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AN EXAMINATION OF THE CONSTITUTIONAL AMENDMENT ON MARRIAGE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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AN EXAMINATION OF THE CONSTITUTIONAL AMENDMENT ON MARRIAGE

THURSDAY, OCTOBER 20, 2005

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

The Subcommittee met, pursuant to notice, at 2:03 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback (Chairman of the Subcommittee) presiding.

Present: Senators Brownback, Sessions, and Feingold.

OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. Good afternoon. I call the hearing to order. Thank you all for joining us today. Thank you to the panelists for being here to testify. I have an opening statement, Senator Feingold will, and then we will go to the panelists.

Just a year ago, the issue of marriage was center stage in the national political debate. Poll after poll showed strong opposition to same-sex marriage and that a majority of Americans supported a Marriage Protection Amendment to the Constitution. When the people spoke last November, they approved every one of the 11 State amendments protecting traditional marriage in those States by decisive majorities. Many commentators acknowledged that President Bush's victory was, in part, attributable to this call for Congress to, quote, "promptly pass and send to the States for ratification a Marriage Protection Amendment," and that is the topic of this hearing today.

In the past year, we have seen the enactment of two more State marriage amendments. Polls continue to show widespread support for amending the Constitution to protect the traditional definition of marriage, particularly after last April's ruling by a single Federal district judge overturning Nebraska's marriage amendment. That amendment was passed by the people of Nebraska with 70 percent support in 2001.

As we have heard in previous hearings, the popular consensus to protect the traditional institution of marriage is widespread and it is strengthening. I have got a chart to show and refer to that and I will go through some of these numbers because it is a pretty busy chart. Eighteen States now have constitutional amendments protecting marriage as solely between a man and a woman. Twenty-seven other States have statutes to protect traditional marriage. Six States have no statutory or constitutional protection for tradi-

tional marriage. Of the States with no current constitutional provisions on marriage, five States are sending constitutional amendments to voters this year or next and another 13 States are considering doing so.

We have also heard testimony in previous hearings that the prospects of Federal or State courts contravening the will of the people on this vital issue by overturning State or federally enacted protections of marriage is a very real concern. In the opinion of many legal scholars, it is just a matter of time before this phenomena becomes the norm. Eight States face lawsuits challenging traditional marriage. In California, New York, and Washington, State trial courts have already followed Massachusetts and found a right to same-sex marriage in State Constitutions. All of those cases are on appeal.

As I have already noted, last April, a Federal district court in Nebraska found unconstitutional a State constitutional amendment protecting marriage that had won 70 percent of the vote. The U.S. Court of Appeals for the Eighth Circuit may hand down a decision on whether to uphold this Federal court ruling at any time.

In June 2005, a Federal district court in California uphold DOMA, Defense of Marriage Act's definition of marriage for purposes of law, but this decision is soon expected to be appealed to the Ninth Circuit, which long has been one of the most activist courts in the nation.

Another case in Washington State challenges DOMA's constitutionality. It is now pending in the Federal district court.

Make no mistake, the threat to redefining marriage by the courts is imminent. The time for us to act is now.

We are here today to discuss the merits of the constitutional amendment protecting marriage as it has always been defined, the union of a man and a woman. We have reached a crossroads in American legal history. The will of the American people is today in danger of being thwarted by the will of an activist judiciary. In order to protect this vital institution so central to the health and stability of families and society at large, we will have to define marriage. The only question is who will do the defining, the people or the judges?

We have a clear choice before us. Do we allow Federal judges to redefine marriage for all of us or do we allow the American people to decide what marriage is? This is especially important because the redefinition of marriage will result in consequences many proponents perhaps have not considered.

I believe that we must act now to protect traditional marriage. I hope this hearing will illuminate some of the reasons why that protection is best achieved through a constitutional amendment. I also hope that the panelists will discuss the specific concerns and review that they have of the draft of the constitutional amendment and give us feedback and thought on the particular drafting of the amendment.

Today, we will hear some arguments for and against a constitutional amendment as the right solution to the attempt of the courts to bypass the will of the people on the issue of marriage. I hope to explore some of the questions related to the wording of the

amendment. We also will explore some of the social consequences of same-sex marriage.

We have a distinguished panel here today to discuss this topic and I look forward to their presentation, but before I introduce the panel, I will turn to my colleague and the Ranking Member, Senator Feingold, for his opening statement. Senator Feingold?

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

Senator FEINGOLD. Thank you, Mr. Chairman. I appreciate once again the collegial manner in which you have handled this hearing, including the advance notice of it that you gave us and the three-to-two ratio for witnesses.

Mr. Chairman, despite all the attention the proposed constitutional amendment has received in the Senate, four hearings in the last Congress and a vote on the floor last year and two out of the total of four hearings we have held in this Subcommittee all of this year, the issue of same-sex marriage does not seem to be something that the public itself is all that concerned about. The issues that my constituents want to usually talk to me about and want Congress to take action on include the war in Iraq and health care and spiraling gas prices. They don't seem as interested in passing judgment on the private lives of their neighbors. They don't feel that marriages or families are particularly threatened by same-sex marriages in Massachusetts or civil unions in Vermont or Connecticut.

One of the main problems with the constitutional amendment that we will discuss today, S.J. Res. 1, is that we still don't really know what effect it will have if it becomes part of the Constitution, and that became clear when its proponents brought it to the floor last year without allowing a markup in the Judiciary Committee. Uncertainty still remains, for example, as to whether the language of the amendment would permit States to offer domestic partner benefits or the option of civil unions to same-sex couples. I hope our witnesses, who I do welcome, can shed some light on these important questions today.

As time has passed since the Massachusetts court ruling, I think it has become clear that passing a constitutional amendment would be an extreme and unnecessary reaction. For more than two centuries, family law has been the province of the States and that is how it should be. Voters in several States passed marriage initiatives in the last election. The legislature in Connecticut recently passed a civil union bill and the Governor signed it. In California, a bill to permit same-sex marriages was vetoed, but new protections for domestic partners were signed into law.

These developments tell me that the States are capable of addressing this issue and they will do so in different ways, which is how our Federal system generally works and should work. Federal intervention here would not be a good idea.

I was struck by reports of what happened in the Massachusetts legislature last month. The legislature narrowly passed a constitutional amendment last year to prohibit same-sex marriage, but when the issue returned this year, as the Massachusetts Constitution requires in order to put the issue on the ballot, the legislature actually rejected it by a vote of 157 to 39.

So I believe we should think long and hard about preempting State legislatures or State initiative processes through a Federal constitutional amendment. There is certainly no crisis warranting a Federal constitutional amendment on this issue, nor is there evidence that the courts are poised to strike down marriage laws.

Mr. Chairman, our Constitution is an historic guarantee of individual freedom that every day stands as an example to the world. Except for the 18th Amendment on prohibition, which was later repealed, it has never been amended to limit basic rights or discriminate against one group of our citizens.

I look forward to the testimony today from which I hope we will learn more about what this amendment will actually do, but I continue to strongly oppose this amendment because I think it is unfair, unwise, and unnecessary.

Mr. Chairman, I do again thank you for your courtesy.

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

Chairman BROWNBACK. Thank you, and I hope today we can get from the witnesses some thoughts on the specific language, because we have held a number of hearings on a constitutional amendment and we really need to get down to the wording of this in discussion as we move that on forward.

Our first witness is Professor Christopher Wolfe. Professor Wolfe teaches political science at Marquette University. He is founder and President of the American Public Philosophy Institute.

Our second witness is Professor Christopher Harris, Assistant Professor of Pediatrics at Vanderbilt University. He serves as Director of the Pediatrics Pulmonary Function Laboratory and Associate Director of the Cystic Fibrosis Center. Dr. Harris is also a former President of the Gay and Lesbian Medical Association.

Our third witness will be Richard Wilkins of Brigham Young University. Professor Wilkins is the founder and Managing Director of the World Family Policy Center and currently teaches constitutional law and international law.

The fourth witness we have today is Louis Michael Seidman, a law professor at Georgetown University. Professor Seidman is the 2004 recipient of the Ally of Justice Award from the Human Rights Campaign.

And finally, we have Professor Scot FitzGibbon of Boston College. Professor FitzGibbon teaches on the subject of marriage law and theory. He has published numerous law review articles on the issue of marriage and is a member of the International Society of Family Law.

Gentlemen, we will run the clock at 5 minutes. That is a guide—actually, let us give you a little more time. Let us run it at six. We want to have plenty of time for questions. Your full statements will be put into the record as if presented, so if you want to summarize, that is certainly your choice.

But I do want to have sufficient time for us to be able to question particularly on—at least from my perspective, Senator Feingold may feel differently—but on the specific wording of the amendment and thoughts, cautions, support, concerns that you have on the legal wording, because we have held a number of hearings on the social implications. We have held hearings on what has happened

in other places around the world. We really now need to get down to the wording itself of the proposed constitutional amendment. I hope all of you have it, have had a chance to look through it, have had a chance to really think and contemplate about it.

So with that, Professor Wolfe, we are delighted to have you here. Thanks for coming and joining us.

STATEMENT OF CHRISTOPHER WOLFE, PROFESSOR OF POLITICAL SCIENCE, MARQUETTE UNIVERSITY, MILWAUKEE, WISCONSIN

Mr. WOLFE. It is good to be here. As has been said, I am a political scientist. I teach constitutional law and American politics at Marquette University and I have edited several books and written several law review articles on homosexuality and American public life.

The marriage tradition amendment which you are considering today would fix in the U.S. Constitution the principle that marriage in the United States means marriage between one man and one woman. Its text reads, "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, shall be construed to require that marriage or the legal incidence thereof be conferred upon any union other than the union of a man and a woman."

Now, one objection that might be made to the amendment is that it is unnecessary since U.S. law, specifically in the form of the Defense of Marriage Act, already defines marriage and prevents one State from imposing a different meaning of marriage on other States. But it is simply a fact of our political and judicial life that courts sometimes go out of their way to give highly controversial constructions to the Constitution, and it is certainly within the realm of possibility that Federal judges might strike down the Defense of Marriage Act as judges have struck down marriage defense laws in various States.

The decisions of the Supreme Court in *Romer* v. *Colorado* and *Lawrence* v. *Texas*, despite the glaring weaknesses of their reasoning, will inevitably be invoked that virtually any legal distinction between heterosexuals and homosexuals is unconstitutional. While it is conceivable that judges might reject such arguments, it is equally conceivable that they may accept them. In fact, I think it would be intellectually dishonest of anyone to deny that there is at least a very real possibility that some judges, including even the Supreme Court, might strike down the Defense of Marriage Act.

Given that fact and given the existence of a well-organized and financed effort to legalize same-sex marriage in this country, backed by extensive ideological scholarship in the academy and in the legal community, it is only prudent to remove even the possibility that judges will intervene to strike down the Defense of Marriage Act and the State laws it was intended to protect.

Some constitutional commentators criticize this amendment on the grounds that it would grant Federal judges excessive power over domestic relations. It is worth noting that most of these commentators are opposed to the amendment on substantive grounds and that they have generally been rather enthusiastic about expanding the power of judges when it advances their own political

views. I have been delighted to see the converts to federalism when it comes to this particular issue.

This amendment, as its backers have made clear, does not give Federal judges general power over domestic relations. In fact, it clearly authorizes State legislatures to regulate civil unions as long as they are not the legal equivalent of marriage. The purpose of the amendment, therefore, is to deny power to Federal and State judges, a very specific power, that is the power to the interpret, that is to reinterpret or to read into or alter the meaning of, Federal or State Constitutions in order to impose same-sex marriage on this Nation.

Another major objection to the Marriage Protection Amendment comes from those who would argue that even if an amendment is necessary, it ought to take a different form. It would be better, they say, for the amendment simply to guarantee the right of the States to deal with the issue of marriage free of Federal, including judicial, interference. This would preserve the Defense of Marriage Act, but make explicit the already existing power of States to define marriage as something other than a union of one man and one woman. But this does not really resolve the fundamental underlying issue, and it deliberately intends not to do so. It would rule out certain ways of introducing and expanding same-sex marriage, but it would fall short of defending traditional marriage by erecting effective barriers to the legitimization of same-sex and polygamous marriages.

Those who advocate a federalism amendment on the gay marriage issue, which simply returns the issue to the States, seeing it as a permanent solution to the dispute apparently do not think that gay marriage is a fundamental issue. But the crux of the case for the Marriage Protection Amendment is that same-sex marriage, like polygamy, is precisely such a fundamental issue. The ready acceptance of a checkerboard pattern of State policy either does not understand or simply doesn't agree that defending certain essential features of marriage, such as gender complementarity, is essential for social and individual well-being.

Marriage is an institution that has certain intrinsic features and those requirements must be honored. For example, even if three or four people sincerely loved each other, our law would not permit them to marry. Why? Because we believe there is something about the very nature of marriage that precludes this. Most Americans today also reject same-sex marriage because they believe that gender complementarity is also essential or integral to the meaning of the institution of marriage.

The discussion of the Marriage Protection Amendment is a key moment in the public debate about marriage stability. That goal will not be achieved if marriage is considered to be a malleable institution, revisable by society and unfettered by deep natural requirements, such as monogamy and gender differentiation, a view that is at the heart of the movement for same-sex marriage. Only by an amendment that directly addresses the core issue, the nature of marriage, can we achieve the goal of preserving marriage as a key social institution.

The American people clearly want marriage to be protected. A large majority of States have laws or constitutional provisions that

define marriage in the way that DOMA and the Marriage Protection Amendment define it. Many of those legal provisions have been passed in recent years with full, free, and open public debate. It is most unfortunate that those who wish to establish same-sex marriage in defiance of popular will are willing to have recourse to the manipulation of law by judicial and legal elites. Under such circumstances, a Marriage Protection Amendment is the only reliable way to preserve the definition of marriage the American people have long recognized and are intent on defending. Thank you.

Chairman BROWNBACK. Thank you, Professor.

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

Chairman BROWNBACK. Dr. Harris, thank you for coming here today.

STATEMENT OF CHRISTOPHER E. HARRIS, M.D., ASSISTANT PROFESSOR OF PEDIATRICS, VANDERBILT UNIVERSITY SCHOOL OF MEDICINE, NASHVILLE, TENNESSEE

Dr. HARRIS. Thank you. Good afternoon. I appreciate the opportunity to speak to this Subcommittee as it considers a proposed amendment to the Constitution that would deprive gay and lesbian couples and their children of important protections that they now enjoy.

I appear before you today as a pediatrician, a father, and a gay African American. I also appear before you as a former president of the Gay and Lesbian Medical Association, an organization of health care providers devoted to equitable health and health care for lesbian, gay, and bisexual people.

By way of introduction, I am a graduate of the University of Wisconsin, both the School of Pharmacy and the Medical School. During my time in medical school, I started my life's devotion to the care of children. This continued with my pediatric residency at Vanderbilt and my fellowship in pediatric pulmonary medicine at the University of North Carolina at Chapel Hill. I subsequently spent 5 years at Children's Hospital in Cincinnati, involved in basic science research of children's lung disease.

However, throughout all of this, I felt compelled to work toward having my own child. As an openly gay man, I realized that this would be a difficult process, but instilled with the values of my parents and previous generations, I was undeterred. The two-and-a-half-year process culminated 3 years ago when I was matched with a birth mother and became the father of a darling daughter. Because of this, these discussions today are more than mere political rhetoric. They affect my family and they affect me deeply, most importantly my daughter, who I am now raising to be a loving, caring member of our society.

I feel compelled to testify before you today not only because I am a gay African American single father, but also as a pediatrician. I hope that my testimony will provide some clarity to the flurry of misinformation regarding the effect of parental sexual orientation on children.

Some supporters of this amendment claim that the welfare of children will be advanced by a constitutional amendment denying the legal protections of marriage to gay and lesbian couples and

their families. I disagree. Willfully injuring children through the denial of legal rights to their parents serves no legitimate social purpose. Regardless of one's individual feelings regarding same-sex relationships, I think that everyone agrees that all children need the care and concern of a loving family and the legal protections that this structure can provide.

The value of a loving family cuts across sexual orientation. In fact, the American Academy of Pediatrics states clearly that civil marriage is the legal mechanism by which societal recognition and support is given to couples and families. It provides a context for legal, financial, and psycho-social well-being, an endorsement of inter-dependent care, and a form of public respect for personal bonds.

As a pediatrician, I deal with children and families firsthand. I have treated children for nearly 20 years and I can tell you what children need most, and that is love and affection. They need parents who care about them and can protect them. I can tell you, whether those parents are gay or straight, kids need the same things, and whether those parents are gay or straight has no bearing on whether they can be good parents to their children.

This has been my personal observation while working directly with children and their parents. Although my anecdotal evidence is grounded in years of clinical experience, I will not ask you to solely rely on my experience to determine what is best for children. In my capacity as a professor of pediatrics, I regularly analyze peer-reviewed medical studies. In preparation for this testimony, I reviewed the scientific evidence regarding the welfare of children in gay-lesbian families.

Judith Stacey's and Timothy Biblarz's article in the American Sociological Review entitled, "How Does the Sexual Orientation of Parents Matter?" is one of the most comprehensive reviews of the scientifically reputable literature on the subject of same-sex parenting. This review confirms that successful child rearing is unaffected by a parent's sexual orientation. For instance, there is simply no significant difference between children of lesbian mothers and heterosexual mothers in such factors as anxiety level, depression, or self-esteem. This difference holds true through studies that test children directly, their parents, and their teachers.

In fact, every relevant study of the effects of parental sexual orientation on children shows no measurable effect on the quality of the parent-child relationship or the child's mental health and successful socialization. I, therefore, concur with previous testimony before this Subcommittee that children raised by lesbian mothers or gay fathers are as healthy and well-adjusted as other children.

Given this body of scientific evidence, it is not surprising that the American Academy of Pediatrics supports both joint and second-parent adoptions by gay and lesbian parents. Thus, these professionals, my colleagues who provide care and have detailed knowledge of the parenting skills of gay and lesbian parents, approve of these parents' ability to raise healthy, socially well-adjusted children. This finding affirms the importance of ensuring the legal rights of children extends to both parents.

This is why I have signed a letter to Congress by the Pro-Family Pediatricians opposing any Federal marriage amendment to the

Constitution. This letter, signed by over 750 of my fellow pediatricians, expresses our strong opposition for a constitutional amendment we know as caretakers would hurt children and their families.

Finally, and perhaps most importantly, as an African American, I cannot express how strongly I feel about the prospect of adopting a discriminatory amendment into the Constitution of the U.S. Much like the first article of the Constitution relegating African Americans to sub-human status, the Marriage Protection Amendment seeks to reduce the rights of some American citizens to a fraction of those enjoyed by others. I urge the members of this Subcommittee to learn from the mistakes of our past and not again condemn another class of Americans to second-class citizenship for future generations to witness. Though repealed, Section 2 of Article I will never disappear. Every time an African-American citizen reads the Constitution, they are reminded of the less-than-human status that my people once held in this country. The Constitution does not have an eraser. It retains all of our mistakes and missteps from now until nigh the end of time.

I commend this Subcommittee for its focus on the welfare of families and, thus, of children. Though this issue is an emotional one, each of us must ask if the proposed constitutional amendment prohibiting the marriage of gay and lesbian parents would support the welfare of all families and all American children, including those millions of children whose parents are gay and lesbian. With all due respect, for me as a pediatrician and a scientist, the answer is clear. The Marriage Protection Amendment will only hurt the well-being of children in this country.

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

Chairman BROWNBACK. Thank you, Dr. Harris. We appreciate that.

[The prepared statement of Dr. Harris appears as a submission for the record.]

Chairman BROWNBACK. Professor Wilkins?

STATEMENT OF RICHARD G. WILKINS, PROFESSOR OF LAW AND MANAGING DIRECTOR, THE WORLD FAMILY POLICY CENTER, BRIGHAM YOUNG UNIVERSITY, PROVO, UTAH

Mr. WILKINS. Thank you, Senator Brownback. I am delighted to be here. I would like to talk about the importance of the interaction of the U.S. Supreme Court and the decisionmaking powers of the American people.

In *Lawrence* v. *Texas*, the Supreme Court held that States could not criminalize homosexual sodomy. That case raises a serious question about the future of marriage. Can it be defined as the union of a man and a woman? But there is another question, as well. Does America even have a written Constitution anymore?

Lawrence relies upon an unwritten right that was first established by the Supreme Court in its 1967 decision in *Griswold*. There, the Court struck down what was undoubtedly an anachronistic or an ancient, outdated law regulating—or involving Connecticut's regulation of condom usage. But rather than wait for democratic debate to reject this silly law, the Court invalidated this

law by saying that marriage was a, quote, "sacred" union between a man and a woman that is supported by a right of privacy found nowhere in the Constitution. It was found in the penumbras, or shadows. These shadows have now brought the sacred relationship relied upon by *Griswold* into very constitutional doubt. It has also put at risk what Chief Justice John Marshall called, quote, "the greatest improvement on political institutions" ever achieved in America, "a written Constitution."

Federal courts have departed from the text of the Constitution before. As was noted by the prior witness, *Dred Scott* v. *Sanford*, prior to the Civil War, the Supreme Court departed from the text of the Constitution to hold that slaves were property and could not be made people and individuals by their owners bringing them into the State of Missouri and thereby freed pursuant to an Act of Congress. The Supreme Court held the Due Process Clause prevented that result. It is that very type of reasoning that is at issue here today.

Dred Scott v. *Sanford* is of a piece of *Griswold* v. *Connecticut* and *Lawrence* v. *Texas*. In 1936, these decisions in the economic area forced President Roosevelt to go on the offensive and threaten to pack the Court unless the Court returned to constitutional text. Within three months of receiving the President's credible threat, it was as if the text of the Constitution had suddenly appeared to the Justices and they departed from their prior practice of enforcing their own views of wise social policy and instead enforced the text of the Constitution.

We must remind the Court that, as Chief Justice John Marshall wrote in *Marbury*, quote, "the Framers of the Constitution contemplated this instrument as a rule for the government of courts as well as of the legislature." The modern court is seemingly unaware of this fact.

In *Lawrence*, the Court even announced it wouldn't even follow *Griswold* anymore. Forget about all that sacred union talk. Privacy has nothing at all to do with marriage, procreation, or bearing of children. Instead, privacy, the Court says, vests sexual partners with an entitlement to determine, quote, "their own concept of existence of meaning of the universe and of the mystery of human life," and under this new Concept of Existence Clause, government, the Court said, may not demean consenting adult sexual behavior. If *Lawrence* is to be taken at its word, governments may no longer be able to distinguish between a marital union of a man and a woman, a sexual partnership between two men, a relationship between two women, a relationship between three men and four women, or any other conceivable sexual relationship.

If *Griswold's* marital relationship is sacred, will *Lawrence* permit States to demean other sexual relationships by suggesting they are not? Can States even require sexual fidelity if that contravenes the meaning of individuals' own universes? Thus, more than marriage is threatened. The very meaning of a written Constitution may be at stake.

Lawrence and cases preceding it have eroded democratic control of debatable and unquestionably difficult issues of public concern. But by substituting a concept of existence test for the actual words of the Constitution, the Court has removed a broad range of impor-

tant questions of social concern from the reach of the American people. No one knows whether marriage will survive, but all relevant decisions to date following *Lawrence* suggest the answer is no.

Ordinary citizens, law professors, doctors, judges, we all disagree regarding the meaning of marriage, but the existence of this disagreement demands that the people be allowed to determine the meaning of marriage. Marriage does have a meaning. It is an essential and longstanding social institution. As described in the proposed amendment, it consists of the union of a man and a woman. Union in this sense means sexual union as it has always meant in the law of marriage. It merely provides that States, courts, and Federal courts should stop construing, meaning stop doing what you did in *Griswold*, stop looking at shadows. Look at the words. Apply the text. And it says that no legal incidence on other unions on other sexual relationships will be conferred.

That does not, however, prohibit States from defining protected relationships based on characteristics other than sexual status. There are aged widows living together in dependent, caring relationships, not involved in a sexual relationship, who deserve social protection, as well.

The marriage debate must not be resolved by the courts because the courts are unable to balance all of the difficult issues involved. It should, indeed, be left to the people.

As Abraham Lincoln warned in his first inaugural address, if the policy of government upon vital questions affecting the whole people is irrevocably fixed by the Supreme Court the instant they are made in ordinary litigation, people will have ceased to be their own Governors.

Let me also, in due deference to the good doctor, let me point out that the study he cited for no difference by Stacey and Biblarz, in fact, concludes that the contention that there is no difference is false. On page 176 of their study discussing differences of social concern, the authors say evidence in these studies that focus on these variables does not support the "no differences" claim. They conclude, quote, "the evidence suggests that parental gender and sexual identities interact to create distinctive family processes whose consequences for children have yet to be studied."

We do not know what the impact of changing the definition of marriage will have, but we should not allow the courts to make it.

Chairman BROWNBACK. Thank you. Is that the end of your statement, Professor?

Mr. WILKINS. That is fine.

Chairman BROWNBACK. Good. Thank you, because I want to try to keep this to a tight timeframe.

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

Chairman BROWNBACK. We have got a vote that has been called. Senator Feingold has gone to vote, and when he comes back, he will just continue the hearing, and so we will continue to run this, if we could.

Professor Seidman, thank you for joining us today.

STATEMENT OF LOUIS MICHAEL SEIDMAN, JOHN CARROLL RESEARCH PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. SEIDMAN. Thank you, Mr. Chairman, and thank you for affording me the opportunity to testify. As I think you know better than I do, the moral, ethical, and public policy questions posed by the amendment generate strong emotions on all sides. Like most Americans, I have views about those questions, but I don't pretend to have any expertise about them. Therefore, I would like to accept your invitation and confine my testimony to something I do know something about, which is the way the courts are likely to interpret the language that has been drafted.

Chairman BROWNBACK. Thank you.

Mr. SEIDMAN. With regard to that matter, I am sorry to say that the amendment reflects remarkably poor lawyering. If adopted, ironically enough, the amendment will grant unelected Federal judges untrammeled discretion that could be checked neither by Congress nor by the State legislatures regarding domestic relations law.

Despite its title, the amendment would also have the perverse effect of weakening the institution of marriage.

Because I can't believe that the drafters of the amendment intended those results, I strongly urge you to reject the amendment being considered at this hearing and other similar amendments pending in this Congress.

The proposed amendment creates a number of interpretative ambiguities. First, Federal courts will be required to decide what the word "marriage" means. Then they will have to decide what the legal incidence thereof means, those words, and what the word "construed" means. It is important to emphasize that the answers to those questions will become matters of Federal constitutional law. It would not be revisable either by the Congress or by the individual States.

Now, why do these words pose interpretative problems? Suppose we start by focusing on the word "marriage" in the first sentence of the amendment. Clearly, the framers of the amendment meant to distinguish between marriage itself and its legal incidence. Apparently, the framers had in mind a distinction between core legal attributes which make up marriage, on the one hand, and an unspecified list of peripheral attributes which make up the legal incidence on the other.

But because the marriage is entirely silent about what is core and what is periphery, it gives the Federal judges unchecked power to place various aspects of marriage in one category or another, and short of a constitutional marriage, neither the States nor Congress could do anything to reverse those decisions.

Suppose, for example, that a State passed a statute that unambiguously created civil unions under which gay Americans could enjoy most, but not quite all, of the benefits of marriage. Is that a marriage or does it confer only the legal incidence of marriage?

As members of this Subcommittee know, this is hardly a far-fetched hypothetical. A number of States have created or are considering various forms of civil union. Yet the drafters of the amendment themselves have testified that they are unsure of the effect

that the amendment would have on these statutes. How can a judge possibly determine whether or not a particular form of civil union, including some but not all benefits of marriage, is a marriage or not when the drafters of the amendment themselves don't know the answer to that question?

Reasonable people might disagree about whether civil unions are wise. It is simply irresponsible, however, to turn that question over to Federal judges for them to decide for all time and for the entire country without any guidance from elected officials.

A similar problem is posed by the second sentence of the amendment, which provides that the Constitution shall not be construed to require either marriage, whatever courts decide that is, or the legal incidence thereof, or whatever they are, to be conferred on anyone other than different sex couples. Suppose that a State court interprets a vaguely worded statute to allow grandparents visitation rights. Again, this is hardly a far-fetched hypothetical. State courts throughout the country are considering this very question and some courts have afforded grandparents these rights. But if visitation is an incidence of marriage and if this amendment is enacted, then the granting of these rights violates the Federal Constitution. That is so because grandparents are not part of the union of a man and a woman and, therefore, are not entitled to enjoy the incidence of marriage. Do the members of this Subcommittee really intend that result? Do they really wish to give Federal judges the discretion to impose this outcome or not as they choose?

The word "construed" is also ambiguous. The most sensible reading of the amendment is that gay men and lesbians should not enjoy core marriage rights, whatever they are, but that States can create peripheral incidents of marriage for them so long as no construal of a Constitution is necessary to create them. This provision requires Federal judges to develop a jurisprudence that distinguishes between the construal of a State constitutional provision and its mere enforcement.

But how are judges supposed to do that? Perhaps, for example, the wording of a statute is somewhat vague, but its legislative history leaves no doubt about the intent of the framers. How is a Federal court to decide whether a State court's engagement with that particular provision constitutes a forbidden construal or a mere enforcement?

In conclusion, some years ago, I had the honor of serving as a reporter for the bipartisan blue ribbon Committee convened by the Constitution Project under the chairmanship of two distinguished Members of Congress, former members, Hon. Abner Mikva and Hon. Mickey Edwards. Our assigned task was to develop guidelines for the amendment of the Constitution. We did so in a document entitled, "Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change."

Although members of the commission disagreed among themselves about specific amendments, they were united in their commitment to some minimal standards before our fundamental document could be changed. Central among those standards was the requirement that proponents of proposed amendments, quote, "attempt to think through and articulate the consequences of their

proposal, including the ways in which the amendment would interact with other constitutional provisions and principles."

I am sorry to conclude that the proponents of this amendment have not met that minimal standard. If enacted, their handiwork is bound to produce outcomes that no one could have wanted or intended and an unprecedented transfer of power over domestic relations law to Federal judges. Although Americans disagree about gay marriage, surely they can agree that more care ought to be taken before the Constitution is sullied in that fashion.

Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you very much.

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

Chairman BROWNBACK. Professor FitzGibbon, and as I mentioned, I am anticipating that my colleague is going to be coming back and we will continue the hearing, but if he doesn't come back here in a couple of minutes, I am afraid we will cut you off in midstream and come back after a brief recess, but thank you for joining us, Professor.

STATEMENT OF SCOTT FITZGIBBON, PROFESSOR OF LAW, BOSTON COLLEGE, BOSTON, MASSACHUSETTS

Mr. FITZGIBBON. Thank you very much for inviting me, Senator Brownback, and thanks to my research assistant, Colbe Mazzarella, who gave me a lot of help on this.

From time to time, skeptics about initiatives to protect and defend the institution of marriage advance the view that same-sex marriage and its recognition is really something of no great importance except to same-sex couples and need not attract any great concern as regards the wider social order. But as a resident of Massachusetts, the only American State to have embraced the practice, as it did under the mandate of the Supreme Judicial Court in *Goodridge*, I come before this Subcommittee to testify that the adoption of same-sex marriage leads on to social changes of the most profound character and that these developments are an appropriate subject of national concern and attention.

The practice has been in place in Massachusetts for only 17 months now. Plainly, we can only begin to surmise the full consequences of a development whose effects are sure to unfold across the generations. But I would like to mention three lines of developments that are already visible.

First, as to the education of our children, the Superintendent of the Boston Public Schools has issued a memorandum which states that, quote, "this is a historic moment in our Commonwealth and in our country" and that legal same-sex marriage "has had, and continues to have, a profound effect on our civil life and discourse," and that its impact will "filter through our society and our schools," and what he predicts, he imposes, because he then grimly warns that he has, quote, "received some reports of inappropriate speech" and goes on to articulate a "zero-tolerance policy" for those who not only exhibit bias as to sexual orientation, but even those who "cause" bias in others or who contribute to a climate of intolerance.

Today in Boston, a teacher would take her career into her hands by conducting a discussion about both sides of the same-sex mar-

riage question or even about both sides of the question of same-sex cohabitation. So the first aspect of the social situation I wish to bring to the attention of this Subcommittee is an icy chilling of discourse.

Now, my second concern involves not what is chilled, but what is presented. "After all," says an eighth grade teacher in a school not far from Boston, "this is legal now so teaching about homosexuality is important," and the way she does it, she lays out as quoted fully in my written testimony. Suffice it to say here, she gets very explicit.

The effect of the *Goodridge* decision has been to encourage the indoctrination of public school students in the merits of same-sex marriage and in many related topics. Today in Massachusetts, a parent would be met with resistance and possibly even legal struggles if he tried too hard to protect his children from presentations of this sort, as illustrated by the case of David Parker, arrested by the Lexington, Massachusetts police on April 24 as described at length in my written submission.

My third concern relates to the social understanding of marriage projected by the same-sex decisions, which is that marriage is not primarily a matter of tradition, custom, or basic moral ordering, but is a creature of the government. The *Goodridge* judges arrogantly announced that marriage is what they say it is. Quote, "The government creates civil marriage," they stated. "The government creates civil marriage and it had better not do so moralistically or with too great a regard for tradition or the beliefs of the community or what some courts have referred to as the prejudices of the people—"

Chairman BROWNBACK. Professor, I am going to have to stop you here. We are right at the end of the vote, so I have to run over and vote. I thought my colleague would be back. I am going to put the hearing into recess until Senator Feingold gets back, at which time he will reconvene and you can finish your statement, and then he will proceed to questions and I will come back for that. So we will be in recess until Senator Feingold appears. Sorry. Thank you.

[Recess.]

Senator FEINGOLD. [Presiding.] We will reconvene the session. Senator Brownback asked me to start things up again. I understand Professor FitzGibbon had some time left on his statement, so why don't you proceed, Professor.

Mr. FITZGIBBON. Well, thank you very much. I kind of lost my pace here, but I will do my best.

I was saying how the *Goodridge* court announces that the government creates civil marriage and it strikes down the definition, whatever it might have been in the common law, and then doesn't give one itself. It says marriage is, quote, "an evolving paradigm," leaving us in a void, not just legally, but as a matter of social attitudes.

As legal and social policymakers lose their grasp on any coherent understanding of marriage, the barrier between marriage and cohabitation breaks down. The institution of marriage forfeits its definitive status in general opinion and social practice, as well. It becomes harder and harder to present and defend any solid marital morality or any morality as to family life in the public schools. And

Denmark, which has traveled this road some decade ahead of us, now reports very high rates of cohabitation and a social normative acceptance of non-marital cohabitation even as a mode for raising children.

Well, I leave in the hands of other witnesses the discussion of federalism and the nature of the relations between State and Federal law, but I do extend my comments that way to the point of observing that these social developments now underway in Massachusetts are proceeding with accelerating velocity and will in no way remain cabined or contained within the borders of any one jurisdiction. When a State gets off the same page as the rest of the country as regards fundamental marital and sexual morality and develops a jurisprudence of marital relationships which is unstable, divergent from tradition, and fundamentally deleterious to the raising of the next generation of Americans, it is appropriate to bring the matter forward for national discussion and common resolution. Thank you.

Senator FEINGOLD. Thank you, Professor.

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

Senator FEINGOLD. My understanding is the Chairman would like me to begin my round at this point, 7-minute rounds.

First, let me ask unanimous consent that Senator Leahy, the Ranking Member, that his statement be placed in the record, without objection.

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

Senator FEINGOLD. Before I begin my questioning, I would also request the written testimony of Joe Salmonese, the President of the Human Rights Campaign, and Professor Nancy Dowd of the University of Florida, Levin College of Law, be entered in the record, without objection.

I would also ask that a letter in opposition to the Federal marriage amendment signed by over 700 pediatricians be entered into the record, without objection.

Let me start by asking Professor Seidman, and I do apologize for missing your testimony, whether you have any response to Professor FitzGibbon's testimony that you would like to make.

Mr. SEIDMAN. Thank you, Senator. Professor FitzGibbon is my law school classmate and I have a tremendous respect for him. I think, though, that we do have to understand the situation we are in in early 21st century America is one where there is just deep disagreement and emotional disagreement about this issue. That is not something that was created by *Goodridge* and it is not something that is going to go away with the marriage amendment. So given that fact that we can't change, we have to find some way to live with each other and understand each other.

So I am prepared to concede that maybe the Boston Superintendent of Schools went too far, although I can't help noting Professor FitzGibbon quotes him as not tolerating harassment, discrimination, bias, or intimidation of any member of the community. I wonder what part of that Professor FitzGibbon disagrees with. But maybe the Superintendent went too far.

But at the same time, we have to recognize that in our society, people like Dr. Harris have kids that they are trying to raise and we have to accommodate both of those situations. The way conservatives have done that in the past has been largely by letting people decide these matters for themselves and keeping government out of it. I think it is a shame conservatives have lost track of that core conservative commitment which seems to me to be at stake here.

Senator FEINGOLD. Thank you. Dr. Harris, first let me say what a wonderful panel this is and for it to begin with two distinguished people with Wisconsin roots is particularly appreciated.

Dr. Harris, do you have anything you would like to comment on based on what you have heard thus far?

Dr. HARRIS. Thank you, Senator Feingold. With regard to the statement by Professor Wilkins from the Stacey article, there are several spots where Dr. Stacey says that lesbian, gay, bisexual parents and their children in these studies display no differences from heterosexual counterparts in psychological well-being or cognitive functioning. In another spot, she says that the results demonstrate no differences on any measures between the heterosexual and the homosexual parents regarding parenting styles, emotional adjustment, and sexual orientation of their children.

She does suggest actually in several spots around the article that actually children of lesbian and gay parents may actually do somewhat better, so perhaps that is what Professor Wilkins was referring to.

Senator FEINGOLD. Thank you. Back to Professor Seidman, you mentioned something in your statement that I wanted you to elaborate on, and that is the situation this amendment creates with how it treats State Constitutions as opposed to statutes. Could you say something about that?

Mr. SEIDMAN. I would be happy to. This is one of the most bizarre aspects of the amendment as it is currently formulated. If a State Constitution by ambiguous language is construed to create civil unions, that would be unconstitutional under this amendment. The State legislature, having seen that, could pass a statute with the exact ambiguous language and then it would be constitutional for a court to construe that to recognize civil unions.

So you have this, so far as I know, unprecedented situation where State Constitutions are treated with less respect than State statutes. I can't imagine a reason for doing that. I can't believe the framers of this provision meant to do it. It is just more sloppiness in how this was put together.

Senator FEINGOLD. Dr. Harris, in your testimony, you mentioned the American Academy of Pediatrics' support of gay and lesbian parenting. This is an organization of 60,000 pediatricians that is dedicated to the health and well-being of all children, that strongly believes in the value of civil marriage for fostering healthy families and children, and feels that same-sex marriage harms no one and is, like any marriage, good for children.

What other organizations in the broader medical community are you aware of that have taken a similar position? In particular, could you tell me how members of the psychiatric field have weighed in on this issue?

Dr. HARRIS. Certainly. The American Psychiatric Association, their membership and board has issued a statement in favor of civil marriage for lesbian and gay people. There are other organizations, the American Association of Family Practice has come out in favor of support for children of lesbian and gay people. The same is true of the American Psychological Association and the National Social Work Association.

Senator FEINGOLD. Thank you, Doctor.

Professor Seidman, Professor Wilkins' testimony focuses largely on a line of decisions regarding the constitutional right to privacy, a line of cases that he basically argues is illegitimate. He blames an out-of-control judiciary for cases with which he disagrees. Could you comment on how this proposed amendment would affect the judiciary's power to make decisions regarding marriage and legal arrangements and benefits related to it?

Mr. SEIDMAN. Two points, Senator. First, as I testified, ironically, the amendment would have the effect of greatly expanding judicial power with no guidance from—and no ability of the popular branches of government to check it. I went through the reasons for that in my testimony.

The other point is this. Professor Wilkins testified at some length about his disagreement with *Lawrence* v. *Texas*. I am more favorably disposed toward *Lawrence* than he is, but we don't have to argue about that now. The fact of the matter is, this amendment does nothing at all to change *Lawrence* v. *Texas*. It leaves *Lawrence* untouched. And given that fact, it produces a really strange result, because the holding of *Lawrence* permits—creates a constitutional right to engage in even casual sex with a total stranger.

So we are now in—if this amendment were to pass, we would be in the bizarre situation where there was an absolute constitutional right to engage in casual sex with strangers, but an absolute constitutional prohibition on legally recognized, long-term relationships. Again, it seems to me that is a result that nobody could want and nobody could intend.

Senator FEINGOLD. Mr. Chairman, we have finished the testimony. I have finished my round and now you see how long it takes to get back and forth. [Laughter.]

Chairman BROWNBACK. [Presiding.] Thank you very much.

I want to look at the text of the draft of the amendment and really focus in on that, if I could. Professor Wilkins, you have heard some of the criticism here and I know a lot of people have spent a lot of time trying to draft this properly and get at the issue of defining marriage in the United States as the union of a man and a woman, that there is a pretty simple intent and clear intent with this. And yet I want to treat with great respect Professor Seidman's raising these issues and concerns and situations. I will think about it and say, well, OK, now that one makes sense to me.

What do you think of the direct wording of this constitutional amendment as it is put forward now and its intended purpose? Do those two match?

Mr. WILKINS. Yes. Thank you, Senator. With due respect to Professor Seidman, this amendment does reflect very careful thinking, careful lawyering, and careful wording. It defines marriage as the union of a man and a woman.

Within the context of marriage law throughout ages, throughout, actually, thousands of years—we can go back to Mesopotamian texts on this—marriage has always been defined as the sexual union, and the word "union" means sexual union. In fact, the traditional, the established definition of marriage in all of the States involves sexual complementarity, a man and a woman, a sexual union. Without the union, a sexual union, you can get an annulment. A pledge of lifelong fidelity, support, that is, of course, eroding. That is one of the problems we need to do. We need to shore up marriage. And then the assumption of a host of rules related to the bearing and rearing of children and the legal responsibilities therefore.

Now, once you understand that fact, most of the ambiguities that the Professor talks about disappear. We know what the union of a man and a woman is. We know what the meaning of marriage is. It is not, as he has asserted, a simple collection of incidents. We have known what the meaning is. It is clear. It is widely understood.

The incidents of marriage are those things that legislatures of various kinds, both State and national, have added to or provided to the institution of marriage because of the perception that this institution has social benefit. They have provided economic grants or social subsidies, et cetera. It is very easy to identify what they are. You just go—it is not hard. It is not ambiguous. You go through the statute books. If this benefit is contingent upon a person being married, it is an incident of marriage.

Now, will this create a problem of, wow, courts will construe things now? Well, no. Right now, courts are already trying to determine what marriage is. This is not going to expand Federal power. This is going to limit Federal power of courts and of State courts because it is going to return them to the core meaning of marriage as the union of a man and a woman. The fact that they are going to have to construe things, courts construe language all the time. That objection just hardly makes sense.

Chairman BROWNBACK. Let me ask you—I want to get on a finer point on this. The Professor raises the issue that you are taking an area of State law jurisdiction and Federalizing it in an unlimited way, if I am correctly interpreting. What do you think of that?

Mr. WILKINS. The response to that, Senator, is very easy. It has already been Federalized. This is the only way. The Federal marriage amendment or the Marriage Protection Amendment, the current name, is the only way to preserve any ability of States and the people within the States to have any say on the meaning of marriage. Right now, the Federal courts are deciding the meaning of marriage. They are deciding what the incidents of marriage are. And the debate comes down to, do you want the judges to Federalize it or do you want this to be left to the people.

Mr. SEIDMAN. Senator—

Mr. WILKINS. This language merely preserves the longstanding union of a man and a woman. It does not stop States, nor will it expand the power of Federal courts because so long as State legislatures or other bodies confer incidents or benefits based on some other ground than sexual union, then it is not an incident of marriage. It is an incident of this other defined relationship.

It will promote fairness. Consider this hypothetical. A man—two women—or two brothers living together, one of them dying of prostate cancer. The one has health insurance. But because they are not sexual partners, they cannot—the insured brother cannot extend his health care benefits. Two similar gay men, if we have gay marriage, would be able to do so. The only distinction is the sexual conduct, which *Lawrence* says is private and the State has no business in regulating, one way or the other.

Therefore, the legislatures should be left free, and this Act will leave the legislatures free, to recognize any dependent caring relationship, confer any incident it chooses on that relationship, and so long as it is not defined sexually, it will not be an incident of marriage and it will not reduce or increase inequality. It will produce more equality, more justice, and preserve the core meaning of a very important social institution.

Chairman BROWNBACK. Let me ask you, if I could, family law has traditionally always been done in the States. Do you think this takes family law away from the States? And there, I am talking about the functionality of granting a marriage license, divorce, child custody, those sorts of issues.

Mr. WILKINS. No. It simply—right now, if we do nothing, we are merely waiting for the day when the Federal courts will Federalize the institution of marriage and take it completely away from the States—

Chairman BROWNBACK. Under the definition of what marriage—

Mr. WILKINS. Under the definition of what a marriage is, and then it will be completely out of the hands of the States and the State legislatures. This Act defines marriage and tells courts they may not construe, meaning you may not twist or contort the language of your own Constitutions or of the Federal Constitution to require that other sexual unions be given the same status as marriage. But it will not prevent State legislatures from providing for protections for families like Dr. Harris and other situations so long as those protections are not defined on the basis of private sexual conduct that *Lawrence* says States no longer have any regulatory interest in.

Chairman BROWNBACK. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Back to Professor Seidman. Last year, the voters in Michigan approved a constitutional amendment and part of that amendment states, quote, "this State and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, quality, significance, or effect of marriage."

During our last hearing on the proposed Federal amendment, Dr. Kathleen Moltz testified that supporters of the amendment insisted during the campaign that the amendment had nothing to do with health benefits for domestic partners. But shortly after Michigan adopted the amendment, the Attorney General issued an opinion prohibiting State and local governments from providing domestic partner benefits to their employees. State employees challenged the Attorney General's opinion in a Michigan court. In a decision issued at the end of last month, the court held that the constitu-

tional amendment was intended to protect the benefits of marriage and health care was a benefit of employment, not of marriage.

You discussed this proposed Federal constitutional amendment's ambiguity at some length in your testimony, but let us talk about the specific situation. In your view, would this amendment permit State employers to give health care benefits to domestic partners?

Mr. SEIDMAN. Senator, I would love to give you an answer to that question but the honest answer is, I don't have a clue. The amendment is so open-ended and so vague, I could imagine judges coming up with any number of different conclusions about that.

With regard to that point, Senator, and with regard to what Professor Wilkins just said, I would like to bring to your attention the testimony just last April of Professor Gerard Bradley before this Committee, who was a drafter, or at least he identified himself as a drafter of this amendment. Here is what he said about the point you are raising and the point Professor Wilkins was just talking about, and I am quoting here from the transcript.

The amendment leaves it wide open for legislatures to extend some, many, most, perhaps all but one, I suppose, benefit of marriage to unmarried people, but I would say if it is a marriage in all but name, that is ruled out by the definition of marriage in the first sentence.

Now, two points about that. First, it is really interesting that what Professor Bradley says is quite different from what Professor Wilkins just said. These are two people involved in the drafting of this amendment who disagree between themselves as to what it means. Second, I would challenge anybody reading Professor Bradley's, what Professor Bradley has to say about this, to give an answer to your question. I don't think he knows the answer, and if he doesn't know the answer, then how is a Federal judge supposed to figure out what the answer is?

Senator FEINGOLD. Well, let me give Professors FitzGibbon and Wilkins a chance to answer it again with regard to the proposed Federal constitutional amendment and concern about ambiguity. In your view, would this amendment, Professor FitzGibbon, permit State employers to give health care benefits to domestic partners?

Mr. FITZGIBBON. You know, I am a little reluctant to testify about what it means because unlike others here, I haven't had the pleasure of helping draft this thing. So to see my name appear in the legislative record as opining on what it means, I am a little reluctant about that.

I am just going to say that the degree of ambiguity which troubles my former classmate so much isn't necessarily a terrible thing. This isn't a part of the tax code. It is proposedly a part of the United States Constitution and constitutional provisions rightly leave some scope for later determinations.

Senator FEINGOLD. I guess I would just say that that may be true, but people whose health care benefits may depend on this may be eager to know what its likely implication is before we vote on it. I respect your desire not to comment on this thing, as you described it, this amendment, but let me ask Professor Wilkins to do it.

Mr. WILKINS. Well again, Senator, thank you. The language does reflect careful lawyering, careful drafting. It uses terminology that

has been used for hundreds of years in marriage law and marital law and defines marriage as the union of a man and a woman. In that context, union of a man and a woman is a sexual union. Without sexual union, a marriage is annulled. It is nonexistent.

The second paragraph, which then restricts the granting of any legal incidents to any other union according to standard principles of constitutional construction, all words in the same text must be given the same meaning. It is sexual union. It is clear. It is not unambiguous. And so long as a State law provided benefits to a civil partnership that was not defined on the basis of sexual union, yes, those benefits could be provided. Is that just? Is that fair? Yes, because there are many, many, many caring, dependent, and interdependent long-term relationships in America.

Senator FEINGOLD. So your answer is, no, that this amendment would not permit State employers to give health care benefits to domestic partners, correct?

Mr. WILKINS. So long as those unions were not defined on the grounds of sexual union.

Senator FEINGOLD. Mr. Seidman, would you like to respond to that?

Mr. SEIDMAN. Well, just very briefly. Again, it is quite remarkable, the problems here. Professor Wilkins just said that the constitutional provision defines marriage only in terms of a sexual union. There are hundreds of thousands, millions of marriages in this country that don't involve sexual union. I am quite proud of the fact, next month, my 86-year-old father-in-law is getting married to a 79-year-old woman. I would be delighted if that involved a sexual union, but I am not at all confident that it does and I would be very upset if that amendment prohibited that marriage. [Laughter.]

Senator FEINGOLD. Mr. Seidman—

Mr. WILKINS. Again, we are not looking at the specific examples of 87-year-old people, and I am in my 50's and it is not nearly as sexual a union as it was when I was in my 20's, but the legal institution itself—[Laughter.]

Chairman BROWNBACK. Wait a minute. What is going on here? I want order in this place. [Laughter.] The oral history hearing is next week. [Laughter.]

Senator FEINGOLD. Professor Seidman, the proposed amendment seeks to prohibit both marriage and the legal incidents thereof from being extended to same-sex couples. Is it clear what the legal incidents of marriage are? How would a court decide whether a benefit was one of legal incidence of marriage?

Mr. SEIDMAN. Senator, it is completely ambiguous. I mentioned in my testimony the problem of grandparent visitation rights, which might or might not be an incidence of marriage, but there were many other examples, things like the ability to visit somebody in a hospital, the ability to get health benefits, the ability to raise children, that may or may not be an incidence of marriage.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you.

I want to get Professor Wolfe involved in this on looking at the specific wording of the actual amendment itself. You have heard some of the criticism on this. I want to get you on the record of

your direct thoughts of the writing of this and whether it hits the intended purpose of defining marriage in the United States as the union of a man and a woman.

Mr. WOLFE. I would like to get involved in this, too. I have been sitting on the sideline hearing what I think are—and Professor Seidman talks about bizarre implications of the amendment. I think, frankly, there are bizarre implications of his bizarre reading of the amendment.

For instance, let us take the phrase he cited from Professor Bradley which he seems to suggest is this incredibly open-ended, ambiguous thing whereas actually it is extremely clear. The amendment leaves it wide open for legislatures to adopt some, many, most, perhaps all but one, I suppose, benefits of marriage to unmarried people, but I would say if it is marriage in all but name, that it is ruled out by the definition of marriage in the first sentence.

What he is basically saying is that if you created another status that had all the exact same aspects, features, incidents of marriage, then that would violate that first sentence. That is, if you established a civil union and then said, we define civil union as everything that marriage is except for the name, that would violate the first line. Anything short of that—if the State legislature wants to give lots of different incidents of marriage or some of them, or most of them, as long as it is not giving everything to them, then there is this distinction. States under this amendment—State legislatures have the right to give those legal incidents, not the whole bundle, but particular ones.

So, for instance, grandmother visitation rights, no problem at all. Of course, grandmothers can have visitation rights. On Professor Seidman's interpretation, anything that a married couple has by virtue of being married must now be specifically denied everybody else. That is a bizarre interpretation. No legislature could possibly have intended that. For instance, to say just because parents have children, nobody but parents can have children. You can't have single parents, for example, adopting, whereas many of the States have it and there is no intention in this record to do away with things like that.

So I think—and frankly, the attribution of ambiguity here is really—it comes from, I think, Professor Seidman attributing a meaning to the amendment that its framers currently don't have, clearly don't have, couldn't possibly have.

Mr. SEIDMAN. May I respond briefly to that?

Chairman BROWNBACK. Let me get down here and then I want to come back to it. I have got another point I want to ask you about, as well.

Professor FitzGibbon, would you care to comment on this debate about whether or not the amendment hits clearly the mark of what I think it seems pretty clear its drafters intended, which is to define marriage as the union of a man and a woman and to make clear that that is not going to be interpreted otherwise in the State courts? What is your thought?

Mr. FITZGIBBON. I think as we develop a good legislative history here with the draftpersons speaking out about what it means, it gets near as clear as a constitutional provision is ever likely to get.

Chairman BROWNBACK. Mr. Seidman, let me ask you this, and I would be happy to hear your response to some of these others. You have been a critic of this. You have looked at it. You have examined it. You have put forward a clear set of questions on it. I respect that. I appreciate that.

If you were drafting this with the mindset of those who are drafting it, which I think is pretty clear what they are trying to get at here, is marriage is a union of a man and a woman and that is what we want recognized in the United States and that is what we are setting it at, how would you have drafted this amendment?

Mr. SEIDMAN. Thank you, Senator. I would be delighted to answer that question. First, though, I do want to just comment very briefly on what Professor Wolfe said, and I have two very quick points. First, I want to note again that Professor Wolfe and Professor Wilkins are in sharp disagreement about what this language means. What Professor Wolfe said is not anything like what Professor Wilkins said.

Second, Professor Wolfe associated himself with Professor Bradley's statement, which is that something that gives all of the attributes of marriage except one to a couple would be permissible under this amendment. Well, OK. Here is an attribute or an incidence of marriage. Married people get to take the name of their spouse. So under Professor Wolfe's reading of this, if you said gay people can have everything that married people have except taking the name of the spouse, that would be constitutionally permissible under the amendment. Now, that is fine with me, but it does seem to make the exercise rather pointless because then you are just dealing with a name and why amend the Constitution to outlaw a word?

Chairman BROWNBACK. Now help me draft it.

Mr. SEIDMAN. OK.

Chairman BROWNBACK. How would you draft it?

Mr. SEIDMAN. I have two responses to that. The first is, I don't draft language on the back of a napkin, so it would take some effort and some thinking, but the second response is this.

I think it is true with a lot of legal concepts that somebody has an idea of something they want to accomplish, but when you actually try to put it down on paper, it becomes difficult or impossible to do. Now, sometimes we are forced into a situation like that. What is really striking about this amendment is despite the parade of hypothetical horribles that have been advanced here, none of those things has happened. That is to say, the Defense of Marriage Act hasn't been struck down. The courts have not required States to recognize marriages from other States.

What I would say is it will be time enough to see if we can figure out how to do this if we actually have to, and I don't think we actually have to right now.

Chairman BROWNBACK. You have thought a lot about this, though. I mean, you have thought of a lot of critique on it, and I respect that. That is what we need and that is why we have got a panel here like we do. Have you thought previously how to draft this sort of constitutional amendment to hit the mark that—I think you pretty well understand where people want to go with this. Have you thought about that?

Mr. SEIDMAN. Well, I am not sure I do understand, Senator. Part of the problem is I think the people behind the amendment themselves are not in agreement on how to go. So I think there are some Americans who are—many, many Americans, actually, who are offended by the use of the word "marriage" but want to extend to gay men and lesbians everything else. There are other people who are in favor of this amendment, I think Professor Wilkins may be one of them, who want to go further than that and want to prohibit the creation of things that look a lot like marriage, but they are a little vague in their mind as to how much like marriage it has to look.

So with respect, Senator, I think you guys have to get straight what you want before you tell me how to go about drafting it.

Chairman BROWNBACK. Well, if you come up with any great thoughts on this, I will look forward to that. And I respect the criticism of it, but I do believe it is clear what people are trying to get at and it would be useful to be able to have that.

Senator Feingold, do you have other questions? I would like to ask a few more, and then if you want to come back after that.

Professor Wolfe and Wilkins in particular, you have heard additional criticism of it. I would appreciate a response, if you had, of what Professor Seidman—and I think this is a useful exchange and a particular one that is good to have in the record. Professor Wilkins?

Mr. WILKINS. Professor Bradley and I are good friends. If you go look and you read his writings, he has written extensively on how marriage is a sexual union. He has written many articles on that fact. I don't know how to explain a comment he made in response to a question off the cuff, but if you look at the writings of Professor Bradley, they are completely consistent with what I have explained is the drafting and intent behind the amendment. Professor Bradley's scholarly and significant academic writings support that interpretation of the amendment. I can't explain precisely why he would describe it with the language that, well, so long as you don't give one thing, somehow, it would be OK. Sometimes in testimony—this is scary. I mean, I am from Utah. This is only the second time in my life I have done something like this. I am nervous. I could say something stupid. I probably have. [Laughter.]

But I do know that Professor Bradley does not disagree and would interpret the meaning of the Marriage Protection Amendment consistently, that it is to protect the sexual union of a man and a woman. The legal incidents that attach to that are easy to find. You just look at the statutes. They are the ones that are contingent upon that union, and once that is understood, the ambiguities disappear. The difficulties disappear. It does not expand Federal judicial power. It reduces it. It does not decrease the power of the States, it increases it. It at least stabilizes it and prevents further erosion.

Therefore, I think the language is well crafted, and Professor Bradley and I are not, in fact, in disagreement on this point.

Chairman BROWNBACK. Professor Wolfe, anything new to add? I don't want to cause you to have to repeat things you have said, but if you have something new to bring in on the definition here.

Mr. WOLFE. Professor Seidman asks a fair question. What if the authors of a State law, for example, conferred all the benefits of

marriage on civil unions and then they simply kind of arbitrarily chose one, you know, some insignificant aspect they could find, and did not confer that simply in order to create a distinction. It seems to me that—and that is why Professor Bradley said, perhaps all but one, because you can imagine a situation where those chose one in a way that clearly was simply a way of evading the force of the constitutional provision.

So if there is a reasonable case to show that they have made one difference simply in order to evade the effect of the amendment, then it is plausible that that kind of statute could be struck down, as well. That is going to be a very narrow range of things. Certainly, it would not include anything like health care benefits or visitation, anything of those sorts.

I mean, it is really striking that Professor Seidman talks about this parade of horribles like all these different things, although he actually only mentions one thing, which is the Defense of Marriage Act being struck down. I have no doubt that Professor Seidman would do whatever he could to get the Defense of Marriage Act struck down, and under those circumstances, it seems to me rather disingenuous for him to argue, why do we have to worry about the Defense of Marriage Act? After all, it is out there and it is intact.

Well, it is intact until he and his allies get a chance to strike it down, in which case then there is going to be a clear need for the Marriage Protection Amendment and I think it is plausible not to sit around waiting for that to happen. Cases like *Romer* and *Lawrence* show that judges are, on these kinds of issues, effectively of control, that they are simply willing to assert their own social views over the majority views in America.

Chairman BROWNBACK. Is there any range of timeframe before or when most people would project DOMA is overturned by the Federal court? Has anybody—I listed the number of cases that are pending on DOMA, the Federal court cases. I listed—

Mr. WOLFE. It could happen any time.

Chairman BROWNBACK.—Federal court cases on State constitutional—

Mr. WOLFE. It could happen any time, but the one real limit is that it probably would take some time for lower court opinions to be appealed up to the Supreme Court. So in that sense, we may not get an absolutely final ruling on it for a couple of years. But, frankly, it could be any time, really, that a Federal judge somewhere strikes down DOMA. We have already had a Federal court judge strike down a State DOMA and so there is no reason to assume that you won't get a Federal judge striking down the Federal DOMA.

Chairman BROWNBACK. And that has gone to Eighth Circuit, and then it would take a couple years after it gets from Eighth Circuit to make it on up to the Supreme Court, so we could be talking in a three- to 5-year timeframe before we have a Supreme Court ruling on this issue?

Mr. WOLFE. I would find it utterly plausible to think in terms of two years.

Chairman BROWNBACK. To have a Supreme Court ruling—

Mr. WOLFE. To have a Supreme Court ruling.

Chairman BROWNBACK [continuing]. On a constitutionality. So really, if we want the people to speak before the courts do, the Supreme Court does, we are talking something in the two-to 5-year timeframe?

Mr. WOLFE. Sure.

Chairman BROWNBACK. Between the nearest and the latest dates?

Mr. WILKINS. I don't think, Senator, that it will take longer than 5 years. I think 2 years is a very realistic estimate. I would be surprised if it took as long as five.

Chairman BROWNBACK. Let me make one comment, if I could, to Dr. Harris, and I appreciate you being here and I appreciate your work and your comments. I have been very sensitive to the issue of this being categorized as a civil rights type of issue, and you presented that eloquently. I have had that conversation with many African-Americans and most do not see this in that same frame that you presented here, and you presented eloquently and very well.

A Worthlin poll in 2003, 62 percent of African-Americans supporting marriage being defined as the union of a man and a woman, supporting a constitutional amendment to protect marriage. I certainly appreciate and respect the difficulty with which you have had to overcome obstacles. I would note that the majority of African-Americans actually support a constitutional amendment defining marriage as a union of a man and a woman, and I am sure you knew that, but I wanted to put that in the record.

Dr. HARRIS. Thank you, Senator, and I just wanted to respond also to what Professor Wolfe said about the will of the majority. Not being an attorney here, the only one not at the panel, I am kind of out of my league, but certainly the Framers were very clear about wanting to protect the rights of the minority and I am very concerned when I hear that the majority has to rule here because this Nation is not founded on solely the will of the majority moving forward. In spite of what polls say, in spite of what the majority says, the rights of minority Americans in all manners need to be protected.

Chairman BROWNBACK. Senator Sessions has joined us. Jeff, do you have any questions or comments for the panelists?

Senator SESSIONS. I would be pleased if you continued, you or Senator Feingold.

Chairman BROWNBACK. I am about ready to wrap it up, and Senator Feingold didn't have further questions. If you had a couple of—

Senator SESSIONS. I am sorry. The vote and all interrupted me. I was more interested in just hearing what you had to say. I will do my best to read your statements and I would just ask this question or share this thought.

I am troubled by the Supreme Court. They have a lifetime appointment and they are unaccountable to the American people. The majority or minority or whatever view they express becomes the Constitution. I remember one Federal judge humorously saying one time in conversation that continuing convention known as the Supreme Court, and really, only five Justices can rewrite the Constitution and make it say what it does not say. If you complain, they say, you are against the Constitution. You are against civil

rights. You are not part of the evolving standards of decency that we see. You are a backwoodsman, narrow minded, and those kinds of things. That is what they say, of course. So it is real troubling.

That is why the confirmation of John Roberts was very important, and he articulated just beautifully the role of a judge and why that is a dangerous thing, and he said at one point—I don't think anybody picked it up, Mr. Chairman, particularly, but he said one of the greatest, and perhaps the greatest threat to the Court would be that it overreached and lost its legitimacy with the people, and then 1 day when a real civil rights issue is up, they don't have the credibility to carry out their order because they don't have an army to call out to enforce it.

So I am concerned about this. I see very little principled basis for any such interpretation that the Constitution, ratified by the American people, would ever have been contemplated by those people who entered into that contract with our government that it was going to allow five judges to redefine marriage when a marriage is not mentioned in the Constitution. Is it, Mr. Chairman? The word is not mentioned, and it has always been left to the States and they have always handled this in various, different ways. If some States want to allow various kinds of marriages, that is one thing. So we are concerned about it.

The Supreme Court in paring back on recently State death penalty cases has said we need to keep up with the evolving standards of decency, and yet at the same time, they strike down a Texas law in the *Lawrence* case and they say a State cannot rely on established, long-held moral values to render. So elected representatives can't base a statute on long-established moral principles as seen by the people, but the judges, five of them on the Supreme Court can use this ephemeral, unprincipled, unlimited view, evolving standards of decency, which means nothing. It means only what they say it means, of course. It is a standardless test.

Mr. SEIDMAN. Senator, may I—

Senator SESSIONS. Professor Seidman—

Mr. SEIDMAN. May I comment very briefly?

Senator SESSIONS. You have every right to maybe rebut my diatribe, but it represents a sincere concern. I think it is held by a majority of the American people. I think we need—and I think it would be my basic view, Mr. Chairman, is what a healthy thing it would be if the American people got to have the opportunity to express their view on this issue rather than leaving it to the unelected five.

Mr. SEIDMAN. Senator, I think that is a very powerful position, very powerfully expressed. I am not going to try to refute it here, but I do just want to introduce some complexities. That is what law professors do for a living. [Laughter.]

So if one had to pick the most important decision this century that was the most deviant from the attempt of the Framers, it would not be *Roe* v. *Wade*, it was *Brown* v. *Board of Education*. While the—

Senator SESSIONS. Post the Fourteenth Amendment?

Mr. SEIDMAN. While the framers of the Fourteenth Amendment were debating it in the House and Senate, the galleries of the House and Senate were segregated by race by the order of the

House and the Senate. There was no evidence that the Framers intended to abolish segregation.

Justice Roberts in his testimony before this Committee—

Senator SESSIONS. Can I interrupt you there? I think you make a valid point, and it is something we should consider, but it is a fair interpretation of the words that were adopted, "equal protection," that that was not equal protection. Tell me what fair interpretations of the words can say you have got to have a redefinition of marriage?

Mr. SEIDMAN. Well, first, let me say this. Justice Roberts, in his testimony before this Committee, on several occasions said that his judicial hero was Justice Robert Jackson. Well, we now have available to us the conference notes of what Justice Jackson said about *Brown* v. *Board of Education* at the time it was decided, and Senator, here is what he said. He said this is a decision that cannot be justified legally. It is not in the Constitution, either in the words or the intent of the Framers. I am voting for it anyway because it is a moral imperative. That is what Justice Roberts's hero said in *Brown* v. *Board of Education*.

Senator SESSIONS. I think you are raising a point here that is worth discussing. Professor Wilkins, do you want to comment?

Mr. WILKINS. Senator, I would like you to read, if you would, my entire 23 pages, but Footnote 38 in particular. [Laughter.]

The problem—the Supreme Court in *Dred Scott* v. *Sanford* for the first time invoked the Due Process Clause to say a human being, a former slave, was still a slave and still property notwithstanding an Act of Congress that freed that slave upon his master's moving the slave to Missouri, and Congress clearly had the power to do so. The Supreme Court struck it down under the Fifth Amendment Due Process Clause in *Dred Scott*, making—

Senator SESSIONS. You would call that an activist decision—

Mr. WILKINS. I certainly would, and that made the Civil War inevitable. We thereafter amended the Constitution three times, Thirteenth, Fourteenth, Fifteenth Amendment, and for about 26 years, the Supreme Court had the courage to apply that language as it was written. In fact, in a case that is never cited by anyone, but I cited in Footnote 38, in the case of *Railroad Company* v. *Brown*, 1873, it invalidated a railroad company's attempt to provide separate but equal provisions and the Supreme Court in 1873 said this is ingenious, but it is a disingenuous attempt to evade compliance with the obvious meaning of the Fourteenth Amendment.

It was only when 20 years, or a few years later, in 1896, the Court again departs from the language of the Constitution in *Plessy* v. *Ferguson* because it complies with the perceived political need to keep the Constitution alive, and in 1896, the political climate was, we really didn't mean what we said in the Thirteenth and Fourteenth Amendment. Let us just depart. And so the Court departs in *Plessy*.

Now, I don't know why Justice Jackson said what he said that has just been quoted by Professor Seidman, but if you look at the Court's decisions, all *Brown* did was bring its own actions back into compliance with the literal text of the Constitution. We get into trouble when courts start construing language to create shadows

and concepts that are not in the Constitution. The documented history of judicial departure from applying constitutional text as construed in light of its history and interpretation by the American people is a sorry one, indeed.

Brown is often cited as this great departure and as this great example of judicial bravery. I favor the *Brown* decision. I am glad the Supreme Court finally came around back to the language. But the point is, they should have stayed with the language as they did in *Strouder* and *Railroad Company* and other cases until they departed in 1896 in *Plessy*.

Senator SESSIONS. And, Professor Seidman, I will just mention this. I know the Committee needs to go on. I think your point is better if you take the view of interpretation as solely an originalist, assuming all your facts are correct, which I really don't know, but Justice Roberts didn't say he was solely an originalist. Some of it is plain meaning of the words, what the words mean. I liked, I believe it was Miguel Estrada that said he believed in a fair interpretation of the Constitution. He didn't like the labels. That may be a richer view of how to handle it.

Thank you, Mr. Chairman, for your leadership. I don't think this is a small matter. I think that the American people are concerned about it in a legitimate way. It represents a cultural shift if the definition of marriage is altered. I think the American people ought to be able to decide those things, if it is within their province and not in violation of the Constitution. I don't see how it can be in violation of the Constitution. Thank you.

Chairman BROWNBACK. Thank you, and thank you for joining us, Senator. It is no small matter, and that is why we have got a panel here of experts to talk about it and I invite them to put forward more information if anything here has stirred them to additional thoughts.

This is a very important issue. It is one I am hopeful that we are going to be able to have a markup in the Judiciary Committee at some point in time on the constitutional amendment. Senator Feingold is right. Last year when it came up, it didn't come through the Committee and I am hopeful this year we are going to be able to have sometime during this session of Congress, this year or next, that we will be able to have a markup and have a full discussion on it and we need all your thought. We need your prayers, too. This is a tough issue to figure out and to try to move the country forward together on, and yet I think there are ways to be able to move that forward and get it right for the betterment of the country and the betterment of our society.

The record will remain open for 7 days for any questions Senators wish to submit.

I thank the panelists and those in the audience for being here. The hearing is adjourned.

[Whereupon, at 3:48 p.m., the Subcommittee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

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31 October 2005

The Honorable Sam Brownback
United States Senator from the State of Kansas
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VIA E-mail to Amy Blankenship
Amy_Blankenship@brownback.senate.gov

Re: Written questions from Senator Russ Feingold for Professors Fitzgibbon, Wilkins and Wolfe related to S.J. Res. 1

Dear Senator Brownback:

On October 28, while I was attending an academic conference in Tampa, Florida, Ms. Amy Blankenship sent me an e-mail requesting that I respond to various written questions propounded by Senator Feingold. I did not open the e-mail from Ms. Blankenship until today. I submit forthwith my written responses to Senator Feingold's questions.

I have complied with Senator Feingold's request to prepare these responses without any research or consultation. Quite frankly, however, compliance with this somewhat unusual request renders it impossible to comply with another of the Senator's stipulations: that I respond as if I "were a federal district court judge hearing a challenge to a state law under the amendment." A federal district court judge would have the advantage of full briefing from all parties on the important questions the Senator propounds. The inconsistent instructions which seemingly animate the Senator's requests (*i.e.,* that I provide responses based solely on my "own understanding" which nevertheless reflect how I would respond as a "federal district court" following full briefing and argument) prompt considerable concern that the Senator may be attempting to establish by stealth non-existent "inconsistencies" and "differences of opinion" regarding the meaning and construction of the proposed constitutional amendment – even among those who drafted it. This concern is compounded by the fact that there was some confusion at the hearing regarding whether I was involved in drafting the proposed constitutional amendment. *I was not.*

As requested by Senator Feingold, I have not consulted with anyone in preparing the following responses. These responses reflect my professional legal opinion based upon my training as a scholar and professor of American constitutional law. My responses are based upon a straight-forward construction of the plain language of the proposed amendment in light of widely applicable principles of constitutional interpretation, established rules of family and marital law,

and general rules of constitutional law. I have no personal knowledge whether my responses necessarily reflect the views of those who drafted the proposed amendment. I likewise have no personal knowledge whether my responses reflect the views of the Alliance for Marriage or other organizations supporting the proposed amendment.

Please contact me at my office if you have any questions. My office phone is (801) 422-2669. My e-mail address is wilkinsr@lawgate.byu.edu. It was an honor to participate in the hearing on October 20, 2005.

With all best wishes,

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SENATE SUBCOMMITTEE ON THE CONSTITUTION, PROPERTY RIGHTS, AND CIVIL RIGHTS HEARING ON "AN EXAMINATION OF THE CONSTITUTIONAL AMENDMENT ON MARRIAGE"

WRITTEN QUESTIONS FROM SEN. RUSS FEINGOLD FOR PROFESSORS FITZGIBBON, WILKENS [SIC], AND WOLFE

You appeared as an expert witness at this hearing in favor of S.J. Res. 1. I would like to know how you would interpret and apply the amendment if you were a federal district court judge hearing a challenge to a state law under the amendment. I would prefer that you answer these questions based on your own understanding of the amendment and research, without consulting or discussing your answers with the other witnesses or with outside scholars or advocates.

1. Attached to these questions, you will find Connecticut Substitute Senate Bill No. 963, which is now effective as the Connecticut Civil Unions law. The bill reads, in relevant part:

> *Sec. 14. (NEW) (Effective October 1, 2005) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.*

If S.J. Res. 1 were to be ratified, would Connecticut's civil union scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

Response of Richard G. Wilkins:

S.J. Res.1 would present American citizens with the option of adding the following language as an amendment to the current text of the United States Constitution:

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

Marriage historically has been defined as the union of a man and a woman. In the context of the marital law of all 50 states, the word "union" connotes and denotes sexual union. Among other things, absence of sexual union provides grounds for annulment of marriage. Numerous statutory and common law provisions related to "marriage," furthermore, assume the sexual nature of the union. This long-standing assumption has given rise to a staggeringly wide variety of legislative and common-law rules related to the sexual "union" of "marriage," including the inheritance rights of children born within "marriage" and the historical presumption that all children born within "marriage" are sired by the husband – regardless whether the husband, in fact, is the biological father of the children.

The first sentence of the proposed amendment defines what marriage **is** throughout the United States: the sexual union of a man and a woman. If ratified, the first sentence of the proposed amendment would prevent state and federal courts and legislatures from extending the definition of "marriage" beyond "the union of a man and a woman."

The second sentence reaffirms the import of the first sentence by establishing a clear constitutional prohibition on state or federal *judicial* redefinition of marriage. Unlike the first sentence, however, the second sentence *would not* restrict the power of state and federal *legislatures* to recognize and confer benefits upon "unions" (including sexual unions) *other* than "marriage." As a result, while the proposed amendment would preserve a unified concept of "marriage" within the United States, it would *not* federalize family law or prevent the 50 states from recognizing and protecting unions beyond those involving "the union of a man and a woman."

Contrary to the claims of its opponents, the proposed amendment *will not* result in a "vast expansion" of "federal judicial power" relating to "marriage," nor will it unduly constrict state authority with regard to "family law." The federal courts, as evidenced by Supreme Court decisions beginning in *Griswold v. Connecticut* and extending through *Lawrence v. Texas*, are *already* defining the "meaning" and "incidents" of "marriage." There is no indication, furthermore, that this federal redefinition of marriage and family life – assumed by the judiciary

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* *See* answer to question five, below. I set out above the most recent version of S.J. Res. 1 contained in my computer files. Because of Senator Feingold's request that I prepare these answers without "research" and "without consulting or discussing [my] answers with the other witnesses or . . . scholars or advocates," I have not verified the accuracy of the above language.

without any express guidance from the text, structure or history of the United States Constitution – will soon end. The proposed amendment merely prevents *further* federal court interference with the historic power of the 50 states to regulate and govern the family – the social unit Article 16(3) of the Universal Declaration of Human Rights describes as the "*natural* and fundamental group unit of society." (Emphasis added.) Absent adoption of the proposed amendment, and beyond all reasonable doubt, federal judicial power regarding the form, meaning, content and legal rules attendant upon "marriage" and "family life" will continue to expand. Accordingly, rather than interfering with established separation of powers principles, the proposed amendment is necessary to preserve American constitutional federalism from further federal judicial erosion.

I explain the impact of the amendment on the judicial and legislative branches separately.

A. Impact upon the Judiciary

Both sentences of the proposed amendment prohibit judicial decrees (based upon judicial construction of existing federal or state constitutional language) that would (1) redefine marriage as a union *other* than a "union of a man and a woman" or (2) confer any "legal incident" of marriage upon any other union. Neither sentence of the proposed amendment imposes upon the judiciary an ambiguous, vague or inappropriate judicial task.

The definition of "marriage" is widely understood and, in any event, is set out in the first sentence of the proposed amendment. The "legal incidents" of marriage are readily identifiable by parsing the relevant state and federal statute books: the "legal incidents" of "marriage" consist of all rights, benefits, subsidies or assistance contingent upon a man and a woman being joined in the sexual union of "marriage"

Accordingly, the two sentences of the proposed amendment prevent state and federal courts from contorting the existing language of federal and state constitutions to either (1) confer marital status or (2) *any* legal incident of marriage upon a sexual union other than "the union of a man and a woman."

B. Impact upon the Legislative Branch

As it does with the state and federal judiciary, sentence one of the proposed amendment prohibits either state or federal legislatures from redefining "marriage." If the amendment is adopted, "marriage" "shall consist" of the sexual union of "a man and a woman." No action by state or federal legislatures, or state or federal courts, could alter this fact. The definition of marriage would be fixed absent a further constitutional amendment adopted by the People of the United States.

Sentence one, however, will not prevent state or federal legislatures from recognizing and protecting relationships *beyond* marriage. Sentence one will preserve the important (and unitary) definition of "marriage" within the United States. It will not deny the People of the United States, however, their democratic right to define and protect relationships beyond those involving "the union of a man and a woman."

Sentence two *does not* place *any* restrictions upon the exercise of state or federal legislative power. While sentence two prevents state or federal *courts* from construing constitutional language to redefine marriage or confer its "legal incidents" upon any sexual union other than "the union of a man and a woman," the second sentence *does not* prohibit federal or state legislative action recognizing and providing social protections for *other* human relationships (and "unions"). While such relationships could *not* be denominated "marriage" under sentence one, state and federal legislatures would remain free to define the terms and conditions of a "union" other than one involving "a man and a woman" and confer whatever rights, benefits, subsidies or assistance the legislature deems appropriate. Any such right, benefit, subsidy or assistance, furthermore, would not violate the terms of sentence two because the right, benefit, subsidy or assistance *would not be conferred on the basis of "marriage."* Such "incidents," whether considered incident-by-incident or as a "package," could not be considered invalid "legal incidents" of "marriage" because an individual's entitlement to the "incident" or "incidents" would be unrelated to "marriage."

Accordingly, under the above reasoning, the language quoted from Section 14 of the Connecticut statute would not be unconstitutional under the proposed amendment.

Note: As a matter of public policy, I would advise state legislatures – when recognizing and protecting relationships beyond marriage – to consider carefully the wisdom of formally recognizing and subsidizing non-marital relationships defined by sexual conduct. Sexual conduct is not necessarily related to any social interest in promoting and subsidizing stable, committed and caring relationships. Formal recognition and subsidy of sexual conduct, furthermore, may well produce serious unintended (and unjust) consequences. Such a regime, for example, will afford no protection to the vast number of committed, caring and interdependent relationships that are not defined sexually and that (to date) have been entirely ignored in the on-going marriage debate. *See my attached essay, in draft form, "Social Justice and Moving Beyond Marriage."* ***Importantly, however, the language of the proposed amendment neither prohibits nor requires state or federal legislative action grounded upon sexual conduct.*** **The attached essay states my informed views regarding what I believe to be the most equitable resolution of the "marriage debate." The attached essay does *not* describe or reflect any limitation inherent in the proposed amendment.**

2. Attached to these questions, you will find California Assembly Bill 205, which is now effective as the California Domestic Partnership law. The bill reads, in relevant part:

> *SEC. 4. Section 297.5 is added to the Family Code, to read:*
> *297.5. (a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.*
> *****
> *(g) Notwithstanding this section, in filing their state income tax returns, domestic partners shall use the same filing status as is*

> *used on their federal income tax returns, or that would have been used had they filed federal income tax returns. Earned income may not be treated as community property for state income tax purposes.*

If S.J. Res. 1 were to be ratified, would California's domestic partnership scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

Response of Richard G. Wilkins:

Yes; see answer to Question 1, above.

3. Attached to these questions, you will find the New Jersey Domestic Partnership Act. The Act reads, in relevant part:

> *c. Because of the material and other support that these familial relationships provide to their participants, the Legislature believes that these mutually supportive relationships should be formally recognized by statute, and that certain rights and benefits should be made available to individuals participating in them, including: statutory protection against various forms of discrimination against domestic partners; certain visitation and decision-making rights in a health care setting; and certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses;*
> ***
> *e. The Legislature, however, discerns a clear and rational basis for making certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex who are in a domestic partnership but have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits;*

If S.J. Res. 1 were to be ratified, would New Jersey's domestic partnership scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

Response of Richard G. Wilkins:

Yes; see answer to Question 1, above.

4. Consider the following legal rights or benefits that citizens who are married often have or receive:

   a) Right to adopt a domestic partner's child using the stepparent adoption procedure.
   b) Right to inherit when partner dies without a will.

c) Right for a partner to recover damages for negligent infliction of emotional distress and wrongful death.
d) Right to make funeral and burial arrangements.
e) Right to make medical or legal decisions for an incapacitated partner.
f) Eligibility for survivor benefits under Social Security.
g) Exemption from estate and inheritance taxes upon the death of a domestic partner.
h) Right to legally change a surname to the surname of a partner more easily than individuals can normally change their surnames.

For each of these rights or benefits, please answer the following questions. A simple "Yes" or "No" answer to each question is acceptable, but you may elaborate if you wish:

i. Does it constitute a "legal incident" of marriage for purposes of the second sentence of S.J. Res. 1?

Response of Richard G. Wilkins:

Depending upon the terms of the relevant legislative codes in the 50 states, each of the legal incidents listed in subparagraphs 4(a) through 4(h) might (or might *not*) be a "legal incident" of marriage. Because I have been requested to answer these questions without conducting any research or discussing my answers with anyone, I simply do not know how all of the foregoing provisions are defined the various states. I have reason to believe that some states make some of the foregoing incidents contingent upon "marriage." But not every incident is so defined by every state. For example, in some states even stepparent adoption is *not* an "incident of marriage" either because of legislative action or judicial decisions extending adoption rights to unmarried couples.

In any event, *all* of the "legal incidents" set out in 4(a) through 4(h) could be extended to relationships (including sexual unions other than marriage) without running afoul of the second sentence of the proposed amendment. State or federal legislatures could not extend the incidents set out in 4(a) through 4(h) upon the basis of "marriage" (a result prohibited by sentence one of the proposed amendment). But state and federal legislative bodies would remain free under sentence two to define relationships beyond those involving "the union of a man and a woman" and, by express legislative grant, extend *every* incident (or any *single* incident, or *combination* of incidents) set out above to the legislatively defined relationship. These legislative grants, because they would be conferred upon a relationship other than "marriage," would not be "legal incidents" of "marriage."

IMPORTANT LIMITATION ON FEDERAL LEGISLATIVE ACTION: The foregoing answer (as well as the answers to Questions 1-3, above) does not consider possible limitations upon federal legislative power imposed by, among other things, the Dormant Commerce Clause or other constitutional doctrines. Federal power with regard to many of the "incidents" in 4(a) through 4(h) is limited. These constitutional limitations on federal legislative action, however, flow from the existing terms of the United States Constitution – not the proposed amendment.

ii. If a civil union or domestic partnership statute passed by a legislature without judicial involvement granted all the rights and benefits available to married couples *except for* the specified right or benefit, would that statute be constitutional under the first sentence of S.J. Res. 1?

Response of Richard G. Wilkins:

Yes, see answer to 4(i), above. The proposed amendment, however, does not require state legislatures to *include* or *exclude* any particular "incident" (or combination of "incidents") so long as no single "incident" (or combination of "incidents") is contingent upon an individual's membership in the marital union "of a man and a woman." So long as legislative entitlement to any right or incident turns upon an individual's involvement in a legislatively defined relationship other than the "union of a man and a woman," the legislative entitlement would not be invalidated under sentence two.

5. Please list every person with whom you spoke about these questions or your answers to them prior to submitting your written answers to the Subcommittee.

Response of Richard G. Wilkins:

Pursuant to the request of Senator Feingold, I did not discuss the answers set out above with anyone prior to submitting these responses to Senator Brownback (from whose office I received these questions). Except for quickly reviewing the essay attached to these answers, I have not consulted any written materials, prepared by myself or anyone else, in the course of preparing these responses.

The language of the proposed amendment set out in response to Question 1 was taken from a computer file containing only the language of what I believe to be the current version of the proposed amendment. Because of Senator Feingold's request that I respond without research, however, I have not checked whether the language set out at Question 1 above accurately reflects the language of S.J.Res.No. 1.

Boston College Law School
November 1, 2005

The Honorable Russ Feingold
United States Senate

Dear Senator Feingold:

Thank you for sending me the questions set forth below and for your attendance during my testimony on October 20 before the Senate Subcommittee on the Constitution, Property Rights and Civil Rights. This was my first experience testifying before a committee of either house of the United States Congress, and it was an honor for me to do so.

I undertook to testify about the situation in Massachusetts ensuing upon the recognition of same-sex marriage in this Commonwealth, rather than about the scope and likely interpretation of S. J. Res. 1. I have therefore not analyzed those matters and am not in a position to supply the discussion and conclusions which the questions require.

I am sorry that I cannot be more helpful.

Yours sincerely,

Scott FitzGibbon

Senate Subcommittee on the Constitution, Property Rights, and Civil Rights Hearing on "An Examination of the Constitutional Amendment on Marriage"

Written questions from Sen. Russ Feingold for Professors Fitzgibbon, Wilkens, and Wolfe

You appeared as an expert witness at this hearing in favor of S.J. Res. 1. I would like to know how you would interpret and apply the amendment if you were a federal district court judge hearing a challenge to a state law under the amendment. I would prefer that you answer these questions based on your own understanding of the amendment and research, without consulting or discussing your answers with the other witnesses or with outside scholars or advocates.

1. Attached to these questions, you will find Connecticut Substitute Senate Bill No. 963, which is now effective as the Connecticut Civil Unions law. The bill reads, in relevant part:

> *Sec. 14. (NEW) (Effective October 1, 2005) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.*

   If S.J. Res. 1 were to be ratified, would Connecticut's civil union scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

2. Attached to these questions, you will find California Assembly Bill 205, which is now effective as the California Domestic Partnership law. The bill reads, in relevant part:

> *SEC. 4. Section 297.5 is added to the Family Code, to read:*
> *297.5. (a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.*
> *****
> *(g) Notwithstanding this section, in filing their state income tax returns, domestic partners shall use the same filing status as is used on their federal income tax returns, or that would have been used had they filed federal income tax returns. Earned income may not be treated as community property for state income tax purposes.*

   If S.J. Res. 1 were to be ratified, would California's domestic partnership scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

3. Attached to these questions, you will find the New Jersey Domestic Partnership Act. The Act reads, in relevant part:

> *c. Because of the material and other support that these familial relationships provide to their participants, the Legislature believes that these mutually supportive relationships should be formally recognized by statute, and that certain rights and benefits should be made available to individuals participating in them, including: statutory protection against various forms of discrimination against domestic partners; certain*

visitation and decision-making rights in a health care setting; and certain tax-related benefits; and, in some cases, health and pension benefits that are provided in the same manner as for spouses;
***
e. The Legislature, however, discerns a clear and rational basis for making certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex who are in a domestic partnership but have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits;

If S.J. Res. 1 were to be ratified, would New Jersey's domestic partnership scheme—which was enacted by the General Assembly without any judicial involvement—be constitutional?

4. Consider the following legal rights or benefits that citizens who are married often have or receive:

   a) Right to adopt a domestic partner's child using the stepparent adoption procedure.
   b) Right to inherit when partner dies without a will.
   c) Right for a partner to recover damages for negligent infliction of emotional distress and wrongful death.
   d) Right to make funeral and burial arrangements.
   e) Right to make medical or legal decisions for an incapacitated partner.
   f) Eligibility for survivor benefits under Social Security.
   g) Exemption from estate and inheritance taxes upon the death of a domestic partner.
   h) Right to legally change a surname to the surname of a partner more easily than individuals can normally change their surnames.

   For each of these rights or benefits, please answer the following questions. A simple "Yes" or "No" answer to each question is acceptable, but you may elaborate if you wish:

   i. Does it constitute a "legal incident" of marriage for purposes of the second sentence of S.J. Res. 1?

   ii. If a civil union or domestic partnership statute passed by a legislature without judicial involvement granted all the rights and benefits available to married couples *except for* the specified right or benefit, would that statute be constitutional under the first sentence of S.J. Res. 1?

5. Please list every person with whom you spoke about these questions or your answers to them prior to submitting your written answers to the Subcommittee.

Answers to Senator Feingold's questions

1. I think Connecticut's civil union scheme, which was enacted by the General Assembly without any judicial involvement, would be unconstitutional under the Marriage Protection Amendment, because it effectively authorizes marriage for unions of two men or two women, since the *only* difference between civil unions and marriage is the name.

2. I think that California's Domestic Partnership law, as applied to unions other than a union between one man and one woman, is a more difficult case.

It could be argued that it is unconstitutional under the Marriage Protection Amendment for the same reason that the Connecticut civil union law is unconstitutional, since–even though one provision provides one exception–the general principle of the law (in SEC. 4) defines the domestic partnership as being equivalent to marriage. The single exception could easily be viewed as merely an evasive maneuver to avoid a pure equivalence that would make the statute constitutionally vulnerable.

It could also be argued, however, that there is a difference between this domestic partnership law and marriage (beyond just the name), and therefore domestic partnership is not marriage in everything but name, and therefore it is within the constitutional power of the California legislature to pass. (Once the statute is acknowledged to have some difference, it could be argued that it is not within the competence of judicial construction to say what "degree" of difference would be necessary to determine the statute's constitutionality–that decision would be left to legislatures.)

In a close case like this, I think the legislative history would be likely to play a determinative role in the final decision.

3. I think that New Jersey's Domestic Partnership Act would NOT be unconstitutional under the Marriage Protection Amendment, because it does not define domestic partnerships in a way that makes them effectively equivalent to marriage.

4. (i) All of the rights or benefits listed are incidents of legal marriage.

But, of course, each of these rights and benefits could, in principle, also be accorded (by the relevant legislative authority) to non-married people. Granting one, or some, of these rights to couples or groups of people would not necessarily make such pairs or groups "married."

However, if couples or groups of the same sex were granted *all* the rights and benefits that are the incidents of legal marriage, then they would effectively be equivalent to marriage, and therefore such a grant would be unconstitutional under the Marriage Protection Amendment.

(ii)As I indicated above, there is room for argument regarding a civil union that was equivalent to marriage in all respects but one. While there is some room for interpretation here, however, this range of interpretation would not be wide, and would not differ from what is typically required in the application of well-drafted constitutional provisions.

Of course, it would be desirable to clarify this question, if possible. For example, offering an unambiguous statement of the meaning of the amendment in the legislative history (e.g., the committee report on the amendment, and representations–uncontradicted by other supporters of the amendment–of the amendment's sponsors in floor debate) would be likely to have a substantial impact on how the amendment would be understood by those who have to vote on it, in Congress and in state legislatures.

SUBMISSIONS FOR THE RECORD

Statement of Nancy E. Dowd

Chesterfield Smith Professor of Law
Co-Director, Center for Children and Families
University of Florida Levin College of Law[1]

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

"An Examination of the Constitutional Amendment On Marriage"

Thursday, October 20, 2005

[1] Institutional affiliation is for identification purposes only.

Statement of Professor Nancy E. Dowd

Thank you for the opportunity to submit this written testimony. It is a great honor to speak to the issues raised by this amendment. As a teacher and scholar of constitutional law and family law, I conclude that a federal constitutional amendment limiting marriage and its attendant protections is legally and constitutionally inappropriate.

I am the Chesterfield Smith Professor of Law and Co-Director of the Center for Children and the Law at the University of Florida Levin College of Law I have written extensively about emerging family forms, including single parent families, adoptive families, and father-headed families. Two of my books are on single-parent families and fatherhood. I have also written extensively about work/family policy, including the Family and Medical Leave Act, and therefore the interface between family and employment law. Finally, I am about to publish a co-edited book on children, culture and violence. In my scholarship I have focused on those areas of constitutional law that affect families and children, particularly fundamental rights, due process, and equal protection.

My testimony draws upon my scholarship regarding the challenges that face today's families, and the role that law – including family law and our Constitution— can play in the lives of children and the families who raise them.

One of the remarkable consequences of the events of September 11, 2001 is what they reveal about families. Most significantly, in the lives of those who perished is exposed the complex fabric of family relationships that are the reality of American society. Rather than simply statistics on single-parent families, cohabitating couples, blended families, and same-sex couples, there are the individual vignettes of the lives that were cut short on that day, and the implications of those losses for the relational webs of individuals.[2] What we see in the 9/11 victims and their families are patterns of change, patterns of multiple family forms, and relationships of feeling sometimes in alignment with legal relationships, but often not. One of the questions that emerged early was who would be entitled to compensation for their loss, focusing particularly on cohabitating couples, common law marriages, same-sex couples, and stepfamilies. Families and family members, who did not fit the traditional model, faced, in addition to grief and loss, challenges to a recognition of their loss and their need for assistance. Their existence as families was obscured by the fact that they were strangers under law.

Our response to 9/11, has been to embrace all who have lost and thereby to embrace the most fluid, flexible, relational view of family. It is a definition of family founded in love and emotion, acts and history, rather than status or formality. At least on this occasion,

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2. The New York Times for months ran an extraordinary section of obituaries, covering the lives of those who died in a quite unique way, very different from the ordinary obituary with its almost ritual spare set of facts. *See* PORTRAITS OF GRIEF, *supra* note 16.

we have forgotten our objections to nontraditional families and embraced a definition of family based on emotional connection. Perhaps we have witnessed a transformation.[3] The movement to embrace nontraditional families in this instance may support greater tolerance and even change legal rules that deny the cultural realities of the characteristics of family culture as it is lived out in the patterns of these families: pluralistic, multifaceted, creative, and fluid. In the aftermath of 9/11 there is, therefore, the transformative potential of understanding and honoring these stories of intimate relational ties, love and feeling, that may affect the definitional norms of "family," thus challenging formal or structural definitions of family.[4]

9/11 teaches something that family law scholars have known for quite some time: our laws should support parents and children in the families that they are in- not exclude families from protection.

The devastation and challenges wrought by Hurricanes Katrina and Rita have reconfirmed those lessons. The dramatic scenes of rescue, heartbreak, and continued loss do not lead us to ask which children deserve help, based on which families we deem deserving; all the children matter. Those who need our help most need support for the families in which the children live. Some 2500 displaced foster children are included among the victims and have particularly serious needs. Non-traditional families need increased protections, not further roadblocks to protecting themselves and their children.

My reasons for opposing this amendment are grounded in both family law and constitutional law. Most fundamentally, my opposition is grounded in serving the best interests of children. If you remember nothing else from my testimony today, I hope you remember this: this amendment will not benefit children. Not one child will be better off if this amendment is passed. The needs of our children are great. We have many pressing issues that demand our attention to improve the lives and enhance the equality and dignity of our children. This amendment is not one of them.

Family Law Concerns

As a teacher and scholar of family law, I have learned that our laws should respect, not undermine, the relationships between children and their parents and families.

Research indicates that marriage correlates with good outcomes for children. This is not surprising, as the commitments made when couples marry, and the state's recognition of those commitments with myriad benefits (at last count, well over a thousand state and federal benefits) provides an environment of affirmative support for stable relationships between parents and children.

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3. It is also mirrored in the spiritual diversity demonstrated since 9/11 as well as the recognition and reaction to cultural ignorance of Islam, and concern that fear not translate into racial and religious hatred. *See NPR News Special: Native American Elders Performing Ceremony to Release Spirits in Battery Park* (NPR radio broadcast, Sep. 11, 2002), LEXIS, News Library, Current News File (Native American ceremony to release the spirits of the dead; the neighborhood ceremony in Battery Park included a Buddhist, iman, rabbi, priest, and minister).

4. *See* Andy Humm, *Second Class Survivors: Gay and Lesbian Partners of 9-11 Victims Struggle to Receive Their Benefits*, THE VILLAGE VOICE (New York), Nov. 20, 2001, at 55.

The benefits of marriage of course do not exclusively flow to children; some are focused on the couple irrespective of whether they have children. Some that particularly benefit children, however, include property rights in life and death (joint income tax filing, tenancy by the entirety, homestead protection, rights of inheritance, health insurance rights, pension rights, spousal veterans' benefits, marital property and alimony rights, rights to bring claims of wrongful death); rights of legitimacy and parentage; entitlement to leave benefits; the rights of individuals to make medical decisions; custody and visitation rights; and the remaining vestiges of distinctions between marital and non-marital children. An amendment that excludes some families from any mechanism for providing this stability works against the interests of the children in these families.

Marriage provides numerous legal benefits at the state and federal level. It also imposes legal obligations upon parents relative to the children in a marriage, whether biological, adopted, or step-children. Narrowing the class of people eligible for marriage or its attendant protections inevitably excludes some children from these protections. Moreover, if exclusion from legal recognition burdens the parents, such as by excluding them from receiving health coverage (for example health insurance, because of enormous cost), then those children may lack essential supports entirely. Certainly we should not use the Constitution to create different classes of children. This amendment, however, has the potential to do just that—punishing over 1 million children in this country for their parents' sexual orientation.

Our practices of partnership, parenthood, family and marriage are deeply pluralistic. That diversity is reflected in our contemporary lived reality of marriage. It is a reality dramatically different from the definition of marriage a century ago, or less than fifty years ago, when the first no-fault divorce statutes came into being, or the past several decades when non-marital parents have gradually evolved to have the same custodial rights and financial responsibilities as divorced parents. The enormous change in marriage is remarkable. It is change that has occurred at the state level, not at the constitutional level. It reflects the choices of "We the People" in a constitutional scheme that particularly honors individual choice as the best means to accomplish the greater social good. The choices that we honor are those that we believe will be to the best benefit of children, and we believe that those decisions are best left to the people rather than the state.

It is particularly apt that we recognize the fluidity and pluralism of the structures of family within which children thrive. At the same time, the honored status of marriage makes it a particularly desirable status for children when it acts as an institutional recognition of an environment of nurture and stability. Marriage cannot make that positive environment happen; but marriage can support and protect the relationships already made, and thereby protect the things most precious to children, their relationships.

Certainly children are not helped by the stigmatization or undermining of their families. Marriage is a means to support a nurturing environment of stability and growth for children. In other words, a constitutional amendment limiting marriage, a strongly preferred social and legal status, to heterosexual couples, should not be enacted in the name of, or for the benefit of children.

If we want to protect our children, we need to meet the challenges posed by poverty, racism, sexism, poor housing, unequal and inadequate education, and violence.

It has been said that a marriage amendment is needed to secure the "ideal" of a mother and father for every child—an ideal that has been framed by some as a right. But an amendment would not alter the composition of one single family, and would instead undermine, rather than support, children in the families they are in.

Children's best interests should be and are paramount in family law. Children benefit from support for their families, within which they have the best opportunity to grow and mature, if it is a nurturing, loving environment.

If those interests are translated into constitutional rights, then those rights should be the right to care and nurture, and a meaningful opportunity to achieve their true potential. Their ability to thrive, however, does not depend on form, but on function. Rather than continue to challenge those who do not fit a preferred norm, like single parents or gay and lesbian couples, or blended families that include nurturing stepparents, or extended families where grandparents or other relatives are raising or helping to raise children, we need to support all the families that children find themselves in.

Rather than attempting to mask hostility to gay and lesbian people in the claim that children have a right to a mother and a father, we should simply recognize that children need nurture, stability, and protection. Children need care; they need action. They do not need this distinguished body to deliberate over how to further entrench the disparities between some families and others.

In considering this proposed amendment, we also need to be mindful of the extreme and unfortunate repercussions of amendments with similar wording that have passed at the state level. In Ohio and Utah, state marriage amendments designed to limit marriage to heterosexual couples and to deny any similar status, such as a separate but equal civil union or domestic partnership status, have been used to argue for the non-enforcement of domestic violence laws when the victim of battering is not a spouse. In Michigan, a similar amendment was the basis to argue for withdrawal of basic health insurance coverage for domestic partners. While these issues ultimately were resolved to maintain protection against domestic violence and provide basic health care, the ambiguous and potentially broad language of those amendments was used to undermine basic protections for children to health care and non-violence. Defining marriage and then using the definition as a basis to stigmatize other families, including same sex partnerships, single parent families, and cohabiting heterosexual couples, not only fails to give state sanction to children in these families, it also withdraws state protection. We must not use the

Constitution to even provide an argument that might deny assistance to a child who is harmed by domestic violence. We must not use the Constitution to deny health insurance to a child. A federal amendment will likely result in the same perverse consequences, and federalize family law on a variety of topics not ordinarily handled by the federal courts, all to the detriment of children.

Constitutional Law Concerns

Lastly, let me also talk briefly about why, from the perspective of constitutional law and doctrine, this amendment should not be supported. The proposal of an amendment to limit rights that otherwise would be defined as fundamental is inconsistent with the framework of our Constitution. Our constitutional cases have constantly refined the meaning of liberty and equality, especially with respect to matters central to personal dignity and self definition. It's history has been characterized by progress away from the constraints on liberty and embedded inequalities, and toward the higher principles that infuse its purpose. Not only is limiting access to marriage a subject that does not lend itself to Constitutional amendment, it also creates an inherent conflict with other Constitutional values—liberty, equality, and Due process.

Defining what marriage is, or more specifically, who can marry, is not a subject that lends itself to constitutional amendment. As Chief Justice Marshall long ago proclaimed in McCulloch v Maryland, "[W]e must never forget it is a *constitution* we are expounding (17 U.S. at 407). The Constitution is not a dictionary. Congress is not a collective English professor, rewriting or establishing the meaning of words. The Constitution is not, in Marshall's words, to have the "prolixity of a legal code," but instead "[I]its nature...requires, that only its great outlines should be marked, its important objects designated...[because it is] "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." There is no doubt that marriage is one of the great fundamental relationships protected by the constitution. That protection rests on a recognition of marriage as a relationship that transcends the Constitution, that because of its transcendent value is inherent in the Constitution. As the Supreme Court recognized forty years ago in *Griswold,* marriage is "older than the Bill of Rights, older than the Constitution itself," "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v Connecticut, 381 U.S. 479, 486 (1965). It is a basic human right inherently included and long recognized in our Constitution.

Proponents of a constitutional amendment argue that it is precisely the importance of marriage that makes an amendment necessary to "protect" that institution. To the contrary, marriage's importance militates against an amendment, which would not only dissolve thousands of marriages in Massachusetts, but endanger basic legal protections for the millions of Americans whose families do not fit the model set forth in the proposed amendment.

Conclusion

A constitutional amendment limiting access to marriage will not serve its proponents' stated purpose. Rather, it will create internal inconsistency in the constitution, stigmatize certain families, and have broad consequences not only for same-sex couples but for the many American families who do not confo

Contact: **Trevor Miller**
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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Subcommittee on the Constitution On the Federal Marriage Amendment

October 20, 2005

Thank you Mr. Chairman. I appreciate, once again, the collegial manner in which have handled this hearing, including the advance notice of it that you gave us and the 3-2 ratio for witnesses.

When you held your first hearing on this topic in April, I had conducted 20 of my annual listening sessions in Wisconsin and only four of the 950 people who came out to ask me questions had raised the topic of same sex marriage. Three of them opposed the constitutional amendment. Now I have held listening sessions this year in all but four counties in Wisconsin, 68 in all. Over 3,400 people have attended these sessions and only about a dozen have raised this issue.

So despite all the attention the proposed constitutional amendment has received in the Senate -- four hearings in the last Congress and a vote on the floor last year and two out of the total of four hearings we have held in this subcommittee this year -- the issue of same sex marriage does not seem to be something that the public is all that concerned about. The issues that my constituents want to talk about, and want Congress to take action on, are the war in Iraq, health care, and spiraling gas prices. They really aren't interested in passing judgment on the private lives of their neighbors, and they don't feel that their marriages or families are threatened by same sex marriages in Massachusetts or civil unions in Vermont or Connecticut.

One of the main problems with the constitutional amendment that we will discuss today, S. J. Res. 1, is that we still don't really know what effect it will have if it becomes part of the Constitution. That became clear when its proponents brought it to the floor last year, without allowing a markup in the Judiciary Committee. Uncertainty still remains, for example, as to whether the language of the amendment would permit states to offer domestic partner benefits or the option of civil unions to same sex couples. I hope our witnesses can shed some light on these important questions today.

As time has passed since the Massachusetts court ruling, I think it has become clear that passing a constitutional amendment would be an extreme and unnecessary reaction. For more than two centuries, family law has been the province of the states and that is as it should be. Voters in several states passed marriage initiatives in the last election. The legislature in Connecticut recently passed a civil union bill and the Governor signed it. In California, a bill to permit same sex marriages was vetoed but new protections for domestic partners were signed into law. These developments tell me that the states are capable of addressing the issue, and they will do so in different ways, which is how our federal system generally works. Federal intervention would not be a good idea.

I was struck by reports on what happened in the Massachusetts legislature last month. The legislature narrowly passed a constitutional amendment last year to prohibit same-sex marriage, but when the issue returned this year, as the Massachusetts Constitution requires in order to put the issue on the ballot, the legislature rejected it by a vote of 157 to 39. Clearly, many supporters of the amendment changed their minds.

So I believe we should think long and hard about pre-empting state legislatures or state initiative processes through a federal constitutional amendment. There is certainly no crisis warranting a federal constitutional amendment on this issue. Nor is there evidence that the courts are poised to strike down marriage laws.

Mr. Chairman, our Constitution is an historic guarantee of individual freedom that every day stands as an example to the world. Except for the 18th Amendment on prohibition, which was later repealed, it has never been amended to limit basic rights or discriminate against one group of our citizens. I look forward to the testimony today from which I hope we will learn more about what this amendment will actually do, but I continue to strongly oppose this amendment because I think it is unfair, unwise, and unnecessary.

Mr. Chairman, again, thank you for your courtesy.

TESTIMONY IN SUPPORT OF THE FEDERAL MARRIAGE AMENDMENT

Professor Scott FitzGibbon[1]
Boston College Law School
October 14, 2005

INTRODUCTION

If I were drafting a slogan to assist opponents of the Federal Marriage Amendment in summarizing a key element in their position, I might suggest, "no big deal." (Or perhaps, "no great matter for national attention.") This slogan puts into a nutshell the cluster of assertions which have it that same-sex marriage initiatives are of importance only to those couples who may seek a same-sex-marriage license, do not have much effect on others, are of local or statewide interest exclusively, and do not merit national concern.

I am a resident of the only American jurisdiction which has adopted same-sex marriage. As a professor who writes and teaches on the subject of marriage, I have had occasion to examine the situation in Massachusetts and also in other jurisdictions which have legal provisions establishing same-sex marriage or similar institutions. The most obvious effects concern legal status: in Massachusetts, more than six thousand same-sex couples obtained marriage licenses during the first year of availability (about 20% of all licenses during that period).[2] But my testimony is not primarily about the direct legal consequences;[3] instead it relates to the social and moral effects that have begun to emerge. I am here to testify that these consequences are a significant matter and that they ought to raise grave concerns, both at the local and at the national level.

The practice of licensing same-sex couples as married has been in place in Massachusetts for only seventeen months. Plainly at this early moment we can only begin to surmise the full consequences of a development whose effects are sure to unfold

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[1] J.D., Harvard. B.C.L., Oxford. Member of the Massachusetts bar. My thanks to Colbe Mazzarella, J.D., for valuable research assistance.

[2] "More than 6100 same-sex couples have gotten married" – "one out of six marriage licenses issued in the state." Charisse Jones, "Gay Marriage Debate Still Fierce One Year Later," article in USA TODAY posted May 16, 2005, http://www.usa .today.com/news/nation/2005-05-16-gay-marriage_x.htm (accessed October 8, 2005). For obvious reasons the first year must be atypical.

[3] Nor does this testimony primarily attend less direct legal consequences such as the implications for other aspects of family law, such as visitation rights and custody, although those consequences are likely to be extensive, since marriage is the axle upon which the entirety of family law pivots. Nor does this testimony address the hundreds of doctrines outside of family law which will be affected because they refer to marriage and the family. Marital status has been identified as implicated in more than a thousand federal laws. *See* Letter from GAO Associate General Counsel Barry Bedrick to the Hon. Henry Hyde dated January 31, 1997, GAO/OGC-97-16; GAO-04-353R, Defense of Marriage Act (January 23, 2004); letter from GAO Associate General Counsel Dayna K. Shah to the Hon. Bill Frist, dated Jan. 23, 2004.

across generations. We can, however, detect the fact that developments to date have been rapid and continue to accelerate in several important sectors of the social order. This testimony identifies several of these developments, in Massachusetts and also to some extent in other jurisdictions which have traveled a similar path. It concludes that these developments are neither small nor exclusively local and that they merit the concern and attention of the nation as a whole.

I. THE SOCIAL AND MORAL CONSEQUENCES OF THE RECOGNITION OF SAME-SEX MARRIAGE

The decision of the Supreme Judicial Court in *Goodridge v. Department of Public Health*[4] brought about the recognition of same-sex marriage (hereinafter referred to as "SSM") in Massachusetts effective in May of 2004. As the effective date approached, Thomas W. Payzant, Superintendent of the Boston Public Schools, issued a memorandum to the Boston School System. This memorandum is attached as an exhibit to this testimony. It states that "[t]his is a historic moment in our Commonwealth and in our country" and that the *Goodridge* decision "has had, and continues to have, a profound impact on our civil life and discourse."[5]

1. Effects in the Public Schools.[6] – One sector in which this effect is already pronounced is that of education. As Superintendent Payzant's memorandum states, the "profound impact" of same-sex marriage "filters through our society and our schools."

As it filters through the schools it suppresses and chills debate and discussion. Superintendent Payzant in his memorandum warns grimly that he has "received some reports of inappropriate . . . speech."[7] He continues:

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[4] 140 Mass. 309, 798 N.E.2d 941 (2003).

[5] Memorandum dated May 13, 2004 (first paragraph).

[6] Left aside in this testimony is the equally important subject of the effect of the recognition of same-sex marriage on higher education in Massachusetts. See generally M. Bronski, "What is the limit, long-term worth of ssm?", http://www.bostonphoenix.com/boston/news_features/other_stories/multi-page/documents/03979297.asp:

> "Last weekend, on the Fourth of July, Cambridge saw one of its most prominent lesbian couples marry at Memorial Church in Harvard Yard. Professor Diana Eck, of Harvard Divinity School, and her partner, the Reverend Dorothy Austin, who ministers at the famed church, wed amid a crowd of well-wishers that included Supreme Judicial Court chief justice Margaret Marshall. And not only did the brides purposely choose Independence Day for their nuptials, the ceremony's final hymn was "America" ("My Country 'Tis of Thee"). Take that, George W. Bush and Mitt Romney."

[7] "inappropriate or hateful."

"It is important at this time, therefore, to reiterate our zero-tolerance policy, and to reinforce a message of respect for the law and for the differences and choices represented among our school population.

"Administrators, teachers, parents and students are reminded that no action or speech will be tolerated that results in harassment, discrimination, bias or intimidation toward any member of our community for any reason, including his/her sexual orientation or perceived sexual orientation. We urge school staff to report and act promptly on any incidents that may create a climate of intolerance in our schools. Such incidents will be considered a serious violation of the BPS Code of Discipline and of accepted standards of professional behavior, and will result in discipline up to and including expulsion of the responsible student or termination of the offending employee."

After this, what would you advise a teacher who was conducting a class discussion? What would you advise a teacher who was advising a student with concerns about his social life? Observe: "no . . . speech will be tolerated that *results in* ... discrimination [or] bias." A teacher would take her career into her hands by encouraging an examination of the cons as well as the pros of SSM, or even of same-sex activities outside of marriage. The way the memorandum is drafted, she violates the rules even if she has no bias; all she need do is say something that causes *someone else* to develop bias. If the teacher says nothing at all, she still may have to worry about an obligation to blow the whistle if one of her students says something unpleasant ("report and act promptly on any incidents that may create a climate of intolerance"). And as to advising a student about concerns in his social life, the mind boggles. He better not exhibit bias in the way he conducts it.

Beyond chilling discussion and debate as to the negative aspects and the contra-SSM position, the effect of this social movement is to encourage the introduction of vivid and sometimes graphic presentation of various sexual practices. The following is an excerpt from the National Public Radio program *All Things Considered* in which an eighth-grade teacher in a public school in the Boston area testifies:

"[Teacher] In my mind, I know that, `OK, this is legal now.' If somebody wants to challenge me, I'll say, `Give me a break. It's legal now.'

"SMITH: And, [she] says, teaching about homosexuality is also more important now. She says the debate around gay marriage is prompting kids to ask a lot more questions, like what is gay sex, which [she] answers thoroughly and explicitly with a chart.

"[Teacher]: And on the side, I'm going to draw some different activities, like kissing and hugging, and different kinds of intercourse. All right?

"SMITH: [She] asks her students to fill in the chart with yeses and nos.

> "[Teacher]: All right. So can a woman and a woman kiss and hug? Yes. Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, `Hold it. Of course, they can. They can use a sex toy.
>
> . . . [A]nd we talk--and we discuss that."[8]

The effect of the *Goodridge* decision has been to encourage the indoctrination of public school students in the merits of legalization of SSM. Thus Superintendent Payzant's memorandum exhorts the Boston Public School teachers to use "this historic moment" as:

> "[An] opportunity to help our students understand it as a vital manifestation of some of the principles that have shaped our system of government – such as rule of law, balance of powers, and separation of church and state – as well as another step in our continuing efforts to create a more just society for all of our citizens."

In other SSM jurisdictions, similar pressures have been felt:

> "In the wake of Canada's legalization of same-sex marriage, a human-rights complaint has been filed in British Columbia alleging the absence of pro-homosexual instruction in public schools is a denial of equal treatment.
>
> The development underscores the concerns of same-sex marriage opponents in the United States who argue legalization would force schools to teach about homosexual behavior as a positive, alternative lifestyle for children.
>
> Murray and Peter Corren, who were given a marriage license last July, concede the province-wide curriculum is not anti-homosexual, but complain its omissions have the effect of 'enforcing the assumption that all people are or should be heterosexual.'
>
> "'Basically, there is systemic discrimination through omission and suppression of queer issues in the whole of the curriculum,' said Murray Corren in an interview with the Vancouver Sun.
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> "Corren, an elementary school teacher in Coquitlam, B.C., said that with the legalization of same-sex marriage, the education ministry needs to update its approach to issues surrounding homosexuality.
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> "'[The issues of same-sex marriage and gay rights] are going to come into the classrooms, whether people like it or not,' Corren told the Sun. 'It's a fact, it's a reality now in Canada.'

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[8] *All Things Considered,* September 13, 2004.

"Corren says the province's social studies curriculum refers to aboriginals, women and multiculturalism, but has no mention of what Corren defines as the 'queer population,' the Vancouver paper said.

"He wants that changed to include: 'Queer history and historical figures, the presences of positive queer role models . . . the contributions made by queers to various epochs, societies and civilizations, and legal issues relating to [lesbian, gay, bisexual, transgendered] people, same-sex marriage and adoption.'"[9]

2. *Effects as regards Parental Authority over Education.* – Inevitably initiatives such as those described above bring school administrators into conflict with concerned parents. This sort of conflict is vividly illustrated by the case of David Parker, a father who became concerned when he found that his five-year-old son had been given a book which dealt with same-sex parenting as part of the educational program of the Lexington, Massachusetts Public School system. School officials refused to assure Mr. Parker that he would receive notice before his son was exposed to further presentations along these lines. Discussions apparently broke down; Mr. Parker refused to leave; officials called the police; and Mr. Parker was arrested and spent the night in jail.[10] And, in a less dramatic confrontation which did not result in an arrest, Newton parents were ejected from school grounds where they were recording a "gay pride" presentation.[11]

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[9] "Brave New Schools: Complaint demands 'pro-gay' studies for kids: Canada's legalization of same-sex marriage prompts case," article in © 2005 WorldNetDaily.com http://worldnetdaily.com/news/article.asp?ARTICLE_ID=42529 (Posted January 25, 2005). (The bracketed material is included, bracketed, in the original.). A fuller version of this article is set forth as an appendix to this testimony.

[10] Maria Cramer & Ralph Ranalli, "Arrested Father Had Point to Make," BOSTON GLOBE, April 29, 2005 (on-line edition, http://www.boston.com/news/local/massachusetts/articles/2005/04/29/arrested_father_had_point_to_make/ (accessed 10/10/05).

[11] *See* Jessica Fargen, "MA parents kicked out of school for videotaping gay pride assembly Mom ousted for taping gay acceptance 'lies'," BOSTON HERALD, Thursday, December 16, 2004 (http://news.bostonherald.com/localRegional/view.bg?articleid=59154):

"Two parents, shocked at frank talk during a gay and lesbian awareness day at Newton North High, were forced off the property after one parent whipped out a video camera and started taping.

"'This does not belong in curriculum,'' said Kim Cariani, who said four police officers and the principal told them they would be charged with trespassing if they did not leave.

'"'It's against my religion. It's morally wrong and forced in a child's face.'

"Each year, some students at Newton North forgo classes during To BGLAD: Transgender, Bisexual, Gay and Lesbian Awareness Day with assembly-like sessions including 'Out at the Old Ballgame' and 'Color Me Queer.'"

It would be incorrect to say that those of us who have children in Massachusetts public schools go about in fear of arrest, but it is the case that same-sex-relationship educational programs lead almost inevitably to a situation of tension and adversity between teachers and school officials, on the one hand, and those numerous parents who adhere to ethical beliefs and belong to religious communities which disfavor those practices, on the other. The situation bears close comparison with that of abortion, which, like same-sex marriage, was imposed by the courts against the wishes of many Americans, and in conflict with the religion and morality by which most citizens have been guided, and which has therefore been made available through school clinics without parental involvement.

Under those circumstances, the incentive is great for school systems to be reticent or less than candid about their programs. Last year the reporter for the local newspaper, the *Newton Tab*, was ejected from among those observing a "gay pride" presentation on the grounds of a Newton, Massachusetts school.[12] And ensuing upon the Parker arrest, school official William J. Hurley wrote to Parker: "'If you are found on Lexington public schools' properties you will be subject to arrest by the Lexington police . . . . Access to school properties can only be accomplished with prior written authorization from the superintendent of schools or his designee."[13] More recently, the Lexington Superintendent of Schools has issued a memorandum which acknowledges that

> "some parents have requested they be notified whenever their child has access to any material, conversation, or activity that acknowledges differences in sexual orientation, including any reference to families with same-gender parents"

but then goes on to rule that:

> "[S]taff has no obligation to notify parents of discussions, activities, or materials that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation. Accordingly, I expect teachers to continue to allow children access to such activities and materials to the extent appropriate to children's ages, to district goals of respecting diversity, and to the curriculum."[14]

It is not unlikely that just as courts have extended the right to abortion to the point of striking down parental consent laws, so also they might extend a right to same-sex

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[12] *Id.*.

[13] Maria Cramer & Ralph Ranalli, "Arrested Father Had Point to Make," BOSTON GLOBE, April 29, 2005 (on-line edition, http://www.boston.com/news/local/massachusetts/articles/2005/04/29/arrested_father_had_point_to_make/ (accessed 10/10/05).

[14] This passage might sound as though Superintendent Ash imposed a requirement to furnish notice when discussions, activities or materials passed beyond the point of beyond "simple reference," but the memorandum recognized no such requirement.

relationships to the point of striking down provisions protecting a parent's access to information and a parent's right to influence school activities in this area. The Federal Marriage Amendment would help protect against this further erosion of parental rights.

3. The Deconstruction of the Intellectual and Social Definition of Marriage. -- More fundamentally, the *Goodridge* decision and others like it project what might almost be called a *theory* of marriage, or at least a certain "take" on how to think about that institution and what it means. That "profound impact on our civil life and discourse" to which Superintendent Payzant portentously referred[15] would include an impact not only on practice but on thought and belief as well.[16]

The marital morality of *Goodridge* and other same-sex marriage authorities displays several important features. The first might be called "positivism": the view that things all come down to the mandates of the State. The *Goodridge* court announced:

> "[T]he terms of marriage – who may marry and what obligations, benefits, and liabilities attach to civil marriage – are set by the Commonwealth."[17]

> "[T]he government creates civil marriage."[18]

Statements like these close the door firmly on the nonpositive roots of the institution of marriage and on nonpositive, extra-state authorities for defining and understanding it; sources widely relied on in judicial authorities until recent decades, namely custom, nature, tradition, and religion. Indeed, statements in some SSM cases bluntly excoriate the marital beliefs of the citizenry. "[R]ooted in persistent prejudices," concludes the *Goodridge* court.[19] "[R]epugnant," states an Ontario court.[20] "[L]ike it or not," a Hawaii court announced, "constitutional law may mandate ... that customs change."[21]

The second feature of the SSM authorities might be called "deconstruction." This

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[15] Memorandum from Thomas W. Payzant, Superintendent, Boston Public Schools dated May 13, 2004 paragraph one (set forth as an appendix to this testimony).

[16] *See generally* Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L. J. 33, 52-54 (2004)(discussing how same-sex marriage will "[c]hange the public meaning of 'marriage'" (at 52)).

[17] Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (Section IIA of the court's opinion).

[18] *Id.*

[19] *Id.*, 798 N.E. 2d at 968.

[20] Halpern v. Canada, 215 D.L.R. (4th) 223 (Can.), par. 243 ("Any justification based upon the belief that heterosexual relationships are superior to same-sex relationships would be rejected as being 'fundamentally repugnant . . . .'").

[21] Baehr v. Lewin, 74 Haw. 530, 570 (1993).

feature arises from the circumstance that Massachusetts has adopted no comprehensive definition of marriage, either as a matter of the common law or as a matter of statute; people here generally understood what marriage meant through custom, tradition, religion, and morality. *Goodridge* called everything into question, put everything up for litigation and challenge, and closed the door on the most obvious bases for reaching a solution. Marriage is something defined by the state, we are told; but then the state does not define it.[22]

A third feature of some judicial authorities in this area is a derogatory attitude towards moral normativity. The *Goodridge* court referred to the desirability of "defin[ing] the liberty of all, not . . . mandat[ing] our own moral code."[23] Justice O'Connor's concurring opinion in *Laurence v. Texas* seeks "other reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group" (turning, instead, to "state interest").[24] Note that this third feature is not merely an extension of the first: it seems to be not only social morals, or religious morals, or objective ethical morals which are to be avoided, but even positive, legal moralizing ("our own" moral order). Fixed standards of conduct are to be generally suspect, it seems, and subject to derogation when they conflict – as they almost always do – with liberty very broadly defined as ""the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[25] Law survives only in those (undefined and shifting) circumstances in which it serves the "interests" of the state.

The fourth feature, inevitably, is confusion and the possibility of infinite malleability in the meaning and conduct of marriage, both socially and as a matter of law. "[C]ivil marriage," the *Goodridge* court announces in its opinion, "is an evolving paradigm."[26]

Last summer in Toronto, two heterosexual men, still heterosexual, each still interested in finding a woman to love, decided to take advantage of that jurisdiction's SSM law and marry one another. (For the tax advantage, they said). They have been advised by counsel that they are eligible to do so.[27] SSM authorities say little or nothing about the purposes and activities which couples need to perform or intend.

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[22] There is some language in *Goodridge* which aims at a definition: "the voluntary union of two persons as spouses, to the exclusion of all others." 798 N.E.2d at 969. This impossibly vague language – leaving aside the use of the term "spouses," which is in this context a redundancy – would turn a two-person law partnership or hiking trip into a marriage.

[23] *Id.,* 798 N.E. 2d at 948, *quoting* Laurence v. Texas, 123 S. Ct. 2472, 2480 (2003).

[24] 539 U.S. 558, 123 S. Ct. 2472, 2487-88 (2003).

[25] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), *quoted in* Laurence v. Texas, 123 S. Ct. 2472, 2481 (2003).

[26] Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941, 967 (2003).

[27] Lesley Wright, "Wedding Cashers," TORONTO SUN, August 6, 2005.

Not only SSM but also heterosexual marriage and the terms which define the traditional family tumble into this post-modern void. The barriers between marriage and cohabitation collapse. The furthest extension to date may appear in a recent provision in Ontario where the legislature, under the prodding of a judicial mandate to revise marriage-related terminology in its statutes, has redefined "spouse" to include people who are not married. *See* Bill 56 (2004), amending the Employment Standards Act to make the term "spouse" include:

> "either of two persons which . . . live together in a conjugal relationship *outside of marriage.*"[28]

Your spouse might be someone you are *not* married to? The ultimate social consequence of the SSM authorities may be the destruction of the sense of the ridiculous.

The trajectory leads on to the recognition of all sorts of "pair-bonded" structures -- including those intended to be temporary rather than permanent. It implies the "nonjudgmental" attitude recommended by a sociologist:

> "[Policymakers] could attempt to create policies to support and help people in what ever type of social structures they create, giving equal credence and respect to divorced and married people, cohabiting and married couples, to children born out of wedlock and children born to married couples, and to married and unmarried parents.
>
> ". . . [S]ocial policies need to support people as they enter into, reside within, and move to whatever pair-bond structures fit their needs and goals. . . . Social policies must be based on respect for people's right to choose . . . to live . . . within any particular pair-bond structure."[29]

And there seems to be no reason why only *pairs* should be supported and recognized. Polygamy – the absurdity to which SSM advocates resisted being reduced in argument even a year or two ago[30] – has recently come to be treated by leading authorities as

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[28] Bill 56 (2004)(emphasis added). The text is available on line at http://www.ontla.on.ca/documents/Bills/38_Parliament/Session1/b056ra_e.htm (accessed October 10, 2005). The Explanatory Note identifies this bill as having been enacted.

[29] William M. Pinsof, *The death of "till death us do part": the transformation of pair-bonding in the 20th century*, 41 FAMILY PROCESS 135 (2002).

[30] "Advocates of same-sex marriage, who held their own State House briefing yesterday, dismissed the argument [that SSM leads to the recognition of polygamy] by their opponents as 'an old myth' that has little to do with fundamental rights of people. Carol Rose of the American Civil Liberties Union of Massachusetts said homosexuality is about 'who they are,' while multiple marriage 'isn't about who you are.'" Raphael Lewis, "Opponents Warn Lawmakers that Polygamy Will be Next," BOSTON GLOBE, February 10, 2004 http://www.boston.com/news/local/massachusetts/articles/2004/02/10/opponents_warn_lawmakers_that_polygamy_will_be_next/ (accessed October 9, 2005).

eligible for legal recognition. A respected Boston columnist sees it on the horizon.[31] The head of the ACLU now favors its protection.[32]

4. The Degradation and Destabilization of Marriage. – As legal authorities and social policy makers lose their grasp on any coherent and common understanding of marriage, that institution forfeits its definitive status as a matter of general opinion and social practice as well. Marriage becomes harder and harder to distinguish from nonmarital cohabitation. Custom, tradition, and religion may be ruled out as determinative and the slight definitive language in the SSM authorities is unhelpful.[33] Both kinds of relationship are based on "choice." The most vivid example is afforded by the Ontario amendment, quoted above, which makes one of the Ontario statutes define "spouse" to include people who are not married.

In Denmark, where SSM-type provisions have been in place for many years, cohabitation is now a "normatively accepted option." [34] The practice has increased in frequency. [35]

5. The Degradation and Destabilization of the Family. – In America and other countries, cohabitation often leads to family turbulence and parental split-ups. Authorities note:

> "Fully three-quarters of children born to cohabiting couples are likely to see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate."[36]
>
> "Cohabiting is not the functional equivalent of marriage. . . . Children with cohabiting parents have outcomes more similar to the children living with single (or remarried) parents than children from intact marriages. . . . Couples who live

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[31] Jeff Jacoby, "Is Legal Polygamy Next?" BOSTON GLOBE, January 5, 2004.

[32] *See* Crystal Paul-Laughinhouse, "Leader of ACLU talks on agenda," YALE DAILY NEWS http://yaledailynews.com/article.asp?AID=27865:

> "In response to a student's question about gay marriage, bigamy and polygamy in certain communities, Strossen [the President of the ACLU] said the ACLU is actively fighting to defend freedom of choice in marriage and partnerships. 'We have defended the right for individuals to engage in polygamy,' Strossen said. 'We defend the freedom of choice for mature, consenting individuals.'"

[33] *See* note 22, *supra.*

[34] Cecilie Whehner, Mia Kambskard & Peter Abrahamson, *Demography of the Family: The Case of Denmark*, http://www.york.ac.uk/inst/spru/research/nordic/denmdemo.pdf (accessed October 9, 2005).

[35] *Id.*

[36] DAVID POPENOE & BARBARA DAFOE WHITEHEAD, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE 8 (2002), *quoted in* note 66 of *The Future of Family Law, supra.*

> together . . . report relationships of lower quality than do married couples – with cohabiters reporting more conflict, more violence and lower levels of satisfaction and commitment."[37]

Following parental split-ups, children are often raised by reconstituted couples, preponderantly by their biological mother and her new partner. "A large body of social scientific evidence now shows that the risk of physical or sexual abuse rises dramatically when children are cared for in the home by adults unrelated to them, with children being especially at risk when left at home with their mothers' boyfriends."[38]

II. RECOGNITION OF SAME-SEX MARRIAGE IS AN APPROPRIATE SUBJECT OF COMMON CONCERN AND ACTION BY THE AMERICAN PEOPLE, AND NECESSITATES ADOPTION OF THE FEDERAL MARRIAGE AMENDMENT.

When one state licenses same-sex unions the consequences inevitably flow over to the others. This is most obviously the case with regard to direct legal consequences. Same-sex partners change residence and litigation ensues as to family-law issues. The following passages from a news story in the Washington Post illustrate such a situation:

> "It is a painfully familiar story with a modern twist: A young couple fall in love, exchange vows and become parents. They later decide to part, with the custody of the child left for a court to determine.
>
> "Lisa Miller and Janet Jenkins were joined in a civil union in Vermont in 2000, merged their last names, and two years later moved from Virginia to this small town in the western part of the state to begin a new life.
>
> "Today they are embroiled in an acrimonious tug of war over a 2-year-old girl named Isabella, a case that legal experts say is the most significant custody battle to emerge since same-sex civil unions were established here four years ago and a test of the viability of marriage laws that vary from state to state.
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> "With more than 7,000 gay couples having formed civil unions in Vermont since 2000 and thousands more married in Massachusetts since such unions became legal there in May, what happens to children when such relationships end is an unsettled legal question. Opponents have long argued that relationships sanctioned by some states and not others make for legal chaos and confusion.
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> "'This is the first of what I imagine will be a long train of cases for gays and lesbians all over the United States testing the idea of whether legal rights they've won in certain states are going to be recognized in other jurisdictions,' said

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[37] WILLIAM J. DOHERTY et al.., WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 7-8 (2002)(footnotes omitted), *quoted in The Future of Family Law: Law and the Marriage Crisis in North America* 25 (Dan Cere, Principal Investigator, 2005).

[38] *The Future of Family Law: Law and the Marriage Crisis in North America* 39 (Dan Cere, Principal Investigator, 2005).

Joseph R. Price, an attorney for Janet Miller-Jenkins and the chairman of Equality Virginia, a gay rights advocacy group."[39]

When a single state or a small minority of states gets off the same page as the rest of the country as regards who is married and who is not, the dislocation and disorder extends beyond specifically legal areas and becomes a matter of social discontinuity as well. In the custody dispute described above, Vermont social-action groups on both sides of the issue have weighed in, with at least one of them engaging in a major fundraiser over the matter. It is a social conflict which, just as attorney Price is quoted as predicting, is likely to be fought out in "a long train of cases for gays and lesbians all over the United States."

When a state gets off the same page as the rest of the country as regards fundamental marital and sexual morality, and comes to indoctrinate children in ways that are anathema elsewhere; when a state begins to exclude or even prohibit the presentation of opinions which are not only acceptable but common and commonsensical in the minds of the rest of the country; and when a state goes even further along the road and develops a morality and jurisprudence of marital relationships which is unstable and divergent from tradition, it is appropriate to bring the matter forward for national discussion and common resolution. A nation cannot maintain a coherent social order while operating two marital systems.

This testimony has laid out in detail some of the social and moral changes which are ensuing upon the recognition of same-sex marriage in Massachusetts and other SSM jurisdictions. This should show some of the reasons why the United States of America needs the Federal Marriage Amendment.

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[39] Jonathan Finer, "Custody Case Puts Civil Unions on Trial; States' Differing Laws Complicate Same-Sex Couples' Fight Over Child," THE WASHINGTON POST, August 7, 2004 (Saturday Final Edition, Section AO3) This article is set forth in its entirety in an appendix to this testimony..

Testimony of Christopher E. Harris, MD, FAAP
Assistant Professor of Pediatrics,
Vanderbilt University School of Medicine[1]

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

"An Examination of the Constitutional Amendment on Marriage"

October 20, 2005

Good afternoon.

I appreciate the opportunity to speak to this Subcommittee as it considers a proposed amendment to the Constitution that would deprive gay and lesbian couples and their children of important protections they now enjoy. I appear before you today as a pediatrician, a father, and a gay African-American. I also appear before you as a former president of the Gay and Lesbian Medical Association, an organization of health care providers devoted to equitable health and health care for lesbian, gay and bisexual people.

By way of introduction, I am a graduate of the University of Wisconsin, both the School of Pharmacy and the Medical School. During my time in medical school, I started my life's devotion to the care of children. This continued with residency training at Vanderbilt University and a fellowship in Pediatric Pulmonary Medicine at the University of North Carolina at Chapel Hill. I subsequently spent 4 years at Children's Hospital Medical Center in Cincinnati involved in basic science research of children's lung disease. However, throughout all of this, I felt compelled to work toward having my own child. As an openly gay man, I realized this would be a difficult process but, instilled with the values of my parents and previous generations, I was undeterred. The two-and-a-half year process culminated nearly three years ago when I was matched with a birth mother and became the father of a darling daughter. Because of this, these discussions today are more than mere political rhetoric. They affect my family and me deeply—most importantly my daughter who I am raising to be a loving, caring member of our society.

I felt compelled to testify before you today not only because of my personal story as a gay, African-American, single father but also because as a pediatrician, I hope my expertise can provide some clarity to the flurry of misinformation regarding the effect of parental sexual orientation on children.

Some supporters of the "Marriage Protection Amendment" claim that the welfare of children will be advanced by a constitutional amendment denying the legal protections of marriage to gay and lesbian couples and their families. I disagree. Willfully injuring children through the denial of legal rights to their parents serves no purpose. Regardless of one's individual feelings regarding same-sex relationships, I think everyone agrees that ALL children need the care and concern of a loving family and the legal protections this structure can provide. The

[1] Institutional affiliation is for identification purposes only.

value of a loving family cuts across sexual orientation. In fact, the American Academy of Pediatrics states clearly that 'civil marriage is a legal mechanism by which societal recognition and support is given to couples and families. It provides a context for legal, financial and psychosocial well-being, an endorsement of interdependent care, and a form of public respect for personal bonds.'

As a pediatrician, I deal with children and families first hand. I have treated children for nearly twenty years and I can tell you what children need most is love and affection. They need parents who care about them and can protect them. I can tell you whether those parents are gay or straight, kids need the same things and whether those parents are gay or straight has no bearing on whether they can be good parents to their children. This has been my personal observation while working directly with children and their parents. Although my anecdotal evidence is grounded in many years of clinical experience, I will not ask you to solely rely on my experience to determine what is best for children.

In my capacity as a professor of pediatrics, I regularly analyze peer reviewed medical studies. In preparation for this testimony, I reviewed the scientific evidence regarding the welfare of children in gay and lesbian families. Judith Stacey's and Timothy Biblarz's article in the American Sociological Review entitled, "(How) Does the Sexual Orientation of Parents Matter?" is one of the most comprehensive reviews of the scientifically reputable literature on the subject of same-sex parenting to date. Stacey and Biblarz's review confirms that successful child rearing is unaffected by a parent's sexual orientation. For instance, there is simply no significant difference between children of lesbian mothers and heterosexual mothers in such factors as anxiety level, depression or self esteem. This difference holds true through studies that test children directly, their parents and their teachers.

In fact, every relevant study of the effect of parental sexual orientation on children shows NO measurable effect on the quality of parent-child relationships or the children's mental health and successful socialization. I therefore concur with previous testimony given before this subcommittee that children raised by lesbian mothers or gay fathers are as healthy and well-adjusted as other children.

Given this body of real scientific evidence, it is not surprising that the American Academy of Pediatrics supports both joint and second-parent adoptions by gay and lesbian parents. Thus, those professionals that provide care and have detailed knowledge of the parenting skills of gay and lesbian parents approve of their ability to raise healthy, socially well-adjusted children. This finding affirms the importance of ensuring that the legal rights of children extend to both parents.

That is also why I have signed a letter to Congress by the Pro-Family Pediatricians opposing any federal marriage amendment to the Constitution. This letter, signed by over 750 of my fellow pediatricians, expresses our strong opposition for a constitutional amendment we know, as caregivers, would hurt children and their families.

But one need not rely solely on these analytical studies to see that denying the legal benefits of marriage to some citizens does all Americans a disservice. For instance, in my home state of Tennessee, families headed by same-sex couples are at risk of being kept out of crucial family medical decisions, denied visitation rights and having inadequate medical and life

insurance coverage due to their legal status. On the other hand, the real world experience of the Commonwealth of Massachusetts shows that protecting families in this manner benefits children and their families. A year after recognizing that same-sex couples and their children are real families under the law, the people of the Bay State are continuing to do the same things they always do—bake beans, fish for scrod and root for the Red Sox. In fact, the people of the Bay State are doing something even more: they are protecting ALL the children of Massachusetts by ensuring that NO family is left outside of the protection of the law. Crucial benefits such as health insurance, life insurance, and the custodial arrangements required during times of family crisis have provided a level of security for the children of Massachusetts that those who care about children should seek to emulate, not prohibit.

Unfortunately, the so-called "Marriage Protection Amendment" prohibits exactly this type of security for children. If enacted, the MPA would deny the parents of millions of American children the ability to secure the same legal benefits available to children of all other two-parent families. This is a step backwards that our children and our country can ill afford.

As an African-American, I cannot express how strongly I feel about the prospect of adopting a discriminatory amendment into the Constitution of the United States. Much like the first article of the Constitution, relegating African-Americans to subhuman status, the "Marriage Protection Amendment" seeks to reduce the rights of some American citizens to a fraction of those enjoyed by others. I urge the members of this subcommittee to learn from the mistakes of our past and not again condemn another class of Americans to second-class citizenship for future generations to witness. Though repealed, Section 2 of Article 1 will never disappear. Every time an African-American citizen reads the Constitution, they are reminded of the less-than-human status that my people once held in this country. The Constitution does not have an eraser. It retains all of our missteps and mistakes from now until nigh the end of time.

I commend this subcommittee for its focus on the welfare of families and thus of children. Though this issue is an emotional one, each of us must ask if the proposed constitutional amendment prohibiting the marriage of gay and lesbian parents would support the welfare of all families and all American children, including those millions of children whose parents are gay or lesbian. With all due respect, for me as a pediatrician and scientist, the answer is clear. The Marriage Protection Amendment will only hurt the well-being of children in this country.

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

Statement of Senator Patrick Leahy
Subcommittee on the Constitution, Civil Rights, and Property Rights
Hearing on "An Examination of the Constitutional Amendment on Marriage"
October 20, 2005

As a nation, we are facing many pressing and problematic issues at this very moment -- the war in Iraq, devastation from flooding and hurricanes, record-high fuel prices, the threat of a flu pandemic, and a burgeoning national debt, to name just a few. This Committee is seeking to conduct expedited proceedings on President Bush's nominee to succeed Justice Sandra Day O'Connor on the United States Supreme Court. Perhaps as a distraction from these important matters, we now are asked to again turn to a divisive measure that will contribute nothing to rebuilding the homes that have been destroyed or saving the lives that are threatened or jumpstarting the economy.

As the Members of this Committee surely remember, proponents of the Federal Marriage Amendment last year could not even assemble a bare majority of Senators to move to consider the amendment. At that time we were warned that immediate action had to be taken to protect the fragile institution of marriage, which was said to be under immediate threat by those in black robes.

In the ensuing months, no States have been forced to recognize same-sex marriages. Rather, several States voted to amend their constitutions to ban same-sex marriage. The Defense of Marriage Act remains the law. Now, even more than last year, there is no imminent crisis that demands the diversion of Congress's attention from all these other urgent problems or that justifies an alteration of our founding document.

We heard a lot of rhetoric about "judicial activism" in last year's debate. The proponents of the FMA claimed that we had to pass it in order to prevent courts from inflicting same-sex marriage on the American people against their will. Ironically, the FMA – now renamed the Marriage Protection Amendment – would itself produce a wide range of litigation that judges would need to resolve.

We cannot say that other state courts will not someday follow the lead of the Republican-appointed judges in Massachusetts to interpret their State constitutions to allow gay marriage within their States, or to recognize same-sex marriages entered into in other States. If this is "judicial activism," however, it is of the State-based variety. We should not adopt a doctrine of constitutional preemption. We should take the prudential course and respect State governments to be responsive to their citizenry.

As the Massachusetts experience has shown, State governments have the tools to respond to decisions they do not like without turning to the Federal government. As a general matter, State constitutions are more easily amended than our Federal Constitution, and in most States, judges are elected, providing an automatic check on their ability to act against the wishes of their citizenry.

By the same token, elected officials in a State may sometimes embrace a decision that the Senate Republican leadership would consider "judicial activism." That is exactly what happened in my State, when each of the justices on the Vermont Supreme Court found in *Baker v. Vermont* that Vermont's marriage laws were unconstitutional because they denied the benefits associated with marriage to same-sex couples. The Vermont Supreme Court referred the matter to the Vermont Legislature, which passed a civil unions law, on a bipartisan basis, after lengthy and often heated deliberation.

I remember a time when leaving States in control of such issues as family law was an easy decision for Members on both sides of the aisle. I am disappointed that our Republican colleagues would endorse this broadly drafted amendment since it so clearly violates the traditions of Federalism and local control that their party, at least in the past, has claimed to respect and cherish.

The particular Federal solution that has been proposed, meanwhile, is exceedingly confusing and subject to interpretation. For example, who would be bound by the provisions of the Marriage Protection Amendment – State actors, private citizens, or religious organizations? What would constitute the "legal incidents" of marriage? Can a legislature pass a "civil unions" law that mirrors its marriage law in all respects, save the word "marriage?" Can the people of a State put protections for civil unions in their State constitution? What State actors are forbidden from construing their own constitutions – the judiciary only, or executive branch officials as well? Of particular concern to me is the fate of the Vermont civil unions that have been formed under the color of state law. Despite an initially contentious debate, this State law remains on the books five years later, and there has been no ensuing crisis in the lives of Vermont families. It is not clear to me, however, whether the proposed amendment would make this law unconstitutional. In short, while the language of the amendment before us has changed slightly from the original version, it raises the same concerns. I look forward to receiving testimony today that will illuminate the problems with the proposed language.

Academic discussion of the proposed language will be helpful but for some time now I have been asking President Bush to explain what language he supports when he gives speeches on the need for a constitutional amendment. Is the language that this subcommittee is considering today endorsed by the President? I note for the record that the White House has not sent a representative to offer his support or concern for the scope of this drastic proposal.

In addition to my concerns that this effort will trample on States' rights, we should all be aware of how the discrimination in such a measure will affect American families that currently exist in this country who seek the protection of civil unions and the acknowledgment of their committed relationships. As an American who has been married for 40 years, I am a great fan of the institution of marriage. I believe it is important to encourage and to sanction committed relationships. I continue to oppose measures such as the Federal Marriage Amendment. I do not think it is necessary and believe it would be a sad day for our nation if we amended our founding document for the first time to specifically disfavor a group of Americans. I hope that those who claim to care about healthy families will turn away from wedge politics and scape-goating so we can focus on, and I hope, properly address the variety of pressing issues already piling up on Congress's agenda.

www.profamilypediatricians.org

The Honorable Bill Frist, M.D.
Senate Majority Leader
S-230 Capitol Building
Washington, D.C. 20510

The Honorable Dennis Hastert
Speaker of the House of Representatives
H-232 Capitol Building
Washington, D.C. 20515

October 20, 2005

Dear Majority Leader Frist and Speaker Hastert:

As pediatricians dedicated to the care of infants, children, adolescents, and young adults, we strongly urge you to oppose amending the Constitution to forever deny gay and lesbian couples and their children the same protections available to other families. A discriminatory constitutional amendment would have a particularly severe impact on the health and security of the hundreds of thousands of children whose parents are same-sex couples.

On a daily basis, we care for sick children in the context of their families. Children deserve all the love, care, and emotional and financial security their families can provide. Any constitutional amendment that throws obstacles in the way of two parents being able to provide the full measure of security for their children that the law allows is clearly not in the best interest of children. The best result for children is the defeat of the Federal Marriage Amendment.

As demonstrated by census and other data, there are literally hundreds of thousands of children whose parents are gay or lesbian couples. According to the 2000 census, same-sex couples are raising children in at least 96 percent of all counties in the U.S. These children go to school, play in sports, sing in choirs, go to worship services, play at the beach, get hugs from their parents and grandparents--and get sick--just like children of opposite-sex couples or single parents. And when these children are sick, their parents come to doctor visits together, take time off from work to stay home with the sick child, worry about paying the medical bills, and if serious enough, stay at the hospital together with their child, take turns holding an oxygen mask or meeting with doctors and nurses.

Whether the problem is as medically simple as a bad cold or a broken finger or as serious as leukemia or a life-threatening heart condition, a child's illness or injury strains both the child and his or her parents. No parents who are already under the emotional stress of caring for their sick or injured child should also have to worry about whether the Constitution will deprive their child of the benefits of both parents being able to provide health insurance, take time off from work to care for their child, authorize medical care, or stay with their child in the hospital. Adding to the worries of already strained parents is simply wrong.

The American Academy of Pediatrics has found that "a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual. When two adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition."

We urge you to find ways to make the lives of all children happier, healthier, and safer. There are lots of good ideas, and good legislation, to meet these goals. But the Federal Marriage Amendment will do the opposite. It will make the lives of children more difficult and make the assurance of the best health care a broken promise. We strongly urge you to protect children by defeating the Federal Marriage Amendment.

Testimony of Louis Michael Seidman, Professor
Georgetown University Law Center[1]
Before the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights
"An Examination of the Constitutional Amendment on Marriage"
October 20, 2005

Members of the Subcommittee:

Thank you for affording me the opportunity to testify concerning the so-called Marriage Protection Amendment. As you know better than I, the moral, ethical, and public policy questions posed by the Amendment generate strong emotions on all sides. Like most Americans, I have views about these questions, but I do not pretend to any special expertise about them. Therefore, I will confine my testimony to a subject I do know something about – the way in which courts are likely to interpret the amendment and its likely effect on the institution of marriage.

With regard to these matters, I am sorry to say that the amendment reflects remarkably poor lawyering. If adopted, the amendment will grant unelected federal judges untrammeled discretion that could be checked by neither Congress nor state legislatures regarding domestic relations law. Despite its title, the amendment would also have the perverse effect of weakening the institution of marriage. Because I cannot believe that the drafters of the amendment intended these results, I strongly urge you to reject the amendment being considered in this hearing and other similar amendments pending in this congress.

The amendment under consideration reads as follows:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.'[2]

This proposed amendment creates a number of interpretive ambiguities. First, federal courts will be required to decide what the word "marriage" means. They will then have to decide what "the legal incidents thereof" means and what "construed" means. It is important to emphasize that the answers to these questions would become matters of federal constitutional law that would not be revisable by either the Congress or the individual states.

Why do these words pose interpretive problems? Suppose we start by focusing on the word "marriage" in the first sentence of the proposed amendment. Clearly, the framers of the amendment meant to distinguish between "marriage" itself and its "legal incidents." This much is obvious because the first sentence defines only "marriage," while the second sentence refers to both "marriage" and its "legal incidents." This distinction is puzzling to say the least. Marriage

[1] Institutional affiliation for identification purposes only.
[2] S.J. Res. 1.

is a legal institution. At least in the civil realm, the only thing that it consists of is a collection of "legal incidents." Apparently, the framers have in mind a distinction between core legal attributes, which make up "marriage," and an unspecified list of peripheral attributes, which make up its "legal incidents." Because the amendment is entirely silent about what is core and what is periphery, it gives federal judges unchecked power to place various aspects of marriage in one category or the other. Short of another constitutional amendment, neither the states nor Congress could do anything to reverse these decisions.

Some hypothetical situations illustrate the problems that this ambiguity is certain to cause. First, suppose that a state passed a statute that unambiguously created "civil unions" under which gay couples could enjoy most, but not quite all, of the benefits and burdens of marriage. Is this a "marriage," or does it confer only the "legal incidents" of marriage? The answer is important because if it is a "marriage," then the statute is unconstitutional under the first sentence of the amendment, whereas if it involves only the "legal incidents" of marriage, then it might well be constitutionally permissible under the second sentence.

As Members of this Subcommittee know, this hypothetical is hardly far-fetched. A number of states have created, or are considering creating, various forms of civil union. Yet even the drafters of the amendment are apparently unsure about its effect on these statutes. Consider, for example, Professor Gerard Bradley's testimony before this Subcommittee last April. Professor Bradley, a proponent of the amendment who participated in its drafting, testified as follows:

> [The amendment] leaves it wide open for legislatures to extend some, many, most, perhaps all but one, I suppose, benefit of marriage to unmarried people, but I would say . . . if it is marriage in all but name, that is ruled out by the definition of marriage in the first sentence.

How can a judge possibly determine whether or not a civil union that includes all but a relatively minor benefit of marriage is a "marriage in all but name" when even drafters of amendment are uncertain as to its meaning? Reasonable people might differ about whether civil unions are wise. It is simply irresponsible, however, to turn that question over to federal judges for them to decide for all time and for the entire country without any guidance from elected officials.

A similar problem is posed by the second sentence of the amendment, which provides that constitutions shall not be "construed" to require that either marriage—whatever the courts decide that is—or "the legal incidents thereof"—whatever they are—be conferred on anyone other than a different-sex couple. Suppose that a state court interprets a vaguely worded statute or constitutional provision to allow grandparents visitation rights. Again, this hypothetical is hardly far fetched. State courts throughout the country are considering this very question, and some courts have afforded grandparents these rights. But if visitation is an incident of marriage, and if this amendment is enacted, then the granting of these rights violates the federal Constitution. This is so because grandparents are not part of "the union of a man and woman," and are therefore not entitled to enjoy the incidents of marriage. Do the Members of this

Subcommittee really intend this result? Do they really wish to give federal judges the discretion to impose this outcome or not as they choose?

The word "construed" is also ambiguous, and its vagueness is certain to cause more mischief. The most sensible reading of the amendment is that gay men and lesbians should not enjoy core marriage rights (whatever they are), but that states can create peripheral "incidents of marriage" for them, so long as no construal of a constitution is necessary to create them. Even apart from the ambiguity of the word "construed," this provision creates truly bizarre results. Suppose that a state constitution contains an equal protection clause and a state court "construes" the clause to guarantee some of the incidents of marriage to gay men and lesbians. Apparently, this action would violate the amendment and is therefore void. Now suppose that a federal court so ruled and that, in response, the state legislature enacted an ordinary statute containing an identically worded equal protection provision. If a state court "construes" the state statute to provide incidents of marriage to gay men and lesbians, its actions are perfectly permissible. This is so because the Marriage Protection Amendment refers only to constitutions. Do the drafters really mean to accord less respect to state constitutions than to state statutes? So far as I am aware, this distinction is entirely unprecedented in this history of American jurisprudence and serves no function that I can imagine.

The second sentence of the amendment would also require federal judges to develop a jurisprudence that distinguished between the "construal" of a state constitutional provision and its mere "enforcement." Apparently, if the state provision explicitly and unambiguously granted incidents of marriage to gay men and lesbians, it would be permissible because no "construction" of it would be necessary. On the other hand, if the state provision is open textured and a court would be required to "construe" it, the court could not do so in a fashion that would extend the incidents of marriage to gay men and lesbians. The problem, of course, is that most cases will fall somewhere in the middle. Courts regularly consider constitutional provisions the meaning of which is not perfectly clear. Perhaps, for example, the wording is somewhat vague, but its legislative history leaves no doubt about the intent of the framers. How is a federal court to decide whether a state court's engagement with a particular provision constitutes a forbidden "construal" or mere enforcement? In order to make this determination, the word "construe" will, itself, have to be construed. Federal courts performing this task will be required to decide for state courts how state judges should go about interpreting their own constitutions. One wonders, yet again, whether the framers of this amendment really intend this result.

Perhaps the drafters of the amendment believe that this unprecedented transfer of power to the federal judiciary is necessary to save the institution of marriage. The final irony, however, is that the amendment actually weakens that institution. This is true in two respects. First, the amendment has the remarkable, and no doubt unintended, effect of abolishing marriage in the State of Massachusetts. As I am sure members of this subcommittee know, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health* that the state's guarantee of equal protection required that gays and straights be treated equally with regard to access to marriage. It is important to understand that nothing in the proposed amendment reverses or modifies that decision. True, the amendment makes marriage unavailable for gay men and lesbians. The holding of the Massachusetts court, however, was that gays and straights

must be treated equally. The Massachusetts constitution has not been amended since that holding was rendered, and nothing in the proposed federal amendment supercedes it. Hence, even after the amendment is adopted, Massachusetts courts will be under a continuing duty to provide this equal treatment. Equality can be created in one of two different ways: by granting the benefit to the disadvantaged group, or by withholding it from the advantaged group. In Goodridge, the Massachusetts court sensibly choose the first course. If adopted the proposed amendment would deprive the court of that option. If the Massachusetts court remains true to its reading of Massachusetts law, it would therefore have no choice but to choose the second course. The upshot would be civil unions for all citizens of Massachusetts and the abolition of marriage. I must ask again: Do Members of this Subcommittee really intend this result?

The amendment also undermines marriage in a second respect. It does nothing to change the Supreme Court's decision in *Lawrence v. Texas*, which invalidated sodomy statutes as applied to gay men and lesbians. Strikingly, that decision creates a constitutional right to engage in even casual sex with total strangers. When Lawrence is read together with this amendment, the upshot is a fundamental constitutional right to casual sex, but an absolute constitutional prohibition on long-term, committed gay relationships. The amendment, in effect, constitutionalizes the one night stand. Is this a sensible way to protect the institution of marriage?

Some years ago, I had the honor of serving as the Reporter for a bipartisan blue ribbon committee convened by The Constitution Project, under the chairmanship of two distinguished former members of Congress – the Honorable Abner Mikva and the Honorable Mickey Edwards. Our assigned task was to develop guidelines for the amendment of the Constitution. We did so in a document entitled "'Great and Extraordinary Occasions:' Developing Guidelines for Constitutional Change." Although members of the Commission disagreed among themselves about specific amendments, they were united in their commitment to some minimal standards before our foundational document was changed. Central among these was the requirement that proponents of proposed amendments "attempt to think through and articulate the consequences of their proposal including the ways in which the amendment would interact with other constitutional provisions and principles."

I am sorry to conclude that the proponents of this amendment have not met this minimal standard. If enacted, their handiwork is bound to produce outcomes that no one could have wanted or intended and an unprecedented transfer of power over domestic relations to federal judges. Although Americans disagree about gay marriage, surely they can agree that more care should be taken before the Constitution is sullied in this fashion.

The Question Raised by *Lawrence*: Marriage, the Supreme Court and a Written Constitution

By Richard G. Wilkins*
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In *Lawrence v. Texas*, the Supreme Court concluded that state legislatures could not criminalize homosexual sodomy.[1] Many (including Justice Scalia in dissent) noted that *Lawrence* raises a serious question regarding the future of marriage: Can marriage any longer be defined as the union of a man and a woman?[2] But *Lawrence* also raises another sober question: Does America still have a written Constitution?[3]

The answers are unknown.

As a result, and depending upon who is speaking, the President and the Senate are either preserving, ignoring, rewriting, or destroying the Constitution each time an individual is nominated or confirmed to the federal bench.[4] Because of decisions like *Lawrence*[5], the selection of those who determine "what the Constitution means now" has become one of the Nation's most contentious

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*Jacob Reynolds and John Nielsen provided able research and editorial assistance in preparing the final version of this written testimony. The views expressed herein, however, are those of the author.

[1] 539 U.S. 558 (2003).

[2] 539 U.S. at 604.

[3] See RICHARD H. FALLON, JR., OVERCOMING THE CONSTITUTION: IMPLEMENTING THE CONSTITUTION (Harvard University Press 2001); *see also* Saikrishna B. Prakash, Book Review, *Overcoming the Constitution: Implementing the Constitution*, 91 GEO. L. J. 407 (2003) ("The constitutional law that emerges from [Supreme Court] opinions sometimes bears only the slightest resemblance to the Constitution itself.").

[4] The recent, politically based arguments made during the nomination and confirmation of Chief Justice John Roberts demonstrates that Members of the Senate – as well as the President and the American people – rather firmly believe that the "text" of the Constitution depends, in large measure, upon the personal views of the individuals who sit on the Nation's highest court. *See, e.g., Roberts is chief; now who's next?*, ST. PETERSBURG TIMES, Sept. 30, 2005 at 1A (Bush calls John Roberts a "faithful guardian of the Constitution"); *A new era begins as Roberts takes oath Top justice OK'd despite Democrat holdouts; pivotal issues await*, The Dallas Morning News, Sept. 30, 2005, at 1A (wherein Senator Kennedy fears that Roberts will reverse the progress of equal protection gained over the last few decades).

[5] 539 U.S. 558 (2003).

political issues.[6] The federal judiciary is no longer the "least dangerous branch," as contemplated by Federalist advocates such as James Madison and Alexander Hamilton.[7] Rather, the anti-Federalist essayist Brutus, who was fiercely critical of the potential power of the Article III courts, provides a more accurate description of modern constitutional law, where "it is impossible . . . to say" what "the principles are, which the courts will adopt," except that they "may, and probably will, be very liberal ones" that are not confined to the "letter" of the Constitution.[8]

The views of James Madison and Alexander Hamilton – not Brutus – carried the day in 1789. The Constitution was adopted by a Founding Generation which assumed that, while the document would be subject to amendment and interpretation, the amendment process was vested where it belonged – in the hands of "the People"[9] – with

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[6] Even the process of judging has become politicized. In determining "what the Constitution means now," individual Justices frankly admit they consider possible political reactions to their individual votes. For example, in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992), the Supreme Court reaffirmed *Roe* v. *Wade*, 410 U.S. 113 (1973), not because *Roe* was correctly decided, but because three Justices concluded that their departure from the "central holding" of *Roe* might appear "political" and therefore undermine the Court's "legitimacy." *See, e.g., Casey*, 505 U.S. at 869 (plurality opinion of Justices O'Connor, Kennedy and Souter) (reasoning that a "decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy").

Constitutional decision making based upon judicial perceptions of current political trends renders constitutional law particularly unstable. As Justice Scalia noted in the first paragraph of his dissent in *Lawrence*:

> "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 844, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe* v. *Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers* v. *Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), is very different. The need for stability and certainty presents no barrier.

539 U.S. at 586 (Scalia, J., dissenting).

[7] THE FEDERALIST, no. 78, *available at* http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.

[8] Brutus, no. 12, THE FOUNDERS' CONSTITUTION, vol. 4, art. 3, sec. 2, cl. 1, doc. 20, *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_1s20.html (The University of Chicago Press).

[9] No one – and certainly not me – seriously contends that the constitutional principles established in 1789 are immune from change. The Founders did not bind future generations to a rigid and unchanging document. On the contrary, they established specific mechanisms for amending the document. *See* U.S. CONST. art. V.

the interpretative process safely left to judges who would apply (but not create) the law.[10] These assumptions of Madison and Hamilton, however, are seriously out-of-place in a world where lawyers, law professors, politicians and even Supreme Court Justices are fixed upon the purported virtues of "a living Constitution" – a Constitution so "alive" that its meaning changes with each new appointment to the federal bench.[11]

How did America's fundamental political charter become so vaporous that the Nation's entire political structure trembles each time a new Justice is named to the Supreme Court?[12] The genealogy of *Lawrence* tells the tale.

Lawrence relies upon a constitutional right not set out in the actual language of the Bill of Rights and the Fourteenth Amendment – the increasingly ubiquitous modern "right of privacy."[13] This right was first announced by the Supreme Court in its 1967 decision in *Griswold v. Connecticut.*[14]

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[10] The anti-Federalists warned that the power of the judiciary would be "formidable, somewhat arbitrary and despotic" and would become "more severe and arbitrary, if not tempered and carefully guarded by the constitution, and by laws, from time to time." *See* Federal Farmer no. 15, 2 THE COMPLETE ANTI-FEDERALIST 8.185 (Herbert J. Storing ed., 1981), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_1s15.htm. Alexander Hamilton responded by assuring that the judges would exercise "judgment" rather than "will." THE FEDERALIST, no. 78, *available at* http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html (emphasis in the original).

[11] As early as 1976 Justice Rehnquist expressed his concerns regarding the notion of a "living Constitution:"

> At least three serious difficulties flaw the brief writer's version of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, the brief writer's version ignores the Supreme Court's disastrous experiences when in the past it embraced contemporary, fashionable notions of what a living Constitution should contain. Third, however socially desirable the goals sought to be advanced by the brief writer's version, advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society.

William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 699 (1976). *But compare* Van Orden v. Perry, 125 S. Ct. 2854, 2888-89 (2005).

[12] *See generally* Larry D. Kramer, The PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (Oxford University Press 2004); Larry Alexander & Lawrence B. Solum, Book Review, *Popular? Constitutionalism? The People Themselves: Popular Constitutionalism and Judicial Review*, 118 HARV. L. REV. 1594 (2005) (synopsis of book explains that the Justices of the Supreme Court have become "the ultimate and final expositor of constitutional meaning.").

[13] *See generally* 539 U.S. 558. "Privacy" has become one of the key concerns when potential Supreme Court nominees are considered, as evidenced during the John Roberts confirmation process. *I Come Before*

The case involved the State of Connecticut's legislative decision to regulate the use of condoms by married couples – a law that, in the mid-1960's, was quaint and anachronistic. But rather than wait for the ordinary processes of democratic debate to adjust state policy, the Supreme Court assumed the task of freeing the electorate of Connecticut (and America in general) from a law the dissenting Justices called "silly."[15] The Court emancipated the country from the bonds of silliness by noting that the Connecticut law regulated the marital relationship, a union between a man and a woman, that was – in the words of the Court – "intimate to the degree of being sacred."[16] This sacred relationship, the Court concluded, *must* be supported by a "right to privacy," even though the Constitution nowhere mentions the right.[17]

The Court did not consider whether its new analysis was consistent with the long-standing history and traditions of the American people. It could not undertake such an analysis because any careful review of actual historical practices would have shown that – however out-of-touch Connecticut's law appeared in the middle of the 1960's sexual revolution – states throughout the nation had regulated the sexual conduct of married and unmarried citizens by means of adultery, incest and fornication laws from the dawn of the Republic. The policies animating these laws (as noted by the concurring opinion in *Griswold*) may have seemed less "silly" in 1967 than a prohibition on condom usage,[18]

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the Committee With No Agenda. I Have No Platform, N.Y. TIMES, Sept. 13, 2005, at A28 (Senators Specter and Feinstein announced their specific intent to address privacy rights at the outset of the meetings).

[14] 381 U.S. 479 (1965).

[15] 381 U.S. at 527 (Stewart and Black, J.J., dissenting).

[16] 381 U.S. at 486.

[17] *Id.*

[18] *See, e.g.*, Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L. J. 195 (1986) (giving a history of the adultery statutes beginning with "barbarian times."); Jennifer A. Herold, Review Note, *A Breach of Vows But Not Criminal: Does Lawrence v. Texas Invalidate Utah's Statute Criminalizing Adultery?*, 7 J. L. FAM. STUD. 253 (2005) (This article begins with a reference to the punishment enforced by the Commonwealth of Massachusetts for adultery – death by hanging – and also

but adultery, incest and fornication laws are rather hard to distinguish on *constitutional grounds* from Connecticut's regulation of marital fecundity.[19] As the dissenting Justices pointed out, nothing in the text of the Constitution invalidated Connecticut's law simply because it was "unreasonable" or "unwise."[20]

Because neither the words of the Constitution nor the specific history and traditions of the American people invalidated Connecticut's law, the Court was required to fashion a new analysis that *would* set aside the state's condom policy.[21] Accordingly, the Court announced that the "specific guarantees in the Bill of Rights have penumbras"

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discusses the history of the Utah adultery statute); Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extra-marital Sex*, 104 HARV. L. REV. 1660 (1991) (stating that in 1991 more than 25% of the states still had fornication statutes).

[19] The concurring opinion noted that Connecticut's policy was essentially a "birth-control law," because "of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception." 381 U.S. at 498 (Goldberg and Brennan, J.J., and Warren, C.J., concurring). The concurring Justices, however, ignored the fact that state condom-use policies which encourage child bearing by married couples, like state adultery laws which encourage sexual fidelity by married couples, both express political and moral judgments regarding the social value and utility of certain sexual practices within marriage; political and moral judgments that are distinguishable from each other *only* as a matter of degree. Which regulation, prohibiting a married couple's use of condoms or prohibiting any expression of extra-marital sexuality, "intrudes" more "significantly" on the "sexual rights" of the marital partners? This inquiry could be answered in various ways by various analysts. Nevertheless, while the concurring Justices found Connecticut's interest in prohibiting one method of birth control unconstitutional, they had no difficulty whatsoever in announcing that the constitutionality of adultery statutes was "beyond doubt." *Id.*

[20] As Justice Black's extensive dissent, joined by Justice Stewart, emphasized:

> [T]there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.

381 U.S. at 520-521 (Black and Stewart, J.J., dissenting).

[21] While the result in *Griswold* is rarely criticized, the legal soundness of the *Griswold* analysis has been questioned. *See, e.g.*, Michael A. Woronoff, Note, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J. L. REFORM 195, 198-201 (1984) (noting that even though the outcome of a case may be correct under *Griswold*, the logic of the case "remains unconvincing.").

(or partial shadows[22]) that give the actual wording of the Constitution "life and substance."[23]

In real life, the substance of shadows (and particularly partial shadows) is questionable and they result from the lack, not the presence, of light. Nevertheless, relying upon dimness, the sacred nature of marriage and the talismanic word privacy, the Court walked away from the specific guarantees of the United States Constitution as well as the history, experience and traditions of the American people.[24] The judicial journey begun in *Griswold* has now brought into constitutional doubt the "sacred" union of "marriage" upon which *Griswold* itself rests.[25] As a result, Americans must act – not only to protect the union lauded in *Griswold* – but to reinstate what Chief Justice John Marshall in 1803 called "the greatest improvement on political institutions" achieved in America: the establishment of "a written constitution."[26]

Legal scholars applauded the rather startling analysis of *Griswold.* They wrote elaborate justifications for the use of "privacy analysis" to abolish legislative

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[22] "Penumbra: (1) A partial shadow, as in an eclipse, between regions of complete shadow and complete illumination," DICTIONARY.COM, http://dictionary.reference.com/search?q=penumbra (last visited 13 October 2005).

[23] 381 U.S. at 484:

> [S]pecific guarantees in the Bill of Rights have *penumbras*, formed by emanations from those guarantees that help give them life and substance. *See Poe v. Ullman*, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[24] *See* Woronoff, note 21, above, at 198-201.

[25] *Griswold*, 381 U.S. at 486 (noting that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred").

[26] *Marbury v. Madison,* 5 U.S. 137, 178 (1803).

anachronisms with a minimum of fuss and bother.[27] They paid little heed to Justice Black's warning that *Griswold* had dramatically altered the meaning of the Bill of Rights by "substitut[ing] for the crucial word or words" of various constitutional guarantees "another word" – privacy – that could be "more or less flexible and more or less restricted in meaning" than the Constitution's original text.[28] They similarly ignored the warning that *Griswold*'s broad notion of a "living Constitution" threatened the very existence of the "written Constitution" lauded by John Marshall.[29]

In the rush to support the purportedly enlightened approach of *Griswold,* too many Americans – including citizens, lobbyists, lawyers, law professors and judges – seemed to forget that constitutional law involves much more than ensuring "proper" results in particular (even silly) cases. Those who drafted the document viewed the Constitution's distribution of decision making power between and among the various branches of state and federal government as its most important role; the very foundation

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[27] *See, e.g.*, Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740-52 (1989) (setting forth the "genealogy" of "privacy" and praising *Griswold* as providing the foundation for constitutional recognition of "personhood"). For an elaborate, book-length defense of *Griswold* and related cases, *see* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS, 88, 140-59 (1991) (praising *Griswold* as an outstanding example of what he calls a "multigenerational synthesis" of new "constitutional moments" with "preexisting constitutional values"). Even generally "conservative" legal scholars – who candidly note the frailty of its constitutional analysis – generally tend to support the outcome of *Griswold. See, e.g.,* Jane E Larson, "The New Home Economics," 10 Constitutional Commentary 443, 449 & n. 20 (1993) (reviewing RICHARD G. POSNER, SEX AND REASON (1993) (noting that although Posner concludes that "*Griswold* and its successors probably have no legal-doctrinal ground in the Constitution," he nevertheless agrees with the outcome of *Griswold* and many subsequent cases on the ground that certain regulations of sexual conduct are "so offensive, oppressive, [and] probably undemocratic" as to warrant a finding of constitutional invalidity).

[28] *Griswold*, 381 U.S. at 509 (Black and Stewart, J.J., dissenting).

[29] *See, e.g., Marbury,* 5 U.S. at 178. As Justice Black explained in his *Griswold* dissent:

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old fashioned I must add it is good enough for me.

381 U.S. at 522 (Black and Stewart, J.J., dissenting).

of American liberty.[30] Because various results may be "proper" at different times and in different circumstances, the constitutional distribution of decision making power in 1789 was – and remains today – profoundly important.[31]

The Constitution was not drafted to resolve every difficult, troublesome and/or controversial issue of public policy.[32] In the areas where it speaks rather clearly, the Constitution leaves final decision making authority with the judiciary.[33] If state or federal governments exercise power in a manner that encroaches upon core constitutional values (as set out in constitutional text construed in light of the actual practices, experience and traditions of the American people)[34], the judiciary *must* act to protect those values.[35] But the drafters of the American Constitution believed this judicial role

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[30] *See, e.g.,* THE FEDERALIST, no. 22 (Alexander Hamilton), no. 51 (James Madison or Alexander Hamilton), no, 62 (James Madison or Alexander Hamilton), no. 73 (Alexander Hamilton) (all discussing the importance of separation of powers as the primary security for the freedom and liberty of the American people), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.

[31] *See, e.g.,* Saenz v. Roe, 526 U.S. 489, 504, n. 17 (1999) (*citing* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995)) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.").

[32] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J. dissenting). Justice Harlan criticizes what he calls a "current mistaken view of the Constitution and the constitutional function of this Court:

> This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

Id. (emphasis in original).

[33] THE FEDERALIST, no. 78, *available at* http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html (Hamilton) (emphasizing that if the legislature were to pass a law that were contrary to one of the clauses of the constitution then it would remain to the courts of justice "whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.").

[34] *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (Court notes that it "begin[s], as we do in all due process cases, by examining our Nation's history, legal traditions, and practices").

[35] THE FEDERALIST, no. 78, *available at* http://press-pubs.uchicago.edu/founders/documents/a3_1s11.html.

would be exceptional and rarely invoked.[36] As the Federalist papers proclaim, the judiciary is the "least dangerous" branch because judges do not create policy but merely exercise "judgment."[37] The *really* difficult questions, the Founders thought, were left to the people.

The Supreme Court has departed from the decision making structure established by the Founders on more than one occasion.[38] Prior to *Griswold* and *Lawrence*, the most

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[36] *Id.* (asserting that the judicial invalidation of a legislative act would be quite rare since "it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution" to strike down "legislative invasions" of the Constitution "instigated by the major voice of the community").

[37] As THE FEDERALIST, no. 78, explains:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be *the least dangerous to the political rights of the constitution*; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, *but merely judgment*; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Id. (emphasis added).

[38] All of the Court's departures from constitutional text *can* be explained as judicial attempts to keep the Constitution in "tune with the times." History, however, demonstrates that keeping the Constitution "in tune with the times" is a questionable enterprise at best. *See, e.g.,* Dred Scott v. Sandford, 60 U.S. 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896).

In Dred Scott v. Sandford, the Court invalidated the Missouri Compromise. Under the terms of that compromise, which was merely one part of an on-going attempt to negotiate a political resolution of the slavery question – Congress prohibited slavery in Missouri. 60 S.Ct. at 455 (Wayne, J., concurring). Dred Scott, the son of slaves forcibly brought to America from Africa, claimed that he, his wife and his children had been freed when their master brought them to Missouri. The majority opinion, written by Chief Justice Taney, concluded that this congressional action violated the slave owners "due process" rights under the Fifth Amendment to the Constitution:

> which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Dred Scott, 60 S.Ct. at 450.

According to the majority opinion, "due process" protected Mr. Sandford's "property" – his ownership of Mr. and Mrs. Scott and their children – despite the express language of Article VI, § 3 of the Constitution, which authorized Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States." Prior to *Dred Scott*, congressional power to enact the sort of legislation struck down by Chief Justice Taney's opinion had never been doubted. Article VI, § 3 of the Constitution previously had been interpreted by Chief Justice John Marshall as conferring broad power on Congress to make *all* regulations deemed appropriate for the governance of territories and new states. *See, e.g.,* The American Insurance Company v. Canter, 26 U.S. 541, 542 (1828) (Marshall, C.J.) (the

Territory of Florida was "governed by virtue of that clause in the Constitution, which empowers 'Congress to make all needful rules and regulations, respecting the territory, or other property belonging to the United States') (*quoting* U.S. Const., Art. VI, § 3).

Dred Scott is the Supreme Court's first reported opinion invoking a free-wheeling "substantive due process" liberty analysis; an approach characteristic of *Griswold*, *Roe* and subsequent cases. *See, e.g.*, Casey v. Reproductive Health Services, 505 U.S. 833, 998 (1992) (Scalia, J. dissenting) ("*Dred Scott* . . . rested upon the concept of 'substantive due process' that the Court praises and employs today"). *Dred Scott*'s departure from constitutional text made the Nation's bloodiest conflict – the Civil War – inevitable by making political resolution of the slavery question impossible.

Following the Civil War, the Nation adopted the 13th, 14th and 15th Amendments to reverse the holding in *Dred Scott*. For a relatively brief period following their adoption, the Supreme Court applied the express language of these important amendments to invalidate state efforts to discriminate against the Nation's former slaves. In Strauder v. West Virginia, 100 U.S. 303 (1879), for example, the Court invalidated a state law excluding former slaves from serving on juries. The Court noted that the 14th Amendment was crafted precisely to ordain that:

> the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color[.]

See also Railroad Company v. Brown, 84 U.S. 445, 452 (1873) (invalidating attempt by railroad to comply with the commands of the 14th Amendment and implementing congressional legislation by providing separate but equal "accommodations for" Blacks; the Court noted that Congress had required "equal treatment" in the operation of the railroad and rejected the company's "ingenious attempt to evade a compliance with the obvious meaning of the requirement"); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (invalidating municipal regulatory regime that routinely denied business licenses to Chinese residents; "the conclusion cannot be resisted that no reason for [the license denial] exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified").

Less than 20 years after *Strauder*, however, with its decision in Plessy v. Ferguson, 163 U.S. 537 (1896), the Supreme Court turned its back on a strict textual application of the 14th Amendment, concluding that a railroad's provision of "separate but equal" railway cars for White and Black passengers complied with all relevant constitutional commands. The opinion's refusal to follow the path marked by cases such as *Strauder, Railroad Company* and *Yick Wo* was rather obviously influenced by the Court's perception of current political trends. The majority opinion attempted to justify its departure from constitutional text by citing as authoritative precedent, not its own prior opinions interpreting the 13th, 14th and 15th Amendments, but opinions from state courts that may well have been motivated to uphold and sanction various discriminatory actions. *See, e.g., Plessy*, 163 U.S. at 550 (distinguishing *Yick Wo* by, among other things, citing five state cases discussing various discriminatory state programs). The Court feebly attempted to justify its retreat from express constitutional language and its realignment with current political views by asserting that:

> [T]he underlying fallacy of the plaintiff's argument . . . [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. at 550. Justice Harlan, in dissent, noted that the express terms of the 13th, 14th and 15th Amendments prohibited the officially supported discrimination involved in *Plessy*. 163 U.S. at 555. He concluded that, "[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case" *Id.* at 559.

Justice Harlan was right.

It took the Court over 50 years to begin correcting the constitutional error it condoned in *Plessy*. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). Without question, the process of eliminating the lingering effects of slavery would have been difficult even if the Court had followed the path set in *Strauder, Railroad Company* and *Yick Wo*. The Court's 50-year departure from the text of the post-Civil War Amendments, however, has made a difficult process seem nearly impossible. More than 50 years since *Brown*, the norms enshrined in the language of the 13th, 14th and 15th amendment remain aspirations rather than realities. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306

recent period of judicial excess was ended (at least in part) by President Roosevelt's famous threat to "pack the Court" in 1937.[39] From the late 1890's to the mid-1930s, the Justices of the Supreme Court invalidated various state and federal legislative judgments on the ground that they unduly interfered with the "liberty" of American citizens.[40] Back then the unwritten freedom that the Court enforced was not privacy, but economic liberty.

In *Lochner v. New York*,[41] for example, the Court struck down a law establishing a 10-hour workday for bakery employees who labored near hot and dangerous wood- and gas-fired ovens. Why was this seemingly sensible regulation unconstitutional? Because, by setting a limit on the number of hours an employee could work, New York had unduly interfered with the right of free men to negotiate their own terms of employment.[42] In the 1920s, the shadows of the Constitution protected a rather unusual constitutional right indeed: the "right" of New York bakers to work themselves to death.[43]

By 1936, cases like *Lochner* threatened to invalidate the Roosevelt Administration's efforts to ease the economic suffering caused by the Great Depression.[44] Various provisions of the New Deal interfered with economic rights highly valued by the

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(2003) (opinions struggling with the difficult issues posed by affirmative action programs, "reverse" discrimination, and the general social unrest caused by long-delayed achievement of racial equality).

[39] *See* Mary Murphy Schroeder, *The Ninth Circuit and Judicial Independence: It Can't Be Politics as Usual*, 37 ARIZ. ST. L. J. 1, 4-5 (2005)(giving a short story of the court packing plan and how Roosevelt did not want to be held to the "horse and buggy days" of the Court's interpretation of the Commerce Clause).

[40] Allgeyer v. State of Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); St. Louis Cotton Compress Co. v. State of Arkansas, 260 U.S. 346 (1922); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[41] 198 U.S. 45, 64-65 (1905).

[42] *Id.* at 57.

[43] *Lochner* is generally considered the great "progenitor" of the modern substantive due process cases discussed below. *See* David E. Bernstein, "Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*," 92 GEO. L. J. 1, 13 (2003).

[44] *See, e.g.*, William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L. J. 2077, 2079-80, 2082-87 (citing various cases and some of Roosevelt's reactions to them leading up to the introduction of his court-packing plan).

Justices.[45] After the Supreme Court invalidated parts of the National Industrial Recovery Act[46] and the Agricultural Adjustment Act[47] in 1935 and 1936, President Roosevelt went on the offensive. Following his election to a second term, in one of his famous "fireside chats," he threatened in 1937 to appoint a new Supreme Court Justice for each one of the "nine old men" on the Supreme Court over the age of 70.[48] These Justices, the President declared, were "out of touch" with the needs of ordinary Americans, the economic realities of the day, and even the intentions of the Founders.[49] Such a strong message from a popular president prompted Congress to hold hearings on the proposal, but before any changes were made, the Supreme Court abandoned its enforcement of non-enumerated constitutional liberties and the president abandoned his plan to pack the Court.

Between December 1936 and the end of the first quarter of 1937, the Supreme Court made an abrupt about-face. On the heels of President Roosevelt's challenge, the Court began to implicitly condemn its prior decisions as unwarranted judicial departures from the text of the Constitution.[50] Rather than invalidating legislation because it restricted the unenumerated economic liberties of American citizens, the Court wrote regarding the obligation, duty and privilege of free men and women to govern themselves

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[45] *See, e.g.*, *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the NIRA); *United States v. Butler*, 297 U.S. 1 (1936) (striking down the AAA); *Carter v. Carter Coal Co.* 298 U.S. 238 (1936) (striking down the "little NRA"); *Ashton v. Cameron County Water Improvement District No. 1,* 298 U.S. 513 (1936) (striking down the MBA).
[46] *See Schecter Poultry*, 295 U.S. 495; *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).
[47] *See Butler*, 297 U.S. 1.
[48] "Fireside Chat on the Reorganization of the Judiciary," March 9, 1937, at http://www.fdrlibrary.marist.edu/030937.html. Accessed October 3, 2005.
[49] *Id.*
[50] *See, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (*overruling* Adkins v. Children's Hospital, 261 U.S. 525 (1923) by upholding minimum wage legislation); National Labor Relations Board (NLRB) v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the constitutionality of the Wagner Act).

by debating and deciding difficult questions of social and economic policy.[51] The Court seemingly recalled (and conducted its business pursuant to) Chief Justice John Marshall's famous dictum in *Marbury v. Madison*[52] that "the framers of the Constitution contemplated that instrument as a rule for the government of *courts,* as well as of the legislature."[53]

Throughout the early 1960's, the Court regularly opined regarding the dangers of enforcing judicially preferred policies, in disregard of the text, structure and history of the American Constitution.[54] Unfortunately, *Griswold* (and subsequent privacy cases) paid little heed. The contraception law in *Griswold* was, as Justice Stewart observed, "uncommonly silly" and outdated.[55] But however proper the *result* in *Griswold* seemed (and still seems today), the *analysis* launched by the case encouraged social activists, lawyers, law professors and judges to increasingly ignore that Article III does not establish the federal courts as the perpetual censor of unreasonable legislation or as the ultimate arbiter of all divisive moral controversies.

Most legislative and executive decisions are *not* controlled (and cannot be controlled) by the presciently precise language of the Constitution.[56] If the "correct"

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[51] *See Jones & Laughlin*, 301 U.S. at 30 (discussing the presumption of constitutionality afforded legislative enactments).
[52] 5 U.S. 137, 178 (1803).
[53] *Id.* at 179-180 (emphasis in original).
[54] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (stating that "intrusion by the judiciary into the realm of legislative value judgments" characterized a number of past decisions, but that "[t]he doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded").
[55] *See Griswold*, 381 U.S. at 528-31 (Stewart and Black, J.J., dissenting).
[56] *Id.* at 531 ("it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases 'agreeably to the Constitution and laws of the United States.' It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books").

answers to pressing questions are fairly debatable, those questions must be – indeed, should *only be* – resolved by legislative action. The "correct" answers to such questions as the appropriate level of welfare assistance,[57] the purity of the nation's air,[58] and the sexual conduct of its citizens[59] are fairly debatable and, therefore, left for resolution by state and national legislatures.[60]

This is particularly true when government action involves moral questions. And although it seems almost prehistoric to note that government action implicates moral issues, questions of morality abound in government decision making.[61] The all-too-common contention that "government has no business regulating morality" makes a good sound bite, but not much sense. Governmental decisions *always* involve striking a balance between competing moral values. To whom should society pay welfare benefits? How much? When? These and thousands of other questions addressed daily by government necessarily will be resolved in favor of one moral view or another. The "right to privacy," enunciated in *Griswold* and expanded in cases thereafter,[62] has rendered the American legal system increasingly oblivious to the reality that debatable moral and ethical questions are poor candidates for judicial resolution.

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[57] *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970) (Court refuses review state-provided benefits under the Due Process and Equal Protection Clauses).
[58] *See, e.g.* Hancock v. Train, 426 U.S. 167 (1976) (construing respective rights and duties of state and federal governments in implementing the Clean Air Act).
[59] Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *rev'd*, Lawrence v. Texas, 539 U.S. 558 (2003).
[60] *See generally,* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).
[61] *See* Dallin H. Oaks (former Chicago Law Professor, Justice on the Utah Supreme Court, and Executive Director of the American Bar Foundation), *Religious Values and Public Policy,* ENSIGN, Oct. 1992, at 60 (address given 29 February 1992 to the Brigham Young University Management Society, Washington, D.C. stating that there is scarcely a piece of legislation that is not founded on some conception of morality; the issue is merely "whose morality and what legislation"). *See also Bowers*, 478 U.S. at 196 ("The law . . . is constantly based on notions of morality , and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").
[62] For a good discussion of the development of the privacy right as it relates to sexual issues, *see* Donald H. J. Hermann, *Pulling the Fig Leaf off the Right to Privacy: Sex and the Constitution*, 54 DEPAUL L. R. 909 (2005).

Following *Griswold*, the privacy right supposedly founded on the "sacred" institution of "marriage" was extended to unmarried couples,[63] a substantive result that (again) sparked little disagreement.[64] But the Court's expansion of privacy to include abortion in *Roe v. Wade*[65] revealed how easy it is for judges to stumble when walking through constitutional shadows. *Roe* starkly revealed the *kinds* of questions the Court (rather than the people) would decide under the penumbral "right to privacy."

The *Roe* Court took pains to explain that abortion was particularly well suited for judicial resolution *precisely because* it involved (among other things[66]) "the difficult question of when life begins;" a question upon which the Court need not "speculate as to the answer."[67] But, despite this disclaimer, the Court announced that a woman could terminate the life of an unborn child for any (or no) reason at any time prior to the point when the child could live outside the womb.[68] By providing a speculative response ("life," or at least legally cognizable "life," begins at "viability"[69]) to a question the Court purportedly did not need to "answer,"[70] the unusual contours of the a-constitutional right

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[63] *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972).
[64] *See* John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973) (explaining that the results of *Griswold* and subsequent cases were so popular that criticisms were like crying "wolf;" such that when the Court abandoned all pretense of judicial restraint with *Roe v. Wade*, few listened to the serious separation of powers issues raised by the case).
[65] 410 U.S. 113 (1973).
[66] *Id.* at 116-17. ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.").
[67] *Id.* at 159. ("We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").
[68] *Id.* at 163-64, 166.
[69] *Id.*
[70] *Id.* at 159.

of privacy at last drew significant attention.[71] Philosophers, ethicists and many Americans recognized that the utilitarian reasoning of *Roe* raised a host of disconcerting questions.[72] For the first time since *Griswold*, many Americans paused. It seemed the Court might, too.

Roe forced America (and the Court) to confront whether the Constitution, in fact, mandates judicial resolution of social controversies precisely because they are moral, divisive and difficult. The legal academy that had nurtured privacy analysis[73] and warmly welcomed *Griswold*[74] now rushed to rewrite and re-explain the Supreme Court's astonishing decision. Thousands of pages in the law reviews were dedicated to sophisticated (and often incomprehensible and contradictory) justifications for *Roe's* elimination of democratic debate and decision making at the very moment they were needed most.[75] These obviously *post hoc* apologetics embarrassed the Court and for many years the Court was hesitant to lengthen the shadows of *Griswold.*

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[71] *See, e.g.,* John Hart Ely, *The Wages of Crying Wolf,* 82 YALE L.J. 920 (1973) (discussing *Roe*'s dramatic departure from established standards of judicial review). The debate surrounding *Roe* is too extensive to chronicle here, but for a good general discussion of the history and legal theory *see* N. E. H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY (2001); for a less scholarly, but more accessible summary, *see also* http://en.wikipedia.org/wiki/Roe_v._Wade #Controversy_over_Roe.

[72] The willingness of the Court in *Roe* to balance the value of unborn human life against a woman's claim to privacy, led inevitably to claims that the Constitution also protects a right to assisted suicide – or "active" euthanasia, a position – so far – rejected by the Court. *Washington v. Glucksberg,* 521 U.S. 702 (1997) (rejecting assertion that the right to assisted suicide is protected by the Due Process and Equal Protection Clauses). But *Roe* raises other ethical issues as well. For a recent example, *see* Larry I. Palmer, *Genetic Health and Eugenics Precedents: A Voice of Caution*, 30 FLA. ST. U. L. REV. 237, 255 & n.89 (2002) (explaining that "without a woman's legal right to have an abortion . . . genetic liability claims would not be theoretically possible").

[73] The legal academia proposed the right to privacy nearly eight decades prior to *Griswold. See* Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. R. 193 (1890). For a good discussion on the development of the privacy doctrine generally, *see* Amy Peikoff, *No Corn on This Cobb: Why Reductionists Should be all Ears for Pavesich*, 42 BRANDEIS L. J. 751 (2004).

[74] *See* authority at note 27, above.

[75] *See* Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on* Roe, Casey, *and the Right to Die,* 44 AM. U. L. REV. 803, 808 & n.16 (1995) (criticizing *Roe* and citing to numerous articles attempting to provide alternative rationales for the decision). *See also* authority at notes 71-72, above.

Indeed, in the 1986 opinion in *Bowers v. Hardwick*,[76] the Court avoided the right to privacy altogether and looked (at long last) to the language of the Constitution and the teachings of long-standing American traditions and history. Because there is nothing in the language of the Constitution that directly addresses the question, *Bowers* concluded that states could decide whether or not to regulate homosexual conduct, even if the chosen course seemed prudish, silly or outdated.[77] The right to privacy did not dictate a contrary result, the Court noted, because human sexuality involves debatable questions of morality that have been regulated for centuries – and might warrant regulation today. The *Bowers* Court also noted that homosexual behavior, unlike that involved in *Griswold* and *Roe,*"bear[s] [no] resemblance" to "family relationships," "marriage," or procreation."[78]

Even *Roe* underwent a transformation during this momentary waning of privacy analysis. In the 1992 decision of *Planned Parenthood v. Casey,*[79] the Supreme Court pointedly *did not* reaffirm the reasoning of *Roe v. Wade*. As the dissenting Justices noted, the controlling opinion for the Court could not "bring itself to say that *Roe* was correct as an original matter."[80] Caught in a difficult gap between *Roe*'s faulty logic and its refusal to reject *Roe*'s result, the Court resorted to *stare decisis* – a doctrine which provides that a legal question, once decided, remains decided. *Roe* may have gotten it wrong, the Court announced, but right or wrong the decision would stand.[81] It looked like the right to privacy had itself become penumbral.

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[76] 478 U.S. 186.
[77] *Id.* at 192-96.
[78] *Id.* at 190.
[79] 505 U.S. 833 (1992).
[80] *Id.* at 953.
[81] *Id.* at 870-71.

But, at least in constitutional law if not in real life, never underestimate the compelling substance of partial and incomplete shadows. The decision in *Lawrence v. Texas*[82] demonstrates that the Court has recovered from the bout of judicial modesty it suffered between *Bowers* and *Casey*. The penumbra of privacy is back.

Roe didn't get it wrong after all. Rather, it is *Bowers* (and the hesitant approach of *Casey*) that are constitutionally suspect. *Bowers*, in fact, is reversed.[83] *Lawrence* declares that the reasoning of *Bowers* – that family, marriage and procreation are sturdy enough social interests to overcome the judicially created right to privacy – is fatally flawed. According to the Court, *Griswold* was wrong, too. Forget all that talk in 1967 about the "sacred" nature of the "marital union;" privacy (following the Court's further consideration) has *nothing at all* to do with marriage, procreation, or the bearing and rearing of children.[84] Instead, privacy vests sexual partners with a constitutional entitlement to determine their "own concept of existence, of meaning, of the universe, and of the mystery of human life."[85] And under this "concept of existence" and "mystery of human life" clause, government may not "demean" consenting adult sexual behavior.[86]

Accordingly, society may have no business making any distinction between a marital union of a man and a woman and a sexual partnership between two men, two women or (why not?) three men and four women.[87] If marriage is "sacred" (as *Griswold* declared[88]) can society "demean" other sexual relationships under *Lawrence* by suggesting *they* are not? Furthermore, can a state even require sexual fidelity between

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[82] 539 U.S. 558 (2003).
[83] *Id.* at 578.
[84] *Id.* at 574, 578-79.
[85] *Id.* at 574.
[86] *Id.* at 578.
[87] Robert P. George, *What's Sex Got to do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, n. 63 (2004).
[88] *Griswold,* 381 U.S. at 486.

spouses? If it does, doesn't that "demean" individuals whose "meaning of the universe" includes "open marriage"? Probably. Thus, marriage may no longer mean a man and a woman, two people, sexual exclusivity, or exclude partnerships between close relatives.[89]

Thus, through the questionable logic of legal reasoning purposely freed from the tethers of the actual language of the United States Constitution and American tradition, a purported right which sprang from the centuries' old social institution called marriage may soon become that institution's very undoing.[90] No wonder Justice Scalia notes that *Lawrence* "leaves on pretty shaky grounds state laws limiting marriage to opposite sex couples."[91]

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[89] Because human reproduction is impossible between partners in same-sex relationships, consanguinity rules (which generally prohibit marriage between close relatives to guard against, among other things, genetic concerns related to reproduction) would seemingly pose no obstacle to marriages between two sisters, two brothers, a mother and her daughter or a father and his son.

[90] The concluding paragraph of *Griswold* adulates marriage:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486.

[91] *Lawrence v. Texas,* 539 U.S. 558, 601 (Scalia, J., dissenting). In addition to Lawrence, decisions from various state courts demonstrate just how "shaky" judicial action has rendered established laws related to marriage. Although decisions from only two states are final (Vermont and Massachusetts), judicial decisions in favor of legalizing same-sex marriage or marriage-equivalent unions have come (in chronological order) from Hawaii, Alaska, Vermont, Massachusetts, Oregon, Washington, New York and California. *Hawaii:* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baehr v. Miicke, 196 WL 694235 (Haw. Cir. Ct. 1996); *Alaska:* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 at 6 (Alaska. Super. Ct., Feb. 27, 1998); *Vermont:* Baker v. State, 744 A.2d 864 (Vt. 1999); *Massachusetts:* Goodridge v. Department of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004); *Oregon*: Li v. State, 2004 WL 1258167 (Or. Cir. April 20, 2004), *rev'd*, 110 P.3d 91 (Ore. 2005); *Washington*: Andersen v. King County, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004); Castle v. State, 2004 WL 1985215, *11 (Wash. Super. Sep 07, 2004); *New York:* Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y.Sup., Feb. 4, 2005); *California:* In re Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. San. Fran., Mar. 14, 2005).

Following *Lawrence*, the Massachusetts Supreme Judicial Court[92] relied upon the reasoning of the Supreme Court's opinion to hold that the Massachusetts Constitution, although nowhere discussing or addressing the matter in its actual text, demands official recognition of same-sex marriage.[93] In reaction to *Lawrence* and the Massachusetts decisions, voters in 11 states last November amended their state constitutions to define marriage as the union of a man and a woman.[94] This unusual action by states ranging in political views from Mississippi to Utah to Oregon does more than prevent state courts from invoking privacy (or other judicial innovations) to redefine marriage – it also demonstrates the growing unease of Americans with expanding state and federal judicial power. Americans are becoming aware that, over the past 40 years, the judiciary's increasing disregard of constitutional strictures has deprived them of the ability to answer many of the political questions that affect them most. Marriage is just one of the more recent questions the judges are about to take from the hands of American voters.

As a result, more than marriage is on shaky ground. So is America's "greatest improvement on political institutions:" the idea of "a written constitution."[95]

The reasoning in *Lawrence* erodes democratic control of debatable – and unquestionably difficult – issues of moral concern. By substituting a potentially far-reaching (and as yet undefined) "concept of existence, of meaning, of the universe, and of

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[92] The Massachusetts judicial system is now hearing a law suit that seeks a judgment that same-sex couples from other states can marry in the Commonwealth, potentially making Massachusetts "America's gay marriage capital." *See* Jason Szep, "Mass. Court Hears Out-of-State Gay Rights Challenge," Reuters, Thurs. Oct. 6, 2005. At: http://today.reuters.com/news /newsArticle.aspx?type=politicsNews&storyID= 2005-10-06T222645Z_01 YUE680772_RTRUKOC_0_US-RIGHTS-GAYS.xml.

[93] Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 973-74 (Mass. 2003).

[94] Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah all passed state constitutional amendments in 2004 defining marriage as between a man and a woman. *See* http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/. Accessed October 4, 2005.

[95] *Marbury,* 5 U.S. at 178.

the mystery of human life" test[96] for the actual text of the Constitution, *Lawrence* seriously erodes the ability of American citizens to engage in open and honest political discussions regarding the outcome of an unknown range of fairly debatable moral controversies. Such questions – ranging from cloning and biomedical research to euthanasia[97] and children's rights[98] – involve some of the most pressing issues of modern life.

After *Lawrence*, which democratic judgments in these areas will survive the new (and apparently individualistic and idiosyncratic) "concept of existence" and "mystery of human life" test? Who can tell? Will the long-standing definition of marriage as the union of a man and a woman withstand judicial analysis? No one knows – although the Massachusetts Supreme Judicial Court's invocation of *Lawrence* suggests that the answer is "No."[99]

Throughout America, ordinary citizens, lawyers, law professors, legislators and judges obviously disagree regarding the meaning of marriage. The existence of this deep disagreement, however, demands that the people be allowed to vote on a Federal Marriage Amendment to express *their* constitutional views regarding the meaning, content and social role of *Griswold*'s sacred relationship.[100]

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[96] *Lawrence,* 539 U.S. at 574.
[97] *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702 (1997) (rejecting the claim that the Due Process Clause establishes a constitutional right to active euthanasia; however, the Court's analysis rests upon a textual and historical examination of the meaning of the clause – the interpretative approach rejected in *Lawrence*).
[98] *See, e.g.,* Roper v. Simmons, 125 S.Ct. 1183, 1198-1200 (2005) (Supreme Court ascertains the content of the Eighth Amendment by relying, in part, upon the practice of foreign nations and the terms of an international treaty never ratified by the Senate). *Compare id.* at 1217 (Scalia and Thomas, J.J., dissenting) (asserting that the Court's holding rests, not upon the language of the Eighth Amendment or the history of its implementation by the American states, but upon the majority's notions regarding "evolving standards of decency" derived in significant part from "the views of foreign courts and legislatures").
[99] *Goodridge,* 798 N.E.2d at 973-74.
[100] *Griswold,* 381 U.S. at 486.

Marriage is an essential and long-standing social institution with profound importance for the social health of American society.[101] Furthermore, while it is unclear what impact judicial redefinition of marriage might have on American society, there is surprisingly general agreement that further debilitation of marriage in America would be dangerous indeed.[102] The meaning and social role of marriage is too important – and the current health of the institution too fragile[103] – for its meaning and future vitality to be determined by the oligarchic votes of as few as five Members of the Supreme Court. As Abraham Lincoln warned in his First Inaugural Address: "if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation . . . , the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[104]

Accordingly, at the end of the day, *Lawrence* raises a fundamental question regarding the *constitutional process* for defining marriage in America. The pressing issue is whether the People or the Court should decide the outcome of a debatable, divisive, difficult – even transcendent – question of social morality. The Supreme

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[101] "Why Marriage Matters: Twenty Six Conclusions from the Social Sciences, Second Edition" The Institute for American Values (2005).

[102] *Id.* at 6-7 (noting that, since the publication of the First Edition of the Study, a careful consideration of all available social scientific studies support five new findings; among these are findings that "[a]n emerging line of research indicates that marriage benefits poor Americans, and Americans from disadvantaged backgrounds, even though these Americans are now less likely to get and stay married;" "[m]arriage seems to be particularly important in civilizing men, turning their attention away from dangerous, antisocial, or self-centered activities and towards the needs of a family;" and "[b]eyond its well-known contributions to adult health, marriage influences the biological functioning of adults and children in ways that can have important social consequences").

[103] *See id* (all 26 findings).

[104] Abraham Lincoln's First Inaugural Address, March 4, 1861, available at http://www.bartleby.com/124/pres31.html (last visited 17 October 2005). *Compare also* Lincoln's Gettysburg Address (noting that the Civil War involved whether "government of the people, by the people, [and] for the people" will "perish") available at http://www.law.ou.edu/hist/getty.html (last visited on 17 October 2005).

Court's decision in *Lawrence* portends that the meaning of marriage will soon be removed from the realm of democratic debate, adjustment, compromise and resolution. This is a serious, and profoundly suspect, matter of structural constitutional law.

America in 2005 faces the question President Roosevelt confronted in 1936 and 1937: When the precise words of the Constitution, considered in light of the country's constitutional traditions, do not provide an indisputable answer for the resolution of a contentious moral, ethical and political question, who charts the Republic's course? The People or the Court? This is the question raised by *Lawrence*.

All Americans should care how it is answered.

Testimony on the Federal Marriage Amendment
Senate Judiciary Subcommittee on the Constitution
October 20, 2005

Christopher Wolfe[1]
Marquette University

Thank you for permitting me to present testimony to you today.

My name is Christopher Wolfe. I am a political scientist and I teach constitutional law and American politics at Marquette University in Milwaukee, and I have edited several books and written several law review articles on homosexuality and American public life.

Outline of the Amendment and Its Effects

The Federal Marriage Amendment which you are considering today would fix in the United States Constitution the principle that marriage in the United States means marriage between one man and one woman. Its text reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, 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."[2]

Is the Proposed Amendment Necessary?

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[1] Professor of Political Science, Marquette University, and President of the American Public Philosophy Institute. In the latter capacity I organized a major public conference on "Homosexuality and American Public Life" in Washington, D.C. in 1997. I subsequently edited two books on the subject, *Homosexuality and American Public Life* (Spence Publishing Co., 1999) and *Same-Sex Matters: The Challenge of Homosexuality* (Spence Publishing Co., 2000), and I have frequently spoken on, or been interviewed regarding, the subject. This past year I have written articles dealing with the topic of homosexuality and/or same-sex marriage for the San Diego Law Review and the Florida Law Review, and for an anthology of readings in social philosophy.

[2] The second sentence includes the phrase "legal incidents thereof" in order to make sure that the amendment is not evaded by the creation of another legal status that differs from marriage literally only in name. As its backers have made clear, it would not interfere with the right of states to offer some of the benefits or rights that married people have to other couples or groups.

One objection that might be made to the amendment is that it is unnecessary, since U.S. law–specifically in the form of the Defense of Marriage Act–already defines marriage and prevents one state from imposing a different meaning of marriage on other states.[3] It is simply a fact of our political and judicial life, however, that courts sometimes go out of their way to give highly controversial constructions to the Constitution, and it is certainly within the realm of possibility that federal judges might strike down the Defense of Marriage Act, as judges have struck down marriage defense laws in various states.[4] The decisions of the Supreme Court in *Romer v. Colo.* and *Lawrence v. Texas*[5]–despite the glaring weaknesses in their reasoning–will inevitably be invoked to argue that virtually any legal distinction between heterosexuals and homosexuals is unconstitutional. While it is conceivable that judges might reject such arguments, it is equally conceivable that they may accept them.[6] In fact, I think it would be intellectually dishonest of anyone to deny that there is at least a very real possibility that some judges (including even the Supreme Court) might strike down the Defense of Marriage Act.

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[3] See *In re Kandu*, No.03-51312 (Bkrcy., W.D. Wash. Aug.17,2004) (rejecting various constitutional challenges to DOMA, and dismissing bankruptcy petition by two women, U.S. citizens, who had been married in British Columbia.

[4] One of the most recent and important examples occurred in May, 2005, when a federal district court judge struck down Nebraska's Defense of Marriage Act in *Citizens for Equal Protection v. Bruning* 290 F. Supp.2d 1004.

Of course, the best known state case on the issue of same-sex marriage is *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Nov.18,2003) (holding that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution).

Other cases sympathetic to same-sex marriage include:

Anderson v. King County, No.04-02-04964-4SEa (Washington Superior Ct., King County, August 4,2004), holding that denial to plaintiffs of right to marry violates the privileges or immunities clause of the Washington state constitution, as well as constituting a denial of substantive due process).

Hernandez v. Robles, No. 103434/2004 (New York Supreme Court, Feb. 4, 2005) (holding that the restriction of marriage to opposite-sex couples under New York's Domestic Relations Law violated the state constitution).

Baehr v. Miike, 1996 WL 694235 (Circuit Court decision holding that the sex-based classification in the Hawaii marriage statute was unconstitutional, and enjoining the state from denying a marriage license solely because the applicants were of the same sex; reversed by the Supreme Court without opinion, after the passage of a state constitutional amendment).

[5] 517 U.S. 620 (1996); 539 U.S. 558 (2003).

[6] For an insightful analysis of this question, concluding that *Romer* and *Lawrence* leave DoMA constitutionally vulnerable, by authors who are opposed to the Federal Marriage Amendment, see John C. Yoo and Anntim Vulchev in *Issues in Legal Scholarship Symposium: Single-Sex Marriage* [2004], Article 3 (available at www.bepress,com/ils/iss5/art3).

Given that fact, and given the existence of a well-organized and financed effort to legalize same-sex marriage in this country, backed by extensive ideological scholarship in the academy and in the legal community, it is only prudent to remove even the possibility that judges will intervene to strike down the Defense of Marriage Act and the states laws it was intended to protect.

Is *This* Proposed Amendment Necessary?

Another major objection to the Federal Marriage Amendment comes from those who argue that, even if an amendment is necessary, it ought to take a different form. It would be better, they say, for the amendment simply to guarantee the right of the states to deal with the issue of marriage, free of federal (including judicial) interference.

This would preserve the Defense of Marriage Act, but make explicit the already-existing power of states to define marriage as something other than a union of one man and one woman. But this does not really resolve the fundamental, underlying issue (and deliberately intends not to resolve it). It would rule out certain ways of introducing and expanding same-sex marriage, but it would fall short of defending traditional marriage by erecting effective barriers to the legitimization of same-sex (and polygamous) marriages.

Those who advocate a federalism amendment on the gay marriage issue, which simply returns the issue to the states, seeing it as a permanent solution to the dispute, apparently do not think that gay marriage is a fundamental issue.[7] But the crux of the case for the FMA is that gay marriage (like polygamy) is precisely such a fundamental issue. The ready acceptance of a checkerboard pattern of state policies either does not understand or simply doesn't agree that defending certain essential features of marriage, such as gender complementarity, is essential for social and individual well-being.

The acceptance of varying state policies on same-sex marriage allows more than just the proverbial camel's nose into the tent. If some states authorize gay marriage, and if one considers the de facto nationalization of various media, then one can assume that formally "married" gay couples will become staples on TV, in movies, in books. But this "normalization" of gay marriage would act powerfully to undermine residual opposition to it, because there is a strong, though indirect, connection between the moral ideals of citizens and their sense of what is "normal" in their society. The backers of the "federalism amendment" either fail to recognize this corrosive effect on social norms, or they are content to live with it. Those who regard traditional

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[7] I concede that the moral implications of a federalism approach to same-sex marriage would look different, however, if it were intended simply as a temporary step toward a more comprehensive solution (a step offered by some with respect to the abortion issue, for example). I think that such a strategy would still be a misplaced one, however, since an effort to achieve a federalism amendment would likely exhaust the political capital of the forces opposed to same-sex marraige and would make a more comprehensive solution less likely rather than more likely. (Moreover, in the case of a same-sex marriage federalism amendment, unlike an abortion federalism amendment, the federalism approach would leave the country with the serious problem of dealing with radically different definitions of marriage.)

marriage as an institution essential for social and individual well-being believe that we cannot accept such corrosion.

The Importance of the Principle of Marriage Between One Man and One Woman

Why is it so important that the U.S. make it clear beyond even unreasonable doubt that its policy is to promote marriage between one man and one woman? There are some people who believe that such a policy deprives homosexuals of their fundamental human and constitutional rights. They ask why the law should deprive them of the same opportunity to have what heterosexuals have, namely, the opportunity to marry the person they love.

The answer to that question has something to do with our understanding of marriage as a central social institution. Marriage is obviously a personal relationship. But it is much more than that. Most importantly, it is the ordinary means by which new human beings are brought into the world and prepared to assume their positions as citizens of society. If marriage were not this–if it were *only* a personal relationship–there would be no essential reason for the state to have any concern about marriage, to recognize it at all. (For example, do we ask the state to formally recognize our friendships?)[8]

One aspect of the context of this debate should be clear to anyone. That is the difficulty our society has had in sustaining stable marriages, especially in the last three or four decades. Illegitimacy is at an all-time high, approaching one-third of babies born in this country. Divorce has recently leveled off, but it has leveled off at a very high rate (and even this leveling off may be due simply to more people cohabiting rather than getting married to begin with). The result of these trends is that many children do not experience growing up with both their mother and father, which most Americans clearly recognize as the optimal framework for raising children. Even many social scientists, despite certain ideological blinders, have come to recognize that a marriage between a biological mother and father is the best context for raising children.

Many supporters of same-sex marriage, in perfectly good faith, recognize the importance of marriage, and they simply want to extend its benefits to homosexuals. What they fail to see is that marriage is not just about a personal relationship and personal intimacy. Marriage is an institution that has certain intrinsic features, and those requirements must be honored. For example, even if three or four people sincerely loved each other, our law would not permit them to marry. Why? Because we believe that there is something about the very nature of marriage that precludes this. In the case of polygamy (or polyandry, or polyamory), it is the fact that marriage is understood to involve a complete reciprocal self-giving of each spouse to the other,

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[8] This social dimension is the key factor distinguishing the current issue from the Texas anti-sodomy law struck down in *Lawrence v. Texas* 2003 U.S. Lexis 5013, at 36. That law concerned only private sexual activity, and did not touch on the institution of marriage, as the Court opinion in that case itself carefully pointed out: "The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

and that such complete self-giving is impossible with multiple spouses. (It is no accident that polygamy was widespread especially in nations in which men dominated women in a particularly extreme way.)

Most Americans today also reject same-sex marriage, because they believe that gender complementarity is essential or integral to the meaning of the institution of marriage. Marriage is a union of two people whose physical union makes them, literally, a single unit, in the sense that this union of two complementary, engendered bodies is the ordinary way of bringing children into existence.[9]

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[9] Contemporary artificial reproduction is simply a process that mimics limited elements of this, and is understood even by those who employ it to be an unfortunate "necessity" in their circumstances.

It is often objected to this that marriage is permitted between a man and a woman when they are unable to conceive children, whether due to some physical defect or age. But there is a fundamental difference between the incapacity of homosexual activity to lead to children and the

incapacity of some heterosexuals to conceive. Heterosexual union may not result in children because of some defect in the matter, the physical properties of the man and woman, but their act remains essentially the same *kind* of physical union in which the spouses of complementary gender unite to form a single principle. No homosexual union is ever capable of achieving that kind of union, and the sterility of homosexual acts is due to no accident of matter, but to the nature of the act itself.

The recent debate about marriage, and the difficulties of the contemporary family, have led us to see more clearly that marriage is not simply a personal contract between two people, which can be adjusted or manipulated in whatever way they wish. It is a fundamental social institution, and the well-being of our society depends on its healthy functioning. Maintaining a respect for the essential features of marriage, including gender complementarity, in our law is an important way in which we can support the family and begin to reverse the unhappy trends we have observed.

It should also be said, finally, that there is reasonable doubt as to whether the real goal of the same-sex marriage movement is to achieve the traditional goals of marital stability for homosexuals. It seems clear that many homosexuals pursue the goal of legalizing same-sex marriage simply as a *symbolic* achievement of equality, of society's affirmation of same-sex activity. (That helps to explain why, in some European nations that have legalized same-sex marriage, relatively few homosexual couples have actually availed themselves of the opportunity to have their unions formally recognized.) In fact, many homosexuals are opposed, in principle, to what they consider excessively narrow or stifling heterosexual views of marriage.[10]

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[10] One powerful indicator of this is found in the case for same-sex marriage put forward by Andrew Sullivan in his book, *Virtually Normal*. One of the striking facets of Sullivan's book–on the whole, a strikingly moderate and even traditional defense of homosexual marriage–is precisely that, after a carefully nuanced argument portraying homosexuality as an involuntary condition and homosexuals as "virtually normal" people who seek the same ends in sex as heterosexuals do, he ends his book by making surprising assertions about homosexual sex–assertions that undercut the earlier arguments dramatically–such as the following: 1) Among "gay male relationships, the *openness* of the contract makes it more likely to survive than many heterosexual bonds"; 2) "there is more likely to be greater understanding of the *need for extramarital outlets* between two men than between a man and a woman"; 3) "there is something baleful about the attempt of some gay conservatives to educate homosexuals and lesbians into an

There are powerful social reasons, then, why our society should defend the institution of marriage as a union of one man and one woman. While many people view this through the lens of expanding individual rights, the true result of such legal innovations may be undermining the notions which provide the very foundations of stable family life.

Will Marriage Continue To Be Available in Our Society?

People generally take it for granted that marriage will be "available," but, despite the powerful forces inclining people to marry, the availability of marriage as an institution they can choose to enter cannot be taken for granted. There are powerful forces inclining human beings to accumulate property, and there is a strong natural basis for (properly qualified) property rights, but in a given society such property rights may not be available. Property is both natural and pre-political, on one hand, and also a social institution essentially dependent on various legal arrangements, on the other. Likewise, marriage is natural and pre-political, but also a social institution dependent on various legal arrangements.

One of the ways in which marriage can become "unavailable" to people is for the law to offer people an institution called "marriage" that is not really marriage. By inculcating in its citizens–through social practices and laws–a notion of marriage that lacks some of its essential ingredients, a political society could, effectively, make "real marriage" impossible for most of its citizens.

One way to do this is to make "marriage" a contract that is temporary and terminable at the will of either party. Whatever the impact of the allowance of divorce in a certain limited number of cases has been, the shift to no-fault divorce has profoundly changed the very notion of marriage among Americans, and has deeply damaged it.

How does this change in law affect marriages? How easily people could say in 1970 "if I want to get divorced, that's my business - I'm not making anyone else [except my former spouse] do it. If others want to stay married, let them." The problem is that such an attitude ignores the subtle interplay of personal choice and social mores. So many of our conceptions are shaped by

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uncritical acceptance of a stifling model *[i.e., because truly monogamous]* of heterosexual normality"; 4) "to flatten their varied and complicated lives into a single, moralistic model *[i.e., the model of complete fidelity]* is to miss what is essential and exhilarating about their otherness" (italics added).

our sense of what is "normal," by the social ecology of which we are a part. No-fault divorce has created a world in which divorce is normal, and it is now a part of the ordinary psychological landscape of many people. For them, marriage is a permanently tentative and revisable commitment. And so, not surprisingly, more marriages break up, and more of the children they produce grow up without a father and mother working together to carry out that profoundly exalting, and often terribly difficult, task.

Another way to make real marriage unavailable to people–by changing social understandings of its very nature–is to make "marriage" *essentially* separable from children. This is what happens when homosexual "marriage" is legitimized despite the fact that homosexual unions are essentially–of their very nature–incapable of procreation. (There are, of course, many instances in which a heterosexual union is incapable *in practice*, by reason of age or physical defect, of leading to procreation; but the nature of the union remains the kind of union capable of producing children.)

Homosexual marriage is one more indication from society that marriage is whatever we want it to be: a malleable human institution that we can shape, rather than a natural institution, with its own internal dynamics and demands, to which we must submit. But if we go down the road of making marriage such a malleable institution, why should we be surprised if it doesn't fulfill the functions it is designed to fulfill?[11]

The discussion of the Federal Marriage Amendment is a key moment in the public debate

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[11] My argument is not, it should be clear, an argument that homosexuals are per se hostile to the general concept of marriage. Some homosexuals want to marry to express deep and enduring love for one another. At the same time a) it remains unclear how many homosexuals really want marriage for itself, and not as a simple way of furthering social legitimization of homosexuality and b) it seems plausible that they want it only under certain conditions, which include non-permanence and even sexual non-exclusivity; that is, as one person has said, homosexuals "want what marriage has become," not what it once was thought to be.

about marriage stability. That goal will not be achieved if marriage is considered to be a malleable institution, revisable by society, and unfettered by deep natural requirements such as monogamy and gender differentiation--a view that is at the heart of the movement for gay marriage. Only by an amendment that directly addresses the core issue--the nature of marriage--can we achieve the goal of preserving marriage as a key social institution.

Nor is this merely an abstract academic discussion. The American people clearly want marriage to be protected. While they generally have come to be much more tolerant of homosexuals' private activities, they draw a sharp line at marriage. Thirty-seven states have laws or constitutional provisions that define marriage in the way that the Federal Marriage Amendment defines it. Many of those legal provisions have been passed in recent years, with full, free, and open public debate. It is most unfortunate that those who wish to establish same-sex marriage in defiance of popular will are willing to have recourse to the manipulation of law by judicial and legal elites. Under such circumstances, a Federal Marriage Amendment is the only reliable way to preserve the definition of marriage the American people have long recognized and are intent on defending.

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