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A PROPOSED CONSTITUTIONAL AMENDMENT TO PRESERVE TRADITIONAL MARRIAGE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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A PROPOSED CONSTITUTIONAL AMENDMENT TO PRESERVE TRADITIONAL MARRIAGE

TUESDAY, MARCH 23, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:08 a.m., in Room 325, Rayburn Senate Office Building, Hon. John Cornyn, Chairman of the Committee, presiding.

Present: Senators Cornyn, Sessions, Kennedy, Feinstein, Feingold and Durbin.

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

Senator CORNYN. This hearing of the Senate Judiciary Committee shall come to order.

Before I begin my remarks, I want to thank Senator Hatch for scheduling this hearing and for allowing me to chair it. It is a timely and appropriate topic for this hearing, the preservation of traditional marriage, and appropriate of course that it be held here before the Senate Judiciary Committee. After all, this is the only Committee that has jurisdiction over both the constitutional issues and the judicial issues, and the only reason that we are here today is because of activist judges who have inserted their personal political agenda into our Nation's most important legal document, the United States Constitution. So I commend Chairman Hatch for wanting to address this constitutional and judicial problem.

I also want to thank Senator Leahy, and Senator Feinstein and their staffs for working with my office on today's hearing. Today's topic triggers strong passions and emotions of well-meaning people on all sides. It is important that we acknowledge the hard work of all parents who are raising children in traditional and nontraditional environments alike, while at the same time we adhere to the dream that we have for every child, that they be raised by their own mother and father under the shelter and protection of the traditional institution of marriage.

Likewise, it is important that today's hearing is the culmination of bipartisan cooperation. The general custom of hearings in this Committee is a 2-to-1 ratio for witnesses, but Senator Leahy requested, and I was happy to agree to a 1-to-1 ratio today for both members and legal experts alike. On such an important issue, I would like to work in a bipartisan fashion, much as was done with the Defense of Marriage Act back in 1996.

Today's hearing will consider and examine carefully a proposed constitutional amendment to preserve traditional marriage. The United States Constitution cannot, and should not, be amended casually. Indeed, our Founding Fathers deliberately designed the Constitution to make it difficult to amend, but difficult does not mean impossible nor does it mean improper. To the contrary, our Founders recognized that situations would arise when amendment would be necessary and appropriate.

George Washington, the President of the Constitutional Convention, said, "The warmest friends and the best supporters that the Constitution has do not contend that it is free from imperfections. The people can, as they will have the advantage of experience on their side, decide with as much propriety on the alterations and amendments which are necessary."

Indeed, our Constitution has been amended no fewer than 27 times during our Nation's history, most recently in 1992. Sometimes we amend in order to alter the allocation of power between the Federal and State Government or between different branches of the same Government.

Today's amendment, however, does not seek to alter the allocation of power at all, but rather to reinforce the original allocation of power that the Founders themselves designed. Indeed, today's amendment is one of a long line of Constitutional amendments that have been ratified as a Democratic response to judicial decisions rejected by the American people, a list that includes the Eleventh, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth amendments.

As Members of Congress, we must never disparage our role in the Democratic process. In the vast majority of circumstances, we can discharge or duties through the introduction, consideration and enactment of statutes. On a few occasions, however, statutes are not enough. On a few occasions, the constitutional amendment may be the only way available to the American people to participate in self-government.

Today, presents one such occasion, and the issue is not legally complicated. Today, we will hear from legal experts who have carefully studied recent U.S. Supreme Court decisions and analyzed the extent to which they pose a serious Federal judicial threat to traditional marriage. We certainly look forward to their testimony, but the issue can be summed up quite simply without need for legal jargon or case citation.

The issue is simply this: The traditional institution of marriage is not about discrimination. It is about children. However, activists in the streets and on the bench insist that marriage is about discrimination. Indeed, it is precisely because they believe that traditional marriage is about discrimination that they believe that all traditional marriage laws are unconstitutional and must be abolished by the courts. These activists have left the American people with no middle ground.

As I have often said, most Americans firmly believe that every individual is worthy of respect and that the traditional institution of marriage is worthy of protection, and certainly no one likes to be unfairly accused of intolerance. But the only way for people of good faith to defend democracy and the traditional institution of

marriage against this judicial onslaught, based on false charges of discrimination, is a constitutional amendment. That is the issue in a nutshell. Either you believe that traditional marriage is about discrimination, and therefore must be invalidated by the courts, or you believe that traditional marriage is about children and must be protected by the Constitution.

The ongoing discussion about marriage in America must be conducted in a manner worthy of our country. It should be bipartisan, it should be respectful, and it should be honest. Indeed, there is bipartisan consensus on a number of fronts. The traditional institution of marriage has always been the law in each of the 50 States and no State legislature has ever suggested otherwise.

Just 8 years ago, overwhelming Congressional majorities, representing more than three-fourths of each chamber, joined President Clinton in codifying a Federal definition of marriage through the bipartisan Defense of Marriage Act. This historic and bipartisan consensus exists because 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 most stable environment for raising children is in the traditional family.

The U.S. Supreme Court itself recognizes the fundamental importance of the traditional institution of marriage nearly 120 years ago in *Murray* v. *Ramsey*. In that case, the Court unanimously concluded that "no legislation can be supposed more wholesome and necessary in the founding of a free self-governing commonwealth than the idea of the family as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." As the Court further noted, the union of one man and one woman is the "sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

In light of the strong bipartisan consensus in favor of traditional marriage, it is offensive for anyone to suggest that supporters of traditional marriage—a group that includes President Clinton and the vast majority of Democrats and Republicans in Congress—with intolerance. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of prejudice, while abolishing American traditions by judicial fiat.

Moreover, Republican and Democratic legal experts alike recognize that the only way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, in previous hearings, Republican and Democratic witnesses alike have recognized the problem and suggested constitutional amendments to defend marriage against judicial activism. It was a Democrat who first proposed a Federal amendment to protect marriage in the last Congress. So both the discussion and the search for constitutional solutions have been bipartisan.

This discussion must also be respectful. Parents are doing the best job they can under difficult circumstances. Relationships based on love, friendship and mutual respect deserve respect. Supporters

of traditional marriage also deserve respect. They do not deserve to be falsely accused of discrimination. In 1996, Senator Teddy 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 indication of intolerance." I hope that spirit continues today.

Finally, our discussion must be honest. Unfortunately, a number of myths have been put forth which demand correction. In my remaining time, I would like to quickly respond to three of those.

The first myth is that "my marriage does not affect your marriage." That statement does not describe reality. How we arrange the building blocks of our society affects all of us. As the archbishop of Boston, Sean O'Malley, recently wrote, "Ideas have profound effects on our society. A casual attitude toward divorce and cohabitation has had serious consequences for the institution of marriage for the last 20 years. Redefining marriage in a way that reduces it to a financial and legal arrangement of adult relationships will only accelerate the deterioration of family life."

Archbishop O'Malley's concerns are substantiated by recent social science studies in Scandinavia, where the abolition of traditional marriage has caused a dramatic increase in the number of children born out of wedlock. If the national culture teaches that marriage is just about adult love and not about raising children, then we should be troubled, but not surprised, by the results.

The second myth is that "we do not need to amend the Constitution to defend traditional marriage." I would like to believe that the courts will always enforce traditional marriage laws against lawless officials. The track record, however, has not been promising. Last year, amendment opponents promised that courts would enforce traditional marriage laws, but they have clearly been proven wrong by recent events.

The problem is that a majority of justices today apparently no longer believe in traditional marriage laws. Legal experts across the political spectrum, including some on our second panel today, have predicted that as many as six justices on the United States Supreme Court stand ready to abolish traditional marriage laws nationwide, the same six that ruled in *Romer* and *Lawrence*. Indeed, one of those six justices—Justice Ruth Bader Ginsburg—has already opined that the courts should abolish laws against polygamy.

So the myth that Federal constitutional action is unnecessary to preserve traditional marriage is precisely that—a myth. It is a myth that the States can take care of this problem on their own, because under our Federal system of Government, States have no power to override a Federal constitutional decision.

Lawsuits to dismantle traditional marriage, as a matter of Federal as well as State constitutional law, have already been filed in Federal and State courts in Massachusetts, New York, Nebraska, Utah, Florida, Indiana, Iowa, Georgia, West Virginia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, Oregon, Washington, California, Vermont and in my home State of Texas.

According to the New York Times, we can expect lawsuits in 46 States by residents who travelled to San Francisco in recent weeks to receive a marriage license and be married. Hawaiians and Alas-

kans took preemptive action when they were faced with State constitutional challenges to their traditional laws. Citizens of Nebraska, Nevada, and other States took preemptive action before lawsuits were even filed back in the 1990's.

Now that the threat is a Federal threat, a Federal constitutional amendment is the only way to preserve traditional marriage laws nationwide. America needs stable families and marriages. The institution of marriage is just too important to leave to chance.

Now, the third and final myth of proponents of traditional marriage is that they are "writing discrimination into the Constitution." This argument is both curious and offensive. In testimony earlier this month, the NAACP declined to oppose traditional marriage laws, and I notice today that the American Bar Association is neutral as well. If marriage laws were about discrimination, surely both the NAACP and the American Bar Association would oppose it. But it is not, and they did not.

But there is something even more pernicious about the claim of writing discrimination into the Constitution. Let me repeat what I said earlier. It is precisely because some activists believe that traditional marriage is about discrimination that they believe that all traditional marriage laws are unconstitutional, and therefore must be abolished by the courts. These activists have left the American people with no middle ground. They accuse others of writing discrimination into the Constitution, yet they are the ones writing the American people out of constitutional democracy.

So supporters of traditional marriage are faced with an unhappy task. Either we give up the traditional institution of marriage to activists in the streets and on the bench, who see marriage as nothing more than discrimination, or we enshrine the traditional institution of marriage with the constitutional protection that our children need and deserve.

The traditional institution of marriage is too important. It is worth defending. So, today, an important constitutional process begins.

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

With that, I will turn the floor over to Senator Feinstein, who will serve as the Ranking Member for this hearing.

Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, for your comments. I would particularly like to welcome Senator Allard, Representatives Frank, Lewis and Musgrave to this Senate hearing. We are delighted to have you, particularly House members over on this side. It is always nice when you come over. We are delighted to have you here, and pardon my scratchy throat.

Mr. Chairman, I would like to present a slightly different argument. Today, we have before us a constitutional amendment not to protect or expand the rights of a group of Americans, but to limit those rights instead.

This amendment, if passed by the Congress and ratified by the States, would become the Twenty-Eighth Amendment to the Con-

stitution since that document itself was first completed in 1787. In those intervening 218 years, the Constitution has been amended infrequently, and almost always for the purpose of expanding, protecting or guaranteeing the rights of Americans. But today this amendment is different, for it would, if enacted, become the first amendment to limit rights.

I believe this amendment is ill-timed, ill-advised, and I would like to briefly discuss why.

First, the issue of marriage and domestic law has always been one under the purview of the States, not of the Federal Government. And throughout this Nation's history, the States have proven entirely capable of dealing with this issue. As early as 1890, in *In Re Burrus*, that Supreme Court of the United States, in a child custody dispute, stated, and I quote, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States."

Later, in a 1979 Supreme Court decision, *Hisquierdo* v. *Hisquierdo*, the Court stated, and I quote, "Insofar as marriage is within temporal control, the States lay on the guiding hand." The Court in that same decision also restated the language I just quoted from *In Re Burrus*.

Even now, as voices are raised at the prospect of same-sex marriages in Massachusetts and California, our traditional, State-centered processes have begun.

In Massachusetts, the recent court ruling allowing for same-sex marriages does not take effect until May, yet the State legislature is at work on a State constitutional amendment to bar same-sex marriages, but allow civil unions. This amendment is certainly not guaranteed to pass, but it is clear that the people of Massachusetts will be dealing with this issue without need of assistance from Washington.

And in California, there is Proposition 22, a ballot initiative which was passed by Californians in 2000, where by a 23-percent margin, Statewide, with over 4.5 million votes, 61-percent of the people voted in favor of an initiative, while almost 3 million—or 38 percent—voted against the initiative which would amend the family code to state that "only marriage between a man and a woman is valid or recognized in California."

A few weeks ago, the mayor of San Francisco decided this law was unconstitutional and ordered the county clerk to issue marriage licenses to same-sex couples. The State Supreme Court has since enjoined the county clerk from issuing any further marriage licenses, and the county has complied, and the mayor will now have to show cause as to why he believes he has not exceeded his legal authority.

The courts have long held that no State can be forced to recognize a marriage that offends a deeply held public policy of that State. States, as a result, have frequently—and constitutionally—refused to recognize marriages from other States that differ from their public policy.

Polygamous marriages, for example, even if sanctioned by another State, have consistently been rejected. Marriages between cousins or other close relatives have also been rejected by some States, even if those marriages are accepted in other parts of the

country. And until the Supreme Court ruled on different equal protection grounds that no such discrimination was acceptable, even mixed-race marriages were often not recognized in many States.

In no case that I know of has the Full Faith and Credit Clause of the United States Constitution been used to require a State to recognize a type of marriage that would violate its own strong public policy.

Because several dozen States have already passed prohibitions on same-sex marriage, it seems clear that in those States, an argument could be made that strong public policy would lead to a refusal to recognize out-of-State, same-sex marriages. Mr. Chairman, I would note that Texas, and my State of California as well, are both among the 37 or so States that have laws on the books today defining marriage as between a man and a woman.

So this is not a problem demanding an immediate solution, because no State currently faces any risk whatsoever of having to recognize a same-sex marriage performed in another State. It is just that simple.

As we sit here today, the people of this Nation are greatly divided on the issue of same-sex marriage. One recent poll suggested that only about 20 percent of the American people support a constitutional amendment banning same-sex marriages like the one we discussed today. Considering that the amendment would need two-thirds of the Congress and then three-fourths of the States to ratify it, both its passage in this body and its enactment by the States seems unlikely.

Additionally, the text of the amendment before us today is problematic in its own right. Although supporters claim that the amendment is limited to the word "marriage," many constitutional scholars and family law experts believe that, as written, the original language of the amendment would also ban civil unions and domestic partnerships as well.

University of Chicago Professor Jacob Levy, for example, criticized the text of the previous version of the amendment because it would prevent the very type of the civil unions that the amendment supporters claim it would allow, based on language in the amendment stating clearly that "Neither this Constitution nor 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."

In a new version of the amendment introduced by Senator Allard just yesterday, this language has been changed. I think this change of language is a good indication of how controversial and complex this issue is. Here, on the eve of a hearing into the text of one amendment, we see a change in language so dramatic that we are now really confronted with a different amendment altogether, with its own unique problems.

I can tell you, as one who has devoted a great deal of time to working on a constitutional amendment to expand the rights of crime victims, this is a very long and detail-oriented process. We have been through literally dozens of drafts—probably as many as 100—over the course of many years and with the help of many constitutional experts. This is not a process best done overnight, on a moment's notice.

In any event, under this new amendment's language, it does now appear, contrary to the previous draft, that civil unions might be acceptable under certain State laws. Yet still, the amendment's text is highly ambiguous and may even suggest, as I read it, that a constitutional amendment passed by a State specifically allowing civil unions would be invalid, because the plain text of the amendment we discuss today would state that, and I quote, "Neither this Constitution, nor the Constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

So the effect of this new amendment is still very much an open question, and I hope that today's hearing can shed some light on the details of the text, as well as the advisability of pursuing any similar amendment to the Constitution.

On a personal note, Mr. Chairman, I should say that I have always believed that marriage is between a man and a woman. However, I also believe that this remains an open and evolving issue in America and that attitudes have changed even in the last few years. But regardless of what you, or I, or anyone thinks of the issue before us, it is hard to understand why we should impose a Federal constitutional prohibition on it or on civil unions.

Marriage has always been, and should continue to be, an issue that is considered, debated and controlled by States, localities and religious leaders. The Federal Government spoke once on this issue, in 1996, with the Defense of Marriage Act.

The Defense of Marriage Act—or DOMA as it is sometimes called—defines marriage as a union between man and woman, and it explicitly allows States to refuse to recognize same-sex marriages performed in other States. As a result, the Defense of Marriage Act is considered, even by its principal architect, former Republican Congressman Bob Barr, to go "as far as is necessary in codifying the Federal legal status and parameters of marriage."

That law is still in place. It has never been successfully challenged or overturned. So we need not readdress this issue with a constitutional amendment. Let us let the State processes work. Let us let the courts look at this issue over time. Let us not jump to the first constitutional amendment in our history that would limit, rather than expand, the rights of American citizens to be free.

Mr. Chairman, I would like to place in the record a couple of op-eds which I thought were excellent—one by a former member of this Senate Judiciary Committee, the Chairman of the Immigration Committee, with whom I had the pleasure of serving, Mr. Alan Simpson, and that is entitled, "Missing the Point on Gays"; another by Bob Barr, which is entitled, "Leave Marriage to the States"; and one by George Will, entitled, "Culture and what Courts Can't Do"; and also a commentary by Lea Brilmayer, entitled, "Full Faith and Credit."

I thank you very much.

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

Senator CORNYN. Without objection, those will be made part of the record.

I want to thank the Senator from California for, while we have some differences of opinion, she unfailingly is courteous, and re-

spectful, and I think the tone that hopefully we have set today, by showing that there are some differences in perspective, and I am sure that we will be able to flesh those out through the witnesses as we hear this testimony evolve this morning, but I want to thank her publicly for her courtesy and for the way she has worked with us to make sure the process moves forward.

I, too, would like to thank our colleague from the Senate, Senator Wayne Allard, as well as our colleagues from across the dome, Representative Barney Frank, Representative John Lewis, and Representative Marilyn Musgrave, for being with us today. We know that you have a lot of commitments, and we want to proceed now to hear your statement, and then we will allow you to do what your schedules dictate, in terms of taking care of other matters that I know are pulling at you as well. But thank you very much for being here this morning and sharing your testimony.

At this time, we will recognize Senator Allard for his statement.

STATEMENT OF HON. WAYNE ALLARD, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator ALLARD. Good morning, Mr. Chairman, and good morning, Senator Feinstein.

I wanted to share with the Committee, just before I give you my prepared remarks, that my attitude, as far as working with the Committee, when I introduced this amendment in the U.S. Senate, my public remarks as well as my remarks to my colleagues in the Senate was that I am always willing to work with the Committee and would certainly appreciate any suggestions and what might come forward to clarify the language that we have in the amendment.

First of all, I do not think that you would consider amending the Constitution lightly. It is a very serious task, and it is important that you have the right language in that amendment. So, after hearing from comments from my colleagues and working with constitutional scholars, the decision was made that we would change the words so that it met the goals which I publicly talked about.

Number one is that we define marriage as the union between a man and a woman; and, second, that we provide for a definite role for the State legislature, so that they could deal with the issues of civil unions and domestic partners as they saw fit and the benefits that might accrue thereof; and then also to limit an activist judiciary, particularly as it would apply to marriage.

And so I viewed those revised revisions that we introduced in the Senate yesterday as pretty much technical in nature to comply with what I had been talking about and then also to clarify and remove any ambiguity, which I think just served us well as we move forward on this debate on marriage.

Mr. Chairman, I appreciate the Committee allowing me to be with you today and to discuss marriage and a possible amendment to the Constitution to define and preserve this institution. It has been a pleasure to work with you, Mr. Chairman, as you have conducted a long and deliberate in-depth study of marriage issues in America today.

Without much academic examination, most of us understand the historical, cultural and civic importance of marriage. Marriage, the

union between a man and a woman, has been the foundation of every civilization in human history. This definition of marriage crosses all bounds of race, religion, culture, political party, ideology and ethnicity.

As an expression of this cultural value, this definition of marriage has been incorporated into the very fabric of civic policy. It is the root from which families, communities, and Government are grown. This is not some hotly contested ideology being forced upon an unwilling populace. It is, in fact, the opposite. The value and civil definition of marriage is an expression of the American people expressed through the democratic process our Founding Fathers so wisely crafted.

In 1996, Congress thoughtfully, and overwhelmingly, passed the Defense of Marriage Act. DOMA passed with the support of more than three-quarters of the House of Representatives and with the support of 85 Senators before being signed into law by then-President Bill Clinton.

The Defense of Marriage Act was designed to allow States to refuse to recognize the act of any other jurisdiction that would designate a relationship between individuals of the same gender as a marriage. Thirty-eight States have since enacted statutes defining marriage in some manner, and four States have passed State constitutional amendments defining marriage as a union of a man and one woman. These State DOMAs and constitutional amendments, combined with Federal DOMA, should have settled the question as to the democratic expression of the will of the American people.

Unfortunately, a handful of activist judges have recently determined that they are in a position to redefine the institution of marriage. A few State courts, not legislatures, have sought to overturn both statute and common perception of marriage by expanding the definition to include same-gender couples.

State court challenges in Arizona, Massachusetts, New Jersey, and Indiana may seem well and good to colleagues concerned with the rights of States to determine most matters, a position near and dear to my heart. These challenges, however, have spawned greater disrespect, even contempt, for the will of the States than any of us could have predicted.

The State of Nebraska provides the most stark example of this. Seventy percent of Nebraska voters supported an amendment to the State Constitution defining marriage as a union between a man and a woman—70 percent, I would add. This amendment has since been challenged in Federal court. In early March, the attorney general of Nebraska testified before a Subcommittee of this body, that it fully expects the duly amended Constitution of his State to be struck down, ruled unconstitutional by a Federal court. This is what we have come to, and this is where we are headed. The will of voters in the Nebraska case, an overwhelming majority of them, undone by activist judges and those willing to use the courts to bend the rule of law to suit their purposes.

The courts are not alone in their subversion of the will of the people. Local activists who want to ignore State law are culpable as well. To date, 4,037 licenses for marriage have been issued in San Francisco, California and more than 2,000 have been issued in Oregon for same-gender couples. California is one of the 38 States

that have enacted a DOMA law, a law selectively ignored by a handful of public officials. Couples from 46 States have taken advantage of the issuance of licenses in San Francisco and returned to their home States. Data on the number of States is unavailable from the Oregon licensees. However, it has been reported that more than 300 of the licenses issued were to out-of-state same-gender couples.

While I do not believe that all same-gender couples who have traveled to San Francisco or Oregon are activists, or even desire to use their personal relationships as forces for policy change, it seems to me that there are long-term implications for both Federal DOMA and the rights of States to define unions through either State DOMA or the State constitutional amendment process. It is clear to me that we are headed to judicially mandated recognition of same-gender couples regardless of State or Federal statute.

In November, I proposed an amendment to the U.S. Constitution to define marriage as a union between a man and a woman and leaving all other questions of civil union or partnership law to the individual State legislatures. The language I introduced was identical to that introduced by my friend and colleague in the House, Congresswoman Marilyn Musgrave.

Yesterday, in response to much debate and deliberation in the Senate, I reintroduced this language with legal scholars and fellow Senators, I reintroduced this language with technical changes to make our intent more clear. Numerous critics have propounded the false notion that we have far greater restrictions in mind, and it is my hope that our technical changes will serve to clear the air of this charge.

The policy goal has been, and will continue to be, to define and preserve the historic and cultural definition of marriage, while leaving other questions to the respective State legislatures. I believe the text originally introduced in the Senate accomplished this goal, but I have remained open to suggestion and stand willing to work with my colleagues as this important topic is debated.

In closing, I would like to again thank the Committee for holding this hearing today. I stand willing to work with you to defend marriage from the current onslaught of judicial activism and to return the power on these matters to the States themselves.

Thank you, Mr. Chairman.

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

Senator CORNYN. Thank you, Senator Allard. I know you and Representative Musgrave have consistently stated your intentions with regard to the amendment that you had originally offered, that it was to leave it up to the legislatures of the various States to continue to develop alternative legal arrangements for unmarried people.

Some technical questions, though, were raised after the time of the initial introduction of your amendment, and I believe you responded appropriately to those and attempt to clarify by making those technical changes to respond to those concerns that have been raised to clarify your intention.

As you may know, UCLA Law Professor Eugene Volokh was one of the leading voices among legal scholars raising some question

about the impact of the original language. And I notice that shortly after you announced your technical changes yesterday, he published an analysis concluding that you, in fact, fixed the problem that he had identified. They were quite simple fixes, just a few short words changed here and there, so it is no surprise that it did not take him much time to reach his considered legal conclusion.

Without objection, I would like to introduce into the record Professor Volokh's comments on those proposed changes to the amendment. At this time, we would be pleased to hear from Representative Barney Frank.

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Representative FRANK. Mr. Chairman, I am glad to be here to take part in the discussion of what the amendment really does, because I have been struck, frankly, by, I must tell you, it seems to me, an element of bait-and-switch in the way it is discussed. Of course, bait-and-switch laws, like a lot of other laws, fortunately don't apply to us in our advocacy. So we don't have to worry about it in the technical sense.

I have discussions here and elsewhere of the importance of this amendment to prevent a Federal judicial decision that same-sex marriage is required. I have heard that it is necessary to prevent activist judges in the States from doing things, although I do have to say, Mr. Chairman, that over the past few years it does seem to me that the objection to activist judges on the part of some of my conservative friends is somewhat selective.

I have to say that when I heard some of the people who have welcomed some of the Supreme Court decisions that have cut back substantially on our ability to protect people against discrimination on the part of their States denounce activist judges, I am puzzled. We have heard it said that this is necessary to prevent one State from doing what another State does.

All of those are issues that could be dealt with, although I think it would be difficult, and I am not in favor of dealing with them in a particular amendment. But the amendment today does much more than that, and I am struck by what appears to be the unwillingness of its proponents to be explicit about this.

We will have a referendum in Massachusetts probably in 2006. Under this amendment, if a majority of the voters of Massachusetts in a referendum decide to allow same-sex marriage, their decision will be canceled by the Federal Government. This amendment goes far beyond some of what we have heard today. It is not simply aimed at activist judges or pacifist judges or any other kind of judges. It is not aimed at full faith and credit.

Its central point, the first sentence of this amendment, the one that hasn't changed, says marriage is the union of a man and a woman. And that means that no political process in any State, no legislative enactment, no referendum, will be respected.

So, please, if you want to talk only about judges or full faith and credit, you could do an amendment to deal with that. I would not be in favor of such an amendment, but let's be clear what this amendment does. It denies any State in this country the right by

any means, including a popular referendum, to decide that it wants to extend marriage to same-sex couples.

Secondly, Mr. Chairman, I have to differ with your characterization that this would invalidate traditional marriage laws. I think people may be getting the impression that somehow the traditional marriages will themselves be affected. And, of course, they will not be.

When a court or anybody else changes a law, there are ways of changing it. You can abolish the law or you can extend its reach. This is a case not of abolishing traditional marriage, but of extending its reach to people who are not now eligible for it.

And I have to say that nothing of what we are seeing in Massachusetts or elsewhere changes traditional marriage one iota. Certainly, the emotional bonds that bind a man and woman in love will not be diminished. The legal obligations, the legal requirements, the benefits—none of that will be changed.

Indeed, it seems to me same-sex marriage frankly has less impact on people who do not choose to enter into one, and maybe we just need to repeat to people in various ways the fact that same-sex marriage will be entirely optional. I have seen no versions that would impinge on anyone else. The point is simply this: If you do not choose to enter into a same-sex marriage, nothing about your marriage will be changed, not legally, not emotionally, not in any other way. And I think again we should be clear about this.

Now, I have said you could, if you wanted to, deal with the full faith and credit, although I think that would be extremely hard. I believe the Senator from California has accurately described the state of law that the courts have not imposed one State's views on another.

In addition to the citation she gave, there was a very good article in the New York Times recently by Adam Liptak which made very clear that the history is of the States being allowed to defer to each other and work this out. The Federal courts have not imposed. I don't think it would be possible or necessary to do anything constitutionally about that. But if that is your problem, it is a different issue. I don't think there is a need to do anything.

Then I want to get to the merits, and what we are talking about, as I said, is not abolishing traditional marriage, not changing traditional marriage. This simply says that people of the same sex—because of the way we were born, because of the way we are, we are not attracted to people of the opposite sex and we wish to express those feelings of intimacy and emotional commitment that most of us who are human are fortunate enough to have in a way that expresses our nature. It doesn't detract from anyone else.

I have to ask, Senators, others, who are we hurting? How does the fact that I or someone else wants to express love for another human being in the same way as the overwhelming majority of my heterosexual friends and relatives—how does that hurt you? Why is this considered somehow an infringement or an assault? That is all we are asking for.

When we push for some legislation, for instance, anti-discrimination legislation, I am very much for it, but that has more effect on the heterosexual majority. We are telling you you have to hire someone, regardless of his or her sexual orientation, even if you

don't like that person's sexual orientation. But nobody is going to marry anybody else who doesn't want to get married to them. Nobody has to associate with anybody who is married that they don't want to associate with. All we are saying is, please, can't we in our lives do this?

When I go home from today's work and I choose, because of my nature, to associate with another man, why is that a problem for you? How does that hurt you? And if two women live across the street from you and they have been in love and have been together for years and now they are able, in Massachusetts, to formalize that relationship to legally be committed to each other, as they are emotionally committed to each other, does that mean the married couple across the street—somehow their marriage has been diminished?

Chairman said, well, ideas have consequences. Yes, they do. You cited the Archbishop of Massachusetts, a very able man who has done great things in his short tenure, as saying, well, if marriage is taken too casually, that could be a problem.

This is the opposite. Imitation is the sincerest form of flattery. What you have is millions of gay and lesbian Americans saying, you know, you have got a good thing going there, we admire it, we would like to be able to share it. How does that detract from it?

I didn't agree with the way they did it in San Francisco, but how does the image of thousands of people in San Francisco knocking on the door of the institution and saying you have got something really good here, we would like to get in—how do you interpret that as detracting from it? It doesn't at all.

Now, the question is children. Well, in the first place, of course, we don't restrict the right to marry only to people who are going to bring up children. Let's look at the fact that no one I know of is proposing laws that would prevent people from having children who happen to be gay or lesbian. There are people who are gay and lesbian who have children.

Now, if you are not prepared to make it illegal—and I think that is a degree of intrusiveness that we don't see coming from anyone—then why is it a problem, given that people have the legal right to have children, if they decide that they want to make sure those children are fully legally protected? Instead of having a claim on one parent, they want a claim on two. That is what we are talking about.

I just want to touch on one other thing, because people have said, well, what about religions? The autonomy of religions in their ability to decide who can get married ought to be fiercely protected as it is. In my State of Massachusetts, I can think of at least two forms of marriage which the State recognizes that religions do not.

If you are an Orthodox Jew and you do not get a "get," I believe it is called—and I will have to work for the reporter to try and spell it for you—but if you do not get a religious divorce from the religious court, subsequent marriages are not recognized and your children are not considered legitimate, the children of a subsequent marriage. It is very harsh in Orthodox Jewry. I don't agree with that tenet of my faith, but it is there. Similarly, if you are a Roman Catholic and you divorce and do not get an annulment, your subsequent marriage is not recognized by the Catholic Church.

Now, I believe very strongly in the right of the Roman Catholic Church and Orthodox Jewry to refuse to recognize those marriages, but the State does. The State has done it for as long as I can remember. That doesn't undermine religion to do that.

So I just want to close by reemphasizing this is not an amendment about the Full Faith and Credit Clause or about judicial activism or about whether or not the six Justices who thought that I shouldn't be locked up for expressing physical intimacy are now going to go and find a national rule against marriage.

I have to say that I gather the Attorney General of Nebraska has told people that he thinks the United States Supreme Court is going to overturn Nebraska's rule. I guess scaring your electorate is sometimes a useful thing to do. I don't know anyone who seriously thinks the United States Supreme Court is even close to that.

But that is not what your amendment does that you are considering here today. If you wanted to do any of those, put them forward and let's debate them. I think they all have flaws, but let's debate them. But let's be clear about what this amendment does. It says that even if the State of Massachusetts, after a very thorough debate that people saw, a thoughtful and useful debate—even if, after that, the constitutional amendment is put on the ballot and after a further debate that I look forward to participating in in 2 years—if the people decide to allow it, you who do the constitutional amendment will cancel out the right of the people of Massachusetts. I do not think that is an appropriate response in many cases, and certainly not to the threat that millions of people are threatening to commit love.

Senator CORNYN. Representative Lewis, we would be pleased to hear your opening statement.

STATEMENT OF HON. JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Representative LEWIS. Thank you very much, Mr. Chairman. Mr. Chairman and members of this Committee, I am delighted to appear before you this morning.

Mr. Chairman, I must say from the outset that I am strongly opposed to the Allard amendment. I am opposed to any amendment that seeks to write discrimination into the Constitution. The Constitution is not the proper place to address the right to marry for same-sex couples. It is better left to the States.

On the eve of the 50th anniversary of *Brown* v. *Board of Education*—and this year we will celebrate the 40th anniversary of Lyndon Johnson signing the Civil Rights Act of 1964—I ask the supporters of this amendment to remember that our history has provided many examples of judges and courts moving this Nation toward social justice, often before legislatures were ready to embrace such progressive change.

I ask the question, where would be as a Nation if Congress in 1954, 50 years ago, radically amended our Constitution to uphold segregation or the "separate but equal" doctrine? I further ask, where would we be as a Nation if Congress in 1967 had made it unconstitutional for interracial couples to get married?

The Constitution is a special, almost sacred document. The Constitution is the document that defines the framework of our Gov-

ernment and protects our rights. It is not a place for mandating social policy in individual States or forcing individuals to reconcile their religious beliefs on such a sensitive and personal issue.

This amendment would deny States the right to determine their own marriage laws, assign one group of Americans to second-class status, and deny children of gay parents the stability and legal protection that they can only be offered through marriage.

The Allard amendment could potentially deny important State court decisions, such as the Vermont civil union decision and the Oregon domestic partnership decision. And restricting rights of certain individuals would set a dangerous and historic precedent. It would take us back.

Since the adoption of the Bill of Rights in 1791, the Constitution has been amended only 27 times. Amendments to the Constitution are very rare and are only done to address critical public policy needs, such as abolishing slavery and extending the right to vote to women, African-Americans and young people.

I believe amending the Constitution on this issue is an irrational and radical step that seeks to undermine the civil rights of many of our citizens. It chips away at the foundation of equal protection for all in our society. To amend the Constitution, as I said before, on this issue would be a major step back and not a step forward.

Mr. Chairman, I ask you and the members of the Committee to think long and hard before altering America's most important document for the sole purpose of restricting the civil rights of some of our citizens. I fought too hard and too long against discrimination based on race and color not to stand up against discrimination based on same-sex marriage.

Some would say today let's choose another route and give the gay and lesbian community certain legal rights, but call it something else; don't quite call it marriage. We have been down that road before in this country. Separate is not equal. The right to liberty and happiness belongs to each of us, and on the same terms, without regard to either skin color or sexual orientation. Our rights as Americans do not depend on the approval of others or on the passion of the times. Our rights depend on us being Americans.

The Allard amendment would divide rather than unite us as a country. Rather than divide and discriminate, let us come together and create one nation. We are all one people. We live in the same house, the American house. Let us as a nation and as a people recognize that gay people live in our American house. We need to realize that gay people live in this house and share the same hopes, troubles and dreams. Now is the time for us to finally treat them as equals, as members of the same house, in the same family, at the same table. We must build a beloved community, an all-inclusive community, a community at peace with itself.

Thank you, Mr. Chairman and members of this Committee.

Senator CORNYN. Thank you, Representative Lewis.

Representative Musgrave, we would be happy to hear your opening statement at this time.

STATEMENT OF HON. MARILYN MUSGRAVE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Representative MUSGRAVE. Chairman Cornyn, Ranking Member Feinstein and other distinguished members of the U.S. Senate, thank you for the opportunity to come before you today.

As the sponsor of the Federal marriage amendment in the United States House of Representatives, I have spoken with Americans across the country about the importance of defending the traditional institution of marriage. I have spoken with legal experts across the political spectrum who agree that the traditional definition of marriage is likely doomed unless we amend the United States Constitution.

I have spoken with family counselors who believe that children are best raised in the shelter and protection of a mother and father who are married. I have spoken with well-meaning Americans who love and respect all people and certainly bear no ill will toward any particular population or group, and yet who also revere, respect and tenaciously hold to the traditional definition of marriage.

But I must say that of all the people I have met on this journey, I have been most impressed and most stirred by the leaders who have taken such a stand in defending marriage in their home States. These people are not from Washington. They are simply local leaders trying to solve the problems that they see in their communities.

I have been stirred to action by the 38 States that have passed Defense Of Marriage Acts, reserving marriage as the union of a man and a woman. Since this issue was forced on the American people and their elected representatives, 38 States have taken clear action to nail down our collective understanding of what marriage is.

The intent of the other 12 States has not changed over the last 200 years either. In fact, I will go farther than that. To date, not one single State has legislatively enacted gay marriage. However, we see four supreme court justices in Massachusetts forcing a redefinition on their body politic, and forcing the rest of the Nation to take note. Since the action in the Massachusetts court, local officials in various States, even States with defense of marriage acts, are blatantly ignoring the rule of law and being disrespectful to the legislative process.

Clearly, there is no national outcry to redefine marriage. Even in the three States that enacted some form of contract law for homosexuals in relationships, the legislatures went out of their way not to redefine marriage. So why is the traditional definition of marriage now under attack? Because activist courts are ignoring the rule of law and their duty to uphold the separation of powers doctrine and are forcing this on the American people against their will.

Look what happened in Hawaii and Alaska after their high courts acted in a similar way. The people of those respective States rose up and, by a vote of more than 60 percent, amended their State constitutions to protect the traditional definition of marriage. In fact, in every State that the definition of marriage has been put to a direct vote of the people, anywhere from 60 to 70 percent voted to preserve marriage as the union of a man and a woman.

Even with this action in the States, State and Federal judges are not stopping their attack. In fact, the opposite is true. State and Federal judges are increasing their attacks in many States. They are even threatening State marriage definitions in Federal courts.

As a former State lawmaker, I honor and cherish State lawmaking. States generally deserve more, not less, power to make law. However, in this case, if no effective Congressional action takes place, we will be leaving state lawmakers with no options to preserve what every State clearly wants as their law.

State and Federal activist judges will not stop until a national marriage definition is legislated from the bench. In our country, this is unacceptable. The American people deserve to have a say on this important issue.

The bottom line is I trust the American people and their elected representatives to help guide this great Nation of ours.

Take, for example, Reverend Richard Richardson. I know you have heard him, Mr. Chairman, when he testified a few weeks ago before a Subcommittee hearing, and I am glad that he is here before this Committee today. Reverend Richardson is an ordained minister in the African Methodist Episcopal Church in Boston. He is also Director of Political Affairs for the Black Ministerial Alliance of Greater Boston. He is also the President and CEO of Children's Services of Roxbury, a child welfare agency. Not only has he worked in the field of child welfare for almost 50 years, he has been a foster parent himself for 25 years. I met him recently and I would like to quote a statement of his.

"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 as 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," end of quote.

Those are powerful words from Reverend Richardson about the importance of the traditional institution of marriage to the African-American community. He is a member of a community that knows what discrimination is, and he speaks with a special moral authority when he says that marriage is about the needs of children and society, not about discrimination.

Reverend Richardson testified before the United States Senate a few weeks ago saying, quote, "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 dis-

crimination. 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?"

Mr. Chairman, of course, this issue is not about discrimination. For the African-American community and for every American community, marriage is about the needs of children and society. It is important that the American people and members of Congress revere our founding charter with the reverence and respect that it so clearly deserves. No one seeks to amend the Constitution casually.

I know that all the members of the Congressional Black Caucus are struggling with the Federal marriage amendment, but they know how important the traditional institution of marriage is to all Americans, regardless of race, culture or religion.

I will quote Congressman Arturo Davis, a Democrat from Alabama and member of the Congressional Black Caucus. He said recently, quote, "I have not made a decision on the constitutional amendment... When I see mayors announcing that they will violate the law, it raises the point and puts the country and the Congress in a difficult position," end of quote.

A difficult position indeed, Mr. Chairman. However, Congress has the duty to watch developments in the States and to help promote the rule and our system of Government, with elected representatives of the people debating and crafting the laws of our various States.

This whole debate, although now necessary, was not initiated by any member of Congress. However, many of us have come to the reluctant conclusion that the legal experts across the political spectrum are right. The only way to preserve traditional marriage is with a constitutional amendment.

When the other side says that we are guilty of "writing discrimination into the Constitution", I am offended on behalf of people like Reverend Richardson and other members of the minority community. Furthermore, this accusation cheapens the debate and shows disrespect to all of those who are trying to have a meaningful public discussion about how our laws are made.

You would have to logically assume that former President Bill Clinton was also being discriminatory when he signed the Federal Defense of Marriage Act in 1996. And what about the other 150 Congressional Democrats both in the House and the Senate who voted for the Defense of Marriage Act? Did they act to codify discrimination? Was over two-thirds of Congress in 1996 filled with animosity toward anyone? I think not.

Reasonable observers would agree that such a charge is blatantly and fundamentally wrong, and distracts from the very real issue that we are all forced to deal with. If Congress does nothing, the courts will have redefined our definition of marriage that is well

over 200 years old without the consent or approval of the American people.

Let me be clear. When I hear the accusations of discrimination, my resolve only grows stronger on this issue. And from what I have seen, this brings members of the minority community that have been truly discriminated against rallying to support the Federal marriage amendment. The American people are sophisticated enough to know that the accusation of discrimination is false.

Those of us that support marriage as the union between a man and a woman have very little choice: either do nothing and surrender the traditional definition of marriage or defend it against unfounded charges of discrimination and amend the United States Constitution to ensure that no court will easily abolish it.

Thank you, Mr. Chairman.

[The prepared statement of Representative Musgrave appears as a submission for the record.]

Senator CORNYN. Thank you, Representative Musgrave, and thanks to each of our panel members for being here today and representing your respective views.

I know some members of the Committee would like to ask a few questions of the panel, but I know many of you have conflicting engagements. So those of you who can stay for just a few more minutes in order to respond to a few questions from the Committee, I would appreciate it. I am sure they would, as well.

I will defer any questions that I may have and recognize Senator Feinstein for any questions she may have.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. My question is of Senator Allard.

Senator I wanted to ask you a question about Section 2 of the amendment, specifically what the intent was of limiting the amendment to the Constitution of the United States or the constitution of any State rather than the law, and what the intent is in requiring that marriage or the legal incidents thereof not be required to be conferred to anyone other than a man and a woman. What is the intent?

Senator ALLARD. Thank you, Senator Feinstein. What we were trying to do was limit the action of the courts on constitutional matters, and that is the reason for addressing the State constitution especially, and the Federal Constitution as well.

And then the sort of catch-all term that you caught at the back was an attempt to deal with contracts, for example, with insurance companies and what not where although it is not State law, they may put provisions in there that would define marriage other than what we have in the amendment. It was intended to basically catch those types of provisions that might occur that would change the definition of marriage.

Senator FEINSTEIN. Including a civil union?

Senator ALLARD. No. Civil unions would not be a part of that. The potential part that could have impacted civil unions we did remove in the revised section. I have always stated publicly that my intent was never to limit civil unions or domestic partnerships; that those were to be addressed by the States.

So the technical change that we put in the revised bill was to carry forward to make sure that we removed any doubt that we

were trying to limit in any way civil unions. We expect that State law would deal with civil unions, and that provision has been removed in the revised bill that we introduced.

Senator FEINSTEIN. I think we will have to look further into that because I am not sure that it doesn't remove it, as well.

Congressman Frank.

Representative FRANK. Senator, I appreciate the chance to comment on that because as I have said, I don't think there is a need to stamp out any of this love. But on the point that the Senator just made, he makes a careful distinction in the second half of the amendment and says judges are prevented from doing this, but legislatures are allowed.

The point I raise is I don't understand why that doesn't also apply to marriage, at least given that it doesn't change the rhetoric. In other words, the rhetoric is activist judges, activist judges, activist judges. But the amendment clearly—and the distinction makes this clear—the amendment with regard to marriage doesn't discriminate in its prohibition between judges, on the one hand, and legislatures or referenda on the other.

Now, clearly, the authors knew how to do that if they wanted to, because in the second part they make that distinction. So I do think again, truth in advertising. Let's be very clear. This is not an amendment to keep activist judges from declaring marriage. It is an amendment that doesn't allow the political will of the State, expressed either through the legislature or through the people, to allow marriage.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Senator CORNYN. Senator Kennedy.

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

Senator KENNEDY. Thank you all for your testimony.

I believe very strongly that if it is not necessary to amend the Constitution, then it is necessary not to amend the Constitution, and I am still strongly opposed to this proposal.

I would ask the panel if, in their own study of this issue, they know of any other time in the history of America that the Federal Government would ever dictate to the States how the States should interpret their own State constitutions. Has that ever happened in the history of this country?

Senator ALLARD. Well, the purpose of the Constitution is to define the limits and the roles of the States and the Federal Government. I remind the Senator that you know very well that I am a veterinarian and not an attorney, but when I look at the Tenth Amendment, for example, we laid out specific roles for the States and specific roles for the Federal Government. And in that way, there were bounds set for the States, as well as the Federal Government.

If you look at the Constitution, it is the law of the land an it puts in place all these relationships. So there are certain dictates that are going to come out of the Constitution. So I don't think this is unprecedented in any way.

I think that if you look at the amendment, it is very respectful of the role of the States, and that is that they can deal with civil

unions or they can deal with domestic partners as they see fit, as it applies to benefits that might apply thereto. So I don't view this as an incursion on States' rights.

Senator KENNEDY. But they couldn't, clearly, if it was a part of the Constitution.

Senator ALLARD. All we have done in this particular amendment is define marriage as between a man and a woman, and then we leave the States to deal with those other issues.

Senator KENNEDY. But the question was if the State made the judgment to do it through its Constitution, you are saying that this would nullify that action.

Senator ALLARD. Well, if the States decided to deal with civil unions through their constitution, or any kind of domestic partners, our amendment would not have an adverse impact on that. We deal just with the definition of marriage as it applies to a man and a woman.

Senator KENNEDY. Congressman Frank.

Representative FRANK. Senator, your question is exactly right. No, we have never seen this degree of intrusion by the Federal Government into the internal decisionmaking processes of the States.

The second half of this amendment says to the States, okay, you can do it by this method, but not by that method. And that is unprecedented, I believe, certainly in terms of the Constitution, and I believe statutorily. We have generally said the State is a political entity.

By the way, with all this talk about activist judges—and again I have to say when I hear some of this denunciation of activist judges and I think about the judges whom people have been supporting and their record, I am puzzled.

But in some of the States, remember these activist judges are elected. Judges aren't always appointed. We are talking about State supreme court judges. So, apparently, even on the second part of this, what this amendment says is elected State supreme court justices may not interpret State constitutions because we, the Congress, don't like it. So this is not simply a case of appointed versus elected. There are a number of States that have elected supreme court judges and this prohibition on them applies.

But it is also the case that this Federal decision that it is okay to do it by the legislature, but not by the courts, we have never seen before. And again, of course, with regard to marriage, it doesn't make any difference.

Senator KENNEDY. Well, just one further question, Mr. Chairman.

With regard to what is proposed now in our own State of Massachusetts, if that were to pass, as of May civil marriage will still be permitted in the State. That will go on. If there is an amendment to the Constitution, it will go through the constitutional process through 2006.

Congressman Frank, is it your reading—and I think you have spoken to it and maybe the record is very clear on it—that the final action, even after the State makes this judgment that it wants to permit civil unions, with all the protections and rights and benefits of marriage, would be struck down if this amendment were to pass?

Representative FRANK. Well, certainly, if the amendment is defeated by the people and marriage is thus allowed to continue, that would be overruled. If this amendment goes in effect, the Federal Government has said to the people of Massachusetts, your referendum is of no consequence. The vote of the people of Massachusetts will simply be ruled out.

With regard to the civil union piece, it is interesting. In Vermont, as we know, several years ago there was a tremendous divisive debate in Vermont about civil unions. Today, it is a non-issue because the reality has turned out to be—and I believe there are some people who are against same-sex marriage or other relationships because, frankly, they don't like us, and not liking one of us, they think two of us is a lot worse.

There are other people who are genuinely concerned about the impact this might have on marriage. I respect that. I think the experience in Vermont shows that those fears did not turn out, and we heard the same fears. In Vermont now, they are very happy with civil unions. No one is trying to undo it. This amendment would cancel it out. I don't know whether it would do it retroactively.

And in Massachusetts, you have a fruit of the poison tree argument. The referendum that we will have in Massachusetts which, if it passes, establishes civil unions is clearly the direct result of the supreme court opinion. If we hadn't had the supreme court opinion, we wouldn't have had this.

So I don't know what its effect would be. It probably wouldn't cancel it out, but it certainly would be the case that if Massachusetts votes for marriage, the Federal Government says, vote, schmote, we know better.

Senator ALLARD. Senator Kennedy, may I respond? I don't think that the constitutional amendment that I am proposing would impact adversely any State's effort to deal with the issue of civil unions, and that includes Massachusetts if you put it in the Constitution, or that includes Vermont, and their legislature has acted. We have drafted this with the intent that it would not have an impact on those State actions.

Representative FRANK. But the legislature in Vermont clearly acted as a result of a directive from the Supreme Court of Vermont. So this is clearly the direct consequence of a judicial decision.

Senator KENNEDY. As I understand it, the revised amendment would require the State courts to construe their own State constitutions in a manner that would prohibit same-sex couples from receiving the, quote, "legal incidents of marriage." That is the operative part. There is no precedent in this democracy for that.

I want to just ask, if I could, finally, John Lewis, some supporters of the Federal Marriage Amendment have compared the need to amend the Constitution to overturn the *Goodridge* decision with the situation faced by President Lincoln after the Supreme Court issued the notorious *Dred Scott* decision.

Do you think it is fair to compare *Goodridge*, which held that the State could not discriminate against gays and lesbians by denying them the many benefits and protections that the laws of the State provide for married couples, with *Dred Scott*, which declared that African-Americans are not citizens of the United States?

Representative LEWIS. I think the day will come in America. It could be 40 years from now. It could be much less. It could be 50 years from now. But we will look back over this debate and say, what was this all about, the same way we look back to 50 or 60 or 70 or 100 years ago, to the days of slavery, to the time when blacks and whites could not be in the same place or sleep under the same roof, ride in the same taxicab, or blacks and whites couldn't marry. And we look back at it now and we say, what was it all about? I think history is going to bear us out on this issue and say, what was it all about?

Senator CORNYN. Senator Feingold, if I may, we are getting away a little bit from the initial plan, which was to—because we want to get to our second panel, people who have traveled a long way to come here and we want to hear from each of them, and I know time is running out. In an effort to accommodate some of my colleagues here who wanted to ask questions of the panel, we were proceeding to ask some, and I appreciate the restraint that has been exercised. Ordinarily, we would go back and forth between sides. At this time, I would recognize the Senator from Alabama if he has a few questions for the panel.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. I will keep it short. Thank you, Mr. Chairman. You have done a great job with this hearing and your experience as a Texas Supreme Court Justice, I think uniquely qualifies you to give a fair hearing here. Your opening statement, in my view, was comprehensive and wise and true and we need to discuss this at a high level and I think we will.

It is a delight to have the panel here. We welcome all of you. Senator Allard, I like the language of the amendment as you have proposed it better than what we looked at first. I think that is supportive. I, like you, am open to any way to make it better. If there are good suggestions and we can refine it more, I am open to, and I think you are, and you have demonstrated that and I certainly salute for it.

Representative Lewis, it is great to have you back. It was good to have been with you in your home State of Alabama recently and I just want to publicly thank you for your courageous leadership in helping move Alabama forward through some difficult days. You are clearly one of the nation's great leaders and it made a difference that we should appreciate.

Mr. Chairman, I would just say this and I think we need to stress this, that this is not disrespectful of the States. Not one State legislature elected by the people that I am aware of has voluntarily voted legislation consistent with the Massachusetts Supreme Court decision. So courts, Federal courts, unelected Federal courts are the ones who are redefining the Constitution to carry out a view of marriage and family they think is appropriate that the American people do not think is appropriate. It undermines democracy.

In this country, elected representatives are accountable to the public. We make judges lifetime appointed individuals and office holders because we want them to be apart from politics and legisla-

tion and all the debates that we carry on. We want them to enforce the law and not to be pressured one way or the other.

So I think what you are doing is simply restoring the right of the American people to decide one of the most critical cultural issues facing America, and that is how do we think about family and marriage. I think it is a good healthy debate. In some parts of it, we need to go and discuss other issues of how we can strengthen families and help children, but that is not what we are doing here in the Judiciary. We need to look at this amendment and see what we can do to make sure it has got integrity, that it works, it is fair, it allows the States freedom but also protects their rights to make important decisions. Thank you very much.

Senator CORNYN. Thank you, Senator Sessions, and on that point, before I go to Senator Feingold, the role of the States, I want to acknowledge that a number of distinguished State law enforcement officials around the country have submitted letters in defense of the traditional institution of marriage and we will enter those letters of record. They, in effect, state that the real threat to States' rights is in the area of judicial activism, not the results of the actions of Congress.

Senator Feingold?

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

Senator FEINGOLD. Thank you, Mr. Chairman. I will just make a brief statement and ask one question. I think it will save time in the long run.

As I said at the two prior hearings on this subject, I really think it is unfortunate that we are devoting so much time to this issue. I continue to believe that a constitutional amendment on marriage is unnecessary and I also believe that the effort to rush the amendment through our Committee and bring it to the Senate floor this summer is politically motivated to score points in an election year.

That is unfortunate for the American people who are struggling every day with so many pressing issues, from jobs to access to health care to educating their children. These things are the things that deserve the Senate's attention and action.

The regulation of marriage in our country has traditionally been a matter for States and religious institutions and should remain so. No one, including the witnesses who have testified at the prior hearings, has shown that there is a need for Federal intervention.

Proponents of an amendment argue that it is necessary to amend the Constitution to ensure that no State is forced to recognize a same-sex marriage performed in another State. But not a single court has forced a State to recognize a same-sex marriage or civil union performed in another State. We spent quite a bit of time on this at the last hearing. In fact, as Professor Lea Brilmayer persuasively testified earlier this month, no State in the history of our Nation has ever been forced to recognize a marriage that was against the public policy of that State.

I note also that just since our last hearing, which was just a little while ago, the California Supreme Court has ordered city officials in San Francisco to stop performing same-sex weddings. The Attorney General in the State of New York ruled that State law pro-

hibits same-sex marriage. And in Massachusetts, as many have discussed, the process for amending the State Constitution is ongoing.

It appears, in other words, that this effort here for this constitutional amendment is ill-timed and ill-advised. We should let States continue to sort these issues out. But the Chairman and many in his party feel differently and so this hearing was scheduled to consider a specific proposal to amend the Constitution, the Federal Marriage Amendment. I think we can all agree that amending the Constitution is a very serious matter and should be undertaken only after careful deliberation and debate. We should not do this in a haphazard or rushed manner.

Yet just yesterday, presumably in anticipation of this hearing, a revised version of the Federal Marriage Amendment was unveiled. I think, Mr. Chairman, it is simply inappropriate to hold a hearing on the text of a constitutional amendment less than 24 hours after that text is introduced. That is not the proper way for the Senate to consider amending our Nation's governing charter which has served our Nation well for over 200 years. No hearing should be held when Senators and witnesses have had less than a day to review the legislative language that is the focus of the hearing. I believe, Mr. Chairman, that it would be inappropriate for the Subcommittee on the Constitution to consider this new language until the Committee holds another hearing on it.

Mr. Chairman, observing an appropriate deliberative process for amending the Constitution of the United States is particularly important because the stakes are so high. We are talking here about an amendment that would, for the first time, as Congressman Lewis said so well, for the first time, put discrimination into our governing document. It would dictate to the people of each State how their own State Constitution should be interpreted and applied on a subject that has since the beginning of our republic been regulated by the States.

I note that the authors of the Federal Marriage Amendment appear to have recognized that the original version of the amendment would not only have prohibited same-sex marriages, it would have barred States from recognizing civil unions or providing some benefits that are available to married couples such as hospital visitation rights to same-sex couples. Of course, that is exactly what some proponents of the Federal Marriage Amendment would like to see. It is encouraging that the sponsors do not share that extreme view.

But no amount of redrafting will convince me that we need a constitutional amendment to regulate marriage. Marriage has been part of human civilization for 4,500 years or more. It is not under seige. It is not in danger of withering away. According to the Department of Health and Human Services, in fiscal year 2003, approximately 2.2 million heterosexual couples were married in the United States. I hope we in the Senate will get back to the business of trying to improve their lives and the lives of their children rather than spending time on a divisive political exercise.

I just ask one question of Representative Lewis. I thank both Congressmen Frank and Lewis for being here. I would especially like to thank Representative Lewis, who has dedicated his life to fighting for civil rights for all Americans.

Representative proponents of the Federal Marriage Amendment argue that a constitutional amendment would strengthen the institution of marriage. For example, Reverend Richardson, who testified at a previous hearing and is with us again today, has stated that the institution of marriage, quote, "plays a critical role in ensuring the progress and prosperity of the black family and the black community at large," unquote, and that is why he supports a Federal Marriage Amendment.

Could you respond to that? Do you agree that in order to ensure the progress and prosperity of the African-American family and community we must amend the U.S. Constitution with a Federal Marriage Amendment?

Representative LEWIS. I grew up in rural Alabama and I saw segregation and I saw racial discrimination. I saw the signs that said, "white men," "colored men," "white women," "colored women." As a child, I tasted the bitter fruits of racism. Years later, I got involved in the civil rights movement. I was ordained a Baptist minister. I went to seminary, studied religion, the great religion of the world, theology, systematic theology. I studied philosophy.

But I don't think, as someone who came to the civil rights movement, got arrested, went to jail for a time, beaten and left for dead at the Greyhound Bus station in Montgomery in May of 1961 during the Freedom Riot, had a concussion at the bridge in Selma on March 7, 1965, 39 years ago, I don't think today that amending the United States Constitution to ban same-sex marriage would do anything, not one thing, to improve the lot of African-Americans or any other group.

I think it is the wrong way to go. Discrimination, as I said in response to Senator Kennedy, discrimination is wrong. It is dead wrong. For the past many years, we have been trying to remove our country, to expand the Constitution, to remove any sign, any symbol of discrimination from the Constitution. And to come back these years later to place discrimination in the Constitution, it is just wrong.

I think black families in America are having problems like all other families. They need jobs. The children need to get an education. Thank you.

Senator FEINGOLD. Thank you, Representative. Thank you, Mr. Chairman.

Senator ALLARD. Mr. Chairman, I am expected at another Committee and I want to excuse myself, if I may, so I can be at that Committee.

Senator CORNYN. Thank you, Senator Allard, for being here with us. We thank the entire panel for being here. Ordinarily, I know we don't detain members this long, but there was an interest in asking some questions and thank you for accommodating the members of the Committee.

Representative FRANK. Senator, I appreciate that. I plan to be around as long as you want to talk about this.

[Laughter.]

Senator CORNYN. Thank you. I knew we could depend on you, Representative Frank.

Senator Durbin?

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

Senator DURBIN. I am really sorry Senator Allard left because I don't think we have on the panel here people that can answer the questions that I have prepared and that is a shame.

There are many things that divide us as members of the House and Senate, politically and otherwise, and there is one thing that unites us. Before we can serve in either of these chambers, we have to take an oath of office, and within that oath of office is a very simple but poignant commitment, to uphold and defend a document, the Constitution of the United States. Whoever designed that oath of office thought as much as anything that we had to take that document very, very seriously.

I am sorry that Senator Allard had to leave, but I understand that. That happens to all of us in Congress, and Musgrave, as well. But the fact of the matter is that we are holding a hearing in this historic room where people have gathered throughout the history of this building to form the most important decisions in our republic, and we are gathered as a Committee with an exceptional mandate, to look at the Constitution of the United States we have sworn to uphold and defend, and we literally are considering words to be added to that Constitution which were conceived and delivered to us less than 24 hours ago. Think of that for a moment. We are going to amend the Constitution of the United States of America with words that were conceived and delivered to us less than 24 hours ago.

I would like to ask Senator Allard a few questions and Congresswoman Musgrave, if she supports this version, as well, but I really strongly disagree with the conclusion that these are somehow technical changes. I think they are much more than technical changes.

I have heard them say repeatedly, both of them, that it is not the intention of this newly drafted amendment to the Constitution to in any way jeopardize civil unions, and yet I have to say point blank, and Congressman Frank, this is your statement I am referring to, what we have here is the proposal by the Commonwealth of Massachusetts that they will add a constitutional amendment establishing civil unions for same-sex couples with, quote, "entirely the same benefits, protections, rights, and responsibilities that are afforded to couples married under Massachusetts law," end of quote.

Now, as I read this, the second sentence of the constitutional amendment says, "Neither this Constitution nor the Constitution of any State shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." I think this expressly prohibits the Commonwealth of Massachusetts from enacting and enforcing this constitutional amendment, the State constitutional amendment which they have proposed.

Let me add a second element. What does the phrase, "legal incidents thereof" mean? I think it means, and I will defer to my constitutional scholars who are on the Committee and witnesses here, I assume that it means the rights that are created by virtue of the institution of marriage, the legal incidents thereof. So I happen to have health insurance through the Federal Government through

Blue Cross and Blue Shield and my health insurance is a family plan and it says it will cover my spouse, and my wife and I are covered by that health insurance.

Now might come a State, my State or others, that say under the State Constitution and an Equal Protection Clause contained in that Constitution, we believe that that spousal coverage of health insurance should extend to those who are in a domestic partnership relationship, to men, to women. Now, that is not a leap of logic. That is exactly what many States and localities have tried to achieve. They have said, we want health insurance to cover your partner if you have a partner of the same sex.

Well, excuse me, but if you say that the equal protection of the law means that spouse can include a same-sex partner, isn't that something like a legal incident of marriage that is prohibited by the language in this constitutional amendment?

So to say that we are protecting civil unions and clearly not protect them, to say that we are going to prohibit the legal incidents of marriage applying is clearly, I think, telling the story here. This language of this amendment is inconsistent with civil unions. It is inconsistent with domestic partnerships.

The last point I will make is this. I don't think words are added or deleted to a constitutional amendment in a careless manner. I assume the people that pored over this language did it extremely carefully, and let me tell you some words that they deleted in their amendment.

In the original amendment, it said "legal incidents thereof be conferred upon unmarried couples or groups." That language, "unmarried couples or groups," was stricken. Why? Well, frankly, because we are still struggling in some parts of this Nation with the idea of polygamy. Now, it is only in a limited number of States, but why was this reference to group marriage deleted? I think it is an important question. I am sorry the sponsors of the amendment aren't here to answer it.

I think it is something very critical for us to ask, because I have heard over and over again, and they said, and I quote Congresswoman Musgrave, we are talking about traditional amendment, a definition well over 200 years old. Does the traditional definition of marriage in America include polygamy? In some States, it might. Does the traditional definition of marriage include interracial marriage? Well, it didn't until 1968 in the Loving decision.

So when we talk about this grand tradition, I think there are a lot of unanswered questions about what that tradition really means, and most importantly, Mr. Chairman, I am sorry that those who are propounding the amendment aren't here to answer those questions. Thank you.

Senator CORNYN. Thank you, Senator Durbin.

I am advised that ordinarily, it is irregular for members of a members' panel to respond to questions. They have the same conflicts and demands on their time as we do, but certainly I don't begrudge anyone who wants to ask anybody any question about anything. It is important that we shed as much light as we can on this, but I know we will have plenty of witnesses to respond to some of the concerns that you have raised and that others may raise.

Senator SESSIONS. Mr. Chairman, I would—

Senator CORNYN. Let me just say one thing and I will recognize the Senator from Alabama, and then we need to get to our next panel. This is not a markup on constitutional text. That will come at a later time. This is a hearing, really an open-ended hearing on one of what I have seen, a total of six different proposals. This is the one that was filed the earliest and one that people have focused the most attention on. There is no limitation, certainly, on any member of the United States Senate to offer amendments on any text that may come before this Committee or, indeed, before the entire Senate.

Indeed, I remember back when we were discussing the victims' rights amendment and one that I proudly cosponsor with the Senator from California, we had some amendments offered the day before the markup of that constitutional text and somehow we were able to accommodate that. I don't think anyone was shocked. I think we were able to absorb what the intention of the amendment was and, indeed, we voted that amendment out.

I would like to get on to our next panel, but I will briefly recognize the Senator from Alabama.

Senator SESSIONS. I just wanted to say that I know Senator Allard was certainly not disrespectful of this Committee. This is about as long as I have seen a Congressional panel stay in a Committee. They have been very responsive. We all have a lot to do around here and I think we have a substantive panel next and I think we should get on with that.

Representative FRANK. Could I ask one question, Senator?

Senator CORNYN. Representative Frank, you can ask one question.

Representative FRANK. Because you mentioned that there were six texts you had seen. Did any of them allow a State legislature or a referendum to make the decision on marriage?

Senator CORNYN. I don't know how many have been filed, and frankly, I couldn't answer the question.

Thank you for your time and participation. We value your participation and input. Thank you, gentlemen, very much.

Senator CORNYN. At this time, we will call the second panel and ask you please to come up to the table. What I would like to do in the interest of time is as our panel members are coming up, to introduce them briefly.

Our first panel member is Ms. Phyllis Bossin, and please correct me if I mispronounce anybody's name. I am very sensitive, having a name like Cornyn, to people mispronouncing it, so I apologize if I do. Ms. Bossin is with Phyllis G. Bossin Company, LPA, and Chair of the American Bar Association Family Law Section. She is from Cincinnati, Ohio.

Professor Teresa Stanton Collett is Professor of Law at St. Thomas School of Law in Minneapolis, Minnesota.

Our next panelist is Reverend Richard Richardson, who others have already alluded to and who testified before this Committee at an earlier hearing. He is Assistant Pastor of the St. Paul African Methodist Episcopal Church and Director of Political Affairs of the Black Ministerial Alliance of Greater Boston, also President and CEO of Children's Services of Roxbury. He is from Boston, Massachusetts.

Our next panelist is Professor Katherine S. Spaht. She is the Jules F. and Frances L. Landry Professor at the Paul M. Herbert Law Center, Louisiana State University, Baton Rouge, Louisiana. Thank you for being here.

Our final panelist is Professor Cass Sunstein, the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School in Chicago, Illinois.

We welcome each of you and I want to especially thank you for your patience. We had an exuberant Committee who wanted to ask questions of the first panel and thanks for hanging in there with us. We appreciate the fact you have sacrificed and traveled a great distance to be here today to offer your expertise to the Committee.

With that, we will recognize each of the panelists for a five-minute opening statement, and I am going to hold you to it. I know you will understand because I know there will be questions we want to ask and we want to make sure we have plenty of time to ask any questions that your testimony provokes.

Senator FEINSTEIN. Mr. Chairman?

Senator CORNYN. Senator Feinstein?

Senator FEINSTEIN. Before you begin and I forget, I would like to ask unanimous consent to enter into the record a statement by the Ranking Member and a few additional letters for the record.

Senator CORNYN. Certainly, without objection.

Ms. Bossin, we would be pleased to hear your opening statement.

STATEMENT OF PHYLLIS G. BOSSIN, CHAIR, SECTION OF FAMILY LAW, AMERICAN BAR ASSOCIATION, CINCINNATI, OHIO

Ms. BOSSIN. Before beginning my formal statement, I do need to correct a misconception that could possibly result from your opening remarks. You correctly stated that the American Bar Association, in opposing the proposed amendment, did not take a position on same-sex marriage per se. You then suggested that the American Bar Association failed to do so because we believe that laws prohibiting such marriages are not discriminatory.

When the United States Supreme Court declines to hear a case, it is well established that no inference may properly be drawn as to their views on the merits. The same is true for the American Bar Association. The only conclusion that can be drawn from the fact that 600 members of our House of Delegates did not take a position on same-sex marriage is that the question was not before them. What they did take a position on is the inadvisability of a constitutional amendment that would prevent the States from deciding these questions, which is what I am here to talk about today.

As you have already indicated, I am the Chair of the Section of Family Law and I am here to express the views of the Association on this extremely important issue. As a practitioner in the field of family law, I have experienced the many complex issues that arise in families as they relate to children over the last 26 years.

The ABA has a longstanding interest in the development of State laws that safeguard the well-being of families and children. While these laws vary among the several States, their common purpose is to ensure that wherever possible, children have the opportunity to grow up in stable family units and to benefit from child support

and other legal protections that derive from a legal relationship with each of their functional parents.

Among the primary means by which the States have accomplished this purpose is by establishing the rules that govern civil marriage. The ABA opposes any constitutional amendment that would restrict the ability of a State to determine the qualifications for civil marriage between two persons within its jurisdiction.

While we have taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriage, the ABA opposes S.J.Res. 26 and other similar amendments that would usurp the traditional authority of each State to determine who may enter into civil marriage and when effect should be given to a marriage validly contracted between two persons under the laws of another jurisdiction.

At a time when millions of children are being raised by same-sex couples, the State should have the flexibility to protect these children by conferring legal recognition on the families in which they are being raised. The States should be permitted to enact laws and policies they deem appropriate to protect these children. That these children are being raised by same-sex couples is the reality. We are not discussing hypothetical or theoretical children. These are real children with real needs.

This authority has resided with the States since the founding of our country, enabling the courts and legislatures to fashion rules that are well-suited to local needs and creating varied approaches that benefit the nation as a whole. As Justice Louis Brandeis famously explained, "To stay experimentations in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to our Nation. It is one of the happy incidents of the Federal system that a single courageous State may serve as a laboratory and try novel social experiments without risk to the rest of the country."

The proposed amendment and the new variation released yesterday are two vague to ascertain their full meaning with certainty. However, they most certainly would have sweeping consequences for the laws of our States, stripping the States of their historic and traditional authority to fashion their own responses to meet the needs of their residents.

I share the concerns expressed by Senators Feinstein and Durbin this morning that this new amendment would actually disallow and prohibit civil unions. In addition to barring all State courts and legislatures from taking steps to permit same-sex couples to enter into civil marriage, S.J.Res. 26 appears to prohibit States from extending to unmarried couples legal protections comparable to those accorded to married spouses. Among these are the right to sue for wrongful death, to inherit under in testate succession laws, to visit a partner in the hospital, to make medical decisions for a person unable to make his or her own decisions, to qualify for family medical leave, dependency presumptions for workers' compensation, and even to control the disposition of a deceased's remains.

Variations among the States' laws governing same-sex unions have provided the opportunities for States to examine the effect of different laws on society and provide guidance to other States that

seek to modify their own laws to reflect the changing views of their residents. A constitutional amendment would offer none of these benefits. Instead, it would freeze the law and usurp the historic responsibilities of States in these arenas. We have faith in the ability of the States to seriously reflect on this important issue and to act accordingly.

While the ABA took no position with respect to DOMA, enacted in 1996, that statute surely is sufficient, together with State defense of marriage laws, to address the concerns of amendment proponents that the Full Faith and Credit Clause might require a State to recognize a same-sex marriage contracted in another State. In addition, the argument that a constitutional amendment now is necessary because DOMA might 1 day be challenged and eventually overturned is, at the very least, premature. One does not amend the Constitution on a hunch. One does not amend the Constitution to call a halt to democratic debate within the States.

Senator CORNYN. Ms. Bossin, we will be glad to introduce your entire written statement as part of the record.

Ms. BOSSIN. Fine.

Senator CORNYN. If I could get you to wrap up so we can stay on schedule as much as possible.

Ms. BOSSIN. Thank you. I will conclude. The Constitution, as has been alluded to this morning, has been amended only 27 times in 215 years. We hope that you will exercise the same restraint and oppose S.J.Res. 26 and other similar amendments, the result of which would be to deprive millions of children the full protection of the law.

Thank you for the opportunity to testify and I will be happy to answer your questions.

Senator CORNYN. Thank you very much.

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

Senator CORNYN. Professor Collett?

STATEMENT OF TERESA STANTON COLLETT, PROFESSOR OF LAW, ST. THOMAS SCHOOL OF LAW, MINNEAPOLIS, MINNESOTA

Ms. COLLETT. Mr. Chairman, Senator Feinstein, my name is Teresa Collett and my remarks today represent my personal opinion as a law professor as written in the area of marriage and family and do not represent the views of my institution, the University of St. Thomas in Minneapolis.

There are three fundamental questions that this Committee must answer. Two are procedural, one is substantive. The first is whether or not the definition of marriage is the proper subject of constitutional concern. In fact, Ms. Bossin and I have a fundamental disagreement.

The question of whether or not marriage is an issue of Federal constitutional concern has already been answered for us by the United States Supreme Court. For over 100 years, the United States Supreme Court has issued Federal opinions dealing with the nature of marriage. As early as 1878, the Court addressed the role that marriage and family play in preparing children to assume the duties of citizenship and upheld the Federal ban on polygamy. Suf-

fice it to say that in the intervening 125 years, I am not sanguine about whether this sitting Supreme Court would uphold such a ban in light of Justice Ginsberg's writings prior to her taking the bench affirming her view that polygamy could not withstand an attack based on privacy.

Marriage has also become a question of State constitutional law through unrelenting attacks by activists in court. It currently has been attacked by 20 different State litigations in States including Arizona, California, Florida, Indiana, Nebraska, New Jersey, New York, Oregon, Utah, Washington, and West Virginia. Those are the States where it is being litigated currently. In addition to that, there are news reports that Pennsylvania, South Carolina, and Tennessee will soon face court challenges.

Add to those 14 States the States of Hawaii, Alaska, and Vermont that had to respond to judicial overreaching where the Supreme Courts found that same-sex marriage was mandated in the State Constitution, and Massachusetts, that remains embroiled in a political fight about the definition, as well as Connecticut, Iowa, and Texas, where activists tried to get courts to redefine marriage in response to civil unions, and we find that 21 States of this Union are having to respond to activists in an attempt to redefine marriage.

Is this a national question? Indeed, it is, not something that the people have sought but rather something that litigators have sought and activist judges have imposed upon this.

But is it a Federal question? Well, in fact, the United States' most recent Supreme Court, Lawrence v. Texas, suggests that indeed it is. Justice Scalia warns in his dissenting opinion that although there is language in the majority opinion that disclaims its impact on same-sex marriage, don't believe it, and that is the consensus of legal scholars. Lawrence Tribe has said it is only a matter of time.

In fact, one of the experts on this panel, Professor Sunstein himself has opined that same-sex marriage is constitutionally mandated in his own legal writing. It is, in fact, only a matter of time before we see a Federal constitutional opinion that forces same-sex marriage upon the people of the United States.

I support the Federal Marriage Amendment, but like Senator Allard, there are three things it must do. It must first protect the right of the people to engage in the most important political right, that of self-governance.

Second, it must define marriage as the union of a man and a woman because marriage is about the needs of children, not about adult desires.

But third, it must protect the rights of States to engage in experimentation to protect the rights of all unmarried individuals.

My experience as an elder law attorney has taught me that there are many unmarried individuals that need special legal statuses that will allow for the creation of legal rights and obligations. That is why in my writing I have supported Hawaii's reciprocal beneficiary statutes. It brings to mind a recent news report of a grandson in India that could conceive of no other way to protect his grandmother than to marry her in order to provide legal protections for her. But I believe that that legal status need not be de-

pendent upon a sexual union. Rather, we have got to allow experimentation by the States, but we don't have to redefine marriage to do it.

The Allard amendment does it and we need a Federal constitutional protection. Thank you, Mr. Chairman.

Senator CORNYN. Thank you, Professor.

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

Senator CORNYN. Reverend Richardson, it is good to have you back before the Committee again. You testified before the Subcommittee on the Constitution a few weeks ago and we would be happy to hear your opening statement here today. Thank you.

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

Rev. RICHARDSON. Thank you, Chairman Cornyn and Senator Feinstein. It is a pleasure to be back. The Honorable Marilyn Musgrave gave my bio, so I will try to keep my remarks to the time limit. My full written statement will be submitted.

As has been said, I am Chairman of the Political Affairs Committee for the Black Ministerial Alliance. I joined yesterday with several hundred African-Americans and others who came to show their support for the Federal Marriage Amendment at the Alliance for Marriage press conference yesterday. I believe that at that press conference, it was certainly a display of where the community that we represent through these churches, the African-American churches and the Church of God in Christ and the AME church in particular, some nine million members that we represent, to show our support for the constitutional change.

The recent decision of the judges of the highest courts in my State threaten traditional marriage laws around the country. It gives us no choice but to engage in this debate. I would like to just spend some time explaining why the definition of marriage as a union of one man and one woman is so important, not just for the African-American community, but to people of all religions and cultures around the world.

To put it simply, we believe that the 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 a mother and a father, their mother and their father if necessary. Society has described the ideal family as being a mother, a 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 these expectations and basic human instinct is at its peril, at the peril of our community.

The dilution of the ideal or procreation or child rearing within the marriage of one man and one woman has already had a devastating effect. We need to strengthen the institution of marriage, not dilute it. Marriage is about children, not just 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 just 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 or a mother and a 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 and aunts, and I don't disparage any of these arrangements. People are working hard and doing the best they can to raise children. But 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, whether they be black or white.

I don't disparage other arrangements. I certainly don't disparage myself, because as a foster parent to more than 50 children, a grandparent of several adopted grandchildren, and almost 50 years of working with children who have been separated from their biological parent or parents 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 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 lasting relationships with many of them, it did not fill the void that they experienced.

I wanted to spend the last few minutes talking about the discrimination. I wanted to state something very clearly without equivocation and hesitation or doubt. The defense of marriage is not about discrimination. But I am doubly offended when people accuse supporters of traditional marriage of writing discrimination into the Constitution. It is bad enough that they are making false charges of discrimination against the vast majority of African-Americans indeed, and the vast majority of all Americans. Marriage is about children, but activist lawyers are convincing activist judges that marriage is about discrimination.

And every time they say that, the Federal Marriage Amendment writes discrimination into the Constitution, they are also saying that traditional marriage must be abolished by courts. So it is not just that they want to silence us. They also want to write our values out of the Constitution, as well. Mr. Chairman, African-Americans know what it is like to be written out of the Constitution. Please don't take us out of the Constitution process again.

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

Mr. Chairman, thank you for giving me the opportunity to represent the Black Ministerial Alliance, the Cambridge Black Pastors' Conference, and the African Methodist Episcopal Church, the Church of God in Christ, and the Ten-Point Coalition, in reaffirming our support for a Federal constitutional amendment to define marriage as a union between a man and a woman. Thank you.

Senator CORNYN. Thank you, Reverend Richardson. We appreciate your being with us today.

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

Senator CORNYN. There are a number of other churches and organizations around the nation who have expressed similar sentiments and we will make their statements part of the record, without objection, including 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, and the Boston Chinese Evangelical Church.

Professor Spaht, we would be delighted to hear your opening remarks.

STATEMENT OF KATHERINE SHAW SPAHT, JULES F. AND FRANCES L. LANDRY PROFESSOR OF LAW, LOUISIANA STATE UNIVERSITY, BATON ROUGE, LOUISIANA

Ms. SPAHT. Mr. Chairman and Senator Feinstein, I do appreciate this opportunity to testify today. As a law school professor who has devoted over 30 years of her professional career and life to the study of family law, I cannot imagine a more important topic for the Committee and for the United States Senate to consider than the institution and definition of marriage.

If you look at my work in my past, you will know that the defense of marriage is not something I come to lately. It has been my life's work. And as a person who works extensively at the State legislature and in that particular arena, I am one who appreciates the role that States play in our Federal system. So it might be logical to ask, why would I support the Federal Marriage Amendment?

I do so because, and the answer is very simple, if this body doesn't approve a Federal constitutional amendment defending marriage, I believe that the courts will take this issue away from the American people and they will abolish traditional marriage. I would ask that this amendment be passed by Congress, much as the Federal DOMA was, the Defense of Marriage Act, and give the people themselves the opportunity to make this decision about traditional marriage.

Why would I say that this issue would be taken away by the Federal courts? Well, my colleague and friend, Teresa Collett, has suggested why, and that is, in particular, the decision by the United States Supreme Court in *Lawrence* v. *Texas*. It is a decision that I have studied very carefully since the decision was rendered, in the context of re-regulating marriage in some way that would strengthen it at the State level. It is clear to me after examining that particular decision very extensively and having written two articles recently about it that will be published in the next 3

months, I am convinced that the decision does, indeed, threaten traditional marriage.

If you look at part of that opinion, the Court stated, quote, "Our laws and traditions afford constitutional protection to personal decisions relating to marriage procreation, et cetera. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." The Court, of course, once again explicitly identified marriage as a Federal issue, which, of course, it is under the 14th Amendment.

Not once did the Court in discussing marriage mention that marriage is about children, not exclusively about adult love, much less discrimination, and when we look at the *Goodridge* decision decided in Massachusetts, not surprisingly, it relies heavily upon the decision in *Lawrence* v. *Texas*. In both cases, both in Lawrence and in the *Goodridge* case in Massachusetts, the Court refers to the fact that many Americans have very deep-seated religious convictions and opinions and beliefs about moral traditions that nonetheless, not in *Lawrence*, clearly, because Justice Kennedy suggested that couldn't be the basis for helping interpret what the word "liberty" means, but also in *Goodridge*, it was rejected, these deep-seated convictions, and ultimately, the Court concluded that traditional marriage laws, in fact, have no rational basis, that they are based on invidious discrimination, that they are, quote, "rooted in persistent prejudices."

In fact, as has been alluded to also by my colleague, Professor Collett, there is an unusual consensus among constitutional law professors, and I say this because I guess we make our living disagreeing with each other, but there is an amazing consensus among law professors across the spectrum, not only on my side but also on the other side. Harvard Law School Professor Lawrence Tribe has said you would have to be tone deaf not to get the message from Lawrence that traditional marriage laws are now constitutionally suspect. Tribe has said that under the Lawrence decision, marriage is, quote, "now a Federal constitutional issue," and predicts that the U.S. Supreme Court will follow the Massachusetts court.

Another constitutional law expert, Yale Law School's William Eskridge, has said that Justice Scalia is right. *Lawrence* signals the end of traditional marriage laws. Eskridge has repeatedly stated under the Court's rulings, DOMA is unconstitutional.

And, of course, as has been also alluded to earlier, my fellow panelist, Professor Sunstein, has expressed the view as early as 1993 that the ban on same-sex marriages is unconstitutional.

I could go on, but my time is limited and I would simply say that there is no way to prevent what has been predicted by these professors other than a Federal constitutional amendment. As Senator Cornyn has correctly noted, throughout history, we have approved a number of constitutional amendments to reverse judicial decisions with which the American people disagreed, and the only way we can know whether they disagree is to let them vote on it. Thank you.

Senator CORNYN. Thank you, Professor Spaht.

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

Senator CORNYN. Professor Sunstein, we would be delighted to hear from you.

STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO, CHICAGO, ILLINOIS

Mr. SUNSTEIN. Thank you, Mr. Chairman. It is an honor to be here. I am just going to make two simple points, not about the policy but about the Constitution and the law. The first has to do with the reservation of constitutional change to what Madison called great and extraordinary occasions, and I am going to try to specify how our tradition has understood that notion. And second, I am going to try to explain why there is no problem that a constitutional amendment is necessary to solve, notwithstanding some fears that have been expressed this morning.

It is the case that we have amended the Constitution rarely. It is also the case that some of our amendments have been in response to judicial decisions. But it is important to see that the amendments have fallen in two very simple categories.

The first has to do with remedies for defects in the constitutional structure, as, for example, in the specification of rules for Presidential succession and in the specification of rules governing the Electoral College. These are structural amendments that are designed to clarify or fix defects in the original design.

The second category involves the expansion of rights, most notably the initial Bill of Rights, which is still over a third of our constitutional amendments, and in the 20th century, extension of the franchise has been the dominant theme of our constitutional change.

Whatever one thinks of this amendment, it can't plausibly fall in the category of fixing structural defects in the original design or in the category of expansion of individual rights. Whether or not it counts as a limitation of individual rights, it is not plausible to say that it is an expansion of individual rights.

Now, it is possible that we can find reasons to amend the Constitution, if we are determined to do that, that fall outside of our longstanding practices. But let me suggest that the concerns expressed on behalf of this amendment are not adequate to justify that radical change.

It is possible that the Chicago White Sox and the Chicago Cubs will meet in the World Series and play to a seventh game tie. That is unlikely, but that scenario is more likely than it is that the Supreme Court of the United States, as currently constituted, will hold that there is a constitutional right to same-sex marriage. This is a reckless conception of what is on the horizon and it is indefensible by reference to anything any Supreme Court Justice has said, at least on the bench, and I believe even off the bench.

The Court has issued two narrow rulings. One strikes down by reference to tradition, by the way, a Colorado amendment. The other strikes down by reference to clear public values a criminal law forbidding consensual sodomy. In neither of those cases did the Court suggest that same-sex marriage would be constitutionally required. In fact, in the latter case, in the more recent one, the very

Justices who supported the majority view went way out of their way to suggest they were not coming near to the same-sex marriage problem.

If we are concerned about what is on the horizon from the Supreme Court, then there might be a constitutional amendment to protect the Endangered Species Act—that is under constitutional attack—or the Clean Water Act—that is under constitutional attack—but not this one. This one is not under constitutional attack.

My views, I am sure inadvertently, have been misstated. The quotation given was with reference to views of other people and all of my writings on this subject have suggested that it would be disastrous, if you will forgive a self-quotation, for the Supreme Court to say the Constitution requires States to recognize same-sex marriage, and in any case, the prediction is extremely clear. The Rehnquist Court is not about to say that States must recognize same-sex marriage.

There is a concern about activism at the State level and I am concerned about that, too. That is objectionable. It is less objectionable than Federal constitutional activism, but here we do not have a reason for amending the Constitution, either. Note that while many constitutional challenges have been filed, only one in Massachusetts has succeeded. Note also that deliberative processes are underway in Massachusetts by which the citizens of Massachusetts can revisit that decision if they choose.

Note also that our longstanding tradition has allowed States not to recognize marriages that violate their own public policy if they don't want to do that. That has been the uncontradicted practice. The major problem with the Defense of Marriage Act is not that it is unconstitutional, it is that it is unnecessary. It simply ratifies what has been a longstanding practice.

Time to conclude. By tradition, our constitutional amendments have been reserved to the correction of serious problems in the government structure or to the expansion of individual rights. The existing situation can't plausibly be placed in either category. It is easily handled and it is being handled through existing institutions. The proposed amendment would show contempt for over two centuries of practice resolving almost all of our disputes through the Federal system and through ordinary democratic processes.

For these reasons, the proposed amendment is constitutionally ill-advised.

Senator CORNYN. Thank you, Professor.

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

Senator CORNYN. Thanks to all of you for your opening statements. I have some questions and I know Senator Feinstein will, as well.

This has been very informative already. To be candid with you, my concern is primarily about who gets to define a fundamental institution like marriage, which I believe, and I believe social science confirms, is the most stable foundation for families and in the best interests of children, not to disparage by any means, as I believe Reverend Richardson pointed out and others, other family arrangements which, of necessity, people do the best they can.

We know every day how single parents heroically struggle to provide in the best interests of their children, foster families, you name it. There are other family arrangements. That is life. But it is not to say that we can't aspire to the ideal, and for me that is what we are talking about. We are also talking about who gets to choose to define marriage.

Certainly, when I hear people talk about writing discrimination into the Constitution, I wonder, after John Adams penned the Massachusetts Constitution, or the principal author of the Massachusetts Constitution in 1780, why it was 224 years later that four judges first divined a constitutional right to same-sex marriage.

Others have said, well, this is all about politics and no one would raise this issue now but for the fact we are in a Presidential election, but I will ask those critics to look at what happened, and that is that this right was first identified, at least by the courts, in 2004, and that is not a timing anybody else chose but them.

But let me ask, first of all, I guess, Professor Sunstein, you had said we should only amend the Constitution for important subjects. Of course, we have amended the Constitution for a number of reasons, but two sort of jump out that I would like you to comment on. One is we have amended the Constitution to limit Congress's ability to vote itself a pay raise. We have also amended the Constitution to say that Congressional sessions shall start every 2 years on January the third. Hardly, it seems, earth-shaking amendments.

In your view, is marriage less important to our Nation than the subject of Congressional pay raises?

Mr. SUNSTEIN. No. Actually, I didn't use the word "important." I used Madison's words, "great and extraordinary occasions." That is the formulation. I agree with you about the importance of marriage. The only suggestion is that there isn't an attack on marriage from a single Federal judge. There is not one pronouncement by any Federal judge raising the scenario that you fear, and the only decision we have from a State court refers not at all as the foundation for its ruling to the Federal Constitution. This is a perfectly ordinary process within one State.

Senator CORNYN. Professor, like every good lawyer, I know you choose your words very carefully. But let me go back and ask you, we have some charts here that I want to ask you about because there has been some suggestion that proponents of the Federal Marriage Amendment are trying to amend the Constitution on a hunch—I think that word was used—or that perhaps we are trying to solve a problem that nobody believes truly exists.

But in 1993, even before the Supreme Court announced its decision in *Romer* and *Lawrence*, you asked readers of the Harvard Law Review to consider the view that a ban on same-sex marriages is unconstitutional. Did you write that?

Mr. SUNSTEIN. Actually, you know, it was a long time ago and I thought maybe I did. I just saw it yesterday, and I looked back on it and it is a footnote in a jurisprudential paper on analogical reasoning. I don't recommend it to you, incidentally, this paper on analogical reasoning. And in the footnote, I referred to the fact that two people had made this argument, a professor named Sylvia Law and a professor named Andrew Koppelman, and I actually said,

consider the view that the ban on same-sex marriages is unconstitutional. I specifically did not endorse the view. And where I have discussed it, I have pleaded with the Federal courts, not that they need or care about my pleas, but I pleaded with them not to hold that on prudential grounds. I recently wrote that it would be disastrous.

Senator CORNYN. Well, thank you for that explanation—

Mr. SUNSTEIN. These are reckless statements about my view. When I testified against the Federal Defense of Marriage—

Senator CORNYN. I am sorry, what kind of statements are they?

Mr. SUNSTEIN. Reckless statements of my view, if I may say. I like being quoted, but these are—

[Laughter.]

Senator CORNYN. Are you saying the question is reckless or your answer is reckless?

Mr. SUNSTEIN. No, these quotations are reckless as statements of my view. The second one is a little better, but my suggestion was not that the Court would strike down the Federal Defense of Marriage Act. It was that it was constitutionally ill-advised because it would raise serious constitutional questions and there is no need for it.

Senator CORNYN. Let me ask you, in 1996, did you, in fact, testify against the Federal Defense of Marriage Act, saying that there is a big problem under the Equal Protection component of the Due Process Clause just as construed a few weeks ago by the U.S. Supreme Court in *Romer* v. *Evans*? Did you say that?

Mr. SUNSTEIN. That is an accurate statement in the context of testimony that refrained from saying the Court would strike down the law. It said that it was constitutionally ill-advised.

Senator CORNYN. And then in 1994, you wrote in the Indiana Law Journal that the ban on same-sex marriage is not easy to support, that the prohibition on same-sex marriages as part of the social and legal insistence on two kinds is deeply connected with male supremacy, that the ban on same-sex marriage may well be doomed to a constitutionally illegitimate purpose. The ban has everything to do with the constitutionally unacceptable stereotypes about the appropriate roles of men and women. Now, did you write that?

Mr. SUNSTEIN. I did, but this was in the context of an article whose bottom line was the Federal courts should stay very far away from accepting arguments like this, and on prudential grounds, the Supreme Court should not intervene in this debate, which should be resolved democratically.

What you are quoting is not an argument that is original to me but has been made by Professor Andrew Koppelman at Northwestern. This was a lecture that contained an overview of a large set of constitutional arguments and its basic plea was for judicial deference.

I think my plea is less important than the predictive question, what is the Supreme Court going to do, and it defies belief to think that the Rehnquist Court is on the verge or even close to being on the verge of striking down laws forbidding same-sex marriage.

Senator CORNYN. Just a few months ago, you wrote in the New Republic that Massachusetts, referring to the *Goodridge* decision of

the Massachusetts Supreme Court, you said Massachusetts gets it right, and you pointed out that the Massachusetts ruling was based on Federal precedents. You were talking about *Lawrence* v. *Texas*, correct?

Mr. SUNSTEIN. No. Actually, these are—if I may say, I really am grateful for all the attention to my writing, but these are really misstatements. The "Massachusetts gets it right" was the editors. Those are not my words. That is the editor's title in an article in which I said, and this the word I used, it would be disastrous if the Supreme Court went Massachusetts's way, and I specifically predicted that the Court wouldn't because it is proceeding—as it didn't in Roe v. Wade. It is now proceeding very cautiously and with due respect for democratic processes.

That it drew some support from Federal precedents is also hilariously out of context because the whole point of the sentence and the paragraph was to say that this was based on State law, not on Federal law.

Senator CORNYN. Professor Sunstein, I appreciate your explanation in response to my questions. The point of my questions is really to address the statement, which to me is pretty amazing on its face, that this is somehow a dreamed-up answer to a question that hadn't been asked.

But you will concede, won't you, that there have been legal scholars like yourself and other who have for some time questioned whether the restriction of marriage to a man and a woman is constitutional? Would you agree with that?

Mr. SUNSTEIN. I think legal scholars have questioned a lot of things, and—

Senator CORNYN. Including that?

Mr. SUNSTEIN. If we amended it, they have also said that the New Deal is unconstitutional and we are not amending the Constitution to entrench the New Deal.

Senator CORNYN. I would say if I was still back in a courtroom that that was unresponsive to the question. Would you just concede with me, and I will leave it at this, that you and other legal scholars have for some time, even before *Lawrence* v. *Texas*, questioned whether the restriction of marriage to a man and a woman is constitutional? Would you agree with that?

Mr. SUNSTEIN. I think I can just speak for myself, and any questions I have raised have been in the context of saying the Supreme Court should not accept constitutional challenges to bans on same-sex marriage.

Senator CORNYN. Professor, you agree that Professor Lawrence Tribe has questioned whether the restriction of marriage to a man and a woman is constitutional after *Lawrence* v. *Texas*? Have you read that somewhere?

Mr. SUNSTEIN. I have, and Professor Tribe has said a great deal of things, a number of things, and I wouldn't want to say the Rehnquist Court is in agreement with Professor Tribe on the great issues of the day.

Senator CORNYN. Let us go back to the text of the language of the amendment itself, please, if we may, on the chart. There has been some concern expressed about the meaning of the constitutional amendment with the technical corrections that Senator Al-

lard and Representative Musgrave have proposed. I would just like to ask perhaps Professor Collett, you are familiar with this language, are you not?

Ms. COLLETT. Yes, I am, Senator.

Senator CORNYN. There has been some charge made that the second sentence of this proposed amendment would somehow restrict the ability of the States to accommodate civil unions by virtue of the democratic process through their elected representatives. Do you share that view or could you explain your view of that language to us?

Ms. COLLETT. Senator, I believe the amendments that were proposed yesterday improve the language tremendously. As is noted in my written testimony, which I hope will become a part of the record of this hearing—

Senator CORNYN. It will.

Ms. COLLETT. —I am active in the efforts to amend the Minnesota State Constitution right now. We want to ensure the ability of the legislature to create some sort of structure for unmarried individuals to have certain legal benefits, and I believe this would allow that, because the legal incidents language, I believe, is modified by marriage so that they have to be attached to the marital status.

Senator CORNYN. Doesn't this sentence, in fact, only restrict the right, the claimed right of a court to force that on the voters of a State without the voters' approval?

Ms. COLLETT. I believe it is directly responsive to opinions like the Hawaii Supreme Court opinion that was responded to by the voters of Hawaii, the Alaska Superior Court opinion, and most recently, the Massachusetts Supreme Court opinion. When Professor Sunstein said there has only been one State Supreme Court, in fact, there have been four State Supreme Courts that have tried to force this radical notion on marriage on the people of their State. The voters of two of those States amended their State Constitution. This would not interfere with that, obviously. And the people of Vermont, their legislature responded by providing civil unions. I do not believe this would interfere with that, as well.

Senator CORNYN. Thank you. My time has expired. I will recognize Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I would like to ask each of the lawyers, and Reverend Richardson, you can relax, this question. If the constitutional amendment that was proposed yesterday were to be ratified, would State legislatures be prohibited from granting marriage equality to same-sex couples if large majorities in the State voted to do so, or a majority of the State voted to do so?

Ms. BOSSIN. I do not believe that this language is quite as clear as Professor Collett believes and I think that the language could be construed just the opposite, to prohibit legislatures on a challenge from extending the legal incidents of marriage to same-sex couples.

Senator FEINSTEIN. But the question I am asking here is, if you have an initiative, proposition, that is brought directly to the voters of the State and the voters of the State say yes, we want same-sex

marriages, would this constitutional amendment eradicate that initiative?

Ms. BOSSIN. I think it is clear that it would.

Senator BENNETT. Okay. That is what I wanted—

Ms. BOSSIN. I apologize. I misunderstood your question. I think it is absolutely clear that it would.

Senator FEINSTEIN. Thank you. Professor?

Ms. COLLETT. Senator Feinstein, if the people of the State decide that marriage is about adult desire rather than children's needs and choose to embody same-sex marriage, I believe that this amendment would preclude that, yes.

Ms. SPAHT. I agree.

Mr. SUNSTEIN. It depends on whether it is in the State Constitution or not. If they decide that and do it through ordinary State law, the new version doesn't reach that. But if they did it through the State Constitution, the new version does reach that.

Senator FEINSTEIN. In other words, you mean that if the initiative were an amendment to the State Constitution, then clearly this would obliterate it?

Mr. SUNSTEIN. That is the key in the new version.

Senator FEINSTEIN. If it were the result of general law, you are saying that—in other words, if the legislature passed it, it gives the legislature higher prominence in law than the Constitution?

Mr. SUNSTEIN. Yes, with one exception or clarification, which is if there is a referendum which changes State law without changing the State Constitution, that is okay under the new language.

Senator FEINSTEIN. So for those that are proposing this, in your view, this would be a major loophole?

Mr. SUNSTEIN. It would be a major loophole. I can predict litigation.

Senator FEINSTEIN. Okay. Now, I would like to ask the same question of everybody else with respect to civil unions or domestic partnerships whereby benefits vest to a couple. Would those be affected by this legislation?

Ms. BOSSIN. Again, I think it certainly could be read to preclude those benefits. I think it could be read contrary to what other people have indicated. I think that this language is vague and could be construed against those benefits.

Senator CORNYN. Professor?

Ms. COLLETT. I do not believe it—I believe it allows for the legislative enactment of civil unions, reciprocal beneficiaries, domestic partnerships, other alternative arrangements.

Senator FEINSTEIN. I am sorry, I didn't—you said that reciprocal arrangements produced by a valid law would not be affected, whether that law would be a city law or a State law or a State Constitution?

Ms. COLLETT. That is correct.

Senator FEINSTEIN. Thank you.

Ms. SPAHT. And having just seen this language this morning and not having as much time maybe to study it, I would agree with Professor Collett. I don't think they would be affected by this language.

Senator FEINSTEIN. Mr. Sunstein?

Mr. SUNSTEIN. Yes. The more natural reading is if the State Constitution calls for civil unions or domestic partnerships that include the legal incidents of marriage, that is forbidden by this text. So if the State Constitution provides the legal incidents of marriage involving medical plans, hospital visits, and so forth, the more natural reading of the text is that that is prohibited.

Ms. SPAHT. Mr. Chairman, I would disagree. Simply by looking at the language, shall be construed to require, and that suggests to me because whatever was done was not a separate constitutional amendment that set it up. It was by virtue of a judicial opinion, looking at the Equal Protection or Due Process Clauses that may be in any particular State Constitution. But I know that lawyers can disagree about language.

Senator FEINSTEIN. I think that is a point, Mr. Sunstein. Do you want to respond to that point?

Mr. SUNSTEIN. Yes. I don't see it. It says neither the Federal Constitution nor any State Constitution shall be construed to require that the legal incidents of marriage must be conferred. So suppose you have a State Constitution that requires that the legal incidents of marriage, though not marriage, be conferred on same-sex marriages, as in, for example, a referendum in Connecticut. That seems in big trouble, doesn't it? It is not—

Senator FEINSTEIN. Yes, but supposing it is a civil union validated by State law—

Mr. SUNSTEIN. By State statute? This doesn't—

Senator FEINSTEIN. It would exempt—clearly, it would not affect State statute if you are correct in your reading, but if it were conferred by an amendment to the Constitution, even voted on by the people, it would.

Mr. SUNSTEIN. I think that is the more natural reading, but Professor Spaht is right. It is not an inevitable reading and it is sad that we have, even after all this thought, ambiguity.

Senator FEINSTEIN. Let me go to my next question, and I would say this to the drafters of the amendment. What was the rationale of impacting the Constitutions both of a State and the Federal Government as opposed to just talking about the law or doing both? Why was this drafted just to relate to the Constitutions? Does anybody know the answer? I think that is a question that needs to be asked, because I find it puzzling that you can then, as a product of this, allow general law to trump the Constitution—

Ms. COLLETT. Senator Feinstein?

Senator FEINSTEIN. —which to my knowledge is unheard of.

Ms. COLLETT. I believe Professor Sunstein is incorrect on that. Under the Supremacy Clause of the Constitution, it would not be possible for a United States constitutional amendment to be trumped by a State statute. So a State statute that provided for marriage between members of the same sex would not trump a United States constitutional amendment that provides marriage in the United States shall consist only of the union of a man and a woman.

Senator FEINSTEIN. Well, then wouldn't this also affect any benefits construed through a civil union if that is the case?

Ms. COLLETT. No, because civil union is a different legal status than a marriage, Senator.

Senator FEINSTEIN. Right now. But assume an amendment to law or the Constitution. Say a civil union, say I went out and got signatures to put on the ballot an initiative providing for civil unions and saying that these—if enacted, Federal benefits should apply to the civil union.

Ms. COLLETT. I understand the question, Senator, but just in the same manner that corporations and partnerships are different forms of organizing a business entity, civil unions and marriages are different forms of relationships between individuals. This amendment applies only to the institution of marriage, which has been organized for centuries around the need for children to have a mother and a father. Civil unions is an institution that is of rather contemporary vintage which was created by the Vermont legislature to respond to a judicial mandate.

If, in fact, the people in a State determine that they want a legal arrangement between individuals because of their affectional preferences, then it would be a different legal status in the same way that partnerships are different than corporations.

Senator FEINSTEIN. Anyone else on that point?

Ms. SPAHT. On that particular one, no, Senator Feinstein, but I would just conjecture as to your question about why it addresses the State Constitution—

Senator FEINSTEIN. Right.

Ms. SPAHT. —in the second sentence, and my conjecture is it is related again to judges making decisions, whether they are at the Federal or the State level, as in *Goodridge*, that a particular State law violates the Equal Protection, Common Benefits Clause in Vermont, or the Human Declaration of Rights in Massachusetts in the *Goodridge* case, to conclude that the State must recognize marriage. And that is only—as I said, again, I wasn't a part of any of that deliberation. I am just conjecturing.

Senator FEINSTEIN. Thank you. That is helpful. Thank you very much, Mr. Chairman.

Senator CORNYN. Senator Sessions?

Senator SESSIONS. Thank you. We are delighted you are here to discuss this issue. It is interesting and I do believe that the amendment should be subjected to scrutiny and questions and let us see how it looks and see how it would play out in real life.

But I do agree that one of the biggest rubs here for members of Congress and the American people is that under the guise of interpreting a Constitution which trumps the people's branch, the legislative branch, judges have interpreted their State Constitution to alter what the legislature has intended, and by having it declared constitutional, a constitutional issue, it therefore requires the legislature to go to the extent of passing a constitutional amendment that might not otherwise be passed.

With regard to the Federal Constitution, I think, as the witnesses indicated, the Federal Constitution trumps State law and State Constitutions and if a Federal Supreme Court rules that Equal Protection means that all marriages and unions have to be treated the same, whether it is same sex or not, then that trumps all State law, negating the ability of every elected legislative branch in the country to otherwise hold and declare.

So it is a pretty significant deal as far as I am concerned, and that is the danger of an activist judge. A judge can take a phrase like "Equal Protection," expand it beyond its traditional meaning, and impose a political decision on the people and they are only left—their only recourse is to go through a constitutional amendment. No legislative enactment can overcome that once they declare it so.

So I think that is why we are concerned about this and why we feel like this amendment goes beyond even the heartland issue of marriage. It goes to separation of powers. It goes to democracy. If we allow the judicial branch to be able to depart from the law, to decide issues based on what they think is right and just, departing from traditional statutory interpretation procedures to do so, then we have lost democracy. The people no longer control, because those judges are lifetime appointed.

They say, you know, the Court may not so hold. They may not overrule DOMA and they may not. Maybe they won't. Maybe they won't in the short term. But let us say a liberal President got elected, maybe one from Massachusetts. The most liberal Senator in the United States Senate gets elected President and has four appointments to the United States Supreme Court. Maybe that makeup today is not such that they would overrule DOMA, but it is quite possible today. Scholars clearly believe it is possible with the current makeup of the Court.

So I believe the American people need to be alert to protect their liberties, their liberties, to decide marriage. You mean a State legislature can't decide with marriage is in their State? Big deal. This is raw power and it represents a clear challenge to democracy, I think, as to how we are going to decide some of these issues.

Professor Collett, you mentioned—and I think we need to think about this—in your remarks that while you favor prohibiting marriage from being defined other than between a man and a woman, you think that the amendment—any amendment, I believe your language is—must allow for compassionate alternatives for unmarried people in various relationships. Would you expand on that, and is that possible under the amendment proposed by Senator Allard?

Ms. COLLETT. Yes, Senator. In fact, my practice area before I came to the academy was in the area of elder law, and based on that practice experience as well as my observation of the loving and committed relationships of some of my gay and lesbian friends convinced me that, in fact, we do need some sort of opportunity for States to create legal arrangements for individuals who are looking for the opportunity to have legal rights and obligations connected to their willingness to enter into long-term mutual commitments of care and affection.

For example, there was a recent news report that I alluded to in my earlier testimony of a young man in India who wanted to care for his grandmother and could think of no other way to do so rather than to enter into a marriage for her. There ought to be some other arrangement than marriage to allow people to provide some sort of benefits for those they love for them and it shouldn't have to be dependent upon a sexual relationship and it shouldn't have to be dependent upon cohabitation.

That is why I have been on record for a number of years in support of the reciprocal beneficiary legislation that was passed by Hawaii. That is why I think that States have to remain free under the amendment to experiment in this way. Two elderly sisters—

Senator SESSIONS. Would this amendment outlaw the Hawaii reciprocal legislation if a State chose to implement it?

Ms. COLLETT. No, it would not. I would not support it if it did.

Senator SESSIONS. On the question of discrimination, I would like to ask this. This is a question of definition, and when you define something, some is in and some is out. We said that the right to vote was 21, then we changed it to 18. Why not 17? The President has to be 35. Why not 30? You make decisions. So I think it is really definitional. We define things every day, and I tried to write this out so I can say what I want to say.

The State has an interest in the continued existence of marriage. When a man and a woman have children and those children, statistically speaking, are shown to be healthier, as Reverend Richardson indicated, in the long run—statistically speaking, not in every case—they do better when they are raised with a mother and a father. So a State has an interest, it seems to me, in that.

Now, same-sex marriage would extend the State's recognition of traditional marriage to a broader group outside the bright-line definition that we have had for thousands of years, and it would be into an area where the State has less interest, because the State has an interest in raising children and who is going to raise them and how they are going to be raised.

It would then recognize for the first time unions outside traditional marriage and to a situation where some partnerships are recognized and some partnerships and unions are not recognized. Homosexual unions would be recognized, apparently, under the Supreme Court of Massachusetts ruling and maybe even a U.S. Supreme Court ruling. But two sisters or two brothers, a brother and a sister, good friends who are not sexual, don't desire to marry, are partners, deeply sharing different values and maybe rent and savings and expenses, they would be in the same general class, it seems to me, as the homosexual relationships and would not qualify for benefits of marriage under some of these court rulings.

So it would seem that the extension of marriage, to me, to same-sex unions would open up a Pandora's box of discrimination. That is, how do you shut it off? What is a legitimate partnership if you get away from the classical man and woman marital union that we have recognized so long?

Professor Spaht, do you want to comment on that?

Ms. SPAHT. I would simply say, Senator, that, in fact, that is what happened in European countries, France in particular. They couldn't make that distinction with the solidarity pact, and so that is not surprising.

Senator SESSIONS. Would you explain that a little more? I am not sure what you are referring to precisely.

Ms. SPAHT. In European countries, they have various different arrangements, you know, whether we are talking about Scandinavia, and Senator Cornyn referred in his statement to, I am sure it is the article by Stanley Kurtz called, "The End of Marriage in Scandinavia," in discussing the different types of legal arrange-

ments and registered partnerships that can occur in those countries.

But also in France, when it got down to making a decision in France what to do, then what the law has done essentially, if I understand it—and I am surely no expert on it, so I don't pretend to be—is that it was difficult to make a decision. Why do we have to know about the sexual relationship at all? It is just two people who want to register, and in part, this addresses Professor Collett's kind of response and as if turns out people have the opportunity to experiment. But when they got down to, why do we have to inquire, then it opened it up to any two people who wanted to sign up for certain benefits, which essentially is what occurs in France.

Senator SESSIONS. Anyone else?

Mr. SUNSTEIN. I can just say that the number of Federal judges who have taken issue with what you have said is zero.

Senator SESSIONS. That disagree with what I said?

Mr. SUNSTEIN. Not one. No Federal judge has raised a constitutional question about bans on same-sex marriage, not one.

Senator SESSIONS. Well, a number of experts have raised that question and—

Mr. SUNSTEIN. More have—

Senator SESSIONS. Scalia said that we are heading that way. I believe Professor Tribe likewise so indicated, and it is pretty plain that Massachusetts thought it was following *Lawrence*, at least to some degree, when it rendered its opinion, so—

Mr. SUNSTEIN. No, they were very clear to say that was the State Constitution, not, if I may say, not the Federal Constitution. They couldn't have done what they did had they not referred the State—I clerked for the Massachusetts Supreme Judicial Court, so I know something about it. It has very distinctive traditions and it is pretty willing to read the State Constitution to go well beyond the National Constitution, and the citizens of Massachusetts seem not to have a lot of trouble with that except on occasion when they slap the court in the face, as they might do here. But the court stayed very far away from saying the Federal Constitution extended as far as it did with the State Constitution.

Ms. COLLETT. Well, with perhaps the exception of the Federal judge in Nebraska, according to the testimony you heard or the Subcommittee heard last time from the Attorney General of Nebraska, who we have only the preliminary ruling, of course, on that State's constitutional amendment where they attempted to define marriage as the union of a man and a woman and that litigation has been brought by activists in that State and they have a preliminary ruling by a Federal judge in that State that the Attorney General characterized in his testimony before the Subcommittee of this Committee saying that he anticipates losing on the basis of Federal law in that case—

Mr. SUNSTEIN. A really pessimistic Attorney General.

[Laughter.]

Ms. COLLETT. —where they have cited both Lawrence and Romer.

Ms. SPAHT. He has lived a long time.

[Laughter.]

Senator SESSIONS. Thank you very much, Chairman Cornyn. Thank you for your leadership, and we are very appreciative that we have someone with your background and experience chairing this.

Could I just offer for the record a Washington times article of last week on the question of civil rights. A number of members of the Congressional Black Caucus do not agree with Mr. Lewis's, Congressman Lewis's, comments. One, Representative Arturo Davis from Alabama, a Harvard-educated African-American lawyer, former Assistant United States Attorney, was quoted as saying this. "The civil rights movement was more of a movement for equal rights for all Americans, education, voting rights, and jobs, whereas gay rights in terms of gay marriage is a movement for a special group of Americans," said Representative Arturo Davis, Alabama Democrat. So I would not compare civil rights and gay rights. I would offer that for the record.

Senator CORNYN. Without objection.

Ladies and gentlemen, I want to say again how much I appreciate your testimony here today and the tone of the witnesses and the respectful and dignified way that I think we have all tried to conduct ourselves. I think that is important. Whatever the fate of any text, whether it is this or anything else, is going to be left up to the vote of Congress. It takes two-thirds vote to pass a constitutional amendment and three-quarters of the States and that has yet to be determined.

But the one thing I want to ask Reverend Richardson on again, I want to touch on something again that Senator Sessions just mentioned because I think the argument that what we are talking about is protecting the civil rights of same-sex couples in the same way that we historically have, or at least in more recent times, sought to protect the civil rights of African Americans, that comparison concerns me a great deal, and you alluded to it Reverend Richardson.

But let me just take you back a little bit. Of course, we fought a Civil War in this country over the role of African-Americans in this society after we were unwilling to confront it at the time of the writing of the Constitution. So we had a Civil War to try to reconcile that omission and the terrible way that African-Americans were treated in this country.

But we also after the Civil War passed three constitutional amendments to deal with it, and the 14th Amendment in particular deals with race and was passed to address and to remedy the racial discrimination that existed officially in this country for a long time, since its inception until after that amendment was passed.

So it concerns me that people would equate what has happened in terms of race in this country with the checkered history that we have, with, in fact, now that we have passed a constitutional amendment to guarantee equal protection to people of different races, how they would equate that with this new-found, newly discovered constitutional right that four judges on the Massachusetts Supreme Court found just this year after 224 years.

I would ask you, please, Reverend Richardson, if you could expand on your earlier answer and address that directly, because

that is an argument that we hear coming back and I would like to hear your response.

Rev. RICHARDSON. I believe that it is offensive to compare it to the struggle that African-Americans went through. It bothers me that when we are talking about different groups that are trying to raise their awareness, whatever they are trying to succeed in getting across, is that they will go back and compare it to the struggles of a people, and in this particular case, African Americans. It bothers me how they always want to dilute it down to satisfy what they are trying to attain.

Civil rights, as I know it, started about oppression of a people, and when that got to the point that it was being raised, then oppression turned to segregation. And then when that got to be argued, then segregation turned to discrimination. They just keep watering it down. But you can't compare what the gay and lesbian community are going through today to what the African-American people went through in their struggle to gain their rights.

I think that it is the same way with this around marriage. We have never had a discussion years ago about what marriage was. That was clearly defined. Now, to make it suit a certain population, they are trying to redefine the word of marriage now. Now you hear talk about religious marriage versus civil marriage. They keep separating the intent of what it was meant to be. Marriage years ago was marriage, a man and a woman, no question about it. Across the world, that has been the standard.

Now to satisfy a special group, they want to now talk about, well, let us separate that into religious marriage versus civil marriage. Well, that difference never came up until just recently, around the difference between what marriage means.

If you asked me what the definition of marriage is, I can tell you what it is. It is a man and a woman. But when I ask that to some of the members of our congregation and some of the people that are saying that—what is your definition of marriage? Well, I can't give a definition of what they are defining marriage. Then they bring in about, well, we love each other and all, and that is fine and we don't disagree with that. We recognize them as human beings and we love them as human beings.

We are just saying, don't start to dilute the thing that has been historical over hundreds of years that has been what marriage has stood for. Now, because of what they are trying to attain, then they say, well, it is different now. That is religious marriage and we are talking about civil marriage. Well, that was never even a discussion years ago. Why are we trying now to dilute it to all of a sudden there won't be anything called marriage. It will just be a, "do your thing," and it does affect families.

They are saying, well, what we do doesn't affect your family. Well, it certainly does. It certainly does, because when I have—I have five girls and I have 25 grandchildren and when they present themselves and say, well, I want to go live with somebody and try it out and see if it works, well, wait a minute. That is not acceptable. That does affect me. Well, somebody else is doing it. Why can't I do it? It seems like it is okay.

It does affect people's lifestyle and it does affect families in general when you see these other things. As much as I enjoy going to

Provincetown and taking—but I had to stop going there and taking my kids as a nice summer resort because of some of the things that they would see and then bring back home and start asking questions about why is this, why is that, and telling their friends. Well, I just went here for the weekend and I saw this and I saw that. It does affect families. So you can't isolate it and say that it doesn't spill over into the general population.

So the whole thing around comparing what is happening now to comparing what happened then is just not the same.

Senator CORNYN. Let me ask you just sort of on a concluding note, Reverend Richardson, have you noticed among your church members, the people in the community that you serve, the negative effect of deterioration in traditional family life?

Rev. RICHARDSON. I don't think we see it on the surface because we certainly talk about we should love everybody and that we should treat everybody equally. But below the surface, there is a difference. We certainly have gay and lesbian members in our congregation. They have adopted children in some cases. They are not looked at differently. They believe in what they believe in. But I think the children feel the difference.

Senator CORNYN. I was really alluding to the impact of single-parent families and fatherlessness, in particular. Has that been a longstanding issue?

Rev. RICHARDSON. I think that every child, every child that is raised in an environment that doesn't have a mother and a father image to help raise them and bring them up truly is affected in some way. I have children that have separated from their husbands and they are trying to raise one of our grandchildren and I see the effect that it has on the grandchildren when it is only a mother there trying to raise them or a father trying to raise them. They need that, and so the grandparents step into the gap or the aunts or the uncles step into the gap to fill that. There is a void in a child's life when they don't have a mother and a father to raise them.

Senator CORNYN. Certainly, as we have said time and time again, no one here is disparaging other family relationships—

Rev. RICHARDSON. No, definitely not, definitely not.

Senator CORNYN. —and I don't understand you to be doing it either, but merely to say what you believe the ideal is in terms of the best interests of family life and children. Is that correct, sir?

Rev. RICHARDSON. That is correct.

Senator CORNYN. I know we have about worn out the audience and we have no doubt worn you out and most of the Committee, too. I want to again express my appreciation for your being here today and your willingness to share your opinions with us. I am sure that we have all learned a lot.

Thank you very much, and this hearing is now concluded.

[Whereupon, at 1:13 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Senate Judiciary Committee Hearing on
"A Proposed Constitutional Amendment to Preserve Traditional Marriage"
March 23, 2004

Response of Phyllis G. Bossin
on behalf of
the American Bar Association
to
Written Questions Submitted by Senator Russell D. Feingold

Questions to Ms. Phyllis G. Bossin

1. **Proponents of a federal marriage amendment argue that it is needed in order to strengthen the institution of marriage. Do you agree? Do you believe that this amendment will strengthen the institution of marriage?**

   Answer: It is hard to imagine how a federal constitutional amendment will strengthen the institution of marriage. As stated previously, a federal constitutional amendment is a drastic response that is completely unwarranted by the circumstances. Approximately one-half of all marriages end in divorce. Within the institution of marriage exist such problems as domestic violence; child abuse, including child sexual abuse; substance abuse, including drugs and alcohol; infidelity; pornography abuse and other problems. While the ABA has taken no position on gay marriage itself, it should be obvious that banning gay marriage will not cure these problems that already exist in traditional marriage.

2. **Could you comment on the impact the Allard amendment would have on the children of same-sex couples and the potential disparate treatment they would receive compared to the children of opposite sex couples?**

   Answer: Without express statutory protection, the children of same-sex couples lack the basic protections that children of marriage receive. To name but a few, these include the right to receive child support from a person not actually the "parent," the right to inherit, the right to receive health insurance coverage from a person not legally the "parent," the right to have a legally enforceable relationship with the person not legally the parent, if there has not been a second-parent adoption, the right to survivor benefits and the right to health care coverage. Because the proposed amendment is ambiguous, it is difficult to say what affect it would have on the children of same-sex couples. However, the amendment appears to prohibit civil unions made part of a state constitution. It is unclear whether this substitute amendment would permit civil unions passed by state legislatures. If allowed by state legislatures, then a state can grant the legal incidents of marriage to same-sex couples and therefore the children of same-sex couples will share those benefits. Obviously, even with a civil union statute, children of same-sex couples will continue to be denied access to federal benefits,

such as Social Security. Also, even with a civil union, children of same-sex couples are placed at risk because there is a lack of certainty that their parents' relationship to each other and to their child will be respected when they travel outside of their home state. This could mean that the child is not treated as the child of one of his or her parents and is denied rights that flow through a parent-child relationship.

Response of Phyllis G. Bossin
on behalf of
the American Bar Association
to
Questions from Senator Richard J. Durbin

A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

1.) **The Federal Marriage Amendment (S.J. Res. 30) states the following: "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."**

a.) What does the phrase "legal incidents" of marriage mean?

Answer: "Legal incidents of marriage" are those rights that exist as a matter of law by virtue of the marital relationship itself. Among the hundreds of such rights and responsibilities, some are:

1) Family law
   a) Distribution of property upon divorce (particularly marital or community property)
   b) Right to seek spousal support (alimony, maintenance)
   c) Right to seek custody, visitation, parenting time
   d) Automatic presumption of parentage for children born during marriage
   e) Right to adopt
   f) Application of common law marriage (in states that recognize common law marriage
   g) Right to enter into prenuptial agreements
   h) Right to change name at time of marriage
   i) Domestic violence laws (including restraining orders and right to occupy home)
   j) Duty to support spouse during marriage
   k) Liability for family expense
   l) Automatic coverage of spouse under most auto policies
   m)Right to seek divorce
   n) Right to annulment
   o) Right to seek/receive child support
2) Taxation
   a) Right to file jointly
   b) Tax rates
   c) Exemptions

d) Transfer of property between partners without tax consequences (gift or estate tax)

3) Health Care Law

a) Surrogate decision making (authorizing treatment or withdrawal of treatment)

b) Access to medical records

c) Right to visit in hospital

d) Consent to organ donation

e) Consent to autopsy

f) Right to make funeral arrangements or dispose of remains

g) Family health insurance, including rights under COBRA

4) Probate

a) Intestate succession (rights to property when one spouse dies without a will)

b) Protection from being disinherited (right to challenge will or elect to take against the will)

c) Preferential status to be named guardian or executor/administrator

5) Torts

a. Right to seek compensation for wrongful death and emotional distress

b. Right to seek compensation for loss of consortium

6) Government Benefits and Programs

a. Survivor benefits (Social Security)

b. Military benefits (survivor, housing, health care, PX)

c. Eligibility (and consideration of family income) for welfare benefits

d. Disqualification from programs because of status of family member

e. Disclosure requirements for public officials (and their family members)

7) Private Sector benefits: Labor Law

a. Family Health insurance, including rights under COBRA

b. Eligibility for life insurance (such as group coverage for spouses)

c. Eligibility for disability insurance

d. Right to take sick leave to care for seriously ill spouse

e. Qualified Domestic Relations Orders (to divide pension benefits upon divorce between spouses)

f. Ability to roll over spouse's 401(K) or other retirement accounts and tax deferral on income distributed by deceased spouse

g. Discrimination based on marital status

h. Eligibility for family memberships and discounts

8) Real Estate

a. Eligibility for tenancy by the entirety (traditionally only available to husbands and wives, a form of tenancy in which the joint ownership and right of survivorship generally cannot be eliminated as a result of one spouse transferring his or her interest to the other)

b. Need for spouse's approval for real estate transaction

c. Dower rights

d. Homestead rights

e. Rent control protections, where applicable

9) Bankruptcy
   a. Joint filing
10) Immigration
   a. Joint petitions to immigrate
   b. Preferred status for spouses or family members (immigrating separately)
11) Criminal Law
   a. Privilege not to testify
12) Miscellaneous
   a. Benefits and rules pertaining to family farms
   b. Right to request and obtain absentee ballot
   c. Consideration of family income for purpose of student aid eligibility
   d. Access to campus housing for married students
   e. Economic disclosure requirements of public officials (and spouse and family members)

b.) Under this language, please explain whether a state could adopt a state constitutional amendment to establish civil unions.

Answer: The language of the proposed amendment would prohibit a state from amending its constitution to permit civil unions. The phrase "legal incidents thereof" is clearly meant to address civil unions. Otherwise, that phrase would have no meaning and it would not add anything to that sentence.

c.) Under this language, please explain whether a popular referendum could alter the state constitution to establish civil unions.

Answer: Under the above interpretation, a popular referendum to permit civil unions would not be given effect nor could it override a federal constitutional amendment.

d.) Under this language, please explain whether a state legislature could pass a law to establish civil unions.

Answer: The proposed amendment only addresses state constitutions, not acts passed by state legislatures. Therefore, it would appear that a state legislature could pass a law permitting civil unions if such a law were not constitutionally required, as in the case of Vermont's civil union system. However, the drafting is silent on this question and leaves open the possibility that a state would be prohibited from passing such a law.

e.) Many health insurance plans include coverage for spouses. Under the language of S.J. Res. 30, would health insurance coverage then be considered a "legal incident" of marriage that then cannot be conferred on a partner in a civil union or domestic partnership?

Answer: If health insurance is provided for **spouses** (defined as one's husband or wife), health insurance coverage would be considered a "legal incident" of marriage that could not be conferred on a partner in a civil union or domestic partnership under S.J.Res 30.

If, however, health insurance is provided for **spouses or partners,** S.J.Res 30 would preclude receipt of such a benefit by partners in civil unions or domestic partnerships if the benefit had been conferred to comply with judicial interpretations of the state's constitution. Such a benefit could be permitted if the benefit were created by statute and not constitutionally mandated.

2.) **If the Federal Marriage Amendment (S.J. Res. 30) were ratified, what specific rights, other than civil unions, would be impacted?**

Answer: If S.J. Res. 30 were ratified, it could jeopardize or preclude any of the versions of civil unions and domestic partnerships acts that currently exist. In addition to these more comprehensive statutes, it would appear to prohibit the provision of more limited forms of rights and protections. Some states allow state employees to receive health care and pension benefits, for example. If interpreted as I have described above, all such statutes could be void if such benefits were required by statute. Furthermore, under both versions of the amendment, courts would be precluded from extending any protections to same sex couples on the basis of state constitutional law. For example, a California trial court recently found that the state constitution required that Sharon Smith, the partner in a same sex union, be allowed to sue for the wrongful death of her partner, in a highly publicized case in which her partner, Diane Whipple, was mauled to death by a dog. This amendment would seem to preclude such a finding by a court.

3.) **The sponsors of the new version of the Federal Marriage Amendment (S.J. Res. 30) characterize the changes between that version and the original version (S.J. Res. 26) as "technical changes." Please describe the legal significance of the changes between these two versions.**

Answer: I disagree with the statement that these are technical changes. It is clear that the revised amendment has deleted references to "state and federal law" and references only constitutions. The deletion of those words creates a possibility that the amendment could be interpreted as permitting legislatures to pass civil union laws. However, the amendment is so ambiguously worded that it is not at all clear whether it would permit statutory civil unions. .

In addition to this major change, the new amendment uses a different qualifying phrase at the end, by stating that no constitution shall require that marriage or its legal incidents "be conferred upon any union other than the union of a man and a woman." This has implications, discussed below.

Finally, the new amendment does not limit the amount of time for ratification by the states.

4.) The original version of the Federal Marriage Amendment (S.J. Res. 26) would have prohibited marital status and its legal incidents from being conferred upon "unmarried couples or groups." However, the new version (S.J. Res. 30) only prohibits marriage and its legal incidents from being conferred upon "any union other than the union of a man and a woman."

a.) What is the effect of this change?

Answer: The original amendment referred to "unmarried couples," which clearly could have included heterosexual couples living together. It also included "groups" clearly referring to polygamous relationships. The new amendment changes the words "unmarried couples" to "any union other than the union of a man and a woman." It is unclear why this change was made or why "groups" was deleted.

b.) Does this new language of the Federal Marriage Amendment (S.J. Res. 30) expressly prohibit polygamy? Why?

Answer. At first blush, one would readily conclude that polygamous marriages are prohibited under the substitute amendment (and under the original amendment) because marriage is defined in the first sentence as the union of a man and a woman. However, this is not explicitly clear because, arguably, polygamists enter into marriages that meet the core definition contained in the amendment – <u>they simply do it multiple times.</u>

The original amendment, which contained the phrase, "unmarried couples or **groups,"** appears to expressly forbid the legal incidents of marriage from being conferred on polygamous relationships. That new amendment does not contain those words. Although the reason for the wording change is unclear, the result is that S.J.Res 30 does NOT appear to expressly forbid the legal incidents of marriage from being conferred on polygamous couples.

Questions from Senator Richard J. Durbin

A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

Professor Teresa Collett

1.) In your testimony, you wrote that you do not believe a state constitutional amendment is sufficient to insure that the people of that state retain the ability to decide what unions should be recognized as constituting a marriage. Your position is based on "the very real *possibility* that the United States Supreme Court will impose an obligation on states to recognize same-sex unions as marriages in the guise of constitutional adjudication (emphasis added)."

You also note that "many constitutional law scholars have opined that the [Supreme] Court *appears poised* to mandate same-sex marriage *in the upcoming years* (emphasis added)."

The Constitution has been amended only 17 times since the Bill of Rights was adopted. Why do you believe it would be appropriate to amend the Constitution preemptively, before the Supreme Court—or any federal court for that matter—has ruled in this matter?

The fundamental question is "who will take the lead on defining marriage – the courts or the elected representatives of the people?" Marriage is one of the basic organizing structures of society. It is a matter of federal constitutional law under existing Supreme Court cases. The heterosexual nature of marriage is being challenged on a national scale as evidenced by the lawsuits pending in Alabama,[1] Arizona,[2] California,[3] Florida, [4] Indiana,[5] Nebraska, [6] New Jersey,[7] New Mexico,[8] New York,[9] North Carolina,[10]

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[1] *Gay Inmates Sue to Marry* (April 13, 2004) at <http://www.365gay.com/newscon04/04/041304prisonMarr.htm>.

[2] *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003). The plaintiffs have appealed the matter to the Arizona Supreme Court. Paul Davenport, *Same-sex Marriage Issue Before Arizona High Court*, KPHO Phoenix (April 13, 2004) at http://www.kpho.com/Global/story.asp?S=1641318&nav=23KuMEXH.

[3] *Lewis v. Alfaro, Order to Show Cause Issued* Case #122865 (Cal. March 11, 2004) at http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=311759.

[4] Ann Rostow, *Gay Couples Sue in L.A., Fla. To Marry* (Feb. 26, 2004) at <http://www.gay.com/news/article.html?2004/02/26/4>.

[5] *Morrison et al. v. Sadler et al.*, Complaint, Docket No. 49D11-0208-PL-001946 (Marion Cty. Super. Ct. decided May 7, 2003), pleadings and trial court order at Marriage Watch <http://www.marriagewatch.org/cases/in/morrison/morrison.htm>. The oral argument heard by the Indiana Court of Appeals on January 12, 2004 is available for viewing via the internet at <http://www.in.gov/judiciary/webcast/oao.html.>

Oregon,[11] Washington,[12] and West Virginia[13] at this time. Based on news reports, it appears that Pennsylvania[14], South Carolina,[15] and Tennessee[16] will be defending their marriage laws in the courts soon as well.

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[6] Jon Brunning, Attorney General for the State of Nebraska, *"Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?* Testimony before The United States Senate Subcommittee on the Constitution, Civil Rights, and Property Rights (March 3, 2004) available at <http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3073>.

[7] *Lewis et al. v. Harris*, Amended Complaint, Docket No. L-00-4233-02 (N.J. Super. Ct. Law Div. filed Oct. 8, 2002) *available at* < http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/135.pdf>. See also Joseph Dee, *Local Officials Weigh Same-sex Marriages*, The Times (March 7, 2004) (discussing public officials responses to trial court ruling that state constitution did not require recognition of same-sex marriage) at <http://www.nj.com/news/times/index.ssf?/base/news-1/107865413039822.xml>. On Monday, a New Jersey Mayor performed a ceremony for a lesbian couple after Shore Town issued a marriage license to the couple in contradiction to the trial court ruling in that state. The mayor announced the city's intention to continue to defy the court until order otherwise. The state attorney general has responded that he will seek a court order that the city stop its unlawful conduct. Joseph A. Gambardello et al., *Shore Town is First in N.J. to Let Gays Marry*, The Philadelphia Inquirer (March 9, 2004) at <http://www.philly.com/mld/inquirer/news/front/8138474.htm>. On Monday, March 15, city officials filed suit seeking a clarification of the state's marriage laws. Maryann Spoto, *Same-sex marriage Heads to Courts,* The Star-Ledger (March 16, 2004) at http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-5/1079421058175220.xml.

[8] Joline Guterriez Krueger, *New Judge Emerges In Case Over Same-Sex Marriage Licenses*, Albuquerque Tribune (April 9, 2004) at http://www.abqtrib.com/archives/news04/040904_news_judge.shtml.

[9] *Hernandez et al., v. Robles*, Sup. Ct. of N.Y. filed on March 5, 2006. Complaint available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1461. See also Robert D. McFadden, *Bloomberg Said to Want State to Legalize Same-Sex Marriages*, The New York Times (March 6, 2004) at <http://www.nytimes.com/2004/03/06/nyregion/06GAY.html>.

[10] Virginia Bridges, *Dismissal Sought of Same-Sex Marriage Lawsuit*, The Herald-Sun (March 23, 2004) at http://www.herald-sun.com/durham/4-462234.html. This matter is set to be heard on May 10, 2004. Tammy Grubb and Mark Schultz, *2 Local Ministers Targeting Same-sex Marriage*, The Herald-Sun (April 10, 2004) at http://www.herald-sun.com/durham/4-468942.html.

[11] Peter Wong and Steve Long, *State Supreme Court Steps Into Fight on Gay Unions*, Salem Statesman Journal (March 18, 2004) at http://news.statesmanjournal.com/article.cfm?i=77247.

[12] Lynn Marshall and Elizabeth Mehren, *Same Sex Marriage Battle Moves to Seattle*, L.A. Times (Mar. 9, 2004) at <http://www.latimes.com/news/nationworld/nation/la-na-marriage9mar09,1,2317112.story?coll=la-home-nation>.

[13] *State ex rel. Link, et al. v. King, Clerk, etc.*, Case No. 040475, W. Va. Supreme Court of Appeals, pleadings available at http://www.state.wv.us/wvsca/Clerk/Topics/Family/. On April 1, 2004 the Court voted not to consider a petition from gay couples seeking marriage licenses from Kanawha County Clerk Alma King.

[14] Pervaiz Shallwani, *Gay Couple Denied Marriage License*, http://www.mcall.com/news/local/all-b1_2marriage-rmar16,0,5953575.story?coll=all-newslocal-hed

[15] *Kept for the Altar* The Herald (March 21, 2004) available at

Each of these lawsuits is premised on the idea that there is a constitutional right to recognition of same-sex unions as marriages. A federal constitutional amendment provides an explicit, clear, and uniform answer to these challenges.

2.) Similarly, in your testimony, you wrote, "Examples of federal constitutional amendments responding to judicial decisions that did not reflect the will of the people are plentiful." However, all of the examples you give are in response to Supreme Court—not state court—decisions.

Wouldn't this be the first time we amended the Constitution in response to a state court decision? Why do you believe it would be appropriate to amend the Constitution before the Supreme Court—or any federal court—has ruled in this matter?

In commenting on the relationship of the *Lawrence v. Texas* opinion to judicial recognition of same-sex marriage, Professor Laurence Tribe of Harvard said, "I think it's only a matter of time".[17] Professor Erwin Chemerinsky of USC has observed, "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in *Lawrence*."[18] Prudence demands that the people address this matter, before the Court takes the issue away from them.

3.) In your testimony, you wrote that a federal constitutional amendment must "leave it to states to craft compassionate alternative legal arrangements for unmarried people."

The Federal Marriage Amendment (S.J. Res. 30) states the following: "Neither this Constitution, nor the constitution of any State, shall be construed to require

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http://www.heraldonline.com/local/story/3436508p-3054678c.html.

[16] Bill Poovey, *Gay Couple Ready for Marriage Battle*, Atlanta Journal-Constitution (March 10, 2004) at http://www.ajc.com/news/content/news/ap/ap_story.html/National/AP.V1377.AP-Gay-Marriage-Ch.html.

[17] Joan Biskupic, *Decision Represents an Enormous Turn in the Law*, U.S. Today (June 27, 2003) at A.05.

In commenting on the *Goodridge* opinion, Professor Tribe stated:

> Well, the opinion this Supreme Court rendered in Lawrence v. Texas about equal dignity and respect for homosexuals suggests that after a sufficient breathing space where the public gets used to what the principles involved are, *it would be prepared to uphold a decision rather like this and to reach a similar conclusion*, but I doubt they would want to do it the day after tomorrow

Morning Edition, Nat'l Public Radio (November 18, 2003) (emphasis added) transcript available at 2003 WL 67031431 NPR: Morning Edition Interview: Professor Laurence Tribe discusses the Supreme Judicial Court of Massachusetts ruling that same-sex couples are legally entitled to marry.

[18] Erwin Chemerinsky, *October Term, 2002: Value Choices by Justices, Not Theory, Determine Constitutional Law*, 6 Green Bag 2D 367, 370-71 (2003).

that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

a.) What does the phrase "legal incidents" of marriage mean?

The phrase "legal incidents" of marriage means the rights and obligations that arise by virtue of being legally married.

b.) What "compassionate alternative legal arrangements for unmarried people" could states establish under the Federal Marriage Amendment?

Presently states and municipalities are experimenting with a number of legal devices and the creation of new legal status. It is impossible to summarize all possible arrangements. Some of the existing arrangements that would still be possible under the Federal Marriage Amendment include:

Vermont: Civil Unions

In 1999, the Vermont Supreme Court ordered its state legislature to come up with a system providing same-sex couples with traditional marriage benefits and protections.[19] In response to the court mandate, the Vermont legislature passed the Vermont Civil Union law, which went into effect on July 1, 2000. This law provided gay and lesbian couples all the same advantages enjoyed by married couples under state law.

Vermont also created a reciprocal beneficiaries relationship, which provides the same health care decision-making rights available to spouses and couples in civil unions.

Hawaii: Reciprocal Beneficiaries

Hawaii's Reciprocal Beneficiaries law provides some marriage-like benefits. Any two state residents can register as reciprocal beneficiaries, as long as they are over 18 and are not permitted to marry. Couples who sign up gain hospital visitation rights, the ability to sue for wrongful death, and property and inheritance rights.

New Jersey and California: Domestic Partnerships

New Jersey is the most recent state to offer marriage-like benefits to its citizens. The new domestic partner law, passed in January 2004, applies to same-sex couples and to opposite-sex couples in which one partner is 62 or older. The benefits provided include equality with married couples in insurance coverage and medical decision making and the choice of filing joint state tax returns.

In California, as of January 1, 2005, registered domestic partners will have community property rights and the right to receive support from one's partner after a separation. Domestic partners will both be considered legal parents of a child born into the

[19] *Baker v. State*, 744 A.2d 864 (Vt. 1999).

partnership, without the necessity of an adoption. Superior courts will have jurisdiction over termination of domestic partnerships, unless the relationship was of short duration and there are no children and no jointly owned property.

i.) Please explain whether a state could adopt a state constitutional amendment to establish civil unions.

Under the text of S.J. Res. 30, a state constitutional amendment could be adopted establishing civil unions. Civil unions are a separate and independent legal status from marriage. I am aware of the questions raised about the earlier language. Because some people have raised questions about the language, Senator Allard has introduced new language deleting "state or federal law" to make absolutely clear that civil unions created through an act of the citizens of a state or their elected representatives (as opposed to judicially-imposed civil unions) are permitted.

ii.) Please explain whether a popular referendum could alter the state constitution to establish civil unions.

Under the text of S.J. Res. 30, a popular referendum could alter a state constitution to establish civil unions. Civil unions are a separate and independent legal status from marriage. I am aware of the questions raised about the earlier language. Because some people have raised questions about the language, Senator Allard has introduced new language deleting "state or federal law" to make absolutely clear that civil unions created through an act of the citizens of a state or their elected representatives (as opposed to judicially-imposed civil unions) are permitted.

iii.) Please explain whether a state legislature could pass a law to establish civil unions.

Under the text of S.J. Res. 30, a state legislature could pass a law establishing civil unions. Civil unions are a separate and independent legal status from marriage. I am aware of the questions raised about the earlier language. Because some people have raised questions about the language, Senator Allard has introduced new language deleting "state or federal law" to make absolutely clear that civil unions created through an act of the citizens of a state or their elected representatives (as opposed to judicially-imposed civil unions) are permitted.

4.) In your testimony, you wrote that a federal constitutional amendment "must insure that marriage is recognized as only the union of a man and a woman. This is because we know that children flourish when raised by their mother and father united in marriage."

I agree that children raised by two parents rather than one are, in general, better off than children raised by a single parent. Many studies demonstrate this. But studies also demonstrate something else. The American Academy of Pediatrics –

the largest pediatric organization in America – issued a report in 2002 that said the following:

> "[T]he weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents."

Therefore, if children can flourish when raised by gay parents or straight parents, why is this constitutional amendment necessary?

Civil marriage is ordered toward ensuring that the sexual conduct that results in the creation of children also results in the long-term union of those adults in nurturing the children to adulthood. The ideal marriage seeks to promote is a loving mother and father married for life raising their children to responsible adulthood. The sexual unions of gays and lesbians do not result in biological offspring.

In fact, gay marriage, as the American Academy of Pediatrics Policy recognizes, displaces a biological parent of the opposite sex with a partner of the same-sex. The conclusion that "no data have pointed to any risk" is a qualitatively different conclusion than such arrangements lead to the flourishing of children. Several scholars have concluded that the studies to date of gay parenting are, at best, inconclusive regarding the effects of such arrangements on the emotional well-being of children. "Unfortunately the research to date has limitations, including small sample size, non-random subject selection, narrow range of socioeconomic and racial background, and lack of long-term longitudinal follow-up."[20] This is not the case regarding the data establishing that children flourish when raised by their mother and father united in marriage.[21]

5.) The original version of the Federal Marriage Amendment (S.J. Res. 26) would have prohibited marital status and its legal incidents from being conferred upon "unmarried couples or groups." However, the new version (S.J. Res. 30) only prohibits marriage and its legal incidents from being conferred upon "any union other than the union of a man and a woman."

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[20] See M.A. Gold, E. Perrin, D. Gutterman, S.B. Friedman, *Children of Gay or Lesbian Parents*, Pediatrics in Review 15 (1994) 354-356. See also Ellen C. Perrin, MD, *Technical Report: Coparent and Second-Parent Adoption by Same-Sex Parents*, Pediatrics, Vol. 109 No. 2, (2002) P. 341 "The small and nonrepresentative samples studied and the relatively young age of most of the children suggest some reserve [regarding generalizations from research data]." Robert Lerner, Ph.D., Althea Nagai, Ph.D., NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME SEX PARENTING, Washington D.C., Marriage Law Project/Ethics Public Policy Center, 2001.

[21] Kristin Anderson Moore, Susan M. Jekielek, and Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief (June 2002): 1 available at http://www.childtrends.org/PDF/MarriageRB602.pdf.

a.) What is the effect of this change?

The change clarifies an inherent ambiguity in the original language in that the only proper candidates for a marriage license in any state are an unmarried man and an unmarried woman (an "unmarried couple").

b.) Does this new language of the Federal Marriage Amendment (S.J. Res. 30) expressly prohibit polygamy? Why?

A proper interpretation of the language "*a* man and *a* woman" in S.J. Res. 30 would preclude recognition of group marriage.

Questions from Senator Richard J. Durbin

A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

Professor Katherine Shaw Spaht

1.) You have written: "[L]et the American people decide if marriage should be defined as a union of a man and a woman." The American people opposed the decision in Loving v. Virginia. In 1968, the year after that decision, a Gallup poll showed that only 20% approved of marriage between whites and non-whites, while 73% disapproved of such marriages.

a.) Do you believe that courts should only make decisions that are popular with a majority of the American people?

ANSWER: Of course not. Clearly, the Fourteenth Amendment to the U.S. Constitution was intended to prohibit racial discrimination, so *Loving v. Virginia* was an entirely appropriate decision. By contrast, there is no evidence whatsoever that the framers of the Fourteenth Amendment were interested in abolishing traditional marriage laws.

b.) Is it your belief that marriage should have been defined as only unions between people of the same race until the American people believed otherwise?

ANSWER: No. It never was so defined in Webster's Dictionary, which by contrast has always defined marriage as a union of one man and one woman.

2.) The Constitution has been amended only 17 times since the Bill of Rights was adopted. Why do you believe it would be appropriate to amend the Constitution preemptively, before the Supreme Court—or any federal court for that matter—has ruled regarding same-sex marriage?

ANSWER: The Framers designed the constitutional process to be difficult. It can be used only when the American people forge a supermajority consensus across lines of party, race, and religion that a matter rises to this importance. I believe marriage is such an issue. And I believe that the American people have a right to use this normal constitutional process, if they so choose. We can, if we choose, take the definition of marriage out of the hands of courts, so we (and they) can move on to other important issues. There is no legal or constitutional doctrine that suggests Americans are obligated to wait for courts to redefine marriage before settling an issue of grave importance to the future of our Republic.

In addition at the state level the citizens of both Nevada and Nebraska amended their state constitutions before any suit was filed, and the citizens of Hawaii and Alaska amended their constitutions prior to final judgment in cases filed as challenges to their traditional marriage laws.

3.) Your written testimony states that "throughout history we have approved a number of constitutional amendments to reverse judicial decisions with which the American people disagree."

However, wouldn't this be the first time we amended the Constitution in response to a state court—rather than Supreme Court—decision? Why do you believe it would be appropriate to amend the Constitution before the Supreme Court—or any federal court—has ruled in this matter?

ANSWER: If marriage really is a key social institution, then settling the question of what marriage means is of critical national importance. It is perfectly appropriate to use the constitutional processes the Framers gave us to settle such a question.

Furthermore, it is my considered legal opinion that *Lawrence v. Texas* in its recognition of an individual's radical right of autonomy threatens marriage. My opinion is that in *Lawrence* when the court says the state must be careful in setting boundaries for relationships absent "abuse of an institution the law protects" that Justice Kennedy and the other Justices forming the majority believe that recognition of "same-sex" marriage is surely not an *abuse* of the institution of marriage. What's more, their overt statements in *Lawrence* when quoting from other decisions very clearly express their views: "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education....Persons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do." Tellingly, this same sentence from *Lawrence* appears on the ACLU website/Lesbian Gay Rights as most significant and results in the following statement: "Will *Lawrence* help bring down 'don't ask, don't tell' and bans on same-sex marriage? In time, yes, although how much time will depend. *Lawrence* largely erodes the underpinning of both." They interpret *Lawrence* as protecting constitutionally both gay and straight sexuality and observing that under *Lawrence* moral disapproval is not a legitimate reason for treating gays/lesbians differently.[1]

The ACLU and I are not the only ones who share this same view. As my written testimony details there is remarkable unanimity among constitutional law scholars on this very point: 1) Harvard Law Professor Lawrence Tribe has said that "You'd have to be tone-deaf not to get the message from *Lawrence*" that traditional marriage laws are now "constitutionally suspect." In addition, he has

[1] http://www.aclu.org/LesbianGayRightsMain.cfm.

described marriage as "a federal constitutional issue" and predicts that the U.S. Supreme Court will follow the Massachusetts court. 2) Yale Law School's William Eskridge has said that "Justice Scalia is right" that *Lawrence* signals the end of traditional marriage laws. Eskridge has repeatedly stated that under the Court's rulings "DOMA is unconstitutional." (All sources of quotations found in original testimony.) 3) Erwin Chemerinsky wrote: "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the *Lawrence* case." *October Term 2002*, 6 Green Bag 2d 367, 370-71 (2003).

Even though *Goodridge* is technically a state constitutional decision, its language resonates with federal constitutional principle which is why it relies heavily upon the U.S. Supreme Court's decision in *Lawrence v. Texas*. The Massachusetts Supreme Court's advisory opinion issued upon request of the Massachusetts State Senate, specifically threatens the Congressional Defense of Marriage Act and traditional marriage laws nationwide. Consider the myriad of cases of those who marry in Massachusetts in late May [because they can't in their own state], travel back to the states where they are domiciled and seek recognition of their marriages (any of the thirty-eight different states with their own DOMAs enacted as authorized by federal DOMA).

4.) I agree that children raised by two parents rather than one are, in general, better off than children raised by a single parent. Many studies demonstrate this. But studies also demonstrate something else. The American Academy of Pediatrics – the largest pediatric organization in America – issued a report in 2002 that said the following:

> "[T]he weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 or more gay parents."

If, in your words, marriage is mainly about "the acculturation of children," and if children do just as well if they have gay parents than straight parents, why is this constitutional amendment necessary?

ANSWER: Let me divide my response into two parts

1. What is the state of social science evidence?

A *Child Trends* research brief summed up the scholarly consensus on evidence in favor of intact married families. While this research does not specifically compare children in same-sex couple households, it does compare children in intact married homes with other kinds of two-parent families and

concludes: "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."[2]

A research brief by the Center for Law and Social Policy (CLASP) comes to a similar conclusion about the social science evidence on family structure: "Research indicates that, on average, children who grow up in families with both their biological parents in a low-conflict marriage are better off in a number of ways than children who grow up in single-, step-, or cohabiting-parent households.[3]

On the question of sexual orientation and parenting, the CLASP brief summarizes the social science evidence this way:

> Although the research on these families has limitations, the findings are consistent: children raised by same-sex parents are no more likely to exhibit poor outcomes than children raised by divorced heterosexual parents. Since many children raised by gay or lesbian parents have undergone the divorce of their parents, researchers have considered the most appropriate comparison group to be children of heterosexual divorced parents. Children of gay or lesbian parents do not look different from their counterparts raised in heterosexual divorced families regarding school performance, behavior problems, emotional problems, early pregnancy, or difficulties finding employment. However, as previously indicated, children of divorce are at higher risk for many of these problems than children of married parents.

Most children with a gay or lesbian parent were, as Dr. Perrin acknowledged "conceived in the context of a heterosexual relationship."[4] They have a mother and a father who are divorced. The research cited by Dr. Perrin suggests they look like other children with a divorced mother and father, which as

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[2] 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, DC: Child Trends) (June): 1 (available at http://www.childtrends.org/PDF/MarriageRB602.pdf). This research brief on family structure does not compare outcomes for children in same-sex couple households to children in other types of families.

[3] Mary Parke, 2003. "Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being," *CLASP Policy Brief* no. 3 (Washington, DC: Center for Law and Social Policy) (May) 6. *Id.* at 5.

[4] Ellen C. Perrin, 2002. "Technical Report: Co-Parent or Second-Parent Adoption by Same-Sex Parents," *Pediatrics* 109(2): 341 (February).

the CLASP report suggests means they do not fare as well as children living with their own married mother and father in a traditional marriage.

Moreover, the entire body of literature on same-sex parenting suffers from extreme limitations that make it an inappropriate base for public policy. Most of these are studies of tiny samples of children; not a single study follows a nationally representative sample of children raised by same-sex couples to adulthood. A respected family scholar, Professor Steven Nock of the University of Virginia, reviewed this body of literature as an expert witness for the attorney General of Canada. He concluded:

> Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research.[5]

The American Academy of Pediatrics is a professional organization of medical doctors, not social scientists. Their expertise is in medicine, not sociology or psychology. Its 2002 report is an endorsement of second-parent adoption, not same-sex marriage. Most of the studies it cites compare children in heterosexual single-parent families to children with a gay or lesbian single parent. Or they show that gay fathers are similar to non-gay fathers, and lesbian mothers are similar to non-lesbian mothers. These studies are not designed to show and do not show that children with two male parents or two female parents do just as well as children with married moms and dads.

2. How will redefining marriage reduce the likelihood that children will have mothers and fathers?

If law and government say that two men or two women are just as good as a husband and wife when it comes to raising children, then law and government are teaching the next generation that children do not need mothers and fathers. Marriage will no longer be about making the next generation and giving it mothers and fathers. Marriage as a legal, shared, public norm will be about something else—most likely as the *Goodridge* court rules, the needs of adults for social affirmation of diverse lifestyle choices.

Law and government are powerful educators.[6] As they seek to marginalize the idea that children need mothers and fathers (to redefine this idea as bigotry or discrimination), fewer and fewer children will have the protection of a married mom and dad. In other words, changing the law of marriage impacts

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[5] Nock Aff. ¶ 3, *Halpern v. Attorney General of Canada*, No. 684/00 (Ont. Sup. Ct. of Justice) (Copies available from the Institute for Marriage and Public Policy; joshua@imapp.org).
[6] Mary Ann Glendon, **Abortion and Divorce in Western Law** 106, 108 (1987).

ALL children, not just the very small proportion of children who live in same-sex couple households.

Ideas communicated by law and government have consequences, in this case serious consequences.

5.) The Federal Marriage Amendment (S.J. Res. 30) states the following: "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

a.) What does the phrase "legal incidents" of marriage mean?

ANSWER: It means all of the consequences the law attaches to marriage—for example, in Louisiana spouses owe to each other fidelity, support and assistance (C.C. art. 98); live under a community property regime (which by the way, essentially treats couples as a child-rearing partnership) (C.C. arts. 2325-2369.8); and are intestate successors of each other (C.C. arts. 887, 889).

b.) Under this language, please explain whether a state could adopt a state constitutional amendment to establish civil unions.

ANSWER: Yes, they could. The adoption in Massachusetts of civil unions by state constitutional amendment is permitted by the new language of the federal marriage amendment.

c.) Under this language, please explain whether a popular referendum could alter the state constitution to establish civil unions.

ANSWER: Yes. (see b.). A popular referendum amending the constitution should be given the same effect as other state constitutional amendments.

d.) Under this language, please explain whether a state legislature could pass a law to establish civil unions.

ANSWER: Yes. The second sentence does not mention state or federal law, and thus clearly state legislatures can pass state laws to provide for benefits. Professor Cass Sunstein, University of Chicago Law School, offers in his written response to this question, that a state legislature could enact legislation providing for civil unions "because no state constitution would be affected." In addition to me and Professor Sunstein, UCLA Law Professor Eugene Volokh who had been critical of the original language in the marriage amendment, comments as follows on the new language (introduced March 22,

2004): ". . .I think this is much better, because it clearly lets state voters and legislatures enact civil unions by statute . . . ." (emphasis added.)

e.) Many health insurance plans include coverage for spouses. Under the language of S.J. Res. 30, would health insurance coverage then be considered a "legal incident" of marriage that then cannot be conferred on a partner in a civil union or domestic partnership?

ANSWER: A private employer who provides health insurance as a part of the contract with the employee could provide such insurance for whomever the employer chooses.

6.) The original version of the Federal Marriage Amendment (S.J. Res. 26) would have prohibited marital status and its legal incidents from being conferred upon "unmarried couples or groups." However, the new version (S.J. Res. 30) only prohibits marriage and its legal incidents from being conferred upon "any union other than the union of a man and a woman."

a.) What is the effect of this change?

ANSWER: The change eliminates any perceived ambiguity.

b.) Does this new language of the Federal Marriage Amendment (S.J. Res. 30) expressly prohibit polygamy? Why?

ANSWER: Yes.

Questions from Senator Richard J. Durbin

A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

Professor Cass Sunstein

1.) Sen. Allard has said that the intent of his proposed Federal Marriage Amendment is "to protect marriage in this country as the union between a man and a woman and to reinforce the authority of state legislatures to determine benefits issues related to civil unions or domestic partnerships."

However, in your testimony, you note that the term "legal incidents of marriage" in this proposal "appears to forbid states from making cautious steps in the direction of permitting civil unions."

Do you believe that the language in the Federal Marriage Amendment conforms to Sen. Allard's stated intent? If not, what changes do you believe would be necessary?

Answer: I am not at all sure if the language conforms to his stated intent; it is ambiguous. The simplest change would be to delete the words "legal incidents of marriage," at least if the goal is not to affect civil unions that confer those legal incidents.

2.) The Federal Marriage Amendment (S.J. Res. 30) states the following: "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

a.) What does the phrase "legal incidents" of marriage mean? **Answer:** I am not sure. It is probably intended to mean the right to various public and private benefits, such as insurance, that ordinarily come from marital status.

b.) Under this language, please explain whether a state could adopt a state constitutional amendment to establish civil unions. **Answer:** This is not clear; it depends on the meaning of the amendment. If civil unions include the "legal incidents" of marriage, there would be a real question.

c.) Under this language, please explain whether a popular referendum could alter the state constitution to establish civil unions. **Answer:** Same answer as to b above; if the referendum conferred the legal incidents of marriage, it would be in trouble.

d.) Under this language, please explain whether a state legislature could pass a law to establish civil unions. **Answer:** I believe that it could, because no state constitution would be affected.

e.) Many health insurance plans include coverage for spouses. Under the language of S.J. Res. 30, would health insurance coverage then be considered a "legal incident" of marriage that then cannot be conferred on a partner in a civil union or domestic partnership? **Answer:** This is not clear. It would certainly be reasonably be say that the answer is yes, if the state constitution was involved.

3.) In your testimony, you note that "state courts often understand state constitutions in a way that diverges from federal judicial interpretation of the national Constitution."

Do you believe it would be appropriate for a federal constitutional amendment to dictate how state courts should interpret their state constitutions? **Answer:** In general, certainly not, simply as a matter of federalism. We could imagine hypothetical cases that might justify such an amendment, but the ordinarily rule is, certainly not, as a matter of federalism. The meaning of state constitutions is for state courts to determine.

4.) The sponsors of the new version of the Federal Marriage Amendment (S.J. Res. 30) characterize the changes between that version and the original version (S.J. Res. 26) as "technical changes."

Please describe the legal significance of the changes between these two versions. **Answer:** I am not sure. I think that the new language is designed to allow both Congress and state legislatures more room to maneuver, and to try to limit the proposal to the use of federal and state constitutions.

5.) This Committee already has considered the Victims Rights Amendment and an amendment regarding the physical desecration of the American flag. Both of these proposed amendments include a time limit of seven years for ratification.

However, the new version of the Federal Marriage Amendment (S.J. Res. 30) removes this requirement from the original version.

The 27th Amendment, regarding congressional pay increases, was submitted to the states as part of the proposed Bill of Rights in 1789 but was not ratified until 1992. In light of this, do you believe the new version of Federal Marriage Amendment should have retained the time limit for ratification that was included in the original version?

Answer: That would be sensible, as it usually is for constitutional amendments.

5.) The original version of the Federal Marriage Amendment (S.J. Res. 26) would have prohibited marital status and its legal incidents from being conferred upon "unmarried couples or groups." However, the new version (S.J. Res. 30) only prohibits marriage and its legal incidents from being conferred upon "any union other than the union of a man and a woman."

a.) What is the effect of this change? **Answer:** I am not sure.

b.) Does this new language of the Federal Marriage Amendment (S.J. Res. 30) expressly prohibit polygamy? Why? **Answer:** The first sentence might well, through the definition of marriage. The second sentence doesn't affect state legislative behavior; it's limited to constitutions.

Senate Judiciary Committee Hearing on
"A Proposed Constitutional Amendment to Preserve Traditional Marriage"
March 23, 2004

Written Questions Submitted by Senator Russell D. Feingold

Questions to Professor Cass R. Sunstein

1. The second sentence of the original Allard amendment, S.J. Res. 26, provides: "Neither this Constitution, nor 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." I believe that this language is so broad that it would render invalid laws enacted by state legislatures authorizing civil unions or domestic partnerships and granting certain benefits to same-sex couples who qualify for that recognition. On March 22, 2004, Senator Allard introduced a revised version of his proposed amendment. The second sentence of his revised amendment now states: "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." I know you testified at the hearing on your initial analysis of this change, but now that you have had more than 24 hours to review the language, what is your opinion on the effect of this new language on laws allowing civil unions or domestic partnerships? Is this new language clear and unambiguous?

Answer: It is ambiguous, because it continues to contain the words "legal incidents thereof." It seems to ban civil unions that confer such legal incidents, **if** they are conferred as a result of the federal or state constitution.

2. One principle of federalism is that government actions that control a citizen's personal life and liberty should generally be made at the level of government closest to the citizen, rather than by the Congress. In fact, the laws regarding whom one may marry — a basic issue of liberty — have always been made by the States. Is a constitutional amendment defining marriage, as the Allard amendment does, consistent with this basic principle of federalism?

Answer: It is not. In extreme cases, the federal constitution does constrain what states can do through family law (eg they cannot ban interracial marriage), but the general rule is certainly that family law is for the states. Constitutional amendments have never specifically focused on family law.

3. As I read the second version of the Allard amendment, it would forbid state legislatures or the people acting through statewide referendums from granting marriage equality to same-sex couples, even if a majority of the people in a state felt that this was the right policy. Am I correct? Please consider both clauses of the Allard amendment in your analysis. Also, please comment on the importance of the balance between state and federal governments in our federal system and how this balance would be affected by the proposed amendment.

Answer: The balance would be altered because the national government would exert constitutional control over what have traditionally been state functions. If the referendum doesn't affect the state constitution, but simply state legislation, it's unaffected by the second sentence. The first sentence would seem to affect such a referendum only insofar as it redefines "marriage" – so equality **with respect to marriage**, if granted by referendum to same-sex couples, seems banned by the first sentence. Hence a state would probably be able to protect civil unions by referenda that do not affect the state constitution, if it doesn't denominate such unions "marriage." But a state would not be able to amend the constitution to provide "marriage equality"; that would be banned by both sentences.

4. You have placed prior amendments to the Constitution into two categories: the expansion of individual rights and fixing problems in the structure of the government. The only exceptions were the 18th Amendment, establishing Prohibition, and the 21st Amendment, which repealed the 18th Amendment. Obviously, Prohibition was a total failure. What was different about the 18th Amendment? What lessons about amending the Constitution can we take from that experience?

Answer: The 18th amendment resolved, at the national level, an issue that was intensely debated on the state level. Obviously many people felt strongly about that issue, and there were right to do so; but constitutional change was a bad way to go. The lesson is that as a general rule, the national government should not intervene, through constitutional amendment, into the domain of the states, except when this is necessary to expand individual rights (and even then constitutional caution is the best rule).

5. You were part of a bipartisan group called The Constitution Project that developed a set of principles to guide Congress and the American people when considering amendments to the Constitution. One of the guidelines asked: "Are there significant practical or legal obstacles to the achievement of the objectives of the proposed amendment by other means?" The bipartisan, blue ribbon group explained this guideline by stating the following: "The Constitution sets up a framework of government. It also

sets forth fundamental political ideals—equality, representation, and individual liberties—that limit the actions of a temporary majority. This is our higher law. All the rest is left to day-to-day politics. . . . Accordingly, the Constitution should not be amended to solve problems that can be addressed through other means, including federal or state legislation or state constitutional amendments. An amendment that is perceived as a surrogate for ordinary legislation or executive action breaks down the boundary between law and politics. . . ." How does this guideline apply to the debate on a federal marriage amendment?

Answer: It suggests that the amendment is ill-advised. The reason is that ordinary political processes are perfectly capable of dealing with this issue, as they now are doing. If we want to amend the Constitution to respond to judicial activism, federal or state, we would be amending the Constitution at least monthly and possibly weekly – and this would be a far less compelling case for such an amendment than countless other ones that are, thank goodness, not receiving serious consideration.

6. In her written testimony, Professor Collett stated: "It is common to use the amendment process to correct a judicial error." She then took a quote from an article you wrote in *The New Republic* to support her proposition that "Constitutional amendments have been ratified 'in response to actual or anticipated decisions.'" Your article, however, discussed the *Goodridge* decision and the state constitutional amendment process in Massachusetts. Did Professor Collett accurately portray your views? Do you believe it is appropriate to amend the U.S. Constitution in response to anticipated judicial decisions?

Answer: Her interpretation is entirely inaccurate. As you say, I was speaking of state constitutions, where amendments are more common, and where traditions are fundamentally different. At the federal level, it is almost never appropriate to amend the Constitution to respond to a judicial decision that is merely anticipated.

SUBMISSIONS FOR THE RECORD

Senator Wayne Allard
Judiciary Committee Testimony
March 23, 2004

Thank you Mr. Chairman. I appreciate the Committee allowing me to be with you today to discuss marriage and a possible amendment to the Constitution to define and preserve this institution. It has been a pleasure to work with you, Mr. Chairman, as you have conducted a long and deliberate in-depth study of marriage issues in America today.

Without much academic examination most of us understand the historical, cultural, and civic importance of marriage. Marriage, the union between a man and a woman, has been the foundation of every civilization in human history. This definition of marriage crosses all bounds of race, religion, culture, political party, ideology and ethnicity.

As an expression of this cultural value this definition of marriage has been incorporated into the very fabric of civic policy. It is the root from which families, communities, and government are grown. This is not some hotly contested ideology being forced upon an unwilling populace, it is in fact the opposite. The value and civil definition of marriage is an expression of the American people, expressed through the democratic process our Founding Fathers so wisely crafted.

In 1996 Congress thoughtfully and overwhelmingly passed the Defense of Marriage Act (DOMA). DOMA passed with the support of more than three-quarters of the House of Representatives and with the support of eighty-five Senators before being signed in to law by then President Bill Clinton.

The Defense of Marriage Act was designed to allow states to refuse to recognize the act of any other jurisdiction that would designate a relationship between individuals of the same gender as a marriage. Thirty-eight states have since enacted statutes defining marriage in some manner, and four states have passed state constitutional amendments defining marriage as a union of one man and one woman. These state DOMAs and constitutional amendments, combined with Federal DOMA, should have settled the question as to the democratic expression of the will of the American public.

Unfortunately a handful of activist judges have recently determined that they are in a position to redefine the institution of marriage. A few state courts, not legislatures, have sought to overturn both statute and common perception of marriage by expanding the definition to include same gender couples.

State court challenges in Arizona, Massachusetts, New Jersey and Indiana may seem well and good to colleagues concerned with the rights of states to determine most matters, a position near and dear to my heart. These challenges, however, have spawned greater disrespect, even contempt, for the will of the states than any of us could have predicted.

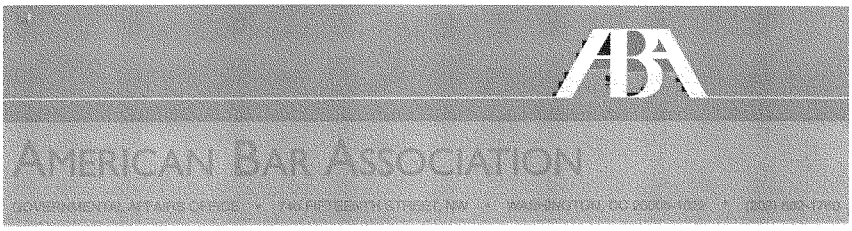
The State of Nebraska provides the most stark example of this. Seventy percent of Nebraska voters supported an amendment to the state constitution defining marriage as a union between a man and a woman - seventy percent. This amendment has since been challenged in federal court. In early March the Attorney General of Nebraska testified before a subcommittee of this body that he fully expects the duly amended constitution of his state to be struck down - ruled un-Constitutional - by a federal court. This is what we have come to and this is where we are headed. The will of voters, in the Nebraska case an overwhelming majority of them, undone by activist judges and those willing to use the courts to bend the rule of law to suit their purposes.

The courts are not alone in this subversion of the will of the people. Local activists who want to ignore state law are culpable as well. To date 4,037 licenses for marriage have been issued in San Francisco, California, and more than 2,000 have been issued in Oregon for same gender couples. California is one of the thirty-eight states that have enacted a DOMA law, a law selectively ignored by a handful of public officials. Couples from forty-six states have taken advantage of the issuance of licenses in San Francisco and returned to their home states. Data on the number of states is unavailable from the Oregon licensees, however it has been reported that more than three hundred of the licenses issued were to out-of-state same gender couples.

While I do not believe that all same gender couples who have traveled to San Francisco or Oregon are activists, or even desire to use their personal relationships as forces for policy change, it seems to me that there are long-term implications for both Federal DOMA and the rights of states to define unions through either state DOMA or the state constitutional amendment process. It is clear to me that we are headed to judicially mandated recognition of same gender couples regardless of state or federal statute.

In November I proposed an amendment to the U.S. Constitution to define marriage as a union between a man and a woman and leaving all other questions of civil union or partnership law to the individual state legislatures. The language I introduced was identical to that introduced by my friend and colleague in the House, Congresswoman Marilyn Musgrave. Yesterday, in response to much debate and deliberation in the Senate, I reintroduced this language with legal scholars and fellow Senators I reintroduced this language with technical changes to make our intent more clear. Numerous critics have propounded the false notion that we have far greater restrictions in mind and it is my hope that our technical changes will serve to clear the air of this charge. The policy goal has been and will continue to be to define and preserve the historic and cultural definition of marriage, while leaving other questions to the respective state legislatures. I believe the text originally introduced in the Senate accomplished this goal but I have remained open to suggestion and stand willing to work with my colleagues as this important topic is debated.

In closing I would like to again thank the Committee for holding this hearing today. I stand willing to work with you to defend marriage from the current onslaught of judicial activism and to return the power on these matters to the states themselves.



STATEMENT

of

PHYLLIS G. BOSSIN

on behalf of the

AMERICAN BAR ASSOCIATION

presented to the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

concerning

S. J. RES. 26

PROPOSING A CONSTITUTIONAL AMENDMENT
RELATING TO MARRIAGE

March 23, 2004

Mr. Chairman and Members of the Committee:

Good morning. I am Phyllis Bossin, Chair of the American Bar Association Section of Family Law. I am here at the behest of ABA President Dennis Archer to express the views of the ABA on this important issue.

The ABA has a longstanding interest in the development of state laws that safeguard the well-being of families and children. While these laws vary among the several states, their common purpose is to ensure that, wherever possible, children have the opportunity to grow up in stable family units and to benefit from child support and other legal protections that derive from a legal relationship with each of their functional parents. Among the primary means by which the states have accomplished this purpose is by establishing the rules that govern civil marriage.

The ABA opposes any constitutional amendment that would restrict the ability of a state to protect the rights of children by determining the qualifications for civil marriage between two persons within its jurisdiction. While we have taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, the ABA opposes S. J. Res. 26 and other similar amendments that would usurp the traditional authority of each state to determine who may enter into civil marriage and when effect should be given to a marriage validly contracted between two persons under the laws of another jurisdiction.

This authority has resided with the states since the founding of our country, enabling the courts and legislatures to fashion rules that are well suited to local needs and creating varied approaches that benefit the nation as a whole. As Justice Louis Brandeis

famously explained:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social experiments without risk to the rest of the country. This Court has the power to prevent an experiment. [But] in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[1]

The federal system has also enabled the states to look to their own constitutions in the effort to define and protect the rights and liberties of their citizens. As Justice Rehnquist said in the case of *Arizona v. Evans*, "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[2] The constitutional amendment process should not be used to impede that freedom, writing into our national charter for the first time a provision denying rights to one group of Americans.

S. J. Res. 26 (and its House counterpart, H .J. Res. 56) proposes an amendment to the Constitution that would declare:

> Marriage in the United States shall consist only of the union of a man

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[1] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, dissenting).
[2] Arizona v. Evans, 514 U.S. 1, 8 (1995). In the Court's opinion, Justice Rehnquist also said: "They [the states] also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in in his dissenting opinion in New State Ice Co. v. Liebmann."

> and a woman. Neither this Constitution nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

While the proposed amendment is far too vague to ascertain its full meaning with certainty, S. J. Res. 26 most certainly would have sweeping consequences for the laws of our states. In addition to barring all state courts and legislatures from taking steps to permit same-sex couples to enter into civil marriage, it appears to prohibit states from extending to unmarried couples legal protections comparable to those accorded to married spouses. Among these are the right to sue for wrongful death, to inherit under intestate succession laws, to visit a partner in a hospital, to make medical decisions on behalf of a person who is not able to make his or her own decisions, to qualify for family medical leave and dependency presumptions for workers' compensation, and even to control the disposition of a deceased's remains.

The proposed amendment would limit the ability of states to fashion their own responses to meet the needs of residents in their states. It is likely that the amendment would nullify Vermont's civil union system, California's new domestic partnership law, Hawaii's protections for reciprocal beneficiaries, and scores of laws and ordinances granting various benefits to unmarried couples throughout the country.

Such laws are among the varied responses developed by the states since the early 1970's as their courts and legislatures have sought to take account of evolving societal norms regarding gay men and lesbians and their families. The first challenge to the

exclusion of lesbian and gay couples from civil marriage was decided in 1971. Since then, there have been challenges across the country. All were unsuccessful until 1993, when the Hawaii Supreme Court held that denying same-sex couples the right to marry may constitute unlawful sex discrimination.[3] While the case was working its way back up to the Hawaii Supreme Court, the voters of Hawaii passed a state constitutional amendment allowing the state legislature to limit marriage to different-sex couples. The Court subsequently dismissed the litigation as moot. While the litigation was pending, the Hawaii legislature passed a statute permitting couples to register as "reciprocal beneficiaries" entitled to approximately 60 rights and responsibilities that are automatically accorded to married spouses.

In 1999, the Vermont Supreme Court held that refusing to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Vermont Constitution's Common Benefits Clause.[4] In response to the Court's instruction to remedy this constitutional infringement, the Vermont legislature enacted a law permitting same-sex couples to enter into civil unions. Couples in a civil union are granted all of the state-conferred rights, benefits, and responsibilities of marriage, and private entities are required to treat marriages and civil unions equally. Persons in a civil union, however, are not granted any of the 1,138 federally conferred rights, benefits, and responsibilities of marriage.[5]

In 2003, the Massachusetts Supreme Judicial Court held that same-sex couples have a right to marry and that limiting civil marriage to opposite-sex couples violates

[3] Baehr v.Lewin, 852 P.2d 44, 57 (Haw. 1993).
[4] Baker v. State, 744 A.2d 864 (Vt. 1999).

principles "of individual liberty and equality under law protected by the Massachusetts Constitution."[6]

Other state legislatures also have been involved in considering these issues. In the 2002-2003 Session, bills were introduced in at least ten states to provide a variety of rights to same-sex couples, ranging from healthcare-related protections to civil unions and civil marriages.

At the other end of the spectrum, 38 states have enacted their own "defense of marriage" laws that prohibit marriages between same-sex couples or provide that such marriages shall not be recognized.

Variations among the states laws governing same-sex unions have provided the opportunity for states to examine the effect of different laws on society and provide guidance to other states that seek to modify their laws to reflect changing views of their residents. A constitutional amendment would offer none of these benefits. Instead, it would freeze the law and usurp the historic responsibility of the states in this area of law.

The first federal intervention in this area came in 1996, with the enactment of the Defense of Marriage Act (DOMA). That law contains two substantive provisions. The first purports to relieve states of any obligation to accord full faith and credit to same-sex marriages that are lawfully entered into in other jurisdictions. The second provides that the federal government will not recognize such marriages. DOMA does not bar any state from recognizing marriages between same-sex couples, nor does it prohibit states from conferring upon such couples the "legal incidents" of marriage. The proposed amendment

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[5] GAO-04-353R (Jan. 23, 2004).
[6] Goodridge v. Department of Public Health, 440 Mass. 309, 342, 798 N.E.2d 941 (2003).

would do both. It is because of these differences that one of the authors of DOMA has opposed the amendment as an infringement on traditional state prerogatives:

> 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. . . . As any good federalist should recognize, [DOMA] leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.[7]

While the ABA took no position with respect to DOMA, that statute surely is sufficient, together with state defense of marriage laws, to address the concerns of amendment proponents that the Full Faith and Credit Clause might require a state to recognize a same-sex marriage contracted in another state. In addition, the argument that a constitutional amendment now is necessary because DOMA might one day be challenged and eventually overturned is, at the very least, premature. One does not amend the Constitution on a hunch. One does not amend the Constitution to call a halt to democratic debate within the states. An amendment should be reserved for the most urgent and compelling circumstances. It is a last resort.

As noted above, the ABA has taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages. However, it is the position of the ABA that states should not be precluded from adopting such laws if they

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[7] BOB BARR, *Leave Marriage to the States,* WASH. POST, Aug. 21, 2003.

so choose. At a time when millions of children are being raised by same-sex couples, the states should have the flexibility to protect these children by conferring legal recognition on the families in which they are being raised. Without a legal relationship to both of their functional parents, these children may not be entitled to child support from the nonlegal parent; they are not entitled to inherit through the nonlegal parent in the absence of a will; they may not be entitled to survivor benefits; and they may be prevented from ever seeing this parent, should the parents separate or the biological parent die. The states should be permitted to enact laws and policies they deem appropriate to protect these children.

Allowing the states to craft their own solutions in this area requires both confidence and humility: confidence in the wisdom of the people and their representatives, and the humility best expressed by Judge Learned Hand, who said, "The spirit of liberty is the spirit that is not too sure that it is right."[8] If the Constitution is to continue to embody the spirit of liberty for future generations, we must not seek to use it to enshrine still-evolving societal views.

The Constitution has been amended only 27 times in 215 years. That is a testament to its vitality and to Congressional restraint. We hope you will exercise the same restraint today and oppose S. J.Res. 26.

Thank you for this opportunity to testify. I will be happy to answer any questions.

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[8] *The Spirit of Liberty [–] Papers and Addresses of Learned Hand*, at 190 (3d ed. Enlarged, University of Chicago Press 1960).

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

108th Congress

March 23, 2004

Prepared Testimony of Professor Teresa Stanton Collett*

Good morning Mister Chairman, Members of the Committee, and other distinguished guests. I am pleased to have been given the opportunity to testify in favor of S.J. Res. 26 regarding the need to amend the United States constitution to define marriage as the union of one man and one woman. My testimony represents my professional knowledge and opinion as a law professor, who writes on the subjects of marriage and family. I am the author of over thirty professional articles, a textbook, and a member of the American Law Institute. I have testified before committees of the United States House of Representatives, as well as the legislatures of six states. My testimony today represents my own views, and is not intended to represent the views of my employer, the University of St. Thomas School of Law, or any other organization or person.

There are three fundamental questions that must be answered in deciding how to vote on this proposed constitutional amendment. Two are procedural. One is substantive. The first procedural question is whether the legal definition of marriage is a proper subject for a constitutional amendment. The second is whether a federal constitutional amendment is appropriate. The substantive question is, assuming a constitutional amendment is desirable, what should such an amendment say.

Is a Legal Definition of Marriage a Proper Subject of Constitutional Concern?

The simple answer to this question is yes. Regardless of whether as a matter of constitutional theory, marriage should be a question of constitutional law, the United States Supreme Court has made it a question of constitutional concern for over a century. For example, in 1878 the Court addressed the role that marriage and family play in preparing children to assume their responsibilities as citizens when it upheld the federal ban on polygamy.[1] Suffice it to say that in the intervening century, the view of those who serve as Justices on the Supreme Court has changed so that the unanimous conclusion of the Court in *Reynolds* that polygamy can be outlawed is no long assured as evidenced by Justice Ginsburg's writings before she took the bench.[2]

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[1] See *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding federal law making bigamy a crime in United States territories).

[2] Ruth Bader Ginsburg & Brenda Geigen Fasteau, *Report of Columbia Law School Equal Rights Advocacy Project: The LegalStatus of Women Under Federal Law* (Sept. 1974) at 190-91 (provision restricting

Marriage also has become a question of state constitutional law through the unrelenting attacks on marriage statutes in the courts.[3] Judges in Hawaii, [4] Alaska,[5] Vermont,[6] and Massachusetts[7] have already mandated recognition of same-sex marriage. In Hawaii and Alaska the people responded by amending their state constitutions. The Vermont legislature resisted in so far as it created civil unions, rather than extending marriage to same-sex couples.

The most recent and troubling ruling, however, is *Goodridge v. Dept. of Public Health*,[8] an opinion of the Massachusetts Supreme Judicial Court declaring that state's marriage laws unconstitutional. Chief Justice Margaret Marshall opens her opinion with a review of the recent United States Supreme Court opinion, *Lawrence v. Texas*.[9] Finding there was no rational reason supporting traditional marriage, she gave the legislature 180 days to "take appropriate action" in light of the opinion, which was widely interpreted as an "order" to create a "gay marriage". Under this ruling, it is expected that marriage licenses will begin to be issued to same-sex couples in May, 2004.[10] On February 3, 2004 the Massachusetts Court advised the state senate that enacting a civil unions law similar to that of Vermont would not satisfy the equal protection and due process provisions of the state constitution.[11] The Massachusetts Legislature is moving forward with a state constitutional amendment, but the people of that state will not be allowed to vote on it until fall of 2006.[12]

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bigamy "is of questionable constitutionality since it appears to encroach impermissibly upn private relationships.").

[3] The long-standing nature of this effort is evidenced by *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (defining marriage as requiring one man and one woman was not discriminatory), and *Singer v. Hara*. 522 P.2d 1187 (Wash. 1974) (same).

[4] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (equal protection clause requires state show compelling interest in restricting marriage to one man and one woman).

[5] *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (state constitutional right of privacy requires recognition of same-sex marriage).

[6] *Baker v. State*, 744 A.2d 864 (Vt. 1999) (common benefits clause requires recognition of same-sex unions).

[7] *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

[8] *Id.*

[9] 798 N.E.2d 941 at 948 quoting *Lawrence v. Texas*, --- U.S. ---. 123 S.Ct. 2472, 2480 (2003).

[10] Erik Arvidson, *Clerks in the Dark on Same Sex Marriage*, North Adams Transcript (March 15, 2004) at http://www.thetranscript.com/Stories/0,1413,103~9054~2019099,00.html.

[11] *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, (Mass. Feb 03, 2004)(advisory opinion rejecting civil unions).

[12] Uncorrected Proof of the Journal of the Senate in Joint Session (March 11, 2004) at http://www.state.ma.us/legis/journal/jsj031104.htm. See also Bob Katzen, *Beacon Hill Roll Call*, Harwich

Unfortunately Massachusetts is not the only state in which activists are currently demanding that judges redefine marriage. At this time Arizona,[13] California,[14] Florida,[15] Indiana,[16] Nebraska,[17] New Jersey,[18] New York,[19] Oregon,[20] Utah,[21] Washington,[22] and

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Oracle (March 16, 2004) at http://www.townonline.com/harwich/news/local_regional/har_colhorollcall03162004.htm.

[13] *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003). Matthew Hale, *Listening to the Supremes: Gay couple brings marriage case to AZ Supreme Court*, ECHO MAG. (Dec. 19, 2003) at http://legalminds.lp.findlaw.com/list/queerlaw/msg05458.html.

[14] *Lewis v. Alfaro, Order to Show Cause Issued* Case #122865 (Cal. March 11, 2004) at http://appellatecases.courtinfo.ca.gov/search/dockets.cfm?dist=0&doc_id=311759.

[15] Ann Rostow, *Gay Couples Sue in L.A., Fla. To Marry* (Feb. 26, 2004) at <http://www.gay.com/news/article.html?2004/02/26/4>.

[16] *Morrison et al. v. Sadler et al.*, Complaint, Docket No. 49D11-0208-PL-001946 (Marion Cty. Super. Ct. decided May 7, 2003), pleadings and trial court order at Marriage Watch <http://www.marriagewatch.org/cases/in/morrison/morrison.htm>.

[17] Jon Brunning, Attorney General for the State of Nebraska, *"Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?* Testimony before The United States Senate Subcommittee on the Constitution, Civil Rights, and Property Rights (March 3, 2004) available at <http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3073>.

[18] *Lewis et al. v. Harris*, Amended Complaint, Docket No. L-00-4233-02 (N.J. Super. Ct. Law Div. filed Oct. 8, 2002) *available at* < http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/135.pdf>. See also Joseph Dee, *Local Officials Weigh Same-sex Marriages*, The Times (March 7, 2004) (discussing public officials responses to trial court ruling that state constitution did not require recognition of same-sex marriage) at <http://www.nj.com/news/times/index.ssf?/base/news-1/107865413039822.xml>. On Monday, a New Jersey Mayor performed a ceremony for a lesbian couple after Shore Town issued a marriage license to the couple in contradiction to the trial court ruling in that state. The mayor announced the city's intention to continue to defy the court until order otherwise. The state attorney general has responded that he will seek a court order that the city stop its unlawful conduct. Joseph A. Gambardello et al., *Shore Town is First in N.J. to Let Gays Marry*, The Philadelphia Inquirer (March 9, 2004) at <http://www.philly.com/mld/inquirer/news/front/8138474.htm>. On Monday, March 15, city officials filed suit seeking a clarification of the state's marriage laws. Maryann Spoto, *Same-sex marriage Heads to Courts*, The Star-Ledger (March 16, 2004) at http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-5/1079421058175220.xml.

[19] *Hernandez et al., v. Robles*, Sup. Ct. of N.Y. filed on March 5, 2006. Complaint available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1461. See also Robert D. McFadden, *Bloomberg Said to Want State to Legalize Same-Sex Marriages*, The New York Times (March 6, 2004) at <http://www.nytimes.com/2004/03/06/nyregion/06GAY.html>.

[20] Peter Wong and Steve Long, *State Supreme Court Steps Into Fight on Gay Unions*, Salem Statesman Journal (March 18, 2004) at http://news.statesmanjournal.com/article.cfm?i=77247.

[21] Pamela Manson, Polygamists See Potential in Recent Marital Movement, Salt Lake Tribune (March 21, 2004) at http://www.sltrib.com/2004/Mar/03212004/utah/149779.asp.

[22] Lynn Marshall and Elizabeth Mehren, *Same Sex Marriage Battle Moves to Seattle*, L.A. Times (Mar. 9, 2004) at <http://www.latimes.com/news/nationworld/nation/la-na-

West Virginia[23] are defending their marriage laws in the courts. Based on news reports, it is likely that Pennsylvania[24], South Carolina,[25] and Tennessee[26] will be defending their statutes in the courts soon as well. Add to these fourteen states, the three states of Hawaii, Alaska and Vermont that have already responded to judicial overreaching on this issue and Massachusetts that remains embroiled in a political fight to return the issue to the people, as well as the states of Connecticut, Iowa and Texas where activists present the issue as one of dissolving a relationship rather than affirming one--- and you have almost half the country's laws under attack by a small group who want to force their will on the people in the guise of constitutional adjudication.

This number will only increase without a constitutional amendment given the acts of civil disobedience of city and county officials and the aggressive litigation tactics of activists. For example, in San Francisco Mayor Gavin Newson decided the California law was unconstitutional and directed county officials to "determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation."[27] For a month, county officials performed ceremonies and issued documents that purported to be marriage certificates to 4,037 same-sex couples from forty-six states.[28] After the Supreme Court of California ordered San Francisco to stop issue licenses, some couples altered their travel plans and went to Oregon where the courts have refused to stop county officials from issuing documents that purport to be marriage licenses while the legality of such actions are considered.[29] These illegal acts by public officials pose the threat of lawsuits in at least forty-six states challenging the definition of marriage.

So while there may be some limited academic value in pursing the theoretical

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marriage9mar09,1,2317112.story?coll=la-home-nation>.

[23] *West Va. Supreme Court Asked to Okay Same Sex Marriage Licenses* (Mar. 5, 2004) at <http://www.dailypress.com/news/local/virginia/dp-sou--gaymarriage-w.va0305mar05,0,3303467.story?coll=dp-headlines-virginia>.

[24] Pervaiz Shallwani, *Gay Couple Denied Marriage License*, http://www.mcall.com/news/local/all-b1_2marriage-rmar16,0,5953575.story?coll=all-newslocal-hed

[25] *Kept for the Altar* The Herald (March 21, 2004) available at http://www.heraldonline.com/local/story/3436508p-3054678c.html.

[26] Bill Poovey, *Gay Couple Ready for Marriage Battle*, Atlanta Journal-Constitution (March 10, 2004) at http://www.ajc.com/news/content/news/ap/ap_story.html/National/AP.V1377.AP-Gay-Marriage-Ch.html.

[27] San Francisco Mayor's Letter to County Clerk Re: Issuing Marriage Licenses <http://news.findlaw.com/hdocs/docs/glrts/sfmayor21004ltr.html>.

[28] Suzanne Herel et al, *Numbers put face on a phenomenon: Most who married are middle-aged, have college degrees,* San Francisco Chronicle (March 18, 2004) at http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/03/18/MNGTB5MUOI1.DTL.

[29] Typh Tucker, *Gay Weddings Draw Many Beyond State Lines*, StatesmanJournal.com (March 21, 2004) at http://news.statesmanjournal.com/article.cfm?i=77355.

question of whether the civil institution of marriage is a proper subject of constitutional law, the fact is that lawless local officials like the mayor of San Francisco and the county officials in Oregon have rendered this question academic. Marriage is an issue of constitutional law, both on the federal and state level. The only questions that remain are who will determine the nature of marriage and what will that nature be.

Why Amend the Federal Constitution?

At the present time there are efforts underway in twenty states to amend the state constitutions to define marriage as the union of a man and a woman.[30] Four states, Hawaii,[31] Alaska,[32] Nebraska,[33] and Nevada,[34] already define marriage as the union of a man and woman in their constitutions, although as the Attorney General of Nebraska testified before this committee earlier this month, Nebraska's provision is being challenged in federal court.[35]

My home state of Minnesota is one of the states where legislators are considering a state constitutional amendment.[36] While I fully support the state constitutional amendment, I do not believe it is sufficient to insure that the people retain the ability to decide issues as fundamental as whether the state should continue to regulate marriage and if so, what unions should be recognized as constituting a marriage.

This is because of the very real possibility that the United States Supreme Court will impose an obligation on states to recognize same-sex unions as marriages in the guise of constitutional adjudication. Building on the Court's statements in *Lawrence v.*

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[30] Kavan Peterson, *50 State Rundown on Gay Marriage Laws*, Stateline.org (March 5, 2004 updated March 15, 2004) at http://www.stateline.org/stateline.

[31] "The legislature shall have the power to reserve marriage to opposite-sex couples." Haw. Const. Art. I, sec. 23 (added after passage in general election Nov. 3, 1998) available at www.hawaii.gov/lrb/con/condoc.html.

[32] "To be valid or recognized in this State, a marriage may exist only between one man and one woman." Alaska Const., Art. I, sec. 25 (added after passage in general election Nov. 3, 1998) available at http://www.gov.state.ak.us/ltgov/akcon/table.html.

[33] "Only marriage between a man and a woman shall be valid or recognized in Nebraska . The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." Neb. Const. art. I, sec. 29 (2000) available at http://statutes.unicam.state.ne.us/.

[34] "Only a marriage between a male and female person shall be recognized and given effect in this state." Nevada Const. Art. I, sec. 21 at http://www.leg.state.nv.us/Const/NVConst.html.

[35] Jon Brunning, Attorney General for the State of Nebraska, *"Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?* Testimony before The United States Senate Subcommittee on the Constitution, Civil Rights, and Property Rights (March 3, 2004) available at <http://judiciary.senate.gov/testimony.cfm?id=1072&wit_id=3073>.

[36] Minnesota HF 2798.

Texas equating heterosexual and homosexual experiences,[37] and its statements in *Romer v. Evans* attributing animus to those who would make any distinctions,[38] many constitutional law scholars have opined that the Court appears poised to mandate same-sex marriage in the upcoming years.

In commenting on the *Lawrence* opinion's relationship to judicial recognition of same-sex marriage, Professor Laurence Tribe of Harvard said "I think it's only a matter of time".[39] Professor Erwin Chemerinsky of USC has observed, "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in Lawrence."[40] Prudence demands that that matter be addressed by the people, before the Court takes the issue away from them.

What Should the Amendment Do?

Assuming there is a need for a federal constitutional amendment, what should such an amendment do? I believe the amendment must do three things. First it must protect the most important right of each of us as citizens – the right of political self-governance. This is assured by providing the states the opportunity to vote on the adoption of a constitutional amendment.

Second, the amendment must insure that marriage is recognized as only the union of a man and a woman. This is because we know that children flourish when raised by their mother and father united in marriage.

Third, the amendment must leave it to the states to craft compassionate alternative legal arrangements for unmarried people. The American people are a compassionate people, who want to serve the needs of all of the unmarried while preserving the traditional institution of marriage. This amendment will allow the states to continue to do what they are doing in this area.

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[37] *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472, at 2481-82 (2003).

[38] 517 U.S. 620, 634-35 (1996).

[39] Joan Biskupic, *Decision Represents an Enormous Turn in the Law*, U.S. Today (June 27, 2003) at A.05.

In commenting on the *Goodridge* opinion, Professor Tribe stated:

> Well, the opinion this Supreme Court rendered in *Lawrence v. Texas* about equal dignity and respect for homosexuals suggests that after a sufficient breathing space where the public gets used to what the principles involved are, it would be prepared to uphold a decision rather like this and to **reach a similar conclusion**, but I doubt they would want to do it the day after tomorrow

Morning Edition, Nat'l Public Radio (November 18, 2003) (emphasis added) transcript available at 2003 WL 67031431 NPR: Morning Edition Interview: Professor Laurence Tribe discusses the Supreme Judicial Court of Massachusetts ruling that same-sex couples are legally entitled to marry.

[40] Erwin Chemerinsky, *October Term, 2002: Value Choices by Justices, Not Theory, Determine Constitutional Law*, 6 Green Bag 2D 367, 370-71 (2003).

Let me be clear. Of course there are loving committed relationships between same-sex couples throughout America. I have witnessed them myself, through my gay and lesbian friends. Marriage is for children,[41] but we can -- and we should -- make other compassionate legal arrangements available to take care of the diversity of human relationships we find throughout our great nation, and indeed throughout the world.

I think of a recent report from India, where a twenty-year old man actually married his grandmother, in order to ensure that he could take care of her.[42] Surely the hearts of all Americans reaches out to that dutiful grandson. Yet just the same, surely we can offer compassionate alternative legal arrangements to people, without redefining the institution of marriage itself. I endorse the amendment because it allows the states to continue to experiment in that regard.

I feel this so strongly, in part because of the career I had prior to becoming a law professor. I used to practice law in the area of trusts and estates. And so I have a lot of experience crafting compassionate alternative legal arrangements for clients and their loved ones.

I served many elderly clients, and I know that there is a real need for a legal status such as "reciprocal beneficiaries" enacted in Hawaii, which allows those who cannot marry to publicly register their willingness to care for each other, and receive various legal rights and obligations. This status need not be dependent upon a sexual relationship, or even cohabitation. In fact, to be inclusive and compassionate to all manner of relationships throughout our nation, such arrangements should not be dependent on such things -- but instead, they should be available to anyone who is willing to provide care and support to another human being. We should establish compassionate legal arrangements to include, for example, two elderly widows who want to care for each other, but have no sexual relationship, or the low income elderly brother and sister who could also benefit from shared support and decision-making.

Response to Common Objections

The Federal Marriage Amendment Is About the Nature of Marriage, Not Discrimination

Being involved in the effort to obtain a state constitutional amendment in Minnesota, it is clear to me that one of the great difficulties we face in conducting any debate on this issue is the emotional tenor of the discussion. Both sides believe the protection of their families is at stake, and so both are given to emotional rhetoric. That is understandable.

What is not understandable, and should not be tolerated in the civil discourse, is the constant charge that prejudice and bias motivate those of us who believe the legal

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[41] Maggie Gallagher & Joshua K. Baker, *Do Mothers and Fathers Matter?* (Feb. 27, 2004) at <http://www.marriagedebate.com/home_includes/Do%20Mothers%20and%20Fathers%20Matter.pdf>.

[42] *Young Man Marries Own Grandmother*, Boston Globe (March 19, 2004) at http://www.boston.com/news/odd/articles/2004/03/19/young_man_marries_own_grandmother/.

institution of marriage is, and should remain, focused on insuring that children are raised by their mother and father.

In *Goodridge*, notwithstanding the Court's admission that its decision "marks a change in the history of our marriage laws",[43] the Court equated those who support traditional marriage with racists, stating "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[44]

Such unfounded attacks on the good-faith of citizens who disagree with judicial political preferences unfortunately can also be found in U.S. Supreme Court opinions. In *Romer v. Evans*, Justice Kennedy, not content to strike down a popularly enacted Colorado referendum restricting the enactment of anti-discrimination laws on the basis of sexual orientation to statewide enactment, goes on to speculate about the motives of those who supported the referendum, "A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[45]

The attribution of malice to defenders of traditional marriage is both wrong and dangerous. As members of this committee heard during its last hearing, the NAACP is unwilling to equate defense of traditional marriage with race discrimination as are other prominent civil rights leaders. The willingness of many of this Committee just a few short years ago to vote for the federal Defense of Marriage Act does not equate with bigotry and any attempts to do so are merely activists' attempts to cut-off public debate regarding the need of a child to be raised by his or her mother and father..

The Federal Marriage Amendment Responds to Judicial Overreaching

It is common to use the amendment process to correct a judicial error. As Professor Sunstein himself as noted, it is also proper to use the amendment process to forestall erroneous constitutional decisions. Constitutional amendments have been ratified "in response to actual or anticipated decisions." [46]

Examples of federal constitutional amendments responding to judicial decisions that did not reflect the will of the people are plentiful. The first sentence of the Fourteenth Amendment was ratified to reverse the result of *Dred Scott v. Sandford*,[47] and thereby guarantee U.S. citizenship to all persons born in the United States. The

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[43] *Goodridge*, 798 N.E.2d 948 (Mass. 2003).

[44] *Id.* quoting *Palmore v. Sidoti*, 466 U.S. 429 (1984).

[45] 517 U.S. 620 at 634.

[46] Cass R. Sunstein, *Federal Appeal*, The New Republic 21 (2003).

[47] 60 U.S. (19 How.) 393 (1856).

Fourteenth Amendment was also ratified to reverse the rule of *Barron v. City of Baltimore*,[48] which held that the Bill of Rights applies only to the federal government. The Sixteenth Amendment, ratified specifically to authorize a federal income tax, effectively reversed *Pollack v. Farmer's Loan and Trust Co.*[49] The Nineteenth Amendment, guaranteeing the right to vote against sex discrimination, reversed the outcome of *Minor v. Happersett*,[50] which had held that the U.S. Constitution, under the Privileges and Immunities Clause of the Fourteenth Amendment, did not guarantee female suffrage. The Twenty-Fourth Amendment, prohibiting poll taxes, reversed the outcome of *Breedlove v. Suttles*,[51] which upheld poll taxes against challenges under the Fourteenth and Nineteenth Amendments. The Twenty-Sixth Amendment, guaranteeing the right to vote against age discrimination for individuals eighteen years old or over, reversed the outcome of *Oregon v. Mitchell*,[52] which held that Congress had no authority to give 18-year-olds the right to vote in state and local elections. In the case of the Federal Marriage Amendment, the process is being initiated preemptively in order to insure that the people have the opportunity to express their will on the issue.

Conclusion

The reality of our situation is that activist judges are increasingly willing to disregard the text of the laws, as well as the political will of the people, in judicial efforts to remake the institution of marriage to suit the judges' particular political views. This is not the proper process to be followed in a democratic republic. It is the people who should determine the meaning and structure to marriage through the process of political debate and democratic voting. It should not be imposed upon us by judicial fiat.

I urge members of this committee to give the people the opportunity to express their will on this matter directly through offering them a constitutional amendment.

Thank you, Mister Chairman, for allowing me the time to appear before the committee and to extend my remarks in the form of this written testimony.

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[48] 32 U.S. (5 Pet.) 243 (1833).

[49] 157 U.S. 429 (1895).

[50] 88 U.S. 162 (1875).

[51] 302 U.S. 277 (1937).

[52] 400 U.S. 112 (1970).

U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"A Proposed Constitutional Amendment to Preserve Traditional Marriage"

Tuesday, March 23, 2004, 10 a.m., Russell Senate Office Building Room 325

This hearing of the Senate Committee on the Judiciary shall come to order.

Before I begin my statement, I want to thank Senator Hatch for scheduling this hearing, and for inviting me to chair it. It is timely and appropriate for this hearing on the preservation of traditional marriage to be held in the Judiciary Committee. After all, this is the only committee that has jurisdiction over both constitutional issues and judicial issues. And of course, the *only* reason we are here today is that activist judges have inserted their personal political agenda into our nation's most important legal document, our U.S. Constitution. So I commend Chairman Hatch for wanting to address this constitutional and judicial problem.

I also want to thank Senators Leahy and Feinstein and their staffs for working with my office on today's hearing. Today's topic triggers the strong passions and emotions of well-meaning people on both sides. It is important that we acknowledge the hard work of all parents who are raising children in traditional and nontraditional environments alike – while at the same time we adhere to the dream we have for every child, to be raised by their own mother and father, under the shelter and protection of the traditional institution of marriage. Likewise, it is important that today's hearing is the culmination of bipartisan cooperation. The general custom for hearings in this committee is a 2 to 1 ratio for witnesses. But Senator Leahy requested, and I was happy to agree to, a 1 to 1 ratio today, for both members and legal experts. On such an important issue, I would like to work in a bipartisan fashion, as was done with the Defense of Marriage Act back in 1996.

OPENING STATEMENT

Today's hearing will consider and examine carefully "A Proposed Constitutional Amendment to Preserve Traditional Marriage."

CONSTITUTIONAL AMENDMENTS

The United States Constitution cannot and should not be amended casually. Indeed, our Founders deliberately designed the Constitution to make it difficult to amend. But difficult does not mean impossible – nor does it mean improper. To the contrary, our Founders recognized that situations would arise when an amendment would become necessary and appropriate. George Washington, the President of the Constitutional Convention, said that "[t]he warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections. . . . The People . . . can, as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendment which are necessary."

Indeed, our Constitution has been amended no fewer than twenty-seven times in our nation's history – most recently in 1992. Sometimes, we amend in order to alter the allocation of power between federal and state government, or between different branches of the same government. Today's amendment, however, does not seek to alter the allocation of power at all, but rather to reinforce the original allocation of power that the Founders themselves designed. Indeed, today's amendment is one of a long line of constitutional amendments that have been ratified as a democratic response to judicial decisions rejected by the American people – a list that includes the 11th, 14th, 16th, 19th, 24th and 26th amendments.

As members of Congress, we must never disparage our role in the democratic process. In the vast majority of circumstances, we can discharge our duties through the introduction, consideration, and enactment of statutes. On a few occasions, however, statutes are not enough. On a few occasions, a constitutional amendment may be the only mechanism available to the American people to participate in self-government.

THE DEFENSE OF MARRIAGE

Today presents one such occasion. And the issue is not legally complicated. Today we will hear from legal experts who have carefully studied recent U.S. Supreme Court decisions and analyzed the extent to which they pose a serious federal judicial threat to traditional marriage laws around the nation. We certainly look forward to their testimony. But the issue can be summed up quite simply, without need for legal jargon or case citation. The issue is simply this:

The traditional institution of marriage is not about discrimination – it is about children. However, activists in the streets and on the bench insist that marriage is about discrimination. Indeed, it is *precisely because* they believe that traditional marriage is about discrimination, that they believe that all traditional marriage laws are unconstitutional and must be abolished by the courts. These activists have left the American people with no middle ground. As I have often said, most Americans firmly believe that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection. And certainly, no one likes to be unfairly accused of intolerance. But the only way for people of good faith to defend democracy and the traditional institution of marriage against this judicial onslaught – based on false charges of discrimination – is a constitutional amendment.

That is the issue in a nutshell. Either you believe that traditional marriage is about discrimination and therefore *must* be invalidated by courts, or you believe traditional marriage is about children and *must* be protected by the Constitution.

The ongoing discussion about marriage in America must be conducted in a manner worthy of our country. It should be (1) bipartisan, (2) respectful, and (3) honest.

BIPARTISANSHIP

Indeed, there is bipartisan consensus on a number of fronts. The traditional institution of marriage has always been the law in all 50 states, and no state legislature has *ever* suggested otherwise. Just eight years ago, overwhelming Congressional majorities – representing over

three-fourths of each chamber – joined President Clinton in codifying a federal definition of marriage through the bipartisan Defense of Marriage Act. This historic and bipartisan consensus exists because, across diverse civilizations, religions and cultures, mankind 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 most stable environment for raising children is through the union of the child's mother and father.

The U.S. Supreme Court itself recognized the fundamental importance of the traditional institution of marriage nearly 120 years ago in *Murphy v. Ramsey*. In that case, the Court unanimously concluded that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than . . . the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." As the Court further noted, the union of one man and one woman is "the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

In light of the strong bipartisan consensus in favor of traditional marriage, it is offensive for anyone to charge supporters of traditional marriage – a group that includes President Clinton and the vast majority of Democrats and Republicans in Congress – with intolerance. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of prejudice, while abolishing American traditions by judicial fiat.

Moreover, Republican and Democratic legal experts alike recognize that the *only* way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, in previous hearings, Republican and Democratic witnesses alike have recognized the problem and suggested constitutional amendments to defend marriage against judicial activism. It was a Democrat who first proposed a federal amendment to protect marriage in the last Congress. So both the discussion, and the search for constitutional solutions, have been bipartisan.

RESPECT

The discussion should also be respectful. Parents are doing the best job that they can. Relationships based on love, friendship and mutual respect deserve respect. Supporters of traditional marriage also deserve respect – they don't deserve false charges of discrimination. 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.

HONESTY

Finally, the discussion must be honest. Unfortunately, a number of myths have been put forth which demand correction. In my remaining time, I would like to quickly respond to three of those myths.

The first myth is that "my marriage doesn't affect your marriage." That statement does not describe reality. How we arrange the building blocks of our society affects all of us. As the archbishop of Boston, Sean P. O'Malley, recently wrote: "[I]deas have profound effects on our society. A casual attitude toward divorce and cohabitation has had serious consequences for the institution of marriage in the last 20 years. Redefining marriage in a way that reduces it to a financial and legal arrangement of adult relationships will only accelerate the deterioration of family life." Archbishop O'Malley's concerns are substantiated by recent studies in Scandanavia, where the abolition of traditional marriage laws has caused a dramatic increase in the number of children born out of wedlock. If the national culture teaches that marriage is just about adult love, and not about the raising of children, then we should be troubled, but not surprised, by the results.

The second myth is that "we don't need to amend the Constitution to defend traditional marriage." I would like to believe that courts will always enforce traditional marriage laws against lawless officials. The track record is not promising, however. Last year, amendment opponents promised that courts would enforce traditional marriage laws. But they have clearly been proven wrong by recent events. The problem is that a majority of justices today apparently no longer believe in traditional marriage laws. Legal experts across the political spectrum, including some on our second panel today, have predicted that as many as six justices are ready to abolish traditional marriage nationwide – the same six that ruled in *Romer* and *Lawrence*. Indeed, one of those six justices – Justice Ruth Bader Ginsburg – has already opined that courts should abolish laws against polygamy.

So the myth that federal constitutional action is unnecessary to preserve traditional marriage is precisely that – a myth. It is a myth that the states can take care of this problem on their own – because under our federal system of government, states have no power to override federal constitutional decisions. Lawsuits to dismantle traditional marriage, as a matter of federal as well as state constitutional law, have already been filed in federal and state courts in Massachusetts, New York, Nebraska, Utah, Florida, Indiana, Iowa, Georgia, West Virginia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, Oregon, Washington, California, and Vermont, as well as my home state of Texas. According to the *New York Times*, we can expect lawsuits in 46 states by residents who have traveled to San Francisco in recent weeks. Hawaiians and Alaskans took preemptive action when they were faced with state constitutional challenges to their traditional marriage laws. Citizens of Nebraska, Nevada, and other states took preemptive action *before suits were even filed*. Now that the threat is a federal threat, a federal constitutional amendment is the only way to preserve traditional marriage laws nationwide – before it is too late. America needs stable marriages and families. The institution of marriage is just too important to leave to lawyers and to chance.

The third and final myth is that proponents of traditional marriage are "writing discrimination into the Constitution." This argument is both curious and offensive. In testimony earlier this month, the NAACP declined to oppose traditional marriage laws – and I notice today that the ABA is neutral as well. If marriage were about discrimination, surely both the NAACP and the ABA would oppose it. But it is not, and they did not. At that same hearing, Reverend Richard Richardson of the Black Ministerial Alliance and Pastor Daniel de Leon of Templo Calvario

offered powerful testimony about the importance of traditional marriage to their communities – communities that are all too familiar with the scourge of discrimination.

But there is something even more pernicious about this claim of "writing discrimination into the Constitution." Let me repeat what I said earlier: it is *precisely because* some activists believe that traditional marriage is about discrimination, that they believe that all traditional marriage laws are unconstitutional and therefore *must* be abolished by the courts. These activists have left the American people with no middle ground here. They accuse others of writing discrimination into the Constitution, *yet they are the ones writing the American people out of our constitutional democracy.*

So supporters of traditional marriage are faced with an unhappy task. Either we give up the traditional institution of marriage to activists in the streets and on the bench, who see marriage as nothing more than discrimination – or we enshrine the traditional institution of marriage with the constitutional protection that our children need and deserve.

The traditional institution of marriage is too important. It is worth defending. So today, an important constitutional process begins.

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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on the Constitutional Amendment on Marriage

March 23, 2004

Mr. Chairman, as I've said at the two prior hearings on this subject, I think it is unfortunate that we are devoting so much time to this issue. I continue to believe that a constitutional amendment on marriage is unnecessary. And I also believe that the effort to rush the amendment through our Committee and bring it to the Senate floor this summer is politically motivated to score points in an election year. That is unfortunate for the American people who are struggling every day with so many more pressing issues – from jobs, to access to health care, to educating their children -- that deserve the Senate's attention and action.

The regulation of marriage in our country has traditionally been a matter for states and religious institutions and should remain so. No one – including witnesses who have testified at the prior hearings – has shown that there is a need for federal intervention. Proponents of an amendment argue that it is necessary to amend the Constitution to ensure that no state is forced to recognize a same-sex marriage performed in another state. But not a single court has forced a state to recognize a same-sex marriage or civil union performed in another state. In fact, as Professor Lea Brilmayer persuasively testified earlier this month, no state, in the history of our nation, has ever been forced to recognize a marriage that was against the public policy of that state. I note also that since our last hearing, the California Supreme Court has ordered city officials in San Francisco to stop performing same-sex weddings, the Attorney General in the state of New York ruled that state law prohibits same sex marriage, and, in Massachusetts, the process for amending the state constitution is ongoing. It appears, in other words, that this effort is ill-timed and ill-advised. We should let states continue to sort these issues out.

But the Chairman and many in his party feel differently, and so this hearing was scheduled to consider a specific proposal to amend the Constitution – the Federal

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Marriage Amendment. I think we can all agree that amending the Constitution is a very serious matter and should be undertaken only after careful deliberation and debate. We should not do this in a haphazard or rushed manner. Yet just yesterday, presumably in anticipation of this hearing, a revised version of the Federal Marriage Amendment was unveiled.

It is simply inappropriate to hold a hearing on the text of a constitutional amendment less than 24 hours after that text is introduced. That is not the proper way for the Senate to consider amending our nation's governing charter, which has served our nation well for over 200 years. No hearing should be held when Senators and witnesses have had less than a day to review the legislative language that is the focus of the hearing. I believe, Mr. Chairman, that it would be inappropriate for the Subcommittee on the Constitution to consider this new language until the Committee holds another hearing on it.

Mr. Chairman, observing an appropriate deliberative process for amending the Constitution of the United States is particularly important because the stakes are so high. We are talking here about an amendment that would for the first time put discrimination into our governing document. It would dictate to the people of each state how their own constitutions should be interpreted and applied on a subject that has since the beginning of our republic been regulated by the states.

I note that the authors of the Federal Marriage Amendment appear to have recognized that the original version of the amendment would not only have prohibited same-sex marriages, it would have barred states from recognizing civil unions or providing some benefits that are available to married couples, such as hospital visitation rights, to same-sex couples. Of course, that is exactly what some proponents of the Federal Marriage Amendment would like to see. It is encouraging that the sponsors do not share that extreme view.

No amount of redrafting will convince me, however, that we need a constitutional amendment to regulate marriage. Marriage has been part of human civilization for 4,500 years, or more. It is not under siege; it is not in danger of withering away. According to the Department of Health and Human Services, in FY 2003, approximately 2.2 million heterosexual couples were married in the United States. I hope we in the Senate will get back to the business of trying to improve their lives, and the lives of their children, rather than spending time on a divisive political exercise.

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News from . . .

Senator Dianne Feinstein

of California

FOR IMMEDIATE RELEASE:
Tuesday, March 23, 2004

Contact: Howard Gantman
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Statement of Senator Dianne Feinstein on Proposed Federal Marriage Constitutional Amendment

Washington, DC -- *The Senate Judiciary Committee today convened a hearing examining a proposed Federal Marriage Constitutional Amendment. Senator Dianne Feinstein (D-Calif.) served as Democratic Ranking Member of the hearing. The following is the prepared text of Senator Feinstein's statement:*

"Today we have before us a Constitutional amendment not to expand or protect the rights of a group of Americans, but to limit those rights instead.

This amendment, if passed by the Congress and ratified by the States, would become the 28th Amendment to the Constitution since that document itself was first completed in 1787. In those intervening 218 years, the Constitution has been amended infrequently, and almost always for the purpose of expanding, protecting, or guaranteeing the rights Americans.

But today this amendment is different – for it would, if enacted become the first amendment to limit rights. I believe this is ill-timed, and ill-advised, and I'd like to briefly discuss why.

First, the issue of marriage and domestic law has always been one under the purview of the states – not of the federal government. And throughout this nation's history, the states have proven entirely capable of dealing with this issue.

As early as 1890, in In Re Burrus, the Supreme Court of the United States, in a child custody dispute, stated '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.' Later, in a 1979 Supreme Court decision, Hisquierdo v. Hisquierdo, the Court stated 'Insofar as marriage is within temporal control, the States lay on the guiding hand.' The Court in that same decision also restated the language I just quoted from In Re Burrus.

Even now, as voices are raised at the prospect of same-sex marriages in Massachusetts and California, our traditional, state-centered processes have begun.

In Massachusetts, the recent court ruling allowing for same-sex marriages does not even take effect until May, yet the state legislature is at work on a state constitutional amendment to bar same-sex marriages but allow civil unions. This amendment is certainly not guaranteed to pass, but it is clear that the people of Massachusetts will be dealing with this issue without need of assistance from Washington.

And in California, there is Proposition 22, a ballot initiative which was passed by Californians in 2000 by a 23% margin. Statewide, over 4.5 million votes, sixty-one percent, voted in favor of the initiative while almost 3 million, or 38 percent voted against the initiative. This initiative amended the California family code to state that 'only marriage between a man and a woman is valid or recognized in California.'

A few weeks ago, the Mayor of San Francisco decided this law was unconstitutional and ordered the county clerk to issue marriage licenses to same-sex couples. The State Supreme Court has since enjoined the county clerk from issuing any further marriage licences and the county has complied. The Mayor will now have to show cause as to why he believes he has not exceeded his legal authority.

Despite this evidence, some still fear that there may be a state or two that does eventually allow same-sex marriages to take place, and that every other state will then be forced to recognize those marriages regardless of their own laws to the contrary. But the long history of marriage law belies that claim.

The courts have long held that no state can be forced to recognize a marriage that offends a deeply held public policy of that state. States, as a result, have frequently – and constitutionally – refused to recognize marriages from other states that differ with their public policy.

Polygamous marriages, for instance, even if sanctioned by another state, have consistently been rejected. Marriages between cousins or other close relatives have also been rejected by some states, even if those marriages are accepted in other parts of the country. And until the Supreme Court ruled on different, equal protection grounds that no such discrimination was acceptable, even mixed-race marriages were often not recognized in many states.

In no case that I know of has the Full Faith and Credit Clause of the US Constitution been used to require a state to recognize a type of marriage that would violate its own strong public policy.

Because several dozen states have already passed prohibitions on same-sex marriage, it seems clear that in those states an argument could be made that strong public policy would lead to a refusal to recognize out-of-state, same-sex marriages. Mr. Chairman, I would note that Texas, and my state of California as well, are both among the 37 or so states that have laws on the books today defining marriage as between a man and a woman.

So, this is not a problem demanding an immediate solution, because no state currently faces any risk whatsoever of having to recognize a same-sex marriage performed in another state. It is just that simple.

As we sit here today, the people of this nation are greatly divided on the issue of same-sex marriage. One recent poll suggested that only about 20 percent of the American people support a constitutional amendment banning same-sex marriage like the one we discuss today. Considering that the amendment would need two-thirds of the Congress and then three-fourths of the states to ratify it, both its passage in this body and its enactment by the states seems unlikely.

Additionally, the text of the amendment before us today is problematic in its own right. Although supporters claim that the amendment is limited to the word 'marriage,' many constitutional scholars and family law experts believe that as written, the original language of the amendment would also ban civil unions and domestic partnerships as well.

University of Chicago Professor Jacob Levy, for example, criticized the text of the previous version of the amendment because it would prevent the very type of civil unions that the amendment's supporters claim it would allow, based on language in the amendment stating clearly that '*Neither this Constitution nor 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...*'

In a new version of the amendment introduced by Senator Allard just yesterday, this language has been changed. I think this change of language is a good indication of how controversial and complex this issue is – here, on the eve of a hearing into the text of one amendment, we see a change in language so dramatic that we are now really confronted with a different amendment altogether, with its own unique problems.

I can tell you, as one who has devoted a great deal of time to working on a constitutional amendment to expand the rights of crime victims, this is a very long and detail-oriented process. We have been through literally dozens of drafts – perhaps as many as 100 – over the course of many years, and with the help of many constitutional experts. This is not a process best done overnight, on a moment's notice.

In any event, under this new amendment's language, it does now appear, contrary to the previous draft, that civil unions might be acceptable under certain state laws. Yet still, the amendment's text is highly ambiguous, and may even suggest, as I read it, that a constitutional amendment passed by a State specifically allowing civil unions would be invalid, because the plain text of the amendment we discuss today would state that '*Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman...*'

So the effect of even this new amendment is still very much an open question, and I hope that today's hearing can shed some light on the details of the text, as well as the advisability of pursuing any similar amendment to the Constitution.

On a personal note, Mr. Chairman, I should say that I have always believed that a marriage is between a man and a woman. However, I also believe that this remains an open and evolving issue in America, and that attitudes have changed even in the last few years. But regardless of what you, or I, or anyone thinks of the issue before us, it is hard to understand why we should impose a federal, constitutional prohibition on it, or on civil unions.

Marriage has always been, and should continue to be, an issue that is considered, debated and controlled by states, localities, and religious leaders. The federal government spoke once on this issue, in 1996, with the 'Defense of Marriage Act'.

The Defense of Marriage Act, or DOMA as it is called, defines 'marriage' as a union between and a woman, and it explicitly allows states to refuse to recognize same-sex marriages performed in other states. As a result, DOMA is considered even by its principal architect, former Republican Congressman Bob Barr, to go 'as far as is necessary in codifying the federal legal status and parameters of marriage.'

That law is still in place. It has never been successfully challenged or overturned. We need not re-address this issue with a constitutional amendment. Let's let the State processes work. Let's let the courts look at this issue over time. Let's not jump to the first constitutional amendment in our history that would limit, rather than expand, the rights of American citizens to be free."

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

March 23, 2004

Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"A PROPOSED CONSTITUTIONAL AMENDMENT TO PRESERVE TRADITIONAL MARRIAGE"

Thank you very much, Senator Cornyn. I know you have put a great deal of time into this issue, both this year and last, and I recognize and appreciate your leadership. This is an extremely important and fundamental issue for our country. To me, the question comes down to whether we amend the Constitution or we let courts or administrative entities do it for us by default. I know which is the more democratic option, and that is for us, as elected officials, to amend the Constitution. Questions about issues that are as fundamental as the family simply should not be left to the courts to decide.

Let me be clear: I am for traditional marriage. The bedrock of American society is the family, and it is traditional marriage that undergirds the American family. 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. We simply must act to 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 think the hearings which Senator Cornyn held last September and earlier this month clearly showed that DOMA and traditional marriage laws are under serious risk of judicial attack. The *Goodridge* decision in Massachusetts proved this fear to be accurate. It is now more apparent to me than ever that courts are usurping the role of legislatures by imposing their own definitions of marriage on the people. We must do something about this.

The Allard Amendment that we are examining today offers a sound and necessary alternative to judicial weakening of the family by stopping the courts from forcing same-sex marriages and unions on the people. Some have suggested that we need to wait until the Supreme Court and other courts further their assault on traditional marriage. I say we cannot wait any longer. Hawaii, Alaska, Nevada and Nebraska all acted to amend their Constitutions to preempt adverse judicial rulings in this area, and I concur with many others that we need to do so here. Even liberal legal scholars such as Lawrence Tribe agree that recent Supreme Court rulings such as *Lawrence v. Texas* render traditional marriage laws "constitutionally suspect." We don't need to wait for the Supreme Court to force this radical change in our culture when we can prevent it with a Constitutional amendment such as the one we are discussing today. For this reason, I wholeheartedly support the passage of the Allard Amendment. There may be other approaches that warrant our consideration.

I thank the Senator Cornyn again for chairing this important hearing today, and I look forward to continuing to work on this issue with you, Senator Feingold and others on the Committee in the coming weeks and months.

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Statement of Senator Edward M. Kennedy
On "A Proposed Constitutional Amendment to Preserve Traditional Marriage"
Senate Committee on the Judiciary
March 23, 2004

Today, the Committee holds its third hearing on various proposals to amend the Constitution to prohibit same-sex marriage. Yesterday, faced with the reality that their earlier proposal had crashed, conservative organizations rolled out a new proposal.

But the bottom line hasn't changed. There is absolutely no need to amend the Constitution. As news reports from across the country make clear, states are already dealing with this issue, and doing so effectively, and doing so according to the wishes of the citizens of their states. Contrary to the claims of the amendment's supporters, no state will be bound by the rulings or laws on same-sex marriages in any other state. Long-standing constitutional precedents make clear that states have broad discretion in deciding to what extent they will honor other state laws in dealing with sensitive questions about marriage and raising families. The federal statute enacted in 1996, the Defense of Marriage Act, makes the possibility of nationwide enforceability even more remote.

If it's not <u>necessary</u> to amend the Constitution, it's necessary <u>not</u> to amend it.

In more than two hundred years of our history, we have amended the Constitution only seventeen times since the adoption of the Bill of Rights. Many of those amendments have been adopted to expand and protect people's rights.

Having endorsed this shameful proposed amendment, in a desperate tactic to divide Americans in an attempt to salvage his faltering re-election 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's not about how to protect the sanctity of marriage, or how to deal with "activist judges." In the recent Goodridge case, the Massachusetts Supreme Judicial Court interpreted the *Massachusetts* Constitution, not the federal Constitution. That is precisely what courts are created to do. This debate is not about activist judges. It's about politics – an attempt to drive a wedge between one group of citizens and the rest of the country, solely for partisan advantage. We've rejected that tactic before, and we should reject it again.

As a rule, the federal government has no authority to tell states how to interpret their own laws and constitutions. The newly revised Federal Marriage Amendment would change this fundamental principle of state sovereignty by imposing a rule of construction on state courts. Even if a state like Massachusetts amended its constitution to authorize civil unions for same-sex couples – as legislators in the state now appear prepared to do – the revised amendment would overturn such an arrangement by requiring the state's courts to "construe" the state constitution in a manner that prohibited same-sex couples from receiving "the legal incidents of

marriage." There is no precedent in our democracy for the federal government to dictate to state courts how they must interpret their own state constitutions.

Supporters of the proposed amendment claim that religious freedom is somehow under attack by states that uphold equal rights and benefits for same-sex couples. But as the First Amendment makes clear, no court, no state, no Congress can tell any church or religious group how to conduct its own affairs. No court, no state, no Congress can require any church to perform a same-sex marriage. The real threat to religious freedom is posed by the Federal Marriage Amendment itself, which would tell churches they can't consecrate a same-sex marriage, even though some churches are now doing so. The amendment would flagrantly interfere with the decisions of religious communities and undermine the longstanding separation of church and state in our society.

I respect the views of those who oppose gay marriage and who disagree with the court's recent decision in Massachusetts. But that's no justification for trying to undermine the longstanding separation of church and state in our society, or trying to write discrimination against gays and lesbians into the United States Constitution.

The decision by the Massachusetts Supreme Judicial Court 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,

and to receive health benefits, family leave benefits, and survivor benefits. In fact, there are now more than a thousand federal rights and benefits based on marriage.

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 rights for gay couples or gay persons. That's why Congress so far has refused even to protect gays and lesbians from job discrimination, or to include them in the federal law punishing hate crimes.

Too often, this debate over the definition of marriage and the legal incidents of marriage has overlooked the very personal and loving family relationships that would be prohibited by a constitutional amendment. More and more children across the country today have same-sex parents. What does it do to these children and 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.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on "A Proposed Constitutional Amendment
To Preserve Traditional Marriage"
March 23, 2004

Today's hearing is merely the latest in what has become a series of hearings on amending the Constitution in one manner or another. It would seem that members of the majority are obsessed with rewriting the Constitution. This is the fourth constitutional amendment to which this Committee has devoted significant time for debate in the 108th Congress, and this is the third hearing this month to debate a constitutional amendment seeking to limit rather than expand the rights of the American people. This proposal is one of 61 constitutional amendments introduced so far this session. Sixty-one amendments to the Constitution introduced in this Congress alone, and more than 11,000 since the 1st Congress was convened. We can only imagine what the Constitution would look like if we had adopted amendments at the wholesale rate seemingly favored by many in the 108th Congress.

I have stated my opposition to the Federal Marriage Amendment at our two previous hearings on this topic, and I state it again today. I oppose the Federal Marriage Amendment because it interferes in a fundamental State matter, and, worse yet, it does so for the purpose of disfavoring a group of Americans. We have never amended our Constitution for that purpose, and we should not start now. The proposed amendment we consider today creates division among the American people. In addition, the timing of these hearings raises concerns that the Constitution is being misused for partisan purposes. Of course, the Republicans who are in the majority in the Senate control the agenda, and this hearing and their concentration on this divisive issue is their choice.

It is all the more disturbing that this hearing takes place less than 24 hours after the sponsors of this amendment have unveiled a new version of it. Proposals to amend the Constitution of the United States that seemingly change as moodily as the latest focus group should give us all the more pause in this rush to amend our national charter.

Neither our witnesses nor the Members of this Committee have had sufficient opportunity to review the new language and the consequences of the multiple changes Senator Allard has proposed. Our witnesses already had prepared their testimony to the Committee before they had even had the opportunity to see this latest version. It is clear, however, that questions raised by the new amendment differ somewhat from the questions raised by the old amendment. As a result, our approach to this hearing would have differed as well. Despite this "bait and switch," the majority rejected our request to postpone this hearing so that we would have an opportunity to review the language and hold this hearing with the respect that is due to our Constitution. At the very least, fundamental fairness requires that the Committee hold a second hearing on this amendment before moving forward on it.

The pace of these hearings, the majority's refusal to postpone today's hearing, and the rhetoric of amendment supporters, including a President of the United States in the midst of a political year, suggests a crisis. Since our last hearing, however, the Massachusetts State legislature and the California Supreme Court have each taken actions that have served to undercut the recognition of same-sex marriage in their own States. Developments in the States have been away from recognition of same-sex marriage and toward recognition of civil unions, in line with the views of the American people. In addition, legal experts have made the case that no States will be made to recognize same-sex marriages from other States against their strong public policy.

Thus, this preemptive attack on the Constitution can no longer be validated by scary allusions to "activist judges." Do Republicans really contend that the United States Supreme Court is staffed by activist liberal judges intent on recognizing same-sex marriages? There is no indication that we are on the verge of such a ruling. There is no case on the Supreme Court docket – or on any federal appellate court docket – that would even raise that issue. We should not alter the Bill of Rights and our Constitution to avert judicial decisions that have not yet even been considered, let alone made, when such a constitutional amendment would hamstring our States in an unprecedented way.

In spite of recent developments, this Committee finds it necessary to return, again, to this divisive issue just days after our last discussion. This hearing has been billed as one focusing on the language of the Federal Marriage Amendment, which Senator Allard and Representative Musgrave have introduced. Given Republican insistence on proceeding with this hearing at this time, even after the 11th hour change in the constitutional language, I want to thank Senator Feinstein for rearranging her schedule to serve as the ranking Democratic member at this hearing.

Of course, we have yet to see the promised alternative constitutional amendment that Senator Hatch has suggested on this topic. Once that language is introduced, if Republicans are serious about actually proceeding to amend the Constitution, the Committee will need to hold hearings on its wording, meaning, and possible effects.

The Hearing

At the outset, I must, again, note for the record some of the important issues this Committee is ignoring while we focus on constitutional amendments to limit the First Amendment and stigmatize homosexual Americans. We are now completing our third month of a short legislative year, and we have still held no hearings on USA PATRIOT Act oversight, even as the President has called for a permanent extension of the law in his State of the Union address and in his campaign speeches. The Chairman and I agreed last year that the Committee should hold an aggressive series of oversight hearings on the PATRIOT Act and related topics, but those hearings have yet to materialize this year.

We have also done nothing about the fundamental protection of voting rights. Last month, 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, our Committee 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, but these offers have not been accepted.

I would hope that we could find at least "equal time" for legislative business and oversight as for the Republican majority's never-ending attempts to churn the text of our Constitution. I fear that this Committee has not fulfilled its responsibility to ensure the rights of the American people, and the Government's accountability to them, by providing vigorous oversight of the most insular and unilateral Administration in memory.

I must also note that the Constitution Subcommittee and this Committee have now all but abandoned earlier interest in questions of government continuity. Constitutional amendments on that topic portrayed as so vital and urgently needed at the beginning of the year have been shoved aside by partisan efforts to exploit the marriage issue for political advantage.

An Amendment That Disrespects States

Senator Allard's Federal Marriage Amendment is breathtaking both in the scope of its intrusion upon the traditional powers of the States and in the lack of clarity in its drafting. There have been press accounts that its wording was the result of conference calls among activists who themselves could not agree on language. I have written the Bush Administration and asked its representatives what language they endorse now that George W. Bush has changed his position and decided to endorse a constitutional amendment on this matter. Although it has been some time and I have provided numerous opportunities for the Bush Administration to respond, I have yet to receive an answer. The Bush Administration has not told me what words they endorse adding to the Constitution on the United States. Perhaps the President supports the old Allard amendment. Perhaps he supports the new Allard amendment, as some news reports suggest, and his Administration was involved in the "bait and switch" that was perpetrated on this Committee yesterday afternoon. Perhaps he supports a third version entirely that has yet to be introduced in this Congress. He has informed neither this Committee nor the American people.

President Bush has called upon Congress to alter our fundamental charter. We in Congress deal in written proposals and not just convenient political slogans for re-election campaigns. The words of our Constitution are particularly important. The President has still not responded to my February 25 letter or to my questions of his Assistant Attorney General two weeks ago. For the third hearing on this topic, the Bush Administration has chosen not to send a representative to testify. 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. What is it President Bush is for, what proposal does he

endorse, where is the language that he endorses be added to the Constitution? How strident does he wish the language to be in restricting people's rights? How restrictive is the language he endorses to constrict the ability of our States to extend rights and benefits to their citizens as they see fit? I know how much this White House is driven by poll numbers. I want to be sure they have seen the *Washington Post*-ABC News poll earlier this month which found that 53 percent of Americans believe that States should make their own decisions about marriage.

Of course, without a thoroughgoing response from the White House about what it is the President is endorsing, and without an Administration witness, we are left with little more than a political posture without substance. The Constitution should not be used for partisan political purposes. Proposing an amendment to our 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. The Administration's refusal to answer such basic questions and to send a witness to testify suggests a lack of seriousness and a surplus of political motivation about this drive to amend the Constitution that is highly regrettable.

I now turn to the proposal before the Committee. The first sentence of Senator Allard's amendment would create a federal constitutional definition of marriage. Congress has already adopted a definition of marriage for the purposes of Federal law, in the Defense of Marriage Act ("DOMA"). No court has questioned DOMA, and even the advocates of this amendment have not seriously argued that that provision of DOMA is at risk in the courts or that it will be thrown out by the United States Supreme Court. As such, the proponents of this amendment are seeking to define marriage *for the States*, whether they like it or not. While the political and judicial processes in Massachusetts, California, and elsewhere continue their review of marriage laws, the proponents of this proposed constitutional amendment rush to take those decisions out of the hands of the people and the States for all time. As Professor Lea Brilmayer put it in *The Wall Street Journal* earlier this month, "In our 200-year constitutional history, there has never yet been a federal constitutional amendment designed specifically to reverse a state's interpretation of its own laws." I ask that a copy of *The Wall Street Journal* essay by Professor Brilmayer, published on March 9, 2004, be included in the record.

To the extent that this amendment's proponents argue that we need a national definition of marriage to prevent States from being forced to recognize same-sex marriages entered into in other States, they ignore the thoughtful testimony offered by Professor Brilmayer at our last hearing on this topic. The Full Faith and Credit Clause has not been interpreted to require States to recognize other States' marriage licenses that violate their own public policies. States have refused to recognize marriages between cousins, between uncles and nieces, and even marriages entered into within a year of the divorce of one of the parties. In other words, States have always had an inherent right to follow their own policies about marriage, regardless of what other States do. Federal law in the form of DOMA *enhances* that right by giving specific congressional approval to States that decline to recognize same-sex marriages.

The brand new second sentence of the Allard amendment is no less troubling for the last-minute tinkering of its sponsors. It forbids the Federal Government and any State government from construing the Constitution of the United States and any State Constitution to allow the "legal incidents" of marriage to "any union other than the union of a man and a woman." As such, it would put legal recognition and protection of same-sex couples outside the scope of all 50 State Constitutions – even if the people of a State freely voted to include civil unions or same-sex marriages in their Constitution. In other words, States could pass a law allowing civil unions but could not pass a Constitutional provision doing so. This is extraordinary micromanagement.

In addition, courts would be prevented from recognizing any right traditionally associated with marriage that is not explicitly recognized by a Federal or State statute. This is a breathtaking invasion on the traditional province of courts, State or Federal.

I do not understand how anyone could support this amendment if they believe in the rights of States, the integrity of the Constitution or in fundamental fairness.

The people's representatives in Vermont passed a law governing civil unions and various benefits four years ago. They did so after a Vermont Supreme Court ruling in *Baker v. Vermont* found that it violated a provision of the Vermont Constitution (one that does not have a Federal parallel) to deny same-sex couples the benefits provided to opposite-sex couples. That Vermont decision would have violated the Federal Constitution were this Amendment then in place. I will never stop defending Vermont's rights to govern Vermont according to our constitution, laws, and tradition, and to have made the decision to provide civil unions for same-sex couples. As we conduct this debate, I remember the real people – in Vermont and elsewhere – who would be directly and adversely affected by this cavalier and ever-changing drive to amend the Constitution.

I think Georgetown law professor Michael Seidman was correct when he stated in written testimony to the Constitution Subcommittee earlier this month that "[t]he first obligation we should impose on people who want to amend our Constitution is that they think clearly about what they are doing and be careful with the words they use." Professor Seidman predicted that the amendment would "produce endless litigation about its meaning," and would "give judges total freedom to do virtually anything they want." I do not think that the changes Senator Allard and Representative Musgrave announced yesterday afternoon have changed this analysis. For those who purport to be concerned about so-called activist judges, this vague language about the "legal incidents" associated with marriage provides a vast playground of possibilities at the expense of State government and our citizens. Will it affect laws like the Mychal Judge Act, by which we allowed public servants to designate recipients of benefits? Will it prohibit State law developments allowing same-sex partners additional rights traditionally associated with marriage? Will it federalize divorce, alimony, child custody and other laws that our States have traditionally provided?

We must not forget that this is a constitutional amendment we are considering. Every word counts.

Bipartisan Opposition

I hope that Republicans will speak out against this effort. No less an authority than Vice President Cheney said during the 2000 Vice Presidential debate: "I don't think there should necessarily be a federal policy in this area." I suspect we will not hear from him, again, on this issue. When the President abandoned his State of the Union caution to, a month later, endorse this constitutional amendment, the Administration put its political interests above the Constitution.

Our former colleague on this Committee, Senator Alan Simpson, wrote last year: "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." I thank Senator Simpson for speaking out on this matter. I look forward to hearing the views of Republican Senators currently serving who oppose this effort and will rise to the defense of the Constitution.

I understand that Governor Schwarzenegger of California and a few other Republican Governors, along with former New York City Mayor Rudy Guiliani, have likewise noted that they support "legal incidents" associated with marriage being accorded same-sex couples. I hope they will speak out forcefully on this effort to amend the Constitution that would straightjacket all levels of representative government on these matters.

Conclusion

This proposed constitutional amendment is seriously flawed not only in its words but also in its design. We have amended the Constitution to limit the rights of our citizens only once, with the 18th Amendment, which imposed Prohibition. And that amendment is the only constitutional amendment subsequently repealed. We have never amended the Constitution to limit the rights of a minority group of Americans. If we pass the Allard amendment, we will permanently define millions of Americans today and millions more tomorrow as second-class citizens.

There is an alternative to writing discrimination into our Constitution, and it is as old as our system of government. We can tolerate differences among our States on this issue. Two centuries of law and DOMA protect the right of each State to decide for itself. Some States may allow civil unions or even civil marriage for same-sex couples. Yet others will choose to maintain the status quo. We leave the definition of marriage to religious interpretation and implementation by our great and multiple religious traditions. Americans are free to choose whatever religion they wish. Likewise, our national government has tolerated differences among the States for our entire history. This is no justification for preemptively declaring war on gay and lesbian Americans or tacking a statement of intolerance onto the Constitution of the United States. We need not – and

we must not – allow tinkering with the Constitution to become merely the latest election year tool. We should reject this amendment, and we should reject wedge politics.

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Testimony
United States Senate Committee on the Judiciary
A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

The Honorable Marilyn Musgrave
United States Representative ,

STATEMENT OF U.S. REPRESENTATIVE MARILYN MUSGRAVE

"A Proposed Constitutional Amendment to Preserve Traditional Marriage"

United States Senate
Committee on the Judiciary

Tuesday, March 23, 2004, 10 a.m.
Russell Senate Office Building Room 325

Chairman Cornyn, Ranking Member Feinstein and other distinguished members of the United States Senate, thank your for the opportunity to come before you today.

As the lead sponsor of the Federal Marriage Amendment in the U.S. House of Representatives, I have spoken with Americans across the country about the importance of defending the traditional institution of marriage. I have spoken with legal experts across the political spectrum who agree that the traditional definition of marriage is likely doomed unless we amend the Constitution.

I have spoken with family counselors who believe that children are best raised in the shelter and protection of a mother and father who are married. I have spoken with well meaning Americans who love and respect all people, and certainly bear no ill will towards any particular population or group and yet who also revere, respect and tenaciously hold to the traditional definition of marriage.

But, I must say that of all the people I have met on this journey, I have been most impressed and most stirred by the leaders who have taken such a stand in defending marriage in their home states. These people are not from Washington. They are simply local leaders, trying to solve the problems that they see in their communities.

I have been stirred to action by the thirty-eight states that have passed Defense of Marriage Acts, reserving marriage as a union of a man and a woman. Since this issue was forced on the American people and their elected representatives, thirty-eight states have taken clear action to nail down our collective understanding of what marriage is. The intent of the other twelve states has not changed over the last 200 years, either.

In fact, I will go farther than that. To date, not one, not one single state has legislatively enacted gay marriage. However we see four Supreme Court justices in Massachusetts forcing a redefinition on their body politic and forcing the rest of the nation to take note. Since the action in the Massachusetts court, local officials in various states (even states with Defense of Marriage Acts) are blatantly ignoring the rule of law and being disrespectful to the legislative process.

Clearly there is no national outcry to redefine marriage. Even in the three states that enacted some form of contract law for homosexuals in relationships, the legislatures went out of their way not to

redefine marriage. So why is the traditional definition of marriage now under attack? Because activist courts are ignoring the rule of law and their duty to uphold the separation of powers doctrine and are forcing this on the American people against their will.

Just look at what happened in Hawaii and Alaska after their high courts acted in a similar way. The people of those respective states rose up and by a vote of more than 60% amended their state constitution to protect the traditional definition of marriage. In fact, in every state that the definition of marriage has been put to a direct vote of the people anywhere from 60 to 70 % voted to preserve marriage as the union of a man and a woman.

Even with this action in the states, state and federal judges are not stopping their attack. In fact, the opposite is true. State and federal judges are increasing their attacks in many states. They are even threatening state marriage definitions in federal courts.

As a former state lawmaker, I honor and cherish state lawmaking. States generally deserve more, not less power to make law. However, in this case, if no effective Congressional action takes place we will be leaving state lawmakers with no options to preserve what every state clearly wants as their law. State and federal activist judges will not stop until a national marriage definition is legislated from the bench. In our country, this is unacceptable! The American people deserve to have a say in this important issue.

The bottom line is, I trust the American people and their elected representatives to help guide this great nation of ours.

Take, for example, Rev Richard Richardson. I know you have heard him, Mr. Chairman, when he testified a few weeks ago before a subcommittee hearing and I am glad that he is here before this committee today. Reverend Richardson is an ordained minister in the African Methodist Episcopal Church in Boston. He is also Director of Political Affairs for the Black Ministerial Alliance of Greater Boston and the Director of Political Affairs for the Black Ministerial Alliance of Greater Boston. He is also the President and CEO of Children's Services of Roxbury, a child welfare agency. Not only has he worked in the field of child welfare for almost fifty years, he has been a foster parent himself for twenty-five years.

I met him recently and I would like to quote a statement of his:

"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."

Those are powerful words from Rev Richardson about the importance of the traditional institution of marriage to the African-American community. He is a member of a community that knows what discrimination is – and he speaks with a special moral authority when he says that marriage is about

the needs of children and society, not about discrimination.

Reverend Richardson testified before the United States Senate a few weeks ago saying:

"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?"

Mr. Chairman, of course this issue is not about discrimination. For the African-American community – for every American community – marriage is about the needs of children and society.

It is important that the American people and member of Congress revere our founding charter with the reverence and respect that it so clearly deserves. No one seeks to amend the Constitution casually. I know that all of the members of the Congressional Black Caucus are struggling with the Federal Marriage Amendment, but they know how important the traditional institution of marriage is to all Americans regardless of race, culture or religion.

I'll quote Congressman Artur Davis, a Democrat from Alabama and member of the Congressional Black Caucus. He said recently:

"I have not made a decision on the constitutional amendment...When I see mayors announcing that they will violate the law, it raises the point and puts the country and the Congress in a difficult position."

A difficult position indeed, Mr. Chairman. However, Congress has a duty to watch developments in the states and to help promote the rule of law and our system of government with elected representatives of the people debating and crafting the laws of our various states.

This whole debate, although now necessary, was not initiated by any member of Congress. However, many of us have come to the reluctant conclusion that the legal experts across the political spectrum are right. The only way to preserve traditional marriage is a constitutional amendment.

When the other side says that we are guilty of "writing discrimination into the Constitution," I am offended on behalf of people like Rev. Richardson and other members of the minority community.

Furthermore, this accusation cheapens the debate and shows disrespect to all those who are trying to have a meaningful public discussion about how our laws are made.

You would have to logically assume that former President Bill Clinton was also being discriminatory when he signed the federal Defense of Marriage Act in 1996.

And what about the other 150 Congressional Democrats (both members of the House and Senate) who voted for the 1996 Defense of Marriage Act? Did they act to codify discrimination? Was over two-thirds of Congress in 1996 filled with animosity toward anyone? I think not.

Reasonable observers would agree that such a charge is blatantly and fundamentally wrong and distracts from the very real issue that we are all forced to deal with. If Congress does nothing, the courts will have redefined our definition of marriage that is over 200 years old, without the approval or consent of the American people.

Let me be clear, when I hear the accusations of discrimination, my resolve only grows stronger on this issue. And from what I have seen, this brings members of the minority community that have been truly discriminated against rallying to support the Federal Marriage Amendment

The American people are sophisticated enough to know that the accusation of discrimination is false. Those of us that support marriage as a union between a man and a woman have very little choice. Either do nothing and surrender the traditional definition of marriage or defend it against unfounded charges of discrimination and amend the U.S. Constitution to ensure that no court will easily abolish it.

Thank you Mr. Chairman.

Testimony
United States Senate Committee on the Judiciary
A Proposed Constitutional Amendment to Preserve Traditional Marriage
March 23, 2004

Reverend Richard Richardson
Assistant Pastor, St. Paul African Methodist Episcopal (AME) Church , Director of Political Affairs, The Black Ministerial Alliance of Greater Boston

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 Leahy, Senators, 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.

In addition, I am joined by hundreds of African-Americans who came to show their support for the Federal Marriage Amendment at an Alliance For Marriage press conference yesterday. Many of the largest African-American denominations in America were represented at that press conference. Indeed, the Federal Marriage Amendment has been endorsed by two of the largest African-American denominations in the United States, representing millions of African Americans – the African Methodist Episcopal Church (AME) and the Church of God In Christ (COGIC). The AME has 1.2 million members. COGIC has over 8 million members.

So it is a broad cross-section of the African-American community that has come to support the federal marriage amendment. And I must say that we didn't come to this conclusion lightly. I never thought that I would be here in Washington, testifying before this distinguished committee, 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 just 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 just 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?

But I am doubly offended when people accuse supporters of traditional marriage of "writing discrimination into the Constitution." It's bad enough that they are making false charges of discrimination against the vast majority of African-Americans – indeed, the vast majority of all Americans. Marriage is about children – but activist lawyers are convincing activist judges that marriage is about discrimination. And every time they say that the federal marriage amendment "writes discrimination into the Constitution," they are also saying that traditional marriage must be abolished by courts. So it's not just that they want to silence us – they also want to write our values out of the Constitution as well. Mr. Chairman, African-Americans know what it's like to be written out of the Constitution. Please don't take us out of the constitutional process.

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. Let me be the first to say that 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 committee 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, the Cambridge Black Pastor's Conference, the African Methodist Episcopal Church, the Church of God In Christ, 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.

TESTIMONY OF KATHERINE SHAW SPAHT
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"A Proposed Constitutional Amendment to Preserve Traditional Marriage"

United States Senate Committee on the Judiciary
Tuesday, March 23, 2004, 10 a.m. – Senate Russell Office Building Room 325

Mr. Chairman, Ranking Minority Member Leahy, members of the committee – thank you for the opportunity to testify today. As a law school professor who has devoted over thirty-years of her life to the study of family law, I cannot imagine a more important topic for this committee and for the United States Senate to consider than the institution and definition of marriage. In my home state of Louisiana, I have worked hard to strengthen the institution of marriage. I have served as the reporter for the Revision of the Law of Marriage of the Louisiana State Law Institute since 1981. I am a longtime active member of the American Law Institute's Committee on the Principles of Family Dissolution. In 1997, I helped draft Louisiana's landmark covenant marriage legislation. So the defense of marriage is not a new topic for me – it is my life's work.

I can honestly tell this committee that, when I entered the area of family law over thirty years ago, I never imagined that I would be here in the United States Senate, endorsing a constitutional amendment defining and defending the traditional institution of marriage. With all my years working at the state legislative level, I am well aware of the prominent role that the states play in the area of family law. So it is fair to ask: Why do I support the federal marriage amendment?

Law professors are fond of giving long-winded answers, and in my written testimony, I try to provide a more extensive response. But the answer is really quite simple: If this body does not approve a federal constitutional amendment defending marriage, the courts will take this issue away from the American people, and they will abolish traditional marriage. It is really that simple. It is, with regret, my considered legal opinion that the courts have left us with no middle ground for this body and for the American people. I see that over three-fourths of this body – including the distinguished Ranking Minority Member, Senator Leahy – voted for the federal Defense of Marriage, which defined marriage as the union of one man and one woman for purposes of federal law. If those votes sincerely expressed the views of members of Congress, then the only choice you have is to support a federal constitutional amendment.

Until the last few months, every citizen in this country shared a common understanding of what marriage is, *a social institution*, consisting of a union of a man and a woman. Every dictionary defines marriage in those well understood, millennia-old terms. As a public institution, marriage serves society's most basic function – the acculuration of children, which is a time-intensive, exceedingly expensive proposition – marriage serves that societal purpose efficiently, and we have all understood it to be a union of a man and a woman. A union that biologically is the only one that can create the children that must be acculurated if we as a society are to survive. In my thirty years of experience in family law, I can attest that the traditional institution of marriage is important in every American community – across different races, cultures, and religions.

I was moved by the testimony of Reverend Richard Richardson and Pastor Daniel de Leon at the last hearing. They explained that, as far as their communities are concerned, marriage is not about discrimination – it's about children. And of course they are right. But there are law professors, lawyers, and judges who clearly view things differently. Those who say that the federal marriage amendment "writes discrimination into the Constitution" clearly believe that traditional marriage *must* be abolished by courts. For the rest of us – the vast majority of Americans who respect and love all people, as well as the institution of marriage – we are left with no middle ground, no other option than to either acknowledge defeat and give up traditional marriage, or support a constitutional amendment defending it.

Despite these false charges of discrimination, there seems to be bipartisan consensus that the traditional definition of marriage is worth defending – and worth defending at the federal level and at the constitutional level. The federal Defense of Marriage Act was signed by President Clinton with the support of over three-fourths of the Senate. The federal marriage amendment was first introduced by a Democrat in the House. And I notice that, in previous hearings, Democratic witnesses have agreed with Republican witnesses in supporting at least *some version* of a constitutional amendment defending (if not defining) marriage – including Rev. Richard Richardson, Professor Dale Carpenter, and Chuck Muth.

There also seems to be bipartisan consensus that, without a constitutional amendment, traditional marriage laws across the country – including the federal DOMA – will likely be invalidated by activist judges around the country. Indeed, that is already happening. And the reason is simple. I have carefully examined the Supreme Court's recent decision in ***Lawrence v. Texas***. That decision gives activist courts and local officials all the excuse they need to abolish traditional marriage laws nationwide. In *Lawrence*, the Court stated that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." The Court specifically identified "marriage" as a federal constitutional issue, and analyzed it, if not explicitly in terms of equal protection, nonetheless in terms of discrimination. Not once did the Court indicate that marriage is about children – and not about adult love, or discrimination. Indeed, at least one Supreme Court justice has *already* taken the position that traditional marriage laws may infringe upon the right of privacy and thus *must* be abolished by courts. In 1974, **Justice Ruth Bader Ginsburg** wrote that any polygamy law or by inference any other traditional marriage law "is of questionable constitutionality since it appears to encroach impermissibly upon private relationships."[1]

Because activist lawyers and judges see marriage as about discrimination, rather than about children, courts have begun to abolish traditional marriage laws under *Lawrence*. Just look at the **Massachusetts court**. Rather than affirm traditional marriage, it characterized it as a "stain" on our laws that must be "eradicated" by judges. It recognized that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman," language virtually identical to that in the *Lawrence* decision. Not

[1] Ruth Bader Ginsburg & Brenda Feigen Fasteau, *Report of Columbia Law School Equal Rights Advocacy Project: The Legal Status of Women under Federal Law* 190-91 (1974).

surprisingly, just as the Supreme Court in the *Lawrence* decision rejected those convictions as a consideration in deciding what constitutes the protected "liberty" interest, the *Goodridge* court found "*no rational reason*" for such laws, and said that traditional marriage is "*rooted in persistent prejudices*" and based on "*invidious discrimination.*" It even suggested that "[i]f ... the Legislature were to jettison the term 'marriage' altogether, it might well be rational and permissible." And throughout its analysis, the court in the *Goodridge* case repeatedly and consistently relied on federal constitutional law and the *Lawrence* decision.

The nation's top constitutional law scholars don't often agree, but in this area, there appears to be a rare consensus. **Harvard Law School Professor Laurence Tribe** has said that "You'd have to be tone deaf not to get the message from *Lawrence*" that traditional marriage laws are now "constitutionally suspect."[2] Tribe has said that under *Lawrence* marriage is now "a federal constitutional issue," and predicts that the U.S. Supreme Court will follow the Massachusetts court.[3] Another constitutional law expert, **Yale Law School's William Eskridge**, has said that "Justice Scalia is right" that *Lawrence* signals the end of traditional marriage laws.[4] Eskridge has repeatedly stated that, under the Court's rulings, "DOMA is unconstitutional."[5] **Erwin Chemerinsky** has similarly written that "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in *Lawrence*."[6]

And of course, my fellow panelist, **Professor Cass Sunstein**, has expressed the view that "the ban on same-sex marriages is unconstitutional."[7] Prof. Sunstein testified as early as 1996 – even before *Lawrence* – that courts would strike down the federal Defense of Marriage Act. He testified that "there is a big problem under the equal protection component of the due process clause, as construed just a few weeks ago by the U.S. Supreme Court in *Romer v. Evans*."[8] Prof. Sunstein has argued that "the prohibition on same-sex marriages, as part of the social and legal insistence on 'two kinds,' is . . . deeply connected with male supremacy,"[9] and "has everything to do with constitutionally unacceptable stereotypes about the appropriate roles of men and women."[10] He has said that "Massachusetts [got] it right."[11] Notably, he has said that "the [Massachusetts] court drew some support from federal precedents."[12]

There is, of course, no way to prevent what has been predicted by these professors other than a federal constitutional amendment. As Senator Cornyn has correctly noted, throughout history we have approved a number of constitutional amendments to reverse judicial decisions with which the American people disagree. The reason why the defense of marriage is a federal issue, and

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[2] Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling With Sodomy Law Decision*, New York Times, Nov. 19, 2003 (quoting Laurence Tribe).
[3] National Public Radio, Nov. 18, 2003 (quoting Laurence Tribe).
[4] Tom Curry, *Gay rights loom large on U.S. agenda*, MSNBC.com, August 5, 2003 (quoting William Eskridge).
[5] Tom Curry, *Gay rights loom large on U.S. agenda*, MSNBC.com, August 5, 2003 (quoting William Eskridge).
[6] Erwin Chemerinsky, *October Term 2002*, 6 Green Bag 2d 367, 370-71 (2003).
[7] Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 768 n.96 (1993).
[8] *The Defense of Marriage Act*, S. Hrg. 104-533 (1996) (testimony of Cass R. Sunstein).
[9] Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 20 (1994).
[10] Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind. L.J. 1, 21 (1994).
[11] Cass R. Sunstein, *Federal Appeal*, The New Republic 21 (2003).
[12] Cass R. Sunstein, *Federal Appeal*, The New Republic 21 (2003).

not a state issue, is simple: Because the courts have made it a federal issue. My written testimony goes even further, by explaining why in any event, family law has largely been federalized for some time now. I will not belabor the point here, but simply ask that that written testimony be submitted for the record. And with that, I would be happy to answer any questions the committee may have. Thank you.

Why not permit states to define marriage in state law?

Even though the subject matter of marriage and family law has historically been left to the states, the differences among states' laws (other than divorce laws, which narrowed after *Williams v. North Carolina* in 1942 and now are very similar) have varied at the edges of the common understanding of marriage – can first cousins marry? is a blood test required? who can perform the ceremony? But the core common understanding of marriage – that marriage bridges the differences in the sexes, a bridge that is essential to procreation – has never been touched, until now.

State experimentation as fifty individual laboratories has not been permitted when the question is as fundamental as what is marriage. Consider the examples in the *Wall St. Journal* opinion editorial by Ed Meese. We don't permit a state to experiment with socialism or printing its own currency. Denying such experimentation is especially prevalent if there is concern for the welfare of children – such as Congress' response to the aftermath of the divorce revolution in the 1980's and low, inconsistent child support awards. Congress enacted laws essentially requiring the states to adopt child support guidelines and more recently efficient uniform child support collection mechanisms. Children's welfare is central and at stake in a common understanding of marriage.

Furthermore, it is not as if marriage law has not been increasingly a concern of a branch of the federal government. *U.S. v. Reynolds* concerned Congress' regulation of marriage in the territory of Utah and whether polygamy as a religious practice was protected by the constitutional provision respecting the free exercise of religion. Marriage as a union of one man and one woman unaffected by religious practice was affirmed – a common, and most (but surely not all) would argue, fundamental understanding about the meaning of marriage. But, NOT as fundamental, or at the heart or core of marriage, as the understanding that marriage is a union of a man and a woman. Marriage is a societal method for managing heterosexual bonding. Or as we now even more clearly understand and uniformly acknowledge, the need a child has for his mother and his father.

The *Reynolds* case is surely not the only example of the federal judiciary's concern with and affecting of a state's (territory's) law of marriage. In a series of more recent cases the court as a federal instrumentality affected marriage with *Loving v. Virginia* declaring unconstitutional a Virginia statute prohibiting interracial marriages; *Zablocki v. Redhail* striking down a Wisconsin statute regulating entry into marriage by a person owing child support; and subsequently, *Turner v. Safley* declaring a Nevada prison regulation of the marriage of inmates unconstitutional.

Why a state definition of marriage in a statute or state constitutional provision may not survive even if state experimentation was desirable?

With the "right to marry" as a fundamental right guaranteed by the Fourteenth Amendment's "liberty" clause, the definition of what is marriage within that context is ultimately within the purview of the United States Supreme Court. A state statutory definition, even a state constitutional definition of marriage, may not survive even if state experimentation were desirable. In *Turner v. Safley,* the description of the aspects of marriage inmates in prison continue to enjoy, contains no mention of children whatsoever in the description. Nonetheless, until the Supreme Court's decision in *Lawrence v. Texas* less than a year ago, I relied on *Bowers v. Hardwick* to anchor the "liberty" interest, the fundamental right to marry, in the history and traditions of our country (reaffirmed to an extent in footnote 6 in *Michael H. v. Gerald D.*) – thus the right to marry could only be defined as the right of one woman to marry one man. After the *Lawrence* decision explicitly overruled *Bowers*, the court unmoored the "liberty" interests. "Liberty" defined in *Lawrence* is a radical right of individual autonomy without the tempering language of "the common good." This radical right of autonomy has been substituted for the anchor of earlier interpretations of "liberty," our country's history and traditions. I can no longer predict what the definition of marriage will be. My state's statutory definition of marriage is at risk as would be my state's constitutional definition. The federal statutory definition of marriage in DOMA is at risk. In fact *Lawrence v. Texas* poses a potential and serious threat to virtually the entire body of state statutory family law, law which regulates marriage and the family and often elevates the "best interest of the family" over that of any individual member.

Let the People Decide

Ultimately, what the proponents of the FMA are asking is simply, let the American people decide if marriage should be remain defined as a union of a man and a woman. The issue of what should be the definition of marriage is not a difficult, hyper technical, or legally complicated one. The American people can easily understand what it is that they are asked to consider. The process of amendment is purposefully difficult, potentially tedious and lengthy. If the American people are not permitted to decide the meaning of the word "marriage," the judiciary, state judges and ultimately the United States Supreme Court, will decide for us. And, among the judiciary, many individual judges at the state and federal level, are openly hostile to traditional marriage and the deeply held convictions of the majority of the American public. they are ready to redefine marriage, if not immediately in the near future. Even though, as the Supreme Court in Lawrence opines, it is unwilling to consider the deeply held moral and religious convictions of American citizens, in interpreting our Constitution, the Court may instead consult the laws of other countries--such as the Western European countries who have adopted laws redefining traditional marriage--or international declarations crafted and released by international bodies, including the United Nations.

Furthermore, those same judges often are highly disdainful of the People's decision making ability. Although the simple act of a majority of judges of a single court ordering the legislature to enact particular legislation is astounding in light of the separation of powers recognized in both state and federal systems, how much more astounding is it to find in those same opinions (Baker v. Vermont and Goodridge v. Massachusetts) sincere reluctance to permit the legislature, who represent the People, ANY limited prerogative afforded it by the court. You need only look at the dissenting opinion in Baker v. Vermont decided in 1999 to find an example in which a

dissenting judge urged the majority not to offer the citizens of Vermont the option in the legislative arena to consider another legal relationship with the rights of traditional marriage.

The only safety that can be afforded traditional marriage is the safe harbor of the United States Constitution, but only if the People of this country decide to create it. Why not ask the People themselves, directly? We do not have to rely on a court's unscientific determination of whether the opinion of the People has evolved to the point of relinquishing the common understanding of traditional marriage. After all, should we leave the issue to the courts, the moment in time is chosen by the litigants. Let the People decide; they will do so in a localized venue where both proponents and opponents have realistic options by which to exert influence and to persuade those making the decision. Only those issues about which there is a substantial and sustained consensus are ultimately resolved by a constitutional amendment. Is marriage worthy of that national focus and resulting debate? Yes--never more so than at this point in our nation's history. We, the citizens, need to know if we live in and can rely on a strong marriage culture focused on the welfare of children free from the risk of experimentation.

Let them vote. That is all we ask--let the People vote.

Statement of Cass R. Sunstein

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Before the United States Senate

Committee on the Judiciary

On Amending the Constitution to Define Marriage

March 23, 2004

Statement of Professor Cass R. Sunstein
University of Chicago

I am grateful to have the opportunity to appear before you today to discuss some of the legal questions raised by the proposal to amend the Constitution to ban same-sex marriages. My basic conclusion is that from the standpoint of the constitutional structure, the proposed amendment is an unfortunate idea. Our constitutional traditions demonstrate that change in the founding document is appropriate only on the most rare occasions -- most notably, to correct problems in governmental structure or to expand the category of individual rights. The proposed amendment does not fall in either of these categories. Those who endorse the amendment fear that if one state recognizes same-sex marriages, others will be compelled to do so as well. But the fear is unrealistic; the federal system permits states to refuse to recognize marriages that violate their own policies. In short, the existing situation creates no problem for which constitutional change is the appropriate solution.

My testimony comes in two parts. The first explores constitutional amendments in general. The second responds to the suggestion that an amendment is necessary to eliminate the possibility that activist judges, at the federal or state level, will impose same-sex marriages on states that do not wish to recognize them.

I. The American Tradition of Constitutional Amendment

A. Stability and Passion: The View from the Founding

By intentional design, the Constitution is exceedingly difficult to amend. James Madison outlined the basic reasons. In the Federalist No. 43, he noted that amending the Constitution must not be made so difficult as to "perpetuate its discovered faults." But he warned "against that extreme facility" of constitutional amendment "which would render the Constitution too mutable." In the Federalist No. 49, he elaborating the point, stressing that amendment should be reserved for "certain great and extraordinary occasions."

Madison's thinking on this count had two principal strands. First, the national Constitution should be stable; a well-functioning republic works best if the text of the underlying framework remains essentially fixed. Thus Madison wrote that "the greatest objection of all" is that constitutional amendment would threaten "the constitutional equilibrium of the government." Second, and more subtly, constitutional change creates the serious "danger of disturbing the public tranquility by interesting too strongly the public passions" in the issues proposed for constitutional change. Madison emphasized that the founding document had been adopted in a truly extraordinary period, "which repressed the passions most unfriendly to order and concord," and "which stifled the ordinary diversity of opinions on great national questions." The result was to ensure that "no spirit of party, connected with the changes to be made, or the abuses to be reformed," could distort the process. Madison thought that no "equivalent security" could be found

in "future situations" – that in ordinary political life, "passions" that were "unfriendly to order and concord" could break out in constitutional debates. In Madison's view, constitutional change should be reserved for "great and extraordinary occasions" to keep our founding document stable and to reduce the level of national polarization and conflict.

B. Amendment Traditions: Rights and Structure

Since its ratification in 1789, the Constitution has been amended only twenty-seven times. Nearly every amendment falls into one of two categories. Most of them expand individual rights. The rest attempt to remedy problems in the structure of the government itself. Thus the nation has developed, over time, a firm tradition governing constitutional amendment, a tradition that elaborates Madison's concerns by restricting fundamental change to two categories of cases.

The first ten 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 punishment. In the aftermath of the Civil War, three new amendments were ratified: to prohibit slavery, to guarantee African-Americans the right to vote, and to assure everyone a panoply of rights against state governments, including the "equal protection of the laws." During the twentieth century, a number of constitutional amendments have expanded the right to vote, which has become a centerpiece of the amendment process. Thus for example, the franchise was granted to women (1920) and to 18-year-olds (1971); poll taxes were forbidden in federal elections (1964); and the District of Columbia was granted representation in the Electoral College (1961).

Many other amendments fix problems in the structure of the government, sometimes by filling gaps in the original document, sometimes by increasing the democratic character of our basic charter. 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 (and thus solved what the nation believed to be an important defect in the original document). A 1951 amendment, responding to Franklin Roosevelt's four terms as president, bans the president from serving more than two terms. A related amendment from 1967 specifies what happens in the event that the president dies or becomes disabled while in office. This amendment, like those just discussed, makes a clarification or correction to structural defects in the Constitution as originally designed.

Only two amendments fall unambiguously outside of the defining categories of expanding individual rights and responding to structural problems. Ratified in 1919, the 18th Amendment prohibits the sale of "intoxicating liquors." Ratified in 1933, the 21st Amendment repeals the 18th.

C. Theory and Practice: Stability, Polarization, and Clarity

What accounts for our remarkable unwillingness to amend the Constitution except to expand rights and to fix structural problems? The simple answer borrows from Madison. From the founding period, Americans have prized constitutional stability. The nation has 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. More than that, Americans have feared that large-scale constitutional debates could lead not only to ill-considered change but could also split and polarize the country. When our citizens differ, we use the other institutions that we have, not constitutional reform. And when the nation's citizens and leaders object to trends within the Supreme Court, or within other institutions of the federal or state government, they have almost always avoided constitutional amendment, even on concrete issues on which they feel deeply.

In the 1930s, for example, President Franklin Delano Roosevelt was repeatedly rebuffed by an aggressively conservative Supreme Court, which endangered the legislation of his New Deal. Change was made not through constitutional amendment, but through the democratic process, which eventually helped lead to dramatic alterations in constitutional understandings.[1] In the 1960s, President Richard Nixon sharply challenged an aggressively liberal Supreme Court; change was made not via constitutional amendment, but through political processes, which led the Court to shift its direction. The examples could easily be multiplied. More recently, the Constitution has not been amended in the face of many controversial Supreme Court decisions – protecting the right to choose abortion and striking down campaign finance regulation, the Violence Against Women Act, the Religious Freedom Restoration Act, and many more. (Indeed the Rehnquist Court has struck down more than two dozen Acts of Congress in recent years, and none of these invalidations has spurred serious calls for constitutional amendment.)

In short, the nation has built firmly on Madison's judgment about the need for caution in altering the founding document. The result was been to create a kind of common law tradition of constitutional change, reserving alterations to expansions in fundamental rights or to remedying important problems in governmental structure.

There is an equally general point in the background. Many constitutional amendments raise novel and complex questions of interpretation, in a way that produces grave uncertainty and a potentially significant increase in federal judicial power. Many American citizens, though committed to equal rights for women, opposed the proposed Equal Rights Amendment on the ground that it would create interpretive difficulties, amount to a bonanza for the legal profession, and produce unanticipated and unintended outcomes from the federal bench. The same arguments were made, plausibly, by critics of the proposed Balanced Budget Amendment. Any amendment dealing with family law is likely to create serious difficulties in this vein.

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[1] This process is discussed in Cass R. Sunstein, The Second Bill of Rights (forthcoming June 2004).

Consider two recent proposals. The language of the Musgrave/Allard proposal says that neither federal nor state constitutions, 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." Any lawyer is likely to wonder: What is meant by "the legal incidents thereof"? Does this provision ban civil unions? Does it forbid states from allowing people in same-sex relationships to have the (spousal) right to visit their partners in hospitals? Does it bear on rules governing insurance? At first glance, the term "legal incidents thereof" appears to forbid states from making cautious steps in the direction of permitting civil unions. And does the word "require" include "permit"? Or consider the recent Allard amendment, which says that neither the federal Constitution nor any state Constitution shall be construed to require that marriage or "the legal incidents thereof" must be "conferred" on same-sex marriages. The most serious difficulty is that the words "legal incidents thereof" raise the same questions about civil unions and spousal benefits and privileges.

These questions are merely illustrative of the grave difficulties of drafting a constitutional provision that does not produce unintended confusion. Such difficulties buttress the argument for reserving constitutional change to "great and extraordinary occasions."

II. Same-Sex Marriage: A Problem Requiring Amendment?

None of these points shows that the Constitution should **never** be amended for reasons that fall outside of the two basic categories that define our amendment tradition. We could certainly imagine situations in which the citizenry believed that formal amendment was necessary (for example) to overrule a damaging and egregiously wrong Supreme Court decision or to correct serious and otherwise irremediable blunders at the state level.

In this light, the impetus for the proposed amendment is easy to understand.[2] The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const., art, IV, section 1. Suppose that one state – Massachusetts, for example -- recognizes same-sex marriages. Is there not a danger that other states, whatever their views, will be forced to accept same-sex marriages as well? Perhaps people will travel to Massachusetts, marry there, and effectively "bind" the rest of the union to one state's rules, forcing all states to recognize marriages that violate their policies and judgments. A national solution might seem necessary if one state's unusual judgments threaten to unsettle the practices of forty-nine other states. This is the hypothetical scenario that motivates some people to favor constitutional change.

[2] In the next few paragraphs I draw on my testimony before this committee eight years ago. See Statement of Cass R. Sunstein on the Defense of Marriage Act, Committee on the Judiciary, July 11, 1996. There I argued that the Defense of Marriage Act was constitutionally ill-advised, mostly because ordinary conflicts of law principles would permit states to refuse to recognize same-sex marriages.

A. Marriage and Public Policy

The response to the underlying fear here is simple. The hypothetical scenario is unlikely in the extreme. The central reason is that the full faith and credit clause has never been understood to bind the states in this way. For over two hundred years, states have worked out issues of this kind on their own. It is entirely to be expected that in a union of fifty diverse states, different states will have different rules governing marriage. American law has established practical strategies for ensuring sensible results in these circumstances, as each state consults its own "public policy," and its own connection to the people involved, in deciding what to do with a marriage entered into elsewhere. In short: States have not been bound to recognize marriages if (a) they have a significant relation with the relevant people and (b) the marriage at issue violates a strongly held local policy. In the particular context of marriages (involving licenses rather than formal judicial judgments), states have had room to pursue policies of their own.[3]

Thus, for example, the first Restatement of Conflicts says that a marriage is usually valid everywhere if it was valid in the state in which the marriage occurred. But section 132 lists a number of exceptions, in which the law of "the domicile of either party" will govern: polygamous marriages, incestuous marriage, marriage of persons of different races, and marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state. The Second Restatement of Conflicts, via section 283, takes a somewhat different approach. It says that the validity of a marriage will be determined by the state that "has the most significant relationship to the spouses and the marriage." It also provides that a marriage is valid everywhere if valid where contracted unless it violates the "strong public policy" of another state that had the most significant relationship to the spouses and the marriage at the time of the marriage. Thus a state might refuse to recognize incestuous marriages, polygamous marriages, or marriages of minors below a certain age.

The two Restatements show that it is a longstanding practice for interested states to deny validity to marriages that violate their own public policy. For example, a state need not recognize a marriage that it deems incestuous, even if that marriage was valid in the state in which it was performed. See, e.g., Osoinach v. Watkins, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle) Petition of Lieberman, 50 F. Supp. 120 (EDNY 1943) (marriage between niece and uncle). In Osoinach, the Court quoted a general authority on the basic rule:

In Corpus Juris, Vol. 38, § 3, p. 1276, the rule as what law governs in determining the validity of marriage is thus stated: "The general rule is that validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the lex loci contractus, it will be held invalid wherever the question may arise. An exception to the general rule, however, is ordinarily made in the case of marriages

[3] Even in the context of judicial judgments, a state's own policies are relevant to the operation of the Full Faith and Credit Clause. See, e.g., Hughes v. Fetter, 341 US 609, 612 (1951); Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 US 493, 502 (1939); Alaska Packers Ass'n v. Industrial Accident Commission, 294 US 532 (1935).

repugnant to the public policy of the domicile of the parties, in respect of polygamy, incest, or miscegenation, or *otherwise contrary to its positive laws."*

Id. (emphasis in original). Under the same principle, states may refuse to recognize marriages by a person who has recently divorced, if such marriages violate their public policy. See Horton v. Horton, 198 P. 1105 (Ariz. 1921); Lanham v. Lanham, 117 N.W. 787 (Wisc. 1908). Many cases have reflected a general view of this kind. See, e.g., In re Vetas's Estate, 170 P.2d 183 (1946); Maurer v. Maurer, 60 A.2d 440 (1948); Bucca v. State, 43 N. J. Super 315 (1957); In re Takahashi's Estate, 113 Mont. 490 (1942); In re Duncan's Death, 83 Idaho 254 (1961); In re Mortenson's Estate, 83 Ariz. 87 (1957). There is no Supreme Court ruling or even suggestion to the effect that this view violates the Full Faith and Credit Clause.

All this demonstrates that the proposed amendment would respond to an old and familiar problem that has heretofore been settled through long-settled principles at the state level and without federal intervention.[4] If some states do recognize same-sex marriage, the problem would be handled in the same way that countless similar problems have been handled, via "public policy" judgments by states having significant relationships with the parties. Different "public policies" will produce different results. This is consistent with longstanding practices and with the essential constitutional logic of the federal system. In the area of marriage, states have always been authorized to adopt diverse practices, consistent with the norms and values of their citizens. What one state has not been allowed to do is to bind other states to its preferred norms and values. Hence the hypothetical scenario rests on a misunderstanding of the applicable legal principles.

Might federal courts invalidate, on either grounds of equal protection or privacy, state court refusals to recognize same-sex marriages? Under existing law, it would not be frivolous to argue that such refusals are a form of discrimination, raising serious problems under the equal protection clause (a question discussed below). But there is a large distance between "not frivolous" and "likely to be convincing to current federal judges." If federal courts accepted this argument, and ruled that the Constitution prohibits states from discriminating against same-sex marriages in this way, they would be essentially ruling that the Constitution requires states to recognize same-sex marriages. No such ruling should be anticipated.

B. The Defense of Marriage Act

The Defense of Marriage Act (DOMA), 28 USC 1738C, attempts to anticipate and to prevent the hypothetical scenario, expressly freeing states from whatever obligation they might have to recognize same-sex marriages. I have suggested that

[4] While the conclusion is clear, the Supreme Court has not offered an explanation. Perhaps the answer lies in the fact that a marriage is in the nature of a contract, and hence it is not a "public Act, Record, [or] judicial Proceeding" within the meaning of the Full Faith and Credit Clause. Perhaps marriages count as licenses entitled to less authority within states that have a strong connection with one or both of the parties. Perhaps the answer lies in the longstanding view, present even in cases involving "judgments," that a state with a clear connection with the parties and strong local policies need not defer to another state's law. In any case the conclusion is straightforward. Hence there is no reason to change the constitution.

DOMA is unnecessary to produce this result; but if DOMA is taken in accordance with its terms, the scenario will not transpire. Some people urge that federal judges will strike down DOMA, and they are right to speculate that constitutional objections might be mounted.[5] Notably, however, no such challenge has been made, and even if it were successful, the preceding discussion suggests that the hypothetical scenario would be most unlikely to occur.

In Romer v. Evans, 517 US 620 (1996), the Court did invalidate a unusual amendment to the Colorado Constitution, one that forbade state and local government from outlawing discrimination on the basis of sexual orientation. But Romer was an exceedingly cautious and narrow ruling, one that cannot plausibly be read to say that states must recognize same-sex marriages. In its most recent pronouncement, Lawrence v. Texas, 123 S. Ct. 2472 (2003), the Court invalidated a law making same-sex sodomy a crime. But the Court went out of its way to say that its ruling did not extend to the question of same-sex marriage. In my view, Lawrence is best understood as a narrow decision invalidating an outmoded law that no longer had support in public convictions, as reflected in a pattern of nonenforcement.[6] So understood, or even if understood more broadly, Lawrence does not call for striking down DOMA.

But the more fundamental point is the one I have been emphasizing. Even if DOMA were invalidated, the longstanding tradition, outlined above, would be unaffected: States would be permitted to decline to recognize same-sex marriages that are inconsistent with their own policies.

C. Judicial Activism

Many proponents of the proposed amendment have voiced concerns about "activist judges," and especially about activist judges at the federal level, reading the federal Constitution to require states to permit same-sex marriages. I share this general concern. In the domain of family law, as elsewhere, judges should tread cautiously. This point is especially important for federal judges interpreting the national Constitution. At least if issued by the Supreme Court, such interpretations are final and binding until they are overruled, either by the Court itself or by constitutional amendment. Even those who favor same-sex marriages, or who do not object to them, should be skeptical about the idea that federal courts should require states to recognize them.

But here too the underlying concern is hypothetical in the extreme. No federal judge has said -- not once -- that the existing Constitution requires states to recognize same-sex marriages. No member of the Supreme Court has indicated that the equal protection clause imposes such a requirement. In both Romer and Lawrence, the Court has issued narrow, cautious rulings. To be sure, the picture is different in a very few state courts. Most important, the Supreme Judicial Court of Massachusetts has ruled that the state constitution forbids Massachusetts to refuse to give marriage licenses to same-sex

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[5] I outline some of the issues in my testimony cited in note 2 supra.

[6] See Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, Supreme Court Review (forthcoming 2004).

couples.[7] See Goodridge v. Department of Public Health, 798 N.E.2d 941 (2003). But even in Massachussetts, well-established processes are now underway for amending the state constitution, if the citizens wish, to overturn the court's decision. In fact constitutional amendments are far more common at the state than the federal level. (The Alabama Constitution, for example, has been amended over 700 times; the California Constitution, over 500 times; the Texas Constitution, over 300 times; and the New York Constitution, over 200 times.)

In the overwhelming majority of states, there is no effort to redefine marriage to include same-sex couples, and indeed about three-quarters of the states have defined marriage to preclude such marriages on their own. I have urged that constitutional amendments are inconsistent with our traditions if they fall outside of the two categories that have defined American practices. But even if those categories do not exhaust the proper grounds for changing our charter, there is no good argument for doing so here, simply because the current situation creates no problem that an amendment is necessary to solve.[8]

Conclusion

By tradition, amendments to the constitution are limited to "great and extraordinary occasions." By tradition, amendments are almost always reserved to the expansion of individual rights and to the correction of serious problems in governmental structure. Whatever one thinks of same-sex marriage, the existing situation cannot plausibly be placed in either category. Issues of family law are best handled at the state and local level, as different norms and values give rise to differences in state and local law. This is an area in which federal judges have been treading exceedingly cautiously, as they should. The system of federalism is perfectly capable of resolving the issues that might arise if states seek, on grounds of public policy, to deny recognition to marriages that are valid where performed.

The proposed amendment responds to a situation that is best handled through existing institutions. It would violate the founders' commitments to constitutional

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[7] It should be noted that state courts often understand state constitutions in a way that diverges from federal judicial interpretation of the national Constitution. Some states, for example, have read their constitutions to protect reproductive freedom more broadly than the Supreme Court; others have read their constitutions to protect a right to equal funding for education, in a way that goes well beyond the Supreme Court's reading of the Equal Protection Clause. Developments of this kind are an ordinary part of the federal system and by themselves do not, and should not, spur calls for federal constitutional change.

[8] If the actual exercise of federal "judicial activism" is a justification for constitutional amendment, then there might be good reason to amend the Constitution to establish congressional power to enact the Religious Freedom Restoration Act (invalidated by the Supreme Court) and the Violence Against Women Act (invalidated in part by the Court). If the mere prospect of federal "judicial activism" is a justification for constitutional amendment, then there would be a stronger case for amendments establishing congressional authority to enact the Endangered Species Act and the Clean Water Act than for the amendment now under discussion. (Under recent Supreme Court rulings, limiting congressional power, some applications of the Endangered Species Act and the Clean Water Act are subject to plausible constitutional challenge.) But in all these cases, critics of actual or anticipated Supreme Court decisions have followed the dictates of history and prudence, and they have not sought formal constitutional change.

stability and to eliminating unnecessary divisions among American citizens. And it would violate our tradition, based on over two centuries of practice, of resolving almost all of our disputes through the federal system and through democratic processes. For these reasons, the proposed amendment should be rejected.

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Tuesday, March 9, 2004

Full Faith and Credit
By Lea **Brilmayer**

Last Wednesday's hearing before the Senate's "Subcommittee on the Constitution, Civil Rights and Property Rights" was billed as the occasion for a serious discussion on the need for a constitutional amendment to limit the interstate effects of Goodridge, the Massachusetts court decision recognizing a state constitutional right to same-sex marriage. Why else would the hearing's organizers invite me, a professor with no particular published opinion on gay rights but dozens of technical publications on interstate jurisdiction? Prepared to do battle over the correct interpretation of the Constitution's Full Faith and Credit Clause, I found myself instead in the middle of a debate about whether marriage is a good thing, and who really loves America's kids the most -- Republicans or Democrats.

Like many political debates, the discussion was framed in absolutist terms. Conservatives say that without a constitutional amendment, Goodridge goes national. Gays will travel to Massachusetts to get married and then their home states will be forced (under the Full Faith and Credit Clause) to recognize their marriages. Traditional marriage (apparently a frailer institution than I'd realized) will be fatally undermined unless we act now to prevent the Massachusetts Supreme Judicial Court from imposing its will upon the whole nation. Either amend the Constitution to adopt a national, and traditional, definition of marriage (they say) or there will soon be gay and lesbian married couples living in your own neighborhood. Either it's their nationwide standard -- anyone can marry -- or it's ours.

The fly in the ointment was that nobody bothered to check whether the Full Faith and Credit Clause had actually ever been read to require one state to recognize another state's marriages. It hasn't. Longstanding precedent from around the country holds that a state need not recognize a marriage entered into in another state with different marriage laws if those laws are contrary to strongly held local public policy. The "public policy doctrine," almost as old as this country's legal system, has been applied to foreign marriages between first cousins, persons too recently divorced, persons of different races, and persons under the age of consent. The granting of a marriage license has always been treated differently than a court award, which is indeed entitled to full interstate recognition. Court judgments are entitled to full faith and credit but historically very little interstate recognition has been given to licenses.

From a technical legal point of view, the debate at last week's hearing was entirely unnecessary. But inciting a divisive and diversionary debate over whether America's children will only thrive in traditional marriages (on the one hand) or whether people who oppose gay marriage are bigots (on the other) was probably a central objective in certain quarters. Social conservatives, in particular, have a vested interest in overstating the "domino effect" of Goodridge. This is particularly true in an election year. Only an ivory tower academic carrying a text full of footnotes would notice anything odd.

The assumption that there must be a single national definition of marriage -- traditional or open-ended -- is mistaken and pernicious. It is mistaken because the existing constitutional framework has long accommodated differing marriage laws. This is an area where the slogan "states rights" not only works relatively well, but also has traditionally been left to do its job. We are familiar with the problems of integrating different marriage laws because for the last 200 years the issue has been left, fairly successfully, to the states. The assumption is pernicious because the winner-takes-all attitude that it engenders now has social conservatives pushing us down the constitutional-

amendment path. For those who see the matter in terms of gay rights, this would be a tragedy. But it would also be a tragedy for those who genuinely favor local autonomy, or even those of us who genuinely favor keeping the constitutional text uncluttered by unnecessary amendments.

If today's proponents of a marriage amendment are motivated by the fear of some full faith and credit chain-reaction set off in other states by Massachusetts, they needn't be. If they are motivated by the desire to assert political control over what happens inside Massachusetts, they shouldn't be. In our 200- year constitutional history, there has never yet been a federal constitutional amendment designed specifically to reverse a state's interpretation of its own laws. Goodridge, whether decided rightly or wrongly, was decided according to Massachusetts' highest court's view of Massachusetts law. People in other states have no legitimate interest in forcing Massachusetts to reverse itself -- Massachusetts will do that itself, if and when it wants to -- and those who want to try should certainly not cite the Full Faith and Credit clause in rationalizing their attempts.

Unlike most other hotly contested social issues, the current constitutional marriage debate actually has a perfectly good technical solution. We should just keep doing what we've been doing for the last 200 years.

Ms. **Brilmayer** is the Howard M. Holtzmann professor of international law at Yale Law School.

(See related letter: "Letters to the Editor: A Stark Choice Faces Us On Definition of Marriage" -- WSJ March 12, 2004)

---- INDEX REFERENCES ----

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