marriage*, excerpt ... 100
FitzGibbon, Scott, Professor, Boston College Law School, Newton, Massachusetts, letter and attachment 121
Gallagher, Maggie, President, Institute for Marriage and Public Policy, New York, New York, prepared statement 124
Ginsburg, Ruth Bader, and Brenda Feigen Fasteau, Authors, *The Legal Status of Women Under Federal Law,* excerpt 128
Hawaii Supreme Court, Honolulu, Hawaii, excerpt from Opinion, May 27, 1993 132
Heidinger, James V., II, President and Publisher, Good News, Wilmore, Kentucky, letter 157
Institute on Religion & Democracy, Diane Knippers, President, Washington, D.C., letter 158
Lawyers' Committee for Civil Rights Under Law, D. Stuart Meiklejohn, Co-chair, and John S. Skilton, Co-chair, Washington, D.C., letter 160
Leadership Conference on Civil Rights, Washington, D.C., letter 162
Los Angeles Times, February 26, 2004, article 171
McKinney, George D., Bishop, St. Stephen's Cathedral, Church of God in Christ, San Diego, California, letter 174
Mercury News, San Jose, California, editorial 176
Miami Herald, article 177
Milwaukee Journal Sentinel:
February 24, 2004, article 178
February 26, 2004, article 179
November 24, 2003, article 181
Muth, Chuck, President, Citizen Outreach, Washington, D.C., prepared statement and attachment 183
National Hispanic Leadership Agenda, Washington, D.C., statement 189
New Republic, Jacob T. Levy, February 18, 2004, article 190
New York Times:
June 30, 2003, article 193
February 25, 2004, article 194
February 27, 2004, article 195
February 29, 2004, article 197
March 1, 2004, article 199
March 3, 2004, article 201
Parents, Families and Friends of Lesbians and Gays, David Tseng, Executive Director, Washington, D.C., letter 203
Perkins, Tony, President, Family Research Council, Washington, D.C., article 205
Renkes, Gregg D., Attorney General, State of Alaska, Juneau, Alaska, letter .. 215
Richardson, Reverend Richard W., Assistant Pastor, St. Paul African Methodist Episcopal Church, Director fo Political Affairs, The Black Ministerial Alliance of Greater Boston, and President and CEO, Children's Services of Roxbury, Boston, Massachusetts, prepared statement 216
Schonfeld, Yoel, Rabbi, Queens Board of Rabbis, Flushing, New York, letter ... 219
Shelton, Hilary, Director, Washington Bureau, National Association for the Advancement of Colored People, Washington, D.C., prepared statement 220
Shurtleff, Mark L., Attorney General, State of Utah, Salt Lake City, Utah, letter 230
Sider, Ronal J., President, Evangelicals for Social Action, Wynnewood, Pennsylvania, letter 232
Southeastern Legal Foundation, L. Lynn Hogue, Executive Director, Atlanta, Georgia, statement 233
Spaht, Katherine S., Jules F. & Frances L. Landry Professor of Law, John S. Baker, Jr., Dale E. Bennett Professor of Law, Patrick H. Martin, Campanile Professor of Mineral Law, John R. Trahan, James Carville Associate Professor of Law, Alain A. Lavasseur, Hermann Moyse, Sr. Professor of Law, Baton Rouge, Louisiana, joint letter 238

Page

Stenberg, Donald B., Counsel, Erickson & Sederstrom, P.C., Omaha, Nebraska, letter 240
Syeed, Sayyid M., Secretary General, Islamic Society of North America, Plainfield, Indiana, letter 242
TEN, The Empowerment Network, Karen M. Woods, Executive Director, Washington, D.C., letter 243
Union of Orthodox Jewish Congregations of America, Harvey Blitz, President, Rabbi Tzvi H. Weinreb, Executive Vice President, Nathan J. Diament, Director, New York, New York, letter 244
United Methodist Action for Faith, Freedom, and Family, David M. Stanley, Chairman, Muscatine, Iowa, letter 245
Wardle, Lynn D., Richard G. Wilkins, William C. Duncan, J. Reuben Clark Law School, Ira L. Shafiroff, Southwestern University School of Law, Dwight G. Duncan, Southern New England School of Law, Provo, Utah, joint letter 247
Washington Post:
- August 21, 2003, article 248
- September 5, 2003, article 249
- February 15, 2004, article 251
- February 25, 2004, article 254
- February 27, 2004, article 255

Washington Times, Bruce Fein, September 2, 2003, article 257
Wilkins, Richard G., Professor of Law and Managing Director, World Family Policy Center, J. Reuben Clark Law School, Brigham Young University, Provo, Utah, letter and attachment 258

JUDICIAL ACTIVISM VS. DEMOCRACY: WHAT ARE THE NATIONAL IMPLICATIONS OF THE MASSACHUSETTS *GOODRIDGE* DECISION AND THE JUDICIAL INVALIDATION OF TRADITIONAL MARRIAGE LAWS?

WEDNESDAY, MARCH 3, 2004

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn, Kyl, Sessions, Feingold, Kennedy, Durbin, and Leahy.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. This hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights shall come to order.

Before I begin my opening statement, I want to thank Chairman Hatch for scheduling this hearing. The topic of our hearing today concerns the institution and legal status of marriage, the bedrock institution of our society.

Last September, I chaired a hearing on the Federal Defense of Marriage Act. That September hearing anticipated the course of events that have subsequently taken place in recent months, and I thank Chairman Hatch for scheduling that hearing as well.

I also want to express my gratitude to Senator Feingold and his devoted staff. They have worked hard with us to make this hearing possible today. Today's topic triggers strong emotions and passions of well-meaning people on both sides, so I am especially grateful for our good working relationship. Although the custom for hearings in this Subcommittee has been a 2:1 ratio for witnesses, Senator Feingold requested a 4:3 ratio, and I was happy to oblige. My staff was not informed of his third and final witness until the close of business yesterday, but I am nevertheless pleased to have the testimony of the NAACP today on such an important issue, and I am glad we were able to find a way to work together as much as possible in a bipartisan fashion, even if we find ourselves on the opposite ends of votes from time to time.

Our hearing this morning is entitled "Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?" In light of recent events, this hearing, I believe, is both important and timely.

An ongoing national conversation about the importance of marriage intensified when four Massachusetts judges declared traditional marriage a "stain" on our laws that must be "eradicated." Since then, Americans have witnessed startling and lawless developments nationwide, from New York to San Francisco and points in between. Those who saw our hearing in September know that today's debate over marriage was actually sparked last June when the U.S. Supreme Court issued its controversial ruling in *Lawrence* v. *Texas*.

In the hands of activist judges like those in the majority in Massachusetts, and in California and elsewhere, part of the rationale adopted in *Lawrence*, one that was completely unnecessary to reach the result, presents a clear and present danger to traditional marriage laws across the Nation. Now, that is not just my conclusion. It is the conclusion of legal experts, constitutional scholars, and Supreme Court observers across the political spectrum.

It is important to note at the outset the American people did not start this discussion, nor did Members of Congress on either side of the aisle. It is important in an emotional area like this to be clear and honest. The only reason that we are having this hearing today is because of the work of aggressive lawyers and a handful of accommodating activist judges.

Across diverse civilizations, religions, and cultures, humankind has consistently recognized that the institution of marriage is society's bedrock institution. After all, as a matter of biology, only the union of a man and woman can produce children. And as a matter of common sense, confirmed by social science, the union of mother and father is the optimal, most stable foundation for the family and for raising children.

Unsurprisingly, then, traditional marriage has always been the law in all 50 States. At the national level, overwhelming Congressional majorities representing more than three-fourths of each chamber joined President Clinton in 1996 in seeing the passage of the Federal Defense of Marriage Act.

In light of this extraordinary consensus, it is offensive for anyone to suggest that supporters of traditional marriage—to charge them with bigotry. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of intolerance while abolishing American institutions and traditions by judicial fiat.

Renegade judges and some local officials are attempting to radically redefine marriage. Marriage laws have already been flouted in Massachusetts, California, New Mexico, New York. Lawsuits seeking the same result have been filed in Nebraska, Florida, Indiana, Iowa, Georgia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, and Vermont, as well as in my home State of Texas. This is no longer just a State issue. This is a national issue.

Disregarding the democratic process, four judges in Massachusetts concluded that "deep-seated religious, moral, and ethical convictions" underlying traditional marriage are no rational reason for

the institution's continued existence. They contended that traditional marriage is rooted in persistent prejudice and invidious discrimination and is not in the best interest of children. They even suggested abolishing marriage outright, suggesting that if the legislature were to jettison the term "marriage" altogether, it might well be rational and permissible.

Apologists for the Massachusetts court lamely contend that democracy and marriage can be restored in that State, but not until 2006, and only through a process citizens should not have to endure just to preserve current law. Moreover, the problem, as I pointed out, is not just limited to Massachusetts. In California, courts have refused to enforce the State's law defining marriage as between a man and a woman against a lawless mayor. New Mexico, New York, and Illinois officials have followed suit. And just this morning, I read that officials in Oregon are joining this trend.

Defenders of marriage and democracy alike recognize that this is a serious problem and, indeed, I repeat, a national problem requiring a national solution. Congress recognized the national importance of marriage in 1996 by codifying a Federal definition of marriage, as I mentioned earlier, by an overwhelming bipartisan vote. Most officials on both sides of the aisle continue to express their support for traditional marriage, but words are not enough to combat judicial defiance. If elected officials are to retain their relevance in a democracy, indeed, if we are to remain faithful to our National creed of Government of the people, by the people, and for the people, words must be joined by action.

True, the Constitution should not be amended casually, but serious people have reluctantly recognized that an amendment may be the only way to ensure survival of traditional marriage in America. Why is an amendment necessary? Two words: activist judges.

Legal experts across the political spectrum agree that the *Lawrence* decision presents a Federal judicial threat to marriage. Harvard law professor Lawrence Tribe has said, "You would have to be tone deaf not to get the message that *Lawrence* renders traditional marriage constitutionally suspect." According to Tribe, the defense of marriage is now a Federal constitutional issue, and he predicts that the United States Supreme Court will eventually reach the same conclusion as did the Massachusetts Supreme Court.

Tribe's predictions are confirmed, of course, by the Massachusetts ruling, which not only invalidated that State's marriage law but also suggested that *Lawrence* might be used to threaten laws across the country, including the Federal Defense of Marriage Act. Tribe is also joined by some Members of Congress who argue that that Federal law is unconstitutional.

Moreover, constitutional scholars predict that Nebraska, which has approved a State constitutional amendment defending marriage, may soon see that amendment invalidated on Federal constitutional grounds in a pending Federal lawsuit. Another Federal lawsuit has been filed in Utah to establish a Federal constitutional right to polygamy under *Lawrence*.

The only way to save laws deemed unconstitutional by activist judges is a constitutional amendment. Indeed, we have ratified numerous amendments as part of the democratic response to judicial

decisions before, including the 11th, 14th, 16th, 19th, 24th, and 26th Amendments.

I want to close my opening remarks by emphasizing that this discussion must be conducted in a manner worthy of our country. It should be bipartisan, and it should be respectful. The defense of marriage has been a bipartisan issue in the past, and I hope it will continue to be one. It was a Democrat during the last Congress who first proposed a Federal constitutional amendment to protect marriage. And as we will see today, our panel is comprised of traditional marriage supporters that transcend political party lines.

The discussion must also be respectful. I have often said that Americans instinctively and laudably support two fundamental propositions: that every person is worthy of respect, and that the traditional institution of marriage is worthy of protection. Throughout the Nation, children are being raised in non-traditional environments—in foster homes, by single parents, by grandparents, by aunts and uncles. We will hear more about this this morning. We know they are doing the very best job they can under challenging circumstances. We can respect the hard work they are doing while at the same time adhering to the dream for every child, which is a mother and father in an intact family.

In 1996, Senator Kennedy pointed out that there are strongly held religious, ethical, and moral beliefs that are different from mine with regard to the issue of same-sex marriage which I respect and which are no indications of intolerance. I hope that spirit continues today. I trust it will. Millions of Americans who support traditional marriage should not be slandered as intolerant. The institution of marriage was not created to discriminate or oppress. It was established to protect and nurture children.

[The prepared statement of Chairman Cornyn appears as a submission for the record.]

With that, I am pleased to turn the floor over to the Ranking Member of this Subcommittee, Senator Feingold, for his opening statement.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

It is common practice in the Senate to thank the Chairman for holding a hearing. I am afraid I cannot do that. But what I can do is thank you for your courtesy to me and my staff, particularly with regard to the witness, so we have to make a distinction between whether we believe this is something that we should be devoting substantial time to versus the courtesies that we are truly grateful for. And, Senator, you have been very courteous to us throughout.

Now, Mr. Chairman, this is the second time in 6 months that this Subcommittee has held hearings on the issue of whether the Federal Government should regulate marriage. Proponents of a Federal marriage amendment say that traditional marriage is under attack. They would have the American people believe that there is a national crisis, and as the Chairman suggested, that renegade judges have run amok over the will of the people, the laws, and the Constitution.

I would say to you that nothing could be further from the truth. I believe a constitutional amendment on marriage is unnecessary, divisive, and utterly inconsistent with our constitutional traditions, which this Subcommittee has a special responsibility to protect.

I object to the use of the constitutional amendment process for political purposes, and I am sorry to say that I believe that is exactly what is going on here.

The President supports a constitutional amendment. The Chairman of the Judiciary Committee says he is going to force an amendment through the Committee. And the Chairman of the Republic Conference said this weekend that there will be a vote on the Senate floor on the amendment this year. Yet few believe that this effort will be successful. This, unfortunately and sadly, is a divisive political exercise in an election year, plain and simple.

The regulation of marriage has traditionally been left to the States and to religious institutions. In addition, our Nation has a long tradition of amending the Constitution only as a last resort, when all other means to address an issue have been exhausted and found inadequate. With only one State having recognized same-sex marriage and no State having ever been forced against its will to recognize a same-sex marriage from another State, we are miles away from reaching that point on the issue of gay marriage.

The title of this hearing is "Judicial Activism vs. Democracy." On the issue of same-sex marriage, I am especially troubled when I hear this label used because it is not only a gross mischaracterization of the current legal landscape, but it sounds as though advocates of a constitutional amendment think that judges should have no role in our constitutional democracy. If the *Goodridge* decision, which was based on the Massachusetts State Constitution, is really a case of judges' imposing their will on the people of Massachusetts, then the people of Massachusetts, through their elected representatives, will surely overrule the court and amend their State Constitution. That process, the outcome of which is uncertain, is already under way.

Similarly, if the people of California or New York disagree with the mayors of San Francisco or New Paltz, and if the courts do not strike down these actions based on current law, the people have ways of making sure their will is carried out.

No one in this room knows what the outcome of these State processes will be, but we do know this: In no State have the people been deprived of their ability to resolve the issue for themselves. The legal and legislative battles as well as the public debate have just barely begun. Yet we in the Congress are now being asked to intervene, to quickly answer all these questions for all States and effectively for all time.

It is the proponents of this constitutional amendment, not the so-called activist judges, who threaten to take this issue away from the American people.

It is true that the constitutional amendment process ultimately involves the people through their Representatives in the Congress and again more specifically in the State ratification process. But I simply fail to see how it is more democratic to have three-quarters of the States decide this issue for Massachusetts than to let the

people of Massachusetts, or Wisconsin, for that matter, decide this for themselves.

The proponents of a constitutional amendment say they are worried that same-sex couples will marry in Massachusetts and move or return to other States demanding recognition of their marriages. But, again, no court has decided such a case. And as Professor Dale Carpenter testified at our last hearing, and as we will hear this morning from Professor Lea Brilmayer, it is entirely possible, if not likely, that under the Full Faith and Credit Clause, no court will require a State to recognize a same-sex marriage conducted under another State's laws.

Furthermore, as the Chairman pointed out, Congress has already acted in this area, and its action so far stands unchallenged. The Defense of Marriage Act, which was enacted in 1996, is effectively a reaffirmation of the Full Faith and Credit Clause as applied to marriage. It states that no State shall be forced to recognize a same-sex marriage authorized by another State. Although I was one of those who voted against this bill, I understood that DOMA was passed to prepare for the possibility of one State recognizing gay marriage, as Massachusetts has now done.

Why, then, do we need a constitutional amendment when we do not even know yet whether DOMA successfully addressed the problem it was supposed to address? Of course, it is possible that the law could change. A case could be brought challenging the Federal DOMA, and the Supreme Court could strike it down. But, Mr. Chairman, do we really want to amend the Constitution now, just in case the Supreme Court reaches a particular result later on? Do we want to launch what amounts to a preemptive strike on our Constitution? That should give every American pause.

There is another reason I will oppose a constitutional amendment. An amendment regarding same-sex marriage would write discrimination into the governing document of our Nation. The Framers of our Constitution created a document that establishes the structure of our Government and protects the liberty of every American. In addition to the Bill of Rights, our Constitution now includes 17 amendments. Leaving aside the misguided Prohibition amendment and the amendment that repealed it, some of the amendments address the structure of our Government while all the rest protect fundamental rights of our citizens.

In stark contrast, Mr. Chairman, this amendment targets a specific group of Americans and permanently excludes them from certain rights and benefits. The most often discussed text for a marriage amendment would not only ban same-sex marriages, it would threaten civil union and domestic partnership laws at the State and local level. These are laws that have been enacted by and for the people of those particular States and localities through the democratic process. They have allowed same-sex couples and their families to avail themselves of certain benefits that cannot be provided for by contract, no matter how much they spend on lawyers.

Mr. Chairman, in the audience today we have families who would be directly affected by such a drastic action. These are families headed by same-sex couples who already do not enjoy the benefits and privileges of marriage that opposite-sex couples enjoy.

They would be further harmed by a constitutional amendment that stigmatizes them and belittles their aspirations for their families.

The proponents of the marriage amendment, including the President of the United States, say they want to conduct the debate in a civil manner with respect for those in our society who are gay or lesbian. But taking away a group of people's rights forever can never be done in a civil manner.

The Constitution is meant to protect rights, not deny them. That is our tradition.

Finally, Mr. Chairman, I am concerned that this Subcommittee is again focused on a remote hypothetical issue when there are real problems facing American families today, not a year from now or a few years from now or sometime in the future, maybe, but today. I cut short a meeting with the wonderful representatives of the Wisconsin National Guard today in order to come here and focus on this. I think that meeting should have gone a little longer and this one shorter.

Each year I visit all 72 counties in Wisconsin and hold a listening session. These meetings are not organized around a specific topic. I do not set the topic. Instead, my constituents can come and speak with me about any topic on their minds. In my first 33 listening sessions this year, 1,638 people attended and 786 asked questions or made statements. Of the people who stood to ask me questions or offer opinions, 139 people were concerned about Medicare, prescription drugs, and the high cost of health care; 83 were concerned about jobs, trade, and the economy; and 76 expressed concern about the situation in Iraq and other foreign affairs issues. Only 11 people raised the issue of gay marriage: six expressed support for a constitutional amendment, four were opposed, and one person just asked about my position on the issue.

Today, Americans are losing jobs or facing the fear that their jobs will leave the United States at any moment. Today, American families are struggling to afford health care and to send their children to college. Today, American families are watching their sons and daughters, husbands and wives, fathers and mothers go off to serve in Iraq hoping and praying that they will come home alive. The American people desperately want us to address those issues. Instead, we are holding our second hearing in 6 months on a constitutional amendment to address court decisions that may someday be issued or legislatures that may someday reach conclusions with which some will disagree. This constitutional amendment debate will only divide our country when we need to be united to face and solve our problems.

Thank you for your courtesy, Mr. Chairman. I look forward to hearing from our witnesses.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman CORNYN. Thank you, Senator Feingold.

I would just say that this is not something that we are going to reach consensus on, at least among the Chairman and Ranking Member of this Committee, but perhaps we will through this conversation that I think is important—certainly I do not understand your remarks to suggest that the issue of marriage is trivial, but indeed I agree with you that there are many important issues that

confront this Nation, and all of them important. The thing that precipitated the need for this hearing—and we are not looking at constitutional text today. We are not going to be talking about what amendment might address this issue at this hearing. That will be reserved for a later hearing. This is to help educate Members of Congress and, to some extent, the American people about what is happening across the country. And I do not think elected representatives like Members of Congress are irrelevant to what the public policy of this country should be. And, again, I do not hear anything you have said to suggest otherwise. I just felt it was important to make that statement.

I would now like to introduce the distinguished panel we have, panel number one. Our panel today is comprised of legal experts and community leaders who feel strongly about the issue of marriage and the fundamental role it plays in our society. Today's hearing is about the national implications of what the Massachusetts court did in the *Goodridge* decision, and it is certainly represented by the broad geographical diversity of our panelists.

First, Reverend Richard Richardson is an assistant pastor of the St. Paul African Methodist Episcopal Church in Boston, Massachusetts. He is also director of political affairs for the Black Ministerial Alliance of Greater Boston. In addition, he serves as president and CEO of Children's Services of Roxbury, a child welfare agency. A native of Cambridge, Massachusetts, Reverend Richardson received his master's degree in education from Cambridge College. He and his wife have been foster parents for 25 years.

Pastor Daniel de Leon, Sr., of Santa Ana, California, is here on behalf of the largest Hispanic evangelical organization in the country, and I am not going to pronounce the Spanish name. I will just say the acronym is AMEN. AMEN represents 8 million members, 27 denominations, and 22 Latino nations. He is pastor of the largest Hispanic evangelical church in America, Templo Calvario in Santa Ana, California, where he ministers to Spanish- as well as English-speaking parishioners. He earned his bachelor's degree from Southern California College, a master's in education at Chapman College, and a master of divinity at the Meadowland School of Theology. He was honored with an honorary doctor of divinity degree in 1983.

Hilary Shelton is director of the Washington Bureau of the National Association for the Advancement of Colored People. The Washington Bureau is the Federal policy arm of the NAACP, and Mr. Shelton has served as the bureau's director for 7 years. He previously served as Federal liaison for the College Fund, UNCF, and as program director of the United Methodist Church's Social Justice Advocacy Agency. He is a graduate of the University of Missouri and the Northeastern University in Boston.

Chuck Muth currently serves as president of Citizen Outreach. A long-time libertarian activist, Mr. Muth has served as Chairman of the Republican Liberty Caucus and the Nevada Republican Liberty Caucus. He is also the editor of an electronic newsletter, "Chuck Muth's News and Views."

Professor Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is a specialist in international law and the conflict of laws. She has previously

taught at the University of Texas—I appreciate that—the University of Chicago, and NYU. She received her undergraduate degree from the University of California at Berkeley and her law degree from Boalt Hall. She is a co-author of a leading case book entitled "Conflict of Laws."

We are also honored to have with us the Attorney General of the State of Nebraska, Jon Bruning, with us here today. General Bruning was elected to serve as a Senator in the Nebraska unicameral legislature in 1996 and was re-elected in 2000. In 2002, he was elected Attorney General of Nebraska with 66 percent of the statewide vote. A fifth-generation Nebraskan and Lincoln native, Bruning received his law degree with distinction from the University of Nebraska College of Law in 1994. He served as executive editor of the Nebraska Law Review and received the Robert G. Simmons Law Practice Award.

Maggie Gallagher is a graduate of Yale University and the president of the Institute for Marriage and Public Policy. She is a nationally syndicated columnist with United Press Syndicate and the author of three books, including most recently "The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially," published by Harvard University Press in 1999. She also operates a Web-based discussion group, or Blog, on marriage called marriagedebate.com. Through her writings, Ms. Gallagher has emerged as one of the most influential women's voices on marriage, family, and social policy.

I would say to all of you thank you for being here. I know many of you have traveled a long distance to be here, and we appreciate your willingness to testify today and your enthusiasm for the issue. To ensure that we have both the opportunity to hear from each member of the panel as well as ample time for members to ask questions, I will ask each witness to keep their opening statements to 5 minutes, and then, of course, we will try to amplify what your opening statements say and what is contained in your written statements through our question-and-answer process.

We will, of course, obviously accept written remarks for the record, and I will take this opportunity to mention that, without objection, we will leave the record open until 5:00 p.m. next Wednesday, March 10, for members to submit additional documents into the record and to ask questions in writing of any of the panelists.

At this time I will also offer, without objection, the statement of Senator Wayne Allard, who is the principal author of the only amendment that I am aware of so far that has been filed in the Senate, even though I will point out that I think I have seen as many as six referred to at different times. But, of course, that will be the subject of a future hearing.

Reverend Richardson, we would be happy to hear from you your opening statement, please.

STATEMENT OF REVEREND RICHARD W. RICHARDSON, ASSISTANT PASTOR, ST. PAUL AFRICAN METHODIST EPISCOPAL CHURCH, DIRECTOR OF POLITICAL AFFAIRS, THE BLACK MINISTERIAL ALLIANCE OF GREATER BOSTON, AND PRESIDENT AND CEO, CHILDREN'S SERVICES OF ROXBURY, BOSTON, MASSACHUSETTS

Rev. RICHARDSON. Chairman Cornyn, Ranking Member Feingold, and other members of the Subcommittee that may be joining us, I want to first thank you for the opportunity to come before you today. Again, my name is Richard W. Richardson. I am an ordained minister in the African Methodist Episcopal Church in Cambridge, Massachusetts, and I am also president and CEO of Children's Services of Roxbury, a child welfare agency. I have worked in the field of child welfare for almost 50 years. In addition, I have been a foster parent myself for 25 years, of course, along with my wife.

Finally, I serve as Chairman of the Political Affairs Committee of the Black Ministerial Alliance of Greater Boston. The Black Ministerial Alliance has a membership of some 80 churches from within the greater Boston area, whose primary members are African-American and number over 30,000 individuals and families. I am here today to offer testimony on behalf of the Black Ministerial Alliance as well as myself.

The Black Ministerial Alliance strongly supports the traditional institution of marriage as the union of one man and one woman. That institution plays a critical role in ensuring the progress and prosperity of the black family and the black community at large. That is why the Black Ministerial Alliance strongly supports a Federal constitutional amendment defining marriage as the union of one man and one woman and why the Black Ministerial Alliance is joined in that effort by the Cambridge Black Pastors Conference and the Ten Point Coalition in Massachusetts.

The Black Ministerial Alliance did not come to this conclusion lightly. I never thought that I would be here in Washington, testifying before this distinguished Subcommittee on the subject of defending traditional marriage by a constitutional amendment. As members of the Black Ministerial Alliance, we are faced with many problems in our communities, and we want to be spending all of our time and energy working hard on those problems. We certainly did not ask for a nationwide debate on whether the traditional institution of marriage should be invalidated by judges.

But the recent decision of four judges of the highest court in my State, threatening traditional marriage laws around the country, gives us no choice but to engage in this debate. The family and the traditional institution of marriage are fundamental to progress and hope for a better tomorrow for the African-American community. And so, much as we at the Black Ministerial Alliance would like to be focusing on other issues, we realize that traditional marriage—as well as our democratic system of Government—is now under attack. Without traditional marriage, it is hard to see how our community will be able to thrive.

I would like to spend some time explaining why the definition of marriage as the union of one man and one woman is so important, not just to the African-American community, but to people of all religions and cultures around the world.

To put it simply, we firmly believe that children do best when raised by a mother and a father. My experience in the field of child welfare indicates that, when given a choice, children prefer a home that consists of their mother and father. Society has described the "ideal" family as being a mother, father, 2.5 children, and a dog. Children are raised expecting to have a biological mother and father in their life. It is not just society. It is biological. It is basic human instinct. We alter those expectations and basic human instincts at our peril, and at the peril of our communities.

The dilution of the ideal—of procreation and child-rearing within the marriage of one man and one woman—has already had a devastating effect on our community. We need to be strengthening the institution of marriage, not diluting it. Marriage is about children, not about love. As a minister to a large church with a diverse population, I can tell you that I love and respect all relationships. This discussion about marriage is not about adult love. It is about finding the best arrangement for raising children, and as history, tradition, biology, sociology, and just plain common sense tells us, children are raised best by their biological mother and father.

Let me be clear about something. As a reverend, I am not just a religious leader. I am also a family counselor. And I am deeply familiar with the fact that many children today are raised in non-traditional environments: foster parents, adoptive parents, single parents, children raised by grandparents, uncles, aunts, godparents. And I do not disparage any of these arrangements. People are working hard and doing the best job they can to raise children. But that does not change the fact that there is an ideal. There is a dream that we have and should have for all children, and that is a mom and a dad for every child, regardless whether they be black or white.

I do not disparage other arrangements. I certainly do not disparage myself. As a foster parent to more than 50 children, a grandparent of seven adopted children, and almost 50 years of working in the field of working with children who have been separated from their biological parent or parents and are living in foster homes or who have been adopted or in any type of non-traditional setting, I can attest that children will go to no end to seek out their biological family. It is instinct. It is part of who we are as human beings. And no law can change that. As much as my wife and I shared our love with our foster children, and still have a lasting relationship with many of them, it still did not fill that void that they experienced in their life.

I want to spend my last few moments talking about discrimination. I want to state something very clearly, without equivocation, hesitation, or doubt. The defense of marriage is not about discrimination. As an African American, I know something about discrimination. The institution of slavery was about the oppression of an entire people. The institution of segregation was about discrimination. The institution of Jim Crow laws, including laws against interracial marriage, was about discrimination.

The traditional institution of marriage is not discrimination. And I find it rather offensive to call it that. Marriage was not created to oppress people. It was created for children. It boggles my mind that people would compare the traditional institution of marriage

to slavery. From what I can tell, every U.S. Senator, both Democratic and Republican, who has talked about marriage has said that they support traditional marriage laws and oppose what the Massachusetts court did. I would ask the question: Are they all guilty of discrimination?

Finally, I want to mention something about the process. I know that the Massachusetts Legislature is currently considering this issue, and I hope that they do. The court has told us that we cannot have traditional marriage and democracy until 2006 at the earliest. I believe that is wrong. I believe that is antidemocratic, that it is offensive and it is dangerous to black families and black communities.

But, importantly, a State constitutional amendment will not be enough. I know that the Attorney General of Nebraska is here, and I am honored to share the panel with him. And I am not a lawyer. But I do know lawyers who have been fighting to abolish traditional marriage laws in Massachusetts. I have been in the courtrooms and seen them argue. They are good people and well-meaning. But I can tell you this—they are tenacious, they are aggressive, and they will not stop until every marriage law in this Nation is struck down under our U.S. Constitution. And every school child that learned in civics class knows that the only way that we can stop the courts from changing the U.S. Constitution is a Federal constitutional amendment.

The defense of marriage should be a bipartisan effort. And I am a proud member of the Democratic Party. And I am so pleased that the first constitutional amendment protecting marriage was introduced by a Democrat in the last Congress. I am honored to have been invited here to testify in front of this Subcommittee of both Republicans and Democrats. I hope that each and every one of you will keep the issue of defending the traditional institution of marriage as a bipartisan issue.

Mr. Chairman, thank you for giving me the opportunity to represent the Black Ministerial Alliance of Greater Boston, the Cambridge Black Pastors Conference, and the Ten Point Coalition, in reaffirming our support for a Federal constitutional amendment to define marriage as the union between a man and a woman.

Thank you so much.

[The prepared statement of Rev. Richardson appears as a submission for the record.]

Chairman CORNYN. Thank you.

Pastor De Leon, we would be glad to hear your opening statement.

STATEMENT OF REVEREND DANIEL DE LEON, SR., ALIANZA DE MINISTERIOS EVANGELICOS NACIONALES, AND PASTOR, TEMPLO CALVARIO, SANTA ANA, CALIFORNIA

Rev. DE LEON. Thank you, Mr. Chairman and members of the Subcommittee, ladies and gentlemen.

My name is Daniel de Leon. I am ordained minister of the Assemblies of God, and I am here to represent the largest Hispanic evangelical organization in the country, AMEN, Asociacion Evangelica de Ministerios Nacionales. AMEN is comprised of over 8 million members, representing 27 denominations and 22 Latino

nations. I am also the pastor of the largest Hispanic evangelical church in America, Templo Calvario, in Santa Ana, California.

AMEN is a leading advocate on issues that concern the Hispanic community. On many issues, we work very closely with our Catholic brethren. We are certainly working together on the issue we are discussing today—the institution of marriage, understood throughout history and across diverse religions and cultures as the union of one man and one woman. We have been a member of the Alliance for Marriage since its inception.

When I turned on my television a few weeks ago and saw what was happening in San Francisco, I could not believe my eyes. As I sat there, several things came to mind.

First, I could not understand how an elected official could ignore and violate the laws of our State and get away with it. I also could not understand why the courts would not stop this, why they would refuse to require an elected official to com ply with the law of his State, and to respect the will of the people as expressed in our laws.

Second, it was not just that officials and judges were ignoring the law. It was much more than that. They were ignoring a law that is so fundamental to society, and in particular, of great importance to our Hispanic community, to the people whom I counsel and whom I love. They were ignoring the importance of the institution of marriage as the union of one man and one woman.

Just 4 years ago, Californians voted to reaffirm that marriage in the State of California is between a man and a woman only. Hispanics in particular voted overwhelmingly to uphold the traditional institution of marriage. This is one institution, even though imperfect, that has withstood the test of time and has proven to bring a sense of stability to society for time immemorial.

The institution of marriage is designed for children, not for adult love. Adults can love in many ways—between brother and sister, between grandparents, uncles, aunts, between friends and loved ones. But marriage is for children. I am saddened that we have forgotten that. I am even more saddened that marriage is drifting further and further from what it is supposed to be all about—children. Adults seem to care more and more about one thing—themselves. This is one of the reasons why 50 percent of marriages wind up in divorce. We must strengthen marriage, not weaken it. And I fear that if we start to abolish marriage laws in our Nation, we will go further down the path of teaching people that marriage does not matter for the well-being of children. It only matters for the pleasure of adults.

I am not here because I want to be here. As Reverend Richardson has said, there are many problems in our community, and I should be there working on them, not here far away in the city of Washington, D.C. But I have flown all the way here from California because I need to be here to defend the most basic institution of society for the good of all on behalf of the Hispanic community, because without marriage we have no hope of solving the other problems we are facing back home.

I live every day in the front lines of urban America, where the ills of society are greatly magnified. People like myself, who provide a service to our community, are often the ones that have to pick

up the pieces when marriages and families fail. In my 30 years of counseling, I have often dealt with grown children that still harbor hurts and deep-seated frustrations because they did not have a mother and a father.

I know that there are good people trying to raise children without a mother and a father. Perhaps it is the single parent or the grandparent or aunt and uncle, or the foster parent. They do their best, and we admire and respect them for that. But at the same time, we want the very best for our children, and that is a mother and a father, and an institution that encourages people to give children both a mother and a father.

I want to say something about civil rights and discrimination as well. My people know something—a lot about discrimination. The institution of marriage was not created to discriminate against people. It was created to protect children and to give them the best home possible—a home with a mother and a father.

Some people talk about interracial marriages, and laws forbidding interracial marriage are all about racism. Laws protecting traditional marriage are about children.

To us in the Hispanic community, marriage is more than a sexual relationship. It is a nurturing, caring, and loving relationship between a man and woman that is to remain intact "until death do us part." Children are born into this loving relationship with a great sense of anticipation. We love our children and we love children, as you can tell by the numbers.

Marriage between a man and a woman is the standard. A child is like a twig that is planted in the soil of our society that requires two poles to have the best chance of growing strong and healthy. These two poles, if you will, are the parents, dad and mom. Very different and at times even opposites, but necessary for a balanced form of living.

Furthermore, marriage is a moral and spiritual incubator for future generations. Our children learn from their parents not only how to make a living but, more importantly, how to live their life. This is not readily learned by a simple form of transference of knowledge but, rather, through the experience of daily living. Children learn from observation. As the home goes, so goes society.

I believe that we need to send a positive message to our children and their children, that we cared enough about the most basic institution of our society, marriage between a man and a woman, that we passed a constitutional amendment to preserve it for future generations. This is not, and must not be, about party politics. This must be seen as our struggle as a social family to bring stability to a divided house.

This hearing is about whether what is happening in Massachusetts is a national problem. As someone from California, I can tell you almost certainly that it is a national problem. The lawlessness in San Francisco would not have happened without Massachusetts. And we are seeing it spread quickly to other States—New Mexico, New York—and lawsuits everywhere else. I see today that the Federal courts are now starting to get involved, too, in Nebraska and very soon elsewhere.

The lawyers who are out there fighting to get rid of traditional marriage laws do not seem ready to sit down and rest. They seem prepared to fight until they win in every State.

So it seems obvious to me that this is a national issue. The President is right when he said, and I quote, "On a matter of such importance, the voice of the people must be heard...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."

Thank you so very much for this opportunity.

[The prepared statement of Rev. de Leon appears as a submission for the record.]

Chairman CORNYN. Thank you, Pastor de Leon. I know you and others, as I said, have traveled to be here, and we are grateful for that.

There are others who wanted to come, but obviously we had limited space for witnesses. But without objection, I would like to submit a number of statements and letters from various churches and organizations expressing support for traditional marriage laws around the Nation, including, but not limited to, the National Conference of Catholic Bishops, the Southern Baptist Convention, the United Methodist Action for Faith, Freedom, and Family, the Islamic Society of North America, the Union of Orthodox Jewish Congregations of America, the National Association of Evangelicals, Campus Crusade for Christ, the Family Research Council, and the Boston Chinese Evangelical Church.

Mr. Shelton, we would be glad to hear from you with your opening statement.

STATEMENT OF HILARY SHELTON, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, WASHINGTON, D.C.

Mr. SHELTON. Good morning. The NAACP, our Nation's oldest and largest grass-roots civil rights organization, greatly appreciates the opportunity to testify today in order to express our firm and historical opposition to using the Constitution to discriminate against or deprive any person of his or her rights.

My name is Hilary Shelton, and I am the director of the NAACP's Washington Bureau, the national public policy arm of the NAACP. I would especially like to thank Chairman Cornyn and Senator Feingold for holding this hearing.

As an organization that has since its inception in 1909 fought for and supported amendments to the Constitution to ensure and protect the most fundamental rights for all persons, the NAACP strongly opposes the so-called Federal marriage amendment and all other proposals that would use the Constitution to discriminate and restrict rather than expand and protect the rights of any and all persons.

The NAACP currently has more than 2,200 membership units across the United States and has branches in every State in the Nation. Our mission over these past 95 years has been to achieve equality of rights and eliminate prejudice. We have consistently opposed any custom, tradition, practice, law, or constitutional amendment that denies any right to any person.

The NAACP is greatly disappointed that President George Bush and others have decided to enter this election cycle by endorsing an amendment that would forever write discrimination into the U.S. Constitution rather than focusing on the crucial problems and challenges that affect the lives of all of us. At a time of record high unemployment, diminishing job prospects, a ballooning budget deficit that is choking our economy and crucial social service programs, a public school system that is in great need of attention, and a health care system that is failing over 43 million Americans that remain uninsured over the past 3 years, this discriminatory constitutional amendment appears to be nothing more than a highly divisive political ploy to distract the country from focusing on our overabundance of real problems and our tremendous lack of creative and effective solutions.

The NAACP recognizes that the issue of marriage rights for same-sex couples is a difficult and sensitive one. As such, people of good will can and do have heartfelt differences of opinion on the matter. The NAACP has not taken a position on this question, but the NAACP is extremely opposed to any proposal that would alter our Nation's most important document for the express purpose of excluding any groups or individuals from its guarantees of equal protection. The Federal marriage amendment would for the first time use an amendment to the Constitution as a tool of exclusion. It is so extreme that, in addition to prohibiting any State government from honoring domestic contractual agreements between persons of the same gender in their States, it would also bar State and local governments from providing basic protections of citizens of the same gender and their families, even such fundamental protections as hospital visitation, inheritance rights, predetermined child custody rights, and health care benefits.

As the members of this Subcommittee are undoubtedly aware, the principal constitutional source of individual rights is in constitutional amendments, not in the Constitution itself. The first ten Amendments to the Constitution, the Bill of Rights, ensure that certain basic and fundamental rights would be guaranteed to the people of our Nation. These ten Amendments were designed to broaden the scope of rights reserved to the people or the States, establishing a floor of protection upon which individual States could build.

However, it was not until after the Civil War that the Constitution, at least on paper, began to provide its protections to all persons. The 13th Amendment abolished slavery. The 14th Amendment ensured all Americans equal protection under law. The 15th Amendment provided voting rights regardless of race or previous condition of slavery. The 19th Amendment guaranteed voting rights for women. The 23rd Amendment provided voting rights in presidential elections for the residents of D.C. The 24th Amendment eliminated discriminatory poll taxes in Federal elections. And the 26th Amendment provided voting rights for younger Americans.

There is no history of successfully enacting constitutional amendments for the purpose of restricting individual rights. The Federal marriage amendment and other discriminatory proposed constitutional amendments stand in stark contrast to the amendments that

have been adopted in the spirit of freedom and liberty. As James Madison explained, constitutional amendments are reserved "for certain great and extraordinary occasions."

The opposition of the NAACP to the Federal marriage amendment and other discriminatory amendments should not be construed to mean that the Constitution should never be amended again. While the NAACP firmly believes that the Congress should reject any amendment that would in any way restrict the civil rights of Americans, we continue to support amendments to the Constitution that would expand the ability of all Americans to pursue their inalienable right to life, liberty, and happiness.

For example, the NAACP believes that the Constitution should be amended to guarantee the right to a quality public education for all America's children. The Constitution should also guarantee the right to affordable, high-quality health care for our Nation's families. And the Constitution should guarantee access to democracy for all of our citizens. While there are several provisions in our Constitution providing for non-discrimination in voting on the basis of race, sex, and age, there is no explicit affirmation of an individual's right to vote in the United States of America. These rights are the rights we need to guarantee in order to build a firm foundation for the future success of our Nation. And they belong in our founding document.

At a time when our Nation has many important problems affecting the lives of millions of Americans, the Congress and this Subcommittee should waste no more time or energy on divisive and discriminatory constitutional amendments. The NAACP strongly urges you to reject the so-called Federal marriage amendment and all other proposed constitutional amendments that would permanently deprive any person in our great Nation of his or her civil rights.

I welcome at this time any questions you may have for me. Thank you.

[The prepared statement of Mr. Shelton appears as a submission for the record.]

Chairman CORNYN. Thank you, Mr. Shelton. We will come back with some questions after we hear the opening statements of other panel members.

Mr. Muth?

STATEMENT OF CHUCK MUTH, PRESIDENT, CITIZEN OUTREACH, WASHINGTON, D.C.

Mr. MUTH. Thank you, Mr. Chairman.

I am here today not as a lawyer, a theologian, or a constitutional scholar, but as a simple conservative grass-roots political activist who shares former Senator Barry Goldwater's penchant for limited Government. It is in that spirit that I come here today urging this Congress to reject the constitutional amendment banning same-sex marriages. This is not to say that conservatives such as myself necessarily favor gay marriage but, rather, that we strongly oppose the notion of addressing this issue of social policy in our Nation's governing document.

While this issue has far-reaching implications, I appreciate the opportunity to talk briefly about some of them here today and will certainly expound upon them and answer any questions later.

The name of this hearing, Judicial Activism vs. Democracy, is itself indicative of the problems we have addressing, let alone resolving, the issue of gay marriage because of the differing definitions many have regarding the terms themselves.

Was the Massachusetts *Goodridge* decision an example of judicial activism? It certainly appears so, especially after the court determined that only gay marriage, and not some sort of civil unions or domestic partnerships which the legislature endeavored to create, were acceptable to the court. However, I found the *Goodridge* decision to be reasonably argued even I disagreed with the conclusion. The fact is reasonable people can disagree as to whether or not this was an example of judicial activism.

On the other hand, I find it always important to point out that we do not live in a democracy but, rather, a representative constitutional republic. The overuse and overreporting of polls only confounds this problem and misperception.

The point is, even if 85 percent of people polled thought that bringing back slavery or taking away the right of women to vote in a particular State was a good idea, the Constitution simply does not permit it. With the exception of States in which citizen-initiated ballot measures are allowed, the people do not vote on issues as in a democracy. They vote for representatives who then vote on the issues. And even then, representatives are precluded from passing laws which are violations of the Nation's highest law, the Constitution.

Now, that being said, I have read accounts indicating that the Legislature of Massachusetts, acting on a citizen-initiated petition, could have addressed the issue of gay marriage well before the Supreme Court's ultimate decision and chose instead to punt the ball away. If these accounts are accurate, then the Massachusetts judiciary can hardly be held fully responsible for filling a vacuum created by legislative inaction and/or obstruction. If indeed the *Goodridge* decision is an example of judicial activism, it was aided and abetted by legislative neglect. In either event, the people of Massachusetts have not been well served.

Which brings me to my second point along these lines. If the *Goodridge* decision by the Massachusetts Supreme Court is, in fact, an example of unelected activist judges imposing their will on the people of Massachusetts, that is a problem for the people of Massachusetts to resolve, not the people of the United States. This is the very essence of our Nation's federalist system. The rights of the people of the individual States to enact policies and laws not in conflict with the U.S. Constitution was of paramount importance to the Founders. Indeed, the enumerated powers of the Federal Government are extremely limited.

Now, as surely as night follows day, whenever I bring up the States' rights argument on this issue, someone immediately whips out the Full Faith and Credit Clause of the Constitution to counter that argument. I would like to make three points in that regard.

There are legal scholars who have made compelling arguments for why the Full Faith and Credit Clause would not apply to gay

marriages. It is entirely possible that, if challenged, the Full Faith and Credit Clause would not be interpreted to force other States to recognize same-sex marriages performed in Massachusetts or some other State.

Two, the 1996 Defense of Marriage Act specifically protects the rights of one State not to recognize the same-sex marriages of another State, and DOMA has yet to be successfully challenged. Surely we should wait to see if DOMA is struck down before embarking on a path as extreme as amending our Constitution.

Third. Even if somewhere down the road DOMA is ruled unconstitutional by the Supreme Court, then the appropriate remedy would be a constitutional codification of DOMA's protection of States' rights, not a national, one-size-fits-all prohibition on gay marriage.

As a constitutional conservative I am very distressed at President Bush's recent statements on this issue. His position in the last presidential election reflected the federalist principle of letting the States decide. Yet by now embracing a Federal constitutional amendment prohibiting same-sex marriages, he has rejected this principle. Should the Federal marriage amendment, as currently drafted, be approved, the people of individual States will forever be banned from coming to a different conclusion on this issue. The President had it right the first time.

Further, I fear this effort could be a first step toward the federalization of family law. Throughout history, Government has used a crisis to expand their encroachment on liberty. In this case, under the guise of a homosexual crisis, can we expect a Federal Department of Family Affairs at the Cabinet level by decade's end? Why not? It was not so long ago that education was understood to be the sole province of the States, and look where we are today. "Fair-weather federalists" who support this amendment need to seriously consider the unintended consequences which may arise from the current gay marriage panic.

If the problem is judicial activism, then let us have a discussion and debate on how to address judicial activism. To address perceived problem of judicial activism only on this one hot-button issue is akin to putting a band-aid on a compound fracture. To move forward on the Musgrave amendment, as written, is to invite, deservedly so in my opinion, criticism that this is solely a punitive discriminatory anti-gay measure, and as such, it has no place in the greatest governing document in the history of mankind.

Sadly, though, this is not the first time a constitutional marriage amendment with such ugly undertones has been proposed. In preparing for my testimony here today, I came across a paper titled "Journal of African-American Men," which describes the objections many had in the early 1900's toward blacks marrying whites. According to this report, Representative Seaborn Roddenberry, proposed a constitutional amendment banning interracial marriage, stating that, "Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant. It is subversive to social peace."

This, unfortunately, is not unlike much of the rhetoric you hear from some supporters of today's Federal marriage amendment.

Of course, supporters of the current Federal marriage amendment will say that was way back then. You cannot equate two gay guys getting married to the notion of a black man getting married to a white woman. However, taking into consideration the passions and context of the times, it is not much of a stretch to believe that people such as Representative Roddenberry found the idea of interracial marriage just as unnatural and abhorrent then as many find the idea of gay marriage today.

We now look at how such people as Representative Roddenberry felt about interracial marriage 100 years ago, and cannot in our wildest dreams imagine such ignorance and bigotry. But if Congress moves forward with this current amendment, I suggest that Americans 100 years from now will look back on this distinguished body with equal amazement, if not disgust.

Then again, maybe not, which brings me to my final point.

There has been a lot of talk in this debate over what the Founding Fathers would have thought about this issue. Let me stipulate that had the notion of gay marriage come up in 1776, it is highly unlikely our founders would have smiled upon it. However, Thomas Payne, in his publication titled "The Rights of Man" left no doubt about his position with regard to one generation binding the hands of the next generation in matters of governance. He wrote, and I quote:

"Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. Every generation is, and must be, competent to all the purposes which its occasions require. The circumstances of the world are continually changing, and the opinions of men change also; and as government is for the living, and not for the dead, it is the living only that has any right in it. That which may be thought right and found convenient in one age may be thought wrong and found inconvenient in another. In such cases, who is to decide, the living or the dead?"

And that is the final thought I wish to leave with you today. I could be personally opposed to gay marriage today, but I have 2-year-old and 4-year-old daughters who may very well come to vastly different conclusions 20, 30 or 50 years from now, just as we in this room today have come to vastly different conclusions in the matter of interracial marriage from that of Representative Roddenberry.

Then again, maybe we will not. The point is, it is simply wrong for our generation to presume to dictate a Federal constitutional amendment how future generations of Americans address this social policy.

In conclusion, as a limited-Government conservative, I feel compelled to point out that this entire problem is a result of Government getting involved in the institution of marriage in the first place. Had marriage remained in the domain of the churches and religious institutions, this debate would be moot. The whole thing reminds me of an earlier constitutional amendment effort to put prayer back in schools, but again, the problem was not that we

kicked God out, but that we allowed Government in. Maybe 1 day we will learn this lesson.

Thank you very much for your time and the opportunity to speak with you today.

[The prepared statement of Mr. Muth appears as a submission for the record.]

Chairman CORNYN. Thank you.

I will recognize the distinguished Ranking Member of the Full Committee for purposes of offering a written statement.

Senator LEAHY. Mr. Chairman, I thank you for your usual courtesy. I do appreciate it. I will put a full statement in the record. Incidentally, I raise a couple issues. One, I hope this Committee will finally find time—I know it is important to do this—but finally find time to get Attorney General Ashcroft up here to testify—he has not found time for well over a year—on the PATRIOT Act. It raises a lot of issues of both conservatives and liberals in the Senate, and secondly, of course, the President said this is an urgent matter to have this constitutional amendment, rather than leave the issue to the States where it belongs. I would hope the President will tell us which of the various amendments out here he actually supports. He has not said so. I appreciate your courtesy. I will put it in the record.

I see my friend from Massachusetts. Those Republican appointed judges in Massachusetts have really given us a lot to chew on, Senator Kennedy.

Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator FEINGOLD. Chairman, excuse me just a second. I would like to submit for the record statements opposing a constitutional amendment concerning same-sex marriage from the following organizations: the National Hispanic Leadership Agenda; the National Gay and Lesbian Task Force Policy Institute; Parents, Families and Friends of Lesbians and Gays; Lawyers Committee for Civil Rights Under Law; and Leadership Conference on Civil Rights, Mr. Chairman.

Chairman CORNYN. Without objection.

Senator FEINGOLD. Mr. Chairman, I would also like to submit for the record a series of editorials and op-ed articles concerning the subject of a constitutional amendment to prohibit same-sex marriage.

Chairman CORNYN. Without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman CORNYN. Professor Brilmayer, we will be glad to hear from you.

STATEMENT OF R. LEA BRILMAYER, HOWARD M. HOLTZMANN PROFESSOR OF INTERNATIONAL LAW; YALE UNIVERSITY SCHOOL OF LAW, NEW HAVEN, CONNECTICUT

Ms. BRILMAYER. Thank you.

I have been a professor of law for almost two dozen years. University of Texas was the first school where I did teach, and it is the State of which I am a member of the bar, and my bar licensing will come up in a moment. Almost every year that I have been in

teaching, I have taught the subject of conflict of laws. As you mentioned in your introduction Senator, I have several books on the conflict of laws, none of which I want to assure you would make interesting additions to your bedtime reading.

This is a highly technical subject, and I think the reason that I was invited to attend this meeting is because I have a kind of technical knowledge that is very different from the knowledge and experience of the other people sitting here with me on this panel. I am probably the only person in this room that does not come here because of any particular interest in same-sex marriage. I have a strong interest in the Full Faith and Credit Clause and the other related clauses of the Federal Constitution, and I have written extensively on all of these areas, but same-sex marriage is not a subject that I have studied in its own right.

When the issue first started to come up—I think it would have been around the middle of the 1990's—I had students coming to me, and typically they would come up to me after class on a day when I had been speaking about the Full Faith and Credit Clause, and they would say, "Well, Professor Brilmayer, the Full Faith and Credit Clause, does that not mean that if you can have a marriage of this or that kind in one State, that it is going to be enforceable everywhere?" Ordinarily these were students that had a particular political point of view and they seemed quite delighted at this little discovery, and they were inevitably quite disappointed when I said, "I am very sympathetic to your concerns, but in fact the Full Faith and Credit Clause has never been read to reach that result, and I would not expect at any point in the future that it is going to be read to reach that result either."

In fact, the Full Faith and Credit Clause has never—to my knowledge "never" is the appropriate word—never in a single case been read to force one State to recognize a marriage entered into in another State that was contrary to the local policies of the State where the marriage was thought to be enforced. Or to say it another way, if people get married, two people get married in State A and then they later go to State B and State B has a different marriage law, I do not know of any cases that as a matter of Federal Constitutional Law, of Full Faith and Credit, either constitutional or statutory, I do not know of one case in which the second State was told that it had to enforce the marriage from the first State.

Of course, it frequently happens that the second State does. We know that, and all of us in this room who are married realize that we can go from one State to another—all of us heterosexuals in this room who are married—know that we can go from one State to another and expect that our marriages are going to be enforced. Why is that true? And if that is the case, why is it not true that the explanation is in the Constitution? Why is it not that the Full Faith and Credit Clause says that a marriage entered into one place is enforceable in other States?

Here I recall my remark about licensing. I have a license to practice law in the State of Texas. No one thinks that the Full Faith and Credit Clause means that my license to practice law in the State of Texas gives me a right to practice law any place else. If you ask people why is that, they would say: A license is just dif-

ferent. A license is not the same thing. It is not the sort of thing that is covered by the Full Faith and Credit Clause. Essentially, that is the sort of answer that would be given if this question was ever presented, and frankly, it has never been presented.

I spoke before the panel started to Attorney General Bruning, to my left, and I said I feel very sympathetic about defending lawsuits. He is defending lawsuits now. But as far as I can tell from what he says, no one is taking their marriage from Massachusetts to Nebraska and trying to get it recognized in Nebraska. That is not the sort of thing that is going on.

The reason is that Full Faith and Credit has been almost entirely restricted to the enforcement of judicial judgments, and there is good but technical and not very exciting reasons this should be true. A judicial judgment is a formal court proceeding where people have been represented by counsel, there has been an opportunity to appeal. Any kind of decision that is entered into after a formal process like that is entitled to recognition in other States. Marriage licenses can be taken out in a number of different ways. You can be married by a number of different people. Marriages have just never been treated that way.

In particular I want to say that the legal explanation that would be given if an explanation had to be given would be what is called the public policy doctrine, and the public policy doctrine says that the public policy of State B, if it is strongly held, can give it a right to not enforce a legal action entered into in State A. This is not simply a matter of marriage law. This is a matter of law generally. For example, if I were to go to Nevada and enter into a contract for prostitution, I could not get that contract enforced in other States. They would say: Prostitution? Maybe it is legal in Nevada, but we do not care what is legal in Nevada. That is a Nevada contract. It is not going to be enforceable in Texas. It would be the same thing with marriage.

I am not speaking speculatively. I am really not. There is well over 100 years of precedent on this, I would say 200 years of precedent, but I have not studied back that far, but I can tell you there is 100 years of precedence on that because there has always been vast differences in marriage laws from one State to another. Right now we are thinking of same-sex marriage. But there has also been questions of whether two first cousins can marry one another, whether an uncle can marry a niece. There is questions of whether polygamist marriages are legal. There is questions of the age of consent. Can someone under the age of 18 or 17 or 16 validly enter into a marriage? There used to be—I do not know if there still are, but there used to be questions about whether someone who was recently divorced could remarry, and some States had laws that said if you have been divorced within the last 12 months, you cannot remarry. You have to wait till the end of that period. This problem is as old as the hills. It is as old as the hills, and frankly, it is not much of a problem because there are solutions and it has never caused any kind of constitutional crisis.

That leaves me, as a specialist in Full Faith and Credit, sort of scratching my head and thinking what is all the excitement about?

My remarks are fleshed out more fully in my written statements and I believe this concludes what I have to say.

[The prepared statement of Ms. Brilmayer appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor.

General Bruning, we will be glad to hear your opening statement.

STATEMENT OF HON. JON BRUNING, ATTORNEY GENERAL, STATE OF NEBRASKA, LINCOLN, NEBRASKA

Mr. BRUNING. Mr. Chairman, members of the Committee, thank you for the opportunity to be here. My name is Jon Bruning. I am the Attorney General of the State of Nebraska.

My office is defending a Federal Court challenge to the portion of Nebraska's Constitution that defines marriage as a union between one man and one woman. Unfortunately, in spite of efforts in States such as Nebraska to preserve the traditional definition of marriage, recent court rulings have created a domino effect that may impose a national policy on gay marriage. I am not here to debate today the moral issue of whether same-sex marriage is right or wrong. I am here because of the reality that I believe that four judges in Massachusetts could eventually invalidate Nebraska's ban on same-sex marriages.

In short, I believe the people of the United States and the people of Nebraska I know would prefer to have policy decided by their elected officials, not by appointed judges.

Today almost 40 States have passed Defense of Marriage Acts. The vast majority of those are by statute, and four, including Nebraska, are constitutional amendments.

President Clinton, of course, signed the Federal Defense of Marriage Act into law, saying, "I have long opposed governmental recognition of same-gender marriages." The Federal DOMA attempted to leave the issue of gay marriage to the States and ensure that no State would be required to recognize same-sex unions from other States.

However, recent court decisions indicate neither State attempts to define marriage, nor the Federal act may be sufficient to protect the ability of States to define marriage.

In 2000, in Nebraska, more than 70 percent of Nebraskans voted to amend the Nebraska Constitution to define marriage as a union between one man and one woman. In 2003, Nebraska was sued by the ACLU and the Lambda Legal Foundation in Federal Court, arguing that the Nebraska amendment unconstitutionally denies gay and lesbian persons equal access to the political system. This is the first Federal Court challenge that we know of to a State's DOMA law. My office moved to dismiss the suit, but last November the Court denied our motion to dismiss. The language in the Court's order was very clear, and it signals that Nebraska will lose this case at trial.

Three recent cases, two in the U.S. Supreme Court, one in Massachusetts indicate that State and Federal attempts to leave this as a State's rights issue are likely to be invalidated by the Federal Courts.

In *Lawrence* v. *Texas*, a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause or the privacy right. In his

majority opinion, Justice Kennedy listed a number of rights protected by the Constitution, including marriage, and he asserted that "...Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

While the majority said the opinion did not speak directly to marriage, Justice Scalia, in his dissent, worried that the Court's opinion "leaves on pretty shaky grounds State laws limiting marriage to opposite-sex couple."

The second case is *Romer* v. *Evans*, the Supreme Court's case, where they held in 1995 that a Colorado Constitutional Amendment violated the Equal Protection Clause. The Supreme Court struck down Colorado's amendment, asserting that the amendment imposed, "a broad and undifferentiated disability" on homosexuals, singling them out and denying them "protection across the board."

In Nebraska's case I can tell you the plaintiffs have cited both *Romer* and *Lawrence* as authority in their attempt to repeal Nebraska's amendment.

The third case, of course, is *Massachusetts* v. *Goodridge*, where the Massachusetts Supreme Court relied on the reasoning in *Lawrence* to hold that the everyday meaning of marriage is "arbitrary and capricious."

While no one can predict with certainty what a particular Federal Court may do, read together, *Lawrence*, *Romer* and *Goodridge* demonstrate the real possibility of courts mandating the national recognition of same-sex marriages. Many well-respected legal scholars, including the one to my right perhaps, and Harvard Law Professor Lawrence Tribe, agree that this issue may end up being resolved by the Federal Courts.

In short, this country is heading down a path that will allow the Judiciary Branch to create a national policy for same-sex marriages. I am here because I believe that policy should be crafted by the States in the first instance, or at a minimum by you, our elected members of Congress with the approval of the States.

One final thought. My friend, Mr. Muth, suggested a potential amendment that may be necessary at some time that would simply give this power to the States. Congress could craft that and put it in the United States Constitution. It would simply say the States have the power to decide what they want to do with the definition of marriage.

Regardless, the ultimate question for you, members of the U.S. Senate, is whether you believe this issue should be resolved by judges or by the American people through you, their elected representatives.

Thank you, Mr. Chairman. Thank you, members, for your time.

[The prepared statement of Mr. Bruning appears as a submission for the record.]

Chairman CORNYN. Thank you, General Bruning.

At this time, without objection, I would like to submit letters from a number of former and current State officials around the Nation who agree with you, General Bruning, about the threat to States' rights in the area of marriage is judicial activism, not Congress. In addition, without objection I would like to submit letters and statements from constitutional law professors around the Nation, constitutional law experts who do not advocate amending the

Constitution lightly, but who believe in the importance of and the need for a constitutional amendment to protect democracy and marriage.

At this time I will recognize Ms. Gallagher for her opening statement.

STATEMENT OF MAGGIE GALLAGHER, PRESIDENT, INSTITUTE FOR MARRIAGE AND PUBLIC POLICY, NEW YORK, NEW YORK

Ms. GALLAGHER. Thank you very much, Mr. Chairman. It is an honor to be here, and I do want to say that I do not think spending a couple of hours every 6 months on the future of our most basic social institution for protecting children is excessive, and I certainly commend you for holding this hearing and for allowing the diverse views that are here.

I also do not understand how you can say both that the issue of same-sex marriage is a divisive political ploy and that nobody in America really cares about it. There is an obvious contradiction between these two thoughts. But what I would most like to do today is address three questions that I think the objections here raise.

The first is the question of whether or not this discussion and the issue of marriage itself is worthy of a constitutional national discussion. The second is whether or not defining marriage as the union of a man and a woman is writing discrimination into our Constitution, and the third is whether or not we ought to have a Federal, national definition, whether a Federal marriage amendment is necessary and desirable.

Is marriage worth it? I think the answer is yes. I think it is worth not only a couple of hours every 6 months, I think it is worth an enormous amount of attention because marriage is not just one of many different values issues. Obviously, it is a very emotional issue. But it has also always been understood as our most basic social institution for protecting children. We do not know of any human society that does not have this understanding of marriage or that has survived without it. We do know from the social science evidence and even more poignantly from the experience of people who live in the communities where marriage has become especially fragile and uncommon, the enormous amount of human suffering and damage and cost to communities, to children and to taxpayers that are created when marriage ceases to play this role of being the normal way in which men and women come together to create and raise children together.

How is it that marriage protects children? Does it offer a certain set of legal benefits that only marital children get? No. The legal protections for children, for parenting, have been mostly severed from marital status. The role that the law plays in marriage is helping to affirm and hold out a certain kind of social ideal in ways that really do make it more likely that men and women will raise children together. I say this as somebody who has worked very hard for the last decade to reverse trends towards family fragmentation so that more children are raised by their own mother and father in a married household.

And I can report some tentative good news: the divorce rate has declined. It is still very high, but it is going in the right direction. The unmarried child-bearing rate, after doubling every 10 years,

now appears to be leveling off. I think that these improvements are directly related to the efforts that many people have been making to call attention to the importance of mothers and fathers for children and the role that marriage plays in getting that protection for children. The idea that soul mates should marry can be left up to the poets and the song writers. The norm that needs reinforcing is that children need mothers and fathers, and adults have an obligation, a serious obligation to try to give this to their children if possible.

Not every child has that ideal. I was an unwed mother for 10 years. I know that very well. Many single mothers are heroically raising children. Many children do not have parents, and they need loving adoptive homes. But when you lose the ideal, you will find that fewer children are raised under the best of possible circumstances, because the things men and women have to do to give this protection to their children are hard, and they will not do it in a society that decides this idea is an example of bigotry and discrimination.

Which brings me to this second point. Is this writing discrimination into the Constitution? I would like you to listen very carefully to what we are saying here. We are saying that anyone who believe there is something special about the relationship between a husband and a wife who can become a mother and a father is just like a bigot who thinks there is something inferior about black people and therefore was in favor of bans on interracial marriage. What the advocates are confessing here, if we listen closely, is that this change, this legal change being thrust upon us is not going to just be a way of delivering some benefits to a small number of people in alternative families. It is going to be a change in our social norms about what marriage is and what it means. If we carry the logic of the race analogy to its natural conclusion, we will have to say that other arms of the law, public schools, capacity to get a liquor license, your tax-exempt status, will be threatened if you continue to hold to bigoted discriminatory ideas like children need mothers and fathers and marriage has something important to do with getting children this need.

That is, this will happen if we really believe that the normal definition of marriage as the union of a husband and a wife is an example of invidious and arbitrary discrimination. Do we really believe that? 60 percent of African-Americans oppose same-sex marriage as do 60 percent of white people. In the latest CBS News poll 55 percent of Democrats believe support a constitutional amendment defining marriage, of allowing only a man and a woman to legally marry. Three-quarters of Senators are on record here supporting that definition for the purposes of Federal law. I do not think that—are all these people bigots, or is there in fact something different here than about this kind of relationship and its relationship to the public purposes of marriage?

Bans on interracial marriage had nothing to do with the purposes of marriage. They were about, as the quotation from the 19th century representative, turn-of-the-century representative suggested. They were about keeping two races separate so that one race could oppress the other. Marriage is about bringing two different genders together so that children have mothers and fathers

and so that one gender, so that women, are not burdened by the social disadvantages and the inequalities, enormous social inequalities created when widespread fatherlessness becomes the social norm.

It really strains credulity to imagine that the reason we have laws on marriage that we have is in order to oppress or express animus against any other group of people. I do not think it is true. I would like to say too, I am puzzled in particular by the NAACP's position here. To say first that this is an issue about which good people of good will can disagree, I do appreciate that. I certainly understand very well that the activists who are pushing for same-sex marriage see themselves as fighting for an important moral good. I think they are wrong, but I understand that they are doing good as they see it. At the same time the NAACP takes no position on the normal definition of marriage, but if defining marriage in the Constitution is an act of discrimination, I do not understand why, as you say, the premier organization committed to fighting discrimination does not oppose it.

So I think it is a confusing position that is going to be rationalized in one direction or the other. Either the normal definition of marriage is not bigotry and discrimination, or it is, and we are going to have to fight in the public square and derive from the public square this idea that there is something about a husband and wife that is uniquely important in order for same-sex couples to be really treated not only with respect and concern, but as the fully equal no difference at all, which is the ideal being expressed by the law.

Is a Federal marriage amendment necessary? I think so. I think many people who are constitutional lawyers do not recognize that the Supreme Court has already federalized the marriage issue. It is a nice idea that it should be left to the States, but by defining a fundamental right to marry, and the Supreme Court regularly strikes down features of marriage law, so there is nothing new or radical in having this treated as a national issue. Moreover I think that we settled this basic question in the 19th century when we decided that in order to join the American system you had to have the same basic common understanding of marriage, that is, you may have a personal belief in polygamy, but you cannot express that belief in your legal system if you want to be part of our common culture of the United States. I think this is the recognition that if marriage is going to be a social institution, if it really is one of the small number of social institutions key to perpetuating and carrying on our free and democratic society, we just cannot have radically different understandings of marriage in different States.

Right now we are in a situation with not only courts but oddly, the local public officials are coming up with their own formulations of what marriage means and announcing that they are imposing it on their own jurisdictions. The one that struck me most recently—you probably have not heard of it, did not make the national news—but the Mayor of Nyack, New York, which is across the river from me in Ossining New York. In Nyack same-sex marriages are going to be recognized and in Ossining they are not going to be. The reality is, if the things I am pointing to are important and

matter, a national common shared definition of marriage is perfectly reasonable and appropriate, and in fact, it is essential.

I would also note, as others have, that the advocates of same-sex marriage are working for a national definition of marriage that includes same-sex marriages in every State. When asked why civil unions will not do, the most common answer is the issue of portability. This means that somebody who is married in Massachusetts should not be considered to be unmarried in South Carolina. So share with GLAAD and others working for same-sex marriage, the belief that ultimately we are going to have a national definition of marriage, and the question is: which one is it going to be?

A constitutional amendment does not have to be a national crisis. The last constitutional amendment we had, lowering the voting age to 18, we just decided to do it. Congress passed it. We proposed it. We debated it. We did it. It does not have to be a national crisis. I think that the support for a Federal marriage amendment is growing as more and more Americans realize that this is the only way to settle this issue and to take it off the table and to preserve our common understanding of marriage, and the alternative is marriage is going to be a political football. It is going to be fought out, not only in various States but in various localities, and it is going to be a legal and political football for the foreseeable future. This is the organized, rational way that our Constitution gives us for settling an issue that we consider of great national importance.

We can only do it if this is the kind of issue that reaches across, that does not divide us, that in fact unites us across lines of party, color, creed. I think that it is becoming clear that marriage is that kind of issue, and I am confident that we can conduct this National debate in a way that is not ugly or divisive or hateful, but is worthy of the highest traditions of American democracy, and I am quite confident that marriage deserves no less.

Thank you.

[The prepared statement of Ms. Gallagher appears as a submission for the record.]

Chairman CORNYN. Thank you, Ms. Gallagher.

We will now go to 10-minute rounds of questioning, and I know we have some members who will be coming in and out. Others have indicated they will be joining us. I will begin.

Let me take up, Mr. Shelton, with something that Ms. Gallagher alluded to. I want to make sure I understand. Does the NAACP take no position on the issue of traditional versus same-sex marriage?

Mr. SHELTON. That is correct. As a matter of fact, to clear the record, quite frankly, our opposition is to a very specific legislation that is now pending before the U.S. Senate. As we talked about the discriminatory nature of an amendment to the Constitution, we are talking about Wayne Allard's bill, which we are convinced will be extremely discriminatory and extremely difficult to enforce in a number of ways.

Chairman CORNYN. Let me make sure I understand. My question was: does the NAACP take a position of neutrality on traditional marriage versus same-sex marriage? I thought you said yes, but then you said it goes to specific legislation.

Mr. SHELTON. Specific legislation that is quite discriminatory in its implementation. Quite frankly, the Allard legislation would actually discriminate against anyone of the same gender that are entering into agreement to do things like help take care of each other's children, like hospital visits, like other issues that oftentimes people of the same gender, regardless of sexuality, have a tendency to enter into.

Chairman CORNYN. So I understand, it sounds to me like that is not neutrality.

Mr. SHELTON. We are opposed to the Allard legislation because it is discriminatory.

Chairman CORNYN. Okay, I am clear.

Mr. SHELTON. We are not taking a position as to whether or not people of the same gender should be able to wed.

Chairman CORNYN. Would the NAACP remain neutral, assuming—I guess your idea of neutrality and mine is a little different. But would you remain neutral if indeed the United States Supreme Court mandated same-sex marriage?

Mr. SHELTON. Certainly it would depend on the decision that is handed down. Our concerns are on a number of levels.

Chairman CORNYN. The decision would be on that mandated same-sex marriage. Would the NAACP be neutral on that?

Mr. SHELTON. Indeed, what would be the tenets of the definition of same-sex marriage in that decision. Quite frankly, for us to generalize about what a decision would do would be extremely difficult to do here and now. I would, however—

Chairman CORNYN. It is pretty—my question I think is clear. Please ask me to restate it if it is not.

Mr. SHELTON. Perhaps you could define the decision that the Supreme Court would hand down in a way that we could respond.

Chairman CORNYN. The Supreme Court of the United States says, hence forth, traditional marriage is unconstitutional. Would you remain neutral on that or would you weigh in one way or another?

Mr. SHELTON. Senator, as you know, the devil is always in the detail. And quite frankly, once they say "hence forth" we have about 12 to 20 pages of definition that we have to comb through to determine indeed whether or not it is something that we would support or not.

Chairman CORNYN. Let me ask, if in fact there was a decision that mandated same-sex marriage coming from the United States Supreme Court, would you support any amendment to the United States Constitution that would allow the people to weigh in as opposed to life-tenured unelected judges?

Mr. SHELTON. Again, it would depend on the language. Quite frankly, our concerns around marriage in general are issues of how marriage would very well protect the American family. Indeed right now I come from a community in which over 60 percent of African-American children are being raised in single family headed households. 43 million Americans have no heath insurance or health care. Our public schools need the attention of not only the U.S. Government, but also their local governments and resources therein. We know there are so many issues that if you want to sup-

port and protect the institution of marriage, that indeed you must support and protect the institution of the American family.

Chairman CORNYN. Mr. Muth, let me try to clarify, if I can, my understanding of what you are saying. I believe you said you do not favor an amendment that addresses marriage specifically, but as I understand it, you are very concerned about judicial activism; is that correct?

Mr. MUTH. That is correct, Senator.

Chairman CORNYN. Are there any circumstances under which you would support, any language you would support for a constitutional amendment which would address judicial activism?

Mr. MUTH. That is interesting. It is my understanding that Senator Hatch may have drafted language which would be—I would still have an objection. I have a concern about amending the Constitution. Let that be said. But if I understand correctly, Senator Hatch's proposal for this would simply be to almost a super-DOMA, to codify the fact that the States have the rights to either recognize or not recognize gay marriages individually, rather than establishing a national prohibition against same-sex marriage. And of the choice between those two, I would absolutely favor one that protects the States' rights to recognize gay marriage or not recognize it, rather then mandate.

Chairman CORNYN. So there could be, in order to check what you regard as unlawful judicial activism, there could be some constitutional text that you would find acceptable?

Mr. MUTH. There could be. I would again like to see this as a last resort, if you will pardon the expression. There may be even a legislative remedy before we even get to that point of a constitutional amendment. I mean Congress has the ability to tell the Federal Court system, you do not get to rule in this. I cannot remember whether it is Article II, section 3—

Chairman CORNYN. I think you must be referring to what I would call jurisdiction stripping language?

Mr. MUTH. Correct.

Chairman CORNYN. Which would say basically Congress prohibits the Federal Courts from even ruling on certain areas.

Mr. MUTH. Right. If Congress established legislation that said, with DOMA that the States are protected, and Congress passed that legislation—they are an equal branch of the Federal Court system—can tell the Federal Court system, hey, you are not allowed to overrule DOMA. I think that would be something that could be done legislatively without going through the process of a constitutional amendment.

Chairman CORNYN. I personally have some concerns about jurisdiction stripping, but what you are saying is you think that is a possible alternative to this issue as well?

Mr. MUTH. Absolutely.

Chairman CORNYN. Professor Brilmayer, I know Senator Kennedy and Senator Feingold and I were here when you were talking about conflicts of laws, and we were having nightmares, sort of flashbacks to law school about what you said is a highly technical are, which I concede it is, the conflicts of laws. But you said never has there been a judicial decision which has forced one State to accept a decision by another State that violated the public policy of

the second State. Maybe you can say it more artfully than I did. Is that correct?

Ms. BRILMAYER. Yes. I need to clarify that. I mean specifically in the context of marriages because there is a lot of doctrine similar to what you say outside the marriage context, but we are interested in the marriage context, so I want to be precise. Within the marriage context, if the question is, have I ever seen a case in which a marriage entered into in State A that was contrary to the fundamental policies of State B, nonetheless had to be enforced in State B for reasons of the Full Faith and Credit Clause, or Full Faith and Credit Statute, the answer is I do not know a case like that.

Chairman CORNYN. Let me ask you a hypothetical question. I know law professors love hypothetical questions. Assume that there was a challenge to that policy in the second State, saying that that policy restricting marriage to persons of the opposite sex violated the United States Constitution. You would agree with me that in that instance, that the second State would be forced to recognize the marriage that was legal in the first State, correct?

Ms. BRILMAYER. I have tried to keep my remarks about conflict of laws separate from the constitutional law question about whether this or that kind of marriage is constitutionally protected, that sort of thing. I have tried to keep those two things separate, yes.

Chairman CORNYN. But from one of the most prestigious, and maybe you think the most prestigious law school in the country, you would agree that the answer to that hypothetical is yes, would you not, that the second State would be compelled to recognize the same-sex marriage in the first State if indeed the public policy of that second State was held to violate the United States Constitution?

Ms. BRILMAYER. I would say that the public policy that is cited in the second State has to be a valid public policy, and of course, that includes not only what comes out of the Constitution, but what comes out of Congress under the Supremacy Clause.

Chairman CORNYN. I take that as a yes. If it is not a valid public policy because it violates the Constitution, the answer to my question is yes, correct?

And you do recognize, and you alluded to General Bruning, the lawsuits that have been filed there. If in fact the Defense of Marriage Act, whether it be a State Defense of Marriage Act or the Federal Defense of Marriage Act, were held to violate the United States Constitution, then every State would have to recognize same-sex marriage, correct?

Ms. BRILMAYER. No. I think that the Federal Defense of Marriage Act acts in a completely different way from what I believe erroneously are called State DOMAs. The State DOMAs have a wide variety of manifestations, so I cannot really generalize about those, but some of them do make particular constitutional provisions about what should count as a marriage, and my belief is that the Nebraska one has those features. The Federal—

Chairman CORNYN. Let me ask you.

Ms. BRILMAYER. I am sorry.

Chairman CORNYN. I am sorry. My time is running out, so just to clarify, if a State Defense of Marriage Act stipulated that mar-

riage is the union of a man and a woman, and essentially equivalent what the Federal DOMA provides, if the United States Supreme Court held that it was unconstitutional to limit marriage to traditional marriage, then indeed that would result in the national recognition of same-sex marriages, would it not?

Ms. BRILMAYER. If the United States Supreme Court held that there was constitutional protection for same-sex marriage, we would not have to worry about the Full Faith and Credit Clause. It would operate directly.

Chairman CORNYN. That is my point. I happened to—you mentioned bedtime reading, your "Conflict of Laws" book, "Cases and Materials," and I confess I have not read all of it, but I have read a page or two. You do cite on page 688 a number of learned Law Review articles where distinguished legal scholars do make the argument that the Defense of Marriage Act is unconstitutional, correct?

Ms. BRILMAYER. They make that argument, and I acknowledge in my written testimony that there are people who say that. The people who say that who have constitutional arguments about it, by and large are not specialists in the conflict of laws. By and large they are constitutional law specialists.

Chairman CORNYN. As you said earlier, that is outside of the conflict of laws area. This is a matter of Federal constitutional law, right? In other words there are two separate issues. One is a conflict of laws question, the other is the constitutional question under whether DOMA would be held unconstitutional.

Ms. BRILMAYER. I do not know of any Court that has held that DOMA is unconstitutional and my own view is that DOMA is constitutional.

Chairman CORNYN. You of course have made clear that your expertise is in conflict of laws, not constitutional law, but you do have distinguished colleagues on your faculty, for example, Professor Eskridge who wrote "The Case for Same-Sex Marriage," who does argue that the Defense of Marriage Act is unconstitutional, correct?

Ms. BRILMAYER. I am in a good position to say that he knows nothing about the conflict of laws.

[Laughter.]

Chairman CORNYN. Are you in the same position to say that this law professor at Yale Law School knows nothing about the United States Constitution?

Ms. BRILMAYER. He knows a lot more about the Constitution than I do, the other parts other than the Full Faith and Credit Clause.

Chairman CORNYN. You agree with me that he has written in this book and elsewhere, "The Case for Same-Sex Marriage," that the Defense of Marriage laws are unconstitutional. Do you agree with that statement?

Ms. BRILMAYER. I actually do not know whether he has addressed the conflict of laws issues in that book because I have not read that book because it is not really my area of interest.

Chairman CORNYN. Professor, I am not asking you about conflict of laws. I am asking you whether this law professor at Yale Law School, Professor Eskridge, Professor Lawrence Tribe, a well-known constitutional scholar, have both of them argued that the Defense

of Marriage Act is unconstitutional under the Federal Constitution or do you know?

Ms. BRILMAYER. I actually do not know what they have said about that. What I do know is that conflict of laws specialists are largely in agreement. The cases are, as far as I can tell to this day, 100 percent in agreement with my position, which is that DOMA is constitutional as a matter of intrastate judgments enforcement.

Chairman CORNYN. I will, without objection, make part of the record both the excerpt from your "Conflict of Laws" text that does reflect two scholarly Law Review articles arguing that the Defense of Marriage Act is unconstitutional, as well as the relevant chapter in Professor Eskridge's called "The Case for Same-Sex Marriage," your colleague at Yale Law School, and both of those will be made part of the record.

Senator Feingold?

Senator FEINGOLD. Thanks, Mr. Chairman.

First, with respect to the comments of Ms. Gallagher, she mischaracterizes the views of those who oppose the constitutional amendment. The issue here is not whether one supports traditional marriage and thinks it is a good idea that people marry and raise children. The issue is whether we should write into the Constitution a definition of marriage for all times and for all States. If we do that, and particularly if we do that in a way that would prevent States from offering benefits now available to opposite-sex couples only, that is discrimination against a large segment of our society who simply want to raise their children to be productive members of society.

General Bruning, I understand that the Nebraska law is quite different from the Defense of Marriage laws passed by the other 36 States and the Federal Government. The Nebraska law, which is an amendment to your State's Constitution, would explicitly ban civil unions and domestic partnerships as well as same-sex marriages; is that not right?

Mr. BRUNING. Yes, that is right, Senator.

Senator FEINGOLD. Just so everyone is clear. The court challenge currently ongoing in Nebraska involves the Nebraska Constitution, not the Federal DOMA statute passed by Congress and signed into law in 1996; is that correct?

Mr. BRUNING. Yes.

Senator FEINGOLD. Thank you. I think it is important for the Senate to understand that the Nebraska situation is quite unusual, and it is certainly not a case study for the kinds of challenges to State DOMA laws or to Federal DOMA law that we could expect in the future.

Professor Brilmayer, thank you for being here very much. I think you have been very clear about your views on whether the Full Faith and Credit Clause would require Texas, for example, to recognize a same-sex marriage performed in Massachusetts. I want to underline what I think is a key point in the debate by quoting from an op-ed by Charles Krauthammer in last week's Washington Post. He says the following: "Because of the Full Faith and Credit Clause of the Constitution, gay marriage can be imposed on the entire country by a bare majority of the State Supreme Court of but one State." He goes on to say "What is the alternative, to nationalize

gay marriage imposed by the Supreme Judicial Court of Massachusetts, the 1996 Defense of Marriage Act? Nonsense. It pretends to allow the States to reject marriage licenses issued in other States, but there is not a chance in hell that the Supreme Court will uphold it," Mr. Krauthammer wrote.

Is not Mr. Krauthammer's assertion about the Full Faith and Credit Clause just completely wrong?

Ms. BRILMAYER. I think he should probably consult with people who know more about the subject. That is a very ignorant view.

Senator FEINGOLD. What about his assertion that there is no chance that the Federal DOMA will be upheld?

Ms. BRILMAYER. I think that is also quite wrong.

Senator FEINGOLD. Thank you for that. Professor, just to follow on the conversation you just had with the Chairman, you spoke to the likely constitutionality, as I understand, of DOMA. Given the continued validity of the Full Faith and Credit Clause in the marriage context, do you think that the Federal Defense of Marriage Act originally passed in 1996 was necessary?

Ms. BRILMAYER. I think it was actually unnecessary and that is one of the reasons I am not a big fan of the Federal DOMA. Even though I think that it is constitutional, I do not think that it was necessary. I also think there is some drafting problems with it, but that is a separate matter.

Senator FEINGOLD. I thank you.

Ms. Gallagher, in your commentary this week in the National Review Online, you said that banning same-sex marriage but allowing civil unions would be a "truly disastrous compromise."

Ms. GALLAGHER. I am sorry. That is not what I said, but I will let you finish the question.

Senator FEINGOLD. Let me characterize then. You argue that allowing civil unions would strip traditional marriage of its uniqueness. Is that not accurate?

Ms. GALLAGHER. No, it is not accurate. I can reflect my views.

Senator FEINGOLD. Madam, I am going to finish my question, and then you can respond.

Ms. GALLAGHER. Sure.

Senator FEINGOLD. From your Weekly Standard commentary published just 3 months ago you said, I think, the opposite of that. You stated that, to succeed and ratify a constitutional amendment banning same-sex marriage, conservatives such as yourself and the "Christian right" need to increase your popular support from 60 to 70 percent, you would need to draw new supports from "liberal and centrist Democrats and Independents." To so, you may need to allow room to support civil unions while opposing gay marriage.

So are you arguing that those are consistent positions?

Ms. GALLAGHER. Your staff has—I am just assuming it is your staff, because I think that you would not have come to that conclusion if you had not got a biased quote. This is what I think, and I am glad to have this opportunity. I do not think that a Federal marriage amendment should prevent States and localities from offering benefits and protections to people in alternative family forums, including gay and lesbian couples. It is my understanding that it is the intention of the sponsors that this question be left to State legislatures and to private contract. Whether or not the word-

ing is accurate or reflects that is another set of debates. That is a drafting issue. But I am opposed to any attempt to use the Constitution to ban civil unions or domestic partnerships.

The question in Massachusetts, in my National Review Online is whether you should offer to the people as a response to the *Goodridge* decision an amendment that says first marriage has a unique status and should be a man and a woman, and (b) then says civil unions have an equivalent status with the identical set of rights and benefits for all eternity, and I think that ultimately that that drafting language would end up throwing the question—I mean you have a contradiction between saying it is unique and it is equivalent, and that that language would throw the issue back to a Court which has already demonstrated hostility to the idea that there is anything unique or special about the marriage between a husband and a wife, who can become mothers and fathers. It is characterized that idea is a rational bigotry.

So I think that specific drafting language would not overturn the *Goodridge* decision and that is why I was opposed to it.

Senator FEINGOLD. Mr. Chairman, I am just going to read in the record here the direct comments from Ms. Gallagher from her column entitled "No Good." One portion reads: "The First Constitutional Convention met February 11, voted down several versions and adjourned till March 11th. Now influential opponents of gay marriage appear to be ready to sign on to a truly disastrous compromise. A constitutional amendment would (a) declare marriage to be a unique status consisting of a man and a woman, and (b) simultaneously declare civil unions to be now and forever the exact legal and constitutional equivalent." Then later in the article it indicates, "In fact the consequences of constitutionally affirming civil unions are likely to be even more destructive than simply letting *Goodridge* stand."

Ms. GALLAGHER. I object to constitutionalizing civil unions or to using the Constitution to ban them.

Senator FEINGOLD. Let me go to Mr. Muth. You warned in your testimony that a Federal marriage amendment could be the first step toward the federalization of family law. You suggested that the President and conservative interest groups and some conservative Senators and Representatives were operating under the "guise of a homosexual crisis," and that this effort could lead to an eventual Federal Department of Family Affairs.

Could you say a little bit more about your concerns of this? I would be particularly interested in your views on the effect of federalizing family law in a democracy like ours.

Mr. MUTH. I think it is the camel's nose under the tent syndrome, which seems to happen with the best of intentions of a lot of legislation. As we open up the door just a crack, and then it gets pushed open a little bit more, and a little bit more, and a little bit more. Next thing you know, you have got an 800-pound gorilla sitting in your midst, and I am afraid that by using the Constitution to address social policy like this, this Nation has been very much opposed to amending our document. The fact that it has so few amendments already is indicative of that. I am afraid that once we start down that road by amending the Constitution for the purpose of defining marriage as between one man and one woman, that

that is going to open up the possibility of amending our Constitution in the future for all kinds of other aspects, and this is of great concern to me.

Senator FEINGOLD. Thank you very much.

Again, to General Bruning, in an interview with National Public Radio last summer, after the *Lawrence* v. *Texas* decision came down, you indicated that the decision may not have any implications for same-sex marriages because the Court did not rely on the Equal Protection Clause of the Constitution. You say, "The Court was very careful to limit the privacy right that they recognized and to stay away from equal protection. The Court did not want to equate homosexuals with blacks or women or other groups that received equal protection coverage under the Constitution."

If this is true, then why do we need a constitutional amendment? Is not a United States Supreme Court decision striking down the prohibitions on same-sex marriages the only situation that would truly require an amendment to the U.S. Constitution?

Mr. BRUNING. Senator, the reason we need a Federal constitutional amendment is because State constitutional amendments are not secure in Nebraska. Ours is to be struck down, and I see it likely to be struck down if it were formed more tightly. As you mentioned, it is fairly broad as constitutional amendments or State DOMA statutes go. But it will be struck down by this Federal Judge. He has said so. And I think State statutes face the same risk. So if State constitutional amendments, State statutes are at risk, why is Federal DOMA not at risk? The only thing that can remain firm is a Federal constitutional amendment. The only thing that can remain above an activist Federal judge is the Federal Constitution.

Senator FEINGOLD. So I take it you agree that we should start amending the Constitution to prevent the Supreme Court from making a decision that seems unlikely even to those that would oppose that decision?

Mr. BRUNING. I think we disagree, Senator, that it is unlikely. I believe the case I am defending currently in Nebraska will end up here at the Supreme Court. I absolutely believe it will. And when it does, I believe it is a long shot, given the current makeup of the Court, I believe we would lose 6–3, just like *Romer*, just like *Lawrence*.

Senator FEINGOLD. That is not the quote that you gave with regard to *Lawrence*. You indicated that this Court had narrowly limited *Lawrence* and it was precisely the opposite of what your quote said.

Mr. BRUNING. Read together, Senator, you are right. *Lawrence* was decided on due process grounds, basically, the privacy right that is inherent in the Due Process Clause. *Romer* was decided on equal protection grounds. *Massachusetts* was decided basically on both. Read together, Courts are going to do anything they can to find that there is no rational basis for these statutes, and activist judges are going to overturn these statutes and constitutional provisions.

Senator FEINGOLD. Let me ask Professor Brilmayer if she would like to respond to Attorney General Bruning's comment that there is a real possibility that the Federal Courts will overthrow mar-

riage laws. Have we ever amended the Constitution because of a possibility, real or imagined, of Courts taking some action?

Ms. BRILMAYER. I think the answer as you phrased it is no, but we could even phrase it more precisely. Has there ever been a constitutional amendment to correct one State interpreting its own law in a way that people outside the State think to be erroneous, which is essentially what is going on here. What sparked this discussion is the *Goodridge* decision. People outside Massachusetts think it is erroneous. They worry that it is going to be imposed on them. There is nothing remotely like this in our existing Constitution. I do not even know of any constitutional amendments that have been proposed that had this sort of motivation, where people outside Massachusetts look at a Massachusetts Court interpreting a Massachusetts law, and they think getting it wrongly, and take constitutional action to reverse that result.

Senator FEINGOLD. That is a very important comment, and I am very glad that is on the record.

Let me finally ask Reverend Richardson. I wanted to ask you about the implications of the *Goodridge* decision on your position as a clergyman in Boston. Is it not true that the Massachusetts Supreme Court's decision will not force you and your church to recognize and conduct same-sex wedding ceremonies?

Rev. RICHARDSON. Yes, that is correct.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman CORNYN. Senator Kyl?

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman. I want to thank all of the panelists here.

Let me start, Professor Brilmayer, by just making a comment. I find it astonishing that you would characterize as ignorant the view that DOMA will not be upheld. I know you feel otherwise. My own view is it may or may not. It is a close question. I bet it will not be unanimous in either event, and yet I would not characterize as ignorant a Justice on the other side who happened to feel that the law should not be upheld. It just seems to me that given the large body of legal opinion, erudite legal opinion on both sides of the issue, that it does not help in the debate to characterize those who hold the view that it will not be upheld as ignorant.

Ms. BRILMAYER. I think there was a very specific quote, Senator, that I was asked to comment on, which went a good deal further than the remark that you have just recited. The quote that I was asked to comment on was something along the lines that there was a snowball's chance in hell that this would not be struck down, and that is just wrong. I am sorry.

Senator KYL. So you think there is at least a snowball's chance that it will be upheld?

[Laughter.]

Senator KYL. You were pretty sure that it would not be upheld. You were pretty sure that it will be upheld.

Ms. BRILMAYER. I think it will be—

Senator KYL. But you caveat that by at least one snowball.

[Laughter.]

Senator KYL. Is that about it?

Ms. BRILMAYER. Thank you for explaining that for me.

Senator KYL. I am sorry I missed the earlier testimony, and the last question to Pastor Richardson causes me to want to ask him to expand a little bit more, and again, I apologize for not hearing your earlier comments, sir.

I suspect that the issue with you is not whether your church would have to perform these marriages, but what you believe the mandate on the State would do to marriage generally within the State. And I just wondered if I am correct and if you would expand on that a little bit.

Rev. RICHARDSON. Yes, you are correct about the mandate on the church. That is correct. But as far as the effect and the mandate on the community, I think that it does have a negative effect on our community. I am not a lawyer, and I am only going from being a practitioner working with families that have experienced a disruption in their home, either by being removed by the State system or finding themselves in a single-parent or a non-traditional setting.

I don't think this is about benefits. I think that in Massachusetts already State workers are entitled to benefits, regardless of relationship. I think that when—it really boils down to families and children. That is really what it boils down to as far as the black community is concerned.

Everything that happens so much in society has an overwhelming devastating effect on the black family. It seems like no matter what it is, we are always disproportionately in the distribution of whatever happens.

I would just like to correct some of the things that people are saying. They are saying that children needs moms and dads. Well, children already have moms and dads. They are born into this world with a mother and dad, and so they are entitled that. They do not need one. They already have one. And that is what I find in dealing with the children that come through our church and that we counsel in our agency, is that they are seeking the mom and dad that brought them into this world. I am not saying that foster parents do not do a good job. Like I said, my wife and I have been foster parents all along.

I think that when we use percentages, we need to be careful. I heard mention here 60 percent of single parents exist in a community. Well, just because a child is with a single parent does not mean that they do not have an interaction or relationship with a father, or a mother. So, you know, when we start to define what the line really is, the line isn't the fact that single parents and the kids that live in a single-parent setting do not have knowledge of a mother and father. The children I deal with every day and counsel with, they know who their mother and father is. They just are not in a position to live with them. And they want to be with their mother and father. That is the issue. Culture says that, you know, children want to be raised in a certain culture. I have nothing against interracial marriage. I have two sons-in-law that are white that my daughters married, and I have interracial children. But I am here to tell you that still—I have adopted grandchildren. I am here to tell you that there is still an urgency to know who they are

culturally as well as biologically. You cannot remove that from the psyche of human beings. They know it took a mother and a father to get them here. It took a man and a woman, let me put it that way, to get them here. But after that, they just cannot drop off the scene.

That is why we have organizations in our community, Big Brothers, Big Sisters, to fill those voids that these children are filling. But can they fill the void? No. The only one that can fill that void is the biological parent.

I counsel young men, and I say, you know, well, we understand that your father or one of the parents may have been an alcoholic. And he says, "No, no. They're not alcoholic. He was a drunk." And we say, well, you know, some of them—they are addicted by substance abuse. "No, no, no. They're junkies." They know. But you know what? They say, "But we still love them." And we want somebody to try to help so we can be back together with them. That is what we are talking about in our community. I don't know about other communities, but that is the impact on the black community and the laws that have been set up.

You know, we are the only individuals that I know of that were brought over on slave ships and put on the block, you know, to be sold as merchandise. Families broken up, husbands turn away from wives, you know, and to never see each other again. You know, I sit here as one that cannot go back more than one generation in my history, you know, and that is sad to say. I hear people talking about developing a family tree. I cannot even get a limb, you know, to my family's roots. And that is painful.

And when you separate children from their biological parents and say that they have no connection, I think we need to think about that, and that is where the black community is coming from that I represent.

Senator KYL. I think it is important that we all focus on that. It concerns me. You know, lawyers can and will argue. That is a certainty. And I do not want this debate to get down to the legal minutiae but, rather, to get the focus back on why this issue has ignited such interest among the American people. And if I think back a few thousand years to what must have been going through people's minds in trying to create the concept of marriage and a monogamous relationship between the mother and father of children and why that relationship has been preserved all of these eons, it seems to me one reason is because the parents were not arguing about parental rights, but they understood as a culture what was good for their continued success as a society. And that is the relationship we are talking about.

Mr. Chairman, the light is still green. Do I still have a little bit of time here?

Chairman CORNYN. Yes.

Senator KYL. Okay. I was not certain what the time was, and I wanted Pastor de Leon to share his perspective on the same point. Obviously no one but the black community has the experience of which you spoke with regard to the division of family historically in this country. But I also know that in many Hispanic communities, because of the way that some of those communities evolved, there are families that are split as well. And perhaps that is part

of your testimony, and, again, I apologize that I was not here to hear your testimony, Mr. De Leon.

Rev. DE LEON. Thank you, sir. It is very true that in a different way—however, the result is the same—we have suffered as a community. For example, the immigration laws that we have in this Nation have contributed to the breakup of the family. A lot of our men, or women, have come from Latin America in recent years, and they have come to make a better living and to make a better living for their children and for their family.

I often say that if I was in their shoes back there in the old country, I would be doing the same, because as a father I feel a great responsibility for my children.

And now, consequently, we have mama out here, children back in Latin America, or vice versa, daddies out here and the children are back there. And as a consequence of that, we are seeing more and more people come to our churches and to our centers where we help these people, not only in the area of the obvious emotional problems and serious deep-seated scars, but financially. We have more poor people now in Orange County, California, which is one of the richest counties in this Nation, coming to our doors for help. And it is not just a matter of now we hand them out a piece of bread. Now we open the door to all their problems that they are living. It always goes back to saying if my dad and my mom were here, I would not be going through this.

We know clearly that the best situation for a child is to have dad and mom with him to help him grow up and develop and become potentially what he or she can be. And so I just pray that some way, somehow, all of us can understand that this is not about anything that has to do with party politics or some kind of a national debate regarding marriage, first of all, but first of all children, and then marriage that supports that. And that is my position, Senator.

Senator KYL. I appreciate that very much.

I guess my time is up, but I thank you, Mr. Chairman, and I thank all of you for being here.

Chairman CORNYN. Thank you, Senator Kyl.

Senator Kennedy?

STATEMENT OF EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman, and I thank the panel for very provocative and informative comments that they have made this morning.

I want to recognize Reverend Richardson. Reverend Richardson is known in Boston for all of his great work in working with foster children, and he does extraordinary work and his church does extraordinary work. So we welcome you here, and so many of these issues we would like to hear you on in terms of the well-being of children. And we thank Reverend De Leon as well.

There are many complicated issues about the separation of families. Our current immigration laws will make those wives or husband wait 8 years so that they can be together. That is not what we are talking about today. So, you know, these issues are complex and they are complicated, and we all reach out to those that you comment upon because no question they are being left out and they

are being left behind. And we are enormously concerned about their well-being, and we welcome your ideas about how we can treat them more fairly and justly.

I do not believe, quite frankly, that the issues that we are talking about today are the ones that are going—we talk about problems of immigration and housing and keeping children together. But there are a lot of different factors. But what we are doing today is talking about a constitutional amendment.

I join with those that believe very strongly that we are facing a number of urgent challenges in our country today. The war in Iraq has brought new dangers, imposed massive new costs, is costing more and more American lives each week. And here at home the unemployment crisis for millions of citizens, retirement savings are disappearing, school budgets are plummeting, college tuition is rising. Prescription drug costs and other health care costs are soaring. Federal budget deficits extend as far as the eye can see. Yet now, instead of calling on Congress to deal with these issues and challenges more effectively, the President is distracting us by calling on Congress to take up and pass a discriminatory amendment to the Constitution to prohibit same-sex marriage.

There is no need to amend the Constitution. As the daily news reports made clear, States across the country are already dealing with this issue, and dealing so effectively, according to the wishes of the citizens in each of the 50 States. And in more than 200 years of our history, we have amended the Constitution only 17 times—17 times—since the adoption of the Bill of Rights. And many of the amendments have been adopted to expand and protect people's rights. And by endorsing this shameful proposed amendment in a desperate tactic to divide Americans, in an attempt to salvage a faltering reelection campaign, President Bush will go down in history as the first President to try to write bias back into the Constitution.

We all know what this issue is about. It is not about how to protect the sanctity of marriage or how to deal with activist judges. I remind my fellow colleagues and Senators of what Professor Brilmayer has just said, and my fellow Americans, that the Massachusetts Supreme Judicial Court interpreted the Massachusetts Constitution, not the Federal Constitution. That is precisely what appellate courts were created to do. The debate is not about activist judges. It is about politics, an attempt to drive a wedge between one group of citizens and the rest of the country solely for partisan advantage. We have rejected that tactic before, and I am confident we will do so again.

I respect the views of those who oppose gay marriage and disagree with the court's recent decision in Massachusetts. I understand the concerns of those who object to city and county officials who allow same-sex marriage without express authority in State law. But each State is dealing with that issue according to its own law, as States have done throughout our history.

What I do not respect are efforts by supporters of the Federal marriage amendment to confuse and deceive the American people about the current situation and what their proposed amendment will do. Supporters claim that any ruling or law on same-sex marriage in one State will instantly bind all other States, and that

claim is not true, as we have heard this morning. Long-standing principles on the conflicts of law give States broad discretion in deciding to what extent they will defer to other States when dealing with sensitive questions about marriage and raising a family. And the Federal Defense of Marriage Act passed in 1996 makes the possibility of nationwide enforceability even more remote.

Many people are concerned that their State government may somehow interfere with the right of churches and religious groups to conduct their own affairs. But as the First Amendment makes clear, no court, no State can tell any church or religious group how to conduct its affairs. No court, no State, no Congress can require any church to perform a same-sex marriage.

Yet supporters of the proposed amendment continue to insist that religious freedom is somehow under attack. Far from upholding religious freedom, the Federal marriage amendment will undermine it by telling churches they cannot consecrate a same-sex marriage even though some churches are now doing so. The amendment would flagrantly interfere with the decision of local faith communities. It threatens the long-standing separation of church and state in our society.

Advocates of the amendment claim that it addresses only gay marriage and will not prevent States from granting the legal benefits of marriage to same-sex couples through civil laws. But that is not what the text of the amendment says. It forbids same-sex couples from receiving the legal incidents of marriage. It would prohibit State courts from enforcing many existing State and local laws, including laws that deal with civil unions and domestic partnerships.

The recent Massachusetts decision addressed the many rights available to married couples under State law, including the right to be treated fairly by the tax laws, to share insurance coverage, to visit loved ones in the hospital, to receive health benefits, family leave benefits, survivor's benefits. In fact, there are now more than a thousand Federal rights and benefits based on marital status.

Gay couples and their children deserve access to all these rights and benefits. Supporters of the amendment have tried to shift the debate away from equal rights by claiming that their only concern is the definition of marriage. But many supporters of the amendment are against civil union laws as well and against any other right for gay couples or even gay persons themselves.

That is why so far Congress has refused to even protect gays and lesbians from job discrimination or to include them in the Federal law punishing hate crimes.

The Family Research Council, a leading supporter of the constitutional amendment, even lobbied against providing compensation to gay partners of the victims of the terrorist attacks on September 11th. Fortunately, they lost that fight.

Too often, this debate over the definition of marriage and the legal incidents of marriage has overlooked the personal and loving family relationship that would be prohibited by a constitutional amendment.

Increasingly large numbers of children across the country today have same-sex parents. What does it do to these children, their

well-being, when the President of the United States says their parents are second-class Americans?

Congress has better things to do than write bigotry and prejudice into the Constitution. We should deal with the real issues of war and peace, jobs and the economy, and the many other priorities that demand our attention so urgently in these troubled times. States are fully capable of dealing with this issue. If it is not necessary to amend the Constitution, it is necessary not to amend it.

In the time I have left, I would like to ask Professor Brilmayer—first of all, thank you for that excellent article in the Washington Post last month on the conflict of laws issue. Let me ask you about the conflict of laws, let me ask you about the States in the Jim Crow era that banned interracial marriage. Were they required to enforce interracial marriage recognized by States? What about the argument that says, well, finally the Federal Government, the Supreme Court got into knocking down these issues. It was a Federal issue then, Federal rights affected. Why isn't it now?

Ms. BRILMAYER. Prior to the point that interracial marriages were given substantive protection, prior to that point as a matter of conflict of laws no State was required to enforce an interracial marriage entered into in another State. Many refused to recognize interracial marriages, and what eventually changed that practice was the recognition that as a substantive matter of constitutional law, all States for both domestic and interstate purposes had to allow interracial marriages.

Senator KENNEDY. But ultimately it was the Federal court that involved itself in what might be the issue that you referred to earlier in terms of marriage which had been strictly decided by the States. How do you deal with that?

Ms. BRILMAYER. As long as it was seen as a matter of conflict of laws and marriage law and viewed under the traditional doctrine of conflict of laws, the States were free to treat it the same way that they treated a polygamist marriage or an underage marriage or a marriage between an uncle and a niece, which was the States did not recognize them if they did not want to. They could if they wanted to, and if they did not want to, they did not have to.

Senator KENNEDY. Could I have one final question? The Majority's title for this hearing is "Judicial Activism vs. Democracy." I would ask Mr. Shelton this. As Professor Edelman recently pointed out in the Washington Post, the phrase "judicial activist" has been used many times before during the 1950's. Segregationists condemned the Supreme Court's ruling in *Brown* v. *Board of Education* as a clear abuse of judicial power, and the broad contours of *Brown* were implemented by courageous Southern judges Elmer Tuttle, John Minor Wisdom, and Frank Johnson, and these judges applied the ruling to dismantle racist institutions in the South, fundamentally restructured systems of political participation, jury selection, and employment. They acted at great personal risk and were repeatedly called judicial activists.

So what are your thoughts about the role that an independent judiciary has in a democracy? Do you believe that it is judicial activism for a State court interpreting its own State Constitution to decide that gay men and lesbians should receive the same rights, protections, and benefits as heterosexuals? Or is judicial activism

simply a label that some people apply when they want to disparage the court ruling with which they disagree?

Mr. SHELTON. It is used quite conveniently to continue to oppose provisions in our law to actually support the greatest opportunity for full participation and full protection. We have consistently seen that problem, and certainly I am very happy that you raised the *Brown* v. *Board of Education* decision in 1954 as one of those circumstances in which we had to continue to look at how judicial activism has been treated in our society. It is 50 years since *Brown* and, indeed, we are still concerned and addressing those particular issues.

Senator KENNEDY. Mr. Chairman, can I include the relevant parts of the American Academy of Pediatrics—they issued a policy statement referring to this issue, concluded that children with gay and lesbian parents should be entitled to the financial, psychological, and legal security from having both parents legally recognized.

Chairman CORNYN. Without objection.

Senator KENNEDY. I thank the Chair.

Chairman CORNYN. Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman, and thanks to the members of the panel.

If I could follow up on what Senator Kennedy just addressed, the title of this hearing troubles me, Mr. Chairman. I do not believe that there is a choice between judicial activism and democracy. To argue otherwise is to suggest that a case like *Brown* v. *Board of Education* did not promote democracy in America. That was clearly an activist court, which took control of an issue which Congress and the President had refused to address, literally the discrimination in America's public schools. In *Brown* v. *Board of Education*, an activist Court said we are going to give equal opportunity to education across America. Did that further democracy? Does anybody argue that it didn't?

The same thing would be said of *Griswold* v. *Connecticut*. Here was a decision by a Court which said that families had the right to decide their own family planning. The State of Connecticut could not dictate to them what family planning was allowed. It was a matter of privacy in family decisions. Was this an activist Court in derogation of democracy that extended to these families and individuals their right to privacy?

Loving v. *Virginia*, when an activist Court said that a ban on interracial marriage in the State of Virginia was improper, was that activist Court in derogation of democracy or promoting it by saying that Americans had the right to marry interracially?

So I think you have created a false choice here, Mr. Chairman, in the title of this hearing. It is not a choice between judicial activism and democracy. Time and time again in our lifetimes, judicial activism has promoted democracy. We have to take care, obviously, that the courts do not go too far, but to categorically say that an activist Court is going to deny the rights of American citizens is just controverted by the obvious legal precedent.

Let me just say that a colleague of mine on this issue of same-sex marriages came up with what I thought to be a rather precise sound bite, and I guess I live in a world where sound bites are more common than not. In opposing this constitutional amendment proposed by the President, this colleague said, "I support the sanctity of marriage, but I also support the sanctity of the Constitution." And most people who agree with this point of view—and I do—nodded their head.

But in a larger sense, as you step back from that statement, you understand the complexity of the issue and the hearing today. The words "sanctity of marriage"? "Sanctity" suggests to me some religious context to marriage, some consecration of marriage, not the legality of marriage but the consecration of marriage. And I welcome the reverend clergy who are here today who have expressed, based on their religious values, why they believe we should not sanctify marriage of the same gender and the same sex. I respect your religious belief. I am glad that you are here to share it with us.

I happen to belong to a church which does not recognize divorce. The church that I belong to says that divorce demeans marriage. They take the Bible quite literally. What God has joined together let no man put asunder. And those in my church who are divorced face penalties and sometimes exclusion from that church.

Now, they can argue theologically that they have taken the best position to strengthen marriage, and the fact that half of our marriages end in divorce would certainly give that credence. But if we are going to adopt the premise that religious values that in their own faith support the institution of marriage should be enshrined in the Constitution, then I think we are moving into perilous territory. Usually, religious leaders come to us and follow the dictates of the Founding Fathers who say, "Thank you, Government, but let us worship as we choose. We want the freedom to worship as we choose. We don't want you to give your imprimatur, your permission, and your approval to our religious belief. Please leave us alone." That is what America is all about.

And when religious groups come to us and say, on the other hand, no, we believe so strongly in our religious beliefs, we want them in our Constitution and law of the land to apply to everyone, that is where I think we get in dangerous territory. We go beyond the question of legality into sanctity. Sanctity is your business, Reverend. Legality is our business. And we better take care to make sure that we keep that bright line between the two.

Let me say that I have listened, Reverend Richardson, to Senator Kennedy, who talked about your work with foster children and read something about your background, and I respect it very much. I would like to just challenge one thing you said. You said only the biological father can fill the void. Many children were here today. I don't know if they were the children of same-sex marriages or heterosexual marriage. They seemed to be happy and contented children, and they seemed to be totally bored with what we are talking about, which you would expect.

In my family, my larger family, there are many adopted children, children of interracial marriages. We are one family. We support one another. It strikes me that if the biological father or mother

was a good person who could contribute to a life, then your statement certainly is right. But in many instances, that is not the case. And the void has been filled by loving people who are not the biological parents. And I believe those children in my family, whom I love as much as any children in the family, are really benefited by those who are not the biological parents but who can give them love and guidance.

Senator Kennedy referred to the American Academy of Pediatrics. They have done the study, and they have come to the same conclusion.

I want to give you a chance, Reverend Richardson, to consider that possibility that those who are not biological parents can fill that void. In fact, some of the biological parents cannot.

Rev. RICHARDSON. Well, I think that it is not a question that somebody else cannot fill the void. I think the issue here is that the child—and this is only from my experience in the 50 years that I have been talking to families and children, to hear from them—we cannot presume what they are thinking. You have to hear it from them. And the ones that come before me and my staff that we counsel both through our agency and the church still have that desire. Even my own biological daughters that have adopted children and we are now adopted grandparents, they love us like—you know, we couldn't question. But they still have that desire inside, as much as they love us—

Senator DURBIN. They want to know.

Rev. RICHARDSON. Yes, and they want to, if possible, even have contact with them. They want to know who their parent was. Where did I get my features from? Where did I get all these cultural things from? You know, is it a throwback?

Interracial marriage has nothing—you know, it is about skin color. It is not about, you know, gender, being able to reproduce children.

And so I think what I am saying is that, you know, you may not have experienced it in your family, in your lineage. You know, you say that you have interracial, you have adoptive—that is fine, and so do a lot of people. And you may not have experienced from them the questions about: Who am I? Where is my mother? Where is my father? And you know what they say? We don't necessarily want to be back with them, but we want to know who they are and have some kind of relationship with them.

Senator DURBIN. I think that is fair, and it is a natural curiosity. And I have seen it manifested many times. But the point I am trying to make is that there are people who will step into the lives of a child.

Rev. RICHARDSON. No question about it.

Senator DURBIN. And, frankly, that child has little or no hope without their guidance and love. And these people are not necessarily the biological parents. So I would agree with the natural curiosity, but I—

Rev. RICHARDSON. My wife and I stepped into the lives of some 50-plus children and filled a void for a while.

Senator DURBIN. Bless you for doing that.

Rev. RICHARDSON. But what I am trying to make you understand is that really does not satisfy sometimes what their really burning

desire is. They certainly welcome us stepping in to take the place of the parent. But they really know you are not my parent. So let's not get mixed up in that of what the difference is.

And to go back to your question about, you know, the religious versus the legal, to my knowledge, the rite of marriage in a religious context precedes anything that—any laws of the State or the country. It was them that changed the law and said we are going to have laws controlling marriage. But this was a long-standing—you can call it, you know, the sanctity of marriage, whatever you want to call it. But it was there long before the States.

In Massachusetts, we would not be talking about a constitutional amendment if the courts had taken this up, the great and general court, if the legislature had taken this up 2 years ago. It would have been on the ballot this year. But we saw the political maneuvering and would not allow it come to the forefront.

Senator DURBIN. I am running out of time here—

Rev. RICHARDSON. So what I am saying is—

Senator DURBIN. The point I am trying to make to you is I am not trying to denigrate or diminish your important responsibility through a religious context in the sanctification and consecration of marriage. It is done in my church and in virtually every church.

Rev. RICHARDSON. That is where it started.

Senator DURBIN. That clearly may be where it started. We are arguing about the legality, whether a decision about the legality of marriage in one State is going to have to be recognized by another State. I voted for the Defense of Marriage Act. I believe in the traditional institution of marriage. But I think, frankly, that this constitutional amendment is proof positive that the one law we need to pass, and as quickly as possible, would be a law banning the adoption of constitutional amendments in an election year.

[Laughter.]

Senator DURBIN. If there is ever an argument for us to step back and realize that this Constitution of ours is such a precious document that it should not be part of a political exchange before an election, this debate is proof positive of that. And I thank you all for your testimony.

Thank you, Mr. Chairman.

Senator FEINGOLD. Mr. Chairman?

Chairman CORNYN. Senator Feingold, I understand you have a statement.

Senator FEINGOLD. Just briefly. I would like to clarify the record in response to the exchange between Senator Kyl and Professor Brilmayer that I understand occurred. I had asked her about a quote from Charles Krauthammer where he said that under the Full Faith and Credit Clause, the Massachusetts court could decide the issue of same-sex marriage for the whole country. She said that that was an ignorant statement, and I understand why she said that.

I then asked her about the statement by Mr. Krauthammer that there was "no chance in hell" that DOMA would be upheld. I think she said that that was wrong as well.

We can check the record for exact words, but it was very clear that she was not saying that it was ignorant to believe that DOMA is unconstitutional. At most, she was saying that it was ignorant

to say that there is no chance that it will be upheld. And I think, Mr. Chairman, that is actually an important distinction because perhaps there is an argument for amending the Constitution because there is no chance that a statute will be upheld, but certainly not when there is some doubt.

And, you know, from my own experience, Mr. Chairman, there were many in the Senate who kept saying over and over again that there was no chance that the McCain-Feingold bill would survive a court challenge, that it was an exercise in futility. But, you know, I resisted the calls to amend the Constitution to deal with this matter that I considered extremely serious for our democracy and, frankly, much more central to what the Constitution is all about and, fortunately, things turned out well. And I think it was an important lesson for me to realize to not go for the constitutional solution prematurely, and whether or not I could have ever supported such a move I think is doubtful. But I think it is important when we are considering how important the Constitution is and how rare attempts to amend the Constitution should be.

So I just wanted to clarify that exchange.

Chairman CORNYN. Thank you, Senator Feingold.

I have a question for Reverend Richardson and Pastor de Leon. Listening to Senator Durbin, it sounds like he is suggesting that marriage is strictly a religious observance and has no secular importance. Could you respond to that, Pastor de Leon? Do you agree with that, first of all?

Rev. DE LEON. No, I do not agree with the statement that he—

Chairman CORNYN. And could you say why?

Rev. DE LEON. First of all, history tells us that marriage has been recognized by every culture between a man and a woman since time immemorial. That they did it or did not do it through some kind of a religious ceremony is up to those that are historians and study that kind of stuff. I think that society recognized the importance of it and finally gave it that religious, if you will, recognition and stamp of approval.

For example, in our own community, Hispanic community, they go to the courts and get married first. They see it as a legal relationship, if you will, or based on legal law, and then they have a religious ceremony. They want not only the blessing of God, but they want to make sure they are doing it right.

And so for us to say that it is purely a religious ceremony is totally out of context for my people. We see it as, first of all, a man and a woman that love each other and want to come together and live together in harmony until death separates them, bring children into the world, and take care of them. And these children will learn from their experience what it is to have a fulfilling life in that context, and that they in turn will go and emulate it.

And so definitely I am not in agreement at all with what he was stating, and I am in agreement today that we need to do something because what has been espoused and supported by the human race for who knows how many years, all of a sudden it is up to question. And I think that because of that, it is something that is very important. And if we are to say that this is something that demands of us at this present time the best that we can put together as a people to send the proper message to our children, I think we have

to do it, which is to pass a Federal amendment to protect marriage between a man and a woman.

Chairman CORNYN. Thank you, Pastor de Leon.

Reverend Richardson, let me ask a slightly different question, if I can rephrase it. I understood you to say that young people, children, crave knowledge of who their parents are for the reasons you have eloquently expressed. Is it important, in your view, that young boys have a positive role model in their father for what it means to be a responsible man and that young girls have the same opportunity to see in their parent a positive role model of what it means to be a responsible grown woman?

Rev. RICHARDSON. I think that there is no question that a positive role model for both young boys and young girls is vitally important. In my work, particularly in the church where we do have single parents trying to raise children, they will come and they will actually say and admit—and many people in this room probably have heard it. They say, "You know, as much as I am trying to be a mother and a father to this child, I just can't be both." Men raising young girls can't be a mother to that child.

There was a time in my life when I was unemployed, and my wife was the breadwinner of the family, and we have five girls. And I am here to tell you that me trying to braid hair and get children ready for school to go out looking presentable was a task that I was not up to. I just did not have that ability inside of me to be able to give to my daughters—as much as they love me, but I couldn't give them what they needed from a female perspective. And the same thing with young boys. You know, as much as you hear the thing about the soccer moms, you know, and the mothers getting the kids involved in athletics, well, you know, boys look to young men or men as the image to introduce them to different phases of society, to teach them how to be a responsible adult, to teach a young boy how to respect women, not to use them as an object for any other reason, to teach them how to be—you know, when a woman walks into your presence, you know, if you are sitting, you get up and you respect them. Who can teach that to a young boy except another man that has experienced it?

That has been one of the problems we find, that when you get to talking about the secular and crossing over into the religious, you know, it was a religious institution that started marriage way, way back. And I don't know if they were issuing licenses then, and since we are getting involved in saying you have the right to get married, if someone loved each other, male and female, they got married and it was respected by everyone. And then all of a sudden the secular world comes in and says, well, in order to register this, we have to have licenses and approve the things going on. And, you know, so they crossed over into the religious territory to take over and usurp the rights that have been going on for thousands of years, and other countries, you know, still may not be in some of the areas, maybe not be issuing licenses, but people are still performing marriages. And if you come from the South, you know, they used to jump over the broom, and that was considered a legal and binding act of marriage.

So I am not sure who crossed the line, but you cannot separate secular from religious.

Chairman CORNYN. Thank you.

General Bruning, when reflecting on your testimony, I had the honor of serving as Attorney General of Texas before I came to the Senate, and I was sort of putting myself in your shoes. I bet you never imagined in your life the likelihood that you would be defending the definition of traditional marriage against a challenge brought under the United States Constitution. Am I right in that?

Mr. BRUNING. You are absolutely right.

Chairman CORNYN. And certainly I think what we are seeing is experimentation with the definition of marriage and taking, from my perspective, a very dangerous turn. But just so everyone understands, we are not just stopping at same-sex marriage. In fact, late last night my staff noticed and brought to my attention there has been a polygamy lawsuit brought in Utah in Federal court, arguing that *Lawrence* v. *Texas*, which recognized for the first time this individual right to autonomy in one's intimate sexual relationships into which Government cannot intrude, by extension would also apply to polygamy. Are you aware of that suit and that argument?

Mr. BRUNING. I am aware of it, and you are absolutely right, Senator. It is a natural extension of allowing preference in marriage. As soon as the definition is expanded to include same-sex, then it may necessarily be expanded by the courts to include polygamy or bisexuality.

Chairman CORNYN. I was also interested to learn that Justice Ruth Bader Ginsburg, who serves on the United States Supreme Court, when she was at the Columbia Law School as a professor, and at the same time served as the American Civil Liberties Union's general counsel, authored a paper in which she said that limitations against bigamy, that is, being married to two people at the same time, appear to encroach upon private relationships and may be unconstitutional. Are you aware of that argument?

Mr. BRUNING. And they all follow along the same line, Senator, no question about it.

Chairman CORNYN. Without objection, that excerpt from this 1974 paper, the report of the Columbia Law School Equal Rights Advocacy Project, authored by Ruth Bader Ginsburg, will be made part of the record.

I know that there has been some statements made that the only time that it is really permissible for the people to act when they see judicial activism threaten their institutions and their values is after it has already happened. But I will make part of the record an excerpt from the Hawaii Supreme Court, 1993, which held that opposite-sex marriage is presumptively unconstitutional. That was in 1993. Before that decision became final, the people of Hawaii approved a constitutional amendment preserving traditional marriage by a 69–31 vote.

Similarly, in Alaska, in 1998, when the Alaska Supreme Court said that same-sex marriage—laws denying same-sex marriage may be unconstitutional, within—well, it looks like 9 months later, the people of Alaska approved a State constitutional amendment preserving traditional marriage by a 68–32 vote.

And that same year—or in 2000, Nebraska, Nevada, and California did the same thing. Not waiting until the judges had ruled but anticipating that indeed the right to traditional marriage was

in jeopardy, the people acted. So I think it is important to put it in that context.

I was interested to hear Senator Durbin talk about the virtues of judicial activism, and I guess, you know, Dred Scott was an example of judicial activism and certainly one that we would all disagree with and condemn. But I think we have gone way off the reservation when we begin to suggest that only life-tenured Federal judges can make good decisions about what is good for us. And even if you agree with that, that only Federal judges can do it in the first instance, to say that the people, whose power is preserved in the Constitution under Article V, have no business overruling the judges about what we think is good for us.

And so that is why I believe that the title of the hearing—we worked hard to try to point out that this is about a choice, but the question is who is going to make the choice. Is it going to be Federal judges, or is it going to be we, the people?

Finally, I just want to ask perhaps Ms. Gallagher, you know, there has been some suggestion here—there are really two prongs of this. One is, well, if one State does it, how does that bother me in Texas if Massachusetts does it, if, in fact, somehow we can erect a wall so that it will not spread, and I think history has shown us that that is probably not possible. But what is wrong with individual States defining marriage? And perhaps, let's say—we have, I think, 38 States that have a Defense of Marriage Act. Presumably, they might—assuming that could be upheld, what is wrong with 38 States choosing traditional marriage and the rest choosing same-sex marriage? What is wrong with that?

Ms. GALLAGHER. Thank you, Senator. I would like to say first of all, in defense of Charles Krauthammer and others who have similar fears, that the idea that there is no precedent for this kind of decision is not very comforting in a legal environment in which the age-old precedents about the normal definition of marriage are being put in play, and in which local officials and legal elites are not responding to obvious flouting of laws. There is a lack of faith among the American people that the judicial elites are with them on this understanding of marriage and are going to allow it to remain.

I also think if you believe, as I do—and I think the two reverends here do—that marriage is not just a private religious act and it is not just a values issue, it really is a critical social institution, one of the small number of them that any society depends on ultimately to create the next generation that we all depend on. If you believe that, then the idea that we need a national definition, a common shared understanding of marriage naturally follows. I think it is as odd as saying that the idea of what a corporation is or what private property is is going to be radically different. Sure, the regulatory schemes can differ, but we don't get born and raised and married in Nyack, you know. We get raised in lots of different communities, and we go to other communities and we marry. And if marriage is to point to the social ideal, it needs to be a shared common ideal. And that is why, in addition to the reality that—the Supreme Court has already made marriage a national issue. And the reason that we are even thinking, that courts are even thinking

about changing the definition of marriage is because they believe there is a substantive issue at stake.

I mean, the lesson—I don't think that same-sex—that opposite-sex marriage is like bans on interracial marriage, except for the reality that once we decide that this is a similar example of bigotry, we are going to spread that new understanding of marriage as being not really child-related and have nothing to do with mothers and fathers. If that is bigotry and discrimination, we are going to spread it—the courts are going to spread it across the land unless the American people use our normal institutions to take control of this issue back into their hands.

Chairman CORNYN. Without objection, I will make part of the record an article that I was alluding to earlier, Mr. Muth, called "Muth's Truths"—that is hard to say—"Finding the Rational Middle on Gay Marriage," and also Chairman Hatch has a written statement that will also be made part of the record.

I want to close by again expressing my appreciation to all of you for participating in this hearing. Unlike some, I think that this has been important. I think it has been informative. Perhaps there are a lot of people across the country who have not been paying close attention to this issue, and I hope what you have said today and what we have heard today helps inform them on their rights as American citizens. We still are a country that believes that the people are sovereign, not Senators, not Congressmen, not even Federal judges, that we, the people, are the ones who determine our destiny, and we, the people, determine what the law of the land should be.

I would like to again thank Chairman Hatch for scheduling this hearing, and as I mentioned earlier, Senator Feingold and his staff for their cooperation and dedication.

We will leave the record open until 5 o'clock next Wednesday, March 10th, for members to submit documents into the record or to ask any additional questions in writing.

And with that, this hearing of the Senate Judiciary Subcommittee on the Constitution is adjourned.

[Whereupon, at 12:56 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

QUESTIONS FOR YALE LAW SCHOOL PROFESSOR LEA BRILMAYER FROM UNITED STATES SENATOR JOHN CORNYN CHAIRMAN, SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

Professor, I'd like to ask you a series of questions concerning a recent *Washington Post* on-line chat discussion you participated in on February 13, just a few weeks ago.

1. You said that the IRS would be able to choose whether to recognize non-traditional marriages established in Massachusetts or elsewhere, for purposes of implementing federal tax law. You also said that federal entitlement programs, such as Social Security widower benefits, could also be extended to individuals in non-traditional marriages.

Those comments are puzzling in light of the federal Defense of Marriage Act ("DOMA"). President Clinton signed that law in 1996, with the strong, bipartisan support of over three-fourths of the House and Senate. And based on your testimony, you seem familiar at least with section 2 of that law. But what about section 3? Section 3 says that, for all purposes of federal law, the word "marriage" means "only a legal union between one man and one woman as husband and wife."

a. Is it your view that DOMA is unconstitutional, and thus that the IRS and the Social Security Administration may refuse to enforce it?

b. You further stated that "there is going to be a lot of litigation over this question – people who are denied benefits will be taking the question to court." Your view appears to be, then, that lawsuits will be filed to strike down DOMA as unconstitutional. Senator Feingold has recognized – as he must – that, if courts strike down DOMA, then the only remaining option for Congress is a constitutional amendment. Does Congress have any other options, besides a federal constitutional amendment, to ensure beyond all doubt that the lawsuits challenging DOMA (which you yourself say will be filed) will not succeed?

2. In the online discussion, a citizen of my home state of Texas asked you about the *Webster's Dictionary* definition of marriage as "the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family." You responded to my constituent: "Well, *Webster's* is not a recognized legal authority, for one thing. I prefer the Constitution, myself." I take it, then, that your view is that courts should somehow use their powers under the U.S. Constitution to change the dictionary definition of marriage. Please explain your comment that *Webster's Dictionary* is somehow wrong, and somehow violative of the U.S. Constitution.

3. In your *Wall Street Journal* op-ed of Tuesday, March 9, 2004, entitled "Full Faith and Credit," you opined that nothing in the Full Faith and Credit Clause threatens the traditional institution of marriage. But as you well know (from attending the hearing if nothing else), constitutional experts across the political spectrum – including your colleague, William Eskridge, Harvard Law Professor Laurence Tribe, and other scholars cited in your own casebook

on the conflict of laws – believe that DOMA will be struck down as unconstitutional. Professors Eskridge and Tribe have both specifically said that the *Lawrence* decision spells the end of traditional marriage laws across the nation, including DOMA. Yet your op-ed did not even mention – let alone analyze – *Lawrence*.

a. Why did you not mention the *Lawrence* decision in your op-ed?

b. Do you agree or disagree with Professors Eskridge, Tribe, and others who say that *Lawrence* spells the end of traditional marriage laws across the nation?

4. You have signed at least two briefs in the U.S. Supreme Court defending the constitutional rights of pornographers. You were counsel for Hustler Magazine in *Keeton v. Hustler Magazine, Inc.*, No. 82-485, and you joined an amicus brief filed by Feminists for Free Expression in *Alexander v. United States*, No. 91-1526. Would you be willing to join the Nebraska Attorney General and others in signing amicus briefs defending the constitutionality of traditional marriage?

RESPONSE OF PROFESSOR LEA BRILMAYER
TO QUESTIONS POSED BY SENATOR JOHN CORNYN
CHAIRMAN, SENATE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS
March 26, 2004

1(a). The IRS and the Social Security Administration will interpret the Defense of Marriage Act in accordance with the usual methods of statutory interpretation and in this way will determine which aspects of the various federal entitlement programs are limited to traditional marriage. In cases of doubt or ambiguity, interpretation of the Act may require judicial consideration.

1(b) The best option (in my view) would be for Congress to review judicial decisions as they are announced, rather than to assume that some kind of pre-emptive action is urgently required. Congress ought also (in my view) to allow the states to adopt definitions of marriage that reflect local beliefs, rather than enforce an artificial and undemocratic uniformity.

2. Webster's Dictionary is not an authoritative source of legal definitions. Terms found in the dictionary often take on more technical meanings when employed in the legal context. Constitutional precedents sometimes cast light on the most appropriate meaning to give a term that has been used in a technical legal sense. Technical legal meanings should be given effect even where they conflict with ordinary dictionary meanings.

3(a) My op-ed did not mention the *Lawrence* decision because my op-ed was about full faith and credit, a subject that *Lawrence* did not address. I continue to believe that traditional full faith and credit principles do not entail that permitting same-sex marriage in one state requires recognizing same-sex marriages in all the others.

3(b) As I am not an expert on substantive constitutional law, I cannot predict what the *Lawrence* decision means for traditional marriage laws across the nation.

4. *Keeton v. Hustler Magazine* concerned personal jurisdiction – a technical doctrine of the conflict of laws – and not "the constitutional rights of pornographers". The decision is featured in numerous civil procedure and conflict of laws casebooks and it has been cited routinely by business corporations and other defendants in standard tort and contract litigation. The question in that case was whether a publisher might be liable to jurisdiction simply because a small number of copies of the publication were sent into the forum.

As a proponent of women's rights (having written, for example, about sex discrimination in pension plans and "political correctness" in feminist thought) I continue to support free expression, even of materials that I personally find repugnant.

I have no background qualifying me to author an amicus brief concerning traditional marriage, other than as a conflict of laws matter.

SUBMISSIONS FOR THE RECORD

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2003

The Honorable John Cornyn, Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Dirksen Senate Office Building - Room 139
Washington, D.C. 20510

Dear Chairman Cornyn:

I understand that the Constitution Subcommittee of the Senate Judiciary Committee is holding a hearing this Thursday, September 4 on the bipartisan Defense of Marriage Act ("DOMA").

I write to express my strong support for this important legislation - which passed Congress in 1996 with overwhelming bipartisan support in both chambers - and the Senate's current attempts to strengthen it. Since DOMA was enacted, 37 states have passed state-level DOMAs, defining marriage for purposes of state law. Recent and pending litigation, however, in both state and federal courts throughout the nation, raises serious questions about the traditional definition of marriage.

I urge the Subcommittee to determine what steps are needed to uphold and strengthen DOMA, reaffirm the principles underlying the Act, and safeguard the traditional institution of marriage. Marriage, as DOMA recognized in 1996 and as several dozen states have reaffirmed since then, is fundamental to our culture and indispensable to a flourishing, civil society. Over millennia and across cultures, traditional marriage has been the cornerstone for a strong and stable family, the building-block institution of civilization. And a wealth of unflinching, empirical data demonstrate the unmatched potency of the family to combat social ills, foster strong communities, and promote happier, healthier lives.

The Congress grasped all this seven years ago when it passed DOMA by a decisive and bipartisan margin. Since then, however, court decisions have weakened the foundation underlying DOMA and require the Congress to reexamine and, if necessary, to take decisive steps to strengthen DOMA and ensure that its traditional understanding of marriage remains the law of the land - and free from activist judicial mischief and usurpation.

Some observers insist that congressional action to protect the institution of marriage and reinforce DOMA would offend states' rights. This argument is specious. The real threat to states' rights is unconstrained judicial activism, not Congress. If courts continue to upend our laws and the first principles that animate them, the right of citizens across America to define marriage, through their elected state representatives, will be usurped. Indeed, Congress may be the only institution that can *protect* states' rights in this area.

Thank you for your efforts to fortify this important legislation, which aims to safeguard the traditional understanding of what marriage is, and which recognizes the inestimable societal strength, stability, and vitality that traditional marriage affords.

Sincerely,

Greg Abbott

Greg Abbott
Attorney General of Texas

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548 TEL: (512)463-2100 WWW.OAG.STATE.TX.US
An Equal Employment Opportunity Employer · Printed on Recycled Paper

WAYNE ALLARD
COLORADO
DIRKSEN SENATE OFFICE BUILDING, SUITE 525
PHONE: (202) 224-5941
FAX: (202) 224-6471

United States Senate

WASHINGTON, DC 20510-0606

04 MAR -3 AM 9:44

ARMED SERVICES
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
ENVIRONMENT AND PUBLIC WORKS

STATEMENT FOR SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS HEARING

Mr. Chairman and Distinguished Colleagues:

I want to thank you for conducting this important hearing.

In recent months, judicial activism has attempted to redefine the institution of marriage. These court decisions, although isolated, have put at risk the Defense of Marriage Act which was passed overwhelmingly by Congress in the mid-1990's and signed into law by former President Bill Clinton.

Throughout human history, the institution of marriage has been defined culturally, spiritually and in the civic arena as a "union between one man and one woman." This definition must be preserved and protected for the long-term benefit of our society.

The vast majority of Americans who strongly support the long held definition of marriage must not be over-run by a few activist judges or local officials who haven taken the law into their own hands in recent weeks. They must be allowed to participate in this decision.

As you explore today the impact of these activist decisions on the institution of marriage, understand as a former state legislator and a strong proponent of states rights, it is clear to me authority beyond the historical definition of marriage must be reserved for the states.

I look forward to working with the committee on addressing this extremely important issue.

Wayne Allard

7340 EAST CALEY
SUITE 215
ENGLEWOOD, CO 80111
PHONE: 303-220-7414
FAX: 303-220-8126

5401 STONE CREEK CIRCLE
SUITE 203
LOVELAND, CO 80538
PHONE: 970-461-3530
FAX: 970-461-3658

111 SOUTH TEJON
SUITE 300
COLORADO SPRINGS, CO 80903
PHONE: 719-634-6071
FAX: 719-636-2590

411 THATCHER BUILDING
5TH AND MAIN STREET
PUEBLO, CO 81003
PHONE: 719-545-9751
FAX: 719-545-3832

215 FEDERAL BUILDING
400 ROOD AVENUE
GRAND JUNCTION, CO 81501
PHONE: 970-245-9553
FAX: 970-245-9523

The Honorable John Cornyn, Chairman
Judiciary Subcommittee on The Constitution
139 DSOB
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As a State Representative in Iowa, I want to express my concern that activist, left-leaning federal judges could force same sex marriage on Iowa and on the American people. If something as vital to society as changing the definition of marriage is to be done at all, it should only be done by the people's elected representatives and never mandated by a few un-elected judges.

I know that an increasing number of political leaders and legal scholars are concluding that the only certain way to restrain these activist judges and preserve marriage is to amend the Constitution to clearly define marriage as the union of a man and a woman. I am also concerned that some of the proponents of same sex marriage are opposing such a constitutional amendment, claiming it is an intrusion on states' rights. This is both absurd and dishonest.

The federal system created in our Constitution protects states' rights as a way of achieving the larger goal of protecting the fundamental rights of our people. A solid majority of Americans oppose same sex marriage and they clearly have the right to establish how an institution as critical as marriage will be defined in our society. Imposing same sex marriage by judicial decree would violate these rights of the people that are much more basic than the states' rights that the people themselves created in the Constitution.

Thank you for holding these important hearings. Please make this letter a part of your hearing record.

Sincerely,

Dwayne Alons
1314 7th Street
Hull, IA 51239

House District 4

8/28/2003

News Release

AAP SAYS CHILDREN OF SAME-SEX COUPLES DESERVE TWO LEGALLY RECOGNIZED PARENTS

Below is a news release on a policy statement published in the February issue of Pediatrics, the peer-reviewed, scientific journal of the American Academy of Pediatrics (AAP).

For Release: February 4, 2002, 12:01 am (ET)

(Headline updated February 7, 2002)

CHICAGO - The American Academy of Pediatrics (AAP) says children who are born to, or adopted by, one member of a gay or lesbian couple deserve the security of two legally recognized parents. Therefore, a new AAP policy statement, "Coparent or Second-Parent Adoption by Same-Sex Parents" supports legal and legislative efforts that provide for the possibility of adoption of those children by the second parent or coparent in same-sex relationships.

The statement says there is a considerable body of professional literature that suggests children with parents who are homosexual have the same advantages and the same expectations for health, adjustment and development as children whose parents are heterosexual.

Coparent or second-parent adoption protects a child's right to maintain continuing relationships with both parents in a same-sex relationship. Several states have considered or enacted legislation sanctioning coparent or second parent adoption by partners of the same sex. But other states have not yet considered legislative action, while at least one state bans adoptions altogether by the second parent or coparent in a same sex relationship.

According to the policy statement, coparent or second-parent adoption in a same-sex relationship provides for the following:

- Guarantees that the second parent's custody rights will be protected if the first parent falls ill or dies.
- Protects the second parent's rights to custody and visitation if the couple separates.
- Establishes the requirement for child support from both parents in the event of the parents' separation.
- Ensures the child's eligibility for health benefits from both parents.
- Provides legal grounds for either parent to provide consent for medical care and other important decisions.
- Creates the basis for financial security for children by ensuring eligibility to all appropriate entitlements, such as Social Security survivors benefits.

The AAP recommends that pediatricians become familiar with professional literature regarding gay and lesbian parents and their children; support the right of every child and family to the financial, psychological and legal security that results from having both parents legally recognized; and advocate for initiatives that establish permanency through coparent or

second-parent adoption for children of same-sex partners.

EDITOR'S NOTE: The February issue of Pediatrics also contains "Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents." The technical report provides details on the growing body of scientific literature that suggests children who grow up with gay or lesbian parents fare as well in emotional, cognitive, social and sexual functioning as children whose parents are heterosexual.

EDITOR'S NOTE: The American Academy of Pediatrics is an organization of 55,000 primary care pediatricians, pediatric medical subspecialists and pediatric surgical specialists dedicated to the health, safety and well-being of infants, children, adolescents and young adults.

EDITOR'S NOTE: The original title of this News Release was "AAP Supports Adoption by Same-sex Parents."

Back to Main Page

© 2004 - American Academy of Pediatrics

Legislative Communications Unit
1333 H St. NW, 10th Fl.
Washington, DC 20005
(202) 675-2312

Fax: (202) 546-0738
Email: media@dcaclu.org
Web: www.aclu.org

WASHINGTON LEGISLATIVE OFFICE

NEWS RELEASE NEWS RELEASE NEWS RELEASE NEWS

ACLU Calls on Congress to Reject Discriminatory Marriage Amendment As Senate Convenes Hearings on "Marriage Laws"

FOR IMMEDIATE RELEASE
Wednesday, March 3, 2004

Contact: Shin Inouye
(202) 675-2312

WASHINGTON – With the Senate Judiciary Constitution Subcommittee set to hear testimony on the state of marriage laws, the American Civil Liberties Union today said that the hearing served as a guise to push a constitutional amendment that, besides limiting marriage to a man and a woman, could forever deny protections to same-sex or heterosexual unmarried couples.

The ACLU also noted that the measure as written is fundamentally at odds with basic principles of federalism and state authority, which has made the amendment a wedge issue even among conservatives.

"The Constitution is not a prop that should be used to score political points," said Christopher E. Anders, an ACLU Legislative Counsel. "Recently, thousands of gays and lesbians demonstrated in favor of receiving the same protections enjoyed by other Americans. This extreme measure says that the commitment made by gays and lesbians is invalid – worse still, this nuclear bomb of anti-gay attacks would lead to a dismantling of a wide range of protections that state and local governments have given to gay and lesbian Americans."

Before the Senate subcommittee hearing, the ACLU joined with several other organizations to hold a news conference denouncing the marriage amendment, where several gay and lesbian families and a retired navy officer spoke. The ACLU noted that gay and lesbian families – already denied equal protection – would be irrevocably harmed if the marriage amendment were to be adopted.

The debate over denying marriage rights to gay and lesbian couples has escalated following the Massachusetts Supreme Court decision that gay and lesbian couples cannot be denied the same rights enjoyed by straight married couples, and the city of San Francisco's issuance of marriage licenses to over 3,000 gay and lesbian couples. Last week, President Bush publicly announced his support for a constitutional amendment to define marriage as between a man and a woman.

In Congress, Rep. Marilyn Musgrave (R-CO) and Sen. Wayne Allard (R-CO) have introduced such an amendment, which would also deny all the "legal incidents" of marriage to any unmarried couple, including straight relationships. While proponents of the measure claim that state legislatures could still recognize same-sex relationships through civil unions or domestic partnerships, the ACLU and other organizations stated that the broad language of the amendment would deny marriage rights for anyone other than those in a straight marriage.

The amendment would also take the extremely rare – and inevitably disastrous – step of changing the Constitution to restrict rights, a purpose that its framers never intended. The last time the Constitution was changed to constrain Americans' liberties – with the 18th Amendment's prohibition on alcohol use – the move was an unqualified failure that had to be repealed.

The proposed amendment lacks across the board support from conservatives. Former member of Congress Bob Barr (R-GA), who opposes legal recognition of homosexual marriages, stated in reaction to the Massachusetts ruling that he, "does not support a federal constitutional amendment defining marriage," preferring instead to, "leave the decision to the citizens of each state." Barr was the author of the 1996 Defense of Marriage Act, which allows individual states to not recognize same-sex marriages performed by other states.

"The promise of the Constitution is equality, and these measures would forever deface that great document," Anders said. "Gays and lesbians are part of American society who serve as law enforcement officers, politicians, and in the military. To alter the founding document of our nation to forever deny the rights that the rest of the country enjoys is mean-spirited and misguided."

For more on the ACLU's response to the Federal Marriage Amendment, go to:
http://www.aclu.org/marriageamendment

Full Faith and Credit, Family Law, and the Constitutional Amendment Process

Testimony of Professor R. Lea Brilmayer[1]
March 3, 2004

United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

"Judicial Activism vs. Democracy:
What Are the National Implications of the Massachusetts *Goodridge* Decision
and the Judicial Invalidation of Traditional Marriage Laws?"

Amending a constitution is serious business. In keeping with the adage "If it's not broken, don't fix it," we have the responsibility to question seriously whether there is anything the matter with the Constitution as it currently stands before setting out to amend it.

The specific question now facing this Subcommittee is whether one state's decision to recognize same-sex marriage demonstrates the need for a constitutional amendment. The answer is that there is nothing the matter with the U.S. Constitution that would require an amendment defining marriage or specifying the consequences of a marriage in another state.

1. Summary

The occasion for today's consideration of a constitutional amendment is a decision by Massachusetts' highest court that the Massachusetts state constitution gives same-sex couples a right to marry. There is much confusion about what the Massachusetts decision means in other states, for instance, if a Massachusetts same-sex couple moves to another state after getting married. Given the technical nature of the applicable legal principles –

[1] Howard M. Holtzmann Professor of International Law, Yale University School of Law. Professor Brilmayer wishes to thank Mr. Darren Cohen of the Yale Law School for his assistance in the research for this statement.

they are part of the legal specialty known as "conflict of laws" – some degree of confusion is understandable.

But no one can seriously claim that there is anything the matter with the way that the Full Faith and Credit clause already handles such problems. The issues we face today concerning the interstate consequences of a marriage are not much different from those faced in previous generations, and the Clause has ample flexibility to handle them. For more than two centuries the Clause has stood as written, with only occasional legislative elaboration to bring it up to date. A constitutional amendment would put an end to the possibility of legislative innovation, state or federal. There was nothing the matter with the Full Faith and Credit Clause when it was written and there is nothing the matter with it now.

Some people think that the Massachusetts judges were mistaken in their interpretation of what the Massachusetts constitution requires. But on its face, this is an insufficient reason to adopt a federal constitutional amendment. In a federal system such as ours, it is taken for granted that a state court is entitled to interpret its own state law, even if other states think the interpretation is mistaken. Passing federal constitutional amendments to correct state judges' interpretations of state law radically alters the distribution of decision-making authority in the American federal system.

2. Full Faith and Credit

The Massachusetts ruling permitting same-sex marriage raises issues about the effect of one state's changes in marriage laws in other states. This question does not arise out of any defect in the Constitution; it arises out of the structure of the American federal system, which gives states the right to adopt different laws and to interpret their own state constitutions differently from other states. The Constitution was written deliberately to protect state power to do so, and the approach that the framers of the Constitution adopted is embodied in Article IV's Full Faith and Credit Clause.

a. Full Faith and Credit Generally

The fact that states may differ in their policies or in the interpretation of their constitutions makes it necessary to find some way to harmonize their different choices. Many transactions and legal relationships have connections to several different states. The Full Faith and Credit Clause of Article IV was written for precisely the purpose of reconciling conflicting state decisions. It 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.[2]

Although the text refers to "public Acts [and] Records" as well as "judicial Proceedings," the Clause has had its main impact in the interstate enforcement of judicial judgments. These are entitled to almost automatic deference in other states; state legislation has always been given less recognition.[3] Less formal legal instruments, such as contracts or (more important here) licenses, have been entitled to less recognition even than legislation.

The Full Faith and Credit Clause unavoidably results in judicial judgments having "extraterritorial" effect. The whole point of the clause is that once a judgment is announced, that judgment will be enforceable in other states. Whether you're talking about a tort judgment or an award in a contract case, the direct consequence of the Full Faith and Credit clause is that one state court – the one that announces the award – gets the opportunity to

---

[2] U.S. CONST. art. IV, § 1.

[3] *See* Pacific Employers Insurance Co. v. Industrial Accident Commission, 306 U.S. 493, 502 (1939) ("[W]e think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events"); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) ("[T]here are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy"). In *Hughes v. Fetter*, 341 U.S. 609 (1951), the Supreme Court invalidated on Full Faith and Credit grounds a Wisconsin statute providing that Wisconsin courts would not be open to wrongful-death actions arising in other states. In doing so it specifically recognized that Wisconsin might refuse to enforce a sister-state wrongful-death action if it had a "real feeling of antagonism against wrongful death suits in general." *Id.* at 612. This statement reflects the general recognition that a state is entitled to refuse to recognize another state's law on the grounds of inconsistency with local public policy, but not out of simple hostility to another state's authority.

impose its will on all the rest, at least for that particular plaintiff and defendant and that particular set of facts. No one thinks that there is anything problematic about this; it is a desirable aspect of our federal system. The alternative is anarchy.

But this wholly unexceptional general principle is now generating opposition in one specific context, namely interstate recognition of marriages. People around the country are asking, "Why should a decision made in Massachusetts about the definition of marriage effectively tie the hands of courts and legislatures in my state?" Their fears are unfounded. First, entering into a marriage is legally more akin to signing a contract or taking out a driver's license than to a full-fledged court case; as will be shown below, marriages have never received the automatic effect given to judicial decisions. They can be refused recognition in other states without offending Full Faith and Credit.

Second, the Full Faith and Credit Clause has never been understood to require recognition of marriages entered into in other states that are contrary to local "public policy." The "public policy" doctrine, which is well recognized in conflict of laws, frees a state from having to recognize decisions by other states that offend deeply held local values.[4] One of the contexts in which it has proven particularly important is family law.

---

[4] Marchlik v. Coronet Insurance Co., 239 N.E.2d 799 (Ill. 1968) (public policy of Illinois forbade direct action against insurance company, even though Wisconsin law applied and Wisconsin allowed the action); Mertz v. Mertz, 3 N.E.2d 597 (N.Y. 1936) (public policy of New York forbade interspousal suit in tort, despite Connecticut law allowing such a suit); Owen v. Owen, 444 N.W.2d 710 (S.D. 1989) (public policy of South Dakota forbade interspousal suit in tort).

The public policy doctrine's application to judgments is less clear. The Restatement (Second) of Conflict of Laws takes the position that:

> A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (1988). *See also,* Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) ("[T]here are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy").

As will appear from the discussion below, for purposes of the public-policy doctrine, marriages have not been treated like judgments, but rather have received less recognition even than legislation. Courts have not hesitated to apply local public policy to refuse to recognize marriages entered into in other states.

b. Full Faith and Credit in the Family Law Context

Family law is one of the most difficult and complex subject areas for conflict of laws. Family-law cases can't be resolved as easily as contract-law disputes; they involve ongoing relationships that may be tied to several different states, and they touch our lives in intimate and important ways. As a matter of existing constitutional law, the conclusion reached by one state is not automatically entitled to recognition by the rest. This is true not only in the context of marriage law, but also for other family-law issues.

One example involves divorce law, an area in which pragmatic solutions have been worked out to accommodate the different interests of the competing states and the opposing parties. Under an approach known as "divisible divorce," the initial divorce might be granted in the state of current residence of the divorcing spouse (usually this was the husband), but property and child-custody decisions had to be made in the state of residence of the wife. The fact that one state decided to grant a divorce, in other words, was not treated as automatically binding on the others, and the first state lacked the authority to adjudicate certain important aspects of the marriage.[5] In particular, the wife's home state had a right to relitigate any aspects of the divorce that touched on her rights to property[6] and custody over her children.

Child custody was another area in which it was necessary to balance finality of decision making against the need for flexibility. For almost a century, it has been appreciated that child custody awards should not be final and permanent; there has to be some leeway to

[5] In Williams v. North Carolina II, 325 U.S. 226 (1945), the Supreme Court upheld North Carolina's right to prosecute for bigamy two North Carolina domiciliaries who traveled to Nevada to divorce their respective spouses and to then marry one another. The Court held that the Nevada judgment did not preclude North Carolina from examining the validity of the divorce and subsequent re-marriage, nor from prosecuting the individuals in question on bigamy charges.

[6] *See, e.g.*, Estin v. Estin, 334 U.S. 541 (1948) (allowing for divisible divorce; state of wife's residence was permitted to adjudicate rights of wife with respect to property, even though divorce was granted in another state); May v. Anderson, 345 U.S. 528 (1953) (holding that a state in which the wife was not domiciled or present did not have jurisdiction to make a determination of her custodial rights in a divorce, despite being able to order a divorce); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (state court of residence of husband did not have jurisdiction over the wife and could not extinguish any right she had under the law of state of her residence to financial support from her husband, even though the court could order a divorce).

modify a judgment.[7] The custodial parent may become unfit or die; if the child develops medical problems the amount of financial support may have to be increased; and so forth. Where the interests of children are involved, awards have to be modifiable.

But state courts took advantage of the modifiability of other states' child-custody awards to reverse awards in ways that were not in the child's best interests. If the losing parent in a Texas divorce proceeding seized the children, he or she could run to a Massachusetts court and get a new award. Then the other parent could try to seize the children and take them back to Texas, which would then enter a new judgment. Ultimately, fortunately, the federal government stepped in and passed a rather complicated statute specifying exactly when a custody award was enforceable as written and when it could be modified.[8] All state courts are bound by this statute.[9]

Regarding the precise point at issue here, marriages entered into in one state have never been considered constitutionally entitled to automatic recognition in other states. This is in part because marriages are not like judicial judgments, which are announced only after lengthy formal court proceedings in which both sides are represented by counsel. It is also because of the special importance in American law of family relationships, which (as noted above) makes family law distinctive. Finally, it has always been too easy for people to avoid their home-state law by traveling to another state to take advantage of more lenient marriage laws.[10] For all of these reasons, states have always had greater freedom to re-examine the validity of marriages entered into elsewhere than they have to re-examine the merits of a

---

[7] *See, e.g.*, Yarborough v. Yarborough, 290 U.S. 202, 222 (1933) (Stone, J., dissenting) ("[I]t comes as a surprise that any state, merely because it has made some provision for the support of a child, should, either by statute or judicial decree, so tie its own hands as to foreclose all future inquiry into the duty of maintenance however affected by changed conditions"); Potter v. Potter, 278 P.2d 1020 (Colo. 1955) (child support ordered in Texas but modified in California allowed, since child support order was not considered a final judgment); B.B. v. D.D., 18 P.3d 1210 (Alaska 2001) (modification in Alaska of child custody order by Oregon court allowed).

[8] Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2004).

[9] U.S. CONST. art. VI, cl. 2.

[10] *See, e.g.*, Lanham v. Lanham, 117 N.W. 787 (Wisc. 1908) (plaintiffs, who were prohibited from getting married in Wisconsin because law prohibited marriage within one year of divorce, were married in Michigan and returned to Wisconsin; Wisconsin held that marriage was not valid, since it violated Wisconsin's public policy).

judicial award in a tort or contract case. The state has a right to take into account its local "public policy."

Among the types of marriages that have been denied recognition are:

- Marriages between cousins, or between uncles and nieces;[11]
- Polygamous marriages;[12] and
- Marriages by an individual who was very recently divorced.[13]

It is obvious that the interstate recognition of same-sex marriages implicates the same legal principles and requires analogous lines of reasoning.

c. *Full Faith and Credit and Congressional Power*

The example of interstate child custody disputes shows that legislative power has been important in determining the amount of credit legal decisions must be given in other states, particularly in the family-law context. In the child-custody context, the issue proved intractable until a federal statute – 28 U.S.C. § 1738A – was adopted.[14]

This example is not unique. Congress has long recognized the substantive importance of its power to provide for recognition – or nonrecognition – of judgments:

---

[11] *See, e.g.*, Osoinach v. Watkins, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle in Georgia not recognized in Alabama); In re Estate of May, 114 N.E.2d 4 (N.Y. 1953) (marriage between uncle and niece in Rhode Island questioned in New York; marriage ultimately considered valid); Catalano v. Catalano, 170 A.2d 726 (Conn. 1961) (marriage between uncle and niece in Italy questioned in Connecticut, where such marriages were prohibited; marriage considered invalid); Petition of Lieberman, 50 F. Supp. 120 (E.D.N.Y. 1943) (petition for naturalization approved where petitioner married her uncle in Rhode Island and returned to New York, where such marriages were not valid).

[12] *See, e.g.*, Matter of Darwish, 14 I & N Dec. 307 (Board of Immigration Appeals 1973) (spouse of U.S. citizen's petition for naturalization denied because she was second wife of her husband, which was valid under Jordanian-Muslim law, because such marriages were against public policy of the United States); Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939) (marriage performed and valid in West Virginia questioned in Virginia, where the marriage was considered bigamous; marriage declared void).

[13] *See, e.g.*, Lanham v. Lanham, 117 N.W. 787 (Wisc. 1908) (plaintiffs, who were prohibited from getting married in Wisconsin because law prohibited marriage within one year of divorce, were married in Michigan and returned to Wisconsin; Wisconsin held that marriage was not valid, since it violated Wisconsin's public policy); Horton v. Horton, 198 P. 1105 (Ariz. 1921) (marriage celebrated in New Mexico within the one-year time period when remarriage was prohibited in Arizona questioned; validity of marriage questioned but marriage ultimately upheld).

[14] Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A (2004).

- Federal full faith and credit legislation has been used to dismiss attempts by criminals convicted in a state court to go to federal court and demand money damages for alleged violation of their civil rights during their arrest or during court proceedings;[15]

- During the Great Depression, Congress adopted the Frazier-Lemke Act to protect family farms from forced sale during bankruptcy proceedings.[16] It was held to create an exception to the general principle that foreclosure judgments should be final and enforceable in any other court;[17]

- In the 1980s, the Supreme Court turned to the Full Faith and Credit Statute[18] to decide the general preclusive effect of state-court judgments in federal Civil Rights Act cases.[19] The Court also used the Full Faith and Credit Statute to decide how much effect a state court decision should be given in federal antitrust cases.[20]

The 1996 federal Defense of Marriage Act ("DOMA") is another example.[21]

Although some people have expressed skepticism about whether DOMA is constitutional, these are mostly people whose expertise lies outside the area of conflict of laws. Even most lawyers are not fully familiar with the history of congressional implementation of the Full Faith and Credit Clause, and they underestimate the latitude it gives to adopt legislation. Constitutional power to enact such legislation is found in Article IV itself. The last provision in the Full Faith and Credit Clause states:

> [T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[22]

In my view, the federal DOMA falls within Article IV's grant of congressional power.

---

[15] Haring v. Prosise, 462 U.S. 306 (1983) (holding that in an action under 42 U.S.C. § 1983, a federal court must give a state conviction effect under the Full Faith and Credit Statute).
[16] Frazier-Lemke Act, 11 U.S.C. § 203(s) (repealed in 1949).
[17] Kalb v. Feuerstein, 308 U.S. 433 (1940).
[18] 28 U.S.C. § 1738 (2004).
[19] Migra v. Warrant City School Dist. Bd. Of Education, 465 U.S. 75 (1984).
[20] Marrese v American Academy of Surgeons, 470 U.S. 373 (1985).
[21] Defense of Marriage Act, 28 U.S.C. 1738C (2004).
[22] U.S. CONST. art. IV, § 1, cl. 2.

d. *The Constitutional Amendment Strategy*

Congress' historic flexibility to adopt legislation on interstate family law would be undercut or sacrificed entirely if the subject of interstate recognition was dealt with by Constitutional amendment. Although today's debate is focused on the alleged need to cut back *state* law-making authority, a constitutional amendment would unavoidably have the additional consequences of restricting *federal* legislative power. This is both undesirable and unnecessary.

Restricting federal and state legislative power by adoption of a constitutional amendment is undesirable because Congress, as well as the state courts and legislatures, needs to have flexibility to shape the legal rules that govern interstate relations, in order to meet unanticipated developments. A constitutional amendment in this area would not make our legal system more democratic, but less democratic.

Restricting federal and state legislative power by adoption of a constitutional amendment is also unnecessary: We already have a fully worked-out and well-functioning system of interstate judgments enforcement. Such problems as have arisen have been dealt with well by statute. The rarity of such problems is probably due to the fact that our courts have considerable experience dealing with interstate enforcement – including in the admittedly difficult area of family law – and have worked out realistic and practical solutions. There are solutions to precisely the problems people are worrying about today. The problems preoccupying the proponents of a constitutional amendment are entirely speculative.

No one has yet identified a defect in the Full Faith and Credit Clause. The Constitution is working well for us, including in this complicated and controversial area, and it does not need amendment.

2. A Federal Constitutional Definition of Marriage

The witnesses for this hearing have not been asked to comment on a particular proposed text for a constitutional amendment. However, it is worth considering whether the

conclusions arrived at above should be different if an amendment simply provided a federal substantive definition of marriage, rather than addressing the problem of full faith and credit for same-sex marriages directly.

What object would be served by enacting a federal constitutional definition of marriage, if not to eliminate the prospect of interstate enforcement? At stake is what Massachusetts may do within its own borders. Some people are bothered not by the possibility that Massachusetts might impose its definition of marriage on other states, but by the idea that Massachusetts might recognize same-sex marriage for its own domestic purposes. These are the people who support amending the U.S. Constitution to adopt a single, federal, definition of marriage.

In terms of the issue on the table at this hearing – the relationship between democracy, judicial activism, and state marriage laws – the response to these people is obvious. Enabling the other states to impose on Massachusetts their definition of marriage – historically, a quintessentially state-law subject – can hardly be described as democratic. If the relevant principle is to be democracy, then it is for the people of Massachusetts to say what their constitution and statutes should say. It is not for the other forty-nine states to dictate to Massachusetts by federal constitutional amendment what Massachusetts law should be. This premise is the basic principle of federalism, upon which the American constitutional system as a whole depends.

4. Conclusion

If the objective is democracy, then federalizing the definition of marriage through adoption of a constitutional amendment is a bad idea. Family law has traditionally been reserved to the states because the impact is experienced locally, and the framers of the Constitution appreciated that decisions on matters of intense local concern should be made at a local level.

All in all, there is no reason for a federal constitutional amendment whose sole purpose is to correct an (arguable) misinterpretation by a state court of a state constitutional provision.

For purposes of interstate enforcement, the solution is well worked-out and already in place. Nothing about the Full Faith and Credit Clause, or its two-hundred-year history of application, suggests any defect that needs to be remedied by constitutional amendment.

Conflict of Laws

Cases and Materials

Fifth Edition

Lea Brilmayer
Howard M. Holtzmann Professor of International Law
Yale University

Jack Goldsmith
Professor of Law
University of Chicago

ASPEN LAW & BUSINESS
A Division of Aspen Publishers, Inc.
New York Gaithersburg

Price, Full Faith and Credit and the Equity Conflict, 84 Va. L. Rev. 747 (1998).

(4) What about antisuit injunctions that order parties not to litigate a case elsewhere? In Cole v. Cunningham, 133 U.S. 107, 134 (1890), the Court held that antisuit injunctions did not violate the full faith and credit clause. But the Supreme Court has never resolved whether antisuit injunctions must be given full faith and credit. Prior to *Baker,* most lower courts held that the full faith and credit clause does not compel recognition of an antisuit injunction. *See, e.g.,* Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 934 (D.C. Cir. 1984) (dicta); James v. Grand T. W. R. Co., 152 N.E.2d 858 (Ill. 1958); *but see* Bard v. Charles R. Myers Ins. Agency, Inc., 839 S.W.2d 791 (Tex. 1992) (liquidation order issued by Vermont receivership court, prohibiting prosecution of any action against company in receivership which would interfere with receiver's conduct of company's affairs, given full faith and credit by Texas court). *James* reasoned that the antisuit injunction need not be respected because it operated upon the parties and not the court. What are *Baker*'s implications for antisuit injunctions?

Note: The Defense of Marriage Act

Article IV, §1 does more than obligate states to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State." It also provides: "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress exercised this power in 1996 in enacting the Defense of Marriage Act ("DOMA"), 28 U.S.C. §1738C. DOMA was a response to the possibility that some states might legalize same-sex marriage (as Vermont subsequently did). It provides in pertinent part:

> 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.

DOMA raises several interesting and novel questions. One is: Is DOMA necessary? We learned in Chapter 1, page 60 *supra,* that states sometimes deny recognition to marriages that violate local public policy. And *Baker* reaffirmed that the public policy exception is consistent with the full faith and credit clause. See *supra* page 678 (noting that it is consistent with the full

faith and credit clause for "a court [to] be guided by the forum State's public policy' in determining the *law* applicable to a controversy"). Since (as Chapter 1 also showed) marriage recognition is generally viewed as a choice-of-law issue, DOMA at first glance seems unnecessary.

But although DOMA probably has no implications for choice-of-law questions involving same-sex marriages, it might well have bite with respect to judgments issues involving same-sex marriage. Consider this hypothetical:

> One member of a same-sex couple, long married and a resident in Hawaii, is negligently injured by a tourist from California. The uninjured spouse sues the California tourist in the Hawaii state courts for loss of consortium and wins a judgment. The California tourist does not pay, and the judgment creditor takes the Hawaii judgment to California to enforce it.

Borchers, *Baker v. General Motors*: Implications for Interjurisdictional Recognition on Nontraditional Marriages, 32 Creighton L. Rev. 147, 180-181 (1998). In the absence of DOMA, would California have an obligation under the full faith and credit clause to enforce this judgment? If so, does DOMA relieve California of this obligation?

If DOMA does relieve the states of a duty to enforce judgments related to same-sex marriages, is it constitutional? In other words, can Congress relieve the states of a full faith and credit obligation they would otherwise have? The answer depends on the meaning of the "effects" clause in Article IV, §1, reproduced above. There is remarkably little information about the original understanding of the clause, and there have been no definitive judicial interpretation of it. Scholars have reached a variety of conclusions. For the view that DOMA would in this circumstance be unconstitutional, see Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965, 2003 (1997) ("Effects" clause cannot be read to "undermine or abolish" the full faith and credit obligation); Currie, Full Faith and Credit to Marriages, 1 Green Bag 2d 7, 8 (1997) ("If Article IV itself requires respect for Hawaii marriages, Congress cannot provide otherwise; like §5 of the fourteenth amendment, the 'effects' clause gives authority only to implement the constitutional provision, not to amend it."); Strasser, DOMA and The Two Faces of Federalism, 32 Creighton L Rev 457 (1998) (arguing that DOMA does not satisfy Article IV's requirement that Congress make "general Laws"). For views supporting a broad congressional power, see Rensberger, Same-Sex Marriages and the Defense of Marriage Act; A Deviant View of An Experiment in Full Faith and Credit, 32 Creighton L. Rev. 409, 450 (1998) (full faith and credit obligation under Article IV merely a default rule subject to congressional change under "effects" clause); Borchers, *supra*, at 183-184 (broad reading of DOMA consistent with Congress's power under Article IV); Whitten, The Original Understanding of the

Jon Bruning
Attorney General, State of Nebraska
Testimony before the United States Senate
Subcommittee on the Constitution, Civil Rights, and Property Rights

March 3, 2004
10:00 a.m.
Room 226, Senate Dirksen Office Building

Thank you Mr. Chairman and members of the committee.

My name is Jon Bruning - B-R-U-N-I-N-G.

I am the Attorney General of the State of Nebraska.

My office is defending a federal court challenge to the portion of Nebraska's constitution that defines marriage as a union between one man and one woman.

Unfortunately, in spite of efforts in states such as Nebraska to preserve the traditional definition of marriage, recent court rulings have created a legal domino effect that may impose a national policy on gay marriage.

I am not here to debate with you the moral issue of whether same sex marriage is right or wrong. I am here because of the reality that four judges in Massachusetts could eventually invalidate Nebraska's ban on same sex marriages.

In short, I believe the people of the United States would prefer to have policy decided by their elected representatives, and not by appointed judges.

Today, almost 40 states have passed Defense of Marriage Acts. The vast majority of those are by statute, and 4, including Nebraska, are constitutional amendments.

President Clinton signed the federal Defense of Marriage Act into law in 1996, saying, "I have long opposed governmental recognition of same-gender marriages." The federal DOMA attempted to leave the issue of gay marriage to the states and ensure that no state would be required to recognize same-sex unions from other states.

However, recent court decisions indicate neither state attempts to define marriage nor the federal act may be sufficient to protect the ability of states to define marriage.

In 2000, more than 70% of Nebraskans voted to amend the Nebraska Constitution to define marriage as a union between one man and one woman. In 2003, the ACLU and Lambda Legal Foundation together sued Nebraska in federal court, arguing that the Nebraska amendment unconstitutionally denies gay and lesbian persons equal access to the political system. This is the first *federal* court challenge to a state's DOMA law.

My office moved to dismiss the suit, but last November, the Court denied our motion to dismiss. The language in the Court's order signals that Nebraska will very likely lose the case at trial.

Three recent cases indicate that state and federal attempts to leave this as a states' rights issue may be invalidated by the federal courts.

First, just last year, the U.S. Supreme Court held in Lawrence v. Texas that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause. In his majority opinion, Justice Kennedy listed a number of rights protected by the Constitution, including marriage, and asserted that "...Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

While the majority said the opinion did not speak *directly* to marriage, Justice Scalia, in dissent, worried that the Court's opinion "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples."

In the second case, Romer v. Evans, the Supreme Court held in 1995 that a Colorado Constitutional amendment violated the Equal Protection Clause. The Supreme Court struck down Colorado's amendment, asserting that the amendment imposed "a broad and undifferentiated disability" on homosexuals, singling them out and denying them "protection across the board."

In Nebraska's case, the Plaintiffs have cited both Romer and Lawrence as authority in their attempt to repeal Nebraska's amendment.

In the third case, Massachusetts v. Goodridge, the Massachusetts Supreme Court relied on the reasoning in Lawrence to hold that the everyday meaning of marriage is "arbitrary and capricious."

While no one can predict with certainty what a particular federal court may do, Lawrence, Romer, and Goodridge demonstrate the real possibility of the courts mandating national recognition of same-sex marriages.

Many well-respected legal scholars, including Harvard Law Professor Laurence Tribe, agree that this issue eventually will be resolved by the federal courts.

In short, this country is heading down a path that will allow the judiciary branch to create a national policy for same sex marriages. I am here because I believe such a national policy should be crafted by the states in the first instance, or at a minimum by Congress with the approval of the states.

The ultimate question for you, as members of the United States Senate, is whether you believe this issue should be resolved by judges or by the American people through you, their elected representatives.

Thank you Mr. Chairman, and thank you committee members for your time.

STATE OF NEBRASKA

Jon Bruning
Attorney General

Office of the Attorney General
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509
402-471-2682

September 3, 2003

The Honorable John Cornyn, Chairman
Judiciary Subcommittee on The Constitution
SD-139
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As the Attorney General for the State of Nebraska, I want to take this opportunity to thank the Subcommittee on The Constitution for addressing the very important issue of preserving traditional marriage laws in this country. This issue strikes particularly close to home, as I am now charged with defending Nebraska's constitutional provision defining marriage as the union of one man and one woman in Federal District Court.

With the United States Supreme Court's ruling in *Lawrence v. Texas*, and the impending decision of the Supreme Judicial Court of Massachusetts in the *Goodridge* case, there is a very real possibility that states may be forced to recognize same sex marriages, despite state statutes or constitutional provisions to the contrary.

This country and many other societies around the world have given the institution of marriage special legal protection because of the many benefits healthy marriages offer children and society. Under our constitutional system, laws relating to sexual behavior and morals have historically and properly been left for state governments to decide. Regardless of what one might think about the propriety of state defense of marriage laws, any changes pertaining to the legal definition of marriage ought to come from state legislatures or an effort by the citizenry via the initiative and referendum process, not through the courts.

Thus, I applaud this Committee's attempt to ensure that states retain the right to enact marriage laws preserving marriage as the union of one man and one woman. Please make this letter a part of your hearing record.

Respectfully submitted,

Jon Bruning
Attorney General
State of Nebraska

Challenging Claims of Judicial Tyranny: Testimony to the United States Senate Judiciary Committee

Sean Cahill, Ph.D.
Director, National Gay and Lesbian Task Force Policy Institute
214 W. 29th St., 5th floor
New York, NY 10001
212-402-1148
scahill@ngltf.org

March 2, 2004

In announcing his support for the Federal Marriage Amendment, which would ban marriage for same-sex couples and jeopardize more limited benefits like health insurance for domestic partners, President Bush portrayed the Massachusetts Supreme Judicial Court as an anti-democratic rogue elephant run amok: "Activist judges...have made an aggressive attempt to redefine marriage."[1] In his State of the Union Address, President Bush even charged the court's judges with "forcing their arbitrary will upon the people."[2]

Measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.
James Madison
The Federalist No.10

President Bush's denunciation of activist judges is particularly rich coming from a man who would not occupy the Oval Office were it not for the intervention of a bitterly divided U.S. Supreme Court in *Bush v. Gore*, a ruling that ignored the will of the American people as expressed in the popular vote.

But President Bush's charge of judicial tyranny in Massachusetts also echoes a broader theme his far right base has deployed frequently of late. The day after Massachusetts' high court legalized marriage equality for same-sex couples, U.S. House Majority Leader Tom Delay pushed the U.S. Constitutional amendment, arguing it's the only option "[w]hen you have a runaway judiciary that has no consideration of the Constitution of the United States.."[3] Other conservative politicians have joined this chorus, as have the anti-gay "family" groups driving the anti-family constitutional amendment.

The Massachusetts Family Institute organized rallies in cities throughout Massachusetts titled, "Americans for God, home and country: Let the people decide," as if gay and lesbian people are against all these things. The Traditional Values Coalition issued "A Call to End Judicial Tyranny!" urging Congress to pass a law prohibiting the U.S. Supreme Court from ruling on homosexuality, abortion, and other right-wing obsessions. Bills restricting courts from ruling in certain areas have already been introduced in some state legislatures, and Pat Buchanan has also

[1] The White House, Office of the Press Secretary (2004, February 24). Remarks by the President.
[2] Kornblut, A. (2004, January 21). Bush demonstrates willingness to tackle divisive cultural issues. *Boston Globe*.
[3] Mason, J. (2003, November 19). Texans urge ban on gay unions. *Houston Chronicle*.

endorsed them. Such proposals would overturn the principle of judicial review established two centuries ago in *Marbury v. Madison.*

Such reactionary proposals and demagoguery are expected from the anti-gay industry, for which divisive wedge issues are a cash cow. However, Americans should expect better from their elected officials, especially their President.

Some facts:

- Six of the seven "renegade judges" in Massachusetts were appointed by Republican governors
- Seven of the nine U.S. Supreme Court justices were appointed by Republican presidents
- Of 13 federal appeals courts, nine have majorities of Republican appointees, two have majorities of Democratic appointees, and two are split evenly between Republican and Democratic appointees
- These purported "activist" courts have struck down many policies that enjoy strong public support, including environmental regulations, campaign finance restrictions, gun control, and even parts of the Violence Against Women Act

It is the courts' job to determine whether laws are equitable, even if the law or practice in question has been accepted for a long time.

In charging judicial tyranny, anti-gay groups appeal to populist sentiment, arguing that legislatures should decide whether or not to provide protections to same-sex couples, not courts. But many of these same anti-gay groups have gone to court to challenge laws passed by legislatures that they do not agree with, appealing to legal or constitutional principles over the heads of the elected representatives of the people. Among those praising President Bush's call for a constitutional amendment was Jay Sekulow, chief counsel of the American Center for Law and Justice, a law firm founded by the Rev. Pat Robertson.[4]

President Bush argued that any amendment passed by Congress "should fully protect marriage while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage."[5] Anti-gay groups backing the Federal Marriage Amendment say that this amendment would allow legislatures to pass domestic partner and civil unions policies.[6] Sekulow, the Alliance for Marriage, and other anti-gay activists imply that if legislatures choose to adopt more limited forms of partner recognition short of marriage, this will be acceptable to them. They also portray courts as anti-democratic, as compared with legislatures, which are allegedly more democratic. However, when anti-gay activists disagree with policies passed by legislatures, they have no problem going to the courts for redress. At least 15 times in recent

[4] Loven, J. (2004, February 29). Congress not rushing gay marriage ban. Associated Press.
[5] Bush, G.W. (2004, February 25). President calls for constitutional amendment protecting marriage: Remarks by the President. Office of the Press Secretary: The White House. Retrieved March 2, 2004, from http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html
[6] Alliance for Marriage. (n.d.). Multicultural coalition reintroduces federal marriage amendment in Congress: strong bi-partisan sponsorship reflects the fact that the future of marriage in America is more important than partisan politics. Author. Retrieved March 2, 2004, from http://www.allianceformarriage.org/reports/fma/fma.cfm

years anti-gay groups, including Sekulow's legal organization, have challenged in court more limited forms of same-sex partner recognition passed by city councils and legislatures.[7]

Americans do not always agree with court rulings, and conservatives' claims of judicial tyranny are no more than a straw man. Their real objection is to legal equality for gay and lesbian people. All elected officials take an oath to uphold the Constitution, including its guarantees of liberty and equality for all (not just heterosexuals), and respect for the rule of law.

Conclusion

With time and public education, a majority of Americans will understand why same-sex couples deserve equal protection under the law, including equal access to civil marriage. In Massachusetts and three other states, such majorities already exist. However, the rights of members of a stigmatized minority should not be determined by the prejudices of the majority.

Courts defend justice when they courageously stick with constitutional principles without regard to the politics or the popularity of their decision. This is the American system of government at its best.

Founding father James Madison warned, "Measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." In other words, majority rule, unchecked, can lapse into majority tyranny.

Prejudice or ignorance should never determine public policy. Anti-gay ballot measures like that proposed for Massachusetts—in which a majority decides whether to grant or withhold individual rights in a secret ballot—violate this fundamental principle.

Courts have a duty in our system of government to protect the civil rights of minority groups from being restricted by an "overbearing majority." The American system of government was designed that way; it's deliberate. It is the courts' job to determine whether laws are equitable, even if the law or practice in question has been accepted for a long time.

Courts defend justice when they courageously stick with constitutional principles—as Massachusetts' high court did in the marriage case—without regard to the politics or the popularity of their decision. This is the American system of government at its best.

[7] Such challenges have overturned domestic partner policies in Atlanta, GA; Minneapolis, MN; Arlington County, VA and Massachusetts (all final) as well as Philadelphia (on appeal). Ten other legal challenges were unsuccessful. Source: Gossett, Charles. (1999, Sept. 4). "Dillon Goes to Court: Legal Challenges to Local Ordinances Providing Domestic Partnership Benefits." Paper presented to the annual meeting of the American Political Science Association. Atlanta, GA. Updated in personal communication with Charles Gossett, October 2002.

波士頓華人佈道會
Boston Chinese Evangelical Church
249 Harrison Avenue, Boston, Massachusetts 02111 Telephone: (617) 426-5711 Fax: (617) 426-0315

September 3, 2003

Senator John Cornyn
Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

Thank you for allowing me to write on behalf of marriage. I appreciate this opportunity to represent the Asian community in defending marriage as between a man and a woman.

I shepherd the largest Asian church in New England. Located in Chinatown in Boston, Massachusetts, my community will be profoundly affected by the decisions and actions of the Supreme Judicial Court in Massachusetts. The community in which I serve will be severely impacted by an attempt to destroy the legal status of marriage in America.

I am one of America's 12 million Asian-Americans. Christian or not, family plays a vital role in the Asian community. The family has two distinct roles of male and female- each playing an essential role for the community as a whole.

Asian culture does not celebrate individuality as a pinnacle goal, rather goals are based on family and community needs. Marriage composed of a husband and a wife is predicated on the need for society to raise children. Fathers have a key role as provider and protector of the family, while mothers are dedicated to the well-being of their children. To an Asian family, it is simply inconceivable for marriage to be defined as anything other than between a man and a woman.

Again, I thank you for this opportunity to speak in support for marriage.

Sincerely,

Steven J Chin

Reverend Steven J. Chin
Senior Pastor

September 3, 2003

The Hon. John Cornyn
Chairman
Subcommittee on Constitution, Civil Rights and Property Rights
United States Senate
Washington, D.C. 20510

Dear Senator:

As you conduct a hearing on the Defense of Marriage Act on September 4, it might be helpful for you to be aware of the strong support of the general public, Christians in particular, for God's first institution -- marriage.

In 2000, in order to celebrate the 2000th anniversary of the birth of the Lord Jesus Christ, an unprecedented group of organizations came together to state that they believe that "marriage is a holy union of one man and one woman in which they commit, with God's help, to build a loving, life-giving, faithful relationship that will last for a lifetime."

The distinguished signers of the "Christian Marriage Declaration" (copy attached), released on November 14, 2000, include the leadership of the National Association of Evangelicals, which organized the gathering, the United States Catholic Conference, and the Southern Baptist Convention.

These three umbrella organizations, representing the largest assembly of Christian believers in America, called not only on churches "throughout America to do their part to strengthen marriage" but to provide "influence within society and the culture to uphold the institution of marriage."

Thank you for your willingness to do everything you can within your capacity as a public servant to uphold marriage as defined in this historic document as "a holy union between one man and one woman."

Sincerely,

Rev. Richard Cizik
Vice President for Governmental Affairs

716 Capitol Square Place SW Washington DC 20024 P.O. Box 23269 Washington DC 20026
202-789-1011 Fax 202-842-0392 www.nae.net

A CHRISTIAN DECLARATION ON MARRIAGE

As we celebrate the 2000th anniversary of the birth of the Lord Jesus Christ, entering the third millennium, we pledge together to honor the Lord by committing ourselves afresh to God's first institution – marriage.

We believe that marriage is a holy union of one man and one woman in which they commit, with God's help, to build a loving, life-giving, faithful relationship that will last for a lifetime. God has established the married state, in the order of creation and redemption, for spouses to grow in love of one another and for the procreation, nurture, formation, and education of children.

We believe that in marriage many principles of the Kingdom of God are manifested. The interdependence of healthy Christian community is clearly exemplified in loving one another (John 13:34), forgiving one another (Ephesians 4:32), confessing to one another (James 5:16), and submitting to one another (Ephesians 5:21). These principles find unique fulfillment in marriage. Marriage is God's gift, a living image of the union between Christ and His Church.

We believe that when a marriage is true to God's loving design it brings spiritual, physical, emotional, economic, and social benefits not only to a couple and family but also to the Church and to the wider culture. Couples, churches, and the whole of society have a stake in the well being of marriages. Each, therefore, has its own obligations to prepare, strengthen, support and restore marriages.

Our nation is threatened by a high divorce rate, a rise in cohabitation, a rise in non-marital births, a decline in the marriage rate, and a diminishing interest in and readiness for marrying, especially among young people. The documented adverse impact of these trends on children, adults, and society is alarming. Therefore, as church leaders, we recognize an unprecedented need and responsibility to help couples begin, build, and sustain better marriages, and to restore those threatened by divorce.

Motivated by our common desire that God's Kingdom be manifested on earth as it is in heaven, we pledge to deepen our commitment to marriage. With three quarters of marriages performed by clergy, churches are uniquely positioned not only to call America to a stronger commitment to this holy union but to provide practical ministries and influence for reversing the course of our culture. It is evident in cities across the nation that where churches join in common commitment to restore a priority on marriage, divorces are reduced and communities are positively influenced.

Therefore, we call on churches throughout America to do their part to strengthen marriage in our nation by providing:

- Prayer and spiritual support for stronger marriages
- Encouragement for people to marry
- Education for young people about the meaning and responsibility of marriage
- Preparation for those engaged to be married
- Pastoral care, including qualified mentor couples, for couples at all stages of their relationship
- Help for couples experiencing marital difficulty and disruption
- Influence within society and the culture to uphold the institution of marriage

Further, we urge churches in every community to join in developing policies and programs with concrete goals to reduce the divorce rate and increase the marriage rate.

By our commitment to marriage as instituted by God, the nature of His Kingdom will be more clearly revealed in our homes, our churches, and our culture. To that end we pray and labor with the guidance of the Holy Spirit.

May the grace of God, the presence of Christ, and the empowerment of the Holy Spirit be abundant in all those who so commit and be a blessing to all whose marriages we seek to strengthen.

Signers and presenters at November 14, 2000 press conference, Washington D.C.

Cardinal William Keeler
Archbishop of Baltimore
National Conference of Catholic Bishops

Dr. Richard Land, President
Ethics and Religious Liberty Commission
Southern Baptist Convention

Bishop Kevin W. Mannoia, President
National Association of Evangelicals

Signatories:

Bishop Anthony O'Connell, Chairman
National Conference of Catholic Bishops
Committee on Marriage and Family Life

Dr. Bill Bright, President
Campus Crusade for Christ

Dr. James Bond, General Superintendent
The Board of General Superintendents
Church of the Nazarene

Bishop Lamar Vest, Presiding Bishop
Executive Council
Church of God

U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senator John Cornyn (R-TX), Chairman

Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?

Wednesday, March 3, 2004, 10 a.m., Dirksen Senate Office Building Room 226

OPENING STATEMENT

Our hearing this morning is entitled: "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?" In light of recent events, this hearing is both timely and necessary.

An on-going national conversation about the importance of marriage intensified recently when four Massachusetts judges declared traditional marriage a "stain" on our laws that must be "eradicated." Since then, Americans have witnessed startling and lawless developments nationwide – from Boston to San Francisco, and numerous points between.

Those who saw our hearing in September know that today's debate over marriage was actually sparked last June, when the U.S. Supreme Court issued its controversial ruling in *Lawrence v. Texas*. In the hands of activist judges like those in Massachusetts, California, and elsewhere, part of the rationale adopted in *Lawrence*, one completely unnecessary to reach the result, presents a serious threat to traditional marriage laws across the nation. That's not just my conclusion – it's the conclusion of legal experts, constitutional scholars, and Supreme Court observers across the political spectrum.

It's important to note at the outset: The American people didn't initiate this discussion, nor did members of Congress of either party. Let's be clear and honest about this. The only reason we are discussing this issue today is the work of aggressive lawyers, and a handful of activist judges.

Across diverse civilizations, religions and cultures, humankind has consistently recognized the institution of marriage as society's bedrock institution. After all, as a matter of biology, only the union of a man and a woman can reproduce children. And as a matter of common sense, confirmed by social science, the union of mother and father is the optimal, most stable foundation for the family and for raising children.

Unsurprisingly, then, traditional marriage has always been the law in all 50 states. At the national level, overwhelming congressional majorities – representing over three-fourths of each chamber – joined President Clinton in codifying a federal definition of marriage by enacting the bipartisan Defense of Marriage Act of 1996.

In light of this extraordinary consensus, it is offensive for anyone to charge supporters of traditional marriage with bigotry. Yet that is exactly what activist judges are doing today:

accusing ordinary Americans of intolerance, while abolishing American traditions by judicial fiat.

Renegade judges (and some local officials) are attempting to radically redefine marriage. Marriage laws have already been flouted in Massachusetts, California, New Mexico, and New York. Lawsuits seeking the same result have also been filed in Nebraska, Florida, Indiana, Iowa, Utah, Georgia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, and Vermont, as well as my home state of Texas.

Disregarding the democratic process, four judges in Massachusetts concluded that the "deep-seated religious, moral, and ethical convictions" underlying traditional marriage are "no rational reason" for the institution's continued existence. They contended that traditional marriage is "rooted in persistent prejudices" and "invidious discrimination," and not the best interest of children. They even suggested abolishing marriage outright, stating that "if the Legislature were to jettison the term 'marriage' altogether, it might well be rational and permissible."

Apologists for the Massachusetts court lamely contend that democracy and marriage can be restored in that state. But not until 2006 – and only through a process citizens shouldn't have to endure just to preserve current law. Moreover, the problem is not limited to Massachusetts. In California, courts have refused to enforce that state's law defining marriage as between a man and a woman, against a lawless mayor. New Mexico, New York, and Illinois officials have followed. And just this morning, I've read that officials in Oregon are going to join this trend.

Defenders of marriage and democracy alike recognize that this is a serious problem – and indeed a national problem, requiring a national solution.

Congress recognized the national importance of marriage in 1996 by codifying a federal definition of marriage. And most officials on both sides of the aisle continue to express their support for traditional marriage. But words are not enough to combat judicial defiance. If elected representatives are to retain their relevance in a democracy – indeed, if we are to remain faithful to our national creed of government of the people, by the people, and for the people – words must be joined by action.

True, the Constitution should not be amended casually. But serious people have reluctantly recognized that an amendment may be the only way to ensure survival of traditional marriage in America. Why is an amendment necessary? Two words: activist judges.

Legal experts across the political spectrum agree the *Lawrence* decision presents a federal judicial threat to marriage. Harvard Law Professor Laurence Tribe has said, "you'd have to be tone deaf not to get the message" that *Lawrence* renders traditional marriage "constitutionally suspect." According to Tribe, the defense of marriage is now a "federal constitutional issue," and he predicts the U.S. Supreme Court will eventually reach the same conclusion as the Massachusetts court.

Tribe's predictions are confirmed, of course, by the Massachusetts ruling, which not only invalidated that state's marriage law, but also suggested that *Lawrence* might be used to threaten

laws across the country – including the federal Defense of Marriage Act. Tribe is also joined by members of Congress who argue that federal law is "unconstitutional."

Moreover, constitutional scholars predict that Nebraska – which has approved a state constitutional amendment defending marriage – may soon see that amendment invalidated on federal constitutional grounds in a pending federal lawsuit. Another federal suit has been filed in Utah to establish a federal constitutional right to polygamy under *Lawrence*.

The only way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, we have ratified numerous amendments as a democratic response to judicial decisions before – including the Eleventh, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

I want to close by emphasizing that this discussion must be conducted in a manner worthy of our country. It should be bipartisan, and it should be respectful.

The defense of traditional marriage has been a bipartisan issue in the past. I hope it will continue to be a bipartisan issue. It was a Democrat who, during the last Congress, first proposed a federal constitutional amendment to protect marriage. And as we will see today, our panel is comprised of traditional marriage supporters who transcend party lines.

The discussion must also be respectful. I have often said that Americans instinctively and laudably support two fundamental propositions: that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection.

Throughout the nation, children are being raised in nontraditional environments – by foster parents, by single parents, by grandparents, uncles and aunts. We will hear more about that this morning. We know they are doing the best job they can. We can respect the hard work that they are doing, while at the same time still adhering to the dream that we have for every child – which is a mother and a father in an intact family.

In 1996, Senator Kennedy pointed out that "there are strongly held religious, ethical, moral beliefs that are different from mine with regards to the issue of same-sex marriage which I respect and which are no indications of intolerance." I hope that that spirit continues today. Millions of Americans who support the traditional institution of marriage should not be slandered as intolerant. The institution of marriage was not created to discriminate or oppress – it was established to protect and nurture children.

Pastor Daniel de Leon, Sr.
Alianza de Ministerios Evangélicos Nacionales (AMEN)
Pastor, Templo Calvario, Santa Ana, California
General Presbyter, Assemblies of God

Thank you Mr. Chairman, members of the committee, ladies and gentlemen.

My name is Pastor Daniel de Leon, and I am here to represent the largest Hispanic Evangelical organization in the country, AMEN (Associacion Evangelica de Ministerios Nacionales). AMEN is comprised of over 8,000,000 members, representing 27 denominations and 22 Latino nations. I am also the Pastor of the largest Hispanic Evangelical Church in America, Templo Calvario, in Santa Ana, California.

AMEN is a leading advocate on issues that concern the Hispanic community. On many issues, we work closely with our Catholic brethren. We are certainly working together on the issue we are discussing today – the institution of marriage, understood throughout history and across diverse religions and cultures as the union of one man and one woman. We have been a member of the Alliance for Marriage since its inception.

When I turned on my television a few weeks ago, and saw what was happening in San Francisco, I couldn't believe my eyes. As I sat there, several things came to mind.

First, I could not understand how an elected official could ignore and violate the laws of our state, and get away with it. I also could not understand why the courts would not stop this – why they would refuse to require an elected official to comply with the law of his state, and to respect the will of the people as expressed in our laws.

Second, it wasn't just that officials and judges were ignoring the law. It was much worse than that. They were ignoring a law that is so fundamental to society – and in particular, of great importance to my community, to the people who I counsel. They were ignoring the importance of the institution of marriage, as the union of one man and one woman.

Just a few years ago, Californians voted to reaffirm that marriage in the state of California is between a man and a woman only. Hispanics in particular voted overwhelmingly to uphold the traditional institution of marriage. This is one institution, even though imperfect, that has withstood the test of time and has proven to bring a sense of stability to society for time immemorial.

The institution of marriage is designed for children, not for adult love. Adults can love in many ways – between brother and sister, between grandparents, uncles, aunts, between friends and loved ones. But marriage is for children. I am so saddened that we have forgotten that. And I am even more saddened that marriage is drifting further and further from what it is supposed to be all about – children. Adults seem to care more and more about one thing, themselves. This is one of the reasons why 50% of marriages wind up in divorce. We must strengthen marriage – not weaken it. And I fear that, if we start to

abolish marriage laws in our nation, we will go further down the path of teaching people that marriage does not matter for the well-being of children, it only matters for the pleasure of adults.

I am not here because I want to be here. There are many problems in my community, and I should be there working on them, not here far away in Washington, D.C. But I have flown all the way here from California, because I need to be here, to defend the most basic institution of society for the good of all, on behalf of my community. Because without marriage, we have no hope of solving the other problems we are facing back home.

I live everyday in the front-lines of Urban America, where the ills of society are magnified greatly. People like myself, who provide a service to our community, are often the ones that have to "pick up the pieces" when marriages and families fall. In my 30 years of counseling, I have often dealt with grown children that still harbor hurts and deep seated frustrations because they did not have a mother and a father.

I know that there are good people trying to raise children without a mother and a father. Perhaps it is the single parent. Or the grandparent or aunt and uncle. Or the foster parent. They do their best, and we admire and respect them for that. But at the same time, we want the very best for children – and that is a mother and father, and an institution that encourages people to give children both a mother and father.

I want to say something about civil rights and discrimination. My people know something about discrimination. The institution of marriage was not created to discriminate against people. It was created to protect children and to give them the best home possible – a home with a mother and father.

Some people talk about interracial marriage. Laws forbidding interracial marriage are about racism. Laws protecting traditional marriage are about children.

To us in the Hispanic community, marriage is more than a sexual relationship. It is a nurturing, caring and loving relationship between a man and a woman that is to remain intact "until death does do us part." Children are born into this loving relationship with a great sense of anticipation. We love our children and we love children as you can tell by the numbers!

Marriage between a man and a woman is the standard. A child is like a twig that is planted in the soil of our society that requires two poles to have the best chance of growing strong and healthy. Those two poles, if you will, are the parents, Dad and Mom. Very different and at times even opposites but necessary for a balanced form of living.

Furthermore, marriage is a moral and spiritual incubator for future generations. Our children learn from their parents not only how to make a living but more importantly, how to live their life. This is not readily learned by a simple form of transference of

knowledge but rather through the experience of daily living. Children learn from observation. As the home goes, so goes society.

I believe that we need to send a positive message to our children and their children. That we cared enough about the most basic institution of our society, marriage between a man and a woman, that we passed a Constitutional Amendment to preserve it for future generations. This is not, and must not be, about party politics. This must be seen as our struggle as a social family to bring stability to a divided house.

The President is right when he said that, "On a matter of such importance, the voice of the people must be heard . . . 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."

Thank you very much.

Copyright 2004 Detroit Free Press
All Rights Reserved
Detroit Free Press

February 25, 2004 Wednesday 0 EDITION

LENGTH: 303 words

HEADLINE: Gay Marriage;
Equal treatment must remain key to Constitution

BODY:

President George W. Bush's decision to back a constitutional amendment banning gay marriage isn't surprising, but it is especially disappointing from a man who ran for president as a "uniter, not a divider."

Bush, like most advocates for the marriage amendment, acts as if the judges and other officials who have upheld a right to gay unions were suddenly dropped from another planet to impose an arbitrary rule foreign to American values.

But there is nothing arbitrary about enforcing the Constitution, and its fundamental concept that the law applies equally to everybody. That's as central an American value as there is. As much as some people might not like to admit it, homosexuals are part of the American fabric; the Constitution must not be turned against them.

Even polls that show Americans are wary of gay marriage reveal they are highly concerned about tampering with this sacred document. Instead, they think the battle should be left to the states.

Which leads to Michigan, where a House committee Tuesday approved a state constitutional amendment, which would have to go to voters in November. Like the federal drive, it's unnecessary, because Michigan already has a Defense of Marriage Act defining marriage as a union between one man and one woman.

Even that seems wrongheaded, needlessly excluding loving adult couples from committing to the kind of long, stable relationship that makes society stronger -- the very thing the pro-marriage camp claims to seek.

"Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society," Bush said.

Those roots should have grown deep and wide enough by now to include a few more people who wish only to unite. Neither constitution should be changed to sever their opportunity permanently.

LOAD-DATE: February 25, 2004

Copyright 2001 The Detroit News
All Rights Reserved
The Detroit News

October 29, 2001 Monday No dot Edition

SECTION: OPINION; Deb Price; Pg. 11A

LENGTH: 640 words

HEADLINE: Gerald Ford: Treat **gay couples** equally

BYLINE: Deb Price

BODY:

Former President **Gerald Ford** believes the federal government should treat **gay couples** the same as married couples, including providing equal Social Security and tax benefits.

Ford's views, expressed in an exclusive telephone interview, make him the highest-ranking Republican ever to endorse equal treatment for gay couples.

"I think they ought to be treated equally. Period," Ford declared. Asked specifically whether gay couples should get the same Social Security, tax and other federal benefits as married couples, he replied, "I don't see why they shouldn't. I think that's a proper goal."

Now 88, Ford was a longtime Michigan congressman and Republican leader of the U.S. House before being appointed vice president and then rising to the presidency in 1974 after Richard Nixon's resignation.

From his office in Rancho Mirage, Calif., Ford comfortably discussed a range of gay issues. He said he supports federal legislation to outlaw anti-gay job discrimination: "That is a step in the right direction. I have a longstanding record in favor of legislation to do away with discrimination."

Although he doesn't know if any of his White House appointees were gay, Ford said, "I applaud that President Bush has appointed three people who are gay. ... That is a big step in the right direction. The atmosphere was totally different 25 years ago, and the issue never arose." The former president added that having gay assistants wouldn't have mattered to him "as long as they were competent."

These days, Ford said, he and his wife Betty have gay friends.

Ford also expressed hope that his Republican Party will continue to expand its outreach to gay voters.

"I have always believed in an inclusive policy, in welcoming gays and others into the party. I think the party has to have an umbrella philosophy if it expects to win elections."

Ford warmly described his inclusive attitudes after I contacted him about what has come to be seen as a stain on his presidency -- his much-criticized response to the gay man who saved his life on Sept. 22, 1975.

Three days after the thwarted assassination attempt, Ford wrote to thank Bill Sipple for his "selfless" heroism.

Yet Ford has been accused of not honoring the Vietnam combat veteran as publicly as he would have had Sipple been heterosexual.

Sipple, who had been active in San Francisco's gay movement but closeted back home in Detroit, was rejected by his mother after a gay San Francisco official revealed Sipple's sexual orientation to a newspaper columnist after the shooting. Crumbling over his mother's rejection in the wake of national media attention, Sipple died a broken man in 1989 at 47. He treasured the Ford letter, which hung in his dilapidated apartment.

Ford blasts as "untrue" and "unfair" the charge -- which has become urban legend and has been repeated by some historians and gay activists -- that he would have honored Sipple more publicly if he hadn't been gay. "I had gone to San Francisco to make a speech before the San Francisco foreign affairs group," Ford recalled. "I came out of the St. Francis Hotel and was about to get into the limo. The shot was fired (by Sara Jane Moore). The Secret Service got me to Air Force One quickly. I later learned ... Bill Sipple hit her hand and, as a consequence, the shot went above my head. ... I wrote him a note thanking him. ... As far as I was concerned, I had done the right thing and the matter was ended. I didn't learn until sometime later -- I can't remember when -- he was gay.

"I don't know where anyone got the crazy idea I was prejudiced and wanted to exclude gays," Ford said.

Jerry Ford's bold embrace of gay Americans is an historic breakthrough for a nation dedicated to equal rights. And it underscores the increasingly visible support of gay Americans by prominent Republicans.

LOAD-DATE: November 15, 2002

SEP-03-2003 16:43 MASTERWRITERS 719 548 5735 P.02

8605 EXPLORER DRIVE, COLORADO SPRINGS, CO 80920 • (719) 531-3400

September 3, 2003

The Honorable John Cornyn
Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
via facsimile: 202/228-2281

Dear Senator Cornyn:

A warm greeting to you from Focus on the Family here in Colorado Springs. Given the significance of the hearings in which you will be involved tomorrow, I consider it a privilege to contact you with my perspective on the institution of marriage. In the event that you are unfamiliar with our organization, I'd like to provide a brief introduction of our mission and philosophy. Focus on the Family is a pro-family ministry with an international presence, and our radio programs are currently heard by 220 million people daily in 122 countries. We are dedicated to the preservation of the family and the defense of traditional values, and all of our efforts center around that overarching goal. As the Founder of this organization and Chairman of the Board of Directors, I am passionately committed to safeguarding marriage, and I believe that the recent attacks on this vital institution present the greatest threat to the survival of our culture than any other issue.

Having said that, I'd like to share a few thoughts that may shed further light on our perspective. Since the dawn of mankind, marriage has been reserved exclusively for the union of one man and one woman, which represent the two segments of humanity. Human nature itself dictates the parameters of this unique relationship. What's more, research overwhelmingly indicates that traditional marriage is the surest way to guarantee that children are reared in the healthiest possible environment – with the benefit of both a mother and a father who demonstrate a complementary relationship with one another. This kind of upbringing is absolutely essential to a youngster's proper development.

By protecting this age-old family structure, we are not only giving the next generation a chance to thrive; we are also acknowledging the manifold benefits to the couple itself. Marriage solves the paradox of humanity: that we exist as male and female. There is no other human institution that serves both to close the gap between the sexes and provide a platform for cooperation and lifelong, mutual society. Marriage "completes" the members of each sex in a way nothing else can.

Some would argue that our culture always profits by remaining open to new approaches. It's crucial that we keep in mind, however, that "new" does not always mean "improved" – especially when it involves tampering with a timeless institution that has lent itself to the success of civilization for countless generations. As an example of the faultiness of this way of thinking, 30 years ago our nation embarked on a dramatic social experiment called "no-fault divorce," convinced it would improve family life. Sadly, the ensuing years have proven this method to be a failure of epic proportions, and the children impacted have been damaged to an extent far beyond what anyone imagined. While no-fault divorce challenged the permanence of marriage, the same-sex proposition defies its very constitution. Given such flagrant attempts to destroy something that has long served as

the fabric and foundation of our society, it never ceases to amaze me when folks assert that there will be no fallout if we redefine marriage so fundamentally.

I urge you and your fellow committee members to take every possible measure to defend traditional marriage from the assaults being leveled against it. In light of all that's at stake, I know of no greater priority facing our country. Deepest thanks for your consideration, and for your work in addressing this critical issue. Please don't hesitate to contact Focus if we can be of any assistance. God's blessings to you, Senator Cornyn.

Sincerely,

James C. Dobson, Ph.D.
Founder and Chairman
Focus on the Family

JCD/rwd

The case for gay marriage

It rests on equality, liberty and even society

SO AT last it is official: George Bush is in favour of unequal rights, big-government intrusiveness and federal power rather than devolution to the states. That is the implication of his announcement this week that he will support efforts to pass a constitutional amendment in America banning gay marriage. Some have sought to explain this action away simply as cynical politics, an effort to motivate his core conservative supporters to turn out to vote for him in November or to put his likely "Massachusetts liberal" opponent, John Kerry, in an awkward spot. Yet to call for a constitutional amendment is such a difficult, drastic and draconian move that cynicism is too weak an explanation. No, it must be worse than that: Mr Bush must actually believe in what he is doing.

Mr Bush says that he is acting to protect "the most fundamental institution of civilisation" from what he sees as "activist judges" who in Massachusetts early this month confirmed an earlier ruling that banning gay marriage is contrary to their state constitution. The city of San Francisco, gay capital of America, has been issuing thousands of marriage licences to homosexual couples, in apparent contradiction to state and even federal laws. It can only be a matter of time before this issue arrives at the federal Supreme Court. And those "activist judges", who, by the way, gave Mr Bush his job in 2000, might well take the same view of the federal constitution as their Massachusetts equivalents did of their state code: that the constitution demands equality of treatment. Last June, in *Lawrence v Texas*, they ruled that state anti-sodomy laws violated the constitutional right of adults to choose how to conduct their private lives with regard to sex, saying further that "the Court's obligation is to define the liberty of all, not to mandate its own moral code". That obligation could well lead the justices to uphold the right of gays to marry.

Let them wed

That idea remains shocking to many people. So far, only two countries—Belgium and the Netherlands—have given full legal status to same-sex unions, though Canada has backed the idea in principle and others have conferred almost-equal rights on such partnerships. The sight of homosexual men and women having wedding days just like those enjoyed for thousands of years by heterosexuals is unsettling, just as, for some people, is the sight of them holding hands or kissing. When *The Economist* first argued in favour of legalising gay marriage eight years ago ("Let them wed", January 6th 1996) it shocked many of our readers, though fewer than it would have shocked eight years earlier and more than it will shock today. That is why we argued that such a radical change should not be pushed along precipitously. But nor should it be blocked precipitously.

The case for allowing gays to marry begins with equality, pure and simple. Why should one set of loving, consenting adults be denied a right that other such adults have and which, if exercised, will do no damage to anyone else? Not just because they have always lacked that right in the past, for sure: until the late 1960s, in some American states it was illegal for black adults to marry white ones, but precious few would defend that ban now on grounds that it was "traditional". Another argument is rooted in semantics: marriage is the union of a man and a woman, and so cannot be extended to same-sex couples. They may live together and love one another, but cannot, on this argument, be "married". But that is to dodge the real question—why not?—and to obscure the real nature of marriage, which is a binding commitment, at once legal, social and personal, between two people to take on special obligations to one another. If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so while other adults, equivalent in all other ways, are allowed to do so?

Civil unions are not enough

The reason, according to Mr Bush, is that this would damage an important social institution. Yet the reverse is surely true. Gays want to marry precisely because they see marriage as important: they want the symbolism that marriage brings, the extra sense of obligation and commitment, as well as the social recognition. Allowing gays to marry would, if anything, add to social stability, for it would increase the number of couples that take on real, rather than simply passing, commitments. The weakening of marriage has been heterosexuals' doing, not gays', for it is their infidelity, divorce rates and single-parent families that have wrought social damage.

But marriage is about children, say some: to which the answer is, it often is, but not always, and permitting gay marriage would not alter that. Or it is a religious act, say others: to which the answer is, yes, you may believe that, but if so it is no business of the state to impose a religious choice. Indeed, in America the constitution expressly bans the involvement of the state in religious matters, so it would be especially outrageous if the constitution were now to be used for religious ends.

The importance of marriage for society's general health and stability also explains why the commonly mooted alternative to gay marriage—a so-called civil union—is not enough. Vermont has created this notion, of a legally registered contract between a couple that cannot, however, be called a "marriage". Some European countries, by legislating for equal legal rights for gay partnerships, have moved in the same direction (Britain is contemplating just such a move, and even the opposition Conservative leader, Michael Howard, says he would support it). Some gays think it would be better to limit their ambitions to that, rather than seeking full social equality, for fear of provoking a backlash—of the sort perhaps epitomised by Mr Bush this week.

Yet that would be both wrong in principle and damaging for society. Marriage, as it is commonly viewed in society, is more than just a legal contract. Moreover, to establish something short of real marriage for some adults would tend to undermine the notion for all. Why shouldn't everyone, in time, downgrade to civil unions? Now that really would threaten a fundamental institution of civilisation. ■

ALSO BY THE AUTHOR

Dynamic Statutory Interpretation

The Case for SAME-SEX MARRIAGE

From Sexual Liberty to Civilized Commitment

WILLIAM N. ESKRIDGE, JR.

100

THE FREE PRESS

New York London Toronto Sydney Tokyo Singapore

Will they? There is reason to doubt it. Indeed, it is the same reason advanced by Hawaii: antihomosexual sentiment. Despite fact, notwithstanding reason, and in spite of human need, judges who harbor such feelings or fear their backlash may not support same-sex marriage. Yet it only requires a few judges in one state to reverse the presumptions established by homophobia, and that state promises to be Hawaii. Chief Justice Ronald Moon and Associate Justices Steven Levinson and Paula Nakayama of the Hawaii Supreme Court have tentatively taken a position that cuts the Gordian knot. In the case brought by Ninia Baehr and Genora Dancel they have relied on a different equal protection argument to require the state to justify its discrimination. The next chapter explores their bold constitutional move.

6

THE CONSTITUTIONAL CASE: DISCRIMINATION

Loving v. Virginia,[1] the leading case for the right to marry, is mainly a discriminatory classification case.[2] Although *Loving*'s creation of an independent right to marry is directly applicable to state prohibitions of same-sex marriage, its race discrimination holding seems on its face inapplicable to the same-sex marriage issue. But is it? Both in the legal world and outside it, we make arguments by analogy. Those on one side argue, "How can we ban gay marriage if we don't ban marriage among transvestites or transsexuals?" Those on the other ask, "If gay marriage, then why not bigamy? Why not incestuous marriage?" This chapter explores the politically charged analogy of interracial marriage, like that in *Loving*, to gay marriage, like that in *Baehr*.

The history of Virginia's law prohibiting different-race marriage, including its downfall, bears on the state's prohibition of same-sex marriages. They are parallel histories. Those defending the prohibitions in both cases relied on arguments that deny marriage's social and contingent features. Specifically, the supporters of antimiscegenation statutes made the same kind of definitional and natural law arguments that supporters of statutes barring same-sex marriage now

[2]Chief Justice Warren's discussion of the right to marry is an alternative basis for the Court's disposition in *Loving*. The primary reasoning of the Court was that the Virginia antimiscegenation statute was an "invidious" racial classification that violated the equal protection clause of the Fourteenth Amendment because it was not justified by a compelling state interest.

make. *Loving* rejected all those arguments and exposed them as pretexts for a discriminatory race-based classification for which the state could advance no compelling interest. Following the Hawaii Supreme Court in *Baehr*, this chapter maintains that *Loving* can be applied to require the state to justify its discriminatory sex-based classification in statutes prohibiting same-sex marriage. *Loving* can also be extended to require the state to adduce a neutral justification for discriminatory sexual-orientation-based classifications such as the same-sex marriage bar.[b]

THE MISCEGENATION ANALOGY

Recall the recurring argument made by opponents of same-sex marriage, namely, that marriage *by definition* cannot include same-sex couples (chapters 4 and 5). To support this definitional argument, opponents cite historical practice, natural law's emphasis on procreation, and religious text and tradition. The strategy of opponents has been to essentialize the social institution of marriage around the concept of husband and wife. The same strategy was followed by opponents of different-race marriage, who essentialized marriage around the concept of racial purity. To support their definitional argument, opponents cited historical practice, natural law's abhorrence of procreative mixing, and religious text and tradition. And for almost all of American history, opponents prevailed. *Loving* was a rejection of this way of thinking, however. Its reasoning provides support for other challenges to natural law thinking about the legal institution of marriage.

American Antimiscegenation Laws

Few traditions are as pervasive in American legal history as laws prohibiting different-race marriages.[2] Virginia's antimiscegenation law was first adopted in 1691, its stated purpose being to prevent "abominable mixture and spurious issue."[3] This law was characteristic

[b]Chapter 5 demonstrates that the state cannot produce a compelling justification for prohibitions on same-sex marriage, and I shall not repeat that discussion here.

of those prevailing in the colonies before the Revolution. After independence, antimiscegenation laws were enacted at one time or another by thirty-eight states. The laws were viewed as recognition of a natural order, but a more directive purpose was also articulated. A Virginia juror said in 1833, "The law was made to preserve the distinction which should exist between our two kinds of population, and to protect the whites in the possession of their superiority."[4]

The Civil War and the Reconstruction amendments to the Constitution did virtually nothing to undermine such laws. Although opponents of the Fourteenth Amendment charged that it would lead to interracial marriages, supporters of the amendment assured Congress that antimiscegenation laws would not be disturbed by the amendment's guarantee of "equal protection of the law" for African Americans.[5] Accordingly, few states repealed their laws after the Fourteenth Amendment was ratified, and antimiscegenation laws were a centerpiece of the Jim Crow regime of *de jure* segregation in the South after Reconstruction. Whites in both the North and South firmly opposed different-race marriage for reasons that were to them fundamental. Senator James Doolittle of Wisconsin put it most broadly, "By the laws of Massachusetts intermarriages between these races are forbidden as criminal. Why forbidden? Simply because natural instinct revolts at it as wrong."[6] Others rooted their opposition in the desire to "maintain the purity of white blood, [to] assure for it that natural superiority with which God had ennobled it."[7] Most opponents sooner or later invoked an argument that African Americans were genetically inferior and that different-race marriages would produce inferior children. The eugenics movement of the late nineteenth century provided scientific respectability for a view long defended by reference to the Bible and theories of white supremacy.[8]

Legal challenges to state antimiscegenation laws in the nineteenth century were uniformly rejected under both federal and state constitutions. State court decisions upholding antimiscegenation statutes emphasized the same religious and scientific arguments made in the social and political arenas. For example, the Georgia Supreme Court upheld its statute in part because "amalgamation of the races is . . . unnatural," yielding offspring who are "generally sickly and effeminate, and . . . inferior in physical development and strength, to the

full-blood of either race."[9] The court also rested its judgment on the view that

> equality [of the races] does not in fact exist and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.[10]

The Missouri Supreme Court went further to opine "as a well authenticated fact" that "if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites."[11] Such reasoning might seem bizarre to us today, but it was fully consistent with the mind-set of those opposing different-race marriage in the late nineteenth century.

The United States Supreme Court resolved the issue in favor of such laws, but on narrower grounds. The Court in *Pace v. Alabama*[12] held that antimiscegenation laws do not offend the equal protection clause because their prohibition applies equally to all races. That is, a black person is just as much constrained by such laws as a white person. Because both races are equally disadvantaged, the Court reasoned, there is no equal protection problem. *Pace*, decided in 1883, was a harbinger of the "separate but equal" philosophy offered by the Court later in *Plessy v. Ferguson*,[13] the decision upholding racial apartheid in general. *Pace* was the parent of *Plessy* in another way, for the popular appeal of segregation in housing, public accommodations, and schooling was based on white fear of interracial mixing and different-race marriage.

The early twentieth century saw the creation of more elaborate legal regimes to regulate different-race marriages. Virginia, for example, updated its antimiscegenation law in the Racial Integrity Act of 1924.[14] The new statute sought the same goal as the former one (avoiding "pollution" of the white race by interracial sexual relations) but sought to implement the policy more thoroughly. The 1924 law made it "unlawful for any white person in this State to marry any

save a white person" and set forth a definition of "white person" for purposes of Virginia law.[15] The law charged local registrars to keep on file certificates of "racial composition"[16] and marriage license officials to require verification of applicants' declarations as to their race.[17] Virginia law not only prohibited a "white person" from marrying someone other than a "white person" but made it a felony to do so; it also made it a felony to file an inaccurate statement of one's race.[18] Post-1924 Virginia law punished interracial couples with one to five years in the state penitentiary.[19]

The Decline and Fall of Antimiscegenation Laws

Pace and the eugenics craze pretty much ended challenges to antimiscegenation laws until after World War II. Thirty states had such laws at the war's end.[c] These laws were increasingly viewed as problematic, partly because of their similarity to the racist regime of the recently defeated Nazis. Added to this, the civil rights movement and its challenge to *de jure* racial segregation drew worldwide attention to American antimiscegenation laws. In his widely read book on American apartheid, Dr. Gunnar Myrdal observed in 1944 that "[t]he ban on interracial marriage has the highest place in the white man's rank order of social segregation and discrimination."[20] Ironically, African Americans did not target these laws as the primary object of legal reform, and two early postwar challenges were brought by couples who were Latino-Caucasian and Asian-Caucasian. Nevertheless, the judicial response to these postwar challenges was mixed. The California Supreme Court struck down its law in *Perez v. Lippold*,[21] while the Virginia Supreme Court upheld its statute in *Naim v. Naim*.[22] Invoking precedent from other states as well as its own policy of racial integrity, the Virginia Supreme Court held that "the natural law which forbids [the Naims'] intermarriage and the social amalgamation which leads to a corruption of the races is as clearly divine as that which imparted to them different natures."

[c]Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virgina, West Virginia, and Wyoming.

In the wake of its controversial decision in *Brown v. Board of Education*, the Warren Court left the divergent state resolutions alone in the 1950s. The Court did act decisively in the 1960s, after half the states had repealed their antimiscegenation laws. In *McLaughlin v. Florida* the Court applied the antidiscrimination principles of *Brown* to invalidate a statute criminalizing interracial cohabitation. Implicitly overruling *Pace*, the Court held that *any* classification based on race is an "invidious discrimination forbidden by the equal protection clause," unless it can be justified by some "overriding state purpose."[23] *McLaughlin* set the stage for the Warren Court's showdown with antimiscegenation laws.

Mildred Jeter and Richard Loving were convicted of violating Virginia's Racial Integrity Act in 1959. Their one-year prison sentence was suspended on condition that they leave Virginia, which they did. Later, the Lovings sought to have their conviction overturned in state court. Notwithstanding *McLaughlin*, they lost in the Virginia courts—for reasons straight out of the nineteenth century. Consistent with the Virginia Supreme Court's reasoning in *Naim*, the trial court held:[24]

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangements there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The Virginia Supreme Court adhered to its decision in *Naim*, where the court had held that the state must have the power "to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there is no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must prevent the corruption of blood even though it weaken or destroy the quality of its citizenship."[25]

The Lovings appealed to the United States Supreme Court. The Supreme Court unanimously reversed the Virginia ruling. Confirming that *McLaughlin* had overruled *Pace*, Chief Justice Warren's opinion held that race-based "classifications" of any kind require a "heavy burden" of state justification. The opinion also rejected the argument that the original intent of the Fourteenth Amendment's framers was

not to interfere with antimiscegenation laws. Although many such statements could be found in the historical record, such an intent was inconsistent with the "broader, organic purpose" of the amendment. In two sentences bursting with history, the chief justice concluded Part I of the opinion by summarily dismissing three centuries of Virginian public policy:[26]

> The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Sixteen state antimiscegenation schemes were thereby constitutionally dissolved. Even though most Virginians and many Americans still do not like different-race marriages, thousands are performed each year in the United States, with no fuss.

The Implications of Loving *for Same-Sex Marriage*

The second part of the *Loving* decision, which recognizes that different-race couples have a fundamental right to marry, bears directly on the right of same-sex couples to marry. The first part of *Loving*, where the Court discusses issues of race discrimination, does not directly implicate same-sex marriage, but its logic is relevant to gay and lesbian challenges to state bars against same-sex marriage.

To begin with, *Loving* rejects defenses similar to those routinely advanced to deny same-sex marriage. For a hundred years definitional arguments had been accepted as sufficient legal justification for antimiscegenation laws. Virginia and other states maintained that different-race marriages are "unnatural"; contrary to American religious and legal traditions; and inconsistent with the overriding purpose of marriage, namely, procreation. The first two arguments are simply the same as those made by opponents of same-sex marriage. The procreation argument is slightly different. Opponents of same-sex marriage claim that same-sex couples cannot procreate whereas opponents of different-race marriage (with some exceptions, such as the Missouri Supreme Court's opinion, quoted earlier) admitted that

different-race couples can procreate but lamented the consequences. Both sets of opponents essentialize marriage around procreation and then exclude couples who cannot procreate in the desired way.

By rejecting these arguments *Loving* cautions us to think twice before we claim that marriage is "inherently" such and such. Neither history nor the Bible nor the imperative of procreation establishes what marriage *must* be, as a matter of law. Marriage is an important social and legal construction, and it is what we *make* it to be. In America marriage has been opened up to virtually any couple who want to take advantage of its legal benefits and obligations. There are few restrictions on who may marry, thanks in part to the Supreme Court decisions protecting the right to marry. Most of the restrictions, such as the bar to different-race marriage, are legally constructed practices reflecting divisive social prejudice rather than sound policy. *Loving* is at odds with the philosophy that historical pedigree alone justifies a dividing practice restricting who may enjoy state benefits. Many arrangements accepted as natural by the founding generation of our society are constitutionally unacceptable in today's world. Slavery and bans on interracial sexuality head the list, which also includes the exclusion of women from political citizenship and their economic and social inequality, the death penalty for sodomy, extraordinary penalties for adultery and fornication, bars against contraception and abortion, limits on who can serve on juries, and property or wealth requirements for voting and other rights of citizenship.

Loving not only rejects the definitional arguments but dismisses them as irrelevant. Although Chief Justice Warren could have cited social science literature (as he did in *Brown*) to refute Virginia's "mongrel race" assumption, he did not bother to do so. In the two sentences quoted earlier the Court noted that the statute only prevented Caucasians from marrying outside their race (Asian- and African-American citizens, for example, could marry one another). What this reasoning revealed was that the statute's goal boiled down to "White Supremacy," a goal that was not only uncompelling but confirmatory of the invidiousness of the racial discrimination effected by the law. What *Loving* rejects, therefore, is not just an essentialist view of marriage but a caste system and its philosophy of white supremacy.

I would read *Loving* in light of the history it reflects. Apartheid was a web of institutions reflecting a caste system in which whites were privileged and blacks subordinated. One institution key to apartheid was marriage, which was defined so as to avoid "pollution" of the white caste, and to prevent confusion as to the caste arrangement generally. As anthropologist Kingsley Davis put it in 1941, "either intermarriage must be strictly forbidden or racial caste abandoned."[27] Dissenting from the Court's sanction of separate-but-equal racial segregation in *Plessy*, Justice John Harlan had warned against the perpetuation of a "caste system" in the United States. "In respect of civil rights, all citizens are equal before the law," he said. *Brown* had adopted Justice Harlan's result. *Loving* adopted Justice Harlan's philosophy and extended it to strike down the dividing practice that was dearest to apartheid. This chapter argues that the state's prohibition of same-sex marriages reflects two related caste systems: an apartheid of the kitchen harmful to women and an apartheid of the closet harmful to gay people.

Either system can be understood as an invidious discrimination violating the constitutional guarantee of equal protection. In both *McLaughlin* and *Loving* the Court seized on the racial *classification* to discredit the states' argument that racial *classes* were being treated equally (whites were just as prohibited as blacks from different-sex marriages). A classification-based attack on bars to same-sex marriage is straightforward because the bars classify according to sex. I am a man. Therefore, I am barred from marrying another man while permitted to marry a woman. This is unequal. Sex-based classifications are subjected to heightened scrutiny under the United States Constitution and state constitutions. You do not get much more sex-based than heterosexual marriage. From another angle, the prohibition against same-sex marriage is even more discriminatory than the prohibition against different-race marriage. Even under *Pace* the states could not enact a law saying African Americans could not marry one another. Yet this is how current state law affects the class of so-called homosexuals: we cannot marry one another. I shall argue that sexual orientation classes should be given some level of constitutional protection against popular prejudice and for the same reasons race and gender classes are protected.

The sex-classification argument and the sexual-orientation-classification argument in this chapter are independent arguments under the equal protection clause. Either is sufficient to invalidate state prohibitions against same-sex marriage under either the national or state constitutions. I make both arguments, and they complement one another.

PROHIBITING SAME-SEX MARRIAGE AS SEX DISCRIMINATION

Relying on Washington State's equal rights amendment, lawyers for John Singer and Paul Barwick were the first to argue in court that the state's refusal to give marriage licenses to same-sex couples is sex discrimination. The state court of appeals rejected their argument in 1974.[28] For the next decade and a half the argument lay dormant, until Professors Sylvia Law and Andrew Koppelman revived it with more sophisticated (feminist) theory and analysis.[29] Ultimately speaking for a majority of the Hawaii Supreme Court, Justice Steven Levinson's opinion in *Baehr v. Lewin* adopted the Law–Koppelman argument as its interpretation of Hawaii's equal rights amendment.[30] The Hawaii court made the right decision, and its logic should be extended to other state constitutions and, ultimately, to the United States Constitution. This part of the chapter lays out the argument, develops a counterargument suggested by *Loving*, and responds to the counterargument.

Same-Sex Marriage Prohibitions Are Sex Discrimination

The state prohibition against same-sex marriage in *Baehr* is on its face sex discrimination in exactly the same way that the prohibition against different-race marriage was held to be race discrimination by *Loving*. In *Loving* a marriage between a *black* man and a black woman was legal, but one between a *white* man and a black woman was not. The only variable (the item that changed, in italics) was the race of one partner. *Loving* held that to be a classification-based race discrimination. In *Baehr* a marriage between a *man* and a woman was legal, but one between a *woman* and a woman was not. The only

variable (the italicized term) was the sex of one partner. *Baehr* held that to be a classification-based sex discrimination.

Loving held that race-based discrimination is invidious and invalid unless justified by a compelling state interest. The Court did so by interpreting the equal protection clause of the Fourteenth Amendment. Although that amendment does not mention race as a classification meriting special attention, as an element of the Reconstruction amendments adopted after the Civil War it nonetheless clearly targets race-based classifications. The Hawaii court was applying Hawaii's equal rights amendment, which is more specific than the federal equal protection clause and reads as follows: "No person shall . . . be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."[31] Sixteen other state constitutions explicitly prohibit discrimination on the basis of sex.[d] It should be clear where I am heading.

How can one avoid the conclusion that a state bar against same-sex marriage is sex discrimination? Judges resisting this conclusion have argued that same-sex couples are denied marriage licenses because of the "recognized definition of marriage," and not because of their sex.[32] Not only is such a definitional argument factually wrong, but it is exactly the same kind of definitional argument Virginia made, and lost, in *Loving*. The Washington Court of Appeals decision denying relief to Singer and Barwick also offered this justification: "The [state] ERA does not create any new rights or responsibilities, such as the conceivable right of persons of the same sex to marry one another;

[d]Provisions similar to Hawaii's, where *sex* is specifically inserted into a broader equal protection clause, are Alaska Constitution, Article I, § 3 (*sex* added 1972); Connecticut Constitution, Article I, § 20 (added 1974); Illinois Constitution, Article I, § 17 (1970 revised constitution); Massachusetts Declaration of Rights, part I, Article I (added 1976); Montana Constitution, Article II, § 4 (1972 revised constitution); New Hampshire Constitution, part I, Article 2 (added 1974); Texas Constitution, Article I, § 3a (added 1972); Virginia Constitution, Article I, § 11 (added 1970); Wyoming Constitution, Article I, § 3 (1889 Constitution).

Some states have clauses specially protecting against sex discrimination, such as Colorado Constitution, Article II, § 29 (equal rights amendment added 1972): "Equality of rights under the law shall not be denied or abridged by the State . . . or any of its political subdivisions on account of sex." To the same effect are Illinois Constitution, Article I, § 8 (equal rights provision in 1970 revised constitution); Maryland Declaration of Rights, Article 46 (added 1972); New Mexico Constitution, Article II, § 18 (added 1972); Pennsylvania Constitution, Article I, § 28 (added 1971); Utah Constitution, Article IV, § 1 (1896 Constitution); Washington Constitution, Article 31, § 1 (added 1972).

rather, it merely insures that existing rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex."[33] The same argument has been made by the Hawaii legislature in response to *Baehr*: "There is simply no class of individuals under [the marriage law] that have been discriminated against in relation to another group of similarly situated individuals. Because all men and all women are treated alike by [the marriage law], there is no sex- (i.e., gender-) based classification."[34] Yet this is precisely the form of argument that had been accepted in *Pace*, which upheld antimiscegenation laws because all "rights and responsibilities" of marriage were "equally available to members of either" race. Whites were barred from different-race marriages in the same manner as blacks. Just as *McLaughlin* and *Loving* overruled *Pace*, so these current precedents cannot be read for any other proposition than the one originally pressed by Singer and Barwick and now invoked by Ninia Baehr and Genora Dancel, namely, that the sex-based classification itself triggers the exacting judicial scrutiny.

Baehr is the correct approach to state equal rights amendments protecting against sex discrimination and ought to be followed in the sixteen other states having such amendments (see note d), as well as in the District of Columbia, which has an equal rights superstatute protecting against sex discrimination.[35] *Baehr*'s reasoning is also applicable to the federal equal protection clause and to analogous state clauses that do not mention "sex." In *Craig v. Boren* the United States Supreme Court interpreted the federal equal protection clause to require that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[36] The Court has repeatedly applied *Craig* to invalidate sex-based classifications, especially where "the statutory objective itself reflects archaic and stereotypic notions."[37] The only issue that remains open is whether sex-based classifications are as completely suspect as race-based classifications are.[38] However that issue is resolved, it is clear that any sex-based classification requires substantial justification under the federal equal protection clause, and state courts are at least as liberal when interpreting their general equal protection provisions.

In short, sex discrimination is now constitutionally questionable in every state and at the national level. As a result, we must carefully examine *all* laws that employ sex-based classifications. Such laws cannot survive constitutional scrutiny unless their defenders can adduce compelling reasons of social policy. Put another way, the burden of proof is now on *opponents* of same-sex marriage because the bar is a sex-based classification.

Must There Be a Link Between Classification and Class?

Baehr was correct to reject the old definition-of-marriage response to the *Loving* analogy, but there is a better objection: Is it not odd that constitutional protection against sex discrimination is invoked to protect gay people? Why should *gay men* benefit from a constitutional protection that is supposed to benefit *women*? The following is a legal way of putting the objection.

Loving holds that the state's use of a racial classification requires a compelling justification, but that holding is expressed in the context of the core purpose of the Fourteenth Amendment, namely, the rejection of a philosophy of white supremacy. In the context of that philosophy the racial classification was revealed to be sinister in a way *Pace* and later *Plessy* refused to recognize: The classification was part of a legal "caste system" subordinating African Americans and other racial groups. *Loving*, therefore, might be narrowly limited as a decision where a particularly invidious classification is used to suppress a group whose identity is defined by that classification. *Baehr* may not be a sex discrimination case in the same way *Loving* is a race discrimination case. The classification in *Baehr* is sex, but the class being disadvantaged is defined by sexual orientation (lesbians, gay men, bisexuals, and some transgendered people), not by sex (women). The philosophy that justifies their disadvantage is "compulsory heterosexuality," that is, the requirement that citizens be (or pretend to be) heterosexual. This may not be the quintessential sex discrimination case, where a sex-based classification disadvantages women on the basis of a philosophy of sexism.

This doctrinal argument parallels the commonsense objection. *Baehr* is not like the classic sex discrimination case because the

classification (sex) does not match up with the disadvantaged class (sexual orientation minorities). That match fails to occur because the disadvantage is the result of compulsory heterosexuality rather than sexism. *Baehr* is also unlike *Loving* for the same reason. Table 1 maps the differences among the cases.[c]

The argument in Table 1 is doctrinally oversimple in one dimension, the middle column (Disadvantaged Class). In *Loving*, for example, the immediately disadvantaged class is composed of people who fall in love with someone of another race. Such people are a minority among both whites and blacks. While African Americans may ultimately have been disadvantaged by the classification, many did not feel that way in 1967 and many do not feel that way now. Racial minorities were disadvantaged by the classification only by reasoning from the ideology (racism or white supremacy). Hence, the middle column in *Loving* reflects an indirect reasoning process rather than direct harm. The Equal Rights Amendment (ERA) line must be qualified in the same way by reference to *Craig v. Boren*, the case that established heightened scrutiny for sex-based classifications. In *Craig* the disadvantaged group was eighteen-to-twenty-one-year-old boys who were denied the right to buy low-alcohol beer, which eighteen-to-twenty-one-year-old girls enjoyed. Justice William Brennan's opinion for the Court emphasized that sex-based classifications ostensibly benefiting men are just as objectionable as those ostensibly benefiting women when they reflect "'archaic and overbroad generalizations'" about women or "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"[39] When sexist assumptions animate a sex-based classification and gender stereotypes are reinforced, women as a group suffer (at least indirectly). Again, the middle column only reflects indirect harm, deriving from the underlying philosophy (sexism) and not from the classification in a particular case (women can buy drinks earlier than men).

This subtler analysis of the miscegenation analogy leaves one question unanswered: Does constitutional doctrine disapproving sex-

[c] I developed Table 1 as a way of commenting on the Law–Koppelman thesis at a panel sponsored by the American Association of Law Schools in January 1995. Professors Law and Koppelman both responded to the doctrinal argument captured by Table 1. I consider their responses persuasive, and they are reflected in the discussion.

TABLE 1

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	Racial minorities	Racism
ERA	Sex	Women	Sexism
Baehr	Sex	Sexual orientation minorities	Compulsory heterosexuality

based classifications rooted in sexism apply to sex-based classifications rooted in compulsory heterosexuality? More simply, does the prohibition of same-sex marriage serve sexist goals? Professors Law and Koppelman have suggested reasons why it does.

Homophobia as a Weapon of Sexism

There is no inevitable connection between the prohibition of same-sex marriage and sexism, as the history in chapter 2 illustrates. Embracing companionate marriage, medieval Christianity represented an advance in women's status, yet it was more (and increasingly) hostile to same-sex male unions than ancient Greece and imperial Rome were. Conversely, ancient Greece was severely sexist by modern standards yet tolerated same-sex unions, especially male unions. Some anthropologists view the African institution of woman marriage as reinforcing patriarchal stereotypes, because the "female husband" takes on the male role. Nonetheless, in the context of modern Western culture there is a strong connection between antihomosexual rules and sexism. Indeed, the construct of "the homosexual" is one modern response to gender equality.[40]

Western history has long stigmatized the "passive" partner in a same-sex male relationship on the ground that he was compromising his "superior" male identity by taking an "inferior" female role. In the modern era, starting no later than the eighteenth century for England, men who lusted after other men were stigmatized as "effeminate sodomites," whatever role they took in intercourse. This represented a historical transition from stigma because of acts to stigma because of

identity. The transition was completed in the late nineteenth century by the appearance of the construct of "the homosexual," the person defined by the new concept of "sexuality." This is the chronology generally accepted by historians of homosexuality. More speculative are the reasons why these cultural changes occurred.

Historian Randolph Trumbach maintains that the effeminate sodomite stigma came when and because "a patriarchal morality that allowed adult men to own and dominate their wives, children, servants and slaves was gradually challenged and partially replaced by an egalitarian morality" of women's equality.[41] Men reacted to this new equality by creating differently defined gender roles. Marriage became a secure refuge of the striving urban bourgeoisie. In a companionate relationship men and women were formally "equal" but functionally unequal. This was possible because their equality was conceptualized by considering each supreme in a separate but equal sphere, that is, men in the workplace and women in the home. This new middle-class equilibrium was necessarily temporary inasmuch as it became possible for women to be economically independent of men. Nineteenth-century feminists demanded not only personal equality for women but also political and social equality. Opponents of women's equality have traditionally argued that it would destroy the family and undermine the institution of marriage. Although still accepted in some quarters, these arguments slowly gave way to women's increasing political clout. As women made gains in politics and the marketplace, middle-class anxiety about gender and the family was displaced onto another object: the homosexual.

Homophobia became one way modern urban culture responded to women's political and social equality.[42] Nervous that their manhood was under seige from the "new woman" (Carroll Smith-Rosenberg's term) and from an increasingly hierarchical economic structure, middle-class men latched onto the class of male "inverts" or homosexuals as their object of special scorn. By setting up the male homosexual as the antithesis of the normal heterosexual, men were reassured of their own sexuality and virility. Power and satisfaction derived from classification and deviance. Homosexual men were threats to the idea of masculinity, for the possibility that a man could

"cross over" into roles and dress traditionally reserved for women impeached the supposed superiority of the masculine role. Although the focus on sexual deviation did not include lesbians at first (but did so by World War II), lesbians, too, came to be seen as threats to male virility: they were the apotheosis of men's fears about feminism, namely, women who had no need for men. The "effeminate man" and "mannish woman" became virtual synonyms in the twentieth century for the male homosexual and the lesbian.

This account is not a demonstrated thesis so much as a coherent hypothesis. Consider other sources of support for the hypothesis. Most feminists (at least among those I have read or talked to) believe that resistance to women's equality, by women as well as men, is associated with antihomosexual patterns of belief. For example, a popular reproach to feminists has long been that they are lesbians and that women's equality will lead to gay marriage and other affronts to family values.[43] Persuasive theories of feminist psychology maintain that the Western concept of masculinity is itself a psychological reaction to men's childhood anxieties about their relationship to their mother and a displacement of those anxieties. Feminized men and masculinized women become objects of intense hatred by men hoping to reaffirm a manhood about which they are deeply uncertain.[44]

Independent survey evidence supports the account given by historians of sexuality and these feminist theorists. Scholars have been studying male homophobia for a quarter century. Many studies emphasize a correlation between antihomosexual feelings and "a belief in the traditional family ideology, i.e., dominant father, submissive mother, and obedient children," as well as "traditional beliefs about women, e.g., that it is worse for a woman to tell dirty jokes than it is for a man."[45] A few studies claim a causal link: "A major determinant of negative attitudes toward homosexuality is the need to keep males masculine and females feminine, that is, to avoid sex-role confusion."[46] One study found a significant correlation between antihomosexual attitudes and one's own conformity to traditional gender roles.[47] Of course, these studies should be read cautiously. Most of them involved small or unrepresentative samples, and causal claims are always suspect.

The Kinsey Institute published an unusually thorough survey using sophisticated statistical analyses in 1989.[48] These researchers found a host of variables positively correlated with antihomosexual attitudes. They were able to map a complicated array of factors associated with those attitudes, and their model employed regression analysis that permitted them to sort out causal from simply associated factors. One variable significantly linked to antihomosexual feelings was respondents' own fears and anxieties about the opposite sex. The researchers believe that people who feel threatened by the opposite sex are hostile to homosexuality as a defense mechanism, displacing an identity-shattering fear onto a socially safe object (gender-bending queers). "Accordingly, we may condemn the homosexual in order to reduce sex role confusion."[49]

Consider the implications of these studies and surveys, of feminist psychology, and of historical theory for the *Baehr* argument. Denying a marriage license to two women simply because one of the partners is not a man is discrimination by reason of a sex-based classification. The ideology that drives this discrimination is deep-seated and arouses fierce emotion in many people. Otherwise, the state would simply make the requirements gender neutral (two persons can get married, rather than a man and a woman), just as the state has since the 1970s routinely rewritten old laws to make them gender neutral (e.g., alimony is now owed to a financially dependent party in a divorce rather than to the wife).

One might simply say that those who oppose same-sex marriage hate homosexuals, but few people will admit that anymore in public discourse.[f] Instead, they will shop around for arguments that support their visceral positions. They may say that it is "unnatural" for two women to get married or that it is "impossible" for men to marry one another. "Who will be the wife?" is a typical crack, usually made in private. (This is a revealing comment, because it signals the underlying fear: If two men can get married, one of them must play housekeeper or the gendered nature of marriage will be lost.)

[f] For a recent example, the current majority leader of the House of Representatives referred to the openly gay representative Barney Frank as "Barney Fag" in a press meeting. The majority leader went to great lengths to cover his tracks, first attacking the media for reporting an allegedly off-the-record remark, then attacking the media for reading antihomosexual implications into a "slip of the tongue," and then apologizing to Representative Frank and indicating his own distaste for homophobic utterances. The slip-of-the-tongue explanation is particularly striking.

The idea that everyone must be heterosexual is closely associated with the idea that every wife must have a husband, which is in turn correlated (though not absolutely) with a belief that the wife rules the home while the husband supports the family. At the level of common sense as well as theory, there is a connection between compulsory different-sex marriage and sexist assumptions. Requiring the state to recognize same-sex marriage (*Baehr*) will not deliver us a world of gender equality any more than requiring the state to equalize beer-drinking ages for men and women did (*Craig*). Both moves do eliminate unjustified sex-based classifications, and they confront traditional views of women's role in society. The federal equal protection clause and state equal rights amendments are more than enough to require the state to show a compelling justification for its discrimination in barring same-sex marriage.

Table 2 maps the result of the foregoing analysis. Parentheses are used for the middle column in order to suggest that the identity of the disadvantaged class is based on inference from the underlying philosophy. In this table, *Baehr* is the same as *Craig* and analytically indistinguishable from *Loving*. *Baehr* and *Craig* involve sex-based classifications derived from a philosophy viewing men and women in traditional (i.e., gendered) terms. In both cases the state is obligated to show a strong interest to justify the continuing discrimination. Likewise, *Baehr* and *Loving* both involve classifications (sex and race, respectively) that restrict the right to marry. As the Supreme Court has interpreted the federal equal protection clause, both classifications

TABLE 2

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	(Racial minorities)	Racism
Craig	Sex	(Women)	Sexism
Baehr	Sex	(Women)	Sexism

are "suspect," for they are red flags triggering heightened scrutiny. Just as the state was unable to carry its burden to justify the invidious discrimination in *Loving* and *Craig*, it will be unable to do so in *Baehr* (for reasons laid out in chapter 5).

Prohibiting Same-Sex Marriage as Sexual Orientation Discrimination

There is a transvestite quality to the argument adopted by the *Baehr* majority. It dresses a gay rights issue up in gender rights garb.[8] Such legal transvestism is not uncommon, and this one is persuasive. But consider a complementary and more direct argument: Prohibiting same-sex marriage is invidious discrimination on the basis of sexual orientation. Several state courts have held that the states have an obligation under their state constitutions to justify such discrimination by reference to a compelling or at least neutral state interest.[50] Judge William Norris has articulated a similar interpretation of the U.S. Constitution.[51] For the reasons that follow, Judge Norris's position ought to be adopted as the standard for the equal protection provisions of both the state and federal constitutions. As we have seen, the exclusion of lesbian and gay couples from marriage would flunk any form of heightened scrutiny.

Issues Suggested by the Racial Classification Cases

The Supreme Court's decisions in *Loving* and *Washington v. Davis*[52] suggest threshold issues for a sexual orientation claim under the equal protection clause. In *Davis* the Supreme Court refused to apply heightened equal protection scrutiny to evaluate the state's use of a personnel test that had the effect of excluding a disproportionate number of African Americans from the civil service. "Standing alone, [disproportionate impact] does not trigger the rule that racial classifications," such as those in *Loving*, "are to be subjected to the strictest

[8]This is even more true of the *Baehr* concurring opinion by Justice James Burns, who believes Baehr and Dancel's equal rights amendment claim can only be justified if they show their sexual orientation to be "biologically fated," or immutable, and therefore part of their "sex." *Baehr*, 852 P.2d at 69-70 (Burns, J., concurring in the judgment).

scrutiny and are justifiable only by the weightiest of considerations."[53] *Davis* raises a question whether there is a sexual orientation "classification" akin to the racial classification struck down in *Loving* and the sex classification struck down in *Craig* and invoked in *Baehr*.

On the other hand, *Davis* denied that "a law's disproportionate impact is irrelevant. . . . A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."[54] For this proposition *Davis* cited *Yick Wo v. Hopkins*,[55] where the Court had invalidated as race-based discrimination a seemingly race-neutral rule that laundry houses must not be constructed of wood. *Yick Wo's* classification operated as a race-based one because it excluded all Chinese American applicants for licenses to run laundries and allowed all but one non-Chinese applicant for such a license. The operation of the state's ban on same-sex marriages is almost as lopsided as the rule in *Yick Wo*, for the large majority of same-sex couples who would desire to get married are homosexual couples. That lopsided effect of the law is no accident, because the state's requirement that marriage involve partners of different sex is animated in large part by the state's insistence on compulsory heterosexuality. Some states express the obvious, providing (as Virginia does) that "homosexual marriage" is prohibited in the jurisdiction. In short, the pervasive class-based effect of the same-sex marriage ban permits challenge of that ban as a discriminatory classification.

A harder issue under *Davis* and *Loving* arises from their shared view that "[t]he *central purpose* of the equal protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of *race*."[56] Ratified in 1868, the Fourteenth Amendment sought to consolidate a new legal regime made possible by the North's victory in the Civil War. The equal protection clause is soaked with race and blood. Why should a constitutional provision concerned with race discrimination be expanded to police issues of sexual orientation? Would the framers of the Fourteenth Amendment have intended such coverage?

To begin with, the equal protection clause is not by its terms limited to racial discrimination. Its assurance that no "person" shall be denied the "equal protection of the laws" is so open textured that the job of the Court has been to narrow its limitless ambit. Serious

judicial scrutiny of legislative classifications will only occur when the legislature is *either* abridging fundamental rights (chapter 5) *or* relying on suspect classifications (this chapter). The phrase *suspect classification* (or sometimes *class*) has become famous in civil rights debates. Often forgotten is that the idea of a *suspect* classification is inspired by the Court's desire to limit the exceedingly broad language of the Fourteenth Amendment.

Does the framers' original intent limit the Court's creativity? The Supreme Court's answer to this question has repeatedly been no. The Court's equal protection jurisprudence finds little support in the framers' original intent. Given pervasive white support for antimiscegenation laws in the 1860s, the Supreme Court in *Loving* did not adopt the pretense that it was simply applying original intent.[57] It was, instead, applying the general antidiscrimination principle when it struck down Virginia's race-based marriage rules. Similarly, the Court's decisions applying heightened scrutiny to sex-based classifications have not been justified by reference to the framers' intent.[58] The framers of the reconstruction amendments made a deliberate decision not to include protections against sex discrimination, and several leading feminists of the 1860s opposed one or more of the amendments for that reason. Scores of sex-based classifications went unchallenged after the adoption of the Fourteenth Amendment, and the Supreme Court upheld these classifications in every case it heard until 1971. As Judge, now Justice, Ruth Bader Ginsburg conceded in 1979, "Boldly dynamic interpretation, departing radically from the original understanding, is required to tie to the Fourteenth Amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities and opportunities."[59]

Loving and decisions strictly scrutinizing sex-based classifications arguably cut against the intent of the framers, who filled the historical record with their views about different-race marriage (against it) and sex-based exclusions (for them). Ironically, an interpretation of the equal protection clause that subjects antigay discrimination to heightened scrutiny would only reach beyond (not necessarily against) the framers' original intent. Because sexual orientation was not even a coherent category of thought in the 1860s (recall the

status of Walt Whitman, discussed in chapter 2), the framers would have had no serviceable intent as to the rationality of laws classifying on the basis of sexual orientation. The framers would have been familiar with sodomy laws, but the laws they knew applied equally to different-sex and same-sex sodomy[h] and had no connection to the not-yet-born idea of sexual orientation. The concept of homosexuality was formulated by a German doctor in 1869, a year after the Fourteenth Amendment was ratified. Although state marriage laws were on their face limited to different-sex marriage in 1868, the concept of gay marriage, which dominates the current debate, was inconceivable. In any event, *Loving* found irrelevant the overwhelming state practice of prohibiting different-race marriages in 1868 and thereafter.

In short, the U.S. Supreme Court and state high courts have not followed an original intent approach to elaborating the equal protection clauses of the federal and state constitutions. Instead, they have pragmatically adopted a category-by-category approach to determining which classifications are "suspect" under the broadly phrased clause.[i] The U.S. Supreme Court has held that classifications based on race, ethnicity, sex, illegitimacy, and (because of the First Amendment) religion are "suspect" and therefore require heightened scrutiny.[60] Over dissents, the Court has held that classifications based on age, income level, physical or mental disability, addiction, and marital status do not require heightened scrutiny.[61] In which grouping does sexual orientation belong? By analogy to the classifications previously categorized (especially sex, the most recent addition) and the reasoning behind their categorization, a neutral analysis would place sexual orientation in the first group.

[h]If the framers had read the sodomy cases that had been reported as of 1868, they would have found that the large majority of cases involved different-sex sodomy (typically between a man and an underage girl) and bestiality, namely, sex between men and barnyard animals. This will be documented in William N. Eskridge, Jr., *Gaylaw*, chapter 1 (Cambridge, MA: Harvard University Press, in press).

[i]Several states (including Hawaii) have equal rights provisions that contain lists of suspect classifications. The argument in the text works less well for these states, unless the category of sexual orientation can be shoehorned into that of sex, as Justice Burns tried to do in *Baehr* (note g above).

Sexual Orientation as an Irrational Classification

Justice Brennan's plurality opinion in *Frontiero v. Richardson* is the Court's primary explanation for why sex-based classifications are suspect. "[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[62] *McLaughlin* had made a similar point about race-based classifications, finding them "in most circumstances irrelevant" to any legitimate state purpose.[63] The same is intuitively true of ethnicity, illegitimate birth, and religion inasmuch as those personal characteristics have no rational relationship to the person's ability to do a job, participate in society and politics, and carry on a productive life. Relatedly, drawing lines based on race, ethnicity, religion, sex, and nonmarital birth is typically motivated by stereotypical rather than fact-based thinking. "These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," the Court has said.[64]

Conversely, the Court has denied heightened scrutiny to classifications that a neutral decision maker will often want to consider. A critical reason the Court gave for declining to subject age-based classifications to heightened scrutiny is that aged people have not been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[65] Age affects people's judgment, physical abilities, and mental capacity, all of which are considerations policymakers ought to be able to take into account. Likewise, the Court declined to give special attention to classifications based on mental disability because "those who are mentally retarded have a reduced ability to cope with and function in the everyday world."[66] The Court's approach to classifications based on income, addiction, and marital status has relied on a similar judgment that these classifications typically serve legitimate social functions and are not pretexts for prejudice.

Sexual orientation classifications almost never serve legitimate state goals. Although once pervasive in American law, most such classifications have been abandoned because neutral observers concluded

that they serve no rational purpose and are, instead, animated by ignorance or prejudice. The case of the immigration exclusion is representative.[67] The McCarran-Walter Act of 1952 prohibited entry into the United States of any person "afflicted with psychopathic personality." This phrase was widely considered a code phrase for "homosexuals" because of medical and psychiatric beliefs that such people are sick.[68] Those beliefs were based on no rigorous neutral or empirical research. As researchers published more rigorous studies, these beliefs came under fire. The evidence has become overwhelming that sexual orientation per se has no connection with intelligence, personality disorder or psychopathy, capacity to interact with others, or the ability to mate and raise a family.[69] After unprecedented debate, the American Psychiatric Association (APA) delisted homosexuality as a mental illness in 1973 on the basis of increasing evidence that "homosexuality per se implies no impairment in judgment, stability, or general social or vocational capabilities."[70] Other professional groups followed the APA's lead, and in 1979 the Public Health Service (PHS) announced that it would no longer cooperate in the exclusion of gay and lesbian immigrants on the basis of the "psychopathic personality" exclusion of the immigration law, which the PHS administered. Lacking the PHS's cooperation, the Immigration and Naturalization Service adopted a "don't ask, don't tell" approach to enforcing the provision, and it went virtually unenforced. In 1990, Congress repealed it. Senate floor manager Alan Simpson, Republican of Wyoming, explained that the exclusion of homosexuals was irrational and grounded on obsolete thinking.[71]

Like the immigration exclusion, one classification after another has been discarded as evidence of its irrationality became too overwhelming to ignore. No impartial judge, no executive officer, no respected professional, no competent senator, no unbiased observer of any scruple is willing to say that sexual orientation bears any relation to lesbian and gay people's ability to participate in and contribute to society. The leading antigay regulation currently in force, the marriage exclusion, is ultimately justified not by any neutral reason but by people's hostility to gay marriage. In short, sexual orientation as a classification is irrational along both dimensions emphasized by the Supreme Court's cases; that is, it is linked to no characteristic neutral

policymakers would normally consider and it is often a pretext for prejudice.

Some judges and commentators have urged that suspect classifications should be limited to those which are immutable.[72] This is an unfortunate attempt to say that in all areas where one has a choice society can make political decisions to reward or punish. Would anyone seriously extend that logic to religion? It makes little sense of the cases or of constitutional theory to require that the identifying characteristic be one that literally cannot be hidden or changed at all. Although sex is widely considered an immutable characteristic, people can successfully conceal their sex and many have changed their sex. Race and, even more so, ethnicity can be concealed. The status of nonmarital children can be changed legally. It is easy to conceal or change one's religion. These suspect classifications are much more mutable than nonsuspect classifications such as age, intelligence, and most forms of disability. To the extent that there is an immutability element in suspect classification law, "a trait [is] effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity."[73]

Sexual orientation may be biologically immutable for at least some people, according to new genetic discoveries and to studies of identical twins separated at birth. This remains an unresolved scientific issue.[74] What is resolved among scientists is that sexual orientation is a characteristic formed early in one's life and that the person has little control over this feature of her or his identity.[75] People can more readily change their religion than change their sexual orientation and can just about as easily change their sex. In all cases (religion, sex, orientation), people's actions can go against their category: Protestants can take Catholic communion and go to confession, women can dress like men, and gay people can date persons of the opposite sex. Passing is possible, but should the benefits of the law depend on denying features of one's personhood? Judge Norris put the immutability question this way: "Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?"[76]

Gay People as a Subordinated Minority

In deciding which classifications should be suspect, the Supreme Court has considered the extent to which the classifications have been used to persecute particular groups in American history.[J] Thus, Justice Brennan's plurality opinion in *Frontiero* emphasized how sex-based classifications had been used to suppress women's interests. Although women had not as a group been subjected to slavery, during most of American history women could neither vote nor hold public office and the law limited their ability to manage property, obtain employment outside the home, or even serve as legal guardians to their children. While "the position of women has improved markedly" in the last three decades, "it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[77] Similarly, racial, ethnic, and religious minorities have all been subjected to legal as well as societal disabilities at various points in American history. All can testify to a history of group discrimination.

Conversely, the Court has sometimes, but not always, emphasized the absence of a history of discrimination when declining to hold a classification suspect. This was the main reason the Court declined to apply heightened scrutiny to age-based classifications, for example. The elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."[78] Although people with disabilities have been objects of prejudice, the

[J]The genesis of the idea is footnote 4 of Carolene Products v. United States, 304 U.S. 144 (U.S. Supreme Court, 1938), where the Court indicated, in dictum, that more searching judicial scrutiny of legislation is justified when it harms "discrete and insular minorities." The Court assumed that such minorities tend to be ill represented in the political process—see John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980)—and tend to be objects of popular prejudice. For reasons developed by Bruce Ackerman, "Beyond *Carolene Products*," 98 *Harvard Law Review* 713 (1985), I do not rely on the "discrete and insular minorities" formulation in the text. Women, for example, are neither insular (everywhere you find men you find women) nor a minority (they are more than half the population). Lesbians and gay men are a minority but are typically anonymous or closeted rather than discrete (you cannot tell by looking) and are often dispersed rather than insular (though there are gay ghettoes in most major cities).

Court believed that "lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[79] As a result, the Court declined to subject disability-based classifications to heightened scrutiny.

People who commit sodomy have been punished, with varying severity, in Western culture for six hundred years or more. Since the creation of the category of sexual invert or homosexual in the latter half of the nineteenth century, there has been distinctly group-focused persecution by individuals and by the state.[80] Being known as a homosexual or associating with known homosexuals triggered all sorts of legal disadvantages as recently as the 1950s: you could not have a job in the federal or most state civil services, have a national security clearance, serve in the armed forces, immigrate to the United States or (if you slipped in by mistake) become a U.S. citizen, use the U.S. mails for your informational magazines, obtain some professional and business licenses, dance with someone of the same sex in a public accommodation, loiter in a public place, hold hands with someone of the same sex anywhere, or (heaven forfend) actually have intercourse with someone of the same sex.[81] Even statutes that were gay neutral on their face, such as vagrancy laws, were used by the police to target gay people and destroy their subculture. For much of this century gay people faced dismissal from their families, private violence and discrimination, and all-out war from the state.

Particularly after the Stonewall riots—when drag queens, dykes, and hangers-on actually resisted police violence against them—gay people have been able to press for the repeal, nullification, or amelioration of sexual orientation classifications. Nonetheless, lesbians, bisexuals, and gay men still live under a cloud of pervasive social homophobia and legal disability. Most gay people have been an object of hate crime or violence. An overwhelming majority of gay people conceal their sexual orientation at work, and a substantial minority have nevertheless suffered workplace discrimination.[82] Societal homophobia affects the ability of gay people to organize politically. Because most gay people are in the closet, their voices are not heard in the political arena. Because gay people remain unpopular, they are available scapegoats for politicians interested in scoring

easy points with voters. Even scrupulous politicians are reluctant to oppose gay bashing, because they reasonably fear a backlash because of their association with a disliked group.

For these reasons, protection of legitimate gay rights has been hard to come by in the political process. Gay rights regulations have been possible mainly in relatively tolerant jurisdictions where they are least needed. Even where such regulations have been adopted, proponents have often had to defend those victories against antihomosexual initiatives and referenda, just as civil rights advocates had to do in the late sixties and early seventies. Antigay amendments proposed in the U.S. Senate are regularly adopted by huge margins, even though they are often dumped behind the closed doors of a conference committee. In short, for every two steps forward the gay rights movement often suffers a step or two backward because of sometimes hysterical backlash against homosexuality.

Classifications according to sexual orientation have no legitimate role in neutral governance. In the past, such classifications have only served invidious goals. The equal protection clause has in the past been a politically necessary means of cleansing American law of classifications based on race, sex, and ethnicity and is just as needed against sexual orientation classifications today. The state's prohibition of same-sex marriage is the primary example of sexual orientation discrimination by the state. Like the immigration exclusion, it should follow the dodo bird's path to extinction.

The analogy between same-sex marriage and miscegenation can now be completed. Table 3 maps the completed analogy.

TABLE 3

	Classification	*Disadvantaged Class*	*Philosophy*
Loving	Race	(Racial minorities)	Racism
Baehr I	Sex	(Women)	Sexism
Baehr II	(Sexual orientation)	Sexual orientation minorities	Compulsory heterosexuality

Denying same-sex couples a marriage license is on its face a sex discrimination and in its effect a sexual orientation discrimination that is motivated by desire(s) both to suppress lesbian and gay couples and to preserve traditional gender roles. Either or both discriminations should trigger heightened scrutiny, and the state's justifications for opposing same-sex marriage are either insufficient or rest on a philosophy of rigid gender roles (the sex discrimination claim) or compulsory heterosexuality (the sexual orientation claim).

In trying to justify its discrimination against this two-pronged attack, the state may face argumentative dilemmas. For example, if it argues that the sexual orientation discrimination is justified by the state interest in procreation (see chapter 4), the state is helping to prove the sex discrimination case, which posits that it is an unacceptable gender stereotype that women get married so that they can be baby producers. If the state argues that the sex discrimination is a benign classification not aimed against women (about the only argument that occurs to me to justify the sex discrimination), it is helping to prove the sexual orientation discrimination case, which posits that the classification is targeted at lesbian and gay couples. The double-barreled argument of sex and sexual orientation discrimination ought to be enough, standing alone, to shoot down the state's prohibition against same-sex marriages. When you add the constitutional arguments based on citizens' fundamental right to marry, the constitutional case becomes irrefutable.

Contact: **Trevor Miller**
(202) 224-8657

Statement of U.S. Senator Russ Feingold
At the Constitution Subcommittee of the Senate Judiciary Committee Hearing on Marriage Laws

March 3, 2004

Mr. Chairman, this is the second time in six months that this Subcommittee has held hearings on the issue of whether the federal government should regulate marriage. Proponents of a federal marriage amendment say that traditional marriage is under attack. They would have the American people believe that there is a national crisis and that renegade judges have run amuck over the will of the people, the laws, and the Constitution. Nothing could be further from the truth.

I believe a constitutional amendment on marriage is unnecessary, divisive, and utterly inconsistent with our constitutional traditions, which this subcommittee has a special responsibility to protect. I object to the use of the constitutional amendment process for political purposes. And I am sorry to say that I believe that is exactly what is going on here. The President supports a constitutional amendment; the Chairman of the Judiciary Committee says he is going to force an amendment through the Committee; and the Chairman of the Republican Conference said this weekend that there will be a vote on the Senate floor on the amendment this year. Yet few believe the effort will be successful. This is a divisive political exercise in an election year, plain and simple.

The regulation of marriage has traditionally been left to the states, and to religious institutions. In addition, our nation has a long tradition of amending the Constitution only as a last resort, when all other means to address an issue have been exhausted and found inadequate. With only one state having recognized same sex marriage, and no state having ever been forced against its will to recognize a same sex marriage from another state, we are miles away from reaching that point on the issue of gay marriage.

The title of this hearing is "Judicial Activism vs. Democracy." On the issue of same-sex marriage, I am especially troubled when I hear this label used because it is not only a gross mischaracterization of the current legal landscape, but it sounds as though advocates of a constitutional amendment think that judges should have no role in our constitutional democracy.

If the *Goodridge* decision, which was based on the Massachusetts state constitution, is really a case of judges imposing their will on the people of Massachusetts, then the people of Massachusetts, through their elected representatives, will surely overrule the court and amend their state constitution. That process, whatever its outcome, is already underway. Similarly, if the people of California or New York disagree with the mayors of San Francisco or New Paltz, and if the courts don't strike down these actions based on current law, the people have ways of making sure their will is carried out.

No one in this room knows what the outcome of these state processes will be. But we do know this: In no state have the people been deprived of their ability to resolve the issue for themselves. The legal and legislative battles, as well as the public debate, have barely begun.

And yet we in the Congress are now being asked to intervene, to answer all these questions, for all states and, effectively, for all time. It is the proponents of this constitutional amendment, not so-called activist judges, who threaten to take this issue away from the American people. It is true that the constitutional amendment process ultimately involves the people through their representatives in the Congress and again, more specifically, in the state ratification process. But I simply fail to see how it is more democratic to have three quarters of the states decide this issue for Massachusetts than to let the people of Massachusetts, or for that matter Wisconsin, decide for themselves.

The proponents of a constitutional amendment say they are worried that same-sex couples will marry in Massachusetts and move or return to other states, demanding recognition of their marriages. But again, no court has yet decided such a case. And, as Professor Dale Carpenter testified at our last hearing, and as we will hear this morning from Professor Lea Brilmayer, it is entirely possible, if not likely, that under the Full Faith and Credit Clause, no court will require a state to recognize a same-sex marriage conducted under another state's laws.

Furthermore, Congress has already acted in this area, and its action so far stands unchallenged. The Defense of Marriage Act, which was enacted in 1996, is effectively a re-

affirmation of the Full Faith and Credit Clause as applied to marriage. It states that no state shall be forced to recognize a same-sex marriage authorized by another state. Although I voted against it, I thought DOMA was passed to prepare for the possibility of one state recognizing gay marriage, as Massachusetts has now done. Why do we now need a constitutional amendment when we don't even know yet whether DOMA successfully addressed the problem it was supposed to address?

Of course, it is possible that the law could change. A case could be brought challenging the federal DOMA, and the Supreme Court could strike it down. But do we really want to amend the Constitution just in case the Supreme Court reaches a particular result? Do we want to launch what amounts to a pre-emptive strike on our Constitution? That should give every American pause.

There is another reason I will oppose a constitutional amendment. An amendment regarding same-sex marriage would write discrimination into the governing document of our nation. The Framers of our Constitution created a document that establishes the structure of our government and protects the liberty of every American. In addition to the Bill of Rights, our Constitution now includes 17 amendments. Leaving aside the misguided prohibition amendment and the amendment that repealed it, some of the amendments adjust the structure of our government, while the rest protect fundamental rights of our citizens. In stark contrast, this amendment targets a specific group of Americans and permanently excludes them from certain rights and benefits.

The most often discussed text for a marriage amendment would not only ban same-sex marriages, it would threaten civil union and domestic partnership laws at the state and local levels. These are laws that have been enacted by and for the people of those particular states and localities through the democratic process. They have allowed same-sex couples and their families to avail themselves of certain benefits that cannot be provided for by contract no matter how much they spend on lawyers.

Mr. Chairman, in the audience today, we have families who would be directly affected by such drastic action. These are families headed by same-sex couples who already do not enjoy the benefits and privileges of marriage that opposite sex couples enjoy. They would be further harmed by a constitutional amendment that stigmatizes them and belittles their aspirations for their families.

The proponents' of a marriage amendment, including the President of the United States, say they want to conduct the debate in a civil manner with respect for those in our society who are gay or lesbian. But taking away a group of people's rights forever can never be

done in a civil manner.

The Constitution is meant to protect rights, not deny them. That is our tradition.

Finally, Mr. Chairman, I am concerned that this Subcommittee is again focused on a remote, hypothetical issue, when there are real problems facing American families today – not a year from now, or a few years from now, or sometime in the future, maybe, but today.

Each year, I visit all 72 counties in Wisconsin and hold a listening session. Those meetings are not organized around a specific topic. Instead, my constituents can come and speak with me about any topic on their minds. In my first 33 listening sessions this year, 1638 people attended and 786 asked questions or made statements. Of the people who stood to ask me questions or offer opinions, 139 people were concerned about Medicare, prescription drugs and the high cost of health care, 83 were concerned about jobs, trade, and the economy, and 76 expressed concern about the situation in Iraq and other foreign affairs issues. Only 11 people raised the issue of gay marriage. Six expressed support for a constitutional amendment, four were opposed, and one person just asked about my position on the issue.

Today, Americans are losing jobs or facing the fear that their jobs will leave the U.S. at any moment. Today, American families are struggling to afford health care and to send their children to college. Today, American families are watching their sons and daughters, husbands and wives, fathers and mothers, go off to serve in Iraq, hoping and praying that they will come home alive.

The American people desperately want us to address these issues. Instead, we are holding our second hearing in six months on a constitutional amendment to address court decisions that may some day be issued, or legislatures that may some day reach conclusions with which some disagree.

This constitutional amendment debate will only divide our country when we need to be united to face and solve our problems.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses.

# # #

BOSTON COLLEGE

LAW SCHOOL

February 26, 2004

Judiciary Committee
United States Senate
Washington, D.C.

Attention: James C. Ho, Majority Chief Counsel
By Fax to (202) 228-2281

Dear Sirs:

This is to recommend an amendment to the United States Constitution to protect the definition of marriage as the union of one man and one woman.

As a Massachusetts law professor specializing in legal theory and marriage at Boston College Law School, I have watched with distress the development of forces aimed at the dissolution of traditional marriage, and I urge you and your colleagues to help prevent their prevailing in the country as a whole.

Some object to such an amendment on grounds of federalism, arguing that each state might better be left to foster the system of marriage that seems best to it. The fact is, however, that a pluralist arrangement, where some states have gay marriage and others do not, is simply not a possible outcome. As soon as one or a few states duly and systematically adopted a regime of gay marriage, the institution would spread throughout the country owing to changes in residence, couples from one state visiting another to obtain a marriage license, and many other interstate phenomena such as the social arrangements in extended families, large corporations, and clubs. We can paraphrase what Lincoln said: the nation could not long remain half for traditional marriage and half licensing gay marriage.

The issue will either be decided by the deliberative process of government at the federal level or it will not be deliberately decided at all but left to the outcome of a race to the most permissive level.

I attach a short column I have witten on some of the other philosophical aspects.

Yours sincerely

Scott FitzGibbon
Professor
Boston College Law School

STUART HOUSE, 885 CENTRE STREET, NEWTON, MASSACHUSETTS 02459-1163
TEL: 617-552-8550 FAX: 617-552-2615

Scott FitzGibbon

Same-Sex Marriage and Plato's "Beautiful City"

Great civilizations fail most dramatically through the misunderstanding and corruption of their central beliefs. The American social and political order could come to grief some day by embracing a distorted view of liberty and equality.

A view is gaining currency which has it that we make people free by maximizing the quantity of their choices, however arbitrary or destructive. Another branch of this ideology has it that we treat people equally when we minimize discrimination – in other words when we erase as many distinctions among them as we can, and ignore the ones we cannot erase.

Plato depicts a deteriorated city where each resident has the license to behave just as he wishes. Each "lives along day by day, gratifying the desire that occurs to him, at one time drinking and listening to the flute, . . . and again idling and neglecting everything; and sometimes spending his time as though he were occupied with philosophy. Often he engages in politics and, jumping up, says and does whatever chances to come to him There is neither order nor necessity in his life."

This man, defensive of his self-indulgence, displays a contempt for what Plato calls the "necessary" and an impatience with all the ties that ought to bind him. "For the sake of a newly-found lady friend and unnecessary concubine such a man will strike his old friend and necessary mother." "For the sake of a newly-found and unnecessary boy friend in the bloom of youth, he will strike his elderly and necessary father."

Such a man also repudiates -- Plato could equally well have said -- the bonds which connect him to his "necessary" wife.

Today attitudes like these are promoted by a culture of easy divorce. The Boston Globe five weeks ago (December 30, page E-2) printed an advice column in which a man who had grown fonder of his mistress asked about the advisability of leaving his wife. His wife was a "good woman," he admitted; and they had a ten-year-old daughter. The Globe's columnist advised him to go right ahead.

Plato's city, besides indulging licentiousness, is characterized by the fading away of distinctions and the blurring of discernment. Its denizens have lost the capacity to discriminate and to treat differences differently.

> "[A] father . . . habituates himself to be like his child and fears his sons, and a son habituates himself to be like his father and to have no shame before or fear of his

> parents . . . . a metic is on an equal level with townsman and townsman with metic, and similarly with the foreigner. . . . [T]he teacher . . . is frightened of the pupils and fawns on them, so the students make light of their teachers . . . . [T]he old come down to the level of the young; imitating the young, they are overflowing with facility and charm, and that's so that they won't seem to be unpleasant or despotic. "

Professor Arlene Saxenhouse characterized Plato's city as one suffering a "blurring of form" and a "forgetfulness of form."

Does it sound familiar? Plato's city is a large-scale Woodstock.

Support for same-sex marriage reflects a confluence of these tendencies. It reflects an ideology of licentiousness which promotes homosexuality in the name of freedom. It reflects an ideology of blurring of form -- an ideology hostile to differentia and anxious to obliterate or ignore them – differences, for example, between men and women.

Here in Massachusetts we are today pressed by our high court to blur one of the most fundamental distinctions of all, that between a man and his wife, on the one hand, and a man and his boyfriend, on the other.

Plato's city morphs into a tyranny. This happens partly because it makes its citizens soft, and partly because it makes them blurry-eyed and weak in discernment. People who will not distinguish between a mother and a mistress, or between the licit and the illicit, will also fall short when it comes go distinguishing between true friend and pretended friend, true leader and false leader, democrat and tyrant.

They will fail to maintain the distinctions between the judge and the advocate, the unconstitutional doctrine and the merely unpopular one. They will fail to discern the difference between those would protect authentic liberty and those who would undermine it.

Let us not allow these things to happen to us.

Scott FitzGibbon is a Professor at Boston College Law School.

Testimony of Maggie Gallagher before The Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights: "What Are the National Implications of the Massachusetts' Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?" March 3, 2004, Room 226, Senate Dirksen Office Building.

Maggie Gallagher is President of the Institute for Marriage and Public Policy (www.marriagedebate.com) and co-author of "The Case for Marriage: Why Married People Are Happier, Healthier, and Better-Off Financially.

This testimony addresses three core concerns: Is marriage worth a Constitutional amendment? Is defining marriage "writing discrimination" into the Constitution? Is a federal marriage amendment necessary?

1. Is Marriage Worth It?

A critic recently raised this question in a particularly intense way by calling the proposed marriage amendment "degrading" "un-American" and "unworthy of our Constitution."

Let me with gravest respect beg to differ. Yes, marriage is the kind of issue that is worthy of our Constitution. Marriage is not a wedge issue. Concern about the impact of profound legal changes on marriage is not degrading. Of course many people find these emotional issues. But in the highest and best traditions of our democracy, we can disagree without denigrating one another. We can discuss our deepest differences with respect for each other as fellow citizens.

Yes marriage is worth it. Marriage is our most basic social institution for protecting children. It is the relationship that every known human society depends on for raising the next generation and insuring the future well-being of the society. Cross-culturally, marriage is a universal human institution and in every known society brings together men and women into a public, not private union so that the children they create have both mothers and fathers.

Does marriage matter? The social science evidence has built a consensus across partisan and ideological lines. The answer is: yes. As a recent Child Trends brief put it, "Research clearly demonstrates that family structure matters for children, and the family structure that helps the most is a family headed by two-biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents."[1]

What are these benefits of marriage? Are they special legal protections that only marital children get? No. Legal protections for children are no longer tied to marital status of parents. How then does marriage protect children? Primarily by affirming a social ideal: children have a right to know and love both their mother and their father. Marriage is the word for the way our culture, and every known culture, transmits to the

next generation this ideal in ways that really do make it more likely that moms and dads raise their children together Of course many children don't have that protection. Many single moms struggle heroically to raise kids on their own. Some kids have no parents and need adoption to get a loving home. Everyone knows the ideal doesn't always happen. Every child is a child of God, and every human being has a dignity we are called to respect.

But when we lose the ideal, the chances of making that dream come true for more children diminish, and the likelihood of deprivation, poverty and suffering for children dramatically increase.

Because marriage is not primarily a benefits-delivery package but a shared social norm, changes in the legal definition of marriage will affect all children, not just children in same-sex households.

Contrary to the assertion of the Goodridge majority, government does not create marriage. A social institution like marriage cannot be called into being merely by passing laws. It requires the combined resources of families, faith, communities, culture, history, law and society. However, in a large, complex society, laws defining marriage play an important role in sustaining the shared meaning of marriage.

The legal structure of marriage, and the unique status conferred on it by both law and society, conveys an absolutely critical message to the next generation: children need mothers and fathers, and marriage is the way you give to your children what they need.

What happens when we lose this common culture of marriage? When the law says fatherless or motherless families are just as good as married mothers and fathers?

What happens when law and government begins to teach the next generation that children don't need moms and dads?

When a marriage culture fails, taxpayers are asked to step in to fund the multitude of social needs created in communities where good enough marriages are not common. Cherished ideals of gender and social equality are threatened as more women face the social and economic disadvantages of single motherhood, and as some children, through no fault of their own are deprived of the profound social, spiritual, emotional, moral, and educational advantages of living with their own mother and father in a decent marriage. Children are put at risk: higher rates of poverty, welfare dependence, teen motherhood, juvenile delinquency, child abuse, sexual abuse, substance abuse, education failure, physical and mental illness.

A society deeply concerned about the suffering, inequality and social and taxpayer costs created by widespread fatherlessness would not consider at this time rewriting its marriage laws to advocate the idea that either parent is dispensable. There must be other better ways to address the legitimate needs of adults and children in alternative family forms.

The Constitution is not to be amended lightly, for passing political causes. Marriage is worth it.

2. Is Marriage Discriminatory?

No. Listen carefully to the implication of the arguments made by the Goodridge court and same-sex marriage advocate: there is nothing special about the unions of husbands and wives who can become mothers and fathers. Two men (or women) raising children together are just the same as a husband and a wife. To believe otherwise, courts and advocates are saying, is irrational bigotry. Laws defining marriage as the union of husband and wife are just like laws that used to ban interracial marriage.

Listen carefully because advocates of same-sex marriage are acknowledging: Same-sex marriage is not just about extending benefits to a small number of needy families. It is about transforming social as well as legal norms. The race analogy implies that people who believe that children need mothers and fathers are the legal and moral equivalents of racists. This idea and the people who believe it must be driven from the public square if same-sex marriage are going to be regarded as fully equal to unions of husbands and wives. Licensing laws, public school curriculum, perhaps even tax exempt status of faith-based organizations will be used to advance this new vision of marriage, if we really believe that defining marriage as the union of husband and wife is invidious and arbitrary discrimination.

Do we? Sixty percent of African-Americans oppose same-sex marriage, as do 60 percent of white Americans, according to a November Pew poll. In the latest CBS News poll, 55 percent of Democrats support a constitutional amendment allowing only a man and a woman to marry. The vast majority of U.S. senators are on record favoring the federal definition of marriage as the union of a man and a woman. Are they all bigots?

Laws banning interracial marriage had nothing to do with the purposes of marriage. They were about keeping two different races separate so that one race could continue to oppress the other. Marriage, by contrast, is about bringing two different sexes together. It strains credulity to believe that marriage was created as a means of expressing animus towards gays and lesbians or any other group.

3. Is a federal amendment necessary?

Yes. Marriage is a national issue because marriage is a key social institution. Without a common, national definition of marriage, our marriage culture will be fragmented as, as judges and public officials impose their own definition of marriage, often against the law and the direct expressed will of the people. A federal marriage amendment is the only way to sustain a common national definition of marriage, which is worthy of its status as a fundamental of civilization.

Same-sex activists themselves are ultimately calling for a national definition of marriage that includes gay marriage, only they seek to use the courts to create this over the will the American people. Why won't civil unions do? "Portability," is the answer most often given. If you are married in Massachusetts you can't be unmarried in South Carolina.

A Constitutional amendment is not a national crisis. Support for it is growing because Americans recognize this is the only way to take the issue off the table, to settle the question of the meaning of marriage in our nation once and for all, so we can move on to other things. The alternative is to let marriage become a political football fought out in thousands of jurisdictions large and small, legal and political, for the foreseeable future.

[1] Kristin Anderson Moore, et al., 2002. "Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?", *Child Trends Research Brief* (Washington, D.C.: Child Trends) (June): 1 (available at http://www.childtrends.org/PDF/MarriageRB602.pdf). For a review and comparison with the social science evidence on unisex parenting, see Maggie Gallagher and Joshua K. Baker, 2004. "Do Mothers and Fathers Matter? The Social Science Evidence on Marriage and Child Well-Being," iMAPP Policy Brief 3 (Washington D.C.: Institute for Marriage and Public Policy) Available as www.marriagedebate.com.

Report of Columbia Law School Equal Rights Advocacy Project

The Legal Status of Women under Federal Law

by Ruth Bader Ginsburg
Brenda Feigen Fasteau

KF
478
.G485
1974

Acknowledgements

We owe thanks to the many colleagues and students whose assistance facilitated preparation of this report. An important role was played by Christine Cassaday Curtis who supervised student research during the initial stages of the work. We are particularly indebted to Barbara A. Brown, Ann E. Freedman, and Harriet N. Katz of the Women's Law Project in Philadelphia, colleagues who prepared and drafted major portions of the Title-by-Title Review.

Large contributions were made by Martin D. Ginsburg, who supplied the substantive analysis of Title 26, and Jane Levine, Columbia Law School student, who assumed principal responsibility for initial preparation of the Title 42 analysis. Invaluable research, drafting and editorial assistance was furnished during the preparatory stage and in composing the report by Columbia Law School student Elaine Scheib.

Columbia Law School students whose research and analyses are reflected in the report include Christopher Brady, Ellen Rebecca Fried, Mary Reynolds Hardin, William Francis Harrison, Samuel Logan Harrison, Jr., Marian McClure Johnston, Donna Krone, Dorothy Ann Lewis, Frank Louis Politano, Gloria Leona Weinberg, and Jonathan David Warner. For careful preparation of the typed manuscript, we are grateful to Jill Hoffman and Ann Frankel.

Ruth Bader Ginsburg
Brenda Feigen Fasteau
September, 1974

100743

U. CONN. SCHOOL OF LAW

Title 48--Territories and Insular Possessions

Sections identified by print-out: 48 U.S.C. §§ 1413, 1415, 1418, 1461*

Two unrelated areas are identified by the print-out: rights accruing to widows of discoverers; restrictions on political rights of persons engaging in specified sexual relationships.

I. Survivors of discoverers (48 U.S.C. §§ 1413, 1415, 1418)

A. Discussion

A discoverer is defined in 48 U.S.C. §1411 as "any citizen of the United States." Though the discoverer may be male or female, 48 U.S.C. §§ 1413, 1415, and 1418 stipulate rights for the discoverer's widow, not widower. The omission probably lacks substantive significance. Widowers are likely to be covered by one of the other enumerated relationships: heir, executor, or administrator of the discoverer.

B. Recommendation

Substitute "surviving spouse" for "widow".

II. Restrictions on political rights of persons engaging in specified sexual relationships (48 U.S.C. §1461)

A. Discussion

This section restricts certain rights, including the right to vote or hold office, of bigamists, persons "cohabiting with more than one woman," and women cohabiting with a bigamist. Apart from the male/female differentials, the provision is of questionable

* Three additional sections were identified by the print-out because they contain the word "sex": 48 U.S.C. §§ 736, 1405p, 1542. Each of these sections involves a prohibition against discrimination with regard to voting based on, inter alia, sex.

constitutionality since it appears to encroach impermissibly upon private relationships. Cf. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 439 (1972).

B. Recommendations

If the section is retained, it should be revised to eliminate sex-based differentials and narrowed to avoid conflict with constitutionally protected privacy interests.

Statement
United States Senate Committee on the Judiciary
Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?
March 3, 2004

The Honorable Orrin Hatch.
United States Senator , Utah

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Hearing on

"JUDICIAL ACTIVISM V. DEMOCRACY: WHAT ARE THE NATIONAL IMPLICATIONS OF THE MASSACHUSETTS GOODRIDGE DECISION AND THE JUDICIAL INVALIDATION OF TRADITIONAL MARRIAGE LAWS?"

Thank you very much, Mr. Chairman. I am for traditional marriage. The foundation of American society is the family, and it is traditional marriage that underpins and sustains the American family. We must always act to maintain and strengthen the family.

Just a few years ago, I helped pass the Defense of Marriage Act (DOMA) to try to prevent one state from forcing another state to adopt its definition of marriage. I believed then and I continue to believe that one state should not be able to determine for another state that it must recognize same-sex marriage.

I commend Senator Cornyn for holding this important hearing today and for his leadership on the Constitution, Civil Rights and Property Rights Subcommittee. As well, I recognize and commend the Ranking Democrat on the subcommittee, Sen. Feingold, for his hard work and insight. I think the hearing which Senator Cornyn held last September clearly showed that DOMA and traditional marriage laws are under serious risk of judicial attack. The Goodridge decision in Massachusetts, which came out after the last hearing, proved this fear to be accurate. It is now clearer to me than ever that courts are usurping the role of legislatures by imposing their own definitions of marriage on the people and that we must do something about this.

The disintegration of the family in this country correlates with many serious social problems, including crime and poverty. We are seeing soaring divorce rates and out-of-wedlock birth rates that have resulted in far too many fatherless families. Weakening the legal status of marriage at this point will only exacerbate these problems.

As to how we approach the problem of courts seizing the decision-making power in this area, I think we need to consider amending the Constitution. Let me be clear: I support President Bush's conclusion that it is time to support and defend traditional marriage. The Musgrave/Allard text, which I support and will vote for, should be seriously considered. I think it would also be prudent if we look at approaches which keep the courts from forcing its definition of marriage on states, and instead let the legislatures and the citizens decide for themselves what is best for them. This is what the democratic process is all about, and there are people all across the political spectrum that share this view. I look forward to discussing the various proposed amendment alternatives in further detail at subsequent hearings.

I look forward to continuing to work on this important family issue with you in the coming weeks and months.

74 Haw. 530, 74 Haw. 645, 852 P.2d 44, 61 USLW 2697
Supreme Court of Hawai'i.
Ninia BAEHR, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, Joseph Melilio, Plaintiffs-Appellants,
v.
John C. LEWIN, in his official capacity as Director of the Department of Health, State of Hawaii, Defendant-Appellee.
No. 15689.
May 5, 1993.
Opinion Granting in Part and Denying in Part Clarification and Reconsideration May 27, 1993.

Applicants whose applications for marriage license were denied solely on ground that they were of the same sex filed complaint alleging that denial of licenses violated their right to privacy and equal protection as guaranteed by the Hawaii Constitution. The First Circuit Court, City and County of Honolulu, granted defendant's motion for judgment on the pleadings, and plaintiffs appealed. The Supreme Court, Levinson, J., held that: (1) section of the Hawaii Constitution does not give rise to fundamental right of persons of the same sex to marry, and (2) statute restricting marital relation to male or female establishes sex-based classification which is subject to "strict scrutiny" test in equal protection challenge.
Vacated and remanded.
James S. Burns, C.J., Intermediate Court of Appeals, concurred in result with opinion.
Walter M. Heen, J., Intermediate Court of Appeals, dissented with opinion.
Heen, J., did not concur in grant of clarification.
Burns, C.J., concurred with opinion.

***535** LEVINSON, Judge, in which MOON, Chief Judge, joins.
The plaintiffs-appellants Ninia Baehr (Baehr), Genora Dancel (Dancel), Tammy Rodrigues (Rodrigues), Antoinette Pregil (Pregil), Pat Lagon (Lagon), and Joseph Melilio (Melilio) (collectively "the plaintiffs") appeal the circuit court's order (and judgment entered pursuant thereto) granting the motion of the defendant-appellee ***536** John C. Lewin (Lewin), in his official capacity as Director of the Department of Health (DOH), State of Hawaii, for judgment on the pleadings, resulting in the dismissal of the plaintiffs' action with prejudice for failure to state a claim against Lewin upon which relief can be granted. Because, for purposes of Lewin's motion, it is our duty to view the factual allegations of the plaintiffs' complaint in a light most favorable to them (*i.e.,* because we must deem such allegations as true) and because it does *not* appear beyond doubt that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to the relief they seek, we hold that the circuit court erroneously dismissed the plaintiffs' complaint. Accordingly, we vacate the circuit court's order and judgment and remand this matter to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

On May 1, 1991, the plaintiffs filed a complaint for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking, *inter alia:* (1) a declaration that Hawaii Revised Statutes (HRS) § 572-1 (1985) [FN1]--the section of the Hawaii Marriage Law enumerating the [r]equisites of [a] valid marriage contract"--***537** is unconstitutional insofar as it is ****49** construed and applied by the DOH to justify refusing to issue a marriage license on the *sole* basis that the applicant couple is of the same sex; and (2) preliminary and permanent injunctions prohibiting the future withholding of marriage licenses on that sole basis.

FN1. HRS § 572-1 provides:

Requisites of valid marriage contract. In order to make valid the marriage contract, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, *brother and sister* of the half as well as to the whole blood, *uncle and niece, aunt and nephew,* whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];

(3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

HRS § 572-1 (1985) (emphasis added). In 1984, the legislature amended the statute to delete the then existing prerequisite that "[n]either of the parties is impotent or *physically incapable of entering into the marriage state*[.]" Act 119, § 1, 1984 Haw.Sess.Laws 238-39 (emphasis added).
Correlatively, section 2 of Act 119 amended HRS § 580-21 (1985) to delete as a ground for annulment the fact "that one of the parties was impotent *or physically incapable of entering into the marriage state*" at the time of the marriage. *Id.* at 239 (emphasis added). The legislature's own actions thus belie the dissent's wholly unsupported declaration, at 8 n. 8, that "the purpose of HRS § 572-1 is to promote and protect propagation...."

In addition to the necessary jurisdictional and venue-related averments, the plaintiffs' complaint alleges the ***538** following facts: (1) on or about December 17, 1990, Baehr/Dancel, Rodrigues/Pregil, and Lagon/Melilio (collectively "the applicant couples") filed applications for marriage licenses with the DOH, pursuant to HRS § 572-6 (Supp.1992); [FN2] (2) the DOH denied the applicant couples' ***539** marriage license applications solely on the ground that the applicant couples were of the same sex; [FN3] (3) the ****50** applicant couples have complied with all marriage contract requirements and provisions under HRS ch. 572, except that each applicant couple is of the same sex; (4) the applicant couples are otherwise eligible to secure marriage licenses from the DOH, absent the statutory prohibition or construction of HRS § 572-1 excluding couples of the same sex from securing marriage licenses; and (5) in denying the applicant

couples' marriage license applications, the DOH was acting in its official capacity and under color of state law.

FN2. HRS § 572-6 provides:

Application; license; limitations. To secure a license to marry, the persons applying for the license shall appear personally before an agent authorized to grant marriage licenses and shall file with the agent an application in writing. The application shall be accompanied by a statement signed and sworn to by each of the persons, setting forth: the person's full name, date of birth, residence; their relationship, if any; the full names of parents; and that all prior marriages, if any, have been dissolved by death or dissolution. If all prior marriages have been dissolved by death or dissolution, the statement shall also set forth the date of death of the last prior spouse or the date and jurisdiction in which the last decree of dissolution was entered. Any other information consistent with the standard marriage certificate as recommended by the Public Health Service, National Center for Health Statistics, may be requested for statistical or other purposes, subject to approval of and modification by the department of health; provided that the information shall be provided at the option of the applicant and no applicant shall be denied a license for failure to provide the information. The agent shall indorse on the application, over the agent's signature, the date of the filing thereof and shall issue a license which shall bear on its face the date of issuance. Every license shall be of full force and effect for thirty days commencing from and including the date of issuance. After the thirty-day period, the license shall become void and no marriage ceremony shall be performed thereon.

It shall be the duty of every person, legally authorized to issue licenses to marry, to immediately report the issuance of every marriage license to the agent of the department of health in the district in which the license is issued, setting forth all the facts required to be stated in such manner and on such form as the department may prescribe.

HRS § 572-6 (Supp.1992).

HRS § 572-5(a) (Supp.1992) provides in relevant part that "[t]he department of health shall appoint ... one or more suitable persons as agents authorized to grant marriage licenses ... in each judicial circuit."

FN3. Exhibits "A," "C," and "D," attached to the plaintiffs' complaint, purport to be identical letters dated April 12, 1991, addressed to the respective applicant couples, from the DOH's Assistant Chief and State Registrar, Office of Health Status Monitoring, which stated:

This will confirm our previous conversation in which we indicated that *the law of Hawaii does not treat a union between members of the same sex as a valid marriage.* We have been advised by our attorneys that *a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes.* In view of the foregoing, *we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572.* Even if we did issue a marriage license to you, *it would not be a valid marriage under Hawaii law.*

(Emphasis added.)

Based on the foregoing factual allegations, the plaintiffs' complaint avers that: (1) the DOH's interpretation and application of HRS § 572-1 to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by article I, section 6 of the Hawaii *540 Constitution, [FN4] as well as to the equal protection of the laws and due process of law, as guaranteed by article I, section 5 of the Hawaii Constitution; [FN5] (2) the plaintiffs have no plain, adequate, or complete remedy at law to redress their alleged injuries; and (3) the plaintiffs are presently suffering and will continue to suffer irreparable injury from the DOH's acts, policies, and practices in the absence of declaratory and injunctive relief.

FN4. Article I, section 6 of the Hawaii Constitution provides:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Haw. Const. art. I, § 6 (1978).

FN5. Article I, section 5 of the Hawaii Constitution provides:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Haw. Const. art. I, § 5 (1978).

On June 7, 1991, Lewin filed an amended answer to the plaintiffs' complaint. In his amended answer, Lewin asserted the defenses of failure to state a claim upon which relief can be granted, sovereign immunity, qualified immunity, and abstention in favor of legislative action. [FN6] With regard to the plaintiffs' factual allegations, Lewin admitted: (1) his residency and status as the director of the DOH; (2) that on or about December 17, 1990, the applicant couples personally appeared before an *541 authorized agent of the DOH and applied for marriage licenses; (3) that the applicant couples' marriage license applications were denied on the ground that each couple was of the same sex; and (4) that the DOH did not address the issue of the premarital examination required by HRS § 572-7(a) (Supp.1992) [FN7] "upon being advised" that the applicant couples were of the same sex. Lewin denied all of the remaining allegations of the complaint.

FN6. Lewin's motion for judgment on the pleadings relied exclusively on the ground that the plaintiffs' complaint failed to state a claim upon which relief could be granted, and the circuit court granted the motion and entered judgment in Lewin's favor on that basis alone. Accordingly, the merits of Lewin's other defenses are not at issue in this appeal, and we do not reach them.

FN7. In substance, HRS § 572-7(a) (Supp.1992) requires "the female" to accompany a marriage license application with a signed physician's statement verifying that she has been given a serological test for immunity against rubella and has been informed of the adverse effects of rubella on fetuses. The statute exempts from the examination requirement those females who provide proof of live rubella virus

immunization or laboratory evidence of rubella immunity, "or who, by reason of age or other medically determined condition [are] not and never will be physically able to conceive a child." *Id.*

***51** On July 9, 1991, Lewin filed his motion for judgment on the pleadings, pursuant to Hawaii Rules of Civil Procedure (HRCP) 12(h)(2) (1990) [FN8] and 12(c) (1990), [FN9] and to dismiss the plaintiffs' complaint, pursuant to HRCP ***542** 12(b)(6) (1990), [FN10] and memorandum in support thereof in ***543** the circuit court. The memorandum was unsupported by and contained no references to any affidavits, depositions, answers to interrogatories, or admissions on file. Indeed, the record in this case suggests that the parties have not conducted any formal discovery.

FN8. HRCP 12(h)(2) (1990) provides in relevant part that "[a] defense of failure to state a claim upon which relief can be granted ... may be made ... by motion for judgment on the pleadings...."

FN9. HRCP 12(c) provides:

Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters
outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

HRCP 12(c) (1990).

HRCP 56 provides in relevant part:

(b) For Defending Party. A party against whom a claim ... is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

....

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set
forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits....

HRCP 56 (1990).

FN10. HRCP 12(b) provides in relevant part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted.... A motion making any of these defenses shall be made before pleading if a further pleading is permitted.... If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
HRCP 12(b) (1990).

In his memorandum, Lewin urged that the plaintiffs' complaint failed to state a claim upon which relief could be granted for the following reasons: (1) the state's marriage laws "contemplate marriage as a union between a man and a woman"; (2) because the only legally recognized right to marry "is the right to enter a heterosexual marriage, [the] plaintiffs do not have a cognizable right, fundamental or otherwise, to enter into state-licensed homosexual marriages"; [FN11] (3) the state's marriage laws do not "burden, penalize, infringe, or interfere ***52** in any way with the [plaintiffs'] private relationships"; (4) the state is under no obligation "to take affirmative steps to provide homosexual unions with its official approval"; (5) the state's marriage laws "protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to ***544** children born to married persons" and, in addition, "constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs"; (6) assuming the plaintiffs are homosexuals (a fact not pleaded in the plaintiffs' complaint), [FN12] they "are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude"; and (7) even if heightened judicial solicitude is warranted, the state's marriage laws "are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained."

FN11. "Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. A "homosexual" person is defined as "[o]ne sexually attracted to another of the same sex." *Taber's Cyclopedic Medical Dictionary* 839 (16th ed. 1989). "Homosexuality" is "sexual desire or behavior directed toward a person or persons of one's own sex." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 680 (1989). Conversely, "heterosexuality" is "[s]exual attraction for one of the opposite sex," *Taber's Cyclopedic Medical Dictionary* at 827, or "sexual feeling or behavior directed toward a person or persons of the opposite sex." *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 667. Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

FN12. Lewin is correct that the plaintiffs' complaint does not allege that the plaintiffs, or any of them, are homosexuals. Thus it is Lewin,
who, by virtue of his motion for judgment on the pleadings, has sought to place the question of homosexuality in issue.

The plaintiffs filed a memorandum in opposition to Lewin's motion for judgment on the pleadings on August 29, 1991. Citing *Au v. Au*, 63 Haw. 210, 626 P.2d 173 (1981), and *Midkiff v. Castle & Cooke, Inc.*, 45 Haw. 409, 368 P.2d 887 (1962), they argued that, for purposes of Lewin's motion, the circuit court was bound to accept all of the facts alleged in their complaint as true and that the complaint therefore could not be dismissed for failure to state a claim unless it appeared beyond doubt that they could prove no set of facts that would entitle them to the relief sought. Proclaiming their homosexuality and asserting a fundamental constitutional right to sexual orientation, the plaintiffs reiterated their position that the DOH's refusal to issue marriage licenses to the applicant couples violated their rights to privacy, equal protection of the laws, and due process of law under article I, sections 5 and 6 of the Hawaii Constitution.
***545** The circuit court heard Lewin's motion on September 3, 1991, and, on October 1, 1991, filed its order granting Lewin's motion for judgment on the pleadings on the basis that Lewin was "entitled to judgment in his favor as a matter of law" and dismissing the plaintiffs' complaint with prejudice. [FN13] The plaintiffs' timely appeal followed.

FN13. A final and appealable judgment in Lewin's favor and against the plaintiffs was filed contemporaneously with the order granting the motion for judgment on the pleadings.

II. JUDGMENT ON THE PLEADINGS WAS ERRONEOUSLY GRANTED.

[1] [2] A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. *Ravelo v. County of Hawaii*, 66 Haw. 194, 198, 658 P.2d 883, 886 (1983) (quoting *Midkiff*, 45 Haw. at 414, 368 P.2d at 890); *Marsland v. Pang*, 5 Haw.App. 463, 474, 701 P.2d 175, 185-86, *cert. denied*, 67 Haw. 686, 744 P.2d 781 (1985). We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. *Ravelo*, 66 Haw. at 199, 658 P.2d at 886. For this reason, in reviewing the circuit court's order dismissing the plaintiffs' complaint in this case, our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true. *Au*, 63 Haw. at 214, 626 P.2d at 177.

[3] [4] An HRCP 12(c) motion serves much the same purpose as an HRCP 12(b)(6) motion, except that it is made after ***546** the pleadings are closed. *Marsland*, 5 Haw.App. at 474, 701 P.2d at 186. " 'A Rule 12(c) motion ... for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.' " ****53** *Id.* at 475, 701 P.2d at 186 (citing 5 Wright and Miller, *Federal Practice and Procedure: Civil* § 1357 (1969)).

[5] [6] Based on the foregoing authority, it is apparent that an order granting an HRCP 12(c) motion for judgment on the pleadings must be based solely on the contents of the pleadings. A claim that is evidentiary in nature and requires findings of fact to resolve cannot properly be disposed of under the rubric of HRCP 12(c). *Cf. Nawahie v. Goo Wan Hoy*, 26 Haw. 111 (1921) ("Only such facts as were properly before the court below at the time of the rendition of the decree appealed from and which appear in the record ... on appeal will be considered. All other matters will be treated as surplusage and of course will be disregarded.") We have recognized that consideration of matters outside the pleadings transforms a motion seeking dismissal of a complaint into an HRCP 56 motion for summary judgment. *See Au*, 63 Haw. at 213, 626 P.2d at 176; *Del Rosario v. Kohanuinui*, 52 Haw. 583, 483 P.2d 181 (1971); HRCP 12(b) (1990); *cf.*

HRCP 12(c) (1990). But resort to matters outside the record, by way of "[u]nverified statements of fact in counsel's memorandum or representations made in oral argument" or otherwise, cannot accomplish such a transformation. *See Au,* 63 Haw. at 213, 626 P.2d at 177; *cf. Asada v. Sunn,* 66 Haw. 454, 455, 666 P.2d 584, 585 (1983); *Mizoguchi v. State Farm Mut. Auto. Ins. Co.,* 66 Haw. 373, 381- 82, 663 P.2d 1071, 1076-77 (1983); HRCP 56(e) (1990).

***547** A. *The Circuit Court Made Evidentiary Findings of Fact.*

Notwithstanding the absence of any evidentiary record before it, the circuit court's October 1, 1991 order granting Lewin's motion for judgment on the pleadings contained a variety of findings of fact. For example, the circuit court "found" that: (1) HRS § 572-1 "does not infringe upon a person's individuality or lifestyle decisions, *and none of the plaintiffs has provided testimony to the contrary* "; (2) HRS § 572-1 "does not ... restrict [or] burden ... the exercise of the right to engage in a homosexual lifestyle"; (3) Hawaii has exhibited a "history of tolerance for all peoples and their cultures"; (4) "*the plaintiffs have failed to show* that they have been ostracized or oppressed in Hawaii and have opted instead to rely on a general statement of historic problems encountered by homosexuals which may not be relevant to Hawaii"; (5) "homosexuals in Hawaii have not been relegated to a position of 'political powerlessness.' ... *[T]here is no evidence* that homosexuals and the homosexual legislative agenda have failed to gain legislative support in Hawaii"; (6) *the "[p]laintiffs have failed to show* that homosexuals constitute a suspect class for equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution;" (7) "the issue of whether homosexuality constitutes an immutable trait has generated much dispute in the relevant scientific community"; [FN14] and (8) HRS § 572-1 "is obviously ***54** designed to promote the general welfare interests of the ***548** community by sanctioning traditional man-woman family units and procreation." (Emphasis added.)

FN14. For the reasons stated *infra* in this opinion, it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuality constitutes "an immutable trait" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. Specifically, the issue is not material to the equal protection analysis set forth in section II.C of this opinion *infra* at 57-67. Its resolution is unnecessary to our ruling that HRS § 572-1, both on its face as applied, denies same-sex couples access to the marital status and its concomitant rights and benefits. Its resolution is also unnecessary to our conclusion that it is the state's regulation of access to the marital status, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution. *See infra* at 58-63. And, in particular, it is immaterial to the exercise of "strict scrutiny" review, *see infra* at 63-67, inasmuch as we are unable to perceive any conceivable relevance of the issue to the ultimate conclusion of law--which, in the absence of further evidentiary proceedings, we cannot reach at this time--regarding whether HRS § 572-1 furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights. *See infra* at 67-68.

In light of the above, we disagree with Chief Judge Burns's position that "questions whether heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated' are relevant questions of fact." Concurring opinion at 3. This preoccupation seems simply to restate the immaterial question whether sexual orientation is an "immutable trait."

Although not expressly denominated as such, the circuit court's order also contained a number of conclusions of law. [FN15] These included: (1) "[t]he right to enter into a homosexual marriage is not a fundamental right protected by [a]rticle I, [s]ection 6 of the Hawaii State Constitution"; (2) the right to be free from the denial of a person's ***549**

civil rights or from discrimination in the exercise thereof because of "sexual orientation [is] ... covered under [a]rticle I, [s]ection 5 of the State Constitution"; (3) HRS § 572-1 "permits heterosexual marriages but not homosexual marriages" and "does not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (4) HRS § 572-1 "represents a legislative decision to extend the benefits of lawful marriage only to traditional family units which consist of male and female partners"; (5) "[b]ecause [entering into a] homosexual marriage [is not] a fundamental [constitutional] right ..., the provisions of section 572-1 do not violate the due process clause of [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (6) "[h]omosexuals do not constitute a 'suspect class' for purposes of equal protection analysis under [a]rticle I, [s]ection 5 of the Hawaii State Constitution"; (7) "a group must have been subject to purposeful, unequal treatment or have been relegated to a position of political powerlessness in order to be considered a 'suspect class' for the purposes of constitutional analysis"; (8) "[a] law which classifies on the basis of race deserves the utmost judicial scrutiny because race clearly qualifies as a suspect classification. The same cannot be convincingly said with respect to homosexuals as a group"; (9) "the classification created by section 572-1 must meet only the rational relationship test"; (10) "[t]he classification of section 572-1 meets the rational relationship test"; (11) "[s]ection 572-1 is clearly a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry"; and, finally, (12) Lewin "is entitled to judgment in his favor as a matter of law[.]"

FN15. A "conclusion of law," for present purposes, is either: (1) a "[f]inding by [the] court as determined through application of rules of law"; (2) "[p]ropositions of law which [the] judge arrives at after, and as a result of, finding certain facts in [the] case[;]" or (3) "[t]he final judgment or decree required on [the] basis of facts found [.]" *Black's Law Dictionary* 290 (6th ed. 1990). The second category may constitute such "mixed questions of fact and law" as "are dependent upon the facts and circumstances of each individual case[.]" *See Coll v. McCarthy*, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991).

In reviewing the circuit court's order on appeal, as noted above, we must deem all of the *factual* allegations of ***550** the plaintiffs' complaint as true or admitted, *see Au*, 63 Haw. at 214, 626 P.2d at 177; *Marsland*, 5 Haw.App. at 475, 701 P.2d at 186, and, in the absence of an evidentiary record, ignore all of the circuit court's findings of fact. *See Au*, 63 Haw. at 213, 626 P.2d at 177; *Marsland*, 5 Haw.App. at 475, 701 P.2d at 186; *cf. Asada*, 66 Haw. at 455, 666 P.2d at 585; *Mizoguchi*, 66 Haw. at 381-82, 663 P.2d at 1076-77; *Nawahie*, 26 Haw. at 111; HRCP 12(c) and 56(e). Ultimately, our task on appeal is to determine whether the circuit court's order, stripped of its improper factual findings, supports its conclusion that Lewin is entitled to judgment as a matter of law and, by implication, that it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief under any alternative theory. *See Ravelo*, 66 Haw. at 198-99, 658 P.2d 883; *Au*, 63 Haw. at 214, 626 P.2d at 177; *Marsland*, 5 Haw.App. at 474-75, 701 P.2d 175.
We conclude that the circuit court's order runs aground on the shoals of the Hawaii Constitution's equal protection clause and that, on the record before us, unresolved factual questions preclude entry of judgment, as a matter of law, in favor of Lewin and against the plaintiffs. Before we address the plaintiffs' equal protection claim, however, it is necessary as a threshold matter to consider their allegations regarding the right to privacy (and, derivatively, ***55** due process of law) within the context of the record in its present embryonic form.
B. *The Right to Privacy Does Not Include a Fundamental Right to Same-Sex Marriage.*

[7] [8] It is now well established that " 'a right to personal privacy, or a guarantee of certain areas or zones of privacy,' is implicit in the United States

Constitution." ***551** State v. Mueller, 66 Haw. 616, 618, 671 P.2d 1351, 1353 (1983) (quoting *Roe v. Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973)). And article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." Haw. Const. art. I, § 6 (1978). The framers of the Hawaii Constitution declared that the "privacy concept" embodied in article I, section 6 is to be "treated as a fundamental right[.]" *State v. Kam,* 69 Haw. 483, 493, 748 P.2d 372, 378 (1988) (citing Comm.Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 1024 (1980)).

When article I, section 6 of the Hawaii Constitution was being adopted, the 1978 Hawaii Constitutional Convention, acting as a committee of the whole, clearly articulated the rationale for its adoption:

By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis.... This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut,* [381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)], *Eisenstadt v. Baird,* [405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972)], *Roe v. Wade,* etc. It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding ***552** this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

Comm.Whole Rep. No. 15, 1 Proceedings, at 1024. This court cited the same passage in *Mueller,* 66 Haw. at 625-26, 671 P.2d at 1357-58, in an attempt to determine the "intended scope of privacy protected by the Hawaii Constitution." *Id.* at 626, 671 P.2d at 1358. We ultimately concluded in *Mueller* that the federal cases cited by the Convention's committee of the whole should guide our construction of the intended scope of article I, section 6. *Id.*

[9] Accordingly, there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail,* 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978). The issue in the present case is, therefore, whether the "right to marry" protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in *Mueller,* looks to federal cases for guidance.

The United States Supreme Court first characterized the right of marriage as fundamental in *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). In *Skinner,* the right to marry ***553** was inextricably linked to the right of procreation. The dispute before the Court arose out of an Oklahoma statute that allowed the state to sterilize "habitual criminals" without their consent. In striking down the statute, the *Skinner* court ****56** indicated that it was "dealing ... with legislation which involve[d] *one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.*" *Id.* at 541, 62 S.Ct. at 1113 (emphasis added). Whether the Court viewed marriage and procreation as a single indivisible right, the least that can be said is that it was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental. This is hardly surprising inasmuch as none of the United States sanctioned any other marriage

configuration at the time.
The United States Supreme Court has set forth its most detailed discussion of the fundamental right to marry in *Zablocki, supra,* which involved a Wisconsin statute that prohibited any resident of the state with minor children "not in his custody and which he is under obligation to support" from obtaining a marriage license until the resident demonstrated to a court that he was in compliance with his child support obligations. 434 U.S. at 376, 98 S.Ct. at 675. The *Zablocki* court held that the statute burdened the fundamental right to marry; applying the "strict scrutiny" standard to the statute, the Court invalidated it as violative of the fourteenth amendment to the United States Constitution. *Id.* at 390-91, 98 S.Ct. at 683. In so doing, the *Zablocki* court delineated its view of the evolution of the federally recognized fundamental right of marriage as follows:
Long ago, in *Maynard v. Hill,* 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court characterized marriage as "the most important relation ***554** in life," *id.,* at 205, 8 S.Ct., at 726, and as "the foundation of the family and of society, without which there would be neither civilization nor progress," *id.,* at 211, 8 S.Ct., at 729. In *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause, *id.,* at 399, 43 S.Ct., at 626, and in *Skinner v. Oklahoma ex rel. Williamson, supra,* ... marriage was described as "fundamental to the very existence and survival of the race," 316 U.S., at 541, 62 S.Ct., at 1113.
....
It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, see *Roe v. Wade, supra,* or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illigitimacy brings.... Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only ***555** relationship in which the State of Wisconsin allows sexual relations legally to take place.
Id. at 384-86, 98 S.Ct. at 680-81 (citations and footnote omitted). Implicit in the *Zablocki* court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others.

[10] The foregoing case law demonstrates that the federal construct of the fundamental right to marry--subsumed within the right to privacy implicitly protected by the United States Constitution--presently contemplates unions between men and women. (Once again, this is hardly surprising inasmuch as such unions are the only state-sanctioned marriages currently acknowledged in this country.)

[11] Therefore, the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, ****57** or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right. There is no doubt that "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection [under article I, section 6 of the Hawaii Constitution] than that given by the federal constitution." *Kam,* 69 Haw. at 491, 748 P.2d at 377 (citations omitted). However, we have also held that the privacy right found in article I, section 6 is similar to the federal right and that no

"purpose to lend talismanic effect" to abstract phrases such as "intimate decision" or "personal autonomy" can "be inferred from [article I, section 6], any more than ... from *556 the federal decisions." *Mueller,* 66 Haw. at 630, 671 P.2d at 1360.
In *Mueller,* this court, in attempting to circumscribe the scope of article I, section 6, found itself ultimately "led back to" the landmark United States Supreme Court cases "in [its] search for guidance" on the issue. *Id.* at 626, 671 P.2d at 1358. In the case that first recognized a fundamental right to privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Court declared that it was "deal[ing] with a right ... older than the Bill of Rights[.]" *Id.* at 486, 85 S.Ct. at 1682. And in a concurring opinion, Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but
to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] ... as to be ranked as fundamental." ... The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ...."
Id. at 493, 85 S.Ct. at 1686-87 (Goldberg, J., concurring) (citations omitted). [FN16]

FN16. In *Mueller,* this court cited *Palko v. Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), for the proposition that only rights that are implicit in the concept of ordered liberty can be deemed fundamental. Pursuant to that standard, this court held that a prostitute
did not have a fundamental right under article I, section 6 of the Hawaii Constitution to conduct business in her own home. 66 Haw. at 628, 630, 671 P.2d at 1359-60.

[12] Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our *557 people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.
Our holding, however, does not leave the applicant couples without a potential remedy in this case. As we will discuss below, the applicant couples are free to press their equal protection claim. If they are successful, the State of Hawaii will no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex. But there is no fundamental right to marriage for same-sex couples under article I, section 6 of the Hawaii Constitution.
C. *Inasmuch as the Applicant Couples Claim That the Express Terms of HRS § 572-1, which Discriminates against Same-Sex Marriages, Violate Their Rights under the Equal Protection Clause of the Hawaii Constitution, the Applicant Couples Are Entitled to an Evidentiary Hearing to Determine Whether Lewin Can Demonstrate that HRS § 572-1 Furthers Compelling State Interests and Is Narrowly Drawn to Avoid Unnecessary Abridgments of Constitutional Rights.*
In addition to the alleged violation of their constitutional rights to privacy and **58 due process of law, the applicant couples contend that they have been denied the equal protection of the laws as guaranteed by *558 article I, section 5 of the Hawaii Constitution. On appeal, the plaintiffs urge and, on the state of the bare record before us, we agree that the circuit court erred when it concluded, *as a matter of law,* that: (1) homosexuals do not constitute a "suspect class" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution; [FN17] (2) the classification created by HRS § 572-1 is not subject to "strict scrutiny," but must satisfy

only the "rational relationship" test; and (3) HRS § 572-1 satisfies the rational relationship test because the legislature "obviously designed [it] to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."

FN17. For the reasons stated *infra* in this opinion, it is
irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a "suspect class" because it is immaterial whether the plaintiffs, or any of them, are homosexuals. *See supra* note 14.

1. Marriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation.

[13] [14] The power to regulate marriage is a sovereign function reserved exclusively to the respective states. *Salisbury v. List,* 501 F.Supp. 105, 107 (D.Nev.1980); *see O'Neill v. Dent,* 364 F.Supp. 565 (E.D.N.Y.1973). By its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the ***559** grounds for marital dissolution. *Id.; see also Maynard v. Hill, supra.*

[15] [16] In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship. This court construes marriage as " 'a partnership to which both partners bring their financial resources as well as their individual energies and efforts.' " *Gussin v. Gussin,* 73 Haw. 470, 483, 836 P.2d 484, 491 (1992) (citation omitted); *Myers v. Myers,* 70 Haw. 143, 154, 764 P.2d 1237, 1244, *reconsideration denied,* 70 Haw. 661, 796 P.2d 1004 (1988); *Cassiday v. Cassiday,* 68 Haw. 383, 387, 716 P.2d 1133, 1136 (1986). So zealously has this court guarded the state's role as the exclusive progenitor of the marital partnership that it declared, over seventy years ago, that "common law" marriages--*i.e.,* "marital" unions existing in the absence of a state-issued license and not performed by a person or society possessing governmental authority to solemnize marriages--would no longer be recognized in the Territory of Hawaii. *Parke v. Parke,* 25 Haw. 397, 404-05 (1920). [FN18]

FN18. In *Parke,* a "common law" petitioner sought unsuccessfully to derive the benefits of inheritance rights unique to a married spouse, apparently having affirmatively chosen not to seek the state-conferred status of a lawful marriage "partner." *Id.* at 398, 405. A "same sex spouse" suffered the identical fate in *De Santo v. Barnsley,* 328 Pa.Super. 181, 476 A.2d 952 (1984) (two persons of same sex cannot contract common law marriage, notwithstanding state's recognition of common law marriage between persons of different sex), a decision on which Lewin
relies in his answering brief. It is ironic that, in arguing before the circuit court that Hawaii's marriage laws do not "burden, penalize, infringe, or interfere in any way with the [plaintiffs'] private relationships" and in urging before this court that their "relationships are not disturbed in any manner by" HRS § 572-1, Lewin implicitly suggests that the applicant couples should be content with a *de facto* status that the state declines to acknowledge *de jure* and that lacks the statutory rights and benefits of marriage. *See infra,* at 58-59.

***560** Indeed, the state's monopoly on the business of marriage creation has been

codified by statute for more than a century. HRS § 572-1(7), descended from an 1872 statute of the Hawaiian Kingdom, conditions a valid marriage contract on "[t]he marriage ceremony be[ing] performed in the State by a person or society with a valid license to solemnize marriages[.]" ***59** HRS § 572- 11 (1985) accords the DOH sole authority to grant licenses to solemnize marriages, and HRS § 572-12 (1985) restricts the issuance of such licenses to clergy, representatives of religious societies (such as the Society of Friends) not having clergy but providing solemnization by custom, and judicial officers. Finally, HRS §§ 572-5 and 572-6 vest the DOH with exclusive authority to issue licenses to marriage applicants and to ensure that the general requisites and procedures prescribed by HRS chapter 572 are satisfied.

The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. Although it is unnecessary in this opinion to engage in an encyclopedic recitation of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates, under HRS chapter 235 (1985 and Supp.1992); (2) public assistance from and exemptions relating to the Department of Human Services under HRS chapter 346 (1985 and Supp.1992); (3) control, division, acquisition, and disposition of community ***561** property under HRS chapter 510 (1985); (4) rights relating to dower, curtesy, and inheritance under HRS chapter 533 (1985 and Supp.1992); (5) rights to notice, protection, benefits, and inheritance under the Uniform Probate Code, HRS chapter 560 (1985 and Supp.1992); (6) award of child custody and support payments in divorce proceedings under HRS chapter 571 (1985 and Supp.1992); (7) the right to spousal support pursuant to HRS § 572-24 (1985); (8) the right to enter into premarital agreements under HRS chapter 572D (Supp.1992); (9) the right to change of name pursuant to HRS § 574-5(a)(3) (Supp.1992); (10) the right to file a nonsupport action under HRS chapter 575 (1985 and Supp.1992); (11) post-divorce rights relating to support and property division under HRS chapter 580 (1985 and Supp.1992); (12) the benefit of the spousal privilege and confidential marital communications pursuant to Rule 505 of the Hawaii Rules of Evidence (1985); (13) the benefit of the exemption of real property from attachment or execution under HRS chapter 651 (1985); and (14) the right to bring a wrongful death action under HRS chapter 663 (1985 and Supp.1992). For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage.

2. HRS § 572-1, on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution.

[17] Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible ***562** state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints. *See, e.g., Zablocki,* 434 U.S. at 388-91, 98 S.Ct. at 682-83; *Loving v. Virginia,* 388 U.S. 1, 7-12, 87 S.Ct. 1817, 1821- 24, 18 L.Ed.2d 1010 (1967); *Salisbury,* 501 F.Supp. at 107 (citing *Johnson v. Rockefeller,* 58 F.R.D. 42 (S.D.N.Y.1972)). It has been held that a state may deny the right to marry only for compelling reasons. *Salisbury,* 501 F.Supp. at 107; *Johnson, supra.* [FN19]

FN19. For example, states, including Hawaii, may and do prohibit marriage for such "compelling" reasons as consanguinity (to prevent incest), *see, e.g.,* HRS § 572-1(1), immature age (to protect the welfare of children), *see, e.g.,* HRS §§ 572-1(2) and 572-2 (1985), presence of venereal disease (to foster public health), *see, e.g.,* HRS § 572-

1(5), and to prevent bigamy, *see, e.g.,* HRS § 572-1(3). *See also Zablocki,* 434 U.S. at 392, 98 S.Ct. at 684 (concurring opinion of Stewart, J.); *Salisbury,* 501 F.Supp. at 107.

[18] The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution somewhat concisely provides, in relevant part, that a state may not "deny to any person within its jurisdiction the ***60** equal protection of the laws." Hawaii's counterpart is more elaborate. Article I, section 5 of the Hawaii Constitution provides in relevant part that "[n]o person shall ... be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of* race, religion, *sex,* or ancestry." (Emphasis added.) Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly ***563** pursuit of happiness by free [people]." *Loving,* 388 U.S. at 12, 87 S.Ct. at 1824. So "fundamental" does the United States Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of [men and women.]' " *Id.* (quoting *Skinner,* 316 U.S. at 541, 62 S.Ct. at 1113). *Black's Law Dictionary* (6th ed. 1990) defines "civil rights" as synonymous with "civil liberties." *Id.* at 246. "Civil liberties" are defined, *inter alia,* as "[p]ersonal, natural rights guaranteed and protected by Constitution; *e.g.,* ... freedom from discrimination.... Body of law dealing with natural liberties ... which invade equal rights of others. Constitutionally, they are restraints on government." *Id.* This court has held, in another context, that such "privilege[s] of citizenship ... cannot be taken away [on] any of the prohibited bases of race, religion, *sex* or ancestry" enumerated in article I, section 5 of the Hawaii Constitution and that to do so violates the right to equal protection of the laws as guaranteed by that constitutional provision. *State v. Levinson,* 71 Haw. 492, 499, 795 P.2d 845, 849-50 (1990) (exclusion of female jurors solely because of their sex denies them equal protection under Hawaii Constitution) (emphasis added).

[19] [20] Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and a female. " '[T]he fundamental starting point for statutory interpretation is the language of the statute itself.... [W]here the statutory language is plain and unambiguous,' " we construe it according " 'to its plain and obvious meaning.' " *Schmidt v. Board. of Directors of Ass'n of Apartment Owners of The Marco Polo Apartments,* 73 Haw. 526, 531-32, 836 P.2d 479, 482 (1992); ***564** *In re Tax Appeal of Lower Mapunapuna Tenants Ass'n,* 73 Haw. 63, 68, 828 P.2d 263, 266 (1992). The non-consanguinity requisite contained in HRS § 572-1(1) precludes marriages, *inter alia,* between "brother and sister," "uncle and niece," and "aunt and nephew[.]" The anti-bigamy requisite contained in HRS § 572-1(3) forbids a marriage between a "man" or a "woman" as the case may be, who, at the time, has a living and "lawful wife ... [or] husband[.]" And the requisite, set forth in HRS § 572-1(7), requiring marriage ceremonies to be performed by state-licensed persons or entities expressly speaks in terms of "the man and woman to be married[.]" [FN20] Accordingly, on its face and (as Lewin admits) as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

FN20. That the legislature, in enacting HRS ch. 572, obviously contemplated marriages between persons of the opposite sex is not, however, outcome dispositive of the

plaintiffs' claim. Legislative action, whatever its motivation, cannot sanitize constitutional violations. *Cf.* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448, 105 S.Ct. 3249, 3259, 87 L.Ed.2d 313 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order ... action violative of the Equal Protection Clause.")

Relying primarily on four decisions construing the law of other jurisdictions, [FN21] ***61** Lewin contends that "the fact that ***565** homosexual [sic--actually, same-sex] [FN22] partners cannot form a state-licensed marriage is not the product of impermissible discrimination" implicating equal protection considerations, but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire." Lewin's answering brief at 21. Put differently, Lewin proposes that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." *Id.* at 7. We believe Lewin's argument to be circular and unpersuasive.

FN21. The four decisions are *Jones v. Hallahan,* 501 S.W.2d 588 (Ky.Ct.App.1973); *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *De Santo v. Barnsley, supra;* and *Singer v. Hara,* 11 Wash.App. 247, 522 P.2d 1187, *review denied,* 84 Wash.2d 1008 (1974).

FN22. *See supra* note 11.

Two of the decisions upon which Lewin relies are demonstrably inapposite to the appellant couples' claim. In *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972), the questions for decision were whether a marriage of two persons of the same sex was authorized by state statutes and, if not, whether state authorization was compelled by various provisions of the United States Constitution, including the fourteenth amendment. Regarding the first question, the *Baker* court arrived at the same conclusion as have we with respect to HRS § 572-1: by their plain language, the Minnesota marriage statutes precluded same-sex marriages. Regarding the second question, however, the court merely held that the United States Constitution was not offended; apparently, no state constitutional questions were raised and none were addressed.
De Santo v. Barnsley, 328 Pa.Super. 181, 476 A.2d 952 (1984), is also distinguishable. In *De Santo,* the court ***566** held only that common law same-sex marriage did not exist in Pennsylvania, a result irrelevant to the present case. The appellants sought to assert that denial of same-sex common law marriages violated the state's equal rights amendment, but the appellate court expressly declined to reach the issue because it had not been raised in the trial court.
Jones v. Hallahan, 501 S.W.2d 588 (Ky.Ct.App.1973), and *Singer v. Hara,* 11 Wash.App. 247, 522 P.2d 1187, *review denied,* 84 Wash.2d 1008 (1974), warrant more in-depth analysis. In *Jones,* the appellants, both females, sought review of a judgment that held that they were not entitled to have a marriage license issued to them, contending that refusal to issue the license deprived them of the basic constitutional rights to marry, associate, and exercise religion freely. In an opinion acknowledged to be "a case of first impression in Kentucky," the Court of Appeals summarily affirmed, ruling as follows:
Marriage was a custom long before the state commenced to issue licenses for that purpose.... [M]arriage has always been considered as a union of a man and a woman.... It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk ... to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.
....

In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage. 501 S.W.2d at 589-90.
***567** Significantly, the appellants' equal protection rights--federal or state--were not asserted in *Jones,* and, accordingly, the appeals court was relieved of the necessity of addressing and attempting to distinguish the decision of the United States Supreme Court in *Loving. Loving* involved the appeal of a black woman and a caucasian man (the Lovings) who were married in the District of Columbia and thereafter returned to their home state of Virginia to establish their marital abode. 388 U.S. at 2, 87 S.Ct. at 1819. The Lovings were duly indicted ***62** for and convicted of violating Virginia's miscegenation laws, [FN23] which banned interracial marriages. *Id.* [FN24] In his sentencing decision, the trial judge stated, in substance, that Divine Providence had not intended that the marriage state extend to interracial unions:

FN23. Virginia's miscegenation laws "arose as an incident to slavery and [were] common ... since the colonial period." 388 U.S. at 6, 87 S.Ct. at 1820-21. It is noteworthy that one of the "central provisions" of the statutory miscegenation scheme *automatically voided* all marriages between "a white person and a colored person" without the need for any judicial proceeding. *Id.* at 4, 87 S.Ct. at 1820.

FN24. As of 1949, the following thirty of the forty-eight states banned interracial marriages by statute: Alabama; Arizona; Arkansas; California; Colorado; Delaware; Florida; Georgia; Idaho; Indiana; Kentucky; Louisiana; Maryland; Mississippi; Missouri; Montana; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; Oregon; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; and Wyoming. 388 U.S. at 6 n. 5, 87 S.Ct. at 1820 n. 5. When the Lovings commenced their lawsuit on October 28, 1964, sixteen states still had miscegenation laws on the books. *Id.* at 3, 6 n. 5, 87 S.Ct. at 1819, 1820 n. 5. The first state court to recognize that miscegenation statutes violated the right to the equal protection of the laws was the Supreme Court of California in *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948). 388 U.S. at 6 n. 5, 87 S.Ct. at 1820-21 n. 5.

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that *he did not intend for the races to mix.*"
Id. at 3, 87 S.Ct. at 1819 (quoting the trial judge) (emphasis added).
***568** The Lovings appealed the constitutionality of the state's miscegenation laws to the Virginia Supreme Court of Appeals, which, *inter alia,* upheld their constitutionality and affirmed the Lovings' convictions. *Id.* at 3-4, 87 S.Ct. at 1819. [FN25] The Lovings then pressed their appeal to the United States Supreme Court. *Id.*

FN25. *See* *Loving v. Commonwealth,* 206 Va. 924, 147 S.E.2d 78 (1966). The Virginia Supreme Court of Appeals, however, modified as "so unreasonable as to render the sentences void" the trial court's twenty-five year suspension of the Lovings' jail sentences "upon the condition that they leave the ... state 'at once and ... not return together or at the same time to [the] ... state for a period of twenty-five years.' " *Id.* at 930, 147 S.E.2d at 82-83. The Virginia high court deemed it sufficient that the Lovings be prohibited from "again cohabit[ing] as man and wife in [the] state" in order to achieve the objectives of "securing the rehabilitation of the offender[s and] enabling [them] to repent and reform so that [they] may be restored to a useful place in society." *Id.* at 930, 147 S.E.2d at 83.

In a landmark decision, the United States Supreme Court, through Chief Justice Warren, struck down the Virginia miscegenation laws on both equal protection and due process grounds. The Court's holding as to the former is pertinent for present purposes:
[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination....
***569** There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. *The statutes proscribe generally accepted conduct* if engaged in by members of different races.... At the very least, the Equal Protection Clause demands that racial classifications ... be subjected to the "most rigid scrutiny," ... and, if they are ever to be upheld, *they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the* racial *discrimination which it was the object of the Fourteenth Amendment to eliminate....*
There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification.... We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.
***63** *Id.* at 10-12, 87 S.Ct. at 1823 (emphasis added and citation omitted). [FN26]

FN26. As we have noted in this opinion, unlike the equal protection clause of the fourteenth amendment to the United States Constitution, article I, section 5 of the Hawaii Constitution, *inter alia,* expressly prohibits discrimination against persons in the exercise of their civil rights on the basis of sex.

The facts in *Loving* and the respective reasoning of the Virginia courts, on the one hand, and the United States Supreme Court, on the other, both discredit the reasoning of *Jones* and unmask the tautological and ***570** circular nature of Lewin's argument that HRS § 572-1 does not implicate article I, section 5 of the Hawaii Constitution because same sex marriage is an innate impossibility. Analogously to Lewin's argument and the rationale of the *Jones* court, the Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, 388 U.S. at 3, 87 S.Ct. at 1819, and, in effect, because it had theretofore never been the "custom" of the state to recognize mixed marriages, marriage "always" having been construed to presuppose a different configuration. With all due respect to the Virginia courts of a bygone era, we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.
Singer v. Hara, 11 Wash.App. 247, 522 P.2d 1187, *review denied,* 84 Wash.2d 1008 (1974), suffers the same fate as does *Jones.* In *Singer,* two males appealed from a trial court's order denying their motion to show cause by which they sought to compel the county auditor to issue them a marriage license. On appeal, the unsuccessful applicants argued that: (1) the trial court erred in concluding that the Washington state marriage laws prohibited same-sex marriages; (2) the trial court's order violated the equal rights amendment to the state constitution; and (3) the trial court's order violated various provisions of the United States Constitution, including the fourteenth amendment.
The Washington Court of Appeals affirmed the trial court's order, rejecting all three of the appellants' contentions. Predictably, and for the same reasons that we have reached the identical conclusion regarding HRS § 572-1, the *Singer* court determined that it was "apparent from a ***571** plain reading of our marriage statutes that the legislature has not authorized same-sex marriages." *Id.* at 249, 522 P.2d at 1189. Regarding the appellants' federal and state claims, the court specifically "[did] not take exception to the proposition that *the Equal Protection Clause of the Fourteenth Amendment requires strict judicial scrutiny of legislative attempts at sexual discrimination.*" *Id.* at 261, 522 P.2d at 1196 (emphasis added). [FN27] Nevertheless, the *Singer* court found no defect in the state's marriage laws, under either the United States Constitution or the state

constitution's equal rights amendment, based upon the rationale of *Jones:* "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself." *Id.* As in *Jones,* we reject this exercise in tortured and conclusory sophistry.

FN27. Accordingly, but for the fact that the *Singer* court was unable to discern sexual discrimination in the state's marriage laws, it would have engaged in a "strict scrutiny" analysis. *See infra* at 63- 64.

3. Equal Protection Analysis under Article I, Section 5 of the Hawaii Constitution

[21] "Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test." *Nakano v. Matayoshi,* 68 Haw. 140, 151, 706 P.2d 814, 821 (1985) (citing *Nagle v. Board of Educ.,* 63 Haw. 389, 392, 629 P.2d 109, 111 (1981)). This court has applied "strict scrutiny" analysis to " 'laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the [c]onstitution,' " ***64** in which case ***572** the laws are " 'presumed to be unconstitutional [FN28] unless the state shows compelling state interests which justify such classifications,' " *Holdman v. Olim,* 59 Haw. 346, 349, 581 P.2d 1164, 1167 (1978) (citing *Nelson v. Miwa,* 56 Haw. 601, 605 n. 4, 546 P.2d 1005, 1008 n. 4 (1976)), and that the laws are "narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Nagle,* 63 Haw. at 392, 629 P.2d at 111 (citations omitted).

FN28. The presumption of statutory constitutionality, to which Judge Heen refers at 8 of his dissenting opinion, does not apply to laws, which, on their face, classify on the basis of suspect categories. *Washington v. Fireman's Fund Ins. Cos.,* 68 Haw. 192, 199, 708 P.2d 129, 134 (1985), *cert. denied,* 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 977 (1986) on
which the dissent relies, is not authority to the contrary inasmuch as the statute in question did not involve any suspect categories and was reviewed under the "rational basis" standard.

[22] By contrast, "[w]here 'suspect' classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." *Id.* at 393, 629 P.2d at 112. "Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest." *Estate of Coates v. Pacific Engineering,* 71 Haw. 358, 364, 791 P.2d 1257, 1260 (1990). "Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment." *Id.*
As we have indicated, HRS § 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. *See infra* at 60-61. As such, HRS § 572- 1 establishes a sex-based classification. HRS § 572-1 is not the first sex-based classification with which this court has been confronted. In *Holdman v. Olim, supra,* a woman prison visitor (Holdman) brought an action against prison officials seeking injunctive, ***573** monetary, and declaratory relief arising from a prison matron's refusal to admit Holdman entry when she was not wearing a brassiere. The matron's refusal derived from a directive, promulgated by the Acting Prison Administrator, that "visitors will be properly dressed. *Women* visitors are asked to be fully clothed, including undergarments. Provocative attire is discouraged." 59 Haw. at 347-48, 581 P.2d at 1166 (emphasis added). Holdman proceeded to trial,

and the circuit court dismissed her action at the close of her case in chief. *Id.* at 347, 581 P.2d at 1165-66.
On appeal, this court affirmed the dismissal of Holdman's complaint. The significance of *Holdman* for present purposes, however, is the rationale by which this court reached its result:
This court has not [heretofore] dealt with a sex-based classification. In *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), a plurality of the United States Supreme Court favored the inclusion of classifications based upon sex among those considered to be suspect for the purposes of the compelling state interest test. However, subsequent cases have made it clear that the current governing test under the Fourteenth Amendment [to the United States Constitution] is a standard intermediate between rational basis and strict scrutiny. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren,* 429 U.S. 190, 197[, 97 S.Ct. 451, 457, 50 L.Ed.2d 397] (1976). *Also see Califano v. Goldfarb,* 430 U.S. 199, 2[10 n. 8, 97 S.Ct. 1021, 1028, n. 8, 51 L.Ed.2d 270] (1977) and ***574** *Califano v. Webster,* 430 U.S. 313, 316-17[, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360] (1977).
....
Dress standards are intimately related to sexual attitudes.... The dress restrictions imposed upon women visitors by the directive derived their relation to prison security out of the assumption that these attitudes were present among the residents. Whether or not this assumption was correct, it is manifest that the directive was substantially related to the achievement of the important governmental objective of prison security and ****65** met the test under the Fourteenth Amendment.
....
[Holdman's] challenge to the directive under the state constitution requires separate consideration. Article I, Section 4 [FN29] of the Hawaii Constitution declares that no person shall be "denied the equal protection of the laws, nor be denied the enjoyment of [the person's] civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Article I, Section 21 [FN30] provides: "Equality of rights under the law shall not be denied or abridged by the State on account of sex." We are presented with two questions, either of which might be dispositive of the present case. We must first inquire whether the treatment [Holdman] received denied to her the equal protection of the laws ***575** guaranteed by the Hawaii Constitution under a more stringent test than that applicable under the Fourteenth Amendment. If the more general guarantee of equal protection does not sustain [Holdman's] claims, we must then inquire whether the specific guarantee of equality of rights under the law contained in Article I, Section 21, has been infringed.

FN29. In 1978, article I, section 4 was renumbered article I, section 5.

FN30. In 1978, article I, section 21 was renumbered article I, section 3.

It is open to this court, of course, to apply the more stringent test of compelling state interest to sex-based classifications in assessing their validity under the equal protection clause of the state constitution. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). [Holdman] urges that we do so, arguing both from *Frontiero v. Richardson, supra,* and from the presence of sex with race, religion and ancestry as a category specifically named in Article I, Section 4.
We need not deal finally with that issue, and reserve it for future consideration, since we conclude that the compelling state interest test would be satisfied in this case if it were to be held applicable....
....
Survival under the strict scrutiny test places the directive beyond [Holdman's] challenge

under her asserted ... right to equal protection.... It does not necessarily place the directive beyond challenge under the equal rights provision of Article I, Section 21. Article I, Section 21, is substantially identical with the proposed Equal Rights Amendment of the United States Constitution.... The standard ***576** of review to be applied under an ERA has not been clearly formulated by judicial decision....
... Unless we are to attempt in this case to define the standard of review required under Hawaii's ERA, no purpose will be served by analysis of the considerable body of decisions which fall short of dealing with that question.... *We have concluded that the treatment of which [Holdman] complains withstands the test of strict scrutiny by reason of a compelling State interest.* We are not prepared to hold in this case that.... a more stringent test should be applied under Article I, Section 21....
Id. at 349-54, 581 P.2d at 1167-69 (emphasis added and citations and footnote omitted).
Our decision in *Holdman* is key to the present case in several respects. First, we clearly and unequivocally established, for purposes of equal protection analysis under the Hawaii Constitution, that sex-based classifications are subject, as a *per se* matter, to some form of "heightened" scrutiny, be it "strict" or "intermediate," rather than mere "rational basis" analysis. [FN31] Second, we assumed, *arguendo,* that such sex-based classifications were subject to "strict scrutiny." Third, we reaffirmed the longstanding principle that this court is free to accord greater protections to Hawaii's citizens ****66** under the state constitution than are recognized under the United States ***577** Constitution. [FN32] And fourth, we looked to the *then current* case law of the United States Supreme Court for guidance.

FN31. In subsequent decisions, we have reaffirmed that sex-based classifications are subject, at the very least, to "intermediate scrutiny" under the equal protection clause of the Hawaii Constitution. *State v. Tookes,* 67 Haw. 608, 614, 699 P.2d 983, 988 (1985); *State v. Rivera,* 62 Haw. 120, 123, 612 P.2d 526, 529 (1980).

FN32. *See, e.g., State v. Texeira,* 50 Haw. 138, 142 n. 2, 433 P.2d 593, 597 n. 2 (1967); *State v. Grahovac,* 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971); *State v. Santiago,* 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971); *State v. Kaluna,* 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974); *State v. Manzo,* 58 Haw. 440, 452, 573 P.2d 945, 953 (1977); *State v. Miyasaki,* 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980); *Huihui v. Shimoda,* 64 Haw. 527, 531, 644 P.2d 968, 971 (1982); *State v. Fields,* 67 Haw. 268, 282, 686 P.2d 1379, 1390 (1984); *State v. Wyatt,* 67 Haw. 293, 304 n. 9, 687 P.2d 544, 552 n. 9 (1984); *State v. Tanaka,* 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985); *State v. Kim,* 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985); *State v. Kam,* 69 Haw. 483, 491, 748 P.2d 372, 377 (1988); *State v. Quino,* 74 Haw. 161, --- n. 2, 840 P.2d 358, 364 n. 2 (1992) (Levinson, J., concurring).

Of the decisions of the United States Supreme Court cited in *Holdman, Frontiero v. Richardson, supra,* was by far the most significant. In *Frontiero,* a married woman air force officer and her husband (the Frontieros) filed suit against the Secretary of Defense seeking declaratory and injunctive relief against enforcement of federal statutes governing quarters allowances and medical benefits for members of the uniformed services. The statutes provided, solely for administrative convenience, that spouses of male members were unconditionally considered dependents for purposes of obtaining such allowances and benefits, but that spouses of female members were not considered dependents unless they were in fact dependent for more than one-half of their support. The Frontieros' lawsuit was precipitated by the husband's inability to satisfy the statutory dependency standard. A three-judge district court panel denied the Frontieros' claim for relief, and they appealed.
***578** Noting that "[u]nder these statutes, a serviceman may claim his wife as a

'dependent' without regard to whether she is in fact dependent upon him for any part of her support," but that "[a] servicewoman ... may not claim her husband as a 'dependent' ... unless he is in fact dependent upon her for over one-half of his support," a plurality of four, through Justice Brennan (the Brennan plurality), framed the issue on appeal as "whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen...." 411 U.S. at 679-80, 93 S.Ct. at 1766. By an eight-to-one majority, the Court concluded that the statutes established impermissibly differential treatment between men and women and, accordingly, reversed the judgment of the district court.

The disagreement among the eight-justice majority lay in the level of judicial scrutiny applicable to instances of statutory sex-based discrimination. The Brennan plurality agreed with the Frontieros' contention that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 683, 93 S.Ct. at 1768 (footnotes omitted). Thus, the Brennan plurality applied the "strict scrutiny" standard to its review of the illegal statutes. Justice Stewart concurred in the judgment, "agreeing that the statutes ... work[ed] an invidious discrimination in violation of the Constitution." *Id.* at 692, 93 S.Ct. at 1772-73.

Particularly noteworthy in *Frontiero,* however, was the concurring opinion of Justice Powell, joined by the Chief Justice and Justice Blackmun (the Powell group). The Powell group agreed that "the challenged statutes constitute[d] an unconstitutional discrimination against servicewomen," but deemed it "unnecessary for the Court ***579** *in this case* to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." *Id.* at 691-92, 93 S.Ct. at 1773 (emphasis added and citation omitted). Central to the Powell group's thinking was the following explanation:

> There is another ... reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. *The Equal Rights Amendment, which if adopted will resolve the substance of this precise question,* has been approved by Congress and ****67** submitted for ratification by the States. If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, ... the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems ... that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

Id. at 727, 93 S.Ct. at 1773 (emphasis added).

The Powell group's concurring opinion therefore permits but one inference: had the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the *Frontiero* Court would have subjected statutory sex-based classifications to "strict" judicial scrutiny.

[23] [24] [25] In light of the interrelationship between the reasoning of the Brennan plurality and the Powell group in ***580** *Frontiero,* on the one hand, and the presence of article I, section 3--the Equal Rights Amendment--in the Hawaii Constitution, on the other, it is time to resolve once and for all the question left dangling in *Holdman.* Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution [FN33] and that HRS § 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights.

FN33. Our holding in this regard is *not,* as the dissent suggests, "[t]hat Appellants are a 'suspect class.' " Dissenting opinion at 72.

4. The dissenting opinion misconstrues the holdings and reasoning of the plurality.

We would be remiss if we did not address certain basic misconstructions of this opinion appearing in Judge Heen's dissent. First, we have *not* held, as Judge Heen seems to imply, that (1) the appellants "have a 'civil right' to a same sex marriage[,]" (2) "the civil right to marriage must be accorded to same sex couples[,]" and (3) the applicant couples "have a right to a same sex marriage[.]" Dissenting opinion at 70-71. These conclusions would be premature. We have, however, noted that the United States Supreme Court has recognized for over fifty years that marriage is a basic civil right. *See supra* at 60-61. That proposition is relevant to the prohibition set forth in article I, section 5 of the Hawaii Constitution against ***581** discrimination in the exercise of a person's civil rights, *inter alia,* on the basis of sex. *See id.* at 60.

Second, we have *not* held, as Judge Heen also seems to imply, that HRS § 572-1 "unconstitutionally discriminates against [the applicant couples] who seek a license to enter into a same sex marriage[.]" Dissenting opinion at 70. Such a holding would likewise be premature at this time. What we *have* held is that, on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5. *See supra* at 60.

We understand that Judge Heen disagrees with our view in this regard based on his belief that "HRS § 572-1 treats everyone alike and applies equally to both sexes[,]" with the result that "neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has." Dissenting opinion at 71-72 (emphasis in original). The rationale underlying Judge Heen's belief, however, was ****68** expressly considered and rejected in *Loving:*

Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications do not constitute an invidious discrimination based upon race.... [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious discriminations.... In the case at bar, ... we deal with statutes containing racial classifications, and the fact of equal application ***582** does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

388 U.S. at 8, 87 S.Ct. at 1821-22. Substitution of "sex" for "race" and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.

As a final matter, we are compelled to respond to Judge Heen's suggestion that denying the appellants access to the multitude of statutory benefits "conferred upon spouses in a legal marriage ... is a matter for the legislature, which can express the will of the populace in deciding whether such benefits should be extended to persons in [the applicant couples'] circumstances." Dissenting opinion at 74. In effect, we are being accused of engaging in judicial legislation. We are not. The result we reach today is in complete harmony with the *Loving* Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws. 388 U.S. at 7, 87 S.Ct. at 1821. If it should ultimately be determined that the marriage laws of Hawaii impermissibly discriminate against the appellants, based on the suspect category of sex, then that would be the result of the interrelation of existing legislation.

[W]hether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it ... work[s] well or work[s] ill presents a question entirely

irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have any, cannot save it; if it is, its faults cannot be invoked to accomplish its ***583** destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483, 54 S.Ct. 231, 256, 78 L.Ed. 413 (1934) (Sutherland, J., dissenting).

III. CONCLUSION

Because, for the reasons stated in this opinion, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, we vacate the circuit court's order and judgment and remand this matter for further proceedings consistent with this opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights. *See Nagle,* 63 Haw. at 392, 629 P.2d at 111; *Holdman,* 59 Haw. at 349, 581 P.2d at 1167. Vacated and remanded.

308 East Main Street, Wilmore, KY 40390 • (859) 858-4661 Fax 858-4972 • http://www.goodnewsmag.org

September 2, 2003

Senator John Cornyn
Chairman
Senate Subcommittee on the Constitution, Civil
Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

"Attention: Mr. James Ho"

This letter comes to request, cordially, that your committee do everything possible to help the United States retain a strong commitment to marriage, as a covenant between a man and a woman.

It is my conviction that more than 90 percent of our 8.6 million United Methodists in this country would share concerns that marriage be strengthened in America. So many other issues are tied to this one key issue. As our families go, so will go the future of our nation.

Unfortunately, voices calling for a re-definition of our traditional understanding of marriage seem to get media coverage far out of proportion to their numbers. Further, many of us are concerned that a major re-definition in our understanding of marriage might come through the action of some state court. This simply must not happen. We must protect the institution of marriage in the U.S. for the abiding welfare of our nation.

I head a ministry within the United Methodist Church and can say without reservation that nearly a hundred percent of the 40,000 United Methodist Churches and families receiving our magazine would favor retaining a strong, traditional understanding of marriage.

Thank you for all you and your committee can do to protect and strengthen the American Family.

Sincerely,

James V. Heidinger II

James V. Heidinger II
President and Publisher

THE INSTITUTE ON RELIGION & DEMOCRACY

September 2, 2003

The Honorable John Cornyn
Chairman, Senate Subcommittee on the
Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator John Cornyn:

The Institute on Religion and Democracy is an ecumenical alliance of U.S. Christians working to reform their churches' social witness, in accord with biblical and historic Christian teachings, *thereby contributing to the renewal of democratic society at home and abroad.*

We are deeply concerned about the future of the institution of marriage in this country.

We support the historic understanding of marriage as an exclusive relationship between one man and one woman. Our religious beliefs tell us that this is what God desires for us. But it is also evident to us, through reason and experience, that marriage between a man and a women enhances the well-being not only of individuals, but of our communities and nation as well.

Marriage is an essential component to establishing strong and healthy families, and thus the stability of our society as a whole. Marriage is the most fundamental and essential building block of society, providing the structure in our private lives that undergirds our public life. It is the foundation on which our families build their hopes and dreams. Strong marriages are the surest means to provide for the financial, physical, psychological and spiritual needs of children.

Polls continue to show that despite the number of hurdles before them as they approach marriage age, most of our youth want to marry and see marriage as an important goal in their lives. They see marriage not only as a means to personal happiness and an expression of loving private commitment, but also as a key social institution, by which they may participate in something larger than themselves – and so contribute to the common good.

Upholding and defending marriage is perhaps the single best way to address a host of social ills that weigh on our society. Poverty, crime and violence – with their huge social

and political costs – are increased in communities where the traditional married family is weakest. There is, for example, a staggering income gap between the married and the unmarried.

Marriages in our society are beset on every side by a variety of threats. This is the worst possible time for social or legal experiments that will further erode marriage.

The victims of misguided social experimentation will be our children. Marriage as historically defined offers the single most important mechanism by which children can avoid poverty and other social pathologies. It is urgent that marriage receives all the legal support it can. Nothing else offers men, women and children the security, stability and longevity as does marriage.

The legal reinforcement of marriage as between a man and a woman would simply be extending greater protection to that institution that we know provides the best hope and opportunity for the future of our families – and our democratic experiment.

In Christ,

Diane Knippers,
President

March 2, 2004

Honorable John Cornyn
Chairman
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights & Property Rights
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Russell D. Feingold
Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights & Property Rights
807 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators:

We write as Co-Chairs of the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee is a forty year old nonpartisan, nonprofit civil rights legal organization, formed at the request of President John F. Kennedy to involve the pro bono legal services of the private bar in addressing racial discrimination.

The Lawyers' Committee for Civil Rights Under Law opposes any effort to amend the United States Constitution to prohibit same sex marriages. We have noted the issuance of statements by others on the topic, and have signaled agreement with some of those who have spoken in opposition. We write separately, to provide the Committee's own perspective on this issue, which is the product of more than forty years of legal work on behalf of African-Americans who have been victims of discrimination. Our opposition to the proposed constitutional amendment does not represent a position for or against same-sex marriage.

The Constitution is our nation's fundamental expression of national unity and national purpose. Our ability to function as a nation, instead of a group of warring factions, depends on the existence of shared principles on certain basic aspects of our political organization. The Constitution is the place we have expressed those principles, both in terms of aspiration and in terms of the structure of the government we create to enable ourselves to exist as a nation. It is a document of inclusion and embrace, of reaching out to ensure that all citizens are part of our remarkable experiment in the ways in which diversity can strengthen a nation.

The proposal to have such a document express stigmatization and discrimination is contrary to the purposes for which the document exists. Previous amendments to the Constitution have not been designed for such purposes. They have instead served to clarify, expand, or strengthen the rights of individuals in our society, to ensure clarity in the allocation of power between the federal and state governments, or otherwise to attend to technical aspects of

government organization such as presidential succession. (The Prohibition amendment, which fell outside of these purposes, was a failure and was later reversed.)

The civil rights work of the Lawyers' Committee has relied extensively on the constitutional principles of liberty and equal protection. The results of this antidiscrimination legal work that we, and the many lawyers who have joined us have done, could not have been achieved without such a framework in place. These legal victories have substantially improved the extent to which African-Americans, Latinos, Native Americans, and Asian Americans have been able to participate in the life of our nation, and therefore represent a substantial improvement in the quality of all our lives. Movements to cut back on the generosity of the constitutional spirit can only harm efforts like ours, and in the process diminish us all.

Sincerely,

D. Stuart Meiklejohn
Co-Chair
Lawyers' Committee for Civil Rights
Under Law

John S. Skilton
Co-Chair
Lawyers' Committee for Civil Rghts
Under Law

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006
Phone: (202) 466-3311
Fax: (202) 466-3435
www.civilrights.org

OFFICERS
CHAIRPERSON
Dorothy I. Height
National Council of Negro Women
VICE CHAIRPERSONS
Judith L. Lichtman
National Partnership for Women & Families
William L. Taylor
Citizens' Commission on Civil Rights
SECRETARY
William D. Novelli
AARP
TREASURER
Gerald W. McEntee
AFSCME
HONORARY CHAIRPERSON
Benjamin L. Hooks
EXECUTIVE COMMITTEE
Barbara Arnwine
Lawyers' Committee For Civil Rights Under Law
Christine Chen
Organization of Chinese Americans
Robert W. Edgar
National Council of Churches
Sandra Feldman
American Federation of Teachers, AFL-CIO
Kim Gandy
National Organization for Women
Ron Gettelfinger
International Union, United Automobile Workers of America
Marcia Greenberger
National Women's Law Center
Andrew J. Imparato
American Association of People with Disabilities
Cheryl Jacques
Human Rights Campaign
Jacqueline Johnson
National Congress of American Indians
Elaine R. Jones
NAACP Legal Defense & Educational Fund, Inc.
Leon Lynch
United Steelworkers of America
Kay J. Maxwell
League of Women Voters of the United States
Kweisi Mfume
NAACP
Marc H. Morial
National Urban League
Laura Murphy
American Civil Liberties Union
Ralph G. Neas
People For The American Way
David Saperstein
Union for Reform Judaism
Andrew L. Stern
Service Employees International Union
Reg Weaver
National Education Association
Richard Womack
AFL-CIO
Jacqueline E. Woods
American Association of University Women
Patrisha Wright
Disability Rights Education and Defense Fund, Inc.
Raul Yzaguirre
National Council of La Raza
COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
National Asian Pacific American Legal Consortium

Executive Director
WADE J. HENDERSON

Oppose the "Federal Marriage Amendment"

March 2, 2004

Dear Member of Congress:

We, the undersigned organizations of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, urge you to oppose the "Federal Marriage Amendment" (H.J. Res. 56, S.J. Res. 26), a radical proposal that would permanently write discrimination into the United States Constitution. LCCR believes that this highly divisive amendment is a dangerous and unnecessary approach to resolving the ongoing debate over same-sex marriage, and it would turn 225 years of Constitutional history on its head by requiring that states actually restrict the civil rights of their own citizens.

As a diverse coalition, LCCR does not take a position for or against same-sex marriage. The issue of same-sex marriage is an extremely difficult and sensitive one, and people of good will can and do have heartfelt differences of opinion on the matter. However, LCCR strongly believes that there are right and wrong ways to address the issue as a matter of public policy, and is extremely concerned about any proposal that would alter our nation's most important document for the direct purpose of excluding any individuals from its guarantees of equal protection.

The proposed amendment is antithetical to one of the Constitution's most fundamental guiding principles, that of the guarantee of equal protection for all. For the first time in history, it would use the Constitution as a tool of exclusion, restricting the rights of a group of Americans. It is so far-reaching that it would not only prohibit states from granting equal marriage rights to same-sex couples, but also may deprive same-sex couples and their families of fundamental protections such as hospital visitation, inheritance rights, and health care benefits, whether conveyed through marriage or other legally recognized relationships. Such a proposal runs afoul of basic principles of fairness and will do little but harm real children and real families in the process.

Constitutional amendments are extremely rare, and are only done to address great public policy needs. Since the Bill of Rights' adoption in 1791, the Constitution has only been amended seventeen times. LCCR believes that the Bill of Rights, and subsequent amendments, were designed largely to protect and expand individual liberties, and certainly not to deliberately take away or restrict them.

LCCR is particularly troubled by the virulent rhetoric of some organizations working to enact the proposed amendment, and their animus towards gays and lesbians. The

attacks made by many of the most vocal proponents, such as the Traditional Values Coalition and the American Family Association, are disturbingly similar to the sorts of attacks that have been made upon other communities as they have attempted to assert their right to equal protection of the laws. This is, of course, an element of the debate that the civil rights community finds deeply disturbing, as should all fair-minded Americans.

In addition, supporters of the Federal Marriage Amendment cite "judicial activism" as a reason to enact it. Terms like "judicial activism" are alarming to LCCR and the civil rights community because such labels have routinely been used in the past to attack judges who made courageous decisions on civil rights matters. When Chief Justice Earl Warren wrote the unanimous Supreme Court decision in *Brown v. Board of Education* (1954), for example, defenders of segregation cried "judicial activism" across the South and across the country. Many groups and individuals demanded that Congress "impeach Earl Warren." The Supreme Court's ruling in *Loving v. Virginia* (1967), which invalidated a state anti-miscegenation law, resulted in similar attacks. Fortunately, our nation avoided taking any radical measures against the so-called "judicial activists" or their decisions, and we believe a similar level of caution is warranted in this case.

At a time when our nation has many great and pressing issues, Congress can ill afford to exert time and energy on such a divisive and discriminatory constitutional amendment. We implore you to focus on the critical needs facing our nation, and to publicly oppose this amendment. If you have any questions or need further information, please contact Rob Randhava, LCCR Policy Analyst, at (202) 466-6058, or Nancy Zirkin, LCCR Deputy Director, at (202) 263-2880. Thank you for your consideration.

Sincerely,

Leadership Conference on Civil Rights

American Association of People with Disabilities
American Association of University Professors
American Civil Liberties Union
American Federation of Government Employees
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
Americans for Democratic Action
Anti-Defamation League
Bazelon Center for Mental Health Law
Blind Friends of Lesbian, Gay, Bisexual and Transgendered People
Center for Women Policy Studies
Central Conference of American Rabbis
Communications Workers of America
Friends Committee on National Legislation
Japanese American Citizens League
Jewish Labor Committee
League of Women Voters of the United States
Metropolitan Washington Employment Lawyers Association

Mexican American Legal Defense and Educational Fund
National Alliance of Postal and Federal Employees
National Association for the Advancement of Colored People
National Council of Jewish Women
National Education Association
National Gay and Lesbian Task Force
National Partnership for Women & Families
National Women's Law Center
National Women's Political Caucus
NOW Legal Defense and Education Fund
People For the American Way
Planned Parenthood Federation of America
Pride At Work
Service Employees International Union
Union for Reform Judaism
Unitarian Universalist Association of Congregations
Women for Reform Judaism

Statement of Senator Patrick Leahy
Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Property Rights
Hearing on"Judicial Activism vs. Democracy:
What are the National Implications of the Massachusetts *Goodridge* Decision
And the Judicial Invalidation of Traditional Marriage Laws"
March 3, 2004

There are at least two topics that this subcommittee and the Senate Judiciary Committee have ignored while preparations were underway to hold at least three hearings on federalizing marriage by way of a constitutional amendment.

First is the lack of ongoing and meaningful congressional oversight in connection with the war on terrorism. Tomorrow will mark one year since the Attorney General of the United States last appeared before the Senate Judiciary Committee in anything approaching congressional oversight of the USA PATRIOT Act or the war on terrorism. I have sought his testimony on PATRIOT Act implementation and the Administration's prosecution of the war on terrorism for months and have consistently been rebuffed. This subcommittee and the Senate Judiciary Committee have not fulfilled the responsibility to ensure the rights of the American people, and government's accountability to the American people, by providing vigorous oversight of the most insular and unilateral Administration in memory.

Second, this subcommittee has done nothing with respect to the fundamental protection of voting rights. Just last week, the Republican Leader offered and then had to withdraw a legislative amendment regarding certain bilingual and preclearance provisions of the Voting Rights Act. Chairman Hatch previously sought to offer but then withdrew a similar amendment. In all of 2003 and now 2004, this subcommittee has convened not a single hearing to provide the hearing record on making permanent the Voting Rights Act. Democratic Senators have offered to work on these important measures, most recently when Senator Kennedy extended that offer again last week. Given the standards recently imposed by the Supreme Court in federalism cases, it is the responsibility of this subcommittee to make that record in order to support such an extension of fundamental rights.

There also have been serious concerns that have arisen across the country that electronic voting machines being programmed by a company whose executives have strong commitments to partisan politics in favor of one party will unfairly skew the voting in the upcoming election. There have also been concerns about the quality, reliability, and security of electronic voting machines like these. There has been no attention to these pressing issues, either.

Instead, this subcommittee gathers today for the second in an extended series of hearings about federalizing marriage by tacking onto the United States Constitution a proposal to take authority over this traditional matter of State law away from the 50 States. When we

last met on this topic, a number of us joined in opposing such an effort to use the Constitution for wedge politics, to take authority from the States, and to use the constitutional amendment process for the first time to limit instead of to expand the rights of the American people, to permanently confine millions of Americans now, and millions more tomorrow, as second-class citizens. My opposition to amending the Constitution in such a way is as strong today as it was then.

Vermont's Experience

In Vermont, over the last five years the people met this challenge. A bipartisan majority of the Vermont legislature in 2000 enacted and the Governor signed a "civil unions" law that provided those benefits and rights the State made available to married couples. That law was crafted jointly by Republicans and Democrats in Vermont's legislature.

The debate over civil unions in Vermont was without question emotional, and it proved to be a difficult period for my State. Some sought to make it divisive. Others of us sought to find consensus. I vividly recall the meeting Senator Stafford attended with Senator Jeffords and myself, in which he spoke so eloquently about love, commitment, tolerance and the Vermont way. Bob Stafford did a lot to calm what could have been choppy and destructive waters. There were many profiles in courage in Vermont. Many legislators – Democrats and Republicans – lost their seats, knowing they would, because they did what they believed was right and supported civil unions. Four years later, the Vermont civil unions law remains on the books, and there is no crisis in everyday life nor inside our statehouse over this issue. For many Vermonters, it has provided great happiness.

David Moats, the Pulitzer Prize winning editorial page editor of *The Rutland Daily Herald* in Vermont, has recently published "Civil Wars," a moving book about the creation of civil unions in Vermont. In it, he tells the stories of the same-sex couples who challenged Vermont law in State court, including Nina Beck and Stacy Jolles, a lesbian couple whose dedication to one another allowed them to cope with the death of their 2-year-old son, and Stan Baker, the named plaintiff in the case and a relative of Ethan Allen. Moats writes also of a Brattleboro man in his 70s who obtained a civil union license the day they became legal, telling the town clerk, "You'll just never know what this means."

I talk about the Vermont experience because I fear that some in this Congress – and the President – support reversing it. I will defend Vermont's rights to have met this challenge and to have resolved this issue on behalf of the people of Vermont. I talk about it because when we speak of the "national implications" of the *Goodridge* decision, and whether to amend the United States Constitution to limit the rights of individuals, we should not lose sight of the real people who would be directly affected by the restrictions that the President and some in Congress seek to enact.

An Invitation to the President

A recent editorial in the *Rutland Daily Herald* summarized the issue well. I ask that a copy be included in the record. The *Rutland Herald* noted: "There are genuine differences in our nation over gay marriage, and there always will be. But for [President] Bush to propose etching into the Constitution an amendment that would enflame those differences shows how low he is willing to stoop in pandering to our fears." The *Herald* went on to suggest: "Someone ought to invite [President] Bush to Vermont, to sit down with some of the hundreds of couples joined by civil union, to witness the goodness, but also the ordinariness, of their lives." Today I would like to publicly issue that invitation, so that President Bush can meet these Vermonters, and if he still feels it necessary, to tell them why he supports amending the Constitution to take away their rights.

Public Debate in Massachusetts

Today, through democratic debate and legislative action, Massachusetts is seeking to meet the challenge that Vermont met a few years ago. Unlike the President and some in this body, I have confidence that the people of Massachusetts and their representatives will meet that challenge. States have had authority throughout our history to regulate marriage. Consideration by Massachusetts of its marriage laws has begun; it has not concluded. There will be a public debate. I hope there will be statesmen in Massachusetts, like Bob Stafford in Vermont, who will point the way toward tolerance and consensus, and I hope that those who seek to fan the flames of division will be thwarted. I do not accept the premise that democracy has been defeated in Massachusetts; indeed, the people of Massachusetts – through their elected officials – are in the midst of deciding whether and, if so, how to amend their State Constitution. If the people decide that *Goodridge* was wrongly decided, they have a remedy.

The President and some in Congress seem to have no patience for democracy and have concluded that they know best and should decide for the people of Massachusetts and every other citizen in every other State what their laws should be by inscribing an inflexible prohibition into the Constitution of the United States. Indeed, this hearing appears to be an attack not only on the unsettled situation in Massachusetts but upon the settled law of Vermont.

Those now supporting a federal marriage amendment to the Constitution of the United States have reached their position preemptively and despite the fact that the federal Defense of Marriage Act – still the law of the land – allows States significant latitude about whether to recognize marriages from other States.

Amendments Before Congress

Thus far, only one proposed constitutional amendment has been introduced in Congress. I understand that Senator Hatch will introduce a more limited amendment, to guarantee that states need not recognize same-sex marriages accepted in another state. The Defense of Marriage Act already accomplishes that purpose, and it remains the law of the land –

any such Constitutional amendment would be premature, at the very least. And as the written testimony today of Professor Lea Brilmayer demonstrates, even if DOMA did not exist, states would still have wide discretion to disregard the decisions of other states on family law matters such as marriage. With DOMA, there is no reason to believe States will be forced against their will to recognize same-sex marriages. We should not preemptively amend the Constitution to address such a speculative concern.

The amendment now pending in Congress, introduced by Representative Musgrave in the House and Senator Allard in the Senate, would be a breathtaking imposition on our State governments. It says that no State Constitution or law "shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Under this language, even modest State laws designed to provide limited economic benefits to same-sex couples would be constitutionally suspect. Such language would almost certainly take away the rights of States to create domestic partnerships or civil unions.

It would undo the progress we have made in providing survivor benefits for those who serve our country and for those who died in connection with September 11. Consistent with DOMA, a few years ago I led an effort to extend survivors' benefits to the partners and families of the victims of the September 11 tragedy, and we ensured through enactment of the Mychal Judge Act that public safety officer benefits were available without discrimination. Extending benefits such as these, including hospital visitation rights and others, are at the heart of our caring society. We should want people to commit to each other in lasting relationships. We need to be mindful not to enshrine discrimination in our laws.

Uncertainty in the law and differences among the laws of the States is not a new feature of our federal union. It is not justification for preemptively declaring war on gay and lesbian Americans or tacking a statement of intolerance onto the Constitution of the United States.

Questions for the President

After the President changed his position and endorsed a federal marriage amendment to the Constitution of the United States, I wrote him a letter. I ask that a copy of my letter be included in the record. Given the importance of the language used in any constitutional amendment, I asked him whether he supported the language of the only constitutional amendment introduced at that time in the House or the Senate, or whether he proposed other language be added to the Constitution. I have not received a reply. Nor has the Administration sent a representative to testify here today. Given the apparent emergency that the President indicated inspired his change of position, I would have thought he would know what he wanted Congress to consider when he so dramatically called upon Congress to act. Act on what? Where is the President's proposal? Where is the language he endorses? How strident does he wish the language to be in restricting people's rights? How does he intend to provide expressly in the constitutional language the ability of States to extend rights and benefits to their citizens as they see fit?

Without a response from the White House and without an Administration spokesperson, we are left with little more than a political position without substance. The Constitution should not be used for partisan political purposes in my view. Proposing an amendment to the basic charter of rights is a serious matter and needs to be approached seriously. Otherwise, we risk diminishing respect for the Constitution and for all our basic institutions.

President's Skewed Definition of 'Activism'

Some seek to inflame passions by presenting this issue as one of "judicial activism." They do not mention that three of the four Massachusetts justices who made up the majority were appointed by Republican Governors. It is increasingly apparent that for this President "judicial activism" is defined as any decision with which he disagrees. Indeed, to justify his support for a federal marriage constitutional amendment at this time, the President must believe that the conservative United States Supreme Court is likely filled with unprincipled judicial activists who will overturn DOMA at their first opportunity.

These same critics of "judicial activism" support federal nominees who are among the most strident and ideologically driven in our history. Take for example the nomination of California Supreme Court Justice Janice Rogers Brown to the District of Columbia Circuit. Justice Brown has dissented from rulings to uphold State laws regulating economic activity that have offended her own devotion to *laissez faire* economic theory. She has been criticized for "judicial lawmaking," and a Republican colleague on the California Supreme Court has accused her of undermining confidence in the courts through her activist approach.

I retain confidence in the people of Massachusetts and their governing institutions. I see the people of the nation seeking ways to recognize the human dignity of all. Americans are a compassionate and tolerant people. They do not need this Committee, this Congress, or the President of the United States to foreclose debate or constrict their rights that are enshrined in the Constitution.

There are times in our history when the courts have been the bulwark that protected our civil rights and liberties. They did so in *Brown v. Board of Education* and again in *Loving v. Virginia*, in which the Supreme Court struck down 16 State laws seeking to ban interracial marriage. They are being called upon to do so in connection with this Administration's implementation of the USA PATRIOT Act and prosecution of the war on terrorism. I wish the Committee and the Senate were more actively interested in providing balance and accountability to Executive policies and practices through effective oversight, and that some were less devoted to political wedge politics that demean people and demean the governmental institutions needed in these difficult times.

# # # # #

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

February 25, 2004

President George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

This week you announced your support for a constitutional amendment regarding what has traditionally been a matter governed by State law; namely, marriage. What is unclear from your remarks, and from statements by White House officials, is whether you support the language of the proposed amendment that has been introduced in the House by Representative Musgrave, H.J. Res. 56, and in the Senate by Senator Allard, S.J. Res. 26. Do you, in fact, support the language of that proposed constitutional amendment? If not, what specific language do you propose be added to the Constitution of the United States?

You noted in your remarks that you intend to leave to the States freedom "to make their own choices in defining legal arrangements other than marriage." Presumably you were referring to civil unions, domestic partnerships, and other arrangements regarding legal rights. Do you view the language of the proposed constitutional amendment introduced as H.J. Res. 56 and S.J. Res. 26 as accomplishing your purpose of leaving the States free "to make their own choices in defining legal arrangements other than marriage?" If so, it will be helpful to all concerned to have your explanation of why it would. If not, what specific language do you propose be added to the Constitution of the United States to accomplish that purpose?

Respectfully,

PATRICK LEAHY
United States Senator

Los Angeles Times latimes.com

COMMENTARY

President Versus Precedent

Bush's reckless bid for an amendment defies an Oval Office tradition

By Cass R. Sunstein
Cass R. Sunstein teaches law at the University of Chicago and is the author of "Why Societies Need Dissent" (Harvard University Press, 2003).

February 26, 2004

In declaring his support for a constitutional amendment that would forbid same-sex marriage, President Bush is repudiating more than 200 years of American theory and practice. His proposal is radically inconsistent with the nation's traditions. Whatever it is, there is one thing that it is not: conservative.

Since its ratification in 1789, the Constitution has been amended only 27 times. Nearly every amendment falls into one of two categories. Most of them expand individual rights. The rest attempt to fix problems in the structure of the national government itself.

The first 10 amendments, ratified in 1791, make up the Bill of Rights, which guarantees liberties ranging from freedom of speech, assembly and religion to protection of private property and freedom from cruel and unusual punishments.

In the aftermath of the Civil War, three new amendments were ratified: to prohibit slavery, guarantee African Americans the right to vote, and assure everyone the "equal protection of the laws." During the 20th century, several amendments expanded the right to vote — granting that right to women (1920) and to 18-year-olds (1971), forbidding poll taxes (1964) and allowing the District of Columbia to be represented in the electoral college (1961).

Many other amendments fix problems in the structure of the government. An early amendment, ratified in 1804, specifies the rules for the operation of the electoral college. In 1913, the Constitution was changed to require popular election of senators; in the same year, an amendment authorized Congress to impose an income tax.

A 1951 amendment, responding to Franklin Roosevelt's four terms as president, bans the

president from serving more than two terms. A closely related amendment from 1967 specifies what happens in the event that the president dies or becomes disabled while in office.

Do any amendments fall outside of these categories? Just two, and they're not impressive precedents. In 1919, the 18th Amendment prohibited the sale of "intoxicating liquors." The 21st Amendment repealed the 18th.

What accounts for our remarkable unwillingness to amend the Constitution except to expand rights and to fix structural problems?

The simple answer is that from the founding period, Americans have prized constitutional stability. We have agreed that the document should not be amended merely to incorporate the majority's position on the great issues of the day. For those issues, we rely on the federal system and on democracy. We fear that large-scale constitutional debates could lead not only to ill-considered change but could also split and polarize the country. When we differ, we use the other institutions that we have, not constitutional reform.

American presidents have shown a remarkable appreciation of these points, and of presidential responsibilities to the founding document itself. Though repeatedly rebuffed by a right-wing Supreme Court, Roosevelt did not favor amending the Constitution. In defending his New Deal, he appealed instead to Congress, the public and the states. Lyndon Johnson argued for dramatic new laws to protect civil rights and to carry out his "war on poverty," but he left the nation's charter alone.

Although he was appalled by a left-wing Supreme Court, Richard Nixon emphasized not constitutional change but ordinary political processes to steer the nation in the directions that he favored. Ronald Reagan may have been the most influential president of the second half of the 20th century, but he didn't seek to change a single word of the Constitution.

In fact, Nixon and Reagan repeatedly emphasized the importance of relying on the federal system for resolving the most contentious issues. They often criticized "activist judges" for protecting criminal defendants and taking over school systems. But when Nixon and Reagan did so, they meant to protest the use of the national Constitution, by either left or right, to forbid experimentation at the state and local levels.

In our history, there is no parallel to Bush's call for a constitutional amendment banning same-sex marriage. (Prohibition is by far the closest analogy.) And even if we agree that such marriages are objectionable, what is the problem for which constitutional change is the solution? No federal judge has said — not once — that the existing Constitution requires states to recognize same-sex marriages.

At the state level, there are ample channels for continuing deliberation and debate. True,

the Supreme Judicial Court of Massachusetts has ruled that the state constitution forbids Massachusetts to refuse to give marriage licenses to same-sex couples. But even there, well-established processes are now underway for amending the state constitution, if the citizens wish, to overturn the court's decision. In the overwhelming majority of states, there is no effort to redefine marriage to include same-sex couples.

Although acknowledging that constitutional amendment "is never to be taken lightly," Bush tried to disguise the radicalism of his proposal by announcing, blithely, that the "amendment process has addressed many serious matters of national concern." But our tradition has been far more specific, wise and careful than that.

Almost all "serious matters of national concern" have been handled through ordinary processes, not through constitutional change. Bush has proposed a reckless departure from our deepest traditions.

ST. STEPHEN'S CATHEDRAL
CHURCH OF GOD IN CHRIST
OFFICE OF THE BISHOP
5825 IMPERIAL AVE.
SAN DIEGO, CA 91941
619/262-2671

03 September 2003
Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D. C. 20510

Honorable Senator Cornyn:

I have been disturbed of late by the mounting attacks on one of the fundamental and foundational institutions of our nation – the institution of marriage. I understand that your Subcommittee is in a position to protect marriage as we know it and as it has been understood since our nation was declared independent over two hundred years ago.

The sacredness of marriage is particularly significant to my constituency as one of twelve members of the governing body of the Memphis headquartered, 5 Million member, International Church of God in Christ. While our membership is open to people of every race and color, we are predominately an African-American body of Christian worshippers. We know that one of the legacies of the tragic history of slavery in this country was the intended destruction of marriage between men and women of color. One of the greatest benefits of the Emancipation was the right to marry and raise our families as God has ordained.

We are opposed to any dilution of the institution of marriage presented under the guise of political correctness. We also condemn any effort to equate choices of sexual life style with the civil rights demands of those disenfranchised because of their race or nationality.

Sexual arrangements that do not allow for the possibility of the birth of children through the natural relationships of the partners are not marriages, they are conveniences of association and nothing more. They do not merit the legal status of a responsible marriage between a man and a woman because they focus only on self gratification and not upon the responsibility of preserving the nation and the culture through the natural birth and rearing of children.

We continue to pray for you and all of the leaders of our nation who have inherited their authority from God. We pray that you will have the courage and fortitude to stand up for righteousness in a day when many seem willing to compromise the truth and the virtue of our nation for peace in our time.

Very truly yours,

Bishop George D. McKinney
2nd Jurisdiction So. Ca. COGIC
Member General Board, COGIC International

The Mercury News
MercuryNews.com

TAKING RIGHTS AWAY FROM GAYS HAS NO PLACE IN CONSTITUTION

Mercury News Editorial

Thousands of amendments to the U.S. Constitution have been formally introduced since it was ratified in 1787. Yet just 27 cleared Congress and were ratified by the states.

The proposal for an amendment to ban same-sex couples from getting married, supported Tuesday by President Bush, should join the long list of past failures in the trash can of history.

An amendment that takes rights away from Americans has no place in the Constitution. The president's aggressive approach is an overreaction to a polarizing issue in the presidential campaign. The validity of gay and lesbian marriages should be settled in the courts and by individual states.

The furor over same-sex marriage is a response to San Francisco Mayor Gavin Newsom's bold act of civil disobedience Feb. 12. The newly elected mayor advocated issuing marriage licenses to same-sex couples. More than 3,000 couples seized that opportunity, prompting Bush to say that decisive and democratic action is needed to preserve the sanctity of marriage.

Quick action is necessary -- by the California Supreme Court, and perhaps the U.S. Supreme Court. On the issue of same-sex marriages, a constitutional amendment should not be an option.

The Miami Herald
Herald.com

Gay marriage isn't a constitutional issue

OUR OPINION: PRESIDENT SHOULD FOCUS ON MORE-PRESSING ISSUES

With so many urgent challenges confronting the country, why would President Bush push a ban on gay marriage to the top of the national agenda? And why now? The president's announcement yesterday bears the unmistakable imprimatur of a political maneuver. It ill-serves the country. Yet Mr. Bush puts the weight of the presidency behind a measure that would make denial of basic civil rights to some individuals a Constitutional mandate.

The effort must be defeated because our Constitution stands for more than government-sanctioned meanness. It must be defeated because bias demeans Americans and is unworthy of a place in our Constitution.

By intentional design, amending the U.S. Constitution is a painstaking, difficult task. Successful amendments require many years of planning, a two-thirds vote by both the U.S. House and Senate as well as ratification by three-fourths of the states. The process is tough because the Constitution represents our guiding principles of governance. We cannot allow it to become a vehicle for discrimination.

President Bush understands the process. So what is his objective? In the short-term, the announcement energizes religious conservatives, a key constituency group, in the heat of an increasingly close presidential campaign and at a time when the president's job-approval ratings are dropping. So an anticipated political boost to President Bush's standing cannot be dismissed.

But if the president hopes to shift the national conversation away from record-high deficits, the war in Iraq or terrorism, he won't succeed. The question of whether gay marriages should be legal clearly is a hot-button issue. The Massachusetts Supreme Court has declared such unions legal, and the mayor of San Francisco has sanctioned weddings for thousands of gay couples.

But 38 states, including Florida, have laws that restrict marriage to a man and a woman, and a federal law, the Defense of Marriage Act, does the same thing. So what Mr. Bush wants to put in the Constitution is already on the books in most states and under federal law.

However, in arguing for a ban on gay marriage, the president sets the stage for a prolonged national debate on the issue. It is plainly obvious that Americans are ambiguous and conflicted about homosexuality. Some states permit gay couples to validate their relationships in civil unions, and many employers extend benefits to their employees gay partners. These arrangements allow gay couples to bind their relationships publicly, legally.

In scouring the Massachusetts constitution, justices there found no basis or justification for discrimination against homosexuals. No such language exists today in the U.S. Constitution, nor should it ever.

Those who would make our Constitution a refuge of hatred and intolerance mustn't be allowed to succeed.

JSOnline
MILWAUKEE
JOURNAL SENTINEL

Editorial: Government in the bedroom

From the Journal Sentinel

Posted: Feb. 24, 2004

President Bush's announcement Tuesday that he supports a constitutional amendment banning gay marriage comes at just the right time. The latest polls indicate that support for some kind of ban on gay marriage far exceeds support for the president's re-election. So the odds are that Bush can pick up a few votes with his support of the amendment and at the same time divert attention from the serious issues the nation faces, such as an out-of-control federal budget, a couple of unfinished wars and an economy that can't quite decide what it wants to do.

But although Bush's announced support may be good for him, we're not convinced it's good for the country:

First, as noted above, there are far more serious matters deserving of the nation's attention. In a recent poll in Wisconsin, 75% of respondents said they believed that state legislators should focus on "more important issues" than a ban on same-sex marriage. Our guess is that a national poll would yield similar results. It seems that while most people think gay marriage should not be recognized as legally valid, they also may think that banning it does not deserve a high priority and is not worth all the fuss that adopting a constitutional amendment would entail.

Second, we're uncomfortable with the idea of a constitutional amendment that would limit individual rights. Most of the 26 amendments that deal with such rights - from speech and due process to voting - guarantee or expand those rights. They don't seek to limit individual liberties, which this amendment clearly would do.

Third, there already is a federal law - the Defense of Marriage Act - that defines marriage as a union between a man and a woman. It's true that a federal law doesn't carry as much weight as a constitutional amendment and that local controversies in Massachusetts and California have raised questions about state laws. But we don't see the need to change the U.S. Constitution until there is a serious challenge to existing federal law and the Supreme Court overturns that law.

Fourth, there are legitimate fears that the proposal currently before Congress would go beyond barring gay marriages to also prohibiting recognition of civil unions and domestic partnership arrangements. Even Bush has expressed some discomfort with such a sweeping notion.

Most important, we're uncomfortable with government interference into such a private and personal commitment and with government discrimination against any group of adults engaging in legal behavior. Maybe it's time government got out of the bedroom and out of the business of blessing personal unions between consenting adults. Let churches do that - let them marry whom they will and refuse to marry whom they won't - but don't make government a party to such personal religious beliefs.

Let government instead issue civil union licenses to willing couples, all of whom would be treated equally before the law, which, after all, is the underlying theme of the Constitution.

FOCUS - 1 of 2 DOCUMENTS

Copyright 2004 Journal Sentinel Inc.
Milwaukee Journal Sentinel (Wisconsin)

February 26, 2004 Thursday FINAL EDITION

SECTION: NEWS; Pg. 19A

LENGTH: 703 words

HEADLINE: States ;
States, not judges, should decide the fate of **marriage**

BYLINE: E. THOMAS MCCLANAHAN

BODY:

Once again, we have a needlessly uncompromising judicial decision on a contentious social issue, namely **gay marriage.** The consequences could well lead to the sort of polarized, either-or debate we've seen on abortion.

Late last year, the highest court in Massachusetts discovered in the constitution of that state an absolute right to **gay marriage.** Asked by the state Legislature whether civil unions for **gays** would be an acceptable alternative, the court replied with a flat "no."

Moreover, it issued a declaration comparing the distinction between civil unions and **marriage** to the "separate but equal" doctrine, once used to rationalize racial segregation.

The basic mistake, as in abortion, is to define the issue solely in terms of individual rights. Sure, individual rights matter. I think it's time to accept that **gay** relationships are legitimate -- that the moment has come to grant them appropriate recognition and status. But the best way to do that is through civil unions, not **marriage.**

I was watching video footage the other day of **gays** being married in San Francisco (in defiance of state law). The word "**marriage**" simply didn't fit, at least in my mind. I saw something else, something with its own validity, but something different from **marriage,** which is a union between a man and a woman.

Take that away, and you haven't merely extended a new right to **gays;** you've redefined society's primary social unit. You've fuzzed up the link between **marriage,** the perpetuation of the species and the critical work of raising children. The long-term effects of such a change are not at all clear.

So the argument isn't merely about individual rights. It's about the future of our society, which has a stake in maintaining a special status for **marriage** -- even if the distinction is largely linguistic.

As dissenting Judge Robert Cordy wrote in the Massachusetts case, **marriage** is an attempt to steer "acts of procreation and child rearing into their most optimal setting." To state the obvious, no **gay** couple, by itself, can participate in perpetuating the human species. That's why dredging up the catch phrase "separate but equal" was such a stretch.

One way to proceed would be to let each state define **marriage** as it sees fit -- not through the undemocratic process of court decisions, but through the normal channels of politics, where policy changes are won through persuasion, debate and elections.

Under the federal Defense of **Marriage** Act, states currently decide for themselves whether to recognize civil unions or **marriages** licensed in other states. Over time, the social consequences of **gay marriage** should become apparent. If those consequences are benign, more states would allow such unions.

Unfortunately, the absolutism of the Massachusetts judges -- along with the San Francisco situation -- may trigger a reaction precluding both **gay marriage** and civil unions in any state.

Under the Massachusetts ruling, **gays** can begin marrying legally in May -- a matter of weeks. Eventually, one of those legally married Massachusetts couples will dispute a state's refusal to recognize the **marriage,** generating a lawsuit through which the Supreme Court could overturn the Defense of **Marriage** Act.

If that scenario plays out, then the enormously complex issue of **gay marriage** would have been decided almost entirely by judges.

This prospect is giving impetus to a constitutional **amendment** at the federal level, the text of which is thoroughly muddled on the subject of civil unions.

It is two sentences long: "**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."

Some supporters say the **amendment** would permit civil unions, but I don't see it in the words. Whatever this linguistic goo means, it's not something that belongs in the nation's basic law. Let the states, not the courts, continue to define the meaning of **marriage.**

E. Thomas McClanahan is an **editorial** board member at The Kansas City Star.

LOAD-DATE: February 26, 2004

FOCUS - 2 of 2 DOCUMENTS

Copyright 2003 Journal Sentinel Inc.
Milwaukee Journal Sentinel (Wisconsin)

November 24, 2003 Monday FINAL EDITION

SECTION: NEWS; Pg. 13A

LENGTH: 702 words

HEADLINE: SAME-SEX UNIONS;
Gay marriage will crowd other issues out of the picture

BYLINE: JAY BOOKMAN

BODY:

Gay marriage is political gold.

Months ago, long before a ruling by the Massachusetts Supreme Court put the issue on front pages, Republican operatives had poll-tested **gay marriage** and had decided to make it a centerpiece of their 2004 campaign. Politically speaking, the decision was a no-brainer.

Opposition to **gay marriage** offers an easy way to reach those voters troubled by a sense that things are spinning out of control, that the world is changing much too quickly. It offers politicians a way to say that here, at least, we can draw the line against the terrifying future.

At a time when public expressions of homophobia have at last gone out of style, the issue of **gay marriage** also offers a means of appealing less directly to that sentiment. Perhaps most important, the issue has the power to blind. Given its emotional nature, it can dominate public debate and voter attention, driving other issues out of the national conversation.

And we surely have a lot to talk about these days. In our debate over Iraq and other issues of national security, we are trying to define what role this country will play in the world for generations to come: Should we lead the world or rule the world?

On fiscal matters, we are refusing to set aside the enormous resources that we know will be needed to sustain the baby boomers in retirement and to cover their medical expenses; instead, we are compounding the problem by shoveling still more debt on generations that have no voice in the matter. And economically, the uneven effects of globalization -- making some people incredibly rich, while putting equally hard-working people in the jobless line -- demand a reweaving or at least a rethinking of the social safety net.

But instead of talking about such serious things, we're going to indulge ourselves in a loud, long and divisive fight whose outcome will have no effect whatsoever on the lives of the vast majority of Americans.

If the institutions of family and **marriage** are in trouble -- and the statistics do suggest cause for concern -- surely we heterosexuals have only ourselves to blame. By law and by custom, **gay** Americans have been allowed no role in those institutions until now. Homosexuals cannot be held responsible for high divorce rates among their heterosexual friends, co-workers and neighbors. They are not responsible for the millions of children casually brought into this world by heterosexual parents and then casually raised to adulthood.

Soiling the U.S. Constitution with the so-called **Marriage** Protection **Amendment** will save not a single straight **marriage** now headed for the rocks. It will prevent not a single pregnancy to an unwed mother. Instead, it is a transparent and rather sad attempt to scapegoat somebody else.

The **amendment's** passage would have only one practical impact: It would deny the legal benefits of **marriage** to a small subset of our fellow Americans. **Gay** Americans would continue to be denied the tax benefits conferred by **marriage.** Their spouses would still be denied the benefits conferred by health insurance. The legal system would continue to deny them any standing as recognized partners.

It would install in our founding document the right of government to discriminate against its citizens based solely on their sexual orientation, and we are a better country than that.

"We don't get to choose and shouldn't be able to choose and say, 'You get to live free, but you don't,' " one political observer said a few years ago. "And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard."

That was Dick Cheney, arguing in the 2000 vice presidential debate that the federal government ought to stay out of the issue of **gay marriage.** As the father of a lesbian, he was in essence speaking in defense of his family. If he now repudiates that position as a means of getting re-elected, then the family values problem in this country is even more serious than many believed.

Jay Bookman is deputy **editorial** page editor of The Atlanta Journal-Constitution.

LOAD-DATE: November 24, 2003

TESTIMONY

United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

Subcommittee Hearing on
"Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? "

March 3, 2004
226 Dirksen Senate Office Building
10:00 a.m.

Testimony of Chuck Muth

Chuck Muth is President of Citizen Outreach, a conservative organization which advocates limited government public policies, editor and publisher of daily "News & Views" e-newsletter with over 25,000 subscribers nationwide and host of LawfullyWedded.com, a website dedicated to conservative opposition to the Federal Marriage Amendment.

- - - - - - - - - - - - - - - - - - -

I am here today not as a lawyer, a theologian or a constitutional scholar but as a simple conservative grassroots political activist who shares former Sen. Barry Goldwater's penchant for limited government. It is in that spirit that I come here today urging this Congress to reject a constitutional amendment banning same-sex marriages. This is not to say that conservatives such as myself necessarily favor gay marriage, but rather that we strongly oppose the notion of addressing this issue of social policy in our nation's governing document.

While this issue has far-reaching implications, I appreciate the opportunity to talk briefly about some of them here today and will certainly expound upon these points or answer any questions later in this hearing.

The name of this hearing, Judicial Activism vs. Democracy, is itself indicative of the problems we have addressing, let alone resolving the issue of gay marriage because of the differing definitions many have regarding the terms themselves.

Was the Massachusetts Goodridge decision an example of judicial activism? It certainly appears so, especially after the court determined that only gay marriage, and not some sort of civil unions or domestic partnerships which the legislature endeavored to create, were acceptable to the court. However, I found the Goodridge decision to be reasonably argued even if I disagreed with conclusion. The fact is, reasonable people can disagree as to whether or not this was an example of judicial activism.

On the other hand, I find it always important to point out that we do not live in a democracy, but rather, in a representative constitutional republic. The overuse and over-reporting of polls only confounds this problem and misperception.

The point is, even if 85% of people polled thought that bringing back slavery or taking away the right of women to vote in a particular state was a good idea, the Constitution simply doesn't permit it. With the exception of states in which citizen-initiated ballot measures are allowed, the people don't vote on issues as in a democracy; they vote for representatives who then vote on the issues. And even then, representatives are precluded from passing laws which are violations of the nation's highest law, the Constitution.

Now, that being said, I've read accounts indicating that the legislature of Massachusetts, acting on a citizen-initiated petition, could have addressed this issue of gay marriage well before the supreme judicial court's ultimate decision and chose, instead, to punt the ball away. If these accounts are accurate, then the Massachusetts judiciary can hardly be held fully responsible for filling a vacuum created by legislative inaction and/or obstruction. If indeed the Goodridge decision is an example of judicial activism, it was aided and abetted by legislative neglect. In either event, the people of Massachusetts have not been well served.

Which brings me to the second point along these lines. If the Goodridge decision by the Massachusetts Supreme Court is in fact an example of un-elected activist judges imposing their will on the people of Massachusetts, that's a problem for the people of Massachusetts to resolve, not the people of the United States. This is the very essence of our nation's federalist system. The rights of the people of the individual states to enact policies and laws not in conflict with the U.S. Constitution was of paramount importance to the Founders. Indeed, the enumerated powers of the federal government are extremely limited.

Now, as surely as night follows day, whenever I bring up the states' rights argument on this issue, someone immediately whips out the "full faith and credit" clause of the Constitution to counter that argument. Three points:

1.) There are legal scholars who have made compelling arguments for why the full faith and credit clause would NOT apply to gay marriages. It's entirely possible that if challenged, the full faith and credit clause would NOT be interpreted to force other states to recognize same-sex marriages performed in Massachusetts or some other state.

2.) The 1996 Defense of Marriage Act (DOMA) specifically protects the rights of one state not to recognize the same-sex marriages of another state and DOMA has yet to be successfully challenged. Surely we should wait to see if DOMA is struck down before embarking on a path as extreme as amending our Constitution.

3.) Even if somewhere down the road DOMA is ruled unconstitutional by the Supreme Court, then the correct remedy would be a constitutional codification of DOMA's protection of states' rights, not a national one-size-fits-all prohibition on same-sex marriages.

As a constitutional conservative, I am very distressed at President Bush's recent statements on this issue. His position in the last presidential election reflected the federalist principle of letting the states decide. Yet by now embracing a federal constitutional amendment prohibiting same-sex marriages, he has rejected this principle. Should the Federal Marriage Amendment as currently drafted be approved, the people of individual states will forever be banned from coming to a different conclusion on this issue. The President had it right the first time.

Further, I believe this effort could be the first step toward the federalization of family law. Throughout history, government has used a "crisis" to expand their encroachment on liberty. In this case, under the guise of a homosexual crisis, can we expect a Federal

Department of Family Affairs at the cabinet level by decades' end? Why not? It wasn't so long ago that education was understood to be the sole province of the states, and look where we are today. "Fair-weather federalists" who support this Amendment need to seriously consider the unintended consequences which may arise from the current gay-marriage panic.

If the problem is judicial activism, then let's have a discussion and debate on how to address judicial activism. To address the perceived problem of judicial activism ONLY on this one hot-button issue is akin to putting a band-aid on a compound fracture. To move forward on the Musgrave amendment as written is to invite, deservedly so in my opinion, the criticism that this is solely a punitive, discriminatory anti-gay measure. And as such, it has no place in the greatest governing document mankind has ever seen.

Sadly, though, this is not the first time a constitutional marriage amendment with such ugly undertones has been proposed. In preparing for my testimony here today, I came across a paper titled "Journal of African American Men" (http://www.csupomona.edu/~rrreese/INTEGRATION.HTML) which describes the objections many had in the early 1900s toward blacks marrying whites. According to this report, Rep. Seaborn Roddenberry, Georgia Democrat, proposed a constitutional amendment banning interracial marriages stating that, "Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant. It is subversive to social peace."

This is not unlike much of the rhetoric you hear from supporters to today's federal marriage amendment.

Of course, supporters of the current Federal Marriage Amendment will say, "That was way back then. You can't equate two gay guys getting married to the notion of a black man getting married to a white woman." However, taking into consideration the passions and context of the times, it's not much of a stretch to believe that people such as Rep. Roddenberry found the idea of interracial marriage just as unnatural and abhorrent then as many today find the idea of gay marriage.

Today we look at how people such as Rep. Roddenberry felt about interracial marriage a hundred years ago and cannot, in our wildest dreams, imagine such ignorance and bigotry. But if Congress moves forward with this current marriage amendment, I suggest that Americans one hundred years from now will likely look back on this distinguished body with equal amazement, if not disgust.

Then again, maybe not. Which brings me to my final point.

There's been a lot of talk in this debate over what the Founding Fathers would have thought about this issue. Let me stipulate that had the notion of gay marriage come up in 1776, it's highly unlikely our Founders would have smiled upon it. However, Thomas Paine, in his publication titled "The Rights of Man," left no doubt about his position with regard to one generation binding the hands of the next in matters of governance. He wrote...

"Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. ... Every generation is, and must be, competent to all the purposes which its occasions require. ... The circumstances of the world are continually changing, and the opinions of men change also; and as government is for the living, and not for the dead, it is the living only that has any right in it. That which may be thought right and found convenient in one age

may be thought wrong and found inconvenient in another. In such cases, who is to decide, the living or the dead?"

And that is the final thought I wish to leave with you today. I could be personally opposed to gay marriage today. But I have two-year-old and four-year-old daughters who may very well come to a vastly different conclusion 20, 30 or 50 years from now, just as we in this room today have come to a vastly different conclusion in the matter of interracial marriage from that of Rep. Roddenberry.

Then again, maybe they won't. The point is, it's simply wrong for our generation to presume to dictate via a federal constitutional amendment how future generations of Americans address this social policy.

In conclusion, as a limited-government conservative I feel compelled to point out that this entire problem is the result of government getting involved with the institution of marriage in the first place. Had marriage remained in the domain of the churches and religious institutions, this debate would be moot. The whole thing reminds me of an earlier constitutional amendment effort to put prayer back in schools. But again, the problem wasn't that we kicked God out, but that we allowed government in. Maybe one day we'll learn this lesson.

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

Muth's Truths: "Finding the Rational Middle on Gay Marriage"

newsandviews_list
Sun, 29 Feb 2004 08:31:14 -0800

MUTH'S TRUTHS
"Finding the Rational Middle on Gay Marriage"
by Chuck Muth

When it comes to gay marriage, it's a mad, mad, mad, mad world.

On the one hand, social conservatives who for years have been lamenting the federalization of the abortion debate, maintaining the hot social issue should have been left to the states, are now all for federalizing marriage in order to establish a national prohibition against same-sex nuptials - in much the same way their ancestors amended the Constitution to prohibit alcohol.

And we all know how THAT turned out.

On the other hand - the left one, that is - we're finding born-again states' righters in the personages of John Kerry, Teddy Kennedy, et. al. Would that their politically convenient new-found support for states' rights extend beyond the issue of marriage. Fat chance.

But it's the right that's driving this debate, so any reasonable compromise solution is going to have to come out of the right. In order to do that, though, one first needs to recognize that there are two polar opposite ends within the conservative movement, as well.

On one end you'll find conservatives such as columnist Andrew Sullivan who outright favor gay marriage and nothing less than gay marriage. On the other end you have folks such as Gary Bauer who oppose even the ability of states to recognize civil unions, let alone gay marriages.

Let's stipulate that those two extremes aren't likely to find any common ground any time soon. So what's needed is a common-ground position which the rational center-right coalition - that is, the rest of us - can embrace.

And that will mean focusing not so much on defining marriage as addressing judicial activism as a whole and preserving the core conservative principle of states' rights.

Which brings me to The Federalist.

The Federalist is an online publication which is decidedly social conservative in nature, but with a strong bias toward the Constitution. They are unabashedly opposed to gay marriage and have actively opposed the "homosexual agenda" in their publication for a long time. Their social conservative bona fides are genuine, well-established and unimpeachable.

So when THEY say the Musgrave federal marriage amendment is the WRONG way to go, conservatives who support it ought to sit up and take note.

"In the end, this proposed marriage amendment does little more than bandage a lesion on a body consumed with cancer," editorialized The Federalist recently. "In addition, it lends a false sense of security. If the issue -- as President Bush presented in no uncertain terms -- is the imminent threat of judicial activism (and indeed it is), then the only constitutional amendment we should be considering is one that addresses JUDICIAL ACTIVISM."

Hoo-hah! Praise the Lord and pass the peas!

But the Federalist is far from alone in seeing the bigger picture in this debate.

"The key flaw is that Mr. Bush's (marriage) amendment - like the failed prayer amendment of two decades ago - doesn't address the core problem, which is that an unelected judiciary is running roughshod over the plain meaning of the Constitution, substituting its views on socio-political issues for those of the framers and the majority of the American people," writes conservative columnist Jack Kelly. "In the unlikely event that the marriage amendment were successful, judicial overreach would be blocked in this one area. But the fundamental problem would persist."

Now, if you're on a religious jihad and just want to stick it gays...then stick with the anti-gay Musgrave amendment. But if you're a true constitutional conservative who recognizes that the problem isn't just judicial activism in the marriage debate, but judicial activism PERIOD, then stick with the Federalist and Kelly.

Of course, some conservatives are intent on specifically addressing the marriage issue. If so, they might at least consider the Taranto Amendment, offered by "Best of the Web's" James Taranto, as a compromise compromise: "Nothing in this Constitution shall be construed to require any state or the federal government to recognize any marriage except between a man and a woman." In other words, protect states' rights without establishing a national one-size-fits-all ban on same-sex marriage.

Of course, even Taranto's marriage-specific language won't please the Sullivans or the Bauers at the far edges of the conservative movement, but it's certainly reasonable common ground for the rest of us in the rational middle.

# # #

Chuck Muth is president of Citizen Outreach, a non-profit public policy advocacy organization in Washington, D.C. The views expressed are his own and do not necessarily reflect the views of Citizen Outreach. He may be

c/o National Puerto Rican Coalition • 1901 L Street, Ste 802• Washington, DC 20036

Tel: 202-223-3915 • Fax: 202-429-2223 • Website: www.bateylink.org/nhla.htm

Executive Committee
Chair, Manuel Mirabal
National Puerto Rican Coalition
Vice Chair, Delia Pompa
National Association of Bilingual Education
Secretary/Treasurer, Gilbert Moreno
Association for the Advancement of Mexican Americans
At-Large, Al Zapanta
U.S.-Mexico Chamber of Commerce
At-Large, Alma Morales Riojas
MANA: A National Latina Organization
Organizations
Alianza Dominicana
American GI Forum
ASPIRA Association, Inc.
Cuban American National Council
Hispanic National Bar Association
Hispanic Association on Corporate Responsibility
Hispanic Association of Colleges & Universities
Hispanic Council on International Relations
Interamerican College of Physicians & Surgeons
Labor Council for Latin American Advancement
Latino Civil Rights Center
League of United Latin American Citizens
Mexican American Legal Defense & Education Fund
National Association of Latino Elected & Appointed Officials
National Council of La Raza
National Association of Hispanic Federal Executives
National Association of Hispanic Publications
National Conference of Puerto Rican Women
National Hispanic Caucus of State Legislators
National Hispanic Corporate Council
National Hispanic Council on Aging
National Hispanic Environmental Council
National Hispanic Foundation for the Arts
National Hispanic Media Coalition
National Hispanic Medical Association
National Puerto Rican Forum
National Latina/o Lesbian, Gay, Bisexual & Transgender Organization
Puerto Rican Legal Defense & Education Fund
Society of Hispanic Professional Engineers
Southwest Voter Registration & Education Project
U.S. Hispanic Chamber of Commerce
Individuals
Rudy Beserra
Henry Cisneros
Rita DiMartino
Frederick Fernandez
Hon. Ciro Rodriguez

National Hispanic Leadership Agenda Opposition to a Constitutional Amendment to Define Marriage

The National Hispanic Leadership Agenda (NHLA) urges Members of Congress to oppose any amendment to the United States Constitution which attempts to permanently deny marriage or the legal incidents thereof to same-sex couples by defining marriage. An amendment of this type has serious civil rights implications and additionally undermines the traditional right of states to regulate civil marriage.

The Constitution and its subsequent amendments were designed to protect and expand individual liberties. If an amendment such as the currently proposed H.J. Res. 56/S.J. Res. 26, or another like it, makes it through the process necessary to amend the Constitution, this would be the first time in history that the Constitution was amended *to restrict the rights of a whole class of people, in conflict with its guiding principle of equal protection.*

An amendment of this type is divisive, discriminatory and seeks to treat one group of citizens differently than everyone else. As a community that knows discrimination all too well, we oppose any constitutional amendment that is intended to deny rights to any one. NHLA concurs with the sentiments expressed by Justice Sandra Day O'Connor as stated in Lawrence v. Texas (2003), a case dealing with gay people, "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause."

Furthermore, this amendment would have sweeping consequences for the protection of civil rights of other people besides gay people. Once discrimination based on belonging to a class, or group, of people is established in the Constitution, attempts will be made to justify discrimination and exclusion of other groups or classes of people by relying on interpretations of the same principle used to discriminate against same-sex couples. This would present a grave threat to the guiding principle of our Constitution - equal protection under the law.

At a time when our nation has a great many pressing issues, exerting time and energy on a discriminatory constitutional amendment seems a poor use of our resources. These proposed amendments only serve to further a divisive and polarizing social issue at a time when we need our leaders to find ways to help us become more unified as a nation. We urge you to oppose H.J. Res. 56/S.J. Res. 26, the "Federal Marriage Amendment" and any other proposed amendments which attempt to achieve the same goal and seek your commitment to do so at any time such an amendment is presented on the floor of the United States Congress.

The National Hispanic Leadership Agenda, NHLA, is a non-partisan coalition of 40 major Hispanic national organizations as well as distinguished Hispanic leaders from across the nation. The NHLA represents all major ethnic groups in the Hispanic/Latino community including Mexican Americans, Puerto Ricans, Cuban Americans, and Americans whose countries of origin are in the Caribbean and Central and South America.

THE NEW REPUBLIC ONLINE

CHICAGO SCHOOL

Law Breaker

by Jacob T. Levy

Only at **TNR Online**
Post date: 02.18.04

Many of the conservative supporters of the Federal Marriage Amendment (FMA) argue that their efforts are intended to limit judicial overreach of the sort they perceive in Massachusetts' *Goodridge* decision. They suggest that the FMA bans gay marriage altogether, but bans civil unions only if they're created by state or federal judges--suggesting that legislatively created civil unions would be acceptable. As Ramesh Ponnuru recently wrote, "[T]he amendment would not bar a state legislature from enacting civil unions, but only block any future replays of Vermont, in which a court essentially ordered a legislature to enact them." This is of a piece with a longstanding argument on the right that social conservative positions can best be presented as defenses of democratic decision-making against an imperial, culturally-left judiciary. And it seems to underlie the Bush administration's political strategy of embracing a marriage amendment while fudging on the issue of civil unions.

As written, though, the FMA would make it impossible to create the type of civil unions FMA boosters like Ponnuru suggest they're open to. More broadly, it's unlikely that *any* amendment preventing courts from creating civil unions would make it possible for legislatures to do the same. Worse, not only would the FMA deny state legislatures the authority proponents claim it would leave intact; it would also constitute the kind of unprecedented assault on state autonomy conservatives reject in almost every other circumstance.

In their zeal to disguise the anti-gay-marriage cause as a crusade against judicial-supremacy, the framers of the Federal Marriage Amendment came up with the following:

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.

The second sentence has become the focus of controversy because of the undefined scope of the phrase "legal incidents thereof," which some FMA supporters have said they mean to ban judicially- but not legislatively-created civil unions. But the text

doesn't actually do that.

The reason has to do with the mechanics of how the state would go about "creating" civil unions. In the normal course of things, the legislature would write a civil unions law--let's call it the "Civil Unions Act of 2004"--which the judiciary would then deem to have created a civil union. The problem is that, if you allow the judiciary to deem that the Civil Unions Act of 2004 has created a right to a civil union--in other words, to "construe" a the legislation as doing so--you also have to allow the judiciary to construe other sources of law--for example, the equal protection clause of a state constitution--as creating that right as well.

Why is this important? Because the converse is also true. If you try to prevent the judiciary from deeming that something like the equal protection clause creates a civil union--which is what supporters of the FMA hope to do--then you also prevent the judiciary from deeming that the "Civil Unions Act of 2004" creates a civil union. The more moderate proponents of the FMA suggest that they're open to the latter but not the former. But there's simply no way to allow a judge to find legal justification for civil unions in an act of the legislature while forbidding him to find legal justification for them in the text of the constitution. Doing so would mean prohibiting any judicial interpretation of the more sweeping constitutional clauses, like equal protection, which would be the height of the kind of judicial activism conservatives frequently complain about. The judicial authority to construe one source of law can't be parceled off so neatly from the authority to construe others.

There is another, subtler problem with the FMA's second sentence: It does not merely limit and constrain state laws. It dictates a rule about how state laws and state constitutions will be construed and interpreted by the state's own courts. *That* is an unprecedented intrusion into the autonomy of the states' legal systems. Instead of limiting state law with federal law, from the outside, it would distort state law from within.

Constraints and limits are the stuff of the federal Constitution and of federal statutes. A state's law prohibiting miscegenation, enacting a poll tax, creating barriers to interstate trade, or creating an internal system of paper money will be overridden by federal courts enforcing the federal Constitution. But the federal courts are interpreting *federal* law when they do so, not state law. It is an important principle of American federalism that only state courts may do the latter. Even the U.S. Supreme Court defers to state supreme courts as the final interpreters of their own states' constitutions and laws; it only judges compatibility of those laws and constitutions with respect to federal law.

The FMA would be different. It would compel not the conclusion that federal law overrides any state's attempt to create gay marriage or civil unions, but the conclusion that, no matter what the state's legislature, constitutional convention or referendum, or judiciary decided, state law never created gay marriage or civil unions in the first place. For example, if a state's legislature and voters agreed, by the constitutionally-required supermajorities, to amend their state constitutions to say that "Civil marriage in this

state shall be available to couples of the same sex," *state judges* would be compelled, by their oaths to the federal Constitution and its supremacy clause, to deny that the state constitution meant what it said. In principle we would never reach the moment of a federal judge using the federal constitution to override the state law, because the FMA would have reached within each state's own constitutional processes and dictated the outcome.

Despite this, some conservatives, such as Ponnuru, have argued that the FMA isn't necessarily an assault on federalism. Federalist principles don't simply demand maximal power and autonomy for the states, they argue, but rather a balance between states and the center. And, they rightly suggest, some changes to that balance can be made without altering the fundamental structure.

But meddling for the first time in how states interpret their own statutes and constitutions isn't a marginal change. It's a change in the basic status of state constitutions and legal systems. That's because state constitutional provisions can mean something different from their federal counterparts, even when they use precisely the same wording. Among other things, state-level precedent and the different overall constitutional structure in whose light provisions must be interpreted allow state legal systems to develop in ways more protective of individual rights than the federal system. Guarantees of freedom of speech, freedom of association, the right to keep arms, privacy and property rights, and, yes, equal protection clauses can all be construed more expansively in a given state than they are at the federal level--a fact that matters dearly to conservative defenders of federalism. For those who care about federalism as an institution for protecting freedom--a description most conservatives would assent to--federal intervention in state constitutional development is a dangerous precedent, imperiling precisely these rights.

The FMA was oddly written in an attempt to meet social conservative aims under cover of shoring up the separation of powers and respecting federalist principles--and while avoiding the appearance of extremism that would be created by banning civil unions altogether. The attempt to do all this simultaneously failed. We're left with an amendment that achieves social conservative aims by *subverting* both the separation of powers and federalism. In this case, a bad cause seems to have made for bad law.

JACOB T. LEVY is Assistant Professor of Political Science and the College at the University of Chicago, and the author of *The Multiculturalism of Fear* (Oxford 2000). He writes regularly at volokh.com.

The New York Times

The Bedroom Door, by William Safire
The New York Times, June 30, 2003

The Supreme Court has just slammed America's bedroom door. Sodomy -- defined in the new 11th edition of Merriam-Webster's Collegiate as "anal or oral copulation with a member of the same or opposite sex" -- when practiced between consenting adults, straight or gay, is none of the government's business.

Libertarian conservatives like me who place a high value on personal freedom consider Lawrence v. Texas a victory in the war to defend everyone's privacy. Homosexuals hail the decision as the law's belated recognition of fairness, which it is, but some would escalate that to American society's acceptance of their lifestyle, which is at least premature.

Traditionalist conservatives put forward a concern that officially decriminalizing sodomy might undermine state laws against adult incest (as between grown-up siblings). But that universal taboo is driven as much by the genetic dangers of inbreeding as by morality or law.

Of more immediate concern to traditionalists is the dramatic warning issued from the Supreme Court bench by dissenting Justice Antonin Scalia. He predicted that this legal triumph for gays would lead to the next big antidiscrimination item on the homosexual agenda: legal sanction of the marriage of two people of the same sex.

Scalia is right about that. We can now expect this question to be asked of every candidate for political office. Because polls will show a majority of voters are uncomfortable with the notion, the issue of same-sex marriage will be evaded or fudged by those primary candidates with an eye on the general election campaign. But the s-s-m issue is now seriously in play.

Don't underestimate the depth of feeling about this on the religious right. Not just fundamentalists, but many churchgoers and congregants see this as a perversion of the institution of marriage and an assault on our standards of morality. Branding them as mindless bigots for holding these views, or for daring to argue that a child's sexual orientation may be influenced by that of his or her parents, is unfair and divisive.

Sooner or later, one of our states -- perhaps Vermont, which already has "civil unions," or Massachusetts or some other liberal bastion -- will get in step with Canadian trends and make it legally possible for gays to marry, with all the tax breaks, insurance benefits and spousal visitation rights and protections that appertain.

What about all the other states that anticipated this cultural battle and passed laws refusing to recognize any such marriages? The coming dispute among states will go to the Supreme Court, and even if the next three appointees are Scalia clones, I'll bet the court will hold that the laws of one state that do not offend the U.S. Constitution must be recognized by all other states.

After that decision, some wedding guests will be hard pressed to forever hold their peace. One reason is that straight marriage is showing signs of strain. More nubile women are postponing weddings to pursue careers. More eligible men dither along into uncommitted cohabitation. More of our marriages are ending in divorce, as no-fault life doth us part. Now marriage isn't even between one man and one woman, the way it's been for thousands of years. Traditionalists despair: What's happening to the idea of the rock-solid, procreative, mutually supportive family?

Rather than wring our hands and cry "abomination!", believers in family values should take up the challenge and repair our own house.

Why do too many Americans derogate as losers those parents who put family ahead of career, or smack their lips reading about celebrities who switch spouses for fun? Why do we turn to the government for succor, to movie porn and violence for sex and thrills, to the Internet for companionship, to the restaurant for Thanksgiving dinner -- when those functions are the ties that bind families?

I used to fret about same-sex marriage. Maybe competition from responsible gays would revive opposite-sex marriage.

Last week I misquoted Walt Whitman as writing "Very well then I am inconsistent." What he wrote, in "Song of Myself," was "Very well then I contradict myself." Best of a torrent of corrections came from Prof. James Bloom of Muhlenberg College: "Whitman knew that using an active-voice transitive verb always beats a copula-and-adjective-complement combo."

Copyright 2004 The New York Times Company
The New York Times

February 25, 2004, Wednesday, Late Edition - Final

SECTION: Section A; Page 22; Column 1; **Editorial** Desk

LENGTH: 482 words

HEADLINE: Putting Bias in the Constitution

BODY:

With his re-election campaign barely started and his conservative base already demanding tribute, President Bush proposes to radically rewrite the Constitution. The **amendment** he announced support for yesterday could not only keep **gay** couples from marrying, as he maintains, but could also threaten the basic legal protections **gay** Americans have won in recent years. It would inject meanspiritedness and exclusion into the document embodying our highest principles and aspirations.

If Mr. Bush had been acting as a president yesterday, rather than a presidential candidate, he would have tried to guide the nation on the divisive question of what rights **gay** Americans have. Across the nation, elected officials and others have been weighing in on whether they believe **gays** should be allowed to marry, have civil unions, adopt, visit their partners in hospitals and be free from employment discrimination. Except for a throwaway line about proceeding with "kindness and good will and decency," the president's speech was a call for taking rights away from **gay** Americans.

President Bush's studied unwillingness to talk about the rights **gay** people do have is particularly significant given the wording of the Federal **Marriage Amendment** now pending in Congress. It calls for denying same-sex couples not only **marriage,** but also its "legal incidents." It could well be used to deny **gay** couples even economic benefits, which are now widely recognized by cities, states and corporations. Such an **amendment** could radically roll back the rights of millions of Americans.

In his remarks yesterday, President Bush tried to create a sense of crisis. He talked of the highest Massachusetts court's recognition of **gay marriage,** San Francisco officials' decision to grant **marriage** licenses to **gay** couples and a New Mexico county's doing the same thing. He did not say the New Mexico attorney general found that **gay marriages** violate state law, the California attorney general is asking the California Supreme Court to review San Francisco's actions, and Massachusetts is considering amending its State Constitution to prohibit **gay marriage.** The president, who believes so strongly in states' rights in other contexts, should let the states do their jobs and work out their **marriage** laws before resorting to a constitutional **amendment.**

The Constitution has been amended over the years to bring women, blacks and young people into fuller citizenship. President Bush's **amendment** would be the first adopted to stigmatize and exclude a group of Americans. Polls show that while a majority of Americans oppose **gay marriage,** many would prefer to allow the states to resolve the issue rather than adopting a constitutional **amendment.** They understand what President Bush does not: the Constitution is too important to be folded, spindled or mutilated for political gain.

http://www.nytimes.com

LOAD-DATE: February 25, 2004

Copyright 2004 The New York Times Company
The New York Times

February 27, 2004, Friday, Late Edition - Final

SECTION: Section A; Page 27; Column 5; **Editorial** Desk

LENGTH: 712 words

HEADLINE: Bliss and Bigotry

BYLINE: By BOB HERBERT; E-mail: bobherb@nytimes.com

BODY:

I wanted to see this threat to the very foundation of civilization close up.

"We met over a noodle kugel that I made that she liked," said Deborah Gar Reichman.

I nodded. Ms. Reichman broke into a wide smile and moved forward in her chair, warming to the topic: her engagement to Shelley Curnow.

I had dropped by their third-floor walk-up in the Carroll Gardens neighborhood of Brooklyn. Very frankly, the two women did not look like revolutionaries. "We're worrying about where to register and arguing with our parents over the guests they want to invite," Ms. Reichman said.

President Bush and others are adamant in their contention that allowing two men or two women to wed would imperil the institution of **marriage,** which Mr. Bush described as "the most fundamental institution of civilization." The hard-liners on this issue seem convinced that something awful will be unleashed if **gays** are allowed to walk down the aisle and exchange vows of everlasting love. On Tuesday the president said the nation "must enact a constitutional **amendment** to protect **marriage** in America."

I kept staring at Ms. Reichman and Ms. Curnow, trying to locate the threat that others perceive in relationships like theirs. But they never came across as menacing. They just looked happy.

"We've been together almost six years now," Ms. Reichman said. "We had big crushes on each other right from the beginning."

"We started planning our wedding a year ago," Ms. Curnow said.

"We had no idea there was any chance that it might be legal," Ms. Reichman said. "We just found a place that we really liked, and it happened to be in Massachusetts. Of course, we want to be legally married. But that issue was never going to stop us. We wanted to have a wedding. We wanted to celebrate with our family and friends the way all our other friends have done, and the way that's been a tradition in our families.

"My family and I wanted to have a Jewish ceremony, and Shelley's O.K. with that. We found a rabbi that's going to declare us married in the Jewish faith."

"The state sanction is kind of an extra layer, if you will," said Ms. Curnow. "If it doesn't happen, we'll still have our wedding."

In a world beset by ignorance and poverty and suffering, a world wracked with wars and terror attacks and ethnic strife of every kind, it seems crazy to be twisting ourselves into knots over the desire of good men and women to transcend the prison of themselves and affirm their love for another by marrying.

That kind of desire is a good thing, isn't it?

And those of you who are already married, tell the truth: the **marriage** of Deborah Reichman and Shelley Curnow (planned for May 22) won't make your **marriage** any weaker, will it?

We should rein in the combative rhetoric on this matter -- the references to the "defense" of **marriage,** the "protection" of the institution, the "threat" to civilization. No one is waging war on **marriage.** It's just the opposite. This is all about people who are longing to embrace it.

"People talk about the **marriage** penalty," said Mike Rutkowski, a resident of Yardley, Pa., who married Tim Harper 20 years ago in a ceremony that is not legally recognized. "I would gladly pay the **marriage** penalty for the benefits that go with it."

Mr. Rutkowski is a grant coordinator, and Mr. Harper is a biochemist. They met 22 years ago in a church choir.

The opponents of **gay marriage** are on the wrong side of history. The interests of civilization are not served by driving mature love underground. And the interests of the United States, which is supposed to be the quintessence of a free society, are not served by enshrining bigotry in law.

The other day I saw a photo on my assistant's computer screen of two women in wedding dresses: Joanna Tessler, a Manhattan real estate agent, and Nicoletta Sellas, a psychology intern at the Bronx Psychiatric Center. Their arms are raised high in the air, and they are dancing joyfully in the aftermath of their **marriage** ceremony in Miami on Valentine's Day. It's an absolutely beautiful photo. The wedding guests are laughing and applauding.

"Bliss" would have been an appropriate caption. Why anyone would want to turn the people in that picture into outlaws is beyond me.

http://www.nytimes.com

LOAD-DATE: February 27, 2004

Copyright 2004 The New York Times Company
The New York Times

February 29, 2004, Sunday, Late Edition - Final

SECTION: Section 4; Page 13; Column 2; **Editorial** Desk

LENGTH: 698 words

HEADLINE: A New Topic for an Old Argument

BYLINE: By Joseph J. Ellis; Joseph J. Ellis is the author of "Founding Brothers."

BODY:

Abraham Lincoln once observed that America was founded on a proposition, and that Thomas Jefferson wrote it. He was referring, of course, to the section of the Declaration of Independence that begins, "We hold these truths to be self-evident . . . " The reality, though, is that we are founded on a debate over what Jefferson's proposition means. And the current struggle over **gay marriage** is but the most recent chapter in that longstanding American argument.

The words that started the current controversy were written by John Adams. In 1779, Adams almost single-handedly drafted the Massachusetts Constitution. It was passages from that document that the state's supreme court cited to support its decision to overturn all legal restrictions on same-sex **marriage.** "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties," Adams wrote. "In fine, that of seeking and obtaining their safety and happiness."

It is most unlikely, of course, that Adams had **gay** rights in mind. But like Jefferson's more famous formulation of the same message, Adams framed the status of individual rights in absolute and universal terms. Certain personal freedoms were thereby rendered nonnegotiable, and any restrictions on those freedoms were placed on the permanent defensive. At the very birth of the republic, in effect, an open-ended mandate for individual rights was inscribed into the DNA of the body politic, with implications that such rights would expand gradually over time.

In 1848, for example, the women at Seneca Falls cited Jefferson's magic words to demand political equality for all female citizens. In 1863 Lincoln referred to the same words at Gettysburg to justify the Civil War as a crusade, not just to preserve the Union, but also to end slavery. In 1963 Martin Luther King harked back to the promissory note written by Jefferson to claim civil rights for blacks. Now the meaning of the mandate has expanded again, this time to include **gay** and lesbian couples wishing to marry. With all the advantages of hindsight, it now seems wholly predictable that America's long argument would reach this new stage of inclusiveness.

Are Adams and Jefferson rolling in their graves? This is not just a rhetorical question, since opponents of same-sex **marriage** are sure to argue that neither man intended his words to be interpreted as a sweeping endorsement of **gay** rights. While such opponents would be historically correct, their argument would also apply to civil rights for blacks and, at least in terms of Jefferson, to voting rights for women. A literal enforcement of their original intentions, in short, would necessitate rolling back a full century of liberal reforms now broadly regarded as beyond debate.

But the open-ended character of their language on individual rights is a crucial clue to a more relevant version of their original intentions. Both Adams and Jefferson regarded the American Revolution as a long-term experiment to test the limits of personal freedom. Present at the creation, they did not want to place any cap on the potential achievement of the experiment in the future. Jefferson was particularly eloquent in urging each new generation to interpret his famous words anew. Adams was a more cautious revolutionary, emphasizing way stations on the road forward to allow

time for popular opinion to catch up with jarring changes. He may well have favored civil unions as a sensible compromise in the current furor.

Most important, the way they framed the question gave great advantage to the side in favor of expanding the scope of individual rights. Notice, for example, that recognizing **gay marriage** will not require a constitutional **amendment,** but blocking it will. And the founders made passage of a constitutional **amendment** very difficult indeed. Our debate over **gay** rights has just begun, so it would be foolish to predict all the legal and political contortions that lie ahead. If history is a guide, however, everyone who has bet against the expansive legacy has eventually lost.

http://www.nytimes.com

LOAD-DATE: February 29, 2004

The New York Times
nytimes.com

PRINTER FRIENDLY FORMAT SPONSORED BY IN AMERICA NOW PLAYING IN SELECT THEATRES

March 1, 2004

OP-ED COLUMNIST

Stolen Kisses

By BOB HERBERT

In the film "Cinema Paradiso" a priest previews each movie that is to be shown in a small Italian town and orders the removal of all kissing scenes. Near the end of the film, the main character, a man named Salvatore who had been a small boy at the time the priest exercised his powers of censorship, is given a film reel in which all the deleted kisses have been restored. He watches, profoundly moved, as one couple after another gives physical expression to their mutual love.

In the magic of movie-making we can sometimes recapture the intimacy that is lost to misguided and intolerant customs and policies. Real life is another matter.

In the United States, many people are still uncomfortable with the idea of two men holding hands (unless it's in a football huddle) or two women kissing. Sex between people of the same gender remains a major taboo. And the notion of gay marriage, viewed as an abomination by a huge swath of the electorate, is threatening to become a decisive element in the presidential campaign.

In a country that is quick to celebrate the rights of the individual and the ideals of freedom, real tolerance is often hard to come by.

One of the particularly absurd arguments against allowing gays to marry is that such a lapse would send us skidding down that dreadful slope to legalization of incest, polygamy, bestiality and so forth.

In an interview last spring with The Associated Press, Senator Rick Santorum, a Pennsylvania Republican, said we'll be on that slope if the courts even tolerate homosexual acts. Referring to the U.S. Supreme Court's consideration of a challenge to a Texas anti-sodomy law, the senator said, "And if the Supreme Court says that you have a right to [gay] consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."

That line of thinking reminded me of a passage in Randall Kennedy's book, "Interracial Intimacies: Sex, Marriage, Identity, and Adoption." In a 19th-century miscegenation case, a black man in Tennessee was charged with criminal fornication. The man's defense was that the woman, who was white, was his wife. They had been married lawfully in another state.

"That argument," wrote Mr. Kennedy, "was rejected by the Tennessee Supreme Court, which maintained that its acceptance would necessarily lead to condoning `the father living with his daughter . . . in lawful wedlock,' " and "the Turk being allowed to `establish his harem at the doors of the capitol.' " We have a tendency to prohibit things simply because we don't like them. Because they don't appeal to us. They don't feel quite right. Or we've never done it that way before. And when things don't feel

quite right, when they make us uncomfortable, we often leap, with no basis in fact, to the conclusion that they are unnatural, immoral, degenerate, against the will of God.

And then the persecution begins.

I find a special irony in the high level of opposition among blacks to gay marriage.

When the U.S. Supreme Court, in the deliciously titled Loving v. Virginia case, finally ruled that laws prohibiting interracial marriage were unconstitutional, 16 states, including Virginia, still had such laws on the books. That was in 1967, at the height of the war in Vietnam and three years after the Beatles had launched their spectacular assault on American-style rock 'n' roll.

In the Loving case a mixed-race married couple was charged with violating Virginia's Racial Integrity Act. The judge who sentenced the couple wrote:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangements there would be no cause for [interracial] marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Now we're told that he doesn't want gays to marry. That there is something unnatural about the whole idea of men marrying men and women marrying women. That it's abhorrent to much of the population, just as interracial marriages were (and to many, still are) abhorrent.

We need to get a grip.

Copyright 2004 The New York Times Company | Home | Privacy Policy | Search | Corrections | Help | Back to Top

The New York Times
nytimes.com

PRINTER-FRIENDLY FORMAT SPONSORED BY IN AMERICA NOW PLAYING IN SELECT THEATRES

March 3, 2004

OP-ED COLUMNIST

Marriage: Mix and Match

By NICHOLAS D. KRISTOF

Shakespeare's "Othello" used to be among the hardest plays to stage in America. Although the actors playing Othello were white, they wore dark makeup, so audiences felt "disgust and horror," as Abigail Adams said. She wrote, "My whole soul shuddered whenever I saw the sooty heretic Moor touch the fair Desdemona."

Not until 1942, when Paul Robeson took the role, did a major American performance use a black actor as Othello. Even then, Broadway theaters initially refused to accommodate such a production.

Fortunately, we did not enshrine our "disgust and horror" in the Constitution — but we could have. Long before President Bush's call for a "constitutional amendment protecting marriage," Representative Seaborn Roddenberry of Georgia proposed an amendment that he said would uphold the sanctity of marriage.

Mr. Roddenberry's proposed amendment, in December 1912, stated, "Intermarriage between Negroes or persons of color and Caucasians . . . is forever prohibited." He took this action, he said, because some states were permitting marriages that were "abhorrent and repugnant," and he aimed to "exterminate now this debasing, ultrademoralizing, un-American and inhuman leprosy."

"Let this condition go on if you will," Mr. Roddenberry warned. "At some day, perhaps remote, it will be a question always whether or not the solemnizing of matrimony in the North is between two descendants of our Anglo-Saxon fathers and mothers or whether it be of a mixed blood descended from the orangutan-trodden shores of far-off Africa." (His zoology was off: orangutans come from Asia, not Africa.)

In Mr. Bush's call for action last week, he argued that the drastic step of a constitutional amendment is necessary because "marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society." Mr. Roddenberry also worried about the risks ahead: "This slavery of white women to black beasts will bring this nation to a conflict as fatal and as bloody as ever reddened the soil of Virginia."

That early effort to amend the Constitution arose after a black boxer, Jack Johnson, ostentatiously consorted with white women. "A blot on our civilization," the governor of New York fretted.

In the last half-century, there has been a stunning change in racial attitudes. All but nine states banned interracial marriages at one time, and in 1958, a poll found that 96 percent of whites disapproved of marriages between blacks and whites. Yet in 1997, 77 percent approved. (A personal note: my wife is Chinese-American, and I heartily recommend miscegenation.)

Mr. Bush is an indicator of a similar revolution in views — toward homosexuality — but one that is still unfolding. In 1994, Mr. Bush supported a Texas antisodomy law that let the police arrest gays in their own homes. Now the Bushes have gay friends, and Mr. Bush appoints gays to office without worrying that he will turn into a pillar of salt.

Social conservatives like Mr. Bush are right in saying that marriage is "the most fundamental institution in civilization." So we should extend it to America's gay minority — just as marriage was earlier extended from Europe's aristocrats to the masses.

Conservatives can fairly protest that the gay marriage issue should be decided by a political process, not by unelected judges. But there is a political process under way: state legislatures can bar the recognition of gay marriages registered in Sodom-on-the-Charles, Mass., or anywhere else. The Defense of Marriage Act specifically gives states that authority.

Yet the Defense of Marriage Act is itself a reminder of the difficulties of achieving morality through legislation. It was, as Slate noted, written by the thrice-married Representative Bob Barr and signed by the philandering Bill Clinton. It's less a monument to fidelity than to hypocrisy.

If we're serious about constitutional remedies for marital breakdowns, we could adopt an amendment criminalizing adultery. Zamfara, a state in northern Nigeria, has had success in reducing AIDS, prostitution and extramarital affairs by sentencing adulterers to be stoned to death.

Short of that, it seems to me that the best way to preserve the sanctity of American marriage is for us all to spend less time fretting about other people's marriages — and more time improving our own.

Copyright 2004 The New York Times Company | Home | Privacy Policy | Search | Corrections | Help | Back to Top

March 2, 2004

U.S. Senator Russell Feingold
Ranking Member, Subcommittee on
The Constitution, Civil Rights and Property Rights
Judiciary Committee, U.S. Senate
Senate Hart Building, Room 506
Washington, DC 20510

Re: Hearing on Judicial Activism vs. Democracy

Dear Senator Feingold:

I write to you on behalf of over 250,000 Americans who are members of Parents, Families and Friends of Lesbians and Gays (PFLAG), one of the nation's key family organizations committed to the rights of gay, lesbian, bisexual and transgender (GLBT) persons. Founded in 1973, PFLAG is a nonpartisan charitable organization that includes families of all political perspectives – Republicans, Democrats and more – and sponsors over 500 chapters, located in all fifty states of our Union. I write regarding the hearing scheduled for tomorrow by Senator Cornyn on the topic, "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts *Goodridge* Decision and the Judicial Invalidation of Traditional Marriage Laws?"

PFLAG families are disappointed and dismayed that our struggle for equality has been further jeopardized because some among our country's leadership would bow to political pressure employed by extremists who are committed to a nation divided: those who enjoy full rights and protections under the Equal Protection Clause of our Constitution, and those who do not. GLBT Americans – including same-sex couples who are parents to over 1 million children in this country – participate and contribute meaningfully to our neighborhoods, communities and nation. These families – that are based in loving, committed relationships sharing the duties of parenthood – succeed notwithstanding the burdens they carry with lesser legal standing. In fact, the General Accounting Office detailed in 1997 over 1,000 rights and benefits that are provided to heterosexual couples – primarily at federal taxpayer expense – that are denied to same-sex couples. Legal recognition of these relationships helps to strengthen and stabilize families, and harms no one.

PFLAG: Parents, Families and Friends of Lesbians and Gays
1726 M Street, NW, Suite 400 / Washington, DC 20036 / phone: (202) 467-8180 / fax: (202) 467-8194 / www.pflag.org

We request respectfully that you and your colleagues ask hearing witnesses on the 3rd to document how same-sex marriages harm or threaten in any way heterosexual relationships. We further ask that you use your office and position as Ranking Member of the Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Property Rights to ensure that tomorrow's hearing provides a balanced perspective so that all American families – not just a few – are represented fairly and accurately before you and your colleagues.

Sincerely,

David Tseng
Executive Director

cc: The Honorable John Cornyn

PFLAG: Parents, Families and Friends of Lesbians and Gays
1726 M Street, NW, Suite 400 / Washington, DC 20036 / phone: (202) 467-8180 / fax: (202) 467-8194 / www.pflag.org

The State of the Family

By Family Research Council President, Tony Perkins

I would like to address the state of the family in America and share where I believe we are as a nation. I hope to shed light on some of the challenges we face and spur each of us on as we stand united for that which we hold vital to America's wellbeing—the family.

The most fundamental institution in our society today is that of marriage. Created and sanctioned by God himself, the union of one man and one woman is the very bedrock of civilization. Marriage has withstood the test of time and it is sacrosanct. The first marriage ever to take place was between Adam and Eve in the Garden of Eden, with the Creator officiating. God said, "It is not good for man to be alone," so he fashioned Eve from Adam's rib. They were intended for each other, to become one flesh, to live together, to rule over the earth together, and to procreate. Social science confirms that the married state is consonant with our nature and good for the individual spouses; studies have

consistently shown that married people are happier, healthier, live longer, and are better off financially.

Marriage is also the safest place for women and children. According to a study by the Heritage Foundation, children from broken or never-married families have greater rates of long-term poverty, serious child abuse, developmental and behavioral problems, and are more likely to end up in jail as adults. Studies also show that divorced, separated, or never-married women experience higher rates of violent abuse than do married women. But it doesn't take a scientific study to understand the benefits of marriage and the reasons it should be maintained as a social norm; for most of our history as a civilization, common sense sufficed.

Marriage is good. But the institution of marriage is under attack. In fact, half of all marriages today end in divorce. In 1960, 393,000 American couples got a divorce. In 1996, that number had exploded to 1.15 million couples. Another alarming trend is the number of couples skipping the altar and opting instead to live together. The number of cohabiting couples has literally skyrocketed, from almost half a million in 1960 to nearly 5 million in 2000. When no-fault divorce was legalized in 1969, the assertion was that it would make getting out of a marriage easier and therefore couples would be less intimidated to tie the knot. In reality, no-fault divorce clearly

communicated the opposite message. Marriage is no longer sacred. Since the courts cheapened society's greatest institution, more couples no longer saw the need to enter into a marital covenant. Instead of making it easier for couples to walk the isle, it has prompted couples to walk away from marriage.

But cohabitation is no substitute for marriage. Studies show that cohabiting relationships are likely to be unstable while cohabitants are less healthy emotionally than married couples and are at a higher risk for later divorce. Children born to cohabiting couples are likely to have emotional and behavioral problems, experience greater educational difficulties, and are more likely to be economically disadvantaged.

Another tremendous challenge facing our country today is homosexuality. When the United States Supreme Court legalized sodomy last June, it succeeded in ripping the fabric of American culture and sending tremors throughout the holy state of matrimony. The court opened the door to redefine marriage, which the Massachusetts Supreme Court brazenly walked through on November 18, when it ruled that denying homosexual couples the right to marry violates the Massachusetts Constitution, a document ratified in 1780 and largely composed by founding father John Adams.

But those who seek to redefine marriage as anything other than a union between one man and one woman are clearly in the minority. A *New York Times* poll released just one month ago showed that 61 percent of Americans oppose legalizing homosexual marriage and an overwhelming 55 percent favor a constitutional amendment that allows marriage only between one man and one woman. A CNN poll, also released one month ago, found that 65 percent of Americans think the law should not recognize marriages between homosexuals as valid. Americans soundly voiced their disapproval, opposing gay marriage by more than 2-to-1. And that opposition is increasing; compared to polls taken before these two contentious court decisions, Americans expressed even more determination to defend traditional marriage. They believe marriage is between one man and one woman and that it should stay that way. In fact, Zogby International just released a poll late last month that showed 69 percent of likely voters in Massachusetts want to vote on a constitutional amendment to keep Massachusetts a traditional marriage state. The poll also showed that 69 percent of likely voters believed it was better for children to be raised by a married mother and father.

Speaking of having and raising children, the American public is showing an unprecedented surge of support for the sanctity of human life. Not only do they feel marriage is the best place for children, but they also feel strongly that those children should be protected in the womb and carried to term. A survey conducted

last year by the Center for the Advancement of Women found that 51 percent of women said the government should prohibit abortion or limit it to extreme cases, such as rape, incest, or life-threatening complications. Pro-life women are clearly now in the majority, compared to 2001 when 45 percent of women sided against making abortion readily available or favored imposing mild restrictions. A second poll conducted last summer found that 54 percent of women opposed all or almost all abortion. The message is obvious. The majority of American women are pro-life.

For years, pregnant women have been having ultrasounds, which allow them to watch their baby suck its thumb, hiccup, open and close its mouth, and stretch out inside the womb. But advanced medical technology now makes it possible for mothers to see their babies' development as never before. They bond with their unborn children and overwhelmingly choose life. According to the *Medical Student Journal of the American Medical Association*, such advances in technology are changing the public's perception of the unborn and may shift the balance of legal rights from the mother to the fetus. Nowhere is this change more obvious than in pregnancy help centers that have decided to offer their clients basic ultrasounds. A Columbus, Ohio pregnancy help center reported that before offering ultrasounds, 80 percent of patients intent on having an abortion chose to terminate their pregnancy after counseling. But after offering clients free ultrasounds and physician consultations, the center reported that, of those

clients whose outcomes could be documented, 90 percent chose to carry their babies to term. And in my home state of Louisiana, a Baton Rouge pregnancy help center reported, Caring to Love Ministries, on whose Board I serve, found that 98 percent of their abortion-minded clients who received an ultrasound examination decided to forgo an abortion.

America has made great strides in 2003. Abortion rates have fallen and more than 50 pieces of pro-life legislation were passed in state legislatures last year. States passed human cloning bans, fetal-homicide laws, informed consent for abortion, abortion clinic regulations and parental involvement laws for minors seeking abortions. And on the federal level, Congress finally passed and President Bush signed into law the partial birth abortion ban.

But the battle is far from over. No sooner had the president's ink dried on the parchment then the law landed in court on grounds that a partial birth abortion ban was unconstitutional. In New Hampshire, a federal judge struck down the state's parental notification law as unconstitutional, clearing the way for young girls to get an abortion without their parent's knowledge. And just six days ago, New Jersey Governor Jim McGreevey signed into law the nation's most sweeping human cloning legislation to date. With no regard for human life, the legislation authorizes New Jersey's biotech industry to clone a

human embryo, implant the embryo into the mother's womb, develop it to the fetal stage, and then kill it for research purposes—treating the unborn as mere lab rats.

Our greatest challenge in defending traditional marriage and the sanctity of human life is the battle we are forced to wage in our courts. When our founding fathers met over 200 years ago to establish a government for the American people, they wisely established three branches of government with an inherent balance of power, designed so that no branch could usurp the powers of another. Yet when we look back at the Supreme Court's decision to legalize sodomy, the Massachusetts Supreme Court's decision to redefine marriage, and the federal judge's decision to strike down New Hampshire's parental notification law, the message is abundantly clear. Judges that were appointed to interpret the laws of this land have severely overstepped their boundaries and taken to making laws—a duty rightfully entrusted to the legislative branch. America, the free, is being assaulted by judicial tyranny. Americans do not want abortion and they do not want homosexual marriage. But judges are thumbing their noses at "we the people" and catering instead to the special interests of a liberal few. This battle comes as no surprise to President Bush, who declared as soon as he signed the partial birth abortion ban into law that, "The executive branch will vigorously defend this law against those who would try to overturn it in the courts."

Nowhere is this struggle more apparent than in the life of Terri Schiavo, a Florida woman whose life changed forever in 1990 when she collapsed from heart failure. She survived, but for more than a decade, her husband, Michael Schiavo, has refused rehabilitation treatment for his wife, waging a long, drawn-out battle to have her feeding tube removed, even though she is not comatose and is able to speak some words to her parents, Bob and Mary Schindler. The Schindlers have taken their son-in-law to court in order to care for Terri, pointing out that he is engaged to be married to another woman and has had two children by her. Last year, a judge ordered Terri's feeding tube removed, which was nothing less than a death sentence by starvation and dehydration. Public outcry was unprecedented as thousands of people across the country called, wrote, and e-mailed their outrage to Governor Jeb Bush, pleading with him to intervene. Terri's feeding tubes were removed. But six days later, at a special session in the Florida legislature called by Governor Bush, lawmakers passed Terri's Law, which put an immediate moratorium on all dehydration and starvation deaths currently pending in Florida. The pro-life community had sounded a clarion call. Do not kill Terri. No sooner had Terri's sustenance been restored than Michael Schiavo filed a lawsuit, immediately challenging the constitutionality of the law. If Judge Douglas Baird rules that Terri's law is unconstitutional, then her

feeding tube will once again be removed and she will likely suffer an excruciating death by starvation.

The power of Terri's life and possible death rests in this judge's hands. She has committed no crime. She is not on life support. She is simply being fed. But Judge Baird could change all of that. Now, a state judge will decide if Terri has a constitution right to life and determine what "quality of life" is worth of protection. Fifty years ago, this case would never have survived. A man suing to remove his wife's feeding tube, while he carried on a public and adulterous affair, would have been criminalized, if not in the judicial courts, then most assuredly in the court of public opinion.

But this is a different day. Our liberties are at stake because certain members of the judicial branch have usurped legislative authority and succeeded in wreaking havoc upon our lives, our liberties, and our pursuit of happiness. We must stand together and defend the institution of marriage. We must stand together and defend the sanctity of life. We must stand together and send out a clarion call to the executive, legislative and judicial branches that we still want a government of the people, by the people and for the people. We must write and call our federal lawmakers and hold them accountable to perform their duties and confirm good judges that have excellent credentials and will not legislate from the bench. We must communicate in every possible

way to the president and members of Congress the urgent need for a constitutional amendment declaring marriage as a union between one man and one woman.

We must stand for the sacred institution of marriage and family. We must continue working to insure that every child conceived in America is welcomed into the world as a blessing and not a curse. For more than we imagine is at stake.

Our freedom, our society, and our country are at stake. We have been driven to this crisis by tyrannical judges bent on imposing a social vision radically at odds with our civilization's Christian heritage, but the responsibility for acting vigorously to defend that heritage is ours. If we feebly submit to the dictates of an imperial judiciary, we can expect the same fate as preceding civilizations that have declined into moral and social decay—and then into the ash heap of history.

.09/04/03 THU 09:16 FAX 907 465 2075 ALASKA AG CNTRL 002

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

September 4, 2003

Dear Senator Cornyn,

Thank you for giving me the opportunity to provide comments for your hearing to discuss measures that could be employed to defend the 1996 Defense of Marriage Act being held in the Senate Judiciary Subcommittee on the Constitution.

Protecting fundamental constitutional rights is the domain of the judiciary. Legislative decisions need to be left to the legislative bodies. State legislatures, including Alaska's, are providing legal definitions of marriage, consistent with the Defense of Marriage Act. *See* AS 25.05.011, 013; Alaska Const. art. 1, § 25. In turn, activist courts are gradually attempting to erode marriage definitions through collateral attacks, even though the definitions impinge no fundamental equal protection or due process rights. An amendment to the U.S. Constitution would provide protection against such an erosion by the federal judiciary, fundamentally protecting the states' Tenth Amendment right to define for themselves what marriage is or is not.

Morality is determined by the people, who speak through their legislatures. Legislatures in turn define certain laws based on that morality. The Defense of Marriage Act speaks to this democratic system by defining for purposes of federal law that marriage is the legal union of one man and one woman. This definition does not preclude a future extension of federal benefits or other legal rights to other types of relationships, nor does it preclude a future definition for the union of same-sex or other types of couples. Acting on the federal level, a constitutional amendment defining marriage does not prevent states from adopting contrary definitions for state benefits or other state purposes.

Fundamental rights and liberties protected by the Constitution, including protecting the private sanctity of the bedroom, need to be and are properly addressed by the courts. The definition of marriage is properly addressed by the legislatures. An amendment to the Constitution defining marriage for federal law as between a man and a woman would not only assist in preventing the breakdown between legislative and judicial power at both the federal and state levels, but it also would not interfere with any state desiring a different state outcome.

Sincerely,

Gregg D. Renkes
Attorney General

TESTIMONY OF REVEREND RICHARD RICHARDSON
St. Paul African Methodist Episcopal (AME) Church
The Black Ministerial Alliance of Greater Boston
Children's Services of Roxbury, Inc.
Boston, MA

Chairman Cornyn, Ranking Member Feingold, and other distinguished members of the subcommittee, thank you for the opportunity to come before you today.

My name is Richard W. Richardson. I am an Ordained Minister in the African Methodist Episcopal Church in Boston, Massachusetts. I am also President and CEO of Children's Services of Roxbury, a child welfare agency. I've worked in the field of child welfare for almost 50 years. In addition, I have been a foster parent myself for 25 years.

Finally, I serve as chairman of the Political Affairs Committee of the Black Ministerial Alliance of Greater Boston. The BMA has a membership of 80 churches from within the greater Boston area, whose primary members are African American, and number over 30,000 individuals and families. I am here today to offer testimony on behalf of the BMA as well as myself.

The BMA strongly supports the traditional institution of marriage, as the union of one man and one woman. That institution plays a critical role in ensuring the progress and prosperity of the black family and the black community at large. That's why the BMA strongly supports a federal constitutional amendment defining marriage as the union of one man and one woman, and why the BMA is joined in that effort by the Cambridge Black Pastor's Conference and the Ten Point Coalition.

The BMA didn't come at this conclusion lightly. I never thought that I would be here in Washington, testifying before this distinguished subcommittee, on the subject of defending traditional marriage by a constitutional amendment. As members of the BMA, we are faced with many problems in our communities, and we want to be spending all of our energies working hard on those problems. We certainly didn't ask for a nationwide debate on whether the traditional institution of marriage should be invalidated by judges.

But the recent decision of four judges of the highest court in my state, threatening traditional marriage laws around the country, gives us no choice but to engage in this debate. The family and the traditional institution of marriage are fundamental to progress and hope for a better tomorrow for the African-American community. And so, much as we at the BMA would like to be focusing on other issues, we realize that traditional marriage – as well as our democratic system of government – is now under attack. Without traditional marriage, it is hard to see how our community will be able to thrive.

I would like to spend some time explaining why the definition of marriage as the union of one man and one woman is so important – not just to the African-American community, but to people of all religions and cultures around the world.

To put it simply: We firmly believe that children do best when raised by a mother and a father. My experience in the field of child welfare indicates that, when given a choice, children prefer a home that consists of their mother and father. Society has described the "ideal" family as being a mother, father, 2.5 children and a dog. Children are raised expecting to have a biological mother and father. It is not just society – it is biology, it is basic human instinct. We alter those expectations and basic human instincts at our peril, and at the peril of our communities.

The dilution of the ideal – of procreation and child-rearing within the marriage of one man and one woman – has already had a devastating effect on our community. We need to be strengthening the institution of marriage, not diluting it. Marriage is about children, not about adult love. As a minister to a large church with a diverse population, I can tell you that I love and respect all relationships. This discussion about marriage is not about adult love. It is about finding the best arrangement for raising children, and as history, tradition, biology, sociology, and just plain common sense tells us, children are raised best by their biological mother and father.

Let me be clear about something. As a reverend, I am not just a religious leader. I am also a family counselor. And I am deeply familiar with the fact that many children today are raised in nontraditional environments. Foster parents. Adoptive parents. Single parents. Children raised by grandparents, uncles, aunts. I don't disparage any of these arrangements. Of course I don't. People are working hard and doing the best job they can to raise children. That doesn't change the fact that there is an ideal. There is a dream that we have and should have for all children – and that is a mom and dad for every child, black or white.

I don't disparage other arrangements. I certainly don't disparage myself. As a foster parent to more than 50 children, a grandparent of seven adopted grandchildren, and almost 50 years of working with children who have been separated from their biological parent(s) and are living in a foster home, been adopted, or in any other type of non-traditional setting, I can attest that children will go to no end to seek out their biological family. It is instinct – it is a part of who we are as human beings, and no law can change that. As much as my wife and I shared our love with our foster children, and still have a lasting relationship with many of them, it did not fill that void that they experienced.

I want to spend my last few moments talking about discrimination. I want to state something very clearly, without equivocation, hesitation, or doubt. The defense of marriage is not about discrimination. As an African-American, I know something about discrimination. The institution of slavery was about the oppression of an entire people. The institution of segregation was about discrimination. The institution of Jim Crow laws, including laws against interracial marriage, was about discrimination.

The traditional institution of marriage is not discrimination. And I find it offensive to call it that. Marriage was not created to oppress people. It was created for children. It boggles my mind that people would compare the traditional institution of marriage to slavery. From what I can tell, every U.S. Senator – both Democrat and Republican – who

has talked about marriage has said that they support traditional marriage laws and oppose what the Massachusetts court did. Are they all guilty of discrimination?

Finally, I want to mention something about the process. I know that the Massachusetts legislature is currently considering this issue, and I hope that they do. The court has told us that we cannot have traditional marriage and democracy until 2006 at the earliest. That is wrong, that is antidemocratic, that is offensive, and that is dangerous to black families and the black community.

But importantly, a state constitutional amendment will not be enough. I know that the Attorney General of Nebraska is here, and I am honored to share the panel with him. I am not a lawyer. But I know the lawyers who have been fighting to abolish traditional marriage laws in Massachusetts. I have been in the courtrooms and seen them argue. They are good people, and well meaning. But I can tell you this – they are tenacious, they are aggressive, and they will not stop until every marriage law in this nation is struck down under our U.S. Constitution. And every schoolchild learns in civics class knows that the only way to stop the courts from changing the U.S. Constitution is a federal constitutional amendment.

The defense of marriage should be a bipartisan effort. I am a proud member of the Democratic Party. And I am so pleased that the first constitutional amendment protecting marriage was introduced by a Democrat in the last Congress. I am honored to have been invited here to testify in front of this subcommittee of both Republicans and Democrats. I hope that each and everyone of you will keep the issue of defending the traditional institution of marriage as a bipartisan issue.

Mr. Chairman, thank you for giving me the opportunity to represent the Black Ministerial Alliance of Greater Boston, the Cambridge Black Pastor's Conference, and the Ten Point Coalition, in reaffirming our support for a Federal Constitutional Amendment to define marriage as the union between a man and a woman. I would be pleased to take any questions.

August 28, 2003

Senator John Cornyn
Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

Thank you for allowing me to write on behalf of marriage. Marriage is fundamental to all our life experiences.

Marriage as defined by a man and a woman is the ideal environment for raising and teaching children. When a child is brought home from the hospital, mother and father both assist in providing the basic needs of life. As the child grows, the marriage between his/her parents give the child a sense of stability needed to explore all life has to offer. Throughout the child's life, mother and father play unique and distinct roles in shaping their child's character and nurturing his/her development.

No other social institution has proven itself as successful as marriage in the raising of well adjusted children. I support maintaining marriage in our culture as the principal way of providing for our youngest citizens. Every free society relies on parents --mothers and fathers-- to train the next generation. Public policies supporting marriage are necessary ingredients for providing a stable foundation for children to explore their new world.

Again, thank you for this opportunity to speak on behalf of traditional marriage.

Sincerely,

Rabbi Yoel Schonfeld
Queens Board of Rabbis
75-30 Vleigh Place
Flushing, NY 11367

Statement on the NAACP's Opposition to the *Federal Marriage Amendment* and Other Discriminatory Proposed Constitutional Amendments

Before the Senate Subcommittee on the Constitution of the Senate Committee on the Judiciary
Presented by Hilary Shelton, Director of the NAACP Washington Bureau
March 3, 2004

Introduction

The National Association for the Advancement of Colored People (NAACP), our nation's oldest and largest grass roots civil rights organization greatly appreciates the opportunity to testify before the Senate Subcommittee on the Constitution in order to express our firm and historical opposition to ever using the Constitution to discriminate against or deprive any person of his or her rights.

My name is Hilary Shelton and I am the Director of the NAACP's Washington Bureau, the federal legislative and national public policy arm of the NAACP. I would especially like to thank Chairman Cornyn and Senator Feingold for holding this hearing and for taking the lead in reviewing and examining this issue.

As an organization that has, since its inception, fought for and supported amendments to the Constitution to ensure and protect the most fundamental rights for all persons, the NAACP strongly opposes the so-called *Federal Marriage Amendment* and all other proposals that would use the Constitution to discriminate and restrict, rather than expand and protect the rights for any and all persons.

Founded in 1909, the NAACP currently has more than 2,200 membership units across the United States and has branches in every state in the nation. Our mission, over these past 95 years, has been to achieve equality of rights and eliminate prejudice among

the people of the United States. The NAACP has consistently opposed any custom, tradition, practice, law or Constitutional Amendment that denies any right to any person.

The NAACP Opposes All Discriminatory Constitutional Amendments

The NAACP is greatly disappointed that President George Bush and others have decided to enter this election cycle by endorsing an amendment that would forever write discrimination into the U.S. Constitution, rather than focusing on the crucial problems and challenges that affect the lives of all of us. At a time of record high unemployment, diminishing job prospects, a ballooning budget deficit that is choking our economy and crucial social service programs, a public school system that is in great need of attention and a health care system that is failing over 43 million Americans that remain uninsured over the past three years. This discriminatory constitutional amendment appears to be nothing more than a highly divisive political ploy to distract the country from focusing on our overabundance of real problems and our tremendous lack of creative and effective solutions.

The NAACP recognizes that the issue of marriage rights for same-sex couples is a difficult and sensitive one, and people of good will can and do have heartfelt differences of opinion on the matter. The NAACP has not taken a position on this question. But the NAACP is extremely opposed to any proposal that would alter our nation's most important document for the express purpose of excluding any groups or individuals from its guarantees of equal protection. The NAACP strongly opposes the *Federal Marriage Amendment*, introduced by Senator Wayne Allard and Congresswoman Marilyn Musgrave, as well as any other proposals to amend the Constitution to discriminate against American families or any other persons.

The *Federal Marriage Amendment* would, for the first time, use an amendment to the Constitution as a tool of exclusion. It is so extreme that, in addition to prohibiting any state government from honoring domestic contractual agreements between persons of the same gender in their states, it would also bar state and local governments from providing basic protections of citizens of the same gender and their families, even such fundamental protections as hospital visitation, inheritance rights, predetermined child custody rights and health care benefits.

Although the potential discriminatory impact of the *Federal Marriage Amendment* is broader than several other constitutional amendment proposals discussed in the media, the NAACP is clear that even so-called "narrow" constitutional amendments to deny these basic family protections between people of the same gender or their families is a dangerous and unnecessary approach to resolving the ongoing debate over this issue. Under no circumstances should the Congress reverse 225 years of constitutional history by using a constitutional amendment to restrict the civil rights of our citizens.

The Federal Marriage Amendment Is Extraordinarily Broad in Its Discrimination

Because the *Federal Marriage Amendment* is the only constitutional amendment introduced on this subject in the Congress, it deserves specific attention. Several recent press reports have characterized the amendment as "moderate" and as allowing states and cities to continue to enforce their civil union and domestic partnership statutes. The argument by many supporters of the amendment is that it would prohibit only court-ordered marriages and civil unions. This interpretation is incorrect. In fact, the amendment could forever eliminate a vast array of rights and protections already provided by states, counties, cities, and towns across the country.

The so-called *Federal Marriage Amendment* provides that:

> "Neither this (US) Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or legal incidents thereof be conferred upon unmarried couples or groups."

One does not need to be a constitutional scholar to see the broad impact of the amendment. The only piece of legal knowledge that one needs to know is the fundamental principle that courts assign meaning to every word in the Constitution. There are no "extra words."

But reading the so-called *Federal Marriage Amendment* as prohibiting only marriages imposed by so-called "activist judges" would require the courts to find that the amendment has nine extra words that have no meaning at all. In fact, they are nine powerful words.

Five of those words, "nor state or federal law," can only mean that the *Federal Marriage Amendment* is prohibiting the enforcement of laws duly passed by federal, state, or local legislatures. If the goal of the amendment is nothing more than to stop so-called "activist judges" from imposing their will against democratic wishes, there is no need to bar the enforcement of laws passed through democratic legislatures.

The four other words, "or legal incidents thereof," as distinguished from marriage itself, means that the *Federal Marriage Amendment* would prohibit any unmarried couple from having any or all of the hundreds of rights included in the compilation of rights known as marriage. There is no reason to include "or legal incidents thereof" if the sole goal of the amendment is to have the federal government deny marriage to all same-sex couples in every state.

These extra nine words could destroy--and forever prohibit--every single right or protection available to people of the same gender working together to raise their families.

The consequences will be severe for the health care, economic security, and probate concerns for millions of unmarried Americans and their children. The amendment could void laws passed by legislatures that provide fundamental rights to allow a person to visit other persons of the same gender in a hospital, participate in a person of the same genders medical decisions at his or her request, or even obtain health insurance.

Moreover, in many states, unmarried persons--including unmarried relatives, heterosexual couples, gay and lesbian couples, and even unrelated clergy members--have the same rights as married persons to jointly adopt or jointly provide foster care or kinship care to persons in need. These unmarried persons are providing loving and secure homes to countless children. By barring states from extending any "legal incidents" of marriage to unmarried persons, the amendment could take away every legal right and protection that states now provide to many American families.

The amendment could also destroy a wide range of other rights that are important to the lives of unmarried persons. Those legal protections may include state and local civil rights laws prohibiting discrimination based on "marital status," state laws protecting unmarried elderly couples who refrain from marrying in order to hold on to their all too menial pensions, and even state laws allowing a person, in the absence of a spouse, to oppose the autopsy of a close friend because of the deceased person's religious beliefs.

Passage of a Discriminatory Constitutional Amendment on Marriage Rights Would Contradict the History of the Bill of Rights and Subsequent Amendments

Adoption of this so-called *Federal Marriage Amendment* or any other discriminatory constitutional amendment on marriage rights would mark the first time that a constitutional amendment has denied or diminished, rather than established or

expanded, civil rights for groups and individuals. It would be a dangerous and a sorry departure from a long celebrated history of the expansion of rights important to all Americans. It would also be contradictory to all that the NAACP has fought for.

The principle constitutional source of individual rights is in constitutional amendments, not in the Constitution itself. As ratified by the states, the original text of the Constitution largely failed to protect the inalienable rights embodied in the philosophy of the Declaration of Independence. In fact, the fifth sentence of the Constitution declared that most African-Americans, who were then slaves, counted as three-fifths of a person, and most Native Americans were not counted at all. The inclusion of this provision in determining the apportionment of members of the House of Representatives highlights how far our nation has had to travel on the path to equality.

The Bill of Rights was proposed, and ultimately adopted, to ensure that certain basic and fundamental rights would be guaranteed to the people of the United States of America. These ten Amendments were designed to broaden the scope of rights reserved to the people or the states, establishing a floor of protections upon which individual states could build.

However, it was not until after the nation went through a long and bloody civil war that the Constitution, at least on paper, began to provide its protections to all persons. The Thirteenth Amendment abolished slavery, the Fourteenth ensured all Americans equal protection under the laws, the Fifteenth provided voting rights regardless of race or previous condition of servitude, the Nineteenth guaranteed voting rights for women, the Twenty-Third provided voting rights in presidential elections for residents of the District of Columbia, the Twenty-Fourth eliminated discriminatory poll taxes in federal elections, and the Twenty-Sixth provided voting rights for younger

Americans. All other constitutional amendments, with the notable exception of the amendments establishing and then repealing prohibition, have been simply ministerial, dealing with subjects such as judicial limits, payment of income taxes, and congressional pay increases.

There thus, with the instructive exception of the prohibition amendments, is no history of enacting constitutional amendments for the purpose of restricting individual freedoms. The *Federal Marriage Amendment*, and other discriminatory proposed constitutional amendments stand in stark contrast to the amendments that have been adopted in the spirit of freedom and liberty. As James Madison explained, constitutional amendments are reserved "for certain great and extraordinary occasions." Amending the federal Constitution to strip civil rights away from any group of persons is not such an occasion.

NAACP Urges Congress to Amend the Constitution to Ensure Equal Protection for All Persons

The opposition of the NAACP to the *Federal Marriage Amendment* and other discriminatory amendments should not be construed to mean that the Constitution should never again be amended. As I have been saying throughout this testimony, the NAACP firmly believes that the Congress should reject any amendment that would in any way restrict the civil rights of the people who have the privilege of living under the Constitution. The NAACP continues to support, however, amendments to the Constitution that would expand the ability of all Americans to pursue their inalienable rights and to meet needs that are still wanting in whole communities in America today.

For example, the NAACP believes that the Constitution should be amended to guarantee the right to a quality public education for our children. Despite the equal

protection clause of the U.S. Constitution, the 1954 Brown vs. Board of Education decision, decades of civil rights laws and volumes of talk about improving our schools, a dramatic disparity in the quality of public education continues to plague our nation. The quality of our children's educations, and the amount of resources dedicated to our public schools, varies radically based on where you live. In short, there exists today a significant educational opportunity gap within states for low-income, urban, rural and racial/ethnic minority students. Congressman Jesse Jackson, Jr. (D-IL) has introduced such an amendment (H. J. Res. 29) and as recently as our annual meeting in mid-February of this year, the NAACP National Board of Directors reiterated our support for this proposed Constitutional amendment.

The Constitution should also guarantee the right to affordable, high quality health care for our nations families. Our country's health care system is failing millions of Americans every year. It costs too much, covers too little and excludes too many. Currently, one seventh of all Americans, 42 million people, lack insurance and suffer unnecessary illness and premature death. In fact, despite being first in spending, the World Health Organization has ranked the United States 37th among all nations in terms of meeting the health care needs of its people. Again, Congressman Jesse Jackson, Jr. has introduced an amendment (H. J. Res. 30) to guarantee all Americans safe, adequate and affordable health care.

And the Constitution should guarantee access to democracy for all of our citizens. While there are several provisions in our Constitution providing for nondiscrimination in voting on the basis of race, sex and age, there is no explicit affirmation of an individual's right to vote in the United States of America. This point was made painfully clear by the U.S. Supreme Court when, in deciding the outcome of the 2000 Presidential election it

constantly reminded lawyers from both sides that "the individual citizen has no federal constitutional right to vote for electors for the President of the United States."

The right to an adequate education, the right to health care, and the right to make sure that all eligible Americans can vote and will have that vote counted are the rights we need to guarantee in order to build a firm foundation for the future success of our nation and they belong in our founding document. We would dare anyone to tell the millions of American families living without health care that they are better served by Congress debating whether to amend the Constitution to discriminate against families headed by two people of the same gender. We would dare anyone to tell the millions of parents whose children are receiving sub-par educations at woefully under-resourced public schools that their primary concern should be about Congress dictating for all the states which families are worthy of the law's protections and which ones are not. We would dare anyone to tell the thousands of American citizens who learned in the year 2000 that they have no Constitutionally guaranteed right to vote that they should clamor to see another group of Americans forever excluded from the guarantee of equal protection of the laws.

If Congress is feeling the need to amend the Constitution, then it should look to expand rights and not restrict rights. And Congress need look no further than three amendments, introduced in the House of Representatives and supported by the NAACP, H.J. Res. 28, H.J. Res. 29, and H.J. Res. 30, which constitutionally address some of the real needs in this country, without causing any harm to anyone's rights.

Conclusion

At a time when our nation has many important problems affecting the lives of millions of Americans, the Congress and this Subcommittee should waste no more time

or energy on divisive and discriminatory constitutional amendments. The NAACP strongly urges you to reject the so-called *Federal Marriage Amendment* and all other proposed constitutional amendments that would permanently deprive any person in our great nation of his or her civil rights.

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

KIRK TORGENSEN
Chief Deputy

September 2, 2003

SENT VIA FACSIMILE

The Honorable John Cornyn, Chairman
Judiciary Subcommittee on The Constitution
SD-139
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As Attorney General for the State of Utah, I want to express my concern that activist federal judges could impose same sex marriage on my state and on the American people. If something as critical to society as changing the definition of marriage is to be done at all, it should only be done by the people's elected representatives and never imposed by a few un-elected judges.

I know that an increasing number of political leaders and legal scholars are concluding that the only certain way to restrain these activist judges and preserve marriage is to amend the Constitution to specifically define marriage as the union of a man and a woman. I am also concerned that some of the proponents of same sex marriage are opposing such a constitutional amendment, claiming it is an infringement on states' rights. This is both absurd and disingenuous.

The federal system created in our Constitution protects states' rights as a way of achieving the larger goal of protecting the fundamental rights of our people. A solid majority of Americans oppose same sex marriage and they clearly have the right to determine how an institution as critical as marriage will be defined in our society. Imposing same sex marriage by judicial fiat would violate these rights of the people that are much more fundamental than the states' rights that the people themselves created in the Constitution.

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114-0810 • TEL: 801-538-9600 • FAX: 538-1121

The Honorable John Cornyn
September 2, 2003
Page Two

Thank you for holding these important hearings. Please make this letter a part of your hearing record.

Sincerely,

MARK SHURTLEFF
Utah Attorney General

MS/bj

SEP. 3. 2003 8:09PM EASTERN BAPTIST THEOGICAL SEMI NO. 7484 P. 1

EVANGELICALS FOR SOCIAL ACTION

RON SIDER, PRESIDENT

September 3, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Att: Mr. James Ho
327 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Cornyn:

I write to urge you and your colleagues to respect the millennia-old tradition of virtually every advanced civilization that marriage is between a man and a woman. This basic conviction of virtually all religions and civilizations is basic to a decent society, and it must be protected in our laws.

Thank you for making sure that our laws do this.

Sincerely,

Ronald J. Sider
President, ESA

RJS:nrm

10 EAST LANCASTER AVENUE • WYNNEWOOD, PA 19096-3495
PHONE 610-645-9390 • FAX 610-649-8090 • EMAIL esa@esa-online.org

Southeastern Legal Foundation

Founded in 1976

3340 Peachtree Road, NE, Suite 2515, Atlanta, Georgia 30326, 404.365.8500, Fax 404.365.0017, www.southeasternlegal.org

Testimony Re:
Hillary Goodridge v. Dept. of Public Health
United States Senate
Subcommittee on the Constitution, Civil Rights and Property Rights
The Hon. John Cornyn, Chairman

March 1, 2004

Southeastern Legal Foundation
Testimony Re: *Hillary Goodridge, et al. v. Dept. of Public Health*, 440 Mass. 309; 798 N.E.2d 941 (2003)
Submitted March 1, 2004

I. Background

Southeastern Legal Foundation ("SLF") is a non-profit, constitutional public interest law firm and policy center based in Atlanta, Georgia. Founded in 1976, SLF litigates matters of constitutional law and advocates for sound principles of limited government, individual liberty, private property rights, and the free enterprise system. Since 1976, SLF has successfully litigated cases before the U.S. Supreme Court on issues ranging from private property rights and affirmative action to free speech and government accountability.

In its capacity as a public interest law firm and policy center, SLF undertook in 2003 a legal research and public education effort to define the legal and social consequences of federal and state court decisions related to the issue of marriage. In light of federal and state court decisions, SLF maintains that the concept of federalism as to this issue which historically has dictated deference to state legislative control of the definition of the institution of marriage no longer applies. As a result, SLF has consistently advocated for both federal and state constitutional amendments to provide robust assurance that marriage will remain in its traditional form as only the union between a man and a woman.

II. The *Goodridge* Decision and the Danger of Judicial Activism

The Goodridge decision by the Supreme Judicial Court of Massachusetts held that the exclusion of same-sex couples from access to civil marriage violated the Massachusetts constitution by failing to accord equal treatment to heterosexuals and homosexuals. *Goodridge* has had numerous repercussions not only in Massachusetts, which is directly affected by the decision, but in sister states which fear that they may be compelled to recognize same-sex unions required by the judicial activism and provocative approach of the Massachusetts court. It is important to recognize at the outset that although *Goodridge* is a state decision, it may well jump the fence and create unwanted effects in sister states. All states currently enjoy protection for the federal Defense of Marriage Act which exempts sister states from according full faith and credit to same-sex marriages recognized in other states. In addition, states may have state constitutional and statutory barriers to recognizing same-sex marriages. For example, in Georgia, by statute, same-sex marriages are prohibited and void. (Ga. Code Ann., § 19-3-3.1). Finally, many states follow a choice-of-law rule, known as the public policy doctrine that allows court's to ignore marriages that violate the state's public policy. See Hogue, "State Common-Law Choice-of-Law Doctrine and Same-Sex 'Marriage': How Will States Enforce the Public Policy Exception?" 32 *Creighton Law Review* 29 (1998). These

three barriers are all, however, at the mercy of the same judicial activism that worked mischief in *Goodridge* and threatens further to erode traditional marriage.

Judicial activism is hardly new. But its operation at the state level has emerged both as a highly visible and a potent threat to our system of state sovereignty and majority rule. A single judge in Massachusetts was able to displace centuries of established law and force a legal novelty not only on that state, but possibly others as well. Any state could be a single judge away from judicially compelled recognition of same-sex marriage.

There is a subtext to the relentless pursuit for legalization of same-sex unions propelled by proponents of same-sex marriage. That is nothing less than a high visibility, public endorsement of the moral legitimacy of homosexuality. Importantly, however, neither the moral legitimacy of homosexuality nor its equal dignity with other forms of sexual expression is conceded nor required under the recent federal Supreme Court decision in *Lawrence v. Texas*, ___ U.S. ___ , 123 S.Ct. 2472 (2003) decriminalizing consensual sodomy between consenting adults. As is explored in greater detail below, *Lawrence* is a very limited decision holding that prevents a state from using criminal penalties to regulate private, sexual conduct among adults, "a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." That liberty interest under the Due Process Clause of the Fourteenth Amendment prevailed against a state "statute [that] further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

Just as constitutional decriminalization under *Lawrence* advances no moral claim on homosexuality's behalf, neither does a narrow reading of that case amount to animus toward homosexuals. As Judge Robert Bork has observed, "Moral objection to homosexual practices is not the same thing as animus, unless all disapprovals based on morality are to be disallowed as mere animus. Modern liberalism tends to classify all moral distinctions it does not accept as hateful and invalid." *Lawrence* illustrates that, in the case of laws imposing criminal penalties, reliance on moral disapproval alone may not suffice. There is a need to define more explicitly the state interests that underlie proscriptions, for example, on consensual, adult sexual conduct, especially proscriptions that heretofore have rested only on moral disapproval.

Although most of the drive for the legitimization of same-sex unions comes unsurprisingly from homosexual activists, they represent only part of the threat to traditional marriage. Proponents of schemes to unravel traditional marriage have no theory of marriage to offer in its place, only a naked demand for equality such as that advanced in *Goodridge*. The biggest threat to traditional marriage probably comes as a logical consequence of the drive to open up "marriage" options. For example, if same-sex marriage is allowed, who is to say that polygamy or group marriage is not required as well. Without a normative rationale for same-sex marriage, there is no

logical endpoint to an equality-driven expansion of "marriage" options. Those who value traditional marriage need to draw lines, to draw them constitutionally and to draw them at both the state and federal level.

The *Goodridge* decision on same-sex marriage is based on a state constitutional requirement for equality of treatment. That requirement is purely of state origin; it is not compelled by the federal constitution. The majority opinion in *Goodridge* incorporates several references to the *Lawrence* case that amount to an expansive distortion of *Lawrence.* An uncritical reading of *Goodridge* could suggest that the references to *Lawrence* imply federal Supreme Court support for the *Goodridge* approach. This would be wrong, however. Justice Kennedy's opinion for the Court in *Lawrence* includes a caution against over reading the case: *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." In the hands of the majority of the Massachusetts Justices in Goodridge, however, that caution gives way to an exuberant equal access to "marriage" position. A recent examination of the *Lawrence* case, by the Eleventh Circuit Court of Appeals in *Lofton v. Secretary of the Department of Children and Family Services*, ___ F3d. ___, 2004 WL (11th Cir. 2004) reveals just how limited in scope the *Lawrence* decision is and, by contrast, just how expansive the *Goodridge* decision is. *Lofton* correctly construed *Lawrence* to recognize no fundamental right to engage in homosexual conduct. As a consequence, homosexuals may be denied the ability to adopt by a categorical exclusion in state law grounded in the ability of the state to define what sort of family environment would be in any child's best interest, i.e., a stable, dual-gendered, traditional family. Carefully crafted state limitations on homosexuals that effectuate clearly articulated state interests will withstand constitutional scrutiny. In the hands of activist judges, state norms can lose their force.

III. Why Marriage Amendments?

The possibility that *Goodridge* cannot effectively be restricted to Massachusetts has prompted interest both at the state and federal level in constitutional definitions of marriage. Objections to the proposed federal marriage amendment take a variety of forms. One is federalism. The legislative control of marriage has traditionally and historically belonged to the States.

State authority has, however, been significantly invaded by the federal Supreme Court to such an extent that it is impossible to argue that federalism limits are entitled to respect. Indeed, much legal damage has been done to traditional marriage and all of it can be laid at the feet of the federal Supreme Court. The creation of *ex parte* divorce, the decriminalization of non-marital sexual relations, and the requirement of equal treatment of marital and non-marital children have all weakened state control of marriage. This relentless nationalization of important aspects of marriage through the Fourteenth Amendment makes a federal amendment to protect marriage from further attack at the federal as well as the state level altogether appropriate.

Federalism is a strongly held value for conservatives, but federalism has its limits, even for conservatives. U.S. Supreme Court Justice Louis Brandeis once famously said that "It is one of the happy incidents of the federal system that a single courageous state may . . . try novel social and economic experiments without risk to the rest of the country." When it comes to issues affecting the entire nation, however, "novel social experimentation" whose results could unacceptably spread at the state level must be restrained.

Marriage has traditionally been a state matter under our federal system, but states are now under focused pressure from special interests who seek legitimacy for "homosexual marriage," which a clear majority of Americans oppose. Clearly articulated state interests can sustain statutes imposing restraints on homosexuals, see *Lofton,* but only state and federal constitutional provisions can effectively corral the judicial activism bent on implementing the drive for legitimizing "same-sex" marriage.

Respectfully submitted this 1st day of March, 2004

Prof. L. Lynn Hogue
Executive Director, Southeastern Legal Foundation
Professor of Law, Georgia State University College of Law

Southeastern Legal Foundation
3340 Peachtree Road, NE
Suite 2515
Atlanta, Georgia 30326
(404) 365-8500
Fax (404) 365-0017

Faculty

March 2, 2004

The Honorable John Cornyn
United States Senator
517 Hart Senate Office Building
Washington, DC 20510

Dear Senator Cornyn:

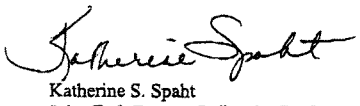
The decision by a state court on an issue of state law ordinarily is not a matter of immediate concern to other states. The *Goodridge* decision in Massachusetts validating so-called "gay marriage," however, does threaten the democratic processes of other states. Under the Full Faith and Credit clause, the states must give recognition to "the public Acts, Records, and judicial Proceedings of every other state." In an attempt to ensure the states would be able to make their own decisions on the issue of "gay marriage," the Congress used its powers under the Full Faith and Credit clause in 1996 to enact the Defense of Marriage Act (DOMA). That legislation defines marriage for purposes of federal law and says that states need not recognize "marriage" between persons of the same sex performed in other states.

If we could be certain that the Supreme Court would uphold the constitutionality of DOMA, there would be no need for a Federal Marriage Amendment. Given the language in the Supreme Court's opinion in the sodomy case last year, *Lawrence v. Texas*, however, there is good reason to fear that a majority of the Supreme Court may continue its inventive and unpredictable interpretations on controversial social issues and may declare DOMA unconstitutional.

So, should not Congress wait to see what the Supreme Court does? Whenever anyone proposes a change to the *status quo*, he or she bears the burden of proof to justify why the change is necessary. The burden of proof currently rests with proponents of so-called "gay marriage" who are attempting to overthrow the established order which rests on the near universal experience of Western society. By acting before any ruling on DOMA, the proponents of a Federal Marriage Amendment are protecting the *status quo*. Should the Supreme Court declare DOMA unconstitutional, however, "gay marriage" would effectively become the law of the land. At that point, proponents of the FMA would be seeking to overthrow the newly established *status quo*.

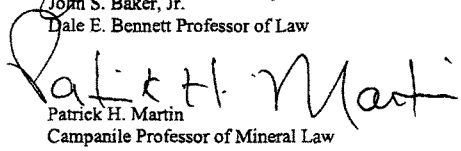
We fully support the effort to adopt a properly worded Federal Marriage Amendment.

Law Center Building · Baton Rouge LA · 70803-1000 · 225-578-8846 · fax 225-578-5935

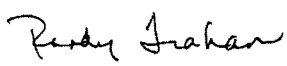


Katherine S. Spaht
Jules F. & Frances L. Landry Professor of Law

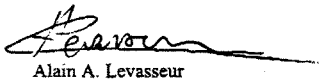
John S. Baker, Jr.
Dale E. Bennett Professor of Law



Patrick H. Martin
Campanile Professor of Mineral Law



John R. Trahan
James Carville Associate Professor of Law



Alain A. Levasseur
Hermann Moyse, Sr. Professor of Law;
Associate Director Center for Civil Law Studies;
Associate Director International Studies,
Center for Commercial & Business Law

These individual are writing on their on behalf; they are not in any way speaking for the university.

LAW OFFICES
ERICKSON & SEDERSTROM, P.C.
A LIMITED LIABILITY ORGANIZATION

DONALD B. STENBERG
OF COUNSEL
NEBRASKA ATTORNEY GENERAL
(1991 - 2002)

REGENCY WESTPOINTE
10330 REGENCY PARKWAY DRIVE, SUITE 100
OMAHA, NEBRASKA 68114-3761

HTTP://WWW.ESLAW.COM
TELEPHONE (402) 397-2200
FACSIMILE (402) 390-7137

donstenberg@eslaw.com

LINCOLN OFFICE

301 SOUTH 13TH STREET
SUITE 400
LINCOLN, NEBRASKA 68508
402-476-1000

August 26, 2003

SENT VIA FAX – (202) 228-2281

Senator John Cornyn
Chair, Subcommittee on the
Constitution
United States Senate
Washington, DC

Dear Senator Cornyn:

I am writing to express my views on the federalism implications of amending the U.S. Constitution to legally protect the institution of marriage in our nation. I am aware that there are some who argue that such an amendment would interfere with states' rights. I do not share that view.

Many of our nation's most important values are reflected in and are defined and protected by amendments to the Constitution. For example, the 13th amendment prohibits slavery, the 14th amendment requires due process and equal protection of the laws, the 19th amendment guarantees the right of women to vote and the 24th amendment abolishes poll taxes. The first ten amendments to the U.S. Constitution guarantee freedom of speech, freedom of the press, freedom of religion, the right to bear arms, prohibit unreasonable searches and seizures, guaranty a right to trial by jury, and much more.

The Constitution has historically been a place where our nation enshrines its most important values.

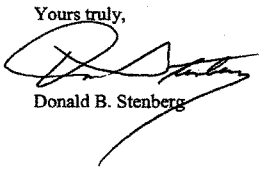
An amendment to the Constitution, unlike some federal laws currently on the books, is not a mandate imposed by the federal government on the states. To become part of the Constitution an amendment must be ratified by three-fourths of the states. This substantial state involvement is the very essence of the federalism envisioned by our founding fathers.

The threat to federalism and states' rights does not come from constitutional amendments. The threat to federalism comes from judicial activism – the imposition of social

policies by the courts in the name of the Constitution without the vote of elected representatives and without a textual basis in the Constitution.

I hope that these views of a former State Attorney General colleague will be helpful to you and your committee as you consider this important issue.

Yours truly,



Donald B. Stenberg

DBS:lks

103543.doc

Sent By: ISNA; 317 839 1805; Aug-25-03 5:28PM; Page 1/1

بسم الله الرحمن الرحيم

الاتحاد الإسلامي في أمريكا الشمالية

ISNA The Islamic Society of North America

August 22, 2003

Senator John Cornyn
Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

Thank you for allowing me the opportunity to write on behalf of marriage between men and women. Marriage as a man and a woman is a fundamental building block of American as well as Muslim society.

There are over 8 million adherents of Islam in the United States, including the many Muslims who have immigrated here to take advantage of the many opportunities available in America. The Bill of Rights in the U.S. Constitution holds freedom of religion as a pillar for civil society—for which we are thankful. Muslims are grateful their country reinforces marriage as being the union of men and women. Marriage of a man and a woman is the one, and only one, way of establishing a family.

In Islam, marriage stresses the equality of all humans by joining together men and women. Marriage demonstrates the virtues of respect, forgiveness, kindness and truth to the next generation. The unique qualities of men and women combine to create the ideal partnership in which to raise children. Through relationships with their male and female parents, children learn to appreciate their own unique gifts and qualities.

In the Declaration of Independence, it states that "all men are created equal". Marriage between men and women is the daily application of equality for millions of Muslim-Americans.

Again, I thank you for this opportunity to speak to you regarding the importance of marriage.

Sincerely yours,

Sayyid M. Syeed, Ph.D.
Secretary General

P.O. Box 38 (mail) • 6555 South County Road 750 East (Express mail & packages) • Plainfield, IN 46168 U.S.A.
Phone: (317) 839-8157 • Fax: (317) 839-1840 • E Mail: isna@surf-ici.com • Website: www.isna.net
Constituent organizations include: The Muslim Students' Association of the U.S. and Canada • The Association of Muslim Social Scientists • The Association of Muslim Scientists and Engineers • Islamic Medical Association of North America

August 22, 2003

Empowerment Caucus Chairman
Hon. Rick Santorum
United States Senate

Board and Personnel
Karen M. Woods, President

Sam Brunell, Senior Vice President
Track Builders International

Robin Reed, Vice President
Mt. Foundation for Women Legislators

Aaron Bocage, Treasurer
Education, Training & Enterprise Ctr.

Freda I. Bennett, National Spokesperson

Empowerment Leadership Roundtable
(partial listing)

Robert L. Woodson, President
Nat. Center for Neighborhood Enterprise

Hon. Senator. Mark Anderson, Chair
Arizona Human Resources Committee

Charles Rabard, Inst. For Responsible
Fatherhood and Family Rehabilitation

Stanley Carlson-Thies
Center for Public Justice

Rev. John Castellani
Teen Challenge International, USA

Rev. Rick Cate
Government Affairs Office
National Assn. Of Evangelicals

Hon. Councilman Bill Cleveland
Alexandria, Virginia

Don Eberly
Civil Society Project

Pastor Freddie and Aleta Garcia
Victory Fellowship

Bertha Gilkey, Urban Women, Inc.
St. Louis, Missouri

Robert Havelans, Institute for
Self Governance, Oakland, CA

Christopher Jacobs
The Alem Fund

Hon. Jack Kemp
Empower America

David Levy
Children's Rights Council

Chip Mellor
Institute for Justice

Hon. Max Montesano
Idaho State Representative

Michael Smith
American Leadership Conference

Hon. Rep. Lesia Washington
Pennsylvania House

Organization Listings For
Identification Purposes Only

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution, Civil Rights, and Property Rights
327 Hart Senate Office Building
Washington, DC 20510
FAX (202) 228-2856

Attention: Mr. James Ho

The Empowerment Network is a national research and information hub primarily serving grass roots community and faith organizations and state legislators. We target individual and community empowerment strategy policy, and because we encourage good policy based on research, we would ask that you consider broadly validated research in your efforts regarding the legal definition of marriage within all confines of the United States legal systems.

Only within the last few years have both liberals and conservatives come to agreement that children do better financially, emotionally, developmentally, and even physically within stable, two parent households. It's only the substantial and growing body of research from virtually all-political perspectives that has empowered the Healthy Marriage Initiatives within the Temporary Assistance to Needy Families reauthorization debates.

In your position as Committee Chair, surely you have seen the blatant attempt to impose changing cultural values as the basis for public policy. However, public policy based on solid research, which honestly considers consequences is still the best policy. Legal 'anchors' such as the definition of marriage cannot be dependent on cultural values.

We urge you to support the legal definition of marriage as a legal union of one man and one woman.

Sincerely,

Karen Woods

Karen M. Woods
Executive Director

800 Eighth Street, N.W. Suite 318 Washington, DC 20001 Tel: 202-513-6484 Fax: 202-289-8936

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
Institute for Public Affairs

HARVEY BLITZ
President

RABBI TZVI H. WEINREB
Executive Vice President

STEVEN J. SAVITSKY
Chair, Board of Directors

RICHARD STONE
Chair, Inst. for Public Affairs

NATHAN J. DIAMENT
Director

BETTY EHRENBERG
Director of International and Communal Affairs

EXECUTIVE COMMITTEE
Jeffrey Ballabon
Julius Berman
Daniel Chill
Ben Chouake, M.D.
Benham Dayanim
Allen Fagin
Elliot Falk
Howard Friedman
Mandell Ganchrow, M.D.
Ahuva Genack
Jerry Gontownik
Nathan Lewin
Gary Litke
David Luchins
Matthew Maryles
Michael Miller
Drew Parker
Jules Polonetsky
Donald Press
William Rapfogel
Aron Raskas
Howard Rhine
Sheldon Rudoff
Herbert Seif
Suzanne Stone
Marcel Weber
Harvey Wolinetz

The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

National Headquarters
11 Broadway
New York, NY 10004

September 3, 2003

Senator John Cornyn
Chairman
U.S. Senate Subcmte. on the Constitution
Washington, DC 20510
By Facsimile: 228-2881

Dear Senator Cornyn,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America – the nation's largest Orthodox Jewish umbrella organization – representing nearly 1,000 congregations, to state our support for the continued legal definition of marriage as being between a man and a woman and the necessity to protect this venerable institution by our nation's laws.

The Jewish tradition has long recognized the centrality of the institution of marriage, so much so that the term in Judaism for marriage is *kiddushin* – or, 'holiness' – our most central aspiration. Moreover, Judaism recognizes that the institution of marriage is central to the formation of a healthy society and the raising of children. Fathers and mothers are a child's first teachers and our tradition understands that a child is best served when receiving the guidance of both male and female role models.

We regret that these foundational insights, recognized over the course of millennia by virtually all faiths and societies have been called into question in our time. While it is clear that persons who choose alternative sexual lifestyles should not be subjected to invidious forms of discrimination, it is equally clear that the principle of civil tolerance should not be served by overturning commonly and broadly held values such as the definition of marriage.

The U.O.J.C.A. urges you and your Senate colleagues to consider and venerate the values held by most Americans on this matter and ensure that the fundamental institution of marriage is not undermined by judicial fiats or any other mechanisms. We believe that defense of this institution is in the best interests of our children and our posterity.

Sincerely,

Harvey Blitz Rabbi Tzvi H. Weinreb Nathan J. Diament

United Methodist *Action*
for Faith, Freedom, and Family
Chairman's Office
800-334-8920 or 563-264-8080
2610 Park Avenue
PO Box 209
Muscatine, Iowa 52761
FAX 563-264-3363
dstanley@pearlfunds.com

September 2, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510
Fax (202) 228-2281

Attention: Mr. James Ho

Dear Senator Cornyn and Subcommittee Members:

United Methodist *Action* for Faith, Freedom, and Family is the United Methodist committee of the Institute on Religion and Democracy.

We strongly support an Amendment to the United States Constitution to define marriage as a union of one man and one woman, for all purposes.

We believe a Constitutional Amendment is now essential to protect the institution of marriage, in view of the growing danger that some courts will rewrite the Constitution to fit their own opinions and will force the nation to accept other kinds of arrangements as "marriage."

Our support for traditional marriage is based on the Bible. Jesus strongly defended, and both the Old and New Testaments strongly affirm, marriage as a God-ordained lifelong covenant between one man and one woman.

There are also strong secular reasons to protect marriage as a union of one man and one woman. A massive and growing amount of empirical research proves that children benefit greatly when they have a married mother and father, and traditional marriage benefits the community and nation.

Thank you for your consideration of our views.

Sincerely,

David M. Stanley

David M. Stanley
Chairman

J. REUBEN CLARK LAW SCHOOL
BRIGHAM YOUNG UNIVERSITY
341 JRCB
PROVO, UTAH 84602-8000
(801) 422-4274 / FAX: (801) 422-0389

March 1, 2004

Senator John Cornyn
Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn,

As faculty of law, jurisprudence and legal policy, we write to express our support for a national response to the imminent threat to marriage and the rule of law posed by radical claims for same-sex marriage in this country. The recent decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health* and the flagrant abuse of office by the mayor of San Francisco, and others, illustrate the seriousness of this imminent threat. We believe the best response is an amendment to the U.S. Constitution defining marriage as the union of a man and a woman.

Each of us has followed the legal issues surrounding a proposed redefinition of marriage to include same-sex couples for many years. Many of us have researched and written on this and related issues. We understand that marriage between a man and a woman provides unique benefits not only to the participants but to the community at large. We also recognize that a redefinition of marriage would threaten the unique status of marriage and send a harmful message that children do not need mothers and fathers.

The recent Massachusetts decision purports to employ the lowest standard of legal scrutiny to invalidate the centuries old common law definition of marriage in the Commonwealth. Unbelievably, the court held that there was no "rational basis" for Massachusetts to treat marriage as different from same-sex sexual relationships. If the court decision ordering the state to issue marriage licenses to same-sex couples goes into effect as scheduled in May 2004, same-sex couples who contract marriages in the state may eventually challenge the marriage laws of other states. It is not hard to imagine a scenario where an overreaching state or federal court holds that the U.S. Constitution demands recognition of Massachusetts same-sex marriages.

This scenario is not mere speculation. Since the mayor of San Francisco ordered clerks to begin issuing marriage licenses to same-sex couples, couples from across the nation have gone there to take advantage of this effort to circumvent the popularly enacted law of California defining marriage as the union of a man and a woman. To take another example, after the Vermont Supreme Court compelled that state's legislature to create a quasi-marital status for same-sex couples, the majority of these "civil unions" were contracted by couples from other states. To date, there have been at least

five cases in which couples sought to have their Vermont civil union recognized in other states. In two of these cases, the couples were successful in convincing their states to grant some recognition.

Congress' previous attempt to address this question, the Defense of Marriage Act of 1996, is a valuable contribution to the legal protection of marriage. We, among others, hoped that it would be sufficient. However, recent events demonstrating judicial regard for core constitutional values, and the refusal of judges in California to enforce the law of marriage, have made that position less viable. Now that lawless judges, public officials and litigators threaten to circumvent the legal process and prevent public input on this issue, it is time for Congress to respond by sending a federal marriage amendment to the states for ratification. This would constitute a moderate effort to allow the American people to settle this important question. We support the Federal Marriage Amendment, S.J. Res. 26 and H.J. Res. 56 and urge you to promote passage of this amendment.

Sincerely,

Lynn D. Wardle
J. Reuben Clark Law School
Brigham Young University

Richard G. Wilkins
J. Reuben Clark Law School
Brigham Young University

William C. Duncan
J. Reuben Clark Law School
Brigham Young University

Ira L. Shafiroff
Southwestern University School of Law

Dwight G. Duncan
Southern New England School of Law

The Washington Post

Leave Marriage to the States, by Bob Barr
The Washington Post, Aug. 21, 2003

The political right and left in America share one unfortunate habit. When they don't get their way in courts of law or state legislatures they immediately seek to undercut all opposition by proposing an amendment to the Constitution.

As they say, bad habits die hard. Apparently White House lawyers and the Senate Judiciary Committee are currently examining the merits of a constitutional amendment, pending in the House of Representatives, to deny any and all "legal incidents" of marriage (in layman's terms, any of the hundreds of legal benefits and obligations of the legal institution of marriage) to all unmarried couples, be they homosexual or heterosexual. They should reject this approach out of hand.

When I authored the Defense of Marriage Act, which was passed overwhelmingly by both chambers of Congress and signed into law by President Clinton in 1996, I was under intense pressure from many of my colleagues to have the act prohibit all same-sex marriage. Such an approach, the same one taken by the Federal Marriage Amendment, would have missed the point.

Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive.

The 1996 act, for purposes of federal benefits, defines "marriage" as a union between a man and a woman, and then allows states to refuse to recognize same-sex marriages performed in other states. As any good federalist should recognize, this law leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.

Following the Defense of Marriage Act, 37 states prohibit same-sex marriage and refuse to recognize any performed in other states, while a handful of states recognize domestic partnerships, one state authorizes civil unions, and a couple of others may have marriage on the horizon. In the best conservative tradition, each state should make its own decision without federal government interference.

Make no mistake, I do not support same-sex marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit.

No less a leftist radical than Vice President Dick Cheney recognized this when he publicly said, "The fact of the matter is we live in a free society, and freedom means freedom for everybody. . . . And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

The vice president is right. There shouldn't be a constitutional definition of marriage. As an institution, and as a word, marriage has very specific meanings, which must be left up to states and churches to decide. The federal government can set down a baseline -- already in place with the Defense of Marriage Act -- but states' rights demand that the specific boundaries of marriage, in terms of who can participate in it, be left up to the states.

This also means that no state can impose its view of marriage on any other state. That is the federal law already on the books. I drafted it, and it has never been successfully challenged in court. Why, then, a constitutional amendment?

I worry, as do supporters of the constitutional amendment on marriage, that a nihilistic amorality is holding ever greater sway in the United States, especially among the young. Similarly, I agree that the kernel of basic morality in America -- the two-parent nuclear family -- has eroded under the influence of the "me" generation, which has left us with an astronomical divorce rate and a tragic number of hurting families across the country.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

Copyright 2003 The Washington Post

The Washington Post

September 5, 2003 Friday
Final Edition

SECTION: EDITORIAL; Pg. A21

LENGTH: 955 words

HEADLINE: Missing the Point on **Gays**

BYLINE: Alan **Simpson**

BODY:

For several weeks now a storm has been brewing in the Senate over just how homosexuals fit into the mainstream of American life. First, an honest debate on the criminalization of **gay** sex in Texas somehow gave rise to baseless fears about permitting bestiality and incest. Then, after the Supreme Court's reasonable ruling in Lawrence v. Texas that the government had no business policing people in their bedrooms, a panic developed. Some worried that the decision would lead to **gay marriage,** thus posing a threat to the survival of the American family.

In the view of this old Senate hand, it's time for everyone to take a deep breath, calm down and wait for this storm to head out to sea. But no such luck: Several Senate members want to create more anguish by pushing a proposal to amend the Constitution. It would set a federal definition of **marriage** as being a union between a man and a woman.

Like most Americans, and most Republicans, I think it's important to do all we can to defend and strengthen the institution of **marriage.** And I also believe it is critically important to defend the integrity of the Constitution. But a federal **amendment** to define **marriage** would do nothing to strengthen families -- just the opposite. And it would unnecessarily undermine one of the core principles I have always believed the GOP stood for: federalism.

In our system of government, laws affecting family life are under the jurisdiction of the states, not the federal government. This is as it should be. After all, Republicans have always believed that government actions that affect someone's personal life, property and liberty -- including, if not especially, **marriage** -- should be made at the level of government closest to the people. Indeed, states already actively regulate **marriage.** For example, 37 states have passed their own version of the Defense of **Marriage** Act.

I do not argue in any way that we should now sanction **gay marriage.** Reasonable people can have disagreements about it. That people of goodwill would disagree was something our Founders fully understood when they created our federal system. They saw that contentious social issues would best be handled in the legislatures of the states, where debates could be held closest to home. That's why we should let the states decide how best to define and recognize any legally sanctioned unions -- **marriage** or otherwise.

As someone who is basically a conservative, I see not an argument about banning **marriage** or "defending" families but rather a power grab. Conservatives argue vehemently about federal usurpation of other issues best left to the states, such as abortion or gun control. Why would they elevate this one to the federal level?

What's more, it is surely not the tradition in this country to try to amend the Constitution in ways that constrict liberty. All of our **amendments** have been designed to expand the sphere of freedom, with one notorious exception: prohibition. We all know how that absurd federal power grab turned out.

My old and dear friend Dick Cheney put it best when he said during the last presidential campaign: "The fact of the matter is we live in a free society, and freedom means freedom for everybody. . . . And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

Dick sees clearly the other reason why federalizing **marriage** is troublesome. The Republican Party I call home is one that purports to respect "freedom for everybody," respecting the rights and dignity of the individual. And that dignity must be respected by both the letter and spirit of our laws.

My views were formed back in my days as a kid in high school in Cody, Wyo. There was one classmate everyone would whisper about: "Jimmy, he's one of those." And we all knew what "one of those" was. Then, one horrible day, Jimmy committed suicide. It was the worst thing, a terrible waste, a sickening tragedy. Jimmy was one who felt isolated and hounded. He deserved a helluva lot better, from those of us in Cody, and from American society as a whole.

As our country has gained honest and steady knowledge about homosexuality, we have learned that it is not a mental illness or a disease or a threat to our families. The real threats to family values are divorce, out-of-wedlock births and infidelity. We all know someone who is **gay**, and like all of us, **gay** men and women need to have their relationships recognized in some way. How are **gay** men and women to be expected to build stable, loving relationships as all of us try to do, when American society refuses to recognize the relationships?

Not long ago the daughter of an old family friend of mine came home for a Thanksgiving dinner with her lesbian partner -- and my friend is one of those "old cowboy" dads, too! He and his wife gently took their daughter's hand, and her partner's hand, and said grace together just as millions of American families do every year.

To reach the best understanding, the debate over **gay** men and women in America should focus not on what drives us apart but on how to make all of our children -- straight or **gay** -- feel welcome in this land, their own American home.

The writer is a former Republican senator from Wyoming and honorary chairman of the Republican Unity Coalition, a **gay**-straight alliance of Republican leaders whose avowed purpose is to work to encourage tolerance and to address concerns of **gay** and lesbian Americans.

LOAD-DATE: September 5, 2003

Copyright 2004 The Washington Post

The Washington Post

February 15, 2004 Sunday
Final Edition

SECTION: Outlook; B01

LENGTH: 1713 words

HEADLINE: A **Marriage** License Only Goes So Far

BYLINE: **Lea** Brilmayer

BODY:

The news that **gay** and lesbian couples will be able to apply for **marriage** licenses and marry legally in Massachusetts starting May 17 pits the rights of states to formulate their own family law policies against their conflicting obligations to recognize legal relationships entered into in other states. Consider what will happen to two women who marry in Massachusetts and then return to, or later move to, another state that does not allow two women, or two men, to get a license. Does Massachusetts law fix their rights, or do their rights depend on the laws where they live?

The practical implications of this question are enormous. Can the lesbian couple get divorced in their new state if their relationship breaks up? If not, then by what legal process would they divide their property? What would it mean to the rights of any children involved if the **marriage** falls apart after the family settles in another state? If one spouse dies, does the other automatically inherit her property? Are they married or single for purposes of tax laws? In answering any of these questions, it may well matter whether the two were long-term residents of Massachusetts at the time of the **marriage** or whether they had gone to the Bay State with the sole intention of evading their own state's more restrictive law.

Even if Massachusetts goes ahead with a controversial state constitutional **amendment** that would end same-sex **marriage** there in 2006 or later, what will happen to couples who marry in the meantime? Whatever one thinks about the morality of the underlying issue, it hardly seems possible to announce retroactively that children born to or adopted by the couple have overnight become legally illegitimate. But then, that result is no worse than having children's status change back and forth between legitimate and illegitimate as their families drive across the country. And yet that is the direction in which we seem to be headed, given that 38 states have already made clear they don't intend to respect the legal validity of **marriages** entered into elsewhere.

These questions are new and largely unresolved, and yet their answers will depend on the application of a legal principle, known as "conflict of laws," that is as old as American law itself. Conflict of laws deals with the overlapping and sometimes conflicting rights and obligations created by the 50 states and by the federal government. It comes into play when a court decision or legislation announced in one state (or in a foreign country) must be recognized in other jurisdictions.

The central guiding principle in resolving such questions derives from Article IV of the Constitution, which says that each state must give "full faith and credit" to the "public acts, records, and judicial proceedings" of the others. With the full faith and credit clause, the drafters of the Constitution tried to reconcile the desire for diversity (different states should be allowed to choose different laws) with mutual respect for differences of opinion (sister states should respect each other's choices).

But there is no clear definition of how much deference the "full faith and credit" clause requires. The states are not required to obey everything the others do. Supreme Court decisions suggest that states have some latitude to exercise their own judgment and to consider their own laws and mores in deciding whether a sister state's decisions have to be enforced, but the extent to which they can do this is unclear. The Constitution gives Congress power to legislate on the subject. But mostly it has been left for the state and federal courts, not Congress, to figure out.

Almost since the beginning, the Supreme Court's interpretations of the clause have been peppered with exceptions to the generalized requirement of mutual respect. For example, the clause has never much applied to legislation. It has been applied almost exclusively to judicial decisions: As a general matter, judgments announced in one state are strictly enforceable in all the others; state legislation is not.

People tend to assume that a **marriage** is like a court judgment; if it's valid in the place where it is celebrated, it has to be honored everywhere. This doesn't necessarily follow. From the rather unromantic position of a conflict of laws specialist, celebrating a **marriage** is something halfway between signing a contract to buy a car and applying for a driver's license. If you enter into a contract or are granted a driver's license in one state, then other states will probably respect it. But they needn't, constitutionally, and sometimes they don't. Such disregard for sister state decisions wreaks havoc with the principle of respect for decisions made by other states, not to mention the practical needs of the people involved who want their legal rights to be steady and predictable.

If states care about legal certainty and mutual respect, they give full faith and credit to the decisions of other states even without any constitutional compulsion -- as well they should. If they don't care, in particular because they are hostile to the public policy of the other state, the Constitution lets them override existing legal relationships by applying their own law. Over and over, the Supreme Court has recognized that many different states can have simultaneous conflicting policies regarding the same transaction or legal relationship. Then, which law applies to settle legal disputes turns largely on the random happenstance of which state's courts happen to hear the case. For same-sex **marriage,** what that is likely to mean is that if a marital dispute is heard in a Massachusetts court, one result will follow; if it is heard in Ohio -- where the state legislature, in response to the Massachusetts decision, took a particularly strong stance this month against same-sex **marriage** -- expect the opposite.

The uncertainty is probably greater in family law than any other area; everyone agrees that certainty is important for commercial relationships, but states are less likely to defer to other states when dealing with sensitive questions about marrying and raising families. States are willing to ignore **marriages** entered into in another state by couples who are trying to avoid their home state's restrictive **marriage** laws, or **marriages** that the state considers fundamentally objectionable and therefore invalid. I have no doubt that the same pattern will follow with same-sex **marriages.**

A prime historical example -- one that will surely make opponents of same-sex **marriage** uncomfortable -- is **marriage** between people of different races. As recently as the 1930s, it was generally understood in the (white) legal community that interracial **marriages** might be considered "odious" and that it would be understandable if other states chose not to enforce them. Indeed, many pressing social issues have been fought out on the battleground of conflict of laws. In the 19th century the issue was slavery and the status of slaves taken temporarily to the north; the question was framed in terms of whether a "contract" enforceable in one state had to be honored in others. Back then the liberal position was to be opposed to recognizing other states' contracts. A hundred years later, a burning issue was divorce, and whether an unhappy spouse might travel to Nevada (the only state in the country with lenient divorce laws) to dissolve the union.

Marriages, in other words, have not been treated as automatically recognized by other states. Its opponents fear that same-sex **marriages** will have to be respected all over the country. That is completely unrealistic. In fact, nationwide enforceability is less real now than ever, as a result of the most recent federal statute on the subject. Passed in 1996, the Defense of **Marriage** Act (DOMA) specifies that no state has to recognize a same-sex **marriage** entered into in another state. Dozens of state legislatures have leaped on the bandwagon, taking advantage of this invitation by providing, with state DOMAs, that their states will not recognize same-sex **marriages** from places like Massachusetts.

But for some opponents of same-sex **marriage,** even the federal and state DOMAs are not reassurance enough. Some of these people worry that the federal law may someday be invalidated as inconsistent with the full faith and credit clause. That's why they seek an **amendment** to the Constitution. But the law is probably not unconstitutional. (Granted, that is not a very high recommendation.) Even if constitutional, it is a silly law, motivated by nothing but political grandstanding. That's not a defect that can be cured by enacting it into the Constitution. President Bush would be well advised to shelve his election-year proposals for a constitutional **amendment.**

There are far more nuanced methods for reconciling diversity and uniformity of laws in this country than a constitutional provision. For example, decades ago, when Nevada's lenient divorce law was creating problems for other states, the Supreme Court came up with a solution that was quickly nicknamed "divisible divorce." Nevada could dissolve a **marriage** but could not decide rights to property or child custody without the absent spouse's participation. So, after getting a divorce in Reno, the husband (as it usually was) had to then go home and decide the future of the children and the property in the courts of the marital domicile.

That wasn't intellectually tidy, certainly, but when confronted by burning social issues the Supreme Court has rarely thrown itself upon its sword for the sake of intellectual tidiness. If faced with parallel issues from same-sex **marriage,** the Supreme Court would probably craft a similar solution. And it would do so without the need for a cumbersome new statute or constitutional **amendment.** One can only hope that it will do so with greater concern for the rights and interests of the couples themselves, and their innocent children, than the states that are so quick to take a stand against the same-sex **marriages** that may soon be entered into in Massachusetts and beyond.

</body>**Lea** Brilmayer is the Howard Holtzmann Professor of International Law at Yale University School of Law, and the author of several books on conflict of laws issues.

LOAD-DATE: February 15, 2004

washingtonpost.com

Debasing the Constitution

▼ADVERTISING

SPEND
$1,000
ON PHONE CALLS

Wednesday, February 25, 2004; Page A24

"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 a man and woman as husband and wife."

WITH THESE WORDS, President Bush abandoned the Constitution to election-year politics. Until yesterday, he had said he believed in defending traditional marriage and would support a constitutional amendment if necessary -- but only if there were no other way to prevent judges from forcing gay marriage on an unwilling American public. Now, Mr. Bush has abandoned nuance. A federal definition of marriage, which has been governed primarily by state law since the beginning, would prevent any state, whatever the views of its residents, from recognizing the equality and legitimacy of same-sex marriages.

The president's explanation of his reversal is unconvincing. The Supreme Judicial Court of Massachusetts, he noted, "will order the issuance of marriage licenses to applicants of the same gender in May of this year." And, "In San Francisco, city officials have issued thousands of marriage licenses to people of the same gender, contrary to the California Family Code" -- as has one county in New Mexico. All true, and all controversial. We believe that extending the benefits and responsibilities of marriage to same-sex couples would be fair and beneficial; we understand that many Americans feel otherwise. But whatever one thinks of the Massachusetts courts or the San Francisco mayor, there is no evidence that state political systems are incapable of responding. Why can't California be trusted to sort out the situation in San Francisco, and Massachusetts legislators and voters to address whatever deficiencies they find in their own court's rulings? And if down the road the voters of some state opt for a legal regime different than that favored by Mr. Bush, why should the Constitution impede their democratic choice? The federal Defense of Marriage Act already guarantees that no state has to recognize a same-sex union performed in another state.

Mr. Bush justified his resort to the constitutional process yesterday by worrying that "there is no assurance that the Defense of Marriage Act will not itself be struck down by activist courts." Perhaps not. But it is reckless to set about amending the Constitution to ensure victory in court cases that haven't yet been filed. The President closed his endorsement of the amendment by insisting that "our government should respect every person" and requesting that Americans "conduct this difficult debate in a manner worthy of our country . . . with kindness and goodwill and decency." In the context of a divisive proposal, this request didn't just ring hollow; it clanged.

© 2004 The Washington Post Company

The Washington Post

What Crisis?

By Richard Cohen

Friday, February 27, 2004; Page A23

One morning long ago, I fetched The Post from the porch and discovered that I had slept through an earthquake. The paper was full of stories about the quake and the damage and the aftershock and what people were saying and doing. Something momentous had happened and I missed it. This, in a nutshell, is my feeling about the "crisis" caused by gay marriage. Where is it?

Almost everywhere, says the president of the United States, who proposes a constitutional amendment to rectify matters. In his official statement, President Bush notes that gays and lesbians have been married in San Francisco and that a county in New Mexico has issued marriage licenses to them. As with weapons of mass destruction, there's a lot less here than (allegedly) meets the eye.

Even for Bush, for whom the bar is set very low, his statement on gay marriage lacks intellectual consistency. He said he was "protecting the institution of marriage," but all he was doing was barring gays and lesbians from participating in it. He admitted the "amendment process" was a serious one and should be limited to "matters of national concern." He then trivialized it all by saying "the preservation of marriage rises to this level of national importance."

That is just plain silly. The 3,000 or so gay and lesbian couples who have been married in San Francisco have not, as far as I can tell, materially weakened this great country. What's more, their marriages may not survive challenge. It could be that the crisis will end with some judgment by a court affirming California's right to limit marriage to heterosexuals, such as Britney Spears.

In the style and rigor of his argument, Bush talked about marriage as he did recently about Iraq. He made one assertion after another, linking them not with evidence or with logic, but simply with the word "and." Saddam Hussein is a madman *and* a threat to the United States. How? Hussein had no weapons of mass destruction. Doesn't matter. He was a threat to us all.

It is the same with gay and lesbian marriage. Whatever you may think, it represents no threat to our way of life -- no reason to take the very serious step of amending the Constitution. The amendment would not bar or condemn homosexuality, which is the real

issue here, but merely turn marriage into a version of a restricted club: Gays need not apply.

Just about everyone agrees that Bush is securing his conservative base before the general election. This makes political sense, but it also represents moral cowardice. Never mind that the Constitution ought to be off-limits to partisan gamesmanship. Concentrate instead on what you might call Bush's body language. Until Tuesday he had been oh so reluctant to endorse this amendment, and when he did, he left the door open to civil unions.

This is hardly a homophobic position, a fire-and-brimstone denunciation of the gay lifestyle or homosexuality. On the contrary, it is recognition that such a thing exists and ought to be accorded some sort of legal standing -- as is the case in Vermont, for instance. That is no different from the position taken by John Kerry and most of the other Democratic presidential candidates.

Everything about Bush -- his background, his innate tolerance -- suggests that he called for this amendment with his fingers crossed behind his back. But he knows -- at least he ought to know -- that some of the movement he is appealing to is motivated by homophobia, by prejudice and that in this, as in all such cases, hatred is hard to contain.

I am thinking now of Harry S. Truman, who thought he could appease the forces of a nascent McCarthyism by instituting a government loyalty program. All he did, though, was encourage anti-communist zealots in their abuse of civil liberties. Truman played politics with fanatics and it didn't work. Too often moderation is seen as weakness.

Bush is attempting something similar. But true homophobes can see through him: Why allow civil unions? They have taken the measure of the man and bullied him into using the weight of his office to restrict the rights of a minority. The grave crisis that Bush would heal by trivializing the Constitution simply does not exist. This self-proclaimed war president looks awfully weak on this issue, a political opportunist who would rather be president than be right. The real crisis is one of conscience. It overwhelmed Bush.

The Washington Times
www.washingtontimes.com

Constitutional rashness

By Bruce Fein
THE WASHINGTON TIMES
Published September 2, 2003

Conservatives should squelch a rash constitutional amendment pending in the House of Representatives to prohibit states from recognizing homosexual marriages and thus place the issue off-limits for popular democratic discourse. The amendment would enervate self-government, confound the cultural sacralization of traditional marriage and child-rearing, and clutter the Constitution with a nonessential.

Marriage wrenches reason and gives birth to impassioned judgments. Sir Francis Bacon insisted that wives and children frustrate great enterprises. Sage Sam Johnson sermonized that second marriages epitomize triumphs of hope over experience. Cervantes decried marriage as a noose. And Benjamin Franklin advised keeping your eyes wide open before marriage, but half shut afterward. On the other hand, Martin Luther celebrated a good marriage as the pinnacle of a charming and affectionate communion.

Same-sex marriage has predictably awakened strong emotions. The topic has captured center stage in recent years through a series of adventuresome judicial decrees. The Hawaii Supreme Court ruled that confining marriage to heterosexual couples constituted gender discrimination prohibited by the state constitution, which provoked an amendment to overrule the decree.

Amidst heated debate in response to a state court mandate, Vermont enacted a civil union law for gays and lesbians, making them eligible for more than 300 benefits enjoyed by married couples.

Last June, the U.S. Supreme Court added fuel to the same-sex marriage fire by holding homosexual sodomy laws unconstitutional in Lawrence vs. Texas (2003). Justice Anthony Kennedy, writing for the majority, and Justice Sandra Day O'Connor, writing a concurrence, maintained that Lawrence left traditional state definitions of marriage undisturbed. But Justice Antonin Scalia, speaking for three dissenters, complained that the reasoning of Justices Kennedy and O'Connor cast a cloud over same-sex marriage prohibitions.

In 1996, President William Jefferson Clinton initialed the Defense of Marriage Act. For purposes of federal law, marriage is defined exclusively as "a legal union between one man and one woman as husband and wife." The act also purports to lift any obligation of states under the Full Faith and Credit Clause of the Constitution to recognize same-sex marriages that might be sanctioned in sister jurisdictions.

At present, 37 states expressly withhold the sanctity of marriage from homosexual couples. The remainder accomplishes the same by implication. Under the Full Faith and Credit Clause, as interpreted by the Supreme Court in Sun Oil Company vs. Wortman (1988), and Pacific Employers Ins. Co. vs. Industrial Accident Commission (1939), no state would be compelled to recognize same-sex marriages authorized by a sister state. The high court explained that the clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to

J. REUBEN CLARK LAW SCHOOL
THE WORLD FAMILY POLICY CENTER
515 JRCB
PROVO, UTAH 84602
(801) 422-5192 / FAX (801) 422-0191

March 2, 2004

Senator John Cornyn
Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Need for a Constitutional Amendment on Marriage

Dear Senator Cornyn,

Together with several colleagues, I have submitted a joint letter explaining why I believe the Senate and House should submit a constitutional amendment defining marriage to the American people. I write separately to bring to your attention my essay on this important subject.

"Government Structure, Marriage and the Constitution: What all Americans Should Understand," was written for the average citizen. The essay sets out, in non-technical terms and (I hope) plain language, the pressing need to engage America in one of the most important tasks of any democratic society: defining the parameters of its most fundamental organic document.

The idea of a written Constitution has played a vital role in the growth, stability and liberty of America for over 200 years. However, recent decisions of the United States Supreme Court and state courts related to human sexuality raise serious doubts whether the modern judiciary is constrained by the terms of a written Constitution – a document that, as Chief Justice John Marshall emphasized, is a "rule for the government of *courts*, as well as of the legislature." *Marbury v. Madison* (emphasis by Justice Marshall).

The meaning of marriage under the United States Constitution is one of the most pressing concerns facing the nation. While some describe the controversy as an unwarranted and unnecessary skirmish in a "culture war," that issues at stake are far too vital to be dismissed. The marriage debate involves not only the meaning and normative role of a social institution as old as time, but the proper division of powers among and between the political and judicial branches of government. No questions are more important or vital to the present and future health of the nation.

Very truly yours,

Richard G. Wilkins
Professor of Law and Managing Director
The World Family Policy Center
J. Reuben Clark Law School, Brigham Young University

GOVERNMENT STRUCTURE, MARRIAGE AND THE CONSTITUTION: WHAT ALL AMERICANS SHOULD UNDERSTAND

By Richard G. Wilkins
Professor of Law and Managing Director
The World Family Policy Center
J. Reuben Clark Law School, Brigham Young University

I am one of the few constitutional law professors in the country who actually reads the Constitution. I even read it to my students. I exhort them to study and understand the intent of the Framers of the Constitution. I insist upon a strict construction of the document and praise the brilliant political structure it creates.

If anyone would have told me, ten years ago, that I would support amending the Constitution to include a definition of marriage, I would have laughed out loud. I would have become quite animated in explaining the foolishness of the proposal (I am not known for a calm demeanor on constitutional questions).

Ten years ago, I would have explained that amending the Constitution to define marriage is clearly wrong – for at least three important reasons. First, the Constitution says nothing about marriage; why should that change? Second, marriage is a question the Constitution wisely leaves to the people within their respective states; why change that? Third, and finally, the last thing America needs is more powerful federal courts; why tempt the judges by inserting a new topic into the Constitution?

But that was then. And this is now.

Now, when I hear devotees of the Constitution repeat arguments that are almost a part of my DNA, I shake my head in disbelief. The very concerns that, ten years ago, would have prompted my opposition to a marriage amendment now compel my support.

"The Constitution says nothing about marriage."

Quite true. But the *judges* have.

The Supreme Court this past summer in *Lawrence v. Texas* gave us an entirely "new Constitution" that, for the first time in history, prohibits state legislatures from treating homosexuality any differently than heterosexuality. What does this "new Constitution" do to marriage? The Massachusetts Supreme Judicial Court answered that question: relying on *Lawrence*, the Massachusetts court has ordered same-sex marriage.

The Constitution now says *a lot* about marriage. (Just interview the mayor of San Francisco. Why did he issue marriage licenses not authorized by California law? The Constitution demands it, he said.)

"Marriage is a question the Constitution wisely leaves to the people to decide in their respective states."

Again, quite true. And again the judges *have taken that power away.*

Does the Massachusetts legislature have any say in who can get married? Indeed, can the legislature even timidly suggest that it give a different name (like "civil union") to state-recognized unions of homosexual couples? No, say the courts. After all, the Constitution (as construed in *Lawrence*) forbids states from treating homosexuals any differently than heterosexuals.

The Constitution now *takes away* the power of the people to decide questions relating to marriage and marital law. (Just ask the Massachusetts legislature.)

"The last thing America needs is more powerful federal courts."

Yet again, quite true. But by now the judges are laughing.

The United States Supreme Court has demonstrated that it is capable of transcending not only the wording of the Constitution but the history, traditions and actual practices of the American people. Even though the Constitution says nothing about "sexual liberty;" even though the history, traditions and actual practices of the American people do not support an unrestrained "right" for consenting adults to engage in any kind of sex they want; the Court has created this very right out of thin air. *Lawrence* created this "right," not by relying upon the wording of the Constitution or the traditions and practices of American society, but by invoking (and I am not making this up) the "meaning of life" and "mysteries of the universe."

The judges are now so powerful that they feel free to invent the Constitution as they move along. (If the definition of marriage – an understanding as old as time – violates constitutional strictures, one wonders what centuries' old legal notions the "mysteries of the universe" will invalidate next.)

In light of these astonishing developments, it is absolutely clear why so many people are putting the words "marriage" and "constitution" in the same sentence. An amendment is necessary to preserve not only the social viability of marriage, but the political integrity of the Constitution.

Don't get me wrong. I fully understand the concerns and arguments of those who assert that the Constitution must not be amended lightly. But just what about the Constitution and marriage is so pristine that it must not be touched? That the Constitution, once upon a time, *didn't* say anything about marriage? That the Constitution, once upon a time, *left* marriage to the states? That some day, and thereafter happily ever after, the judges will once again read the Constitution and tie it to the actual history, traditions and practices of the American people?

Precisely who is taking the Constitution lightly? The judges. And that is why the people must amend it.

An amendment on marriage will go a long way toward restoring constitutional order. An amendment on marriage will not do *everything* that should be done to instill a proper respect for the Constitution. But it will do at least two vital things. An amendment will restore the crucial understanding that our government operates under a written Constitution. And, by forcibly demonstrating to the judges that they have gone much too far in "interpreting" the Constitution, an amendment will restore the proper balance of power between the judiciary and the representative branches of government.

1. A Constitutional amendment will restore the crucial understanding that American government operates under a written Constitution.

As Chief Justice John Marshall noted in the famous decision of *Marbury v. Madison* in 1803, America is governed by "a written constitution" and "the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature." (Emphasis by Justice Marshall.) Because the Constitution binds the courts as well as any other branch of government, judges should adhere to the text of the Constitution and interpret and apply its terms consistently with the traditions, history and actual practices of the American people. Any other course, as Chief Justice Marshall noted in *Marbury*, "would subvert the very foundation of all written constitutions."

Modern courts have dangerously ignored the teachings of *Marbury*.

The "new Constitution," announced by the Supreme Court in *Lawrence,* frees judges from any need to tie their decisions to either the words of the Constitution or the traditions, history and actual practices of the American people. Many people applaud the idea of a "living Constitution;" a document that transcends words, definitions and the restrictive bonds of history and tradition. But a document as fluid, unfettered and free as the "new Constitution" unveiled in *Lawrence* bears little resemblance to the Constitution that, for most of its 215-year history, has demanded that the people (and not the courts) resolve society's controversial moral and social debates.

Under the "new Constitution" announced in *Lawrence,* the more divisive, difficult and debatable the controversy, the more likely it is that a court – rather than a legislature – will settle the matter. Why? Because (according to the judges, the law professors and other elites) the "meaning of life" and the "mysteries of the universe" become more and more important as social debates become more and more divisive, difficult and debatable.

Of course, this is not the Constitution the Framers intended. It is not what the written text demands. But it *is* what the courts have now decreed.

We need an amendment on marriage, not only to protect marriage, but to demonstrate to the courts that they exceeded their power in constitutionalizing marriage in the first place.

Modern courts feel free to ignore or alter constitutional text at will. A constitutional amendment on marriage, by forcefully rejecting the judges' latest excursion from constitutional text and history, will forcibly (and quite properly) remind the judges that their role is to adjudicate, not legislate. A constitutional amendment is necessary to revive the idea which provides "the very foundation of all written constitutions;" that is, that the Constitution is "a rule for the government of *courts*, as well as of the legislature." *Marbury v. Madison* (emphasis in original).

2. A constitutional amendment will restore the proper balance of power between the judiciary and the representative branches of government.

Under the "new Constitution" drafted by the Supreme Court in *Lawrence*, state legislatures may not "demean" the sexual practices of "consenting adults" that are closely connected to individual views regarding "the meaning of life" and "mysteries of the universe." (For those of you who either aren't familiar with legal lingo or simply like people to write clearly: legislatures may not suggest that there are any differences between heterosexuality and homosexuality.) To reach this result, of course, the Supreme Court had to ignore the words of the Constitution and the history and traditions of the American people. In their place, the Justices have given us a poem – a poem as vague, expansive or restrictive as the next metaphor or lyrical couplet favored by five members of the Supreme Court.

This departure from text, history and tradition is a serious matter. It dramatically upsets the proper balance of power between the judiciary and the representative branches of government.

If government action encroaches upon core constitutional values (as contained in clear constitutional text construed in light of actual American practice, experience and tradition) the judiciary *must* act. But the Founders intended the judicial role to be exceptional and rarely invoked. Alexander Hamilton, writing in The Federalist Papers, proclaimed the judiciary the "least dangerous branch" because it does not create policy but merely exercises "judgment." The *really* difficult questions, Hamilton and the other Founders thought, would be left to the people.

Modern social activists (and too many judges) have either forgotten or chosen to ignore that most governmental decisions are *not* controlled (and *can't* be controlled) by the precise language of the Constitution. If the "correct" answers to pressing questions are fairly debatable, those questions must be – indeed, can *only* be – resolved by legislative action.

The expanding reach of American constitutional law has rendered the public increasingly oblivious to its role as the primary source of decision making power under the United States Constitution. By inventing and enforcing "rights" nowhere evident in the language of the Constitution or the history and traditions of the American people, lawyers, judges and law professors have slowly eroded democratic decision making,

reducing or eliminating the people's popular control over an ever-expanding range of fairly debatable controversies.

The Constitution was not drafted, nor was it intended, to turn over marriage and marital policy to the federal courts. But, because the courts have now concluded otherwise, a constitutional amendment is needed to restore democratic balance. Without a constitutional amendment, the Supreme Court – and not the people – ultimately will determine what marriage means. With all due respect to the Honorable Court, this is too important a decision to be made by five people in black robes.

What does the Constitution demand?

I end this essay where I began. I *do* take the Constitution seriously. I look to the intent of the Framers, and I sincerely believe in the political structure created by the Constitution. I wish with all my heart that it was *not* necessary to even *think* about putting marriage in the Constitution. I wish that I could rest secure in the knowledge that marriage, like other important topics vital to the health and social welfare of the American republic, was left to the sound judgment of local legislatures supervised by a prudent, careful and principled judiciary.

I fully understand the concerns of those who assert that, since the Constitution has never addressed marriage before, it should not be amended to address marriage now.

But whatever the Constitution said (or did not say) about marriage for the past 215 years, whatever the history, traditions and practices of the American people confirm (or do not confirm) about the meaning of marriage, marriage *is* in the Constitution. The Founders did not do it. *But the courts have.*

By placing marriage in the Constitution, the judges have taken marriage out of the hands of the people. The judges have done violence to the very idea of a written Constitution, have eroded legislative power, and have significantly expanded their own power. It is now up to the people, by constitutional amendment, to remedy these errors.

A constitutional amendment is needed, not only to preserve marriage, but to restore constitutional order.

○