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WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?

THURSDAY, SEPTEMBER 4, 2003

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

The Subcommittee met, pursuant to notice, at 2:06 p.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

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

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

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

Before I begin my opening statement, I want to thank Chairman Hatch for scheduling this hearing, and I also want to recognize the fact that the August recess is a difficult time to organize a hearing on such short notice, and express our appreciation to the witnesses who have taken special effort to try to be here today. I also want to express my gratitude to Senator Feingold and his staff for working so hard with my staff to make this hearing possible.

Today's hearing is entitled "What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?" I have convened this hearing because I believe it is important that the Senate consider what steps, if any, are needed to safeguard the institution of marriage, which has been protected under Federal law since the passage of the Defense of Marriage Act in 1996.

Americans instinctively, and laudably, support two fundamental propositions, that every individual is worthy of respect and that the traditional institution of marriage is worthy of protection. Recent cases and pending cases before courts, both before the United States Supreme Court and in Federal and State courts across the country, have raised serious questions regarding the future of the traditional definition of marriage as embodied in the Defense of Marriage Act.

I believe that the Senate has a duty to ensure that on an issue as fundamental as marriage, the American people, through their elected representatives, decide the issue. It is very simple and easy

to read the language. DOMA states that marriage is the legal union between one man and one woman as husband and wife, and that a spouse is a husband or wife of the opposite sex.

That declaration did not break any new ground or set any precedent. It did not eliminate any rights. It simply reaffirmed and protected the traditional definition of marriage, an understanding that is reflected in the statutes, common law, judicial precedents, and historical practice of all 50 States.

The Defense of Marriage Act received overwhelming bipartisan support in both Houses. The House of Representatives passed it by a vote of 342 to 67, and the Senate passed it by a vote of 85 to 14. President Clinton signed that bill into law, stating, quote, "I have long opposed government recognition of same-gender marriages and this legislation is consistent with that position." Since that time, 37 States have passed defense of marriage acts at that level.

As the eloquent senior Senator from West Virginia, a sponsor of the Act, said at that time, quote, "Throughout the annals of human experience and dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between man and woman is the keystone to stability, strength, and health of human society, a relationship worthy of legal recognition and judicial protection."

The question before us now is whether the popular and bipartisan legislation that I referred to a moment ago, the Defense of Marriage Act, will remain the law of the land, as the people intend, or will be overturned by activist courts. The witnesses before us today share their knowledge and analysis of the recent decisions in pending cases and on the importance of protecting traditional marriage both as a social and legal institution. I look forward to hearing their testimony.

I recognize that this issue is not without controversy, but I believe that we should not shirk our duty and treat it with less than the seriousness that this issue is due. As representatives serving the people of our respective States, we in this body should not abandon the definition of marriage to solely the purview of the courts.

I believe it is our duty to carefully consider what steps, if any, are needed to safeguard the traditional understanding of marriage and to defend the Defense of Marriage Act. Perhaps no legislative or constitutional response is required to reinforce the current standard and to defend traditional marriage. If it is clear that no action is required, so be it, but I believe we must take care to do whatever it takes to ensure that the principles defined in the Defense of Marriage Act remain the law of the land.

With that, I would turn the floor over to the honorable Ranking Member, Senator Feingold.

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

Senator Feingold, I understand the Ranking Member of the full Committee, Senator Leahy, has a brief statement he would like to make.

Senator FEINGOLD. Yes. I would like to defer to the Ranking Member, and if I could follow the Ranking Member of the Committee, I would appreciate it, Mr. Chairman.

Chairman CORNYN. Thank you.

Senator LEAHY.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you very much, Mr. Chairman. This hearing begins another of our friends on the other side of the aisle's exploration of ideas for yet another constitutional amendment. Just this morning, our Committee met for hours on one proposed amendment to our Constitution, actually to the Bill of Rights, which hasn't been amended in over 200 years. There is this one that is now being considered and apparently there are still others to come forward.

Usually, we speak of constitutional amendments at a time when there are major crises or changes in our country. I recall when I was a law student in Washington and President Kennedy was assassinated and the concerns because we had no provisions for the President to appoint a Vice President.

President Johnson probably could not leave the country. We had the Speaker of the House and the President Pro Tem of the Senate who were next in line, both extremely elderly, at least with some question as to their capabilities, and the country realized the need to have a constitutional amendment. That is a matter of great moment, so that a President without a Vice President could, with the normal advice and consent, appoint a Vice President.

We had a major constitutional amendment in the last century when the States allowed for the direct election of U.S. Senators, something that has affected all of us who now serve.

These were matters of significant importance and something that took us 100 or 200 years of concerns and questions before we reached that point. Now, today, we have enormous economic troubles at home. We have deepening problems abroad, and it raises the possibility of having all these constitutional amendments at a time when some may question their necessity—whether that is just simply a distraction.

Now, the Defense of Marriage Act which this hearing has been called to examine—and I am one who supports the idea of having oversight hearings. I would like very much, for example, if this Committee could find time to do oversight hearings of the PATRIOT Act or on how hundreds of people are being held incommunicado in this country, things like that, or how the Department of Justice has used some of its new powers.

I have to assume that at some time we will also reach time for those, but at this time we are having hearings on the Defense of Marriage Act, which did pass overwhelmingly in both the House and the Senate and was signed into law by President Clinton.

This already defines marriage for Federal purposes as the union between a man and a woman. No court has questioned that law. In fact, I don't think anybody has seriously suggested that that law is in danger, certainly a law that is on the books which was passed, signed into law by the President and does not appear to be in dan-

ger. Yet, we suddenly question, well, maybe we should have a constitutional amendment to reinforce something that doesn't appear to need reinforcement.

So, obviously, members of the Republican Party who control the agenda can set whatever they want. They don't have to set hearings on the PATRIOT Act, they don't have to set hearings on the economy, they don't have to set hearings on problems abroad. But I wonder whether this issue really should be demanding so much of the attention of Congress if we don't have time to give attention to all these other issues.

Now, I fully respect the Senator from Texas, as I have said many times publicly, and everybody has to decide why they want to do this. But I fear that it may be politically tempting for some outside the Congress to want these hearings to score political points at the expense of gay and lesbian Americans. To be clear, I do not support a constitutional amendment, nor do I feel it is necessary. I hope that it will be unsuccessful if it is introduced.

I would also like to note that I am pleased and honored that we have Keith Bradkowski here, whose partner was a flight attendant on American Airlines Flight 11. He is here as a witness today, and I feel sorry for your loss.

When we in Congress became aware that partners of gay and lesbian Americans who were killed in the 9/11 attacks—let's not forget a lot of people were killed in those attacks and there were partners of gay and lesbian Americans who were killed. And when we found out here in Congress that they might be denied benefits, the same benefits everybody else was getting from that attack, I wrote to Kenneth Feinberg, the Special Master of the 9/11 Victims Compensation Fund, and I urged him to allow compensation claims to be brought by same-sex partners of those who were killed in the attacks. I am pleased that such claims were granted.

Along the same lines, I was honored in the 107th Congress to have been able to introduce and help pass S. 2431, the Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002. This bill provided death benefits to the families of ten fallen heroes of September 11, including, of course, the person that it was named after, Father Mychal Judge, who was gay and stayed there ministering to those who had been injured or fallen on 9/11, who could easily have escaped, but stayed with people who could not escape and was killed himself.

He was survived by his two sisters, who under the law at the time were ineligible to receive payments through the PSOB program. It was wrong. We were able to overcome the opposition of a number in the House to change the law and we changed it.

So I would only suggest this. We passed the Defense of Marriage Act. Nobody seems to really think that is under attack. There are pressing matters before the Congress. I am not sure why we need to be talking about changing our Constitution to do something that has already been accomplished in Federal law.

Frankly, if we have all this extra time, I would hope we would go and do a lot of the oversight that we have not done, especially with a number of the laws that were passed following September 11. But, of course, as I have said before, the Chairman has an absolute right to call whatever hearings he wants and I know that

he, with the help of Senator Feingold, will give a very fair hearing. I am going on to the Appropriations Committee to pass all that money that Texas needs.

Chairman CORNYN. Thank you, Senator. We appreciate it. Just multiply it by two.

Senator Feingold.

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

Senator FEINGOLD. Thank you, Mr. Chairman. First, let me thank the Ranking Member. My remarks will largely track the good points that he has made.

Mr. Chairman, I want to thank you and your staff for your courtesies and working with me and my staff in preparing for this hearing. That having been said, Mr. Chairman, with all due respect, I do not believe that Congress should spend time on an issue that should be left to the States and religious institutions.

The Free Exercise and Establishment Clauses of our Constitution guarantee that religious institutions have the freedom to determine, without government interference, which unions they will recognize. In addition, our Nation has a long tradition of deferring to the States on marriage and family law issues.

I feel especially strongly about this, given the many pressing challenges that our Nation faces at home and abroad. We just returned from a month of recess and most of us spent a lot of time with our constituents. I certainly did. I held 21 town meetings in 21 Wisconsin counties, and I can tell you, Mr. Chairman, that my constituents were talking to me about the economy, the loss of jobs to foreign competition, skyrocketing gas prices, the war in Iraq and the fact that our troops are still suffering considerable losses on almost a daily basis, the need for Federal help to fund homeland security efforts and equip and train our crucial first responders, and access to health care.

The American people should be united to meet these and other challenges, and they are best served if Congress focuses its attention on these pressing matters that are properly within its authority and not a divisive issue that is best left to the States and the courts. In these difficult times, we should be working to bring the country together to solve our problems, not to divide it with controversy.

For these same reasons, Mr. Chairman, I voted against the Defense of Marriage Act, or DOMA, in 1996. I believed then, as I believe today, that the issue of marriage is best left to the States. The President and a majority of the Congress disagreed and DOMA became law. Despite my protests, it is the law today.

Representative Musgrave has introduced a marriage amendment to the Constitution. Mr. Chairman, if a similar resolution is introduced and considered in the Senate, I would oppose it. I do not believe that Congress should amend the Constitution on this issue.

During the 200-plus years since the adoption of the Bill of Rights, as the Senator from Vermont pointed out, the Constitution has been amended only 17 times. The Constitution has never before regulated marriage and I don't think it should begin to do so now.

A number of conservative commentators and legal scholars agree with me. Former Congressman Bob Barr, who was the author of DOMA in the House, recently wrote, quote, "Marriage is a quintessential State issue. A constitutional amendment is both unnecessary and needlessly intrusive and punitive," unquote.

Mr. Chairman, I am also concerned that amending the Constitution could have the effect of writing discrimination into the Constitution. House Joint Resolution 56, the marriage amendment introduced in the House, defines marriage as a union between a man and a woman. But this proposed amendment also states, quote, "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 incidence thereof be conferred upon unmarried couples or groups," unquote.

This is wrong. A state should be able to grant rights or protections to same-sex couples if it wants to, and the Federal Government should not interfere with that decision. For example, over 170 State and local governments extend health benefits to the same-sex partners of their public employees. But if the House marriage amendment is ratified, same-sex couples could be denied such rights and protections.

As Senator Leahy pointed out, among our witnesses today we will hear from Keith Bradkowski. Keith lost his longtime partner, Jeff Collman, a flight attendant on American Airlines Flight 11, on September 11, 2001. Keith will talk about the protections he has enjoyed as a partner and now as a surviving partner in a committed relationship, and the impact a constitutional amendment could have on his life and on the surviving partners of other patriotic Americans.

In the audience today, we have individuals who are in same-sex, committed, long-term relationships—Joe Deutsch, Cheryl Griffin, Wanda Floyd, Frank Benedetti, and Gary Trowbridge. The amendment proposed in the House would prevent States from choosing to give them and other individuals in same-sex, committed relationships the same legal recognition that married couples enjoy.

I also want to acknowledge Alice Hogwin, who is also with us today. Her son, Mark Bingham, a gay man, was one of the heroes on Flight 93 who helped to divert that plane from Washington, D.C., on September 11.

With the exception of the 18th Amendment instituting Prohibition, which was later repealed, Mr. Chairman, the Constitution has never been amended to limit basic rights. If the Federal marriage amendment is ratified, it would do just that.

Our Constitution is an historic guarantee of individual freedom. It has served as a beacon of hope and an example to people around the world who yearn to be free and to live their lives without government interfering with their most basic human decisions. We should not seek to amend the Constitution in a way that will reduce its grandeur.

I do look forward to hearing from Keith and all our witnesses as we explore these issues. I thank you, Mr. Chairman.

Chairman CORNYN. Thank you, Senator Feingold. I understand your deeply held beliefs on this subject, as you held, as you pointed out, on occasion of the passage of the Defense of Marriage Act.

A couple of things I just want to point out perhaps by way of clarification. First of all, this hearing is not about whether we should adopt a constitutional amendment. In my view, that is premature. What this hearing is about is whether we ought to take whatever steps that may be necessary, and the question is here whether there are any steps necessary to defend an Act that has already passed overwhelmingly by the vote of a bipartisan majority of the Senate and the House, and signed by President Clinton into law.

So that is my interest, and I hope the witnesses will address that issue and we will leave perhaps the other issue for a future date or not.

Senator FEINGOLD. Mr. Chairman, if I could just make one unanimous consent request?

Chairman CORNYN. Sure.

Senator FEINGOLD. I ask unanimous consent that following documents be inserted into the record: an op ed by former Congressman Bob Barr; an op ed by Bruce Fein; a Milwaukee Journal Sentinel article entitled "Sensenbrenner Sees No Need for Marriage Amendment"; a San Francisco Chronicle article; a Washington Times editorial; a statement by the American Civil Liberties Union; a statement by the Leadership Conference on Civil Rights; an excerpt from the 2000 Vice Presidential debate between Senator Joe Lieberman and Vice President Dick Cheney; the testimony of Sean Cahill, Director of the Policy Institute of the National Gay and Lesbian Task Force; and the statement of Elizabeth Birch, the Executive Director of the Human Rights Campaign.

Chairman CORNYN. Without objection, they will be made part of the record.

Responding briefly to Senator Leahy's comments, and I guess to some extent the Ranking Member's comments about why we should spend our limited time on this issue, I think all we need to do is to read the newspaper or news magazines or watch television to understand that this is an issue of tremendous interest and concern to the American people.

So I do think it is appropriate that we spend our time on this subject, as well as other important subjects that we have had the opportunity to have hearings on; for example, the constitutionality of filibuster of judicial nominees. We will have a hearing coming up soon on the continuity of Congress in the wake of a terrible disaster such as a 9/11 incident which does incapacitate Congress, and how we should respond by way of anticipating that terrible possibility.

Under your leadership, Senator Feingold, you have, of course, held hearings on racial profiling by law enforcement. I know there have been hearings on religious liberty, free speech, and the like. But simply stated, the job of the Constitution Subcommittee is to consider potential constitutional issues, and that is what we are going to do today.

Finally, I just want to say with regard to the issue of whether this matter ought to be left up to the States, my contention would be that the Congress has already crossed over that bridge in passing the Defense of Marriage Act. So the question is whether that law ought to be sustained or not.

I would just for the sake of the record introduce letters from State officials across the country, including my home State of Texas, Utah, Iowa, Nebraska, and Alaska, and perhaps there may be others, that state the importance of this issue from their perspective, and also why they believe a Federal response is required, which, of course, is the subject of this hearing.

Without objection, they will be made part of the record.

At this point, I would like to ask the distinguished members of our panel to come and take their seats at the witness table. Our panel today is comprised of both legal experts and individuals who feel strongly about the issue of marriage and the fundamental role it plays in our society.

I am glad Senator Kennedy could join us, and perhaps we will have other members of the Subcommittee come.

I first want to recognize, as I said earlier, that this is an issue that raises strong feelings among many Americans, and I know our witnesses are no exception. Strong passions are what help make this country great. Unfortunately, sometimes strong passions can lead to harsh statements, divisive rhetoric, and destructive politics.

We should be able to all agree, however, that everyone on this Subcommittee, on this panel, and in this room deserves respect and deserves an opportunity to state their views, regardless of whether we happen to agree with those views or not.

I think, Senator Kennedy, my staff came up with a great quotation, something you said once before which I agree is exactly right. You said, "There are strongly held religious, ethical, and moral beliefs that are different from mine with regard to the issue of same-sex marriage which I respect and which are no indication of intolerance." I believe that that should help set the tone for what we are going to do here today.

Our first witness is Reverend Dr. Ray Hammond. Dr. Hammond is Pastor of the Bethel AME Church in Boston, Massachusetts. He is a graduate of Harvard College and Harvard Medical School. After serving on the emergency medicine staff at Cape Cod Hospital in Hyannis, Dr. Hammond decided to leave the practice of medicine to join the preaching ministry in 1976.

In 1982, he completed his master's of arts degree in the study of religion, focusing on Christian and medical ethics, at the Harvard Graduate School of Arts and Sciences. In 1988, he founded the Bethel African Methodist Episcopal Church, in Boston, and he continues as its pastor today.

He has a long history of involvement with youth and community activities. Most notably, he is President of the Ten Point Coalition, an ecumenical group of Christian clergy and lay leaders working to mobilize the Christian community around issues affecting black youth.

Maggie Gallagher is a graduate of Yale University and President of the Institute for Marriage and Public Policy. She is a nationally-syndicated columnist with United Press Syndicate and the author of three books, including most recently *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially*, published by Harvard University Press in 1999.

She also operates a Web-based discussion group, or BLOG, on marriage, called Marriagedebate.com, a group which also happens

to involve another one of our witnesses, Professor Dale Carpenter. Through her writings, Ms. Gallagher has emerged as one of the most influential younger women's voices on marriage, family, and social policy.

We are also honored to have testifying before this Subcommittee a number of legal experts with extensive experience arguing appellate cases in the United States Supreme Court and in Federal and State courts.

First is an exceptional attorney with whom I happen to have been acquainted for a number of years in my home State of Texas. Greg Coleman is the former Solicitor General of the State of Texas who served at my invitation when I was attorney general representing the State of Texas in the United States Supreme Court and in appellate courts across the country. He is now the head of national appellate practice for one of New York's most prestigious law firms, Weil, Gotshal and Manges.

As a State Solicitor General and State law enforcement official, Mr. Coleman was called upon on a regular basis to analyze litigation risks associated with constitutional challenges to State laws. So I think he is a particularly good witness for the issue we have here today. He notably as a three and 0 record of successfully arguing cases before the United States Supreme Court, as well as other courts across the land.

Michael Farris is also an experienced appellate advocate, having personally argued cases in the United States Supreme Court, as well as other Federal courts of appeals and State appellate courts. He is an educator as well. He currently serves as President of and a Professor of Government at Patrick Henry College, in Purcellville, Virginia, where he teaches constitutional law to undergraduates, some of whom, I understand, Professor, are here with you today.

He was named one of the most significant 100 faces of the century in education by Education Magazine, and has published a well-regarded high school textbook on constitutional law as well. Mr. Farris is also an ordained Baptist minister who serves part-time as Chairman and General Counsel of the Home School Legal Defense Association.

Dale Carpenter, whom I know as a Texan formerly at the Vinson Elkins law firm in Houston, Texas, is currently an associate professor at the University of Minnesota Law School. He teaches in the area of constitutional law, sexual orientation and the law, and commercial law. He also serves on the Advisory Board of the Republican Unity Coalition.

He and Solicitor General Coleman, or I should say former Solicitor General Coleman, share one thing in common, both having clerked for a distinguished member of the Fifth Circuit Court of Appeals, Judge Edith Jones. After his clerkship, he practiced with the law firm of Vinson and Elkins, in Houston, as I mentioned, and with Howard, Rice, Nemerovski, Canady, Falk and Rabkin, in San Francisco.

Finally, we are pleased to have Mr. Keith Bradkowski, from San Francisco, California, with us today. He was in a long-term relationship, as we have already heard from two of our members of the Subcommittee, with Jeff Collman, a flight attendant. Mr. Collman

served on American Airlines Flight 11, which was headed from Boston to Los Angeles when it was hijacked and flown into the North Tower of the World Trade Center on September 11.

Mr. Bradkowski, thank you for being here today to express your views, and I want to join Senator Leahy and others in expressing our condolences for your loss, as well as the other families who lost loved ones in that terrible tragedy of that day.

So as you can see, we have a number of distinguished witnesses on our panel today. To ensure we both have the opportunity to hear from each panelist as well as ample time for members to ask questions, I will ask each witness to keep your opening statement to 5 minutes. I know that is short, but we want to make sure that we are able to ask questions. I will promise you this, that your written statement will be made part of the record of this hearing.

I will take the opportunity to mention finally that, without objection, we will leave the record open until 5:00 p.m. next Wednesday, September 10, for members to submit additional documents into the record and to ask questions of any of the members of the panel in writing.

With that, Dr. Hammond, would you please proceed.

Senator KENNEDY. Mr. Chairman, could I just add a word of welcome to Dr. Hammond?

Chairman CORNYN. Yes, Senator Kennedy.

Senator KENNEDY. He is highly regarded and respected not only in Boston and our State of Massachusetts, but he has probably done more in terms of reaching out to young people and to potential drop-outs in high schools and to children that were in danger of being involved in adverse social behavior, and has had a really important impact in terms of the reduction of violence in our communities, and also in terms of maintaining very open communications with all of the neighborhoods and the citizens of Boston. He is really a highly regarded citizen of whom we are deeply proud. We appreciate having him.

Chairman CORNYN. Thank you, Senator Kennedy, for those additional personal remarks.

Dr. Hammond.

STATEMENT OF RAY HAMMOND, PASTOR, BETHEL AFRICAN METHODIST EPISCOPAL CHURCH, BOSTON, MASSACHUSETTS

Dr. HAMMOND. Thank you to the Chairman, and also to Senator Feingold and the esteemed Senator from our home State of Massachusetts, who has indeed been a tremendous friend and supporter to our work with youth.

The Chairman has very ably, and I think succinctly summarized some of the rather eclectic aspects of my life history, so I won't go over those again. Let me note that in my capacity as the leader of an African-American congregation in the inner city, as the Chairman has noted, I have a long history of involvement with youth and community activities.

I am Chairman of the Ten Point Coalition, an ecumenical group of clergy and lay leaders working to mobilize the greater Boston community around issues affecting black and Latino youth, especially those at high risk for violence, drug abuse, and other destructive behaviors.

I am also the Executive Director of Bethel's Generation Excel Youth Intervention Project and a member of several church and community boards, including the Black Ministerial Alliance Executive Committee, Youth Ministry Development Project Advisory Board, Catholic Charities of Boston, the Minuteman Council of the Boy Scouts of America in Boston, City Year of Boston Advisory Committee, and the United Way of Massachusetts Bay.

Finally, I am a member of the Advisory Board of the Alliance for Marriage, a diverse, non-partisan coalition composed of civil rights and religious leaders, as well as national legal experts, who are dedicated to restoring a culture of intact families founded upon marriage in America.

I am here today to speak about an issue that transcends all political and ideological categories—the importance of marriage and families to the health of our children, the health of our communities, and the health of our society. I find it very encouraging that most polls reveal a high degree of consensus among Americans, regardless of race, ethnicity, or creed, about the importance of families to the health and well-being of our Nation.

Moreover, most Americans instinctively understand that there is an integral connection between the institution of marriage and the health of families in our country. After all, in virtually every society on the face of the Earth, marriage and family is, among other things, what makes fatherhood more than a biological event by connecting men to the children they bring into the world.

But the American family is in serious trouble today. At present, an historically unprecedented percentage of families with children in our Nation are fatherless. In fact, over 25 million American children, more than 1 in 3, are being raised in a family with no father present in the home. In some inner-city communities, that figure is well above 50 percent. This represents a dramatic tripling of the level of fatherlessness in America over the past 30 years.

There is also an overwhelming body of social research data which shows that the epidemic level of father absence in America represents a disaster for children and society. In fact, many of our most serious social problems, from youth crime to child poverty, track far more closely with fatherlessness than they do with other social variables like race, educational level, or the condition of the economy.

As compelling as the empirical evidence may be, I don't need to consult social science research studies in order to conclude that the African-American community in particular has paid a heavy price for the modern epidemic of family disintegration.

As an African-American male, as a pastor, and as a founder of the Boston Ten Point Coalition, I know that we live in a time of social crisis, and nowhere is that crisis more acute than where I live, the inner city, and no group experiences that crisis more profoundly than the young urban men and women I see and work and worship with.

For too many, their world is a topsy-turvy world of a growing number of households struggling to make ends meet, with parents, usually single mothers, striving to hold themselves and their families together while they try to raise boys who will not become fodder on the killing fields called urban streets, and raise daughters

who will not become mothers before they become women and before they become wives. Theirs is a world where children face high death rates, low expectations, and a future that is cloudy at best.

The problems of America's urban neighborhoods are well-known, but the modern epidemic of family breakdown means that an increasing number of children in every part of America are growing up under similarly difficult conditions. Indeed, for several decades our Nation as a whole has been wandering in a wilderness of social problems caused, among other things, by family disintegration.

Tragically, as bad as our current situation may be, it could soon become dramatically worse. This is because the courts in America are poised to erase the legal road map to marriage and family from American law. In fact, the weakening of the legal status of marriage in America at the hands of the courts has already begun.

This process represents nothing less than a social revolution advancing apart from the democratic process and against the will of a clear majority of the American people. If allowed to continue, this revolution will deprive future generations of Americans of the legal, social, and emotional road map that they will need to have a fighting chance of finding their way out of the social wilderness of family disintegration.

More than ever, we must be clear as a society about the fact that men and women contribute more than their genetic material to our children, our families, and our future. More than ever, we must communicate the need for men and women working together to contribute their time, their love, and their complementary gender differences to the families and children that are the bedrock of our present and our hope for the future.

More than ever, marriage must be seen as an institution that goes beyond the contractual giving of rights, and even beyond the emotional celebration of the love of two people for each other. Rather, we must by word and deed make real the role of marriage as the place in which the great divide in the human race, the gender divide, is reconciled as mothers and fathers build their own healthy relationships and model those relationships before the next generation.

It is no accident that the union of male and female is the most multicultural social institution in the world. It cuts across all racial, cultural, and religious lines. Significantly, this common-sense understanding of marriage as the union of male and female is so fundamental to the African-American community that over 70 percent of all African-Americans in the United States would currently favor a constitutional amendment to protect the legal status of marriage as the union of a man and woman.

Indeed, polls consistently show that the African-American community, along with other communities of color in the United States, lead the way in their support for a Federal marriage amendment to protect the legal status of marriage in America.

No one in the Alliance for Marriage believes that saving the legal status in America is sufficient to stem the tide of family disintegration in our country, but we are convinced that protecting the legal status of marriage is necessary for the renewal of a marriage-based culture in the United States.

The good news in all of this is that family breakdown is a curable social disease. This is one of the greatest and most prosperous nations in the world, and we can do better than to accept historically unprecedented levels of youth crime and child poverty because more than one-third of our Nation's children are being raised without the benefit of a married family made up of a mother and father. We can and we must rebuild a culture of marriage and intact families in this country while we still have time.

Thank you for your time.

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

Chairman CORNYN. Thank you, Dr. Hammond.

I know Senator Feingold offered some letters that we received on this issue, and I would likewise offer a number of statements and letters we have received from various organizations expressing support for traditional marriage, including the National Conference of Catholic Bishops, the Southern Baptist Convention, the United Methodist Action for Faith, Freedom and Family, the Islamic Society of North America, the Union of Orthodox Jewish Congregations of America, the National Association of Evangelicals, the Campus Crusade for Christ, and the Boston Chinese Evangelical Church.

Without objection, those statements and letters will be submitted into the record. As I said earlier, we will receive others that we get before the deadline and they will also be part of the record.

Ms. Gallagher.

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

Ms. GALLAGHER. Thank you. I am here as someone who has spent the last 15 to 20 years of my life in research and public education on the marriage issue, on the problems created by and on coming up with new solutions to family fragmentation, unmarried child-bearing, and divorce.

With great respect for the Senators' views, I would like to take a minute to explain that before we can decide how far we should go to protect the normal definition of marriage, we have to decide how important this social institution is and why it is worth bothering about, why it is not a distraction from more pressing affairs, why it is not discrimination, and why it really is a Federal issue.

The answer is that marriage is not just a religious institution or a social and cultural value. It really is not only a key social institution, but the key social institution involved in the protection of children.

As Reverend Hammond has said, we are in a marriage crisis. Marriage is in a fragile state at this time, for reasons that obviously have nothing to do with gays and lesbians or advocates of gay marriage, but which are intimately associated with the question of how committed we are as a society to the idea that children need mothers and fathers, and that marriage as one of its core purposes is about getting children the mothers and fathers that they need.

Now, there is an enormous body of social science evidence that we now have, after 40 years of social experimentation with alternative family forms. To sum up what is not dozens, not hundreds, but literally thousands of different research studies, in pretty much

every way that social scientists know how to measure, children, on average, do better when their parents get and stay married in your average, decent, garden-variety, good-enough marriage.

There is almost nothing that this Congress is spending money on domestically which is not being driven at least in part and to a significant extent by our high rates of family fragmentation. When men and women don't do this basic thing of getting and staying married and making a decent marriage for their children, children are at risk of pretty much every bad thing that happens to a child in 21st century America.

They are somewhere on the order of two to three times more likely to be poor, to experience welfare dependency, to be victims of child abuse, to be victims of sexual abuse, to get in trouble in school, to be held back in a grade, to have conduct disorders, to be special ed students, to drop out of high school. Or if they graduate from high school, they are less likely to either go to college or graduate from college.

Years after their parents split up, you can see that children who are raised outside of intact marriages suffer disadvantages in terms of going on and living the American dream in terms of having higher job status and making more money. They are more likely to become involved in premature and promiscuous sexual activity, leading to higher rates of teen pregnancy and unwed pregnancy and sexually-transmitted diseases.

They are less likely as adults to go on and form lasting marriages and enjoy the benefits of lasting marriages if their parents don't get and stay married. They have higher rates of physical illness, higher rates of mental illness, higher rates of suicide, drug abuse. They are more likely to become involved, as Reverend Hammond knows from personal experience, as well as from the social science literature, both with juvenile delinquency and with ongoing adult criminal activity.

In short, the evidence is that marriage matters an enormous amount, and particularly for the well-being of children, and that the high rates of family fragmentation and fatherlessness we are experiencing are a serious problem because, first of all, children suffer, because some children are permanently damaged, because a number of children face obstacles that lead to profound differences in equality of opportunity that are not their fault at all, that are based on what their parents did and did not do, and because when families don't stay together and raise their children, inevitably taxpayers and communities pick up the tab both in terms of experiencing high rates of dysfunction that make community life more difficult for everyone in those communities and because such a large proportion of our domestic budget is directed at the problems that are created when the marriage idea doesn't hold.

There is a lot of talk about the benefits of marriage. I think it is important to recognize that marriage is not a basket of legal goodies that the government hands out; that the benefits of marriage come from the extent to which law and society and culture and public policy help reinforce this basic idea that the mother and father who make the baby are supposed to stay around and love each other and the baby. All of the benefits that we are describing here come not from the legal structure of marriage, but from the

incredible advantages it gives to children when parents get and make that kind of commitment.

Now, of course, not every married couple has children, but every husband and wife is capable of giving any child they create or adopt a mother and a father. And we never know when people get married who is going to have children and who is going to create and adopt.

Moreover, every man or woman who is faithful to their vows—and married people are more faithful than people who are not married—is not going to be making fatherless children across multiple households. And in that way, even childless marriages help serve and sustain this basic marriage idea.

So, for me, and I hope for Congress and the American people, the really important question, the one that has to be answered before we ask any other question, is will unisex marriage help or hurt marriage as a social institution. And I think that it is pretty clear that what we are doing with unisex marriage is making a powerful statement by law and by our Government. The statement we are making is that children do not need mothers and fathers; that, in fact, alternative family forms, motherless or fatherless families, are not only just as good, they are just the same as a mother-father married family.

I think that this idea may well have an impact on people who are already married. That, I am not sure of, but I am certain it is going to have a tremendous impact on the culture of marriage that our children and our children's children grow up in.

The fallacy is the belief that some people have that we are going to have two kinds of marriage. There is going to be gay marriage for gay people and there is going to be straight marriage for straight people, and they will just go on on their separate tracks.

The reality is that if we take this step, this radical legal transformation, there are not going to be two kinds of marriage. There is going to be one kind of marriage, and it is no longer going to be about getting mothers and fathers for children. It will be an open question what this new institution will be about, but I suggest at a minimum it would be an endorsement of the idea that adult interests and desires and affirmation of diverse family forms is more important than this old, kind of stubborn, cross-cultural, multicultural, universal human idea, which is that as a public institution, marriage is about getting mothers and fathers for children.

In fact, in the latest data for 2002, 40 percent of our children are being raised outside of intact marriages at this moment. It is morally and socially irresponsible to decide that adult interests in anything is more important than this children's interest in strengthening and recovering the idea that marriage is about getting mothers and fathers for children.

Chairman CORNYN. Ms. Gallagher, if I could ask you to sum up for now so we can—

Ms. GALLAGHER. So just in conclusion, I would say the marriage idea is very simple. It is that children deserve mothers and fathers, and that adults have an obligation to order their intimate lives in order to give children this need. And if we surrender this marriage idea and decide that adult interests are more important than chil-

dren's interests, there will be a huge price to pay and our children will be the ones that pay.

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

Chairman CORNYN. Thank you very much.

Our next three witnesses are going to talk about the legal questions that have been raised by recent court decisions, and perhaps take some divergent views on that, but nevertheless I think it is important to hear from all perspectives.

As I said earlier, Mr. Coleman worked with me at the state attorney general's office in Texas, so I know him well. We are glad to have him, Mr. Farris, and Mr. Carpenter address those legal issues.

Gentlemen, if I could ask the next to impossible and ask that you try to hold it to 5 minutes, then we will come back with questions and give everybody a chance to explore the matter in as much depth as possible.

Mr. Coleman.

STATEMENT OF GREGORY S. COLEMAN, WEIL, GOTSHAL AND MANGES LLP, AND FORMER SOLICITOR GENERAL, STATE OF TEXAS, AUSTIN, TEXAS

Mr. COLEMAN. Thank you, Mr. Chairman, Senator Feingold, Senator Kennedy. If my profession has taught me nothing else, it is at least to shut up when the red light comes on.

I appreciate the opportunity to address the Subcommittee today. I do believe that this is a timely issue, that this is not something that has sprung up as a novel issue this year. But rather the question of same-sex marriage is a question that has been unanswered for over 30 years now, when litigation began in the early 1970's challenging traditional heterosexual marriage principles.

Most of that litigation has historically been unsuccessful, but in 1993 the Hawaii Supreme Court held that the State marriage statute was subject to strict scrutiny because it discriminated on the basis of sex. Before a final judgment was entered in that case—and lower court, of course, subsequent to that had held that the statute was unconstitutional—the voters of Hawaii passed a State constitutional amendment. That also happened in Alaska, and litigation is continuing now in several States, including my home State of Texas.

The Defense of Marriage Act was enacted in 1996 largely in response to the Baehr case in Hawaii. That Act has two primary principles in it. The first provision substantively defines marriage as between a man and a woman for Federal purposes, and the second is passed pursuant to Congress's full faith and credit authority to define the effect given to a potential marriage in one State in other States, and clarifies full faith and credit principles that I believe have been well established.

Recent events, however, have suggested that the Defense of Marriage Act may be and probably is in trouble, and I will focus on two recent United States Supreme Court decisions—the first, *Lawrence* v. *Texas*, which came out this June, and the other being *Romer* v. *Evans*, which came out in 1996.

The first principle that we see in DOMA is the definition of marriage as between man and woman. I believe and it is my professional opinion that that is in some doubt as a constitutional principle after *Lawrence*. It has been said on this record and elsewhere that *Lawrence* simply is a matter of intimate conduct within the confines of one's home, but the very first paragraph of the *Lawrence* v. *Texas* opinion says that it is not.

The first paragraph does define a sense of liberty as freedom within one's home, but then goes on to talk about other spheres outside the home, freedom that extends beyond spatial bounds. And while my written testimony contains much more detail than I can go into now, suffice it to say that the opinion as a general matter does not focus on conduct within the confines of one's home, but rather the opinion goes on at great length defining the freedom and liberty that the Court was attempting to define as a freedom and liberty that is related to one's personal relationships and recognition of those relationships outside the home.

While the Court on at least two points in the opinion said that the decision was not about recognizing same-sex marriage, the very fact that it demurred on that issue is a suggestion that the Court is at least thinking about it and recognizing that its opinion might be used in that way in the future.

The *Romer* decision also, I think, suggests that DOMA may be in trouble. In *Romer*, what was at issue was a constitutional amendment to the Colorado State constitution that prohibited the giving of special preferences, the inclusion of sexual orientation within the enumerated list in the States' and municipalities' anti-discrimination laws. That was not required to be there, but many municipalities had, in fact, included that.

The point of the *Romer* decision is not that the State was ending up with a result that was itself unconstitutional, but the process of directing animus toward a specific group and removing that from the democratic process—that procedural issue became a constitutional violation.

But DOMA in its most basic sense is really no different. DOMA takes a principle that I believe exists in the background law of full faith and credit, which is that States generally do not have to recognize marriages that violate a strong public policy and institutes it as a specific statutory provision of Federal law.

It would be very simple for a court to say that once we have recognized a freedom and liberty under *Lawrence* of certain same-sex relationships that Congress acted with the same animus that the voters of Colorado acted with, and that it would thereby be subject to being struck down under the United States Constitution.

The question of whether to have a Federal amendment is a question of the courts. There has been much activity, as has already been noted, in the individual States. Many States have already passed something similar to DOMA in their own States or have constitutional amendments. But it is the Federal courts that have been moving toward the point at which they will declare as a matter of United States constitutional law that marriage as between a man and a woman can no longer be sustained as a guiding constitutional principle and that the Constitution requires as a matter

of anti-discrimination notions and freedom and liberty that same-sex marriages be recognized.

Therefore, the only process that can be undertaken to address that, or recourse that might be taken by the States is through a Federal constitutional amendment. That is why I believe that it is timely to discuss this issue, to make some resolution with respect to where the courts are heading, and to make some ultimate decisions about whether those decisions should be made by the courts or through the democratic process.

Thank you.

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

Chairman CORNYN. Thank you, Mr. Coleman.

Mr. Farris.

STATEMENT OF MICHAEL P. FARRIS, CHAIRMAN AND GENERAL COUNSEL, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, AND PRESIDENT AND PROFESSOR OF GOVERNMENT, PATRICK HENRY COLLEGE, PURCELLVILLE, VIRGINIA

Mr. FARRIS. Thank you, Mr. Chairman and members of the Subcommittee. As a point of personal privilege, I would be remiss at a hearing on marriage to not mention the fact that today is my 32nd wedding anniversary. I got married when I was 6 or 7.

The specific question the Chairman has posed is whether or not DOMA will survive the ultimate constitutional challenge, and the fact that it has not been successfully challenged yet is of no moment to anyone who understand the basics of law. No one has standing to challenge DOMA until some State legalizes same-sex marriage and then someone tries to attempt to register that same-sex marriage in a second State. So since no State has yet done the first act, DOMA can't be challenged. No one has standing.

But we are on the threshold of that moment. As several commentators both for and against the outcome of the same-sex marriage issue have made it quite clear, after *Lawrence* v. *Texas* and the pending decision of the Supreme Judicial Court of Massachusetts, we are on the doorstep of yet another situation that is like Hawaii and like Alaska, but there is no political rescue in sight in the Massachusetts situation, for example.

So we have to seriously consider what are the legal trends that would lead us to a conclusion whether or not DOMA would be held to be constitutional by the courts. Mr. Coleman has done a very good job of saying that. In light of *Lawrence*, I think anyone that believes that DOMA will be held to be constitutional has a very stiff job ahead of them to make a good defense on that point.

Secondly, another way of analyzing the problem is to look at the scholarly journals because there is one singular view that marches through the scholarly journals and the law reviews on the point that announces time after time after time the opinions of professors, law students, practicing lawyers, judges, and the like that DOMA is unconstitutional.

I happen to think that they are wrong on it because those writing the opinions are almost without exception advocates of an ultimate solution of same-sex marriage. Nonetheless, it is the dominant view, and I can tell you any person with any degree of looking

at the situation would understand that what is the dominant view in the law reviews today will be the dominant view of the courts in a generation.

I don't think we will have a generation; I think it will be 5 years at the most that DOMA would last, if it would last that long. But it is without question that the dominant scholarly view—and I have given you the examples of the Nebraska Law Review, the New York University Law Review, one of the law reviews at Yale, and Professor Eskridge of Yale, who said at some point in time DOMA's requirement that the Federal law discriminate against same-sex couples will be constitutionally vulnerable.

There is no doubt that DOMA is in trouble. All these law reviews were written, importantly, before the *Lawrence* case. After that, we simply would double or triple those predictions of doom and gloom for DOMA.

Now, I have had the opportunity to see the written testimony of Professor Carpenter, who follows me, that suggests that a constitutional response to this question is anti-democratic. That would be to say that if two-thirds of Congress and three-fourths of the State legislatures through the process of democracy enacted a constitutional amendment, that is anti-democratic, just as the First Amendment is anti-democratic and all the other amendments are anti-democratic. I find that notion legally preposterous.

The trouble is the courts. Senator Feingold in his opening remarks often said that we should leave the issue to the States. But once he said in the full statement that we should leave the issue to the States and the courts. That is exactly the problem—leaving the issue to the courts.

The courts are robbing the American people of their fundamental right of self-government. Tyranny, as the Founding Fathers said, is when non-legislators, non-elected legislators make the law. Only our elected officials have the moral integrity to make law over us. In the Founders' era, it was understood that any other form of making law over people was nothing other than tyranny.

My Virginia home State flag says "This Always with Tyrants." Tyrants were defined as people who try to rule over us without the proper legislative authority of our elected representatives making law. We are on the verge of a judicial revolution that has got to stop, and it has got to stop before, as Ms. Gallagher adequately points out, they destroy the culture itself. This is about democracy, this is about participation. I welcome all of the debate about this. I wish it would stay in the legislative chambers and out of the courtrooms.

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

Chairman CORNYN. Thank you, Mr. Farris.

Professor Carpenter.

STATEMENT OF DALE CARPENTER, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA LAW SCHOOL, MINNEAPOLIS, MINNESOTA

Mr. CARPENTER. Mr. Chairman and members of the Subcommittee, I want to thank you for the opportunity to testify today. I am going to speak on one possible response, a constitutional re-

sponse, to the purported deficiencies in the Defense of Marriage Act.

The theory of the Federal marriage amendment now being proposed seems to be that the States must be saved from themselves, that they must be saved from their own legislatures, that they must be saved from their own courts, and that they must be saved from the people.

Whatever one thinks of same-sex marriage as a matter of policy, no person who cares about the Constitution should support this amendment. As a conservative, I believe it is unnecessary, it is unwise, it is contrary to the structure of our Federal Government, it is anti-democratic, and unnecessarily so, and it is a form of overkill.

First, even if one opposes same-sex marriage, a constitutional amendment is unnecessary. It is a solution in search of a problem. No State in the Union has ever recognized same-sex marriages. Even if and when a State court did recognize same-sex marriages in its own jurisdiction, that can and should be a matter for a State to resolve internally through its own governmental processes, as, in fact, the States have done, as my good friend Gregory Coleman has pointed out in the cases of Alaska and Hawaii—the States are capable of taking care of themselves, thank you—and as Congress has done through the Defense of Marriage Act, which no court has yet held constitutional, and probably can't because there hasn't been a challenge yet that would have standing.

Supporters of the Federal marriage amendment argue that the Full Faith and Credit Clause might be used to impose gay marriage on the country. But the Full Faith and Credit Clause has never been understood to mean that every State must recognize every marriage performed in every other State. Each State may refuse to recognize a marriage performed in another State if that marriage would violate the public policy of the State, and 37 States pursuant to the Defense of Marriage Act have already enacted as their public policy a declaration that they will not recognize same-sex marriages.

It is also unlikely, in my view, that the Supreme Court or that the Federal appellate courts for the foreseeable future would declare a constitutional right to same-sex marriage. *Lawrence* v. *Texas* does not change this. *Lawrence* involved the most private of acts, sexual conduct, in the most private of places, the home.

By contrast, marriage is a public institution freighted with public meaning and significance. If I gave my first-year constitutional law students an exam question asking them to distinguish *Lawrence* from a decision favoring same-sex marriage, I am confident that all of them could do so and produce an A exam answer.

Moreover, if the Court were suddenly to order nationwide same-sex marriage through whatever mechanism of the Constitution, it would be taking on practically the entire country, something it almost never does. We should not tamper with the Constitution to deal with hypothetical questions as if it was part of some national law school classroom.

Second, a constitutional amendment would be a radical intrusion on federalism. States have traditionally controlled their own family

law. This commitment to federalism is enshrined in the very structure of our Constitution.

But here is an important point: Federalism is not valuable simply as a tradition; it has a practical benefit. It allows the States to experiment with public policies in order to determine whether they work. That is happening right now. Contrary to the remarks by Reverend Hammond, much of whose remarks I actually agree with, this is happening democratically in the country right now, not just through the court systems. I am advised that just recently, the California legislature approved a domestic partnership law that will probably be signed by the Governor. That is happening democratically, not just through the courts.

Moreover, I would say in response to my friend, Maggie Gallagher, who points that it is necessary for children to be raised in stable homes, that there are hundreds of thousands of children being raised by gay couples in this country. Where are the protections under the law for these children? They need them, too.

Repudiating our history, the Federal marriage amendment would prohibit State courts, or even State legislatures, from enacting same-sex marriages. It might even prevent State courts from enforcing domestic partnerships or civil unions.

I think we conservatives have a basic question to ask and to answer, and that is this: Given that gap people exist in America and are not going to removed, what is to be done about them? Are we to shunt them to the side, to ostracize, to marginalize them, or are we to bring them into the fabric of American life? I understand why a sexual revolutionary or liberationist or a radical leftist might think we ought to shunt people to the side, but I cannot for the life of me understand why a conservative would reach that conclusion.

Third, a constitutional amendment is anti-democratic. And I want to respond here to the remarks by Mr. Farris, who said that there are many parts of our Constitution that are anti-democratic. That is, of course, the case, and it is not sufficient as an objection to a proposed constitutional amendment that it would limit the processes of democracy.

But here is what is different about the Federal marriage amendment: It would be the first time in the Nation's history that the Constitution was amended to limit democratic decisions that were designed to expand the rights of individuals and to include people in the fabric of American life. That hasn't been done before, with the possible exception of Prohibition, which is, I think, an instructive exception.

Fourth, the Federal marriage amendment is constitutional overkill. It is like hauling out a sledge hammer to kill a gnat. If I have been wrong about everything I have said regarding the supposed court-imposed revolution around the country, the Federal marriage amendment is not narrowly tailored to address that problem. A much narrower amendment, dealing only with preserving States' control on this issue, could be proposed. But in my view, even that narrower amendment would be unnecessary under existing interpretations.

To sum up, the Federal marriage amendment is not a solution to any problem that we currently have. Never before in the history of the country have we amended the Constitution in response to a

threatened, not existing, State court decision or Federal court decision. Never before have we adopted a constitutional amendment to limit the States' ability to control their own family law. Never before have we amended the Constitution to restrict the ability of the people through the democratic process to expand individual rights. This is no time to start.

Chairman CORNYN. Thank you, Professor Carpenter.

I want to just clarify one thing before we turn to Mr. Bradkowski. Certainly, Professor Carpenter talked about the Federal marriage amendment and that is fine to do. But just to be clear for the witnesses and for those who may be listening, this hearing is not about any particular amendment. Indeed, none has been filed in the United States Senate.

At least my intended scope for this hearing is to talk about sustaining, upholding, defending the Defense of Marriage Act which, as we talked about earlier, passed by wide bipartisan majorities and which was signed by President Clinton.

But I understand, Professor Carpenter, your position, and also that perhaps if there was an amendment filed, it would be broader than you would think necessary in order to address the issue. But there might conceivably be some language that you would support.

Go ahead.

Mr. CARPENTER. Mr. Chairman, let me make myself very clear on this. I think if the perceived problem is that States will be required to recognize same-sex marriages in the case, for example, of Massachusetts ordering them, if the fear is that those marriages will be leveraged onto the other States through the Full Faith and Credit Clause or some invalidation of DOMA, I think that fear is hypothetical and exaggerated. So I wouldn't support any amendment right now, but if any amendment were to be offered, it could be much more narrowly tailored to address that specific question.

Chairman CORNYN. Thank you for clarifying.

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

Senator FEINGOLD. Mr. Chairman, I would just like to clarify something as well.

Chairman CORNYN. Senator Feingold.

Senator FEINGOLD. I understand your repeated cautions that this hearing isn't about a constitutional amendment, but there has been such an amendment offered in the House of Representatives. If it is not supposed to be about this hearing, it is certainly the 800-pound gorilla that is in the room, especially when one of your chosen witnesses has indicated that the courts of this country have run amok. Now, the only remedy for that, Mr. Chairman, is a constitutional amendment. So we can pretend that is not what we are talking about, but, in fact, that is what we are talking about.

Chairman CORNYN. Mr. Bradkowski.

STATEMENT OF KEITH A. BRADKOWSKI, SAN FRANCISCO, CALIFORNIA

Mr. BRADKOWSKI. Good afternoon, Honorable Chairman and Members of the Subcommittee. My name is Keith Bradkowski and I am a resident of California. I have been a registered nurse since 1983 and have worked for many years in hospital administration.

It was on a Tuesday almost exactly 2 years ago that I received a call from American Airlines notifying me that I had lost my life partner, Jeff Collman. Jeff Collman was an American Airlines flight attendant who volunteered to work an extra trip on September 11. His flight would be the first of four flights hijacked, and I know in my heart Jeff died courageously trying to protect the passengers and crew. This is a photo that I wanted you to see so that you could put a name with a face.

The last time I spoke with Jeff, who was my soul mate of 11 years, was about 2:00 a.m. Boston time on the morning of the 11th. He had awakened in the middle of the night and uncharacteristically called me on the West Coast to say how much he loved me and he couldn't wait to get home. I believe he must have had some premonition of the events to come and I feel blessed that I had that last moment with him.

Jeff was the ultimate caregiver. He often volunteered at homeless shelters on holidays. He would always carry crayons and coloring books to give to children on planes to keep them from getting bored. Personally, I experienced his caring by the trail of Post-It notes he left for me every time he went on an overnight trip. His last note, still on my bathroom mirror, greets me every morning with a "Guess Who Loves You?"

Jeff and I had exchanged rings and we were married in our hearts. Legally, it was another matter entirely. After his death, I was faced not only with my grief over losing Jeff, who was indeed my better half, but with the painful task of proving the authenticity of our relationship over and over again.

With no marriage license to prove our relationship existed, even something as fundamental as obtaining his death certificate became a monumental task, and that was just the beginning. During the years we were together, Jeff paid taxes and had Social Security deducted from his paycheck like any other American. But without a civil marriage license, I am denied benefits that married couples and their families receive as a matter of routine.

Jeff died without a will, which meant that while I dealt with losing him, I also had the huge anxiety about maintaining the home we shared together. Without a marriage license to prove I was Jeff's next of kin, even inheriting basic household possessions became a legal nightmare.

Married couples have a legal safety net of rights and protections that gay Americans are currently denied. Until Jeff died, I had no idea just how vulnerable we were. Where married couples have security and protection, gay couples are left without a net. Like so many other gay Americans, my mourning and grief were compounded by the stress and anxiety of horrific legal uncertainty and confusion.

The terrorists who attacked this country killed people not because they were gay or straight, but because they were Americans. It is heart-wrenching to know that our Government does not protect its citizens equally, gay and straight, simply because they are Americans.

Two years ago, we were all united against the common threat of terrorism. Now, less than 2 years later, I am sitting here and being told that my relationship was a threat to our country. Jeff and I

only sought to love and take care of each other. I do not understand why that is a threat to some people, and I cannot understand why the leaders of this country would hold a hearing on the best way to prevent that from happening.

In closing, I would like to read an excerpt from a letter that Jeff had given me on our last anniversary. "Keith, we have been through much the past 11 years. Our lives haven't always been easy, but through it all our undeniable love for each other has carried us through. I love you and don't ever forget that. When you are feeling lonely and I am not home with you, just pull out this letter and read my words to you once again and know how much you will always mean to me. With loving thoughts of you now and forever, Jeff."

I just want to thank you for this opportunity. I am very honored to have had this chance to appear before this Subcommittee.

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

Chairman CORNYN. Thank you, Mr. Bradkowski.

I will start with an opening round of questions and then we will recognize other members of the Subcommittee in turn.

Mr. Bradkowski, let me just first say to you that obviously our hearts go out to everyone who suffered the loss of a loved one in the terrible events of 9/11, without exception.

As I understand what you are saying, though, you believe that the current law, as reflected in the Defense of Marriage Act defining marriage for purposes of Federal law as the union of a man and a woman, is unfair and should be changed. Is that correct?

Mr. BRADKOWSKI. Personally, I disagree with the Defense of Marriage Act. However, it was signed into law. But as other things that have changed in our Constitution, things aren't always the right thing to do.

Chairman CORNYN. One of the premises of this hearing is that if there is a change, it ought to occur through the democratic process; that is, through the legislative process by elected representatives rather than by judicial decision which may be at odds with what the legislature as elected representatives of the people might see fit to do.

Do you have a position on whether the Congress ought to address any proposed changes or whether it ought to be left up to the courts?

Mr. BRADKOWSKI. I believe it needs to be up to the individual States. I will add on to Professor Carpenter's statement that Assembly Bill 205, in California, was passed yesterday and it will be signed into law, I expect, which does expand our legal recognition. I was involved last year in Assembly Bill 2216 which provided intestate line of succession for registered domestic partners in the State of California.

Chairman CORNYN. During the course of, I believe, Professor Carpenter's testimony—and Mr. Bradkowski raised the issue again and perhaps there were others who talked about this, whether the Full Faith and Credit Clause of the Constitution, whereby if one State recognized same-sex marriage other States might be compelled to recognize it.

Let me ask this question of our three legal experts, starting with Mr. Coleman. You mentioned two cases, the *Romer* v. *Evans* case and the *Lawrence* v. *Texas* case, as the reason why you believe that, while not compelled to do so, a Federal court could hold as a matter of Federal constitutional law that any limitation on the institution of marriage to persons of the opposite sex as reflected in DOMA could be held unconstitutional and in jeopardy.

Do you happen to recall who the author of each of those opinions were?

Mr. COLEMAN. I believe Justice Kennedy wrote both of them.

Chairman CORNYN. And as I recall, my notes reflect here that Justice Kennedy, Justice Stevens, Justice O'Connor, Justice Souter, Justice Ginsburg, and Justice Breyer were in the majority in the *Romer* case. Justices Rehnquist, Scalia, and Thomas were in dissent; similarly, in *Lawrence*, the same lineup, with the exception that Justice O'Connor wrote a concurring opinion and agreed in the judgement.

Is that your recollection as well?

Mr. COLEMAN. That is correct, Mr. Chairman.

Chairman CORNYN. Can you explain if it is, in fact, your belief that a protection in terms of the Full Faith and Credit Clause would not address your underlying concerns that a Federal court might, using the tools of those cases, hold as a matter of Federal constitutional law that DOMA is unconstitutional?

In other words, let me be clear about the two issues I see we are talking about here. One is the question of whether one State, if it says that same-sex marriages cannot—that marriages should be extended to those, that that could thereby be imposed on another State against its will under the Full Faith and Credit Clause. The second issue is whether as a matter of Federal constitutional law the court would say that you cannot do that without regard for the Full Faith and Credit Clause.

Mr. COLEMAN. Mr. Chairman, there are layers of arguments that could be made. Starting with *Lawrence*, I believe there is a risk in the foreseeable future that any and all Federal laws that distinguish between same-sex and other marriages could be struck down on constitutional grounds. That would invalidate all of the State DOMA-type statutes, as well as the State constitutional amendments.

Setting that particular argument aside, there are multiple layers of State statutes and State constitutional amendments with DOMA now. A State statute or State constitutional amendment that declines to recognize same-sex marriages could be subject to a straightforward full faith and credit challenge.

DOMA itself is probably not subject to a full faith and credit challenge, although there are arguments that have been made in law review articles that Congress' act in withdrawing or contracting full faith and credit recognition was itself a violation of that constitutional provision.

But more generally, under the equal protection principles set out in the *Romer* case, the Federal DOMA or a State similar statute or a State constitutional amendment could be struck down under equal protection grounds. Even if the background principle was not itself unconstitutional, the overlay of an imposition of a same-sex-

specific statute or constitutional amendment declining to recognize them could be struck down and may very well be struck down on equal protection grounds.

Chairman CORNYN. Thank you.

Mr. Farris.

Mr. FARRIS. Mr. Chairman, there is not a lot of practical difference for equal protection purposes between the law that was struck in *Romer* v. *Evans* and DOMA. In *Romer* v. *Evans*, the voters of Colorado voted to say we don't want to extend the protections of civil rights legislation on the basis of sexual orientation.

The Supreme Court, under an equal protection theory, said that is animus toward homosexuals and that is a violation of the equal protection component of the Fifth Amendment's Due Process Clause, which is kind of reverse incorporation.

Nonetheless, I think that the prevailing theory is good law. You have got six Justices of the Supreme Court in 1996 saying that. When there is proper standing to challenge DOMA on equal protection grounds, I see no way of surviving, absent a dramatic change of who is on the Court.

So I think full faith and credit is a far less litigated subject than equal protection, making predictions a little more difficult. But there is a sword waiting in the wings that transcends all those full faith and credit concerns, although I think again the dominant legal scholarship of published law reviews opines that the Full Faith and Credit Clause has been inappropriately done in DOMA.

Chairman CORNYN. Professor Carpenter.

Mr. CARPENTER. Let me address both of these questions that you have raised, the question of the Full Faith and Credit Clause and substantive constitutional doctrines that might be used to attack DOMA.

On the Full Faith and Credit Clause, I take it that both Mr. Farris and Gregory Coleman agree with that an attack based on the Full Faith and Credit Clause is not terribly likely. The Full Faith and Credit Clause has never been interpreted to require every State to recognize every other State's marriages.

Moreover, it has never been interpreted literally. It doesn't literally mean that every State has to recognize the law of every other State. It serves a very, very minimalist gatekeeper function. A State can't impose its own law in a case if it doesn't have any connection to the issues that arise in the case. So it is not going to be a fruitful avenue, in my view—and I think to some extent this is shared by my co-panelists—for attack on DOMA.

As to the second issue, the substantive constitutional doctrines that might be used to attack DOMA, there are really one two that we have discussed here. One is the Equal Protection Clause as it was discussed in *Romer* v. *Evans*, and the other is the Due Process Clause as it was discussed in *Lawrence*. So let's take both of those one at a time.

Chairman CORNYN. Well, I am sorry that our time is limited. Let me try to hone in on it, and I don't mean to cut you off and I will give you an opportunity to expound on your views. But you do acknowledge that there are those who have claimed that DOMA is unconstitutional. Isn't that right?

For example, Patricia Logue, of the Lambda Legal Defense and Education Fund, has said, "I think it is inevitable now" that courts will strike down DOMA and recognize same-sex marriage. Will Harrell, the Executive Director of the American Civil Liberties Union in my home State of Texas, said he believes that "the *Lawrence* decision opens to challenges the Defense of Marriage Act."

Certainly, there are organizations like the Human Rights Campaign, Lambda Legal Defense, the ACLU, and other groups who are filing briefs both in the *Lawrence* case and elsewhere, and making perhaps extra-judicial statements claiming that DOMA is unconstitutional based on *Lawrence* and *Romer*. Would you agree with that?

Mr. CARPENTER. I certainly agree that there is a strong body of scholarship that exists that challenges DOMA on a variety of grounds. But I will tell you this as someone who has toiled on many law review articles. The fact that someone who has written a law review article is no guarantee that a court will ever pay attention to it, I regret to say.

Moreover, if the court pays some attention to it, the court is more often than not likely to mangle what the law review article says. Further, if the court doesn't mangle what the law review article says, it is quite as likely to reject what the law review article says as accept what the law review article says. Not every academic fashion in the past 30 to 40 years, if this is what this is, has become the law of the land or been accepted by the courts, and I could give many examples of that.

Chairman CORNYN. Finally, let me just ask, and then I will pass the questioning over to the Ranking Member, I noticed that you filed a brief in the *Lawrence* case with a co-counsel by the name of Mr. Erik Jaffe. Is that correct?

Mr. CARPENTER. That is correct.

Chairman CORNYN. Do you acknowledge that Mr. Jaffe was recently quoted as stating his view that, under *Lawrence*, courts may begin to strike down traditional marriage laws as unconstitutional? Specifically, he said the ruling "certainly contains room to make solid arguments for marriage rights" for same-sex couples. Do you agree with him?

Mr. CARPENTER. I have enormous respect for Erik Jaffe and we were co-clerks on the brief. I don't agree with his analysis entirely of the *Lawrence* opinion and I can tell you why.

It seems to me that under the Equal Protection Clause, the court is still applying rational basis scrutiny to laws that classify on the basis of sexual orientation. As long as that is the case, it seems to me that for DOMA to survive an equal protection challenge, all that the Government would have to do in defending it is to come up with a legitimate objective that is sought by the legislation and show that the law is rationally related to that legitimate objective.

Now, it may be difficult for such a law to pass strict scrutiny, but it seems to me that a plausible argument could be made on behalf of Congress that at least it would pass rational basis scrutiny. And I see nothing in the *Romer* opinion, nor do I see anything in the *Lawrence* opinion that suggests that the court now has moved toward applying strict scrutiny to classifications based on sexual orientation.

That is not to say that there could not be good arguments for that to happen, but it hasn't happened now. It is an entirely hypothetical possibility and it is great fodder for law review articles, and I will be writing law review articles on it and I hope to get tenure on the basis of some of these writings someday.

Chairman CORNYN. We wish you luck in that regard.

Mr. CARPENTER. I am sure I will need it.

Chairman CORNYN. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. Mr. Chairman, just quickly I just want to say to Mr. Bradkowski how much I appreciate your willingness to appear before us. I have been a legislator for over 20 years and have been in many, many hearings. Once in a great while, somebody testifies in a way that defines an issue and I believe you may have done that today.

Those 20 years have also taught me to defer to somebody who has twice as much legislative experience as I do, so I am going to defer to Senator Kennedy.

Senator KENNEDY. Thank you, Senator Feingold.

I do want to thank all of our witnesses here today, and also thank Keith Bradkowski for his comments. To talk about sadness and joy and love, these challenges are very, very difficult to do. But I agree with Senator Feingold that you have certainly helped us understand this issue in a very important and significant way.

I thank the Chair. I just want to make a very brief kind of comment, and I won't intrude on the time. We have an important briefing, as you know, with the Secretary of Defense on Iraq at four o'clock.

I came here, I must say, as all of our members, returning from the August recess and seeing the flames alive over in Iraq; challenged by where we are in terms of our economy; reminded this morning, with the withdrawal of Mr. Estrada, of our constitutional responsibilities and trying to get it right in terms of judicial nominations; perplexed, as many Americans are, by the breakdown in the grid systems that caused blackouts in major areas of my region of the country; troubled by the announcements that were made in the EPA about the permission of these major power facilities to be able to increase their production to 25 percent without complying with previous environmental considerations, which in my part of the country is going to threaten the quality of the air that children will breathe and elderly people will breathe, and will result in the killing of ponds and lakes with acid rain; and wondering about what we are doing over here at this particular hearing that is of such central importance and consequence to our Constitution.

With the exception of the equal rights amendment, I have not cosponsored any constitutional amendment. I think all of us are very familiar with some of the very challenging amendments that we had, very emotional and powerful—the flag burning amendment, very, very powerful. I think for a while, there were certainly the votes here in the Senate to pass that, until we had the full consideration of it.

I think of the great debates that we had on these constitutional amendments and I wonder what in the world are we doing over here to consider a constitutional amendment on this issue. What in the world are we doing?

Looking at the fact, as we are reminded by our panel, that we have had, besides the Bill of Rights, 17 constitutional amendments, the mistakes that were made in the area of Prohibition, what are we being asked to do here that is of such central importance? The 14th Amendment, the Fifth Amendment, the post-Civil War amendments—what are we being asked to do here?

Now, we know that there are some legitimate concerns that the Government may somehow interfere with the ability of the churches and religious groups to conduct their own affairs. There are some serious concerns.

Religious marriage is an ancient institution, and nothing in the Constitution, as I understand it, requires any religion to accept same-sex marriage. If this hearing accomplishes anything, it should make the point completely clear that under the current Constitution, no court can tell any church or religious group how to conduct its own affairs.

Unless there is a constitutional amendment, no court will ever be able to require any church to perform or grant sacramental status to same-sex marriage. The law of each State is what determines the legal effects of marriage and civil unions.

But far from upholding religious freedom, the proposed amendment—and I agree with Senator Feingold; we are not having this hearing in a vacuum. An amendment has been proposed and taken seriously by a number of political leaders.

The proposed amendment would actually undermine these protections by telling churches that they can't consecrate same-sex marriages, even though some churches are now doing so. Last month, the General Convention of the Episcopal Church recognized that "local faith communities are operating within the bounds of our common life as they explore and experience liturgy celebrating and blessing same-sex unions."

The proposed constitutional amendment would blatantly interfere with the decisions of local faith communities and would threaten the longstanding separation of church and state in our society.

We are all familiar with the General Accounting Office in terms of the benefits and rights and protections that have been referred to here. These rights include the right to file joint returns, share insurance, visit loved ones in the hospital, receive health and family care, survivors' benefits. These would seriously obviously be threatened by the proposed language that is included in this amendment. The amendment would repeal many of these, including laws dealing with domestic partnerships and laws that have nothing to do with such relationships.

I believe just as it is wrong for State criminal laws to discriminate against gays and lesbians, it is wrong for State civil laws to discriminate against gays and lesbians by denying them the many benefits and protections provided to married couples.

The proposed amendment would prohibit States from deciding these important issues for themselves. The Nation has made too much progress in the ongoing battle for civil rights for gays and lesbians to take an unjustified step backwards.

On a bipartisan basis, we have fought for comprehensive Federal prohibitions on job discrimination on the basis of sexual orienta-

tion. We have worked to expand existing Federal hate crimes laws to include hate crimes based on this flagrant form of bigotry.

This summer, I read a letter to the editor of the New York Times. I clipped it out because I thought at some time it would be worthwhile and useful to mention, and I brought it over to this meeting here. It is signed by Paula Surrey and Steve Gersman, from Auburn, Maine, to the New York Times in the middle of the summer. "Marrying Kinds," it says.

"Having been happily married for 21 years, perhaps we should be grateful to the proponents of the Defense of Marriage Act, but we are not exactly sure against what we are being defended. We always thought that couples protected their own marriage with love, communication, and honesty. Our mothers never told us that the secret of a happy marriage was to be sure that same-sex partners weren't allowed to have them. Love and commitment are special and rare enough in our modern society that we should be offering gay couples or best wishes, not self-righteous moral judgments."

I thank the Chair for permitting me to make these comments.

Chairman CORNYN. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman, and thank you, Senator Kennedy.

Let me follow up on what Senator Kennedy brought out in his comments.

Professor Carpenter, as you know, currently no State grants same-sex couples the right to marry. In Vermont, same-sex couples are given the opportunity to formalize their relationship in a civil union. As far as I know, this is an entirely civil proceeding and does not involve any religious institution in recognizing the relationship.

If a State were to permit same-sex couples to marry, wouldn't you agree, as Senator Kennedy was pointing out, that churches, synagogues and other religious institutions would not be affected, that no religious institution could constitutionally be required to perform such ceremonies? Wouldn't you say that is correct?

Mr. CARPENTER. Yes, I agree. I believe that their right not to perform same-sex unions would be protected by the Free Exercise Clause.

Senator FEINGOLD. Do any of the witnesses disagree with that legal conclusion?

[No response.]

Senator FEINGOLD. Let me move on to something else, then.

Mr. Farris and Mr. Coleman, in the Supreme Court's *Lawrence* decision, Justice Scalia wrote a dissent in which he stated, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision. The Court makes no effort to cabin the scope of its decision to exclude them from its holding."

Do you agree with Justice Scalia's prediction that Federal and State DOMA laws could well be found unconstitutional in light of *Lawrence*, and therefore you argue a constitutional amendment

may well be the only way to prevent the Federal or State courts from reaching such a result?

Isn't the logical conclusion of your argument that Congress should actually enact a series of constitutional amendments based on this prediction contained in the dissenting opinion; in other words, a constitutional amendment on bigamy, a constitutional amendment on adult incest, a constitutional amendment on prostitution, a constitutional amendment on adultery, and so on, to protect each State law that Justice Scalia fears will be called into question by the *Lawrence* decision?

Mr. Coleman?

Mr. COLEMAN. No, Senator Feingold, I don't think that Congress needs to do that. What Justice Scalia was doing was pointing out a logical conclusion. He was playing out arguments that the Court was accepting to a logical conclusion. I don't know that any of those types of laws have yet been challenged.

Certainly, the petitioners in *Lawrence* said that they would not be at issue. There was quite a bit in the briefs about those types of issues, but I am not aware of any litigation that has been going on in that connection, as there has been in this case that has been going on for a period of approximately 33 years.

Senator FEINGOLD. Mr. Farris.

Mr. FARRIS. Senator Feingold, I don't think it is realistic that we would expect those other issues to get the kind of political traction that same-sex marriage has. But the reality is that if we say that it is unconstitutional to legislate on the basis of morality, a grand number of our laws are in jeopardy, including laws against racial discrimination, laws on the environment, laws on virtually everything because everybody's views of right and wrong may differ.

But a law ultimately says what is right and what is wrong, what is acceptable and what is not acceptable. And if morality alone cannot justify these particular laws, then no law can be justified. Basically, what it really means is no laws that the prevailing majority on the Court thinks are inappropriate can be justified.

It is the rule of man, not the rule of law. It is a dramatic revolution; it is the most revolutionary opinion, I believe, ever in the history of the Supreme Court, far more than *Roe* v. *Wade* and other cases that have been roundly criticized as judicial activism.

I would say that perhaps the conservative form of judicial activism that was remedied by the Roosevelt court-packing scheme may be instructive. It just took one serious attempt to change them and they changed the entire philosophy. If there was one serious attempt to fix *Lawrence* by a constitutional amendment relative to marriage, I think the Supreme Court might wake up and smell the coffee.

Senator FEINGOLD. I appreciate your practical assurance or political assurances, but I don't think it escapes the logic of Justice Scalia's dissent.

Professor Carpenter, would you like to respond?

Mr. CARPENTER. Yes, I would. It is important to note what the *Lawrence* decision said. It did not say that States cannot pass laws that forbid or prohibit some kinds of harm to individuals. The Court was very careful to note that it did not involve a case of rape, it did not involve a case where minors were involved.

Ordinarily, when the State defends a law before a court, whether it is a Federal court or a State court, a State ordinarily doesn't just say we are defending the law on the basis of a moral justification; we just have a moral view that this is wrong. Ordinarily, the States defend the law on the basis of some harm that the State can show, some verifiable, quantifiable harm, some way to test the constitutionality of the law and its relationship to the objectives of the State.

Lawrence was a very unusual case, especially in the way that Texas argued it. Texas defended its law not on the basis of any health justifications or anything else. It defended its law solely on the basis of a claimed moral judgment of a majority of the people of Texas. And there was simply no way for the Court to falsify a judgment like that and so no way to subject it to any kind of legal analysis.

So the idea that we are now going to get rid of environmental laws which involve harm to the entire population, the idea that we are going to get rid of laws that subject people to discrimination in the workforce that have them out of a job or unable to advance within their jobs, I think is a very great over-reading of the *Lawrence* opinion, and I might say is symptomatic of the general over-reading of the *Lawrence* opinion that we are seeing from advocates of the Federal marriage amendment.

Senator FEINGOLD. I would like to ask a question of Ms. Gallagher.

In your testimony, you state "Marriage is not just a legal construct. It is socially and culturally a child-rearing institution, the place where having children and creating families are actually encouraged rather than merely tolerated," unquote.

But this strikes me as a rather narrow view of marriage and the different reasons that people decide to marry. At least in these comments, you don't seem to recognize that people in committed, loving relationships may want to formalize that relationship and their commitment to each other even if children are not involved.

For example, an elderly man and an elderly woman can decide to marry because they want to formalize a loving relationship without having any intent to have more children or adopt more children. Some couples cannot bear children or don't want to bear children. I don't think their marriages are any less deserving of respect and recognition.

Wouldn't you agree that there are perfectly valid and admirable reasons other than having children for couples to decide to marry, and do you think that marriages between a man and woman that do not involve children or the possibility of children are somehow less worthy of protection and respect?

Ms. GALLAGHER. If you will excuse me, Senator, if I can say just very briefly in response to the last issue I think it is important to recognize that marriage is not just one of a set of moral issues that people might be concerned about and disagree with the Supreme Court.

My position is that marriage is a necessary social institution, that we do not know of any cultures that survive in the long run without a reasonably well-functioning marriage system, and that cross-culturally, yes, the answer is the reason the marriage idea

appears again and again is that every society has to figure out some way to deal with the fact that we need children and it is relationships between men and women that produce children.

I think I did address your underlying question, in which I said that, of course, not every married couple has children. Not every married couple wants children, but every husband and wife who marries is capable of giving any children they either create or adopt a mother and a father. And in that way, childless marriages are not contradicting the core idea of marriage as a public institution.

As a private institution and as a religious institution, it has many multiple meanings, but the reason we have laws about it, in my opinion, and the reason this particular kind of relationship is, in fact, singled out as a social ideal is because of the importance of giving children mothers and fathers.

As I said, in addition, even childless married couples are helping sustain the marriage idea because if they are faithful to their vows, neither the man nor the woman is creating fatherless or motherless children across multiple households. And I think that in that way, even childless marriages between men and women not only contradict, but they sustain the core marriage idea.

It is really quite different. We don't know who is going to choose to adopt or create children, and I think it would be intrusive and destructive of marriage as a social institution to say we are going to grill you and determine your fertility expectations.

In reality, what people want change. Dear friends of mine adopted a child after 20 years of marriage. So it is not practical to say, well, we are going to determine in advance who wants children and only let those people marry. But it is important that all of the marriages between husbands and wives can do something that no other form of relationship can do, which is to give children mothers and fathers, not just stable relationships, but mothers and fathers.

Senator FEINGOLD. I am interested in your answer. It still sounds like you only really define marriage vis-a-vis the reality or possibility of having children.

Ms. GALLAGHER. I think I just didn't do that, actually.

Senator FEINGOLD. What is that?

Ms. GALLAGHER. I disagree with that characterization of my remarks.

Senator FEINGOLD. Well, everything you just said about childless marriages is related to something to do with the possibility of relating to children either directly or indirectly. And, of course, I share that important function of marriage, but aren't people's marriages which are unrelated to that just as worthy of protection and respect as others?

Ms. GALLAGHER. I think that all marriages are worthy of protection and respect, yes.

Senator FEINGOLD. Professor Carpenter, the Constitution Project, a bipartisan group of scholars and respected Americans, has set forth criteria for when amending the Constitution is appropriate. One of the principles they articulate is whether proponents of the proposed amendment have attempted 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.

As I think about my day, I spent all morning dealing with this same issue as it relates to the victims' rights amendment. I have spent the entire day on constitutional amendments and what is an appropriate type of amendment when you consider its relationship to the overall Constitution.

Could you discuss how the proposed marriage constitutional amendment would interact with other constitutional provisions and principles? I would be particularly interested in your views on how it would square with the Constitution's equal protection guarantees.

Mr. CARPENTER. Well, one thing that this proposed Federal marriage amendment would do is injure, intrude upon the very structure of the Constitution, which sets up a Federal Government of limited and enumerated powers and also leaves to the States most of the remaining issues of government, including the most important areas of life—criminal law, family law, and all the rest. This would be the first time in the history of our country when we have effectively amended the very structure of those relationships for reasons that seem to me entirely hypothetical.

Now, on the equal protection issue, I think there is also a question here about the ultimate effect of the Federal marriage amendment. It could turn out, if my reading of the Federal marriage amendment is correct, that it not only prevents State legislatures from adopting same-sex marriages, but it would make effectively unenforceable domestic partnership arrangements and civil unions laws because, after all, if there were a dispute about the coverage of a civil unions law or a domestic partnership law, that dispute would have to go to court.

A court would then have to declare—that is, it would have to construe the State law in order to grant the legal incidents or some of the entitlements that are associated with marriage to that domestic partnership or to that civil union. I am not the only one who thinks this is a possible ramification of this amendment. Professor Eugene Volokh has written about this on his Internet BLOG and has made a very intriguing argument about it. I am concerned about the reach of this amendment. I think it goes far beyond anything that is being claimed on its behalf.

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

Chairman CORNYN. Thank you.

Let me just remind everybody that there isn't a constitutional amendment that has been filed. The very purpose of this hearing, at least in the U.S. Senate, is to decide whether the Defense of Marriage Act needs to be defended in some way.

Of course, we have heard views, both pro and con, as to whether a court has the legal tools, and some have argued that in the *Romer* and in the *Lawrence* case they do, to hold the Defense of Marriage Act unconstitutional, and thus undermine the intent of Congress, an overwhelming bipartisan majority. So, again, a constitutional amendment is not before us.

As far as the concerns that have been expressed time and time again about whether we are wasting our time by having this hear-

ing today, I would have to say I disagree in the most fundamental way. Congress is conferred many responsibilities and we have to deal and legislate and perform oversight on a lot of different issues. Senator Kennedy mentioned many of them—the environment, war and peace. But, certainly, I don't think marriage is any less deserving of our attention than any of the other of the important issues that the Congress has to deal with.

Let me just ask perhaps Dr. Hammond this question with regard to Professor Carpenter's testimony, and I hope I relay this faithfully. I think he said that a moral judgment is not a sufficient basis to prefer one arrangement or another in terms of marriage or sexual relationships.

Let me try that again. In the *Lawrence* case, I think the Court said that purely a moral judgment without demonstration of some harm would be insufficient to sustain the statute at issue there.

But as I understood you to say, Dr. Hammond and Ms. Gallagher, you believe that there is actual harm associated with undermining the Defense of Marriage Act which defines a marriage as a union between a man and a woman in terms of its impact on families, and particularly children.

Is that a correct understanding of your testimony, Dr. Hammond?

Dr. HAMMOND. Yes, absolutely.

Chairman CORNYN. And would you perhaps address the harm that you feel could occur if the Defense of Marriage Act were held unconstitutional?

Dr. HAMMOND. I think it does in a very real sense diminish at least that third dimension I kind of talked about. I think marriage, yes, is very much about benefits, and marriage is very much about a contractual relationship. Marriage is about the love of two people, but marriage is also again a place where that great divide in the human race, the gender divide, really is reconciled, and that is modeled before the generation that is coming.

It is about much more than just the two people who are involved. It extends in its impact far beyond that, and I think there is a reason in our history and throughout much of the world that it has not been a mono-sexual institution. And I don't think that that is something we want to re-define and change now.

Chairman CORNYN. Do you view the potential, whatever it is, large or small, that the Defense of Marriage Act might be held unconstitutional by the courts at some future date a credible concern in terms of the further undermining of the institution of the family?

Dr. HAMMOND. I certainly have to defer to the debate between the real, real experts here. I think I could say, as is true for many other people, that that is certainly a concern. I live in the State of Massachusetts, where this is a very real issue right now, and what the larger impact of that is going to be, I think, none of us can predict. But we are certainly concerned that DOMA and many of the State bills could be declared unconstitutional.

Chairman CORNYN. Ms. Gallagher, let me give you a chance to respond and then I will turn to Senator Schumer for any questions he has.

Ms. GALLAGHER. To me, the redefinition of marriage will just have profound impact on our society and on our idea of marriage in a way that strikes right at the heart of the marriage crisis, which is how committed we are to whether or not marriage is in some key way—the reason we have public support and concern and legal recognition surrounding marriage is not primarily because we think soul mates should marry and love is a good thing, in which case you go down one road. It is really the core public concern about the well-being of children and the way this institution protects children and do we really think that children need mothers and fathers, because what the law and the government will be saying if the courts take this step and will be reflected in institutions from public schools to professional accreditation to everywhere the government is involved on the marriage question—the new image of marriage will be essentially gender-less, unisex. It may still be about adult love, but it will not be about the idea that children need mothers and fathers.

You know, if two mothers are just the same as a mother and a father, then a woman and her mother are just the same as a mother and father. The whole effort that I have been engaged in to try to reverse these negative and destructive trends for family fragmentation—courts will drag that to a halt.

Chairman CORNYN. Thank you.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

I guess my first question is for Professor Carpenter and it deals with the issue of States' rights. What we have seen in this Congress, in general, is an argument mainly from the other side against Federal laws that impose obligations on States and restrict States' rights. On environmental laws, we hear this all the time; legislation protecting the rights of women or the disabled.

The argument has been there may be a need for Federal action, but States' rights trump the others, any Federal desire to impose something. Now, of course, we hear from the other House this constitutional amendment. And, again, I know Senator Cornyn has said it is not in play here. It might be next week for all we know. It is certainly in play in the House. There is certainly a drum beat out in the country to do it. So people are pushing a constitutional amendment that would limit States' rights.

I am not a constitutional scholar, but can you comment on this kind of inconsistency here?

Mr. CARPENTER. Ordinarily, conservatives, people like me, say that it ought to be generally the role of the States to determine important matters very closely related to people, like family law, criminal law, and property law. Now, we have a claim that based on a hypothetical concern that some court someday, some time in the future, might question the legitimacy of DOMA or of the little State DOMA laws, we need to amend the Constitution to change that basic constitutional structure.

I think what conservatives ought to recognize is that the States historically in this country have acted as laboratories for change, for trying out policies and seeing if they work. Some of the most important innovations in American law have come from the States. Women's right to vote, for example, limitations on child labor, max-

imum hours laws, minimum wage laws—those didn't initially come from the Congress. We tried them out in the States, we saw how they worked, and then other States adopted them if they worked and rejected them if they didn't.

The States have a role in acting as those laboratories, and they can act as laboratories in this case, too, to find out if all of the terrible things that my friend, Maggie Gallagher, thinks will happen actually happen. I mean, will parents leave their children? Will husbands leave their wives? Will all of this parade of horribles actually happen? Well, let's find out in a couple of States if some form of recognition for same-sex couples actually leads to these terrible results.

Senator SCHUMER. Okay, thank you.

Mr. COLEMAN. Senator Schumer, if I might just very briefly address your question as well?

Senator SCHUMER. Please.

Mr. COLEMAN. I have not spent time studying the proposed amendment in the House, but I think the issue of States' rights and experimentation is something that Mr. Carpenter and I very much agree on. The issue, though, as I have been asked to address it, is what is the likelihood that the Federal courts will exercise their prerogatives and declare that the United States Constitution prevents or prohibits the States from doing what they have traditionally done in the area of marriage.

In that sense, the courts have acted as an obstacle to or a break upon the experimentation that has traditionally happened. I think *Lawrence* is an example of that. Obviously, there were different types of statutes around the country and the Court addressed some of those variations, but ultimately in the end declared that as a matter of Federal constitutional law it was impermissible.

Whether one agrees with *Lawrence* or not, I don't think anyone can disagree with the fact that it did put a stop to any experimentation that might have continued on in the future. So as a matter of constitutional law, the experimentation issue does work for many things, but doesn't work as to a Federal court declaration of what the United States Constitution imposes upon the States.

Senator SCHUMER. Professor Carpenter.

Mr. CARPENTER. I certainly agree with Gregory Coleman that there are limitations on the power of States to experiment with certain kinds of matters. We would not want States experimenting again with racial segregation. We would not want States experimenting with denying women the right to vote, and so on.

When it comes to basic constitutional rights, fundamental rights enshrined in our Constitution, certainly States cannot experiment with those, and that was what was at issue in the *Lawrence* decision. I think the marriage question presents a very different issue having to do with various kinds of State justifications for limitation on marriage.

I might add that in the *Lawrence* opinion, as Gregory Coleman noted, not once but twice the Court said we are not dealing with the question of marriage. Now, Gregory says that the fact that the Court notes this indicates that the Court might be thinking about it. But I have to tell you if the Court had been silent on that issue, I believe that advocates of the Federal marriage amendment would

come before this Subcommittee today and say there has been a pregnant silence in the Court's *Lawrence* opinion about the question of marriage.

Senator SCHUMER. A second question also relating to both what you, Professor Carpenter, and you, Mr. Coleman, have talked about, and this relates to the constitutional amendment. I have a strong feeling against constitutional amendments, in general. To me, the Constitution is a sacred document. I think it is just wonderful. I think the Founding Fathers, when they created it, said America is God's noble experiment. I believe that to this day; we still are. You don't amend it lightly.

Just this morning in this Committee—I happen to be sort of more conservative on some of the crime issues, so I believe in defending victims' rights, and have done that when I was a State legislator, as a Congressman and a Senator. There is a proposal to bring a victims' rights constitutional amendment before us, when there is no case that has reached even the court of appeals where victims' rights are abrogated, are declared to be unconstitutional.

I sometimes think lower-level courts do maybe go too far on the defendant side and not enough on the victim side, but I am going to vote against that amendment, even though it may not be popular to do, because I don't want to look at myself in the mirror 20 years from now and say I put something in the Constitution that wasn't really necessary, even though it makes us feel good.

We are not even close to a stare decisis situation on DOMA. We don't know what will happen in Massachusetts. You are certainly right, Reverend Hammond, that things are close there, and then someone has to have standing and you have to go up through the court of appeals and even to the Supreme Court to see how they will rule on DOMA.

So, again, if you could comment on the idea of amending the Constitution, which is making its way through the House and may come here, before there is any ruling that it is needed, and the consequences to our Constitution if we start adorning it with things we might believe in or things we might worry about, but are not cases before the court and that are not necessary. I mean, how many times have we amended the Constitution since the Bill of Rights—17?

Professor Carpenter, and then others.

Mr. CARPENTER. Yes. I heard somewhere that there have been more than 10,000 constitutional amendments proposed.

Senator SCHUMER. You mean in the history of the Senate?

Mr. CARPENTER. In the history of the country.

Senator SCHUMER. Yes, there is a House.

Mr. CARPENTER. There is a House. Not all of them have made it to a vote; not many of them have even made it to a Committee hearing. This one may not yet make it to a Committee hearing in the Senate. We will have to see, but it is the case that we have been very reluctant to amend the Constitution.

Now, I would go further than you did, actually, and say that with the exception of two extraordinary historical periods in this country, the founding period when we had the 10 original amendments to the Constitution and the period immediately after the Civil War when we had 3 amendments to the Constitution, there have actu-

ally really in ordinary times been only 14 amendments to the Constitution in more than 200 years.

That is because the system as we have it, a mixture of an enormous amount of power for the States, some power for the Federal Government, and a role for courts in making sure that the legislatures of the States and the Federal Government stay within certain kinds of limits—that system has worked enormously well. It has produced a prosperous and free country, even with all of its problems.

We ought to be very reluctant, certainly, if we regard ourselves as conservatives, to touch that document, especially to touch it on the basis of hypothetical fears based on conjecture and "maybes" and "mights" and "futures."

Mr. FARRIS. If I could just briefly comment, I agree that we should amend the Constitution with great reluctance only with things that are extraordinarily important. I think that Maggie Gallagher has set out the case very well that marriage is that important, that our civilization is at stake. So I think that if we get to the stage of determining that a constitutional amendment is necessary, I for one say that the subject is well worth appearing in the United States Constitution.

Senator SCHUMER. Even if no one has declared DOMA unconstitutional or anything—

Mr. FARRIS. They have no standing to do so.

Senator SCHUMER. Well, I understand, but what if a statute would do the same job? In other words, to a lot of victims, victims' rights rises to an extremely high level. I have talked to them. I can think of 50 issues that are extremely important to me.

We have never traditionally, I don't think—and, Professor Carpenter, you correct me if I am wrong—put in the Constitution things on the basis that we believe in them strongly. We have put them in the Constitution either because you have to overrule a law or to change the structure of the Government. You know, the Senate should not be appointed, should be elected. Presidents should not go more than two terms. That has to be in the Constitution because the structure of the Federal Government was constitutional.

So you are advocating, it seems to me, Mr. Farris—and I will give you a chance—a new view of constitutional amendments, which is if it is very important to, let's say, a very large number of Americans, we ought to put it in the Constitution. Isn't that correct?

Mr. FARRIS. That is not a complete explanation, Senator Schumer.

Senator SCHUMER. Go ahead.

Mr. FARRIS. The reality is our principles of self-government are under threat by judicial activism. For all the talk of federalism, *Lawrence* v. *Texas* overturned the decisions of the people of the State of Texas through their elected representatives of what they could do on the subject. And now the people that advocated that are advocating federalism. It is hypocrisy at its finest.

Now, I would simply say that the only way we can get the democratic consensus for a constitutional amendment is two-thirds of both Houses of Congress and three-fourths of the State legislatures. If that number of people think that the basis of our society

is under attack by the judiciary, then by all means we should amend the Constitution. That is what democracy is all about.

Senator SCHUMER. Even if a statute could do the same job?

Mr. FARRIS. No statute will cure judicial activism.

Senator SCHUMER. So, in other words, anything that deals with judicial activism we should put in the Constitution? There are lots of issues that deal with judicial activism. The environment: lots of people have railed against court decisions that extend environmental laws. I have seen some of them myself.

Now, should we put a constitutional amendment in? I mean, we have never done this before, as best I can tell. If you can tell which constitutional amendment of the 27 that we have—

Mr. FARRIS. By the way, we have 11 from the Bill of Rights. One of the 12 original Bill of Rights was ratified in the 1990's by the States. So the talk that we have not ratified the Bill of Rights and it has never been changed is a tiny, technical point. This Congress has gotten around it by—you are not supposed to be able to raise your pay without an intervening election. You have got around it with cost-of-living bills that—

Senator SCHUMER. That wasn't part of the Bill of Rights. That is dealing with the structure of the Government.

Mr. FARRIS. That is part of the Bill of Rights.

Senator SCHUMER. As much as Senators and Congressmen may think their pay is important, it doesn't rise to the level of freedom of speech.

Mr. FARRIS. Senator, I don't know if you are a betting man, but I will walk with you down to the National Archives and go look at the document with you and look at the Bill of Rights. One of the first two Bill of Rights is the amendment that is now the 27th Amendment to the Constitution. The First Amendment was originally the Third Amendment. The Second Amendment was originally the Fourth Amendment. If you want to stake your reputation on that one, I would be glad to take you on on that.

Senator SCHUMER. You are getting kind of pugilistic here.

[Laughter.]

Mr. FARRIS. I am a lawyer. What do you expect? I apologize, Senator, for that, but the lawyer in me came out.

Senator SCHUMER. Or the boxer.

Mr. FARRIS. Whatever.

There are multiple criteria for a proper constitutional amendment, one of which is enormous public support and believing that the issue rises to that importance. Second is a threat to our society, and I believe that both are present in this potential amendment. If DOMA will not work, then we need to do something.

Senator SCHUMER. Mr. Farris, I would argue to you you are creating a whole new standard for what a constitutional amendment would be.

Ms. Gallagher.

Ms. GALLAGHER. Briefly, I would just like to say that it is often the case that we amend the Constitution out of a sense of crisis or threat. I mean, the only constitutional amendment I saw was lowering the voting age to 18, which is about the structure of Government, but we did it because people thought it would be a good idea

to do. There were no court threats. There was just a consensus that this was a good thing to do.

Senator SCHUMER. But, Ms. Gallagher, just one note. You couldn't do that by a statute.

Ms. GALLAGHER. And I would like to say that, in my opinion, and in the opinion of a lot of Americans, marriage is one of a small number of core institutions which is, in fact, integral to the functioning of limited government, of constitutional democracy, and of our civilization, and that we don't have to do it even out of a sense of imminent threat.

If it makes sense to two-thirds of the American people to define marriage and get this out of—you know, most Americans are kind of shocked that courts are even thinking about tinkering with this basic definition. I think it is perfectly legitimate for people to say this is what marriage is; we think it is important and let's just clarify this for the future and go on to the other important issues.

In my judgment, the FMA which is before Congress—and I am not an expert on law, but the way I read it as an ordinary person, I think it does leave the question of benefits up to the State legislatures. I know there are people who disagree, but in my opinion that is a perfectly reasonable division.

Senator SCHUMER. That is a second issue, but I would just argue to you again that if we use the standard that you argue for and Mr. Farris argues for, we will have a lot of constitutional amendments. And who knows what the consequences will be of using constitutional amendments because you feel strongly when, whether I agree or disagree with you, a statute would do the same job?

Ms. GALLAGHER. I think, fortunately, our Framers made it extraordinarily difficult to amend the Constitution and we don't really need to live in fear that it will be constantly amended if we decide to define marriage.

Chairman CORNYN. Senator Schumer, Senator Feingold has to me that I have cheated him by giving you more time to question than he had. So I want to be seen as being fair.

Senator SCHUMER. I can assure you of this, Mr. Chairman: I will not introduce a constitutional amendment to prevent Senator Feingold from being cheated.

Chairman CORNYN. I want to give Senator Durbin a chance to ask any questions he may have, but first let me note that on the issue of passing constitutional amendments before a court acts, voters in Nevada, Nebraska, and California each passed constitutional amendments, or statewide initiatives relative to this issue before a court in those States acted.

Of course, as someone pointed out in their opening comments, Hawaii and Alaska did. I believe Mr. Coleman mentioned before the final judgment was rendered before the trial court, the people in each of those States passed constitutional amendments on this very issue, preserving traditional marriage.

So I think we do have a question of perhaps, as Professor Carpenter mentioned, innovation by the States. While apparently there is some disagreement about the urgency of a constitutional amendment, which we are not considering in this hearing, it is, I guess, a matter of considered judgment and opinion as to what the risk is of DOMA being held unconstitutional and the urgency and im-

portance of the traditional institution of marriage relative to the other important issues that Congress, and indeed the Nation and our culture and society must confront.

With that, Senator Durbin, I will turn it over to you.

Senator DURBIN. Thank you, Mr. Chairman. I think the only thing that troubles me about your statement that we are not considering a constitutional amendment is the fact that this is the Constitution Subcommittee.

Chairman CORNYN. No constitutional amendment has been filed in the Senate. Obviously, there has been in the House.

Senator DURBIN. That is true.

I voted for DOMA and I haven't read it since I voted for it. I have just read it again today. I can recall what Congressman Barr was offering and what we debated at length, and I look at it and I try to envision why we are here and why we are involved in this conversation. I have heard a lot of reasons, some anticipatory: we had better do something quick or something awful just might happen. That is, I think, a rare premise for amending a constitution.

I come to this, as Senator Schumer does, with a sense of humility when you deal with the Constitution. I don't want our generation to take a roller to a Rembrandt. We ought to take care to be certain when we propose changes to this Constitution that they really rise to the level of constitutional necessity.

I would certainly say that this conversation is premature to the extreme. It is not bad that we are talking about it, but before we seriously consider amending the Constitution, there are a lot of things that need to be considered.

I don't know of anyone that has suggested a national standard imposing gay marriage. I haven't read that anywhere. I mean, I don't know that that has happened. To date, no State has created a gay marriage situation that would run in conflict to DOMA. So at this point in time, there doesn't appear to be any standing for anyone to challenge DOMA, the Defense of Marriage Act, its constitutionality or its legality. It is still on the books. So I think this hearing is a solution in search of a problem.

I would like to address two things, in particular. Ms. Gallagher, you talked about the state of marriage in America, and certainly when you look at the statistics on the number of divorces, roughly half of marriages end in divorce. When you have children of my family's age in their 30's and you are still waiting patiently for them to get married, you start saying what are you waiting for. There is a resistance among some to getting married for a variety of reasons, but some of it is the fear that it won't work, which is being borne by the society.

How much of this situation do you think has been driven by the call of homosexuals wanting to be married? How much of this problem has been created by those of different sexual orientation who are seeking a civil union or a domestic partnership? Do you believe they are the ones who are dragging the institution of marriage down?

Ms. GALLAGHER. No, absolutely not. I don't think that they are the driving force behind the current marriage crisis at all. I think, as I said, that this is not created by gay and lesbian activists or

by other advocates who are not gay and lesbian of gay marriage. This is not just a gay and lesbian issue.

As I said before but will repeat for you, I have devoted most of my public career to the issue of men and women coming together in lasting, good-enough marriages to protect their children and reducing divorce and unmarried child-bearing. That has been my principal concern, but that doesn't answer the question of whether or not, if we do decide to make this legal change to accommodate the interests of adults in alternative family forms, or equal opportunity or equal benefits or anti-discrimination—that doesn't answer what is for me the key question: will this legal change strengthen or weaken marriage as a social institution.

I do think that having the marriage law say that two fathers and two mothers are just the same as a mother and father is an additional blow that will make it very difficult to have a marriage recovery because the Government will be on one side of this family debate now and it will be saying that.

Senator DURBIN. Do you think, then, that would encourage people to have more divorces if we had gay marriages?

Ms. GALLAGHER. I think that children who are raised in a society that does not think it is important to have mothers and fathers will be less likely to get married. They will have more children out of wedlock and they will have more divorces, yes.

Senator DURBIN. Although you don't think that is a driving force to the current problem, you do believe that it might be a problem in the future?

Ms. GALLAGHER. I think that the problem is how committed we are to the idea that children need mothers and fathers, and marriage is about getting them for children. So, yes, if we change our whole legal structure, if the Government says—I think civil unions and benefits are a separate issue. I have concerns about them, but I think they are a separate issue that deserves its own discussion from the gay marriage issue.

But, yes, I think definitely if we redefine marriage so that we say publicly, officially our shared, new idea of marriage is either it has nothing to do with children altogether, which is one theory, or it does have something to do with children, but mothers and fathers aren't key, it is something else we are doing with marriage.

Senator DURBIN. Reverend Hammond, let me ask you about the issue of discrimination. I don't ask that of you simply because you are a person of color, but I ask you in a historical context.

I try to think of my moment of history here in the United States Senate and then reflect on where this country has come since its beginning. Of course, in the beginning of this country, people of color and women and many others were discriminated against, not counted as citizens, not allowed to vote. There was a painful and lengthy process involving a war, as well, where we came to grips with this issue. We haven't resolved either one, obviously, but are coming to grips with the issue of discrimination.

Does it trouble you that many of the conversations involving people of different sexual orientation appear to be discussions about discrimination and whether it will be tolerated?

Dr. HAMMOND. It very much troubles me and it is one reason why I have been part of the Scout council, for example, that, con-

trary to the national policy, decided that it would not adhere to a discrimination policy. I supported that because I don't think gay and lesbian people should be discriminated against in their activities and involvement and memberships, and so on.

This is not, from my perspective, against gay and lesbian and people. It is for an institution which has traditionally been understood to be about men and women working together in relationship, and especially for children.

Senator DURBIN. Then let me ask you this question, and I wasn't here for Mr. Bradkowski's testimony, but I have read it. He speaks about some compelling personal issues involving someone he loved who died and how he was restricted under the current law from grieving and participating in the loss of someone he loved frankly because of some laws that discriminate against that relationship.

How do you reconcile that when you hear his story and hear what he has been through?

Dr. HAMMOND. I wouldn't at all disagree, and that is one reason why I think I find the Federal marriage amendment, for example, attractive because I think it does allow for us to correct many of those issues in terms of discrimination. It certainly doesn't abrogate private or State-based remedies for those denials of benefits. I don't see that being a problem at all. What I don't think is an appropriate response is to redefine marriage.

Senator DURBIN. So I don't want to put words in your mouth, but would you feel that domestic partnership arrangements which have been recognized by some major corporations and by some governments, and civil unions which have been recognized by some governments, would be acceptable inasmuch as it is short of marriage as we traditionally define it?

Dr. HAMMOND. In different States, in different situations, that may be an approach. There may be other legal remedies that people would advocate. I certainly again would not support any attempt to discriminate, but don't think the redefinition of marriage is the way to do it.

Senator DURBIN. That was very helpful.

Mr. Chairman, I really think he comes to the heart of it, doesn't he, when he says in certain States, in certain situations, certain responses are appropriate? Are we at a point now where we want to preempt that kind of conversation and that kind of decision by State and local governments? I hope we aren't.

Though I supported DOMA and have my own misgivings and reservations about gay marriage, when I hear Mr. Bradkowski's story, it is one that I have heard over and over again.

There are certain things that we should have done to make your grief and sorrow a little less and we didn't, and I think we can without assaulting the institution of marriage. I hope we will.

Thank you, Mr. Chairman.

Chairman CORNYN. Thank you, Senator Durbin.

I believe Senator Feingold had one final matter.

Senator FEINGOLD. I just have another question for Ms. Gallagher and then just a comment.

Ms. Gallagher, just last month you wrote, quote, "Polygamy is not worse than gay marriage. It is better. At least polygamy, for

all its ugly defects, is an attempt to secure stable mother-father families for children."

Do you really believe that a polygamous relationship is a more suitable environment in which to raise children than a loving two-parent household headed by a same-sex couple?

Ms. GALLAGHER. I think that polygamy and gay marriage are both part of the continuum of what happens when you move away from our traditional definition of marriage. This was my attempt to say to people who argued that the problem with gay marriage is that it will lead to polygamy, which is an argument that has been out in the public, I am dissatisfied with that slippery slope argument.

I think we need to be able to describe and define what it is about unisex marriage itself that is destructive to marriage, and that column was one of my first attempts to do try to do so.

Senator FEINGOLD. But you did say that polygamy is better?

Ms. GALLAGHER. I think that among the really, really, really, really bad ideas, polygamy is at least a cross-cultural marriage option. But I am really against polygamy, as well as same-sex marriage. I would just like to make that clear. I think it is clear from the context of the column.

Senator FEINGOLD. Mr. Chairman, if I could just comment briefly because I know you will make concluding remarks, I really do enjoy working with you and I think you are an excellent Chairman and one of the more courteous persons I have ever had the opportunity to work with.

Let me just comment on the hearings we have held briefly. I have come and diligently participated in a hearing on the issue of whether the filibuster of judges is unconstitutional, and I would rate the constitutional basis for saying that is unconstitutional to be flimsy, at best. It was sort of my conclusion from the hearing, but I came and I participated.

Secondly, I have attended this hearing and certainly understand that at least in theory, it could be the basis for a constitutional amendment under the Constitution Subcommittee, but the Chairman made every effort to say over and over against wasn't about a constitutional amendment. So I am a little puzzled about why we would devote the time to this particular matter at this time if we are not really talking about a potential constitutional amendment.

Third, we are about to have, I think, two hearings, which I certainly will participate in, about the issue of continuity of Government, the possibility of a tragedy involving the loss of executive people or members of Congress and what we do in that situation. That apparently would involve a constitutional amendment and I understand that.

I guess I would just say, Mr. Chairman, I hope you will consider some of the bills that are in the Judiciary Committee at this time that relate to the very urgent question of the proper balance between the fight against terrorism and protecting our Constitution and the Bill of Rights when it comes to civil liberties. This is very much at the heart of what this Subcommittee and the full Committee should be considering.

I am not alone in this, although I was alone when I voted against the USA PATRIOT Act. But since then, questions have been raised

about data-mining, and there are a number of bills in the Committee that relate to data-mining. I and Senator Boxer have introduced bills that relate to Section 215 of the USA PATRIOT Act which relates to getting records at libraries in a way that has never been permitted before. Finally, even a Republican Senator, Senator Lisa Murkowski, has introduced a bill that would repeal major portions of the USA PATRIOT Act.

I would simply request that these matters, which I think are right at the heart of our role, and frankly are quite urgent, receive hearings as well. But I do thank you for your courtesies and for the opportunity to participate.

Chairman CORNYN. Thank you, Senator Feingold. Obviously, being in the majority has its prerogatives.

Senator FEINGOLD. It certainly does.

Chairman CORNYN. And the Chairman gets to set the agenda for the hearings, but certainly I hope you feel completely free to make suggestions. We indeed have worked with you on a number of issues and will continue to do that.

I guess this hearing has perhaps demonstrated that there are some who believe that marriage is more important than other issues, or at least no less important than many of the other issues that Congress needs to confront. I must say that perhaps my own experience as attorney general in Texas dealing with child support enforcement and the ravages of family disintegration have just made this an important issue for me, perhaps more than it might be otherwise, the importance of making sure children have the benefit of intact families, a loving mother and father, and that they have a chance to be everything that they are capable of being in life.

Unfortunately, I think as Dr. Hammond alluded to earlier, he has seen, and perhaps all of us have seen to a greater or lesser extent what happens because of family disintegration. I have been interested to hear not just about the constitutional arguments about whether DOMA is being threatened or not, but also testimony about the harm to traditional marriage, and indeed the Federal policy embodied in the Defense of Marriage Act, which again passed overwhelmingly by bipartisan majorities. Not everybody voted for it. I understand that some have different views, but indeed it is Federal policy. It is the policy of the U.S. Government.

And lest anybody think that this issue was perhaps—I have heard several Senators say why are we wasting our time with the issue of marriage and the Defense of Marriage Act. Well, you had to be blind not to see on the newsstands, on July 7, how Newsweek and other popular magazines raised the issue. Everybody seems to be talking about it, and so why not Congress, particularly when we have important oversight responsibilities when it comes to legislation we pass?

It may require a constitutional amendment, it may not. We have heard divergent views here, but certainly this is the one place where that debate is entirely appropriate, if it is appropriate anywhere, because indeed this is the only body that can act to propose a constitutional amendment, if indeed it is the collective will of this institution that that is an important enough issue to gain the

super-majority of support required to present it to the States for ratification.

So with that, let me just say thanks again to all of our panel members and the members of the Subcommittee. I know some of you at least traveled a great distance to be here, and certainly all of you at inconvenience, and we appreciate your willingness to discuss these important issues before the Subcommittee.

Before we adjourn, I would like to again thank Chairman Hatch for scheduling the hearing and Senator Feingold for his usual cooperation and dedication. I find that Senator Feingold and I may not vote alike on many issues, but I find him uniformly easy to deal with and civil in all our discussions, and I appreciate that more than I can say.

Again, we will leave the record open until 5:00 p.m. on Wednesday, September 10, for members to submit additional documents into the record or to ask written questions of any witness.

With that, the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights is adjourned.

[Whereupon, at 4:39 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

Keith Bradkowski: Responses to Questions from Constitution Subcommittee

A. From Senator Saxby Chambliss

Question:
"Please provide your thoughts as to the need for a remedy like the Federal Marriage Amendment, which has been introduced in the House, when it would be possible to insure the continued viability of the existing Defense of Marriage Act by resubmitting its language in the form of a constitutional amendment."

Answer:
I am not a lawyer and don't have a comment on the wording of a constitutional amendment.

As an American citizen who pays my taxes and obeys the law, I cannot agree with amending the Constitution to discriminate against anyone. Furthermore, as a gay man who lost my life's partner to a terrorist attack, I cannot comprehend why Congress would want to do such a thing. Why would government get in the way of people in committed relationships being more responsible for each other?

B. From Senator Craig

No questions for Mr. Bradkowski.

C. From Senator Lindsey Graham

Question 1:

During the hearing, Senator Feingold state that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that...is a constitutional amendment." Do you agree that, if a law is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment, and that the same result could not be accomplished by statute?

Answer:

I am not a lawyer, and don't have a comment on how Congress could enforce a law once courts found it to be unconstitutional.

It seems to me that if the highest court in our country concludes that discriminating against families like mine is not constitutional, the United States Congress should respect that, and should stop trying to hurt the families formed by gay and lesbian Americans.

Question 2:

It has been asserted by the Leadership Conference of Civil Rights and others that a constitutional amendment may be appropriate "to address great public policy need." In your view, is the defense and protection of traditional marriage "a great public policy need?"

Answer:

Your question implies that discriminating against same-sex couples and "defending and protecting traditional marriage" are the same thing. I do not believe that they are. At the hearing, not one witness explained how relationships like Jeff's and mine threaten anyone's marriage. In fact, even witnesses who oppose equal rights for gay Americans admitted that the problems other American families face today have nothing to do with whether or not same-sex couples may legally marry or whether gay and lesbian families should receive fair treatment in this country. While there are many things that make it more difficult for married couples to hold their relationships together, providing equal rights and support to committed, same-sex couples and their children is not one of them.

D. From Senator Kyl

Questions 1(a) and 1(b):

During the hearing, Senator Feingold stated that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that…is a constitutional amendment."

(a) Do you agree that, if DOMA is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment?
(b) If DOMA is ruled unconstitutional on equal protection and/or due process grounds, can you suggest any other statute that would be upheld that would provide the substantive results embodied in DOMA?

Answers:

(a) I am not a lawyer, and don't have a comment on how Congress could enforce a law once courts found it to be unconstitutional.

It seems to me that if the highest court in our country concludes that discriminating against families like mine is not constitutional, the United States Congress should respect that, and should stop trying to hurt the families formed by gay and lesbian Americans.

(b) I am not a lawyer, and don't have a comment on how Congress could write a law that would discriminate against same-sex families without being ruled unconstitutional.

I believe, however, that any way you try to word it, a law that singles out gay people to be denied the basic rights of citizenship — the right to love whom we choose and secure our families' futures — is wrong.

RESPONSES OF DALE CARPENTER TO WRITTEN QUESTIONS

Senator Saxby Chambliss
Question for All Witnesses at September 4, 2003 Hearing
Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
"What is Needed to Defend the Bipartisan Defense
of Marriage Act of 1996?"

"Please provide your thoughts as to the need for a remedy like the Federal Marriage Amendment, which has been introduced in the House, when it would be possible to insure the continued viability of the existing Defense of Marriage Act by resubmitting its language in the form of a constitutional amendment."

Response: I believe that, for the foreseeable future, a constitutional amendment is unnecessary as a means to prevent courts from imposing same-sex marriage nationwide. Further, the proposed Federal Marriage Amendment would not simply constitutionalize the Defense of Marriage Act. Among many other things, it would prevent states from recognizing same-sex marriage even through ordinary democratic processes.

QUESTIONS FOR WITNESSES FROM SENATOR LINDSEY GRAHAM

WHAT IS NEEDED TO DEFEND
THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?

SENATE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS

SEPTEMBER 4, 2003

To all members of the panel:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment." Do you agree that, if a law is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment, and that the same result could not be accomplished by statute?

Response: No. Assuming the decision came from the Supreme Court, Congress would have at least three other options: (1) rewrite the law to conform to constitutional requirements, (2) exercise whatever authority it has to limit federal courts' jurisdiction over the matter, and (3) reargue the matter in a subsequent case and ask for reconsideration of the issue.

2. It has been asserted by the Leadership Conference on Civil Rights and others that a constitutional amendment may be appropriate "to address great public policy need." In your view, is the defense and protection of traditional marriage "a great public policy need"?

Response: No. Same-sex marriage would be beneficial to same-sex couples, to their children, and to society as a whole, without damaging existing or future opposite-sex marriages. Married couples will not think less of their own marriages because same-sex couples are allowed to marry. Thus, there is no "great public policy need" to exclude same-sex couples from marriage.

To the lawyers on the panel:

3. A lot of attention has been directed to the case now pending before the Massachusetts Supreme Judicial Court. The plaintiffs in that case are asking the Massachusetts court to strike down traditional marriage laws in that state. A number of organizations have filed briefs in support of the plaintiffs. Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop at some point if they do not win? Or are they instead simply going to file multiple lawsuits in various jurisdictions, until traditional marriage laws are eventually invalidated by judicial fiat and thereby removed from the democratic process?

Response: The groups dedicated to ending the exclusion of same-sex couples from marriage will

speak and act for themselves. I am not active in any of them and am not privy to their litigation strategies. As an outsider, I expect them to continue challenging bans on same-sex marriages. However, for the foreseeable future, they are very unlikely to win under circumstances or in courts in a position to impose same-sex marriage on the entire nation by "judicial fiat."

4. Professor Carpenter testified that "[no] State in the Union has ever recognized same-sex marriages." What is your understanding of how previous state court suits were resolved? Specifically, please address the situations in Hawaii, Alaska, Nebraska, Nevada, and California where voters in those states adopted state constitutional amendments, or a statewide initiative in the case of California, in 1998 and in 2000. Finally, would a federal constitutional amendment be necessary to defend these amendments from a suit based on *Romer* and *Lawrence*?

Response: As to the first question, the experience in the states so far is that they have successfully dealt on their own with judicial invalidations or prospective judicial invalidations of laws limiting marriage to opposite-sex couples. They have not needed, nor have they requested, the assistance of Congress or of a constitutional amendment to deal with their state courts.

As to the second question, the answer for the foreseeable future is no. In the first two decisions evaluating arguments for same-sex marriage in light of Lawrence v. Texas, *one in Arizona and one in New Jersey, state courts have rejected the claims. This is no guarantee that every court will reach the same conclusion but it indicates what is likely to be a strong trend in state and federal courts for the foreseeable future.*

5. Would you agree that, all things being equal, it is better for the law to be clear, rather than unclear – particularly in an area of law that is as important to so many Americans as marriage and family law? Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to an uncertain legal landscape?

Response: It is certainly good for law to be "clear" on any subject, including marriage and family law generally, in the jurisdiction in which a person lives. However, clarity does not mean uniformity. In our federal system it has never been deemed necessary to have uniformity as to very important matters, like criminal law, property law, education, tort law, or family law. Though the states may and have adopted many aspects of proposed uniform codes in several areas, there has notably been no uniform family code.

SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

TO ALL MEMBERS OF THE PANEL:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment."

(a) Do you agree that, if DOMA is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment?

Response: No. Assuming the decision came from the Supreme Court, Congress would have at least three other possible options: (1) rewrite the law to conform to constitutional requirements, (2) exercise whatever authority it has to limit federal courts' jurisdiction over the matter, and (3) reargue the matter in a subsequent case and ask for reconsideration of the issue.

(b) If DOMA is ruled unconstitutional on equal protection and/or due process grounds, can you suggest any other statute that would be upheld that would provide the substantive results embodied in DOMA?

Response: The answer depends on the particular constitutional infirmity found in the law. Without knowing that, it is very difficult in the abstract to give an answer.

SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

TO ALL LAWYERS ON THE PANEL:

1. As you know, many lawyers have argued, both in legal briefs and in the news media, that traditional marriage laws, like the federal Defense of Marriage Act and the marriage laws of every state, should be struck down by courts as unconstitutional. For example, according to media reports, Patricia Logue of the Lambda Legal Defense and Education Fund has said "I think it is inevitable now" that courts will strike down DOMA and recognize same-sex marriage. Will Harrell, executive director of the American Civil Liberties Union in Texas, "says he believes the [*Lawrence*] decision opens to challenges the Defense of Marriage Act." And organizations like Lambda Legal Defense and the ACLU, as well as the Human Rights Campaign; People for the American Way; the National Gay and Lesbian Task Force; the International Lesbian and Gay Law Association; the Lesbian and Gay Equality Project; Lesbian and Gay Legal Equality; The Freedom to Marry Coalition of Massachusetts; The Freedom to Marry Foundation; The Lesbian, Gay, Bisexual and Transgender Political Alliance of Western Massachusetts; The Massachusetts Gay & Lesbian Political Caucus; Bay Area Lawyers for Individual Freedom; The Freedom to Marry Collaborative; PridePlanners Association; and other groups have all argued in courts across the country that courts should recognize a constitutional right to same-sex marriage, and that democratically-enacted laws limiting the institution of marriage to traditional marriage should be struck down as unconstitutional.

(a) Do you believe that these legal arguments are frivolous?

Response: While I am not familiar with all of the legal arguments being made on behalf of same-sex marriage advocates, and so cannot comment on the specifics of each group's advocacy, I believe there are non-frivolous arguments that can be made for holding unconstitutional laws that exclude same-sex couples from marriage. The fact that an argument is non-frivolous hardly means it will be successful, however. Many imaginable non-frivolous arguments on almost any legal issue would have very little chance of success, especially in a court of final resort such as an appeal court or the Supreme Court.

(b) Should courts sanction those individuals and organizations who file such briefs for making frivolous arguments?

Response: Only if the particular arguments they make are, indeed, frivolous.

(c) Do you instead believe that these arguments have some basis in law?

Response: The answer depends on the arguments and the case. However, I believe there are non-frivolous arguments that can be made for holding unconstitutional laws that exclude same-sex couples from marriage.

2. The plaintiffs in *Goodridge v. Massachusetts Dep't of Health* have asked the Massachusetts Supreme Judicial Court to strike down the Commonwealth's traditional marriage law, mandate the granting of marriage licenses to same-sex couples, and thus to take that issue away from the democratic process. And a number of organizations have filed briefs in support of the plaintiffs.

(a) Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop filing lawsuits of this sort if they do not win the *Goodridge* case?

Response: The groups dedicated to ending the exclusion of same-sex couples from marriage will speak and act for themselves. I am not active in any of them and am not privy to their litigation strategies. As an outsider, I expect them to continue challenging bans on same-sex marriages. However, for the foreseeable future, they are very unlikely to win under circumstances or in courts in a position to impose same-sex marriage on the entire nation by "judicial fiat."

(b) Instead, do you expect these activist groups to file lawsuit after lawsuit after lawsuit until they convince courts to strike down traditional marriage laws?

Response: The groups dedicated to ending the exclusion of same-sex couples from marriage will speak and act for themselves. I am not active in any of them and am not privy to their litigation strategies. As an outsider, I expect them to continue challenging bans on same-sex marriages. However, for the foreseeable future, they are very unlikely to win under circumstances or in courts in a position to impose same-sex marriage on the entire nation by "judicial fiat."

3. If you were an attorney representing a state government against a constitutional attack on your state's traditional marriage laws, would you advise your client that there is no litigation risk whatsoever, or would you advise your client that there may be some risk that courts may strike down such laws as unconstitutional?

*Response: The answer would very much depend on which state I was in, what the state constitution had to say on the subject or related subjects, whether the judges in the state judicial system were elected or subject to recall, and whether groups were actively organized to challenge state marriage law. In general, I would probably never, under any circumstances, on any subject, advise a client that "there is no litigation risk whatsoever." However, depending on the above factors, I might advise the state that the litigation risk is very, very low and perhaps close to zero. I would, of course, factor into my advice the precedent already set by state court decisions in Arizona and New Jersey rejecting post-*Lawrence *constitutional claims for same-sex marriage. This is no guarantee that every court will reach the same conclusion but it indicates what is likely to be a strong trend in state and federal courts for the foreseeable future.*

4. Professor Carpenter testified that "[n]o State in the Union has ever recognized same-sex marriages," but that is true only because certain states adopted state constitutional amendments to prevent courts from imposing same-sex marriage by judicial fiat.

(a) For example, didn't courts in Hawaii and Alaska indicate that they were going to impose same-sex marriage by judicial decree, and weren't they stopped only because voters in those states adopted state constitutional amendments in 1998?

Response: Yes. Each case was a textbook example of the states' ability to deal with perceived activism by their own state courts. Neither state asked for or received the assistance of Congress or of a federal constitutional amendment in doing so.

(b) Likewise, didn't the voters of Nebraska, Nevada, and California adopt state constitutional amendments or statewide initiatives in 2000 to preempt future court action to impose same-sex marriage by judicial decree?

Response: The voters in these states did adopt such amendments. Why they adopted these amendments is unclear. However, again, they serve as examples of states' ability to deal prospectively with problems they feel are significant.

(c) Finally, wouldn't a federal constitutional amendment be necessary to prevent a constitutional attack based on federal law, such as an attack based on *Romer* and *Lawrence*?

*Response: No, for the foreseeable future. Already two state courts, one in Arizona and one in New Jersey have rejected post-*Lawrence *constitutional claims for same-sex marriage. This is no guarantee that every court will reach the same conclusion but it indicates what is likely to be a strong trend in state and federal courts for the foreseeable future.*

5. Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to an uncertain legal landscape?

Response: It is certainly good for law to be "clear" on any subject, including marriage and family law generally, in the jurisdiction in which a person lives. However, clarity does not mean uniformity. In our federal system it has never been deemed necessary to have uniformity as to very important matters, like criminal law, property law, education, tort law, or family law. Though the states may and have adopted many aspects of proposed uniform codes in several areas, there has notably been no uniform family code.

6. The traditional definition of marriage as a union of one man and one woman has been constant for centuries and in all 50 states. The Defense of Marriage Act simply codified that definition into the U.S. Code for purposes of federal law. For the last several years, some courts have attempted to redefine marriage by judicial fiat.

(a) Is it appropriate for courts to change the longstanding, preexisting statutory and common law definitions of marriage?

Response: The answer depends on the basis of the challenge. It was appropriate, for example, for the Court to declare unconstitutional the longstanding antimiscegenation laws of 16 states in Loving v. Virginia. *The court has also struck down state marriage laws excluding inmates and*

dead-beat parents who do not pay legally required child support. As to same-sex marriage, I do not believe the Supreme Court would or should, for the foreseeable future, strike down state laws excluding same-sex couples.

(b) Which branches of government should be involved in any effort to redefine marriage, and which branches of government should not be involved in such an effort?

Response: The definition of marriage should generally be left to the states, as it historically has been, and thus no branch of the federal government should "redefine" marriage. The exception to this is when a state defines marriage in a way that violates the Constitution, as in the case of antimiscegenation laws.
SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

TO MR. CARPENTER:

1. You suggest in your written testimony opinion that the Supreme Court rarely goes against public opinion and that public opinion is therefore a "check" against radical judicial activism. This argument strikes me as a significant misinterpretation of the Court's recent jurisprudence, one that appears to have colored your optimism for the survival of DOMA. For example:

(a) Public opinion polls show overwhelming opposition to partial birth abortion. Do you believe the Supreme Court was following public opinion when it struck down Nebraska's statute banning this practice?

Response: The premise of the question is misleading. Results in opinion polls depend very much on what is asked and how the question is asked. If people are asked whether they support "partial-birth abortion," the answer is overwhelmingly no. If people are asked whether such procedures should be allowed to preserve the mother's health, the answer, I suspect, is yes. The Court's decision in the Nebraska case allows for prohibition of the procedure except when it is necessary to protect the mother's health. Thus, I doubt it is out of line with public opinion. Indeed, the Court's entire jurisprudence in the abortion area is remarkably consistent with public opinion as a general matter: women should generally be able to choose whether to carry a child to term, but the states may place limits on that choice.

(b) Liberal commentators often criticize the Rehnquist Court for not giving sufficient deference to Congress in its Commerce Clause and 11th Amendment/sovereign immunity jurisprudence. Congress and state legislatures, of course, gives effect to public opinion through the laws they pass. Do you believe that the Supreme Court has been following public opinion by striking down duly enacted laws that violate the Commerce Clause, the 11th Amendment, and related principles of sovereign immunity?

Response: There are errors in the premise of the question. First, not only "liberal" commentators have been concerned by the Court's decisions in areas like sovereign immunity.

For example, as a conservative I am concerned that in its sovereign immunity cases the Court has departed significantly from the text and history of the Eleventh Amendment. It appears to have created an unenumerated, free-floating right of the states to sovereign immunity. Second, Congress and state legislatures are not simply pass-throughs reflecting public opinion on a given matter. Many factors other than public opinion determine the outcome of the legislative process.

On the substance, I doubt there is an informed public view on the vagaries of the Commerce Clause, the Eleventh Amendment, or sovereign immunity generally. Thus, I doubt the Court is either consistent with, or inconsistent with, any strong public consensus on these issues. The Court, as a matter of historical fact, rarely strays far or long from a strong national consensus on a given issue. The Court's jurisprudence in the areas of the Commerce Clause, Eleventh Amendment, and sovereign immunity are neither an example of this historical trend nor an exception to it.

(c) Sixty-nine percent of Americans polled by Gallup in June 2003 said that they believed that college applicants should be admitted "solely" on the basis of merit, and not on the basis of race. Yet educational and legal elites made clear through amicus briefing in the Supreme Court that they want to preserve racial preferences in higher education. And of course, the Supreme Court upheld the University of Michigan's racial-preferences regime this past June, consistent with elite opinion and against general public opinion on this issue. Doesn't the Michigan case suggest that the general public's views have little or no effect on the Court's jurisprudence?

Response: The premise of the question is misleading. Results in opinion polls depend very much on what is asked and how the question is asked. If people are asked whether they support racial quotas, the answer is overwhelmingly no. If people are asked whether they support efforts to increase racial diversity at public schools without the use of quotas, the answer is yes. The Court's decisions in the Michigan cases are consistent with this view in that they allow race to be considered in admissions but do not allow the assignment of rigid race-based scores for applicants. This is consistent with the practice of state universities and other state institutions across the country, as well as with congressional policy in a number of areas. Thus, whatever one thinks of the merits of the question, the Court's result is roughly consistent with the policies of democratic institutions throughout the nation. In any case, there appears to be no strong national consensus against consideration of race under any circumstances.

(d) Finally, as a constitutional law professor, do you believe that it is appropriate for the Supreme Court to rule on constitutional cases through the lens of public opinion?

Response: In saying the Court rarely strays far or long from a strong national consensus on an issue, I am making a descriptive claim, not a normative one. In fact, I believe constitutional principles should not vary with opinion polls. On the other hand, in deciding whether to decide *a case involving constitutional principle, the Court appropriately considers its own institutional capacity, competence, and standing with the other branches of government and with the people.*

2. Consider a hypothetical in which DOMA's Section 2 (bolstering States' right not to recognize other States' same-sex marriages) or Section 3 (providing a federal definition for purposes of federal law) is challenged in federal court.

(a) Do you believe that there is no district court in the nation that would rule either provision unconstitutional? Have any district judges, for example, recently held the death penalty unconstitutional despite controlling Supreme Court precedent?

Response: It is possible, though unlikely for the foreseeable future, that litigants could find a district court somewhere that would hold one or both of these provisions unconstitutional. Such a ruling would be of no consequence, however, since it would be reviewed by the governing appellate court.

I have not followed district court rulings of late on the death penalty.

(b) Do you believe that there is no panel of any circuit court that would so rule? In that vein, are there any circuits whose judges recently have refused to follow Supreme Court precedent?

Response: It is possible, though very unlikely for the foreseeable future, that litigants could find a panel of an appellate court somewhere that would hold one or both of these provisions unconstitutional. Such a ruling would be of little consequence, however, since it would be reviewed en banc *and/or by the Supreme Court.*

I am not aware of any appellate courts that have explicitly refused to follow a Supreme Court precedent they believe is controlling.

(c) Perhaps you rely completely upon the Supreme Court as the only true protector of the Constitution. Do you believe that none of the current Justices would rule that the 5th or 14th Amendments require States to grant marriage licenses to same-sex couples? If not, then please identify which Justices you believe would be amendable to so ruling.

Response: All six Justices in the majority in Lawrence *explicitly stated their view that the case did not address the issue of same-sex marriage. No Justice currently on the Court has argued for heightened scrutiny of discrimination based on sexual orientation, although* Lawrence *and* Romer v. Evans *presented them with opportunities to do so. If there is a Justice presently on the Court who would support a decision ordering a state to recognize same-sex marriages, I do not know which one it would be.*

(d) You filed an amicus brief in the *Lawrence* case. If a coalition of law professors asked you to join an amicus brief in the hypothetical case above – a brief that advocated recognition of a constitutional right for same-sex couples to be married – would you join that brief? Would you file a brief on the opposite side of the same-sex couple(s) seeking recognition of a new constitutional right?

Response: Since I do not believe the Court would or should, for the foreseeable future, issue an opinion ordering the states to recognize same-sex marriages, I doubt I would sign a brief urging it to do so. I also doubt I would sign a brief urging it not to do so.

3. I understand from your resume and your representations at the subcommittee hearing that you are a Republican who views his political and constitutional beliefs as "conservative."

(a) Do you consider yourself an originalist and/or textualist in terms of constitutional interpretation?
Response: I consider myself both a textualist and an originalist in the following senses: I believe the text of the Constitution is the starting point, and provides the fundamental framework, for constitutional interpretation. I also believe the principles enshrined in the Constitution, as understood by those who ratified the relevant text, should help guide constitutional interpretation as we apply those principles to circumstances and arguments the ratifiers could scarcely have imagined.

(b) Do you believe that the drafters of the 5th or 14th Amendments intended to create a right for same-sex couples to receive marriage licenses, or that the text of either amendment compels such a result?

Response: I doubt the drafters of the Fifth or Fourteenth Amendments specifically intended to create a "right" to same-sex marriage. I also doubt they intended to end public racial segregation or the exclusion of women from the law profession.

I do not believe the text of the Fifth or Fourteenth Amendments compels the recognition of same-sex marriage. The relevant texts are so spacious they are consistent with many possible outcomes on many issues, but compel *very few outcomes on any issues.*

4. If the Massachusetts Supreme Judicial Court rules in the pending case of *Goodridge v. Massachusetts Dep't of Health* in favor of the same-sex petitioners, do you expect legal challenges to DOMA to follow? Would you be supportive of those challenges?

Response: Yes, I expect same-sex marriage advocates eventually to challenge DOMA after a hypothetical future victory in a state court case. Since I do not know what the basis for these hypothetical, future, contingent challenges would be, I am not sure whether I would support them. I am dubious, for example, about Section 2 of DOMA as a matter of congressional power. The constitutional text suggests, to me, a purely procedural role for Congress to determine "the manner" in which foreign state acts or judgments are "proved" and the "effect" of that manner of proof. I have not further considered the matter, devoted time to the scholarship on the congressional power issue, or researched the relevant history, so this view is a tentative one.

Questions Submitted for the Record
United States Senate Committee on the Judiciary
"What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"
September 10, 2003

The Honorable Senator Larry E. Craig
United States Senate

Question for Mr. Farris:

You did not mention the possibility of a constitutional amendment in your written testimony. If U.S. Courts find the Defense of Marriage Act unconstitutional in the future, as you suggested they might despite your belief that it is constitutional, is there anything short of a constitutional amendment that would effectively cure the problem? In the same vein, if a constitutional amendment was in order, would you support a narrower amendment that only addresses the federalism issue rather than one that sets forth a uniform definition of marriage?

Question for Mr. Coleman:

You mentioned that "if DOMA or similar state enactments are invalidated on federal constitutional grounds, the only possible recourse would be a constitutional amendment." If this becomes the case, would you support a narrower constitutional amendment than one defining marriage as the legal union of one man and one woman? Please explain the advantages and disadvantages of a narrower amendment.

Question for Professor Carpenter:

You called a constitutional amendment defining marriage as the union between one man and one woman "anti-democratic" insofar that it removes the debate over same-sex marriages from the states. But, at present, it seems that the courts–not the voters–have been doing most of the talking on the issue, with voters stepping in only to check state court decisions or decide questions of civil unions, domestic partnerships, and other forms of legal same-sex partnerships. If a constitutional amendment defining marriage was ratified, would conditions be any less democratic? That is, if the amendment defined marriage as the legal union of one man and one woman, it seems that the voters in the states could still debate the issue of civil unions, domestic partnerships, and the like. With elected representatives voting on an amendment, and the states ratifying it, how is the debate over marriage removed from the states, and thereby "anti-democratic," when the states are the ones that ultimately determine the fate of the amendment?

Response: These are important questions. Let me take them in order:

(1) If a constitutional amendment defining marriage were adopted, democratic control over family law would be significantly eroded. As of now, the people of the states may, through their legislatures, choose to recognize same-sex marriages, to ban same-sex marriages via state statute or state constitutional amendment, or to adopt some "marriage-lite" option like domestic

partnerships or civil unions. The people of the states have been actively considering, and exercising, these options through their state legislatures and through popular initiatives. Very few state court challenges – and no federal court challenges – to the exclusion of same-sex couples from marriage laws have been successful. Even those few state court successes have been reversed (Alaska, Hawaii) or limited (Vermont) by democratic processes. Thus, the "activism" of state and federal courts in this area has been exaggerated. The people of the states have so far very much been in control of their own destinies on this issue.

Yet the proposed Federal Marriage Amendment (FMA) would, at a minimum, strip the people of the states of their ability to recognize same-sex marriages. It would also likely prevent courts from enforcing the rights of parties to state-created domestic partnerships or civil unions, since enforcing such rights would require courts to "construe" state law to give "the incidents" of marriage to couples other than one man and one woman. Thus, while the states might in theory be able to adopt domestic partnerships or civil unions, in practice these state experiments would be meaningless (because they would be effectively unenforceable). The proposed amendment would be a significant and radical intrusion on the traditional role of the states in our federal system.

(2) Even though an amendment requires a supermajority in Congress and among the states, it has three antidemocratic effects. The first two are common to all constitutional amendments; the third is peculiar to the FMA. First, any amendment is antidemocratic as to the states that refuse to ratify it. There could be as many as twelve states, perhaps among them our most populous, like California and New York, that would be stripped of their traditional power to decide the issue democratically by the actions of the Congress and the 38 ratifying states. Second, an amendment would bind the people of all the states, even those states that had approved the amendment, from ever reconsidering the issue democratically (except through another federal constitutional amendment). Under the present system, states may opt for one policy choice now but are free to revise their own choice at a later date based on their experience. The FMA would preclude that normal democratic process, binding the people of the states forever to an earlier decision made by an earlier generation lacking their experience. Finally, the proposed FMA would be "peculiarly" anti-democratic. It would mark the first time we amended the Constitution to limit states' ability to decide democratically to expand *rights and to* include *more people in the fabric of national life. Up to now, the constitutional constraints on democratic processes have been designed to limit states' ability to* diminish *rights and to* exclude *people from national life. Rather than setting a floor on rights and inclusion, for the first time in our history the FMA would set a ceiling on them. What a tragic and needless departure from our history and traditions that would be.*

MEMORANDUM

September 24, 2003

To: Joshua Sandler
Senate Subcommittee on the Constitution,
Civil Rights, and Property Rights

From: Gregory S. Coleman

Re: Constitutional Amendments

Below are my responses to the questions you faxed me several days ago. As I noted previously, the view that I express are mine alone and do not reflect the view of my Firm.

Response to Question of Senator Saxby Chambliss:

The need for a remedy like the proposed Federal Marriage Amendment depends on one's view of how important issues should be decided – *i.e.*, whether such issues should be decided in a democratic fashion or by the judiciary using non-textual and ahistorical methods of constitutional interpretation. As I stated during the September 4, 2003 hearing, it is my professional opinion that the courts are likely during the next decade to rely on the holdings of *Romer* and *Lawrence* to rule that the constitution requires recognition of same-sex marriage. Consequently, if one believes that the issue should be determined through democratic processes, a constitutional amendment is likely the only process available to determine the issue in a democratic fashion. I have not spent any significant time evaluating the proposed Federal Marriage Amendment and, therefore, cannot compare its language with the language of the Defense of Marriage Act.

Responses to Questions from Senator Lindsey Graham:

1. As I have stated, I agree that a constitutional amendment is the only democratic recourse available to address a judicial determination that a state or a federal law is in violation of the constitution.

2. I believe that our society and, indeed, our civilization are grounded in a nuclear family structure in which the children of each new generation are raised to be caring, law-abiding, and productive members of our society, not as a mere legal recognition of two individuals' love for one another. Traditional marriage is at the core of this nation's understanding of family and society. If that

structure is to be modified, it should be done through democratic processes, and attempted constitutional amendment is probably the only way to prevent the courts from short-circuiting those democratic processes.

3. The Massachusetts lawsuit is not unique in its goal of striking down traditional marriage on constitutional grounds. Similar lawsuits have been pending in various jurisdictions for over 30 years. In addition to the cases referenced in my written testimony, I also recently learned of an additional lawsuit challenging traditional marriage in Arizona. It is clear from the history of this litigation, that the resolution of the Massachusetts lawsuit will have little or no effect on the continuation of similar lawsuits in various jurisdictions across the country.

4. In Hawaii, the lower court held that the state's marriage statute was unconstitutional. That judgment, however, was never implemented because of an intervening state constitutional amendment. Other states have similarly adopted constitutional amendments prior to the entry of a final judgment or as a preemptive move. These state constitutional amendments are insufficient, however, to guard against a court ruling based on *Romer* and *Lawrence*.

5. Clarity is an important legal principle, and in this instance it highlights the difficulty caused by a prospective court ruling that is not grounded in the text, structure, or constitutional history of our nation. The role of marriage and family is so central to our communities and culture that the legal rules regarding their recognition should be absolutely clear as they previously were.

Responses to Questions of Senator Kyl:

As I have previously stated, if the Defense of Marriage Act is struck down as unconstitutional, the only recourse to modify that ruling would be a constitutional amendment because a statute cannot contravene a constitutional interpretation by the courts.

Responses to Additional Questions of Senator Kyl:

1. The argument asserted by numerous groups that the Constitution should be interpreted to require recognition of same-sex marriages are not grounded in the text, structure, or constitutional history of our nation, but they are supported to some degree by the Supreme Court's decisions in *Romer* and *Lawrence*, and therefore are not legally frivolous.

2. As I noted in my response to the question from Senator Graham, the Massachusetts case is only one in a long series of cases

challenging traditional marriage, and the resolution of that case is not likely to stem the flow of litigation that is currently building speed.

3. As I noted in my prior testimony, it is my professional opinion that as things currently stand there is significant litigation risk associated with the constitutional challenges to traditional marriage.

4. Again, as I noted in my response to the question from Senator Graham, the court in Hawaii actually held that the state's marriage statute was unconstitutional. The court in Alaska was close to a similar holding before the voters adopted the state constitutional amendment. I believe my prior written testimony makes clear that only a federal constitutional amendment can prevent the courts from removing this issue from the democratic process.

5. I agree, as I noted in my response to the question from Senator Graham, that clarity in the law is essential and in an area like this that cuts to the core of our traditions and culture.

6. I continue to believe that the central issue of defining the scope and nature of marriage is one that must be left for the traditional democratic processes. The text, structure, and constitutional history of our family-based culture do not place this question within the purview of the courts in interpreting the Constitution.

Response to Question of Senator Larry E. Craig:

As I noted in my response to Senator Chambliss, I have not spent any significant time evaluating the proposed Federal Marriage Amendment and, therefore, cannot assess its advantages or disadvantages in comparison with a narrower potential constitutional amendment.

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

Subcommittee Hearing on

"*What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?*"

September 4, 2003

Response to Questions Submitted for the Record

Michael P. Farris
President, Patrick Henry College

Senator Saxby Chambliss
Question for All Witnesses at September 4, 2003 Hearing
Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
"What is Needed to Defend the Bipartisan Defense
of Marriage Act of 1996?"

> "Please provide your thoughts as to the need for a remedy like the Federal Marriage Amendment, which has been introduced in the House, when it would be possible to insure the continued viability of the existing Defense of Marriage Act by resubmitting its language in the form of a constitutional amendment."

Answer of Mike Farris:

It is hard to answer this question without a definitive version of a Federal Marriage Amendment. If states are free to create same-sex marriages—as would be the case if DOMA was simply constitutionalized—then states are put in the very difficult position of having actual marriages be valid and invalid when a person moves from state to state. While constitutionally possible, it is neither desirable nor wise.

I. Questions submitted by Senator Graham, dated September 4, 2003.

To all members of the panel:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment." Do you agree that, if a law is going to be struck down as constitutional, the only remedy to enforce that law is a constitutional amendment, and that the same result could not be accomplished by statute?

Farris Answer:

This is a difficult issue, for the question is really about the reach of judicial supremacy as it pertains to interpreting the United States Constitution.

While this subject has been a matter of debate, should the judiciary declare DOMA unconstitutional, or such a ruling seems certain, the United States Senate, has, at least theoretically, four options: (1) utilize impeachment to achieve a new result; (2) limit the federal courts' jurisdiction to review the constitutionality of DOMA; (3) pursue the inherent powers of the legislative branch to thwart the reach of the court's decision, such as the power of the purse or passing a new law which meets the court's constitutional objections; or, (4) pass a constitutional amendment addressing the issue of marriage.

The clearest, but perhaps most difficult, protection for DOMA would be the passage of a new constitutional amendment setting forth the nature of marriage in the United States. Clearest, because Congress has the ability to give the courts precise guidance which even the most activist court would find impossible to circumvent. Difficult, because it requires a 2/3 majority and the concurrence of ¾ of the states.

Whether or not DOMA could be fixed by another statute would depend entirely on the reasoning adopted by the Supreme Court in striking it down. The likely basis for such a ruling would be one of two things: (1) under *Lawrence v. Texas,* the principle of substantive due process prohibits laws of this character; or (2) the Full, Faith, and Credit Clause cannot be used to

limit the registration of interstate decrees on a substantive basis. If the Court adopted either of these lines of reasoning, there is no fix short of a constitutional amendment.

2. *It has been asserted by the Leadership Conference on Civil Rights and others that a constitutional amendment may be appropriate to "address great public policy need." In your view, is the defense and protection of traditional marriage "a great public policy need."?*

Farris Answer:

Yes. Marriage is the foundation of the family and is the bedrock of our society. This is not merely a great public policy question, it is the singularly most important question of our generation.

The concept of marriage between a man and a woman is, and has been, one of the basic foundations of our society. Even the Supreme Court has described traditional marriage as a "basic civil right." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). It is "fundamental to our very existence and survival" and being a revered institution "older than the Bill of Rights -- older than our political parties, [and] older than our school system." *Loving v. Virginia*, 388 U.S.C. 1, 12 (1967).

3. *A lot of attention has been directed to the case now pending before the Massachusetts Supreme Judicial Court. The plaintiffs in that case are asking the Massachusetts court to strike down traditional marriage laws in that state. A number of organizations have filed briefs in support of the plaintiffs. Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop at some point if they do now win? Or are they instead simply going to file multiple lawsuits in various jurisdictions, until traditional marriage laws are eventually invalidated by judicial fiat and thereby removed from the democratic process?*

Farris Answer:

In my over twenty-five years as a lawyer active in the area of constitutional litigation, I have never seen a group which believed itself to be in the right cease litigating for their cause unless (1) they run out of money, or (2) the

judicial opinions become so clear that they become subject to sanctions if they continue. The efforts to use the courts to legislate a new social policy allowing gay marriage will continue unabated.

4. *Professor Carpenter testified that "[n]o State in the Union has ever recognized same-sex marriages." What is your understanding of how previous state court suits were resolved? Specifically, please address the situations in Hawaii, Alaska, Nebraska, Nevada, and California where voters in those states adopted state constitutional amendments, or a statewide initiative in the case of California, in 1998 and in 2000. Finally, would a federal constitutional amendment be necessary to defend these amendments from a suit based on Romer and Lawrence?*

Farris Answer:

The state courts which have finally considered the issue of same-sex unions have yet to extend full marriage privileges to these couples – for wide variety of reasons, most hinging on specific interpretations of state statutes. In fact, in at least 36 states the laws now reflect that marriage is between a man and a woman. In at least four states, as noted in the question, the protection has been done through an amendment to the state constitution. For example, the Nebraska Constitution was amended in 2000 to read "Only a marriage between a male and female person shall be recognized and given effect in this state." Should these state constitutional amendments be challenged under theories arising under the federal constitution, the federal constitution would, of course, preempt the meaning of the state constitutions. Given the broad reasoning of *Lawrence*, that is that morality is not a sufficient basis for law, it is likely that only a constitutional amendment at the federal level could keep any federal court so desiring from opining that failing to recognize same-sex marriages is a violation of the federal constitution.

It is very important to emphasize that while state constitutional amendments can stop state courts from interpreting state laws in a way to create judicially imposed same-sex marriage, state constitutional amendments are powerless to stop a state or federal court from reaching the same result under the 14th Amendment using *Lawrence*

5. *Would you agree that, all things being equal, it is better for the law to be clear, rather than unclear – particularly in an area of law that is as important to so many Americans as marriage and family law? Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to uncertain legal landscape?*

Farris Answer:

One of the pillars of the American legal system is the notion of the rule of law. The rule of law depends, at least in part, on clear statements which the populace may rely upon in their plans. This, coupled with the deep beliefs which many Americans hold on this subject, counsel strongly in favor of the government being clear on this issue. This is the tragedy of the *Lawrence* decision. Not only was clear constitutional precedent overturned, the *Bowers* case, but it was done so in such a way as to make the moral basis of law very unclear. This is not good for the American legal system.

II. Questions submitted by Senator Kyl

To All Members of the Panel:

1. *During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that... is a constitutional amendment."*

(a) Do you agree that, if DOMA is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment?

(b) If DOMA is ruled unconstitutional on equal protection and/or due process grounds, can you suggest any other statute that would be upheld that would provide the substantive results embodied in DOMA?

Farris Answers:

(a) Should the judiciary declare DOMA unconstitutional, or such a ruling seems certain, the United States Senate, has, at least theoretically, four options: (1) utilize impeachment to achieve a new result; (2) limit the federal courts' jurisdiction to review the constitutionality of DOMA; (3) pursue the inherent powers of the legislative branch to thwart the reach of the court's decision, such as the power of the purse or passing a new law which meets the court's constitutional objections; or, (4) pass a constitutional amendment addressing the issue of marriage.

The clearest, but perhaps most difficult, protection for DOMA would be the passage of a new constitutional amendment setting forth the nature of marriage in the United States. Clearest, because Congress has the ability to give the courts precise guidance which even the most activist court would find impossible to circumvent. Difficult, because it requires a 2/3 majority and the concurrence of ¾ of the states.

(b) If the court strikes DOMA on equal protection or due process grounds, I am not aware of a substantive statute which would be upheld that would provide the substantive results embodied in DOMA. Congress could attempt, at least theoretically, to pass a new DOMA, while at the same time limit the reach of the court's review of the statute. The cleaner route would be to pass a constitutional amendment.

To All Lawyers on the Panel:

1. *As you know, many lawyers have argued, both in legal briefs and in the news media, that traditional marriage laws, like the Defense of Marriage Act and the marriage laws of every state, should be struck down by courts as unconstitutional. For example, according to media reports, Patricia Logue of the Lambda Legal Defense and Education Fund has said "I think it is inevitable now" that courts will strike DOMA and recognize same-sex marriage. Will Harrell, executive director of the American Civil Liberties Union in Texas, "says he believes the [Lawrence] decision opens to challenges the Defense of Marriage Act." And organizations like Lamda Legal Defense and the ACLU, as well as the Human Rights Campaign, People for the American Way, the National Gay and Lesbian Task Force; the International Lesbian and Gay Law Association; the Lesbian and Gay Equality Project; Lesbian and Gay Legal Equality; The Freedom to Marry Coalition of Massachusetts; The Freedom to Marry Foundation; The Lesbian, Gay, Bisexual and Transgender Political Alliance of Western Massachusetts; The Massachusetts Gay & Lesbian Political Caucus; Bay Area Lawyers for Individual Freedom; The Freedom to Marry Collaborative; PridePlanners Association; and other groups have all argued in courts across the country that courts should recognize a constitutional right to same-sex marriage, and that democratically-enacted laws limiting the institution of marriage to traditional marriage should be struck down was unconstitutional.*

(a) Do you believe these legal arguments are frivolous?

(b) Should courts sanction those individuals and organizations who file such briefs for making frivolous arguments?

(c) Do you instead believe that these arguments have some basis in law?

Farris Answers:

(a): As explained in my testimony, there is a solid legal argument in favor of the constitutionality of DOMA. However, in light of the reasoning in the *Lawrence* case, there are many arguments which could be raised to challenge the constitutionality which, in my opinion are wrong, but would

not rise to the level of being frivolous. In terms of the sheer numbers, the scholarly community is strongly on the side of those who wish to dismantle DOMA and traditional marriage. Their opinions, however, are not guided by actual scholarship, but by their political motivations which they recycle into results-oriented reasoning.

(b): Because there are many arguments which, while I believe they are wrong, could be raised to challenge the constitutionality of DOMA, I do not think that courts could automatically sanction individuals or organizations who file such briefs for making frivolous arguments.

(c): In light of the Supreme Court's reasoning in the *Lawrence* case, it is my opinion that some judges might rule favorably that courts should recognize a constitutional right to same-sex marriage, and that democratically-enacted laws limiting the institution of marriage to traditional marriage should be struck down as unconstitutional. I strongly believe that such a ruling would be contrary to the courts' role as interpreter, not maker, of the law. *Lawrence* will need to be repudiated or limited to protect traditional marriage.

2. *The plaintiffs in Goodridge v. Massachusetts Dep't of Health have asked the Massachusetts Supreme Judicial Court to strike down the Commonwealth's traditional marriage law, mandate the granting of marriage licenses to same-sex couples, and thus to take that issue away from the democratic process. And a number of organizations have filed briefs in support of the plaintiffs.*

a.) *Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop filing lawsuits of this sort if they do not win the Goodridge case?*

b.) *Instead, do you expect these activist groups to file lawsuit after lawsuit after lawsuit until they convince courts to strike down traditional marriage laws?*

Farris Answers:

(a): In my over twenty-five years as a lawyer active in the area of constitutional litigation, I have never seen a group which believed itself to be in the right cease litigating for their cause unless (1) they run out of money,

or (2) the judicial opinions become so clear that they become subject to sanctions if they continue.

(b): Based on my legal experience, I believe that these activist groups will continue to file lawsuits.

3. *If you were an attorney representing a state government against a constitutional attack on your state's traditional marriage laws, would you advise your client that there is no litigation risk whatsoever, or would you advise your client that there may be some risk that courts may strike down such laws as unconstitutional?*

Farris Answer:

In light of the Supreme Court's reasoning in the *Lawrence* case, I would have to advise my client that some judges might rule favorably that courts should recognize a constitutional right to same-sex marriage, and that a state's laws limiting the institution of marriage to traditional marriage could be struck down as unconstitutional. *Lawrence* represents a serious threat that cannot be taken lightly.

4. *Professor Carpenter testified that "[n]o State in the Union has ever recognized same-sex marriages," but that is true only because certain states adopted Constitutional amendments to prevent courts from imposing same-sex marriages by judicial fiat.*

a.) For example, didn't courts in Hawaii and Alaska indicate that they were going to impose same-sex marriage by judicial decree, and weren't they stopped only because voters in those states adopted state constitutional amendments in 1998?

b.) Likewise, didn't the voters of Nebraska, Nevada, and California adopt state constitutional amendments or statewide initiatives in 2000 to preempt future court action to impose same-sex marriage by judicial decree?

c.) Finally, wouldn't a federal constitutional amendment be necessary to prevent a constitutional attack based on federal law, such as an attack based on Romer and Lawrence?

Farris Answers:

(a): The courts of Hawaii and Alaska made preliminary rulings that were favorable to the position of same-sex marriage. Those rulings could not be finalized because of the activity of voters.

(b): As you note, voters have moved in many states to tighten the definition of marriage.

(c): Should a state recognize gay marriage, the constitutionality of DOMA will be challenged almost immediately. The theories underlying this challenge will undoubtedly rely on *Lawrence* and *Romer*. Should a federal court agree, gay marriage will become available in every state. At that point, a constitutional amendment will become a necessity, absent a reversal by the Supreme Court of the United States.

5. *Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to an uncertain legal landscape?*

Farris Answer:

One of the pillars of the American legal system is the notion of the rule of law. The rule of law depends, at least in part, on clear statements which the populace may rely upon in their plans. This, coupled with the deep beliefs which many Americans hold on this subject, counsel strongly in favor of the government being clear on this issue. This is the tragedy of the *Lawrence* decision. Not only was clear constitutional precedent overturned, the *Bowers* case, but it was done so in such a way as to make the moral basis of law very unclear. This is not good for the American legal system.

While clarity is important, it is of secondary concern to the importance of being clearly for marriage. The whole idea of civil unions might be clear from a strictly legal view, but if we settle the issue preserving traditional marriage while allowing for allowing for its functional equivalent under another name, we would be rightly criticized for introducing utter legal and moral confusion.

6. *The traditional definition of marriage as a union of one man and one woman has been constant for centuries and in all 50 states. The Defense of Marriage Act simply codified that definition in to the U.S. Code for purposes of federal law. For the last several years, some courts have attempted to redefine marriage by judicial fiat.*

a.) Is it appropriate for courts to change the longstanding, preexisting statutory and common law definitions of marriage?

b.) Which branches of government should be involved in any effort to redefine marriage, and which branches of government should not be involved in such an effort?

Farris Answers:

(a): No. The law of marriage in the United States is not new. For generations, there has been no question but that marriage is between a man and a woman. Only an activist court, based on making law rather than interpreting law, could decide that the institution of marriage is anything other than between a man and a woman. This is not the function of the judicial branch in the American judicial system.

(b)When anyone—the President, the agencies, or the judiciary—makes law, this violates the most fundamental precept of self-government. Only our elected legislatures may make law. It is moral and legal tyranny for the judiciary to continue to make law in this area.

SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

FOR MR. COLEMAN and MR. FARRIS

1. *Are there any district or circuit courts that have, in recent years, refused to follow Supreme Court precedent—for example, in the death penalty or criminal justice context? If so, can you please identify some of those cases to your conclusion that DOMA is not secure.*

Farris Answer:

Lower courts often ignore or distinguish Supreme Court decisions to support their desired conclusion. For example, when the Supreme Court ruled that religious speech is not second class speech, this was blatantly ignored by the Second Circuit. This action by the Second Circuit prompted this stinging rebuke by the Supreme Court in *Good News Club v. Milford*:

> We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. See, *e.g.,* 202 F. 3d 502, 513 (CA2 2000) (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with *Lamb's Chapel*"); 21 F. Supp. 2d, at 150; App. O9-O11 (District Court stating "that *Lamb's Chapel* and *Rosenberger* pinpoint the critical issue in this case"); Brief for Appellee in No. 98-9494 (CA2) at 36-39; Brief for Appellants in No. 98-9494 (CA2), pp. 15, 36.

2. *If the Massachusetts Supreme Judicial Court rules in the pending case of* Goodridge v. Massachusetts Dep't of Health *in favor of the same-sex petitioners, are other courts more or less likely to find portions of DOMA unconstitutional?*

Farris Answer: Every case has its own unique facts and every state has its own statutes. However, if gay marriage becomes a reality in Massachusetts, these new marriages will be brought to other states. In that process, DOMA will be challenged as unconstitutional. Undoubtedly, the Massachusetts' decision, should it be favorable to gay marriage from a constitutional perspective, would be at least persuasive precedent in any court for the proposition that DOMA is unconstitutional. The decision of the Supreme Court in *Lawrence* makes it far more likely that DOMA will be ruled to be unconstitutional by some court.

SENATOR CRAIG:

Question for Mr. Farris

You did not mention the possibility of a constitutional amendment in your written testimony. If U.S. Courts find the Defense of Marriage Act unconstitutional in the future, as you suggested they might despite your believe that it is constitutional, is there anything short of a constitutional amendment that would effectively cure the problem? In the same vein, if a constitutional amendment was in order, would you support a narrower amendment that only addresses the federalism issue rather than one that sets forth a uniform definition of marriage?

This is a difficult issue, for the question is really about the nature of judicial supremacy.

Since judicial impeachment is not a viable alternative at this stage of our political history, the only realistic alternative is a constitutional amendment.

Ideally, the United States Congress would propose an amendment which settles the issue of marriage (by whatever name it is called) being between one man and one woman.

Senator Saxby Chambliss
Question for All Witnesses at September 4, 2003 Hearing
Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
"What is Needed to Defend the Bipartisan Defense
of Marriage Act of 1996?"

"Please provide your thoughts as to the need for a remedy like the Federal Marriage Amendment, which has been introduced in the House, when it would be possible to insure the continued viability of the existing Defense of Marriage Act by resubmitting its language in the form of a constitutional amendment."

Maggie Gallagher:

Is marriage really a key social institution? If so it is a key social institution in all 50 states. Government does not create marriage. Merely passing laws cannot bring a social institution like marriage into being. Government can however seriously disrupt the social institution by undermining our common definition of marriage. Congress in the 19th century recognized this need for a common marriage culture and intervened vigorously to protect monogamy as part of our national understanding of marriage. Taking the definition of marriage off the table, so the American people (and our courts) can get on to other matters, is well within the prerogatives of the American people and is more effective, legally and culturally, than retreating to a mere procedural stance on a matter of this critical importance.

QUESTIONS FOR WITNESSES FROM SENATOR LINDSEY GRAHAM

WHAT IS NEEDED TO DEFEND
THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?

SENATE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS

SEPTEMBER 4, 2003

To all members of the panel:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment." Do you agree that, if a law is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment, and that the same result could not be accomplished by statute?

Maggie Gallagher: Yes.

2. It has been asserted by the Leadership Conference on Civil Rights and others that a constitutional amendment may be appropriate "to address great public policy need." In your view, is the defense and protection of traditional marriage "a great public policy need"?

To the lawyers on the panel:

3. A lot of attention has been directed to the case now pending before the Massachusetts Supreme Judicial Court. The plaintiffs in that case are asking the Massachusetts court to strike down traditional marriage laws in that state. A number of organizations have filed briefs in support of the plaintiffs. Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop at some point if they do not win? Or are they instead simply going to file multiple lawsuits in various jurisdictions, until traditional marriage laws are eventually invalidated by judicial fiat and thereby removed from the democratic process?

4. Professor Carpenter testified that "[n]o State in the Union has ever recognized same-sex marriages." What is your understanding of how previous state court suits were resolved? Specifically, please address the situations in Hawaii, Alaska, Nebraska, Nevada, and California where voters in those states adopted state constitutional amendments, or a statewide initiative in the case of California, in 1998 and in 2000. Finally, would a federal constitutional amendment be necessary to defend these amendments from a suit based on *Romer* and *Lawrence*?

5. Would you agree that, all things being equal, it is better for the law to be clear, rather than unclear – particularly in an area of law that is as important to so many Americans as marriage and family law? Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to an uncertain legal landscape?

SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

TO ALL MEMBERS OF THE PANEL:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment."

(a) Do you agree that, if DOMA is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment?

Maggie Gallagher: Yes.

(b) If DOMA is ruled unconstitutional on equal protection and/or due process grounds, can you suggest any other statute that would be upheld that would provide the substantive results embodied in DOMA?

Maggie Gallagher: No

Senator Saxby Chambliss
Question for All Witnesses at September 4, 2003 Hearing
Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Property Rights
"What is Needed to Defend the Bipartisan Defense
of Marriage Act of 1996?"

"Please provide your thoughts as to the need for a remedy like the Federal Marriage Amendment, which has been introduced in the House, when it would be possible to insure the continued viability of the existing Defense of Marriage Act by resubmitting its language in the form of a constitutional amendment."

Since I am not an attorney or lobbyist, I am not in a position to comment on this particular question.

QUESTIONS FOR WITNESSES FROM SENATOR LINDSEY GRAHAM

WHAT IS NEEDED TO DEFEND
THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?

SENATE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND PROPERTY RIGHTS

SEPTEMBER 4, 2003

To all members of the panel:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment." Do you agree that, if a law is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment, and that the same result could not be accomplished by statute?

Although I am neither an attorney or lobbyist, it appears to me that without a constitutional amendment, any such statute would be potentially subject to constitutional challenge.

2. It has been asserted by the Leadership Conference on Civil Rights and others that a constitutional amendment may be appropriate "to address great public policy need." In your view, is the defense and protection of traditional marriage "a great public policy need"?

There are few issues more worthy of the title, "a great public policy need," than the future of the legal status of marriage.

To the lawyers on the panel:

3. A lot of attention has been directed to the case now pending before the Massachusetts Supreme Judicial Court. The plaintiffs in that case are asking the Massachusetts court to strike down traditional marriage laws in that state. A number of organizations have filed briefs in support of the plaintiffs. Based on your legal experience, are the groups that are litigating to strike down traditional marriage laws likely to stop at some point if they do not win? Or are they instead simply going to file multiple lawsuits in various jurisdictions, until traditional marriage laws are eventually invalidated by judicial fiat and thereby removed from the democratic process?

Although I am not an attorney, it is evident to everyone who has followed the lawsuit here in my home state that the legal groups involved are tenacious and that they fully intend to strike down the marriage laws of every state in the nation through the courts.

4. Professor Carpenter testified that "[n]o State in the Union has ever recognized same-sex marriages." What is your understanding of how previous state court suits were resolved? Specifically, please address the situations in Hawaii, Alaska, Nebraska, Nevada, and California where voters in those states adopted state constitutional amendments, or a statewide initiative in the case of California, in 1998 and in 2000. Finally, would a federal constitutional amendment be necessary to defend these amendments from a suit based on *Romer* and *Lawrence*?

Since I am not an attorney or lobbyist, I am not in a position to comment on this particular question.

5. Would you agree that, all things being equal, it is better for the law to be clear, rather than unclear – particularly in an area of law that is as important to so many Americans as marriage and family law? Would you agree that, regardless of whether the law provides for traditional marriage or same-sex marriage, the law should be clear, so that people can know how to arrange their lives accordingly, rather than be unprepared to respond to an uncertain legal landscape?

I would definitely agree that the law should be very clear in an area as critical as the definition of marriage.

SENATOR KYL

WRITTEN QUESTIONS FOR HEARING ON THE DEFENSE OF MARRIAGE ACT

TO ALL MEMBERS OF THE PANEL:

1. During the hearing, Senator Feingold noted that, if an act of Congress is struck down as unconstitutional, then "the only remedy for that . . . is a constitutional amendment."

(a) Do you agree that, if DOMA is going to be struck down as unconstitutional, the only remedy to enforce that law is a constitutional amendment?

Although I am not an attorney, I strongly believe that DOMA is at great risk of being struck down as unconstitutional and that therefore a constitutional amendment is necessary,

(b) If DOMA is ruled unconstitutional on equal protection and/or due process grounds, can you suggest any other statute that would be upheld that would provide the substantive results embodied in DOMA?

Since I am not an attorney or lobbyist, I am not in a position to comment on this particular question.

SUBMISSIONS FOR THE RECORD

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2003

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

Dear Chairman Cornyn:

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

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

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

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

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

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

Sincerely,

Greg Abbott

Greg Abbott
Attorney General of Texas

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Sandler, Josh (Judiciary)

From: Dwayne & Clarice Alons [dalons@hickorytech.net]
Sent: Tuesday, August 26, 2003 6:09 PM
To: Sandler, Josh (Judiciary)
Subject: Marriage Amendment

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

Dear Mr. Chairman:

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

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

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

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

Sincerely,

Dwayne Alons
1314 7th Street
Hull, IA 51239

House District 4

American Anglican Council

The Very Rev. Canon David C. Anderson, President & CEO

September 2, 2003

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

Attention : Mr. James Ho

I am writing to you on behalf of the American Anglican Council (AAC) to urge you to do all you can to support the historic understanding of marriage as a union of one man and one woman. The AAC is an organization within the Episcopal Church in the United States that upholds the traditional Christian teaching on marriage and family, and represents tens of thousands of individuals as well of entire dioceses and parishes around the country.

We believe that the historic standard for marriage, one man and one woman in a life long union, is embedded in Western Civilization as well as many civilizations around the world, and provides the stability and nurture that is needed for child rearing, role modeling for children, and continuity of family leadership. We find that the world's major religions, and certainly the historic Christian faith, only recognize marriage as a union of a man and a woman.

We believe that historic marriage is under attack by those who would use the courts to replace the role of the legislature and make law by judicial fiat rather than through constitutional process. We are concerned that the pressure brought by social revisionists to include same gender marriage will in time expand to include polygamy, polyandry, and group marriage. We find no basis in historic religious creeds of the world's major religions to support same gender marriage, and in light of current events and judicial trends, urge you to support traditional marriage understanding in every way you can.

A major step would be federal legislative definition, embedded in both law and Constitutional Amendment, which would establish the standard of "one man and one woman in a faithful life long commitment" as the only basis for marriage in all the United States and Territories. Thank you for your consideration.

Sincerely,

David C. Anderson

The Rev. Canon David C. Anderson
President, The American Anglican Council
1110 Vermont Avenue, NW
Suite 1180
Washington, DC 20005

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

1333 H Street, NW Washington, D.C. 20005 (202) 544-1681 Fax (202) 546-0738

September 3, 2003

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

Re: Oppose the Marriage Constitutional Amendment

Dear Senator:

As you consider legislation related to the Defense of Marriage Act of 1996, the American Civil Liberties Union strongly urges you to oppose a proposed constitutional amendment that would deprive the families of gay men and lesbians--and all other unmarried couples--of all legal protections for their relationships. The amendment would be an unprecedented attack on the legal rights of millions of families.

The proposed constitutional amendment, introduced in the House as H.J. Res. 56, would bar same-sex marriages and prohibit the federal government and all states from conferring "the legal incidents" of marriage on unmarried couples. It would explicitly override any contrary provisions in the U.S. Constitution, any of the fifty state constitutions, or any of the laws of the federal or state governments. This extraordinarily harmful amendment could:

Reverse the Constitutional Tradition of Protecting, Not Harming, Individual Liberty Rights: None of the current constitutional amendments restricts individual freedoms. In fact, the amendments to the Constitution are the source of most of the Constitution's protections for individual liberty rights. The proposed amendment, by contrast, would deny all protection for the most personal decisions made by millions of families.

Sharply Break from the Historical Civil Rights Practice of Allowing Stronger State Laws: The federal civil rights laws have always provided a floor, not a ceiling, for civil rights protections. However, the proposed amendment would prohibit states from expanding their civil rights laws to protect gay and lesbian couples, or unmarried heterosexual couples, and their families. It would forbid states from serving their traditional role as testing grounds for stronger civil rights laws.

End the Role of State Governments in Protecting Unmarried Couples and Their Families in Their States: In exercising their jurisdiction over family law issues, many states have extended important protections to the families of gay men and lesbians and other unmarried couples. This state authority is broadly

accepted. In fact, during the vice presidential debates, Vice President Dick Cheney explained that:

> "The fact of the matter is we live in a free society, and freedom means freedom for everybody. … And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. … I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

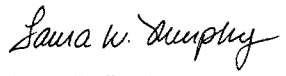
Invalidate All State Domestic Partnership Laws: By prohibiting states from providing any of the "legal incidents" of marriage to unmarried couples, the amendment could void the domestic partnership laws in at least eight states and in more than 100 counties, cities, and towns across the country. These usually modest laws typically include such fundamental rights as allowing a person to visit his or her partner in a hospital, participate in a partner's medical decisions at his or her request, or obtain health insurance. Some state and local governments also provide health insurance to the partners of state or local government employees. The amendment could prohibit state and local governments from making their own decisions on providing benefits to their own employees' families.

Undermine State Adoption, Foster Care, and Kinship Care Laws: In many states, unmarried persons--including unmarried relatives, heterosexual couples, gay and lesbian couples, and even unrelated clergy members--have the same rights as married persons to jointly adopt or jointly provide foster care or kinship care. These unmarried persons are providing loving and secure homes to countless children. By barring states from extending any "legal incidents" of marriage to unmarried persons, the amendment could take away every legal protection that states now provide to these families.

Destroy a Wide Range of Other Rights Provided to Unmarried Persons: By denying unmarried persons all legal protections for any of the "legal incidents" of marriage, the amendment would destroy a wide range of other rights that are important to the lives of unmarried persons. Those legal protections include state and local civil rights laws prohibiting discrimination based on "marital status," state laws protecting unmarried elderly couples who refrain from marrying in order to hold on to their pensions, and even state laws allowing a person, in the absence of a spouse, to oppose the autopsy of a close friend because of the deceased person's religious beliefs.

For these reasons, the ACLU strongly urges you to oppose amending the Constitution to deprive millions of families of their most fundamental rights. Please do not hesitate to call us if you have any questions regarding this issue.

Sincerely,



Laura W. Murphy
Director

Christopher E. Anders
Legislative Counsel

Testimony of Keith A. Bradkowski
Before the Senate Judiciary Committee's Subcommittee on the Constitution
September 4, 2003

Good afternoon Honorable Chairman and Members of the subcommittee.

My name is Keith Bradkowski and I am a resident of California. I've been a registered nurse since 1983 and have worked for many years in hospital administration.

It was on a Tuesday, almost exactly two years ago, that I received a call from American Airlines notifying me that I had lost my life partner, Jeff Collman. Jeff was an American Airlines flight attendant who volunteered to work an extra trip on September 11th. His flight was the first of four planes hijacked by terrorists that day. I know in my heart Jeff died with courage, trying to protect the passengers and crew.

The last time I spoke with Jeff - who was my soul mate of 11 years - was at about at 2 a.m. Boston time on the morning of the 11th. He had awoken in the middle of the night and uncharacteristically called me to say "I love you and can't wait to get home." I believe he must have had some premonition of the events to come, and I feel blessed to have had that last moment with him.

Jeff was the ultimate caregiver -- I experienced his caring by the trail of post-it notes he left for me every time he went on a trip. His last note, still on my bathroom mirror, greets me every morning with a "Guess who loves you?"

Jeff and I had exchanged rings and we were married in our hearts. Legally, it was another matter entirely.

After his death, I was faced not only with my grief over losing Jeff - who was indeed my better half - but with the painful task of proving the authenticity of our relationship over and over again. With no marriage license to prove our relationship existed, even something as fundamental as obtaining his death certificate became a monumental task.

And that was just the beginning.

During the years we were together, Jeff paid taxes and had social security deducted from his paycheck like all other Americans do. But without a civil marriage license, I am denied benefits that married couples and their families receive as a matter of routine.

Jeff died without a will, which meant that while I dealt with losing him, I also had huge anxiety about maintaining the home we shared together. Without a marriage license to prove I was Jeff's next of kin, even inheriting basic household possessions became a legal nightmare.

Married couples have a legal safety net of rights and protections that gay Americans are currently denied. Until Jeff died, I had no idea just how vulnerable we were - where married couples have security and protection, gay couples are left without a net.

Like so many other gay Americans, my mourning and grief were compounded by the stress and anxiety of horrific legal uncertainty and confusion.

The terrorists who attacked this country killed people not because they were gay or straight - but because they were Americans. It is heart wrenching that our own government does not protect its citizens equally, gay ***and*** straight, simply because they are Americans.

Two years ago we were all united against the common threat of terrorism. Now, less than two years later I am sitting here and being told that my relationship was a threat to our country.

Jeff and I only sought to love and take care of each other. I do not understand why that is a threat to some people, and I cannot understand why the leaders of this country would hold a hearing on the best way to prevent that from happening.

In closing, I would like to read an excerpt from a letter that Jeff wrote to me on our last anniversary:

"Keith, we've been through much the past 11 years. Our lives haven't always been easy, but through it all, our undeniable love for each other has carried us through! I love you - don't ever forget that! When you're feeling lonely and I'm not home with you, just pull out this letter and read my words to you once again and know how much you will always mean to me! With loving thoughts of you now and forever, Jeff."

I truly believe I have learned the meaning of the phrase - Love is Eternal.

Thank you. I am honored to have had this chance to appear before you.

Testimony of Elizabeth Birch
Executive Director of the Human Rights Campaign
September 4, 2004

Members of the Subcommittee,

You heard today from four witnesses who talked about the gay community and the impact that we have on this country -- I would just like to take a moment to talk about who gay Americans are.

According to the 2000 Census, gay and lesbian couples live in 99 percent of the counties in this nation. From Massachusetts to Montana, California to Kansas – gay Americans build homes in every corner of the country – just like anyone else. We represent every class and race in our nation. We are parents. We are your sons and daughters, brothers and sisters. We are your neighbors, your dear friends, and your faithful coworkers.

Gay Americans are whole and complete human beings that serve in Congress, risk their lives by defending the country in the armed forces, and make valuable contributions across every spectrum of the society.

We are patriotic citizens who are proud of our country, even as some in our nation are not proud of us. Gay Americans are tax payers who have paid and paid for decades for an American infrastructure that does not serve and protect us. For example, gay people in this country pay into social security from every one of their hard earned pay checks -- and yet we have no ability to protect our partners with our social security survivor benefits.

I want to acknowledge that when framed simply as "gay marriage" – this issue is jarring – even shocking to many Americans. It is our contention that the issue has not been framed correctly for the American people and that put in its proper context, support for this issue changes dramatically.

Civil marriage is a secular, state-based, administrative act that allows the majority of couples in our society to have access to the most fundamental of rights, like:

Access to a hospital room when one's beloved is either healing or dying;

Access to pension plans and social security that have been invested in for a lifetime by one's partner;

Access to the laws of inheritance, which operate so seamlessly for the rest of society and are a nightmare for every gay couple.

There are quite literally more than one thousand federal rights, benefits, protections and responsibilities – along with hundreds of state level rights and protections -- that can only be accessed through a civil marriage license. That is what we are focused on here today: a civil license, and who has the opportunity to obtain it.

It may help to consider that a "marriage license" may be more aptly called a "family license", a "relationship recognition license" or any number of other things – but the fact remains that what we call that license in the United States of America happens to be a marriage license. To develop a wholly separate system for gay couples and their families – while a tempting short term solution – will likely result in a tangled administrative mess over the years to come.

My point in all of this is that when we discuss civil marriage – we are talking about rights and protections for couples that help create stability and security; rights and protections that encourage individual responsibility; rights and protections that gay Americans are currently denied.

No one is here to advocate that churches should have to change their sacred beliefs and age old traditions. Some churches do not allow divorce – but the state does because marriage is also a legal relationship. Similarly, some churches do not recognize a person's ability to remarry after a divorce. Again, the state does because marriage is not only religious – it is also secular, and it is the right of every American to enter into legal relationships separate from the church – that is, every American, ***except*** gay Americans.

In a country where all people are created equal, it seems intellectually dishonest and deeply unfair that some people cannot have the legal rights and protections for their relationships that most others take for granted.

One week from today we will mark the second anniversary of one of the darkest days in American history. But in that darkness, we will also remember the hope and unity that brought this nation together in the face of unimaginable peril and pain.

In fact, in the wake of the attacks, Congress passed the Mychal Judge Act. Named after the gay New York firefighter chaplain who died in the line of duty at the World Trade Center, the Mychal Judge Act made federal benefits available to the named beneficiaries of public safety officers killed in the line of duty, including same-sex partners. Under this bill, it was clear that Congress recognized the family relationships of gay public safety officers and believed that they should be equally provided for under the law. Congress extended the rights and protections of same-sex families during this tragic event; fairness dictates that Congress should not discriminate now.

Indeed, we learned many hard won lessons in the wake of the September 11th tragedy. Perhaps the most important lessons were also the simplest – as Americans, we are all much more alike than we are different – and we are stronger as a nation when we stand together.

I would ask that each of you keep those lessons close to your hearts when you consider this issue. As we gather here today we still have service men and women risking their lives on distant shores so that others may spread their wings in freedom and democracy. We have economic issues and challenges facing our country that are more serious than

anything we have seen in generations. From coast to coast we still see families living without health care, children in need of stronger schools, and adults in need of jobs.

As a country, we will be better able to meet the great challenges before us if we stand together in spite of our differences and because of our similarities. As a nation – we would be wise to spend our time and energy finding new ways to work together, rather than new ways to marginalize and demean one another.

For thousands and thousands of gay Americans, today's hearing potentially represents a return to a more dark and fearful time – as Congress contemplates how to further bar gay couples and our families from the many protections and responsibilities others enjoy as a matter of birthright.

As I leave you today, I will simply say that the Constitution is an amazing and wonderful document that we as a people have spent more than 200 years perfecting. We have worked tirelessly to expunge discrimination and prejudice from it.

The so called Federal Marriage Amendment would take a giant step backward in our national evolution -- the FMA would prevent gay couples in committed, lifelong relationships from fully accepting individual responsibility for their families;

The FMA completely overrides each state's right and ability to make its own decisions about family law.

And of course, the FMA would single out one group of Americans for unequal treatment; denying gay people rights and protections that most don't have to think twice about.

The Federal Marriage Amendment represents a giant leap backward in our national effort to form a more perfect union, and to really recognize that all people are created equal.

On behalf of fair minded Americans across the country who value equality and fairness, I ask you to oppose this amendment.

Thank you.

STATE OF NEBRASKA

Jon Bruning
Attorney General

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

September 3, 2003

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

Dear Mr. Chairman:

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

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

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

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

Respectfully submitted,

Jon Bruning
Attorney General
State of Nebraska

Testimony to the United States Senate Judiciary Committee

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

September 4, 2003

In May I attended the wedding mass of my friends Brendan Fay and Tom Moulton in Brooklyn, NY, officiated by two brave priests, one Catholic and the other Episcopal. Tom's mother and Brendan's sisters visiting from his native Ireland walked them down the aisle. Tom is a pediatric oncologist in the Bronx, Brendan a long-time human rights activist. They met seven years ago through the gay Catholic group Dignity, and own a small home in Queens. In July, Brendan and Tom went to Toronto and got legally married. Brendan just renewed his green card for a year. If the federal government would recognize their marriage, they would have peace of mind knowing that they would be able to stay in the U.S., and not have to leave Tom's native country to stay together. Binational gay couples occasionally have to move to a third country to stay together, as did Charles Zhang and Wayne Griffin, natives of China and New Hampshire, respectively. Fourteen countries, including South Africa and Israel, recognize same-sex couples for the purposes of immigration. The U.S. does not.[1]

Already hundreds of same-sex couples have gotten married since Ontario's highest court legalized gay marriage in June, and Canada's premier introduced legislation to legalize marriage throughout the country. British Columbia quickly followed suit, and Massachusetts' highest court will rule soon on the issue.

In reaction to these developments and the U.S. Supreme Court's landmark ruling striking down laws criminalizing homosexuality in *Lawrence v. Texas*, anti-gay activists are pushing the Federal Marriage Amendment to the U.S Constitution that would ban state or federal recognition of the marriages of same-sex couples, and would prevent courts from mandating equal benefits for gay couples at the level of state policy, as Vermont's highest court did in 1999. This comes seven years after Congress passed the Defense of Marriage Act banning federal recognition of same-sex marriages, and told states they were free to not recognize them as well.

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[1] Cahill, S., Ellen, M., and Tobias, S. (2002). *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families*. New York: Policy Institute of the National Gay and Lesbian Task Force. Pp. 54-56.

How Nonrecognition Hurts Gay Families

The nonrecognition of same-sex marriages means gay couples do not have basic elements of family security. For example:

- Lisa Stewart of South Carolina has terminal cancer. She worries what will happen to her 5-year-old daughter Emily if she dies. Will her ten-year partner Lynn be able to maintain custody in a state that is considering an anti-gay adoption ban? Being able to marry would ease Lisa and Lynn's minds, and protect the integrity of their family. How could anyone construe Lisa and Lynn's desire to maintain their family's security as a threat to other families?

- Bill Randolph lost his partner of 26 years when the World Trade Center was attacked on September 11, 2001, but is not eligible for Social Security survivor benefits—benefits that would automatically be given to the surviving spouse in a heterosexual marriage. "If you're straight and have a marriage license, it's one, two, three," said Randolph. "We're clawing at it just to be acknowledged."[2]

- Jeanne Newland left her job in Rochester N.Y. to go with her life partner, Natasha Doty, to Virginia where Doty had accepted a new job. Newland expected to find a job in short order, but after six months of trying unsuccessfully to find work, she applied for unemployment benefits—benefits that would have been granted automatically if she had been married to her partner. New York state denied her claim, stating that following her partner was not a "good cause" to leave a job. This situation "just...didn't seem fair" to Newland.[3]

- Bill Flanigan was prevented from visiting his life partner, Robert Daniel, when Daniel was dying in a Baltimore hospital in October 2000. Hospital personnel refused to acknowledge that Flanigan and Daniel were family. "Bill and Bobby were soulmates and one of the best couples I've known," said Grace Daniel, Robert's mother. "They loved each other, took care of each other, came to family holidays as a couple and Bill still babysits for my grandson. If that isn't family, then something is very wrong. When someone is dying, hospitals should be bringing families together rather than keeping them apart."[4]

- When Linda Rodrigues Ramos died tragically in a car accident, her partner, Lydia Ramos, did not expect that she was about to lose their daughter also. After the funeral, Linda's sister held a memorial gathering and asked that the daughter be

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[2] Lee, Denny. (2001, October 14). "Neighborhood Report: New York Up Close; Partners of Gay Victims Find The Law Calls Them Strangers." *The New York Times*.
[3] Rostow, Ann. (2002, Jan. 24). "Lesbian Sues State for Unemployment Benefits." *Gay.com / PlanetOut.com Network*. Available at http://www.gay.com/news/article.html?2002/01/24/2.
[4] Lambda Legal Defense and Education Fund. (2002, Feb. 26). "University of Maryland Medical System to be Sued Wednesday by Gay Man Prevented from Visiting His Dying Partner at Shock Trauma Center in Baltimore." News Release. Available at http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1011.

present. However, Linda's sister never returned the girl as she had promised, refusing Lydia's pleas and not even allowing Lydia to visit her daughter. Not understanding Lydia's relationship to her daughter, a court refused to grant her emergency guardianship. The girl was completely cut off from her only surviving mother, her siblings and her grandparents on that side. Only after going to court, with representation from Lambda Legal Defense and Education Fund, was Lydia able to gain permanent guardianship and be reunited with her daughter.[5]

The proposed Constitutional amendment wouldn't just ban civil marriage for same-sex couples; it would also prohibit conferring "marital status or the legal incidents thereof" on same-sex couples based on an interpretation of the federal constitution, state constitutions, or state or federal law. This could jeopardize hard-won domestic partner health benefits and registries, offered in nearly a dozen states and hundreds of municipalities, as well as by thousands of private employers. Civil unions, which afford most of the obligations, responsibilities and recognitions of marriage to Vermont gay couples at the level of state policy, could also be jeopardized. While anti-gay groups say this would allow legislatures to pass domestic partner and civil unions policies, these same groups regularly challenge more limited forms of same-sex partner recognition.[6] The proposed Federal Marriage Amendment would only embolden these challenges and could deter state and local governments from offering domestic partner health insurance to their employees or registries for resident gay couples. States should be able to decide for themselves whether or not to offer domestic partnership, civil unions or civil marriage to same-sex couples.

The Particular Needs of Lesbian and Gay Families with Children

Some anti-gay activists claim that marriage is about procreation, that gay and lesbian couples don't have children, and therefore that they should be denied the right to marry. In fact, parenting is widespread among same-sex couples. According to the 2000 Census, same-sex partnered households were reported in 99.3 percent of all U.S. counties, and represented every ethnic, racial, income and adult age group.[7] While 72.4 percent of heads of household in reporting gay and lesbian couples were non-Hispanic white, 10.5 percent were black, 11.9 percent were Hispanic, 2.5 percent were Asian/Pacific Islander, 0.8 percent were American Indian, and 1.8 percent were multiracial.[8] This nearly corresponds to the ethnic makeup of the overall U.S. population.

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[5] Source: Jennifer Pizer, Esq., Lambda Legal Defense and Education Fund, Oct. 30, 2002.

[6] Such challenges have overturned domestic partner policies in Atlanta, GA; Minneapolis, MN; Arlington County, VA and Massachusetts (all final) as well as Philadelphia (on appeal). Ten other legal challenges were unsuccessful. For more detail, see Appendix A attached.

[7] Bradford, J., Barrett, K., and Honnold, J., A. (2002). *The 2000 Census and Same-Sex Households: A User's Guide*. New York: National Gay and Lesbian Task Force Policy Institute. Available at http://www.ngltf.org/pi/census.htm.

[8] These data were gathered using Table PCT22 of the U.S. Census' American Factfinder, available at http://factfinder.census.gov. For information on how to access these data through the U.S. Census, see Bradford, J., Barrett, K., and Honnold, J., A. (2002). *The 2000 Census and Same-Sex Households: A User's Guide*. New York: National Gay and Lesbian Task Force Policy Institute. Available at http://www.ngltf.org/pi/census.htm.

Many same-sex couples are raising children. Thirty-four percent of lesbian couples and 22 percent of gay male couples[9] reporting on the 2000 Census have at least one child under 18 years of age living in their home.[10] Many more are parents of children who do not live with them, or are "empty nesters." The 2000 Black Pride Survey, undertaken by the Policy Institute of the National Gay and Lesbian Task Force in collaboration with 10 Black Gay Pride organizations and five African American researchers, queried nearly 2,700 black gay, lesbian, bisexual and transgender people in nine cities. It found that almost 40% of black lesbians and bisexual women, 15% of black gay or bisexual men, and 15% of black transgender people reported having children. Twenty-five percent of black lesbians and 4% of black gay men reported that those children lived with them.[11] An earlier study found that one in four black lesbians and 2% of black gay men lived with a child for whom they had child-rearing responsibilities. One in three black lesbians reported having at least one child, as did nearly 12% of the gay black men surveyed.[12] Analysis of the 1990 Census data on same-sex households found higher rates of parenting among black, Hispanic, Asian American and Native American lesbian couple households than among white non-Hispanic lesbian households, although these differences were not statistically significant.[13]

Clearly, many lesbian and gay couples have children, and their families in particular would benefit from the family security that partner recognition would afford. Many other same-sex couples don't have children, but still need the family security protection that married heterosexuals take for granted, such as hospital visitation rights and health insurance for their partners. Unfortunately, even the most limited forms of partner recognition like domestic partnership would be threatened by the Federal Marriage Amendment.

While Americans are still split on the issue of same-sex marriage, an overwhelming majority does support equal access to the specific obligations, responsibilities and recognitions of marriage, all of which are threatened by the Federal Marriage Amendment. For example, most people feel that gays and lesbians should be entitled to inheritance rights (73%) and Social Security survivor benefits (68%), benefits that Brazil offers to same-sex surviving partners but that the United States does not.[14] The U.S.

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[9] Some individuals in these couples would not identify as gay or lesbian, but by some other term for homosexual. Others would identify as bisexual. Still others would not want to be categorized. But the critical point is that these individuals are in an amorous, long-term, committed, partnered same-sex relationship widely viewed as a "gay or lesbian" relationship.

[10] U.S. Census Bureau (2003). *Married-Couple and Unmarried-Partner Households: 2000.* http://www.census.gov/prod/2003pubs/censr-5.pdf.

[11] Battle, J., Cohen, C., Warren, D., Fergerson, G. and Audam, S. (2002). *Say It Loud: I'm Black and I'm Proud; Black Pride Survey 2000.* New York: National Gay and Lesbian Task Force Policy Institute. p. 14.

[12] Mays, V., Chatters, L., Cochran, S., and Mackness, J. (1998). "African American Families in Diversity: Gay Men and Lesbians as Participants in Family Networks." *Journal of Comparative Family Studies.* 29(1): 73-87.

[13] Bradford et al. (2002).

[14] Kaiser (Henry J.) Family Foundation (2001). *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation.* Cambridge: Author. Available at

public supports "legally sanctioned partnerships and unions" for gay couples by a plurality of 47 to 42%, according to one 2001 poll.[15] The public is evenly divided on civil unions, with 49% supportive and 49% opposed.[16] According to a 2001 poll, nearly 40%of the public supports the freedom of same-sex couples to marry.[17] Moreover, public support for equal marriage rights is growing rapidly: polls conducted in the last several months, for example, show that majorities in Massachusetts (50-44%), New Hampshire (54-42%) and New Jersey (55-41%) support same-sex marriage.[18] Similarly, 58% of college freshmen support the freedom to marry for same-sex couples, according to a 2001-2002 survey.[19]

We are hopeful that, with time and public education, a majority of Americans will understand and support equal treatment of same-sex couple families. However, the rights of members of a stigmatized minority should not be determined by the prejudices of the majority. James Madison warned that majority rule, unchecked, can lapse into majority tyranny.[20] Our system of representative government, separation of powers, checks and balances, and the Bill of Rights was designed to prevent against majority tyranny over unpopular minority groups.[21] We urge Congress to reject the Federal Marriage Amendment, which would enshrine discrimination in our country's most sacred founding document.

The U.S. Supreme Court just ruled that the state cannot single out gay people for harassment and discriminatory treatment. Justice Kennedy, writing for the majority in *Lawrence v. Texas*, spoke of "respect" for gay couples and warned that "the state cannot demean their existence..." These are important, basic principles of fairness.

Respecting Tradition

While anti-gay activists often point to tradition to justify opposing marriage rights for same-sex couples, the United States has a centuries-old tradition of respecting marriages performed in other countries and jurisdictions under the principle of "comity." Marriages valid where celebrated are respected everywhere. That system has stood the U.S. in good stead up to this point. When American couples travel abroad, don't we want other countries to respect their marriages?

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http://www.kff.org/content/2001/3193/LGBSurveyReport.pdf.; Rohter, L. (2000, June 10). "Brazil Grants Some Legal Recognition to Same-Sex Couples." *New York Times*.

[15] Kaiser Family Foundation (2001).

[16] Newport, Frank (2003, May 15). "Six out of 10 Americans Say Homosexual Relations Should Be Recognized as Legal; But Americans are evenly divided on issue of legal civil unions between homosexuals giving them the legal rights of married couples." Gallup News Service.

[17] Kaiser Family Foundation (2001).

[18] Phillips, Frank (2003, April 8). "Support for gay marriage; Mass. poll finds half in favor." *Boston Globe*; Associated Press (2003, May 23). "Poll: New Hampshire residents favoring law for same-sex marriages"; Zogby International Poll, July 15-19, 2003.

[19] "2001-2 Freshmen Survey: Their Opinions, Activities, and Goals." (2002, February 1.) *The Chronicle of Higher Education*. p. A37. Available at http://chronicle.com/free/v48/i21/opinions.htm.

[20] Madison, J. (1987). Federalist 10. *The Federalist Papers*. New York: Penguin Classics.

[21] Madison. Federalist 51.

The U.S. Constitution has traditionally been amended to clarify or expand rights, not to single out a group of people to deny them the protections of the Constitution and the Bill of Rights. This anti-gay marriage amendment would set a disturbing precedent and is not in the best tradition of American justice.

Real People, Real Families

Marriage rights for gay couples are no longer an abstract hypothetical. Hundreds of gay and lesbian couples have married in Canada, and they are *married*. Some are Americans who are returning home as married couples. These married gay couples will go about their lives and do the things other married couples do—apply for mortgages, seek health benefits for their spouses and children, and build a life together. Married Canadian couples will travel to the U.S. on vacation, to work, or to study.

The American people have a choice in how they are going to treat these hopeful newlyweds. They can treat them with respect, dignity and fairness, or they can discriminate against them. We trust that most Americans will do the right thing. We know that many Americans are wrestling with this issue, and ask them to approach it with an open mind. We urge Congress to reject the Federal Marriage Amendment, which represents the divisive politics of the past, and to reject this political attack on gay and lesbian families.

APPENDIX A

Cases Involving Challenges to Local Domestic Partnership Benefit Programs
(Status as of October, 2002)

STATUS	CITY	CASE (date of last decision)
Domestic Partnership Program Overturned -Final	Atlanta, GA	*McKinney v. City of Atlanta* (March 14, 1995; S. Ct.)
	Minneapolis, MN	*Lilly v. City of Minneapolis* (March 29, 1995; S. Ct.)
	Boston, MA	*Connors v. City of Boston* (July 8, 1999; S. Ct.)
	Arlington County, VA	*White v. Arlington County* (April 21, 2000; S. Ct.)
Domestic Partnership Program Overturned – On Appeal	Philadelphia, PA	*Devlin v. City of Philadelphia* (August 29, 2002; App. Ct.)

Domestic Partnership Program Upheld -Final	Atlanta, GA	*Morgan v. City of Atlanta* (November 3, 1997: S. Ct.)
	Pima County, AZ	*LaWall v. Pima County* (July 14, 1998; Ct. of Ap.)
	Santa Barbara, CA	*Jacks v. City of Santa Barbara* (January 13, 1999; not appealed)
	Denver, CO	*Schaefer & Tader v. City of Denver* (April 12, 1999; S. Ct.)
	Chicago, IL	*Crawford v. City of Chicago* (October 6, 1999; S. Ct.)
	New York City, NY	*Slattery v. City of New York* (February 29, 2000; Ct. of Ap.)
	Chapel Hill and Carrboro, NC	*Godley v. Town of Chapel Hill and Town of Carrboro* (May 16, 2000; not appealed)
	Broward County, FL	*Lowe v. Broward County* (April 4, 2001; S. Ct.)
	Vancouver, WA	*Heinsma v. City of Vancouver* (August 23, 2001; S. Ct.)
	Montgomery County, MD	*Tyma v. Montgomery County* (June, 2002: S. Ct.)

*Date is of last available opinion or the denial of a review by a higher court, whichever is most recent. Source: Gossett, Charles. (1999, Sept. 4). "Dillon Goes to Court: Legal Challenges to Local Ordinances Providing Domestic Partnership Benefits." Paper presented to the annual meeting of the American Political Science Association. Atlanta, GA. Updated in personal communication with Charles Gossett, October 2002.

U. S. Senate Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Property Rights

Hearing on "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"

September 4, 2003

Written Testimony of Professor Dale Carpenter, University of Minnesota Law School

To the Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify on the question of whether any action should be taken to defend the Defense of Marriage Act of 1996 (DOMA). I will address my testimony to the question whether a constitutional amendment might be appropriate. I oppose amending the Constitution to forbid same-sex marriages, and in particular I oppose the proposed Federal Marriage Amendment, H.J. Res. 56 (the "FMA"). In this testimony I will discuss four principal reasons for that opposition.

To summarize my four main points: First, a constitutional amendment is unnecessary because federal and state laws, combined with the present state of the relevant constitutional doctrines, already make court-ordered, nationwide same-sex marriage unlikely for the foreseeable future. Therefore, an amendment banning same-sex marriage is a solution in search of a problem. Second, a constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism in an area traditionally reserved to state regulation. Third, a constitutional amendment banning same-sex marriage would be peculiarly anti-democratic, cutting short an ongoing national debate over what privileges and benefits, if any, ought to be conferred on same-sex couples, and preventing democratic processes from expanding individual rights. Fourth, the proposed FMA is constitutional overkill that reaches well beyond the stated concerns of its proponents. Whatever one thinks of same-sex marriage as a matter of policy, no person who cares about our Constitution should support this unnecessary, radical, unusually anti-democratic, and overly broad departure from the Nation's traditions and history.

First, a constitutional amendment is unnecessary. Advocates of the proposed FMA claim it is needed to prevent both state and federal courts, at the request of gay-rights advocates, from imposing same-sex marriage on the whole country. Yet neither state nor federal courts have done so thus far. Nor, given the present state of the relevant constitutional doctrines, are they likely to do so for the foreseeable future. Anyone with a printer and enough money for a filing fee can file a lawsuit, of course, but winning is a different matter. Here, I will not address my personal view of the merits of the legal arguments for same-sex marriage, but only the likelihood that such arguments will be persuasive to courts of final resort in the near future.

Let us start with a basic fact. No state in the union has ever recognized same-sex marriages. Thirty-seven states have explicitly declared same-sex marriages contrary to their own public policy, barring recognition of same-sex marriages under state statutes or state constitutions. DOMA bars recognition of such marriages for federal purposes.

It is unlikely courts will impose immediate, nationwide gay marriage contrary to this powerfully expressed legislative and popular will. Even if and when a state court ordered same-sex marriage in its jurisdiction, that should be a matter for a state to resolve internally, through its own governmental processes, as the states have so far done. Neither federal nor state courts are likely to order same-sex marriage under the traditional interpretation of the Constitution's Full Faith and Credit Clause. Nor, for the foreseeable future, are courts likely to mandate same-sex marriage under substantive federal constitutional doctrines, such as the Fourteenth Amendment's Due Process Clause or the Equal Protection Clause. Let me now address each of these points in greater detail.

Substantive state constitutional law

Going back to the early 1970s, in cases challenging state marriage laws under substantive doctrines of state constitutions, such as state constitutional equal-rights provisions, most state courts have rejected arguments for same-sex marriage. *See, e.g., Singer v.* Hara, 11 Wash. App. 247, 522 P.2d 1187, *review* denied, 84 Wash.2d 1008 (1974). The strong resistance of state courts to same-sex marriage should not be surprising since 87 percent of all state court judges are subject to some form of election. Thus, state courts are accountable to a public that in most jurisdictions still opposes same-sex marriage by fairly large margins.

On the three occasions that state courts have seriously considered ordering the recognition of same-sex marriage in their states under their own substantive state constitutional doctrines – in Alaska, Hawaii, and Vermont – the democratic processes in those states immediately dealt with the issue by preventing the imposition of full-fledged gay marriage. In Hawaii, for example, the state legislature and the people themselves voted to amend their own constitutions to permit the state legislature to define marriag. In Vermont, the state legislature created a system of civil unions that extends the benefits and responsibilities of marriage (under state law only) to same-sex couples, but reserves marriage itself for opposite-sex couples. Historically, the states themselves have been entrusted to rein in the activism of their state courts. The states certainly have the power to do so, whether or not they choose to use it. They have not asked for, or received, the assistance of federal authorities to deal with their own state statutes and state constitutions.

The Massachusetts Supreme Judicial Court is currently considering a case, *Goodridge v. Massachusetts Dep't of Public Health*, involving a challenge to that state's restriction of marriage to opposite-sex couples. I do not hazard a guess at what the outcome might be, though the record so far for same-sex marriage supporters has not been promising. Even if the Massachusetts court, or any other state court, were to order the recognition of full-fledged, same-sex marriage in a state, the ruling would be limited in its reach to the state itself. A hypothetical state court ruling favoring same-sex marriage could not require other states to recognize such marriages. That would require additional hypothetical rulings by courts-of-last-resort in the

other states. A pro-gay-marriage ruling, as in Massachusetts, would likely be based on the state, not federal, constitution. Thus, the immediate legal effect of the decision would be confined to the state itself.

Could a pro-gay-marriage ruling in a state affect the outcomes of such challenges in other states by influencing other states' substantive interpretations of their own constitutions? Again, this presents a hypothetical, not existing, question. Certainly such a ruling would not bind other states' interpretation of their own state constitutions. Though courts in sister states might regard the pro-gay marriage ruling as persuasive authority in the interpretation of their own state constitutions, they would also have a much larger body of contrary authority from other states to follow. The lone state to recognize same-sex marriage would hold the minority view for a very long time. And, of course, in most states courts would be both accountable to the state's voters and would be reversible by popular democratic processes. Both of these factors would make them reluctant, as they historically have been, to impose immediate gay marriage even in their jurisdictions.

The Full Faith and Credit Clause

Supporters of the FMA argue that *if* a state court imposes same-sex marriage on a state, then courts in other states or federal courts *might* require states in their jurisdiction to recognize such marriages under the Constitution's Full Faith and Credit Clause (FFCC), Art. IV, Sec. 1. This fear, too, is hypothetical and exaggerated.

As a nation, we have already addressed this issue. In 1996, in reaction to litigation for same-sex marriage in Hawaii, Congress passed, and President Clinton signed, DOMA. DOMA defines marriage as the union of one man and one woman for purposes of federal law, such as entitlement to Social Security benefits and for federal taxation. DOMA also provides that states may refuse to recognize same-sex marriages performed elsewhere. A state court decision recognizing same-sex marriages in a given state does not by itself make DOMA invalid.

Supporters of a constitutional amendment warn that Adam and Steve, or Sue and Ellen, will go to a state that has just recognized same-sex marriages, get married there, and then return to their home state demanding recognition of their union under the FFCC. By this method, they conjecture, gay marriage would gradually sweep the nation.

However, the FFCC has never been interpreted to mean that every state must recognize every marriage performed in every other state. It is true that, under the *place-of-celebration* rule, states usually recognize marriages validly performed in other states. But each state also reserves the right to refuse to recognize a marriage performed in another state (or performed in a foreign country, like Canada) if that marriage would violate the state's public policy. Under this *public-policy exception* to the general rule of recognition, states will generally overlook small or technical differences in the marriages laws of other states. For example, the fact that a marriage was witnessed by only two people (as required in a sister state), instead of three (as required in the home state), would not usually prevent recognition of a marriage validly performed in the sister state.

But under the public-policy exception, states do not ordinarily overlook major differences in the marriage laws of foreign jurisdictions. Thirty-seven states have already declared by statute and/or state constitution that it is their public policy not to recognize same-sex marriages. Even in the other thirteen states, state policy is probably adequately declared on the issue of whether same-sex unions will be recognized. In that sense, DOMA and the 37 "little DOMAs" passed by the states were probably redundant, a form of insurance against the recognition of same-sex marriage by activist judges. In any event, even former Republican congressman Bob Barr, who opposes same-sex marriage on policy grounds, wrote recently that DOMA is more than adequate to prevent the imposition of nationwide same-sex marriage.

Under the traditional understanding of the FFCC and choice-of-law principles, then, it is doubtful state or federal courts would require states to recognize same-sex marriages performed elsewhere. This does not mean, of course, that litigants might not be able to find a state or federal court judge willing to do so. But it does mean that the chances of having such a ruling withstand appellate review are slim.

Substantive federal constitutional doctrines

It is also unlikely the Supreme Court or the federal appellate courts, for the foreseeable future, would declare a constitutional right to same-sex marriage under present understandings of substantive doctrines arising from the Fourteenth Amendment's Due Process Clause or the Equal Protection Clause. No federal or state appellate court, to date, has declared such a right under any substantive federal constitutional doctrine. Thus, once again, we are dealing with a purely hypothetical fear of a possible future ruling by a court of last resort.

Lawrence v. Texas, 123 S. Ct. 2472 (2003), the recent Supreme Court decision using the Due Process Clause to strike down Texas's law criminalizing homosexual sex, has somehow been transformed by the popular press and by FMA supporters into a gay-marriage decision. It is not that. In *Lawrence*, the Court emphasized that the Texas law violated the right to liberty insofar as it intruded on private sexual relations between adults in the home. The interest involved was the liberty to avoid state intrusion into the bedroom via criminal law. It did not involve the liberty to seek official state recognition of the sexual relation, along with all the benefits state recognition entails. *Lawrence* involved the most private of acts (sexual conduct) in the most private of places (the home); marriage is a *public* institution freighted with *public* meaning and significance. The Court noted explicitly that it was not dealing with a claim for formal state recognition. Especially in light of Justice Scalia's fretting that same-sex marriage may soon be the child of *Lawrence*, these qualifications signal a Court that seems very unlikely even to address the issue in the near future, much less to take the bold step of ordering nationwide same-sex marriage.

The Equal Protection Clause hardly seems more promising in the near term for gay-marriage advocates. The only Justice in *Lawrence* to embrace this seemingly more gay-marriage-friendly argument, Justice O'Connor, made clear her unwillingness to take the doctrine that far.

Romer v. Evans, 517 U.S. 620 (1996), has, so far, not had much generative force in fighting legal discrimination against gay people. That may be because of the unprecedented nature of the law the Court confronted in *Evans*: a state constitutional amendment that (1) targeted a single class of people (homosexuals) and (2) sweepingly denied them all civil rights protections in every area of life, from employment to housing to education. Because the law was so overly broad, the narrow justifications the state offered could not sustain it, leaving only impermissible animus as a motivating force behind the law. *Evans* was one of the few times in the Court's history when a law failed the lowest level of constitutional scrutiny, the rational basis test.

Unless the Court were to apply strict scrutiny to laws that fence out gay couples from marriage, a step neither it nor any federal court has taken, states will need to show only a rational basis for their marriage laws. This test requires the state only to show that the law is rationally related to a legitimate governmental end. That is ordinarily not a difficult task. Thus, there is little reason to believe a court would strike down all 50 state marriage laws or DOMA on Equal Protection grounds, at least under the present state of those doctrines. Certainly no court has yet done so.

Aside from the merits of a constitutional claim for same-sex marriage, it is unlikely for practical and historical reasons the Court would impose it on the nation in the near future. The Court rarely strays far or long from a national consensus on any given issue. When it does, it risks its own institutional standing and credibility. *Lawrence* is no exception to this rule since sodomy laws existed only in a minority of states (13 of 50) and were opposed by most Americans. By contrast, no state has recognized same-sex marriage and laws limiting marriage to opposite-sex couples enjoy broad popular support in most states and nationwide. If the Court were to order same-sex marriage, whether under the FFCC or a substantive constitutional doctrine, it would be taking on almost the entire country. I cannot think of another time the Court has done that in modern times, with the instructive and chastening exception of *Roe v. Wade*.

In short, the fear of court-imposed, nationwide gay marriage is exaggerated and hypothetical. To amend the Constitution now to prevent it would be to do so based on fear of a future, hypothetical adverse decision by an appellate court or the Supreme Court, in a case that has not been filed, by litigants who do not have standing, and will not get standing until another future, hypothetical adverse decision by a state court succeeds in making its pro-gay marriage ruling stick, something no state court in the history of the country has yet managed to do.

The Constitution is the Nation's founding blueprint. We should not trifle with it. There have been more 10,000 proposed constitutional amendments, all supported by advocates who no doubt sincerely believed that their causes required immediate constitutional support in order to save the Republic. Yet leaving out the extraordinary founding period that produced the ten amendments known as the Bill of Rights and the extraordinary post-Civil War period that produced three amendments, we have amended it only 14 times in more than two centuries. It should not be tampered with to deal with hypothetical questions as if it were part of a national law school classroom. It should be altered only to deal with some clear and present problem that cannot be addressed in any other way. We are nowhere near that point on the subject of same-

sex marriage. The "problem" of nationwide same-sex marriage is neither clear nor present. At the very least, we should wait until an issue actually arises before we address it by changing the Constitution.

Second, a constitutional amendment would be a radical intrusion on federalism. From the founding of the Nation, the design of our federal system has been that the federal government has limited and enumerated powers and that state governments have residual powers. The states have been free to legislate on all matters not reserved for federal authority, such as interstate commerce or waging war. State power has been limited only insofar as necessary to protect nationhood, the national economy, and individual rights. Specifically, states have traditionally controlled family law, including the definition of marriage, in their jurisdiction. The Nation's commitment to this federalism is enshrined in the Constitution's enumeration of congressional powers in Article I and in the reservation of other powers to the states in the Tenth Amendment.

Concern over preserving the traditional authority of the states over matters like family law has been a central theme of the Court's recent jurisprudence. In its recent commerce-clause cases, the Court has emphasized the need for limits on federal power in the interest of preserving states' domain over areas like criminal law and family law. *See, for example, United States v. Lopez*, 514 U.S. 549 (1995). These recent decisions upholding the role of the states have been supported by the Court's most conservative justices, like Chief Justice William Rehnquist and Justices Clarence Thomas and Antonin Scalia.

Federalism is not valuable simply as a tradition. It has a practical benefit. Federalism has served the country well insofar as it has allowed the states to experiment with public policies, to determine whether these policies work or need to be amended, and then to follow or decline to follow the example of other states. Acting as laboratories of social change, the states have been responsible for some of the most important innovations in American law. These innovations have included allowing women to vote, setting maximum hours for working, adopting minimum wage requirements, and prohibiting child labor.

Repudiating this long history, the FMA would impose a single, nationwide definition of marriage as the union of one man and one woman. It would prohibit state courts or even state *legislatures* from authorizing same-sex marriages. The supporters of the FMA freely acknowledge this much. But additionally, it would tell states how to interpret their own state constitutions and state statutes by prohibiting them from "construing" their own laws so as to permit same-sex marriages or grant marriage-like benefits to same-sex couples. Although state legislatures would presumably be free to adopt "marriage-lite" institutions like domestic partnerships or civil unions that accord some of the benefits of marriage to same-sex couples, these laws might be practically unenforceable in state courts. State courts, asked to referee a dispute between the couple and the state over whether they qualified for benefits under a domestic-partnership law, would be prohibited by the FMA from "construing" the law to grant "the legal incidents [of marriage]" to the couple. Purporting to protect the states from gay marriage, the FMA tramples federalism.

Yet federalism is working on this subject. A national debate is underway on whether to grant some form of legal recognition to same-sex couples. States and localities are trying a

variety of approaches, from complete non-recognition to domestic partnerships that grant some benefits to civil unions that grant many of the benefits of marriage. These experiments test whether encouraging stable same-sex unions through some formal legal recognition and support is, on balance, a good or bad thing. Under federalism, states have the opportunity to see whether such recognition truly has the ill effects predicted by opponents.

It is true that there have been limited historical exceptions to the general rule that states control their own family law, including the definition of marriage. The Supreme Court decided in *Loving v. Virginia*, 388 U.S. 1 (1967), for example, that a state antimiscegenation law was unconstitutional. That decision was grounded in the fundamental right to marry and in the anti-racist principles of the Equal Protection Clause, which explicitly restrains state power. The decision altered state law to uphold individual rights and make the institution of marriage more inclusive, not to derogate individual rights and make marriage more exclusive. The decision was thus distinct in substance and spirit from the FMA. Additionally, Congress required Utah and a few other states to relinquish polygamy as a condition for entering the union as a state. Yet in so doing, Congress was dealing with an actual controversy then extant. It was not dealing with the hypothetical possibility that Utah might some day recognize polygamous marriages. Congress was also arguably exercising its constitutional power to admit new states, an issue not present in the FMA context.

In short, there is simply no precedent for amending the Constitution to intrude on states' structural constitutional power to shape their own family law. Vice President Dick Cheney has argued that states should decide the issue of same-sex marriage for themselves. Prominent American conservatives – including Bob Barr and legal scholar Bruce Fein – oppose the FMA on federalism grounds. Under federalism principles, this is not an area where federal policy needs to intrude.

Third, a constitutional amendment would be peculiarly anti-democratic. A constitutional amendment would have the effect of allowing the people of some states to order the people of other states not to experiment with their own state family law. The people of the states, traditionally free to act either through popular initiative or through their own state legislatures, would lose their right to consider the issue of same-sex marriage (or, as a practical matter, domestic partnerships or civil unions). Their family law would be frozen by the will of people in other states or, alternatively, by the will of people in their own state from an earlier generation.

Further, domestic partnership laws and civil unions in states and localities across the country would be effectively repealed. Democratic outcomes would be reversed. Public debate through normal democratic processes would be cut short.

As conservative legal scholar Bruce Fein recently wrote in the *Washington Times*: "The amendment would enervate self-government . . . . Simple majority rule fluctuating in accord with popular opinion is the strong presumption of democracies. But that presumption and its purposes would be defeated by the constitutional rigidity and finality of a no-same-sex-marriage amendment."

Of course, in certain areas democratic experimentation should be limited, including by constitutional provisions if necessary. States should not be free, for example, to experiment with racial segregation or with denying women the right to vote. But these limitations on the democratic process should be imposed, and historically have been imposed, only to vindicate individual rights, not to deny individual rights. Limitations on democratic decisionmaking have been imposed to broaden the stake that individuals and groups have in our Nation, not to fence them out. The FMA would mark the first time in the Nation's history that the Constitution was amended to limit democratic decisions to make the states *more* inclusive and *more* affirming of individual rights. This is yet another peculiar and unprecedented property of the FMA.

Moreover, although proponents of the FMA are no doubt sincere in their defense of traditional marriage, the FMA appears to be a cynical means by which to defend it. It appears to be an effort by opponents of same-sex marriage to constitutionally cement their current advantage in popular opinion before they lose that advantage. This strategy reflects a deeply anti-democratic impulse, a fundamental distrust of normal political processes.

Fourth, the FMA is constitutional overkill. If the fear prompting serious consideration of the FMA is that a state court decision in favor of same-sex marriage might be leveraged onto other states via Full Faith and Credit Clause principles, the FMA is an overreaction. As discussed above, it would do far more than prohibit such impositions via the FFCC. Even if I have been wrong about the likelihood of an FFCC-led marriage revolution, the FMA is not a carefully tailored response to *that* problem. A much narrower amendment, dealing only with the federalism issue, could be proposed. In my view, even such a narrower amendment would be unnecessary to prevent the imposition of court-ordered nationwide same-sex marriage for the foreseeable future. But at least it would not amount, as the FMA does, to killing a gnat with a sledgehammer.

In sum, the FMA is not a response to any problem we currently have. The solemn task of amending the Nation's fundamental law should be reserved for actual problems. Never before in the history of the country have we amended the Constitution in response to a threatened (or actual) state court decision. Never before have we adopted a constitutional amendment to limit the states' ability to control their own family law. Never before have we dictated to states what their own state laws and state constitutions mean. Never before have we amended the Constitution to restrict the ability of the democratic process to expand individual rights. This is no time to start.

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

September 3, 2003

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

Dear Senator Cornyn:

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

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

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

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

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

Sincerely,

Steven J Chin

Reverend Steven J. Chin
Senior Pastor

nae national association of Evangelicals

September 3, 2003

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

Dear Senator:

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

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

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

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

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

Sincerely,

Rev. Richard Cizik
Vice President for Governmental Affairs

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

A CHRISTIAN DECLARATION ON MARRIAGE

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

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

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

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

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

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

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

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

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

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

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

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

Cardinal William Keeler
Archbishop of Baltimore
National Conference of Catholic Bishops

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

Bishop Kevin W. Mannoia, President
National Association of Evangelicals

Signatories:

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

Dr. Bill Bright, President
Campus Crusade for Christ

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

Bishop Lamar Vest, Presiding Bishop
Executive Council
Church of God

Gregory S. Coleman
Testimony before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights
September 4, 2003

Mr. Chairman and the members of the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights, I am honored and appreciate the invitation to testify before the Subcommittee today for its hearing entitled "What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"

My name is Greg Coleman. I am a partner with the law firm of Weil, Gotshal & Manges LLP and am head of the firm's Supreme Court and Appellate Litigation Practice Group. My testimony today represents my own views and does not represent the views of the firm. Between 1999 and 2001, I served as Solicitor General for the State of Texas. I also served as a law clerk to Justice Clarence Thomas and, earlier, to Judge Edith Hollan Jones on the United States Court of Appeals for the Fifth Circuit. I am a graduate of the University of Texas School of Law.

I was invited to testify this afternoon on the litigation risks that the Defense of Marriage Act (DOMA) may face in the foreseeable future and particularly in light of the Supreme Court's recent decisions in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996).

The question of same-sex marriage is not a particularly new phenomenon. Starting in the 1970s, numerous same-sex couples brought challenges in a variety

of jurisdictions seeking to marry. These challenges ordinarily sought an order compelling a county clerk to issue a marriage license to the couple. Prior to 1993, unsuccessful challenges had been brought in several jurisdictions, including Colorado, District of Columbia, Kentucky, Minnesota, Pennsylvania, and Washington. *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dism'd*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972); *De Santo v. Barnsley*, 328 Pa. Super. 181, 476 A.2d 952 (1984); *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187, *review denied*, 84 Wash.2d 1008 (1974).

The first successful constitutional challenge to traditional heterosexual marriage occurred in Hawaii. In 1993, the Hawaii Supreme Court held that the state's marriage law defining marriage as between a man and a woman "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex" and "establishes a sex-based classification." *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993). Consequently, the court held, the statute was subject to strict scrutiny under the state's equal protection clause and would be presumed to be unconstitutional. *Id.* at 67. The court remanded the case to permit the lower court to determine whether the state could demonstrate that the statute's sex-based classification was justified by compelling state interests and was narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights. *Id.* at 68. On remand, the circuit court declared the state's marriage statute unconstitutional. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir.

Ct. 1996). The decision was stayed pending appeal and, in 1998, the voters approved a state constitutional amendment preserving traditional marriage.

Litigation has continued in several states. Voters in Alaska similarly adopted a state constitutional amendment in 1998 in response to a lower court determination that Alaska's marriage law would be subjected to strict scrutiny. *See Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998). The Vermont Supreme Court ordered the state legislature to provide the benefits of marriage to same-sex couples, and the legislature enacted a civil-union statute. Courts in Connecticut and Georgia have rejected claims by couples who obtained civil unions in Vermont to claim the legal incidents of marriage in the home states. A New York court has permitted a man with a civil union to sue a hospital for the death of his partner. Lawsuits seeking recognition of same-sex marriage are also currently pending in Massachusetts, New Jersey, and Indiana.

The federal Defense of Marriage Act was enacted in 1996, largely in response to the *Baehr* decision in Hawaii. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C and 1 U.S.C. §7). DOMA contains two substantive provisions, one of which defines "marriage" and "spouse" for federal purposes as excluding same-sex marriages, and the other providing that states need not recognize a same-sex marriage performed and valid in another state. The first provision substantively defines marriage for purposes of federal law and the second was enacted pursuant to Congress's power under the Full Faith and Credit Clause to prescribe "by general Laws" the effect that one state's "public Acts,

Records, and judicial Proceedings" will have in every other state. DOMA was the first time that authority was used to contract the reach of the Full Faith and Credit Clause.

Direct challenges to the constitutionality of DOMA will focus on two tracks, each of which has been significantly strengthened by the Supreme Court's recent decisions in *Romer* and *Lawrence*. First, and primarily, proponents of same-sex marriage will continue to push, as they have for more than 30 years, for formal recognition of the right to marry. Second, couples with civil unions or similar forms of recognition will continue to seek to require states to give formal recognition to the status achieved in other jurisdictions. My review of the key cases and litigation trends leads me to conclude that both of these efforts are likely to be successful in the next five to fifteen years.

Although *Lawrence v. Texas* does not address the issue of same-sex marriage—and, indeed, specifically disclaims the issue—much of the language in the Court's opinion suggests that recognition of same-sex marriage may be a foregone conclusion in near future. The right the petitioners sought to have recognized in *Lawrence* can be viewed from two perspectives: first, as a privacy interest that protects sexual conduct between consenting adults in the home; or, second, as a liberty interest that requires a broader societal recognition of the relationship itself (and perhaps legal recognition, too).

The Court could have decided the case on the narrower privacy grounds, but it expressly declined to do so. Indeed, the first paragraph in Justice Kennedy's opinion for the Court is explicit in its intentions:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Slip op. at 1.

The first two sentences are clearly directed at the privacy interest, but the remainder of the paragraph is directed toward a broader "liberty" and "freedom" that, while not defined, are clearly not directed at the specific conduct directly at issue in the case. Indeed, the crux of the Court's criticism of *Bowers*, which it overruled, is that it focused solely on conduct and failed to "appreciate the extent of the liberty at stake." Again, although the Court does not expressly define that "liberty," the opinion appears to equate it with the same-sex relationship with which the Texas sodomy statute interfered:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition of the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the

> Constitution allows homosexual persons the right to make this choice.

Slip op. at 6.

The first sentence in the quotation addresses the question of same-sex marriage in two related ways. First, by defining the offending nature of the Texas sodomy statute, not in its prohibition of sexual conduct, but in its "control" of a "personal relationship," the Court has for the first time clearly recognized constitutional protection for homosexual relationships. Second, that conclusion is bolstered rather than weakened by the Court's disclaimer, "whether or not entitled to formal recognition of the law." The federal courts have never recognized a formal marriage-like same-sex relationship, so the Court's mere invoking of the "whether or not" is itself a suggestion that perhaps same-sex relationships are entitled to formal legal recognition.

The second paragraph in the quotation similarly focuses on the "relationship" and the "personal bond" but is somewhat more oblique. In stating that "the Constitution allows homosexual persons the right to make *this choice*," the opinion is unclear about whether the "choice" relates to the conduct directly at issue in the case or more generally to the relationship. Given the nature of the paragraph, though, it is more probably the latter.

These statements regarding the Constitution's protection of same-sex relationships do not, of course, inevitably lead to the conclusion that DOMA and similar state statutes and state constitutional amendments are unconstitutional

invasions of liberty and privacy as those terms have come to be defined by the Supreme Court. But the Court's reminder that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, *family relationships*, child rearing, and education," slip op. at 13, do not suggest that those enactments are beyond *Lawrence*'s reach. Ultimately, there is a tension between the Court's demurrer that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," slip op. at 18, and its insistence on "respect for their private lives" and preventing the state from "demean[ing] their existence or control[ing] their destiny." The Court is not speaking of the private respect to which every person is morally entitled from every other, but rather of a formal, governmental respect for individuals' choices in their personal relationships. If so, then there is only a short and relatively insignificant step between *Lawrence*'s holding that the control and demeaning consequences of a sodomy statute is unconstitutional and a future holding that the control and stigma from not being able to obtain formal governmental recognition of a same-sex relationship are similarly unconstitutional.

DOMA is also at risk from the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). Courts have long recognized that the Full Faith and Credit Clause does not require states to recognize as valid a marriage from another state that violates its strong public policy. *See Brinson v. Brinson*, 96 So.2d 653 (La. 1957); *Henderson v. Henderson*, 87 A.2d 403 (Md. 1952); *see also* RESTATEMENT

(SECOND) OF CONFLICT OF LAWS §283(2). Moreover, while DOMA represents the first time that Congress has contracted the application of full faith and credit, most believe that Congress has authority to do so. Although many would dispute those general propositions, the greatest litigation danger to DOMA is not from the direct application of the Full Faith and Credit Clause, but from the logical application of *Romer*.

In *Romer*, as in these circumstances, sexual orientation was not required to be recognized as a protected class in state and municipal discrimination codes, just as full faith and credit does not necessarily require a state to recognize a marriage (or civil union) from another state. The problem in *Romer* was not that the result sought by the Colorado referendum was itself necessarily unconstitutional, but that the Court held that the referendum was grounded in animus to a specific group. Thus, the court found that the classification was "at once too narrow and too broad." It would be a relatively straightforward application of *Romer* for a Court to similarly find that DOMA and its state-law parallels violate equal protection. These legislative and state-constitutional enactments are clearly directed toward the preservation of traditional marriage and, consequently, like Amendment 2 in *Romer*, are express in their purpose of preventing same-sex marriage and, therefore, suffer the same infirmities the Court identified in *Romer*.

As things currently stand, given the outcomes and rationales in *Romer* and *Lawrence*, it is likely, though not inevitable, that DOMA itself and prohibitions on same-sex marriage more generally will be held to be unconstitutional in the

relatively near future. Those decision provide the necessary background principles for such a holding, and the courts need not establish any additional concepts before reaching that conclusion. And while that future result is not ineluctable, current trends point strongly in that direction, and it is my professional opinion that, in the absence of some intervening event, the Supreme Court's evolving standards of liberty and privacy will result in constitutional protection for same-sex marriages within the next five to fifteen years.

A final note on the issue of states' rights. Some have objected to a proposed constitutional amendment on federalism grounds. These concerns are misplaced. The relationship between the states and the federal government is defined by the Constitution and, a fortiori, a constitutional amendment cannot violate principles of federalism and states' rights. A federal constitutional amendment is perhaps the most democratic of all processes—because it requires ratification by three-fourths of the states—and simply does not raise federalism concerns. The real danger to states' rights comes from the recognition of unenumerated constitutional rights in which the states have had no participation. If DOMA or similar state enactments are invalidated on federal constitutional grounds, the only possible recourse would be a constitutional amendment.

JOHN CORNYN

United States Senator ★ Texas
CONTACT: DON STEWART
(202) 224-0704 office
(202) 365-6702 cell
Don_Stewart@Cornyn.Senate.gov

FOR IMMEDIATE RELEASE
September 4, 2003

CORNYN'S HEARING STATEMENT

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

What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?

Thursday, September 4, 2003, 2 p.m., Dirksen Senate Office Building Room 226

--Below is Sen. Cornyn's complete opening statement as prepared--

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

Before I begin my opening statement, I want to thank Chairman Hatch for scheduling this hearing. I also want to recognize the fact that the August recess is a difficult time to contact and invite witnesses and to prepare for hearings. So I want to express my gratitude, both to Senator Feingold and his staff for working so hard with my staff to make this hearing possible, and to all of the witnesses for appearing before this subcommittee at this time to express their views.

Today's hearing is entitled: "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?" I have convened this hearing because I believe it is important that the Senate consider what steps – if any – are needed to safeguard the institution of marriage, which has been protected under federal law since the passage of the Defense of Marriage Act.

Americans instinctively and laudably support two fundamental propositions: that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection.

Recent and pending cases, however – both before the U.S. Supreme Court and in federal and state courts across the country – have raised serious questions regarding the future of the traditional definition of marriage, as embodied in DOMA. I believe that the Senate has a duty to ensure that, on an issue as fundamental as marriage, the American people, through their representatives, decide the issue.

In very simple and easy to read language, DOMA states that a marriage is the legal union between one man and one woman as husband and wife, and that a spouse is a husband or wife of the opposite sex. That declaration did not break any new ground, or set any new precedent. It

did not eliminate any rights. It simply reaffirmed and protected the traditional definition of marriage – an understanding that is reflected in the statutes, common law, judicial precedents, or historical practice of all 50 states.

The Defense of Marriage Act received overwhelming bipartisan support in both houses. The House passed the Act by a vote of 342-67, and the Senate passed it by a vote of 85-14. President Clinton signed the measure, stating that: "I have long opposed governmental recognition of same-gender marriages, and this legislation is consistent with that position." And since that time, 37 states have passed Defense of Marriage Acts at their own level.

As the eloquent senior Senator from West Virginia, a sponsor of the Act, said at the time: "Throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society – a relationship worthy of legal recognition and judicial protection."

The question before us now is whether the popular and bipartisan legislation will remain the law of the land as the people intend, or be overturned by activist courts. The witnesses before us today will share their knowledge and analysis of the recent decisions and pending cases, and on the importance of protecting traditional marriage as both a social and legal union. I look forward to listening to their testimony.

I recognize that this issue is not without controversy. But I believe we should not shirk from treating it with all the seriousness it is due. As representatives serving the people, we in this body should not abandon the definition of marriage to the purview of the courts. I believe it is our duty to carefully consider what steps are needed to safeguard the traditional understanding of marriage, and to defend the Defense of Marriage Act.

Perhaps no legislative or constitutional response is required to reinforce the current standard and to defend traditional marriage. If it is clear that no action is required, so be it. But I believe that we must take care to do whatever it takes to ensure that the principles defined in the Defense of Marriage Act remain the law of land.

And with that, I would turn the floor over to Senator Feingold.

-30-

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Auspiciado por:

Billy Graham Evangelistic Association

Alianza de Ministerios Evangélicos Nacionales

September 3, 2003

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

Dear Senator Cornyn:

Thank you for allowing me to write on behalf of marriage. Marriage as a man and woman is the backbone of the Hispanic Community.

I am a member of the Alianza de Ministerios Evangelicos Nacionales, the largest network of Hispanic churches in America. We represent approximately 7.7 million Latinos in the United States and Puerto Rico.

The 200 Census found the Hispanic population in America to be more than 40 million. The Hispanic Churches in American Public Life National Survey found that 93% of Hispanic Americans identify themselves as Christian while the remaining 7% have no religious preference or practice another world religión. Only one half of one percent of Hispanics surveyed identified themselves as atheist or agnostic.

With well over 35 million Hispanics identifying with Christianity, it is not surprising to know that marriage in the Latino culture has been built on the definition as a man and a woman. As a cultural group, Hispanics place a great deal of emphasis on family cohesiveness and childrearing. Dedication to family throughout one's lifetime is paramount.

Dedication to family translates into supporting best environment for children. The ideal situation for children is living with one mother and one father. After 30 years of divorce data, it cannot be argued otherwise. I, for one, do not need studies and other empirical data de know that the Hispanic culture has impressed upon me from an early age – children need mothers and fathers. To endorse a definition of marriate that excluded a mother or a father would be counter to my culture.

Again, I thank you for this opportuity de speak in support for marriage.

Sincerely,

Daniel de León, Member
Alianza Ministerial Evangelica Nacional

2617 W. 5th. Street Santa Ana, CA 92703 Teléfono: (714) 834-9331
E-mail: tcmin@pacbell.net & amen_1194@hotmail.com

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

September 3, 2003

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

Dear Senator Cornyn:

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

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

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

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

Senator Cornyn
September 3, 2003
Page 2

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

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

Sincerely,

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

JCD/rwd

August 22, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution, Civil Rights, and Property Rights
327 Hart Senate Office Building
Washington, DC 20510
FAX (202) 228-2856

Attention: Mr. James Ho

The Empowerment Network is a national research and information hub primarily serving grass roots community and faith organizations and state legislators. We target individual and community empowerment strategy policy, and because we encourage good policy based on research, we would ask that you consider broadly validated research in your efforts regarding the legal definition of marriage within all confines of the United States legal systems.

Only within the last few years have both liberals and conservatives come to agreement that children do better financially, emotionally, developmentally, and even physically within stable, two parent households. It's only the substantial and growing body of research from virtually all-political perspectives that has empowered the Healthy Marriage Initiatives within the Temporary Assistance to Needy Families reauthorization debates.

In your position as Committee Chair, surely you have seen the blatant attempt to impose changing cultural values as the basis for public policy. However, public policy based on solid research, which honestly considers consequences is still the best policy. Legal 'anchors' such as the definition of marriage cannot be dependent on cultural values.

We urge you to support the legal definition of marriage as a legal union of one man and one woman.

Sincerely,

Karen Woods

Karen M. Woods
Executive Director

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

Subcommittee Hearing on

"*What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?*"

September 4, 2003
226 Dirksen Senate Office Building
2:00p.m.

Testimony of Michael P. Farris
President, Patrick Henry College

I.

The Future of DOMA

The task I have undertaken today is an aspect of legal practice that is difficult at best. I am called upon to make predictions about what may happen to the federal Defense of Marriage Act (DOMA) in light of predictable legal challenges to its constitutionality. The maxim of the stockbroker seems appropriate, "Past performance is no guarantee of future results." But lawyers for private clients are often called upon to predict what may happen in the course of litigation so that their client can assess the risks they are about to assume.

No one can say for certain what the outcome will be of constitutional challenges to the Defense of Marriage Act. As much as I would like to see it held to be constitutional, and while I can construct a credible legal argument to support that outcome, a lawyer must give weight to other factors to make a reasonable prediction of what may happen. These other factors certainly include trends in the law and the dominant scholarly view of the issue at hand.

The constitutionality of the Defense of Marriage Act cannot be seriously challenged until one state legalizes same-sex marriage. Thus, the fact that DOMA has not been judged unconstitutional to this point tells us nothing about its long-range prospects when faced with a proper legal challenge.

It may be instructive to review the circumstances which are required before a proper challenge to DOMA can be raised. If the Supreme Judicial Court of Massachusetts, the Supreme Court of New Jersey, or the supreme court of some sister state, rules that same-sex marriages are required under their respective state constitutions then the stage is set. Couples who are married in the wake of one of these rulings will then seek to move or return to another state and have that marriage recognized. If the second state wants to recognize that same-sex marriage, DOMA does not prevent such recognition. However, if the second state refuses to recognize the out-of-state same-sex marriage, then the argument will be raised that the Full Faith and Credit Clause requires its recognition. The state will then employ DOMA as a part of its defense against such a constitutional challenge.

If we assume that a proper challenge is mounted, what then is the likely outcome? Again, I can argue, and do below, that DOMA should survive such challenges. But let us consider the legal trends and the

dominant scholarly view as criteria for judging what the courts are likely to do on this issue in the foreseeable future. I will consider these two categories separately.

Legal Trends

The flow of a river might be an appropriate metaphor to assess the strength of a legal trend. Six months ago, the legal trend in favor of a successful constitutional challenge to DOMA might well be described as a small stream. The principle case in this era was *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the voters of Colorado enacted an initiative that limited the ability of citizens to obtain legal protections in civil rights laws on the basis of sexual orientation. The Supreme Court held that this law was based upon a clear animus toward homosexuals and violated the principles and requirements of the 14th Amendment's Equal Protection Clause.

It is one thing to hold that a recent law with a particular political background possesses such a clear and intentional animus. It is quite another thing to hold that a state's marriage law that has been on the books for decades if not centuries possesses the same unconstitutional animus.

As we shall see in the next section, the legal commentators jumped to the conclusion that *Romer* presaged or required judicial rulings in favor of same-sex marriage and against the constitutionality of DOMA. But a careful

lawyer would look upon such predictions with a decree of skepticism because *Bowers v. Hardwick,* 478 U.S. 186 (1986), was still good law and was not explicitly reversed by *Romer.* A distinction could be made. *Romer* was about political rights, not gay rights. *Bowers* held that there was no constitutional right to engage in homosexual sodomy and therefore the law stood with the long-standing tradition of marriage as a uniquely heterosexual institution.

That was before June 26, 2003 when the Supreme Court released its opinion in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The legal trend is no longer a small stream. It is a river raging with floodwaters, and not just any flood, but the hundred-year flood against which all future events will be judged.

At issue in the *Lawrence* case was the nature of liberty as set forth in the Due Process Clause of the Fourteenth Amendment. In considering whether this clause of the Constitution was violated by the Texas statute, the majority, quoting from a dissent from Justice Stevens in an earlier case, declared that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 123 S. Ct. at 2475.

Let me put this proposition another way: the Supreme Court has determined that the traditional views of the majority of the people of this country are not good enough to justify law. I should note at this point that this now largely irrelevant majority was the same majority which drafted, ratified, and from time to time amended the freedom-granting constitution the court is interpreting. If you think about it, this is astounding. Under the "reasoning" of the court, how can we know with any certainty what is legally right and what is legally wrong? How can we know what our Constitution, or any of its amendments, really mean? How will we know what will be persuasive in a court of law?

In the *Lawrence* case, the majority notes concern that the European Court of Human Rights did not follow our earlier jurisprudence, but followed its own decisions. *Lawrence,* 123 S. Ct. at 2483 (citing *Dudgeon v. United Kingdom*, *See P. G. & J. H. v. United Kingdom*, App. No. 00044787/98, ¶56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H. R. (1988)). Are we now to turn to Europe to ascertain the nature of our own Constitution? If we cannot turn to our own heritage and the intent of the drafters of our Constitution and its amendments, where really can we turn at all? What is left as the basis of law other than what the judges feel on a particular day?

This is why none of us here can say with any certainty what the future of DOMA really is.

The dramatic change in the flow of water in this particular stream has been noted by both those who support and those who oppose the *Lawrence* decision. MSNBC reported:

> Speaking shortly after that ruling, Elizabeth Birch, the executive director of the leading gay rights advocacy group, the Human Rights Campain, said, "Every once in a while in the history of a people there is a monumental paradigm shift. ...it allows for a breakthrough to a deeper understanding to a nation as a whole. I believe we are in such a gay moment in terms of history.[1]

Matt Foreman, the executive director of the National Gay and Lesbian Task Force wrote:

> In just a few short weeks, the confluence of legal marriage in Canada, the *Lawrence v. Texas* decision abolishing sodomy laws, and the expected marriage ruling from the Massachusetts supreme court has dramatically altered the national and intra community debate about our lives, our families, and our legal rights.[2]

But the most dramatic prediction of the impact of *Lawrence* is found in the pages of that decision in Justice Scalia's strong dissent.

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private

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[1] Curry, Tom, *Gay rights loom large on U.S. agenda*, (August 5, 2003) <http://www.msnbc.com/news/947715.asp?cp1=1>.
[2] Foreman, Mark, *A future of promise and peril* (July 29, 2003) <http://www.advocate.com/html/stories/895_6/895_6_promise.asp>.

> homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern* v. *Toronto*, 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Ante*, at 17. Do not believe it.

There is a recognized branch of Full Faith and Credit law that has been directly and seriously undermined as a result of the decision in *Lawrence.* States have not been required to recognize decisions or decrees of other states if a strong state public policy interest prohibited such recognition. According to the *Restatement (Second) of Conflict of Laws* Sec. 283 (1971), a state that had a "significant relationship to the spouses and the marriage at the time of the marriage" need not recognize a marriage if the marriage contravenes "the strong public policy" of that state.

In *Lawrence*, the Supreme Court adopted the utterly unprecedented notion that a law cannot be held to be constitutional in the face of a substantive due process challenge if the state's interest in enacting the law was nothing more than traditional morality.

While lawyers can make arguments about anything and find state interests that never entered the minds of the legislators who made the law, any honest person would say that laws prohibiting same-sex marriage, just as laws prohibiting bigamy, were based on traditional majority views of morality.

Accordingly, it will be difficult for a court to accept an argument asking for a public policy exception to the Full Faith and Credit Clause when that public policy is based on a motivation that has been labeled by the Supreme Court as violating the Equal Protection Clause.

Let me be clear about my own views of proper constitutional interpretation. The Supreme Court in *Lawrence* cannot plausibly be said to have interpreted the 14th Amendment in a manner that is consistent with the original meaning of the words that compose the clauses of that Amendment.

The *Bowers* Court got the history right. The power of the states to legislate sexual crimes outside of marriage was unquestioned at any relevant point in American history. To be sure there were contrary theories of history presented in briefs of the *amici* in *Lawrence* that were largely accepted by the Supreme Court.

The idea that anti-sodomy legislation is of recent duration and a change from a much more tolerant era of the late 1700s and early 1800s is

nothing more than a mix of advocacy and wishful thinking with a thin veneer of Ivy League scholarship. Anywhere else it would be called "spin" and recognized for what it is.

The attitude of that era is far better captured in the following language by James Wilson, who said, "The crime not to be named, I pass in a total silence." James Wilson, 2 *The Works of James Wilson* (1967) (from lectures given in 1790 and 1791).

This is not to say that the states were not free to adopt new positions on matters concerning homosexuality. The political trends have been strongly in favor of the gay movement. But the Supreme Court is not supposed to be a venue in which political trends are translated into judicial edict. The theory of judicial review necessarily depends upon faithful adherence to the meanings and intentions of the drafters of the Constitution and its amendments for any claim to legitimacy in a constitutional republic.

Simply stated, in a democratic republic only the legislative branches may legitimately make law. New political paradigms should not be accomplished by a judicial decision. When a court announces a decision that is contrary to the intentions of the framers of the Constitution, it is engaging in raw judicial legislation which any member of the founding generation would label as tyranny.

Only our elected legislative officials have the authority to make new law. *Lawrence* is new legislation in a diaphanous cloak of legal interpretation.

Only those people who value a particular transient political goal more than the preservation of American democracy should be pleased with this outcome. Self-government is essential to the preservation of all our liberties. This nation was founded on the notion that self-government is essential to liberty. Establishing a pet theory of liberty at the expense of the fundamental principle of self-government threatens the long-range survival of our Constitution. The American people will not long accept the idea that fundamental policy change can be made by anyone other than their elected legislators.

Law Review Analysis

The writers of articles in several law reviews and journals have opined that DOMA is, or may well be, unconstitutional. Anyone who knows the production schedule of a law review recognizes that all of these articles and comments were written prior to the Supreme Court's decision in *Lawrence.*

The following is a sampling of the opinion of the constitutionality of DOMA as reflected in legal journals:

Paige Chabora argues that a textual interpretation of the Full Faith and Credit Clause results in a determination that DOMA is unconstitutional.[3] Two theories underlie her conclusion: the "procedures theory" and the "ratchet" theory.

Under the procedures theory, Congress may only utilize Article IV's Full Faith and Credit clause to regulate the procedures by which judgments and decrees are recognized. Congress may not use Article IV to regulate substantive law.

Under the ratchet theory, Congress can give a decision from one state enhanced significance in another, but not lesser. The ratchet theory is based on dicta in a 1980 Supreme Court decision.

> [W]hile Congress clearly has the power to increase the measure of full faith and credit that a State may accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980). The "ratchet" theory has been labeled "a powerful argument."[4]

Professor William Eskridge of Yale, who authored a prominent brief in *Lawrence*, predicts the ultimate demise of DOMA. After describing a

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[3] Paige Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997).

[4] Michael T. Morley, Richard Albert, Jennie L. Kneedler, Chrystiane Pereira, *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 195 (2003).

very modest path of the gradual enactment of Vermont-styled civil unions, Eskridge says: "Over time—perhaps a generation or two—enough states may follow this modest step to persuade the U.S. Supreme Court to make it mandatory for the country. And at that point, if not before, DOMA's requirement that federal law discriminate against same-sex couples will be constitutionally vulnerable."[5]

Other theories calling into question the constitutionality of DOMA have been set forth. Julie Johnson doubts that DOMA represents "general legislation", which she considers a requirement for any proper use of the Full Faith and Credit Clause.[6] Barbara Robb suggests that DOMA violates the equal protection value of the Fifth's Amendment's Due Process Clause.[7] Lewis Silverman, of Touro College, takes the position that: "Because the words of **DOMA,** at least regarding interstate recognition, are permissive rather than mandatory, the statute appears to offer nothing beyond a 'sense of Congress' which is non-binding."[8]

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[5] William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U.L. REV. 1327, 1396 (2000).

[6] Julie L. B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997).

[7] Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997).

[8] Lewis A. Silverman, *Vermont Civil Unions, Full Faith and Credit, and Marital Status*, 89 KY. L.J. 1075, 1099 (2000).

The issues surrounding DOMA evoke deep concern. Professor Mark Strasser of Capital Law School calls DOMA "an embarrassment" and "the antithesis of a full faith and credit measure."[9] In another journal, he describes DOMA as a "mean-spirited enactment" but reserves the final conclusion as to its constitutionality to the reader.[10] James Donovan, of Tulane University School of Law, goes so far as to call DOMA an unconstitutional establishment of fundamentalist Christianity.[11]

There are more articles to the same effect. The voices in opposition are essentially silent.

It is not a stretch to say that the dominant reviews in today's law reviews will more than likely be the dominant view in the courts within a generation. I am dubious that DOMA will survive even a few years. I am absolutely certain that it will not last a generation.

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[9] Mark Strasser, *Loving the Romer out for Baehr: On Acts In Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 279 (1997).
[10] Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U.L. REV. 363, 366 (2002).
[11] James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997).

II.

In Defense of DOMA

I would like to see DOMA succeed. Setting aside, for the moment, my concerns over the changing nature of law and its effect on predictability, I also think that, given a fair read, DOMA is constitutional.

Marriage is one of the foundations that the majority of people in the United States cherish. Even the Supreme Court has described traditional marriage as a "basic civil right." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Marriage is "fundamental to our very existence and survival" and is a revered institution "older than the Bill of Rights—older than our political parties, [and] older than our school system." *Loving v. Virginia*, 388 U.S.C. 1, 12 (1967).

Article IV of our Constitution provides that full faith and credit shall be given in each State to the public proceedings of every other state, and that, and this is the critical issue: "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Const. Article IV.

Of this clause, James Madison wrote:

> The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.

The Federalist, No. 42, at 271 (James Madison) (Clinton Rossiter, ed., 1961).

Congress has only exercised its Article IV § 1 authority four times. In 1790, Congress codified the functions of the Full Faith and Credit clause (28 U.S.C. § 1738). In 1980, Congress passed the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A). In 1994, the Full Faith and Credit Child Support Orders Act of 1994 (28 U.S.C. § 1738B) became law. Finally, in 1996, Congress passed DOMA.

Congress' exercise of its authority to legislate under the Full Faith and Credit Clause has never been successfully challenged in any court. Since there is no legal precedent by which the constitutionality of DOMA can be measured, the best available standard is found in these prior acts of Congress.

The law of 1790 was merely procedural in character. It does not serve as a precedent for DOMA. However, the 1980 and 1994 laws established clear legislative precedents that demonstrate that Congress is fully within its authority to enact DOMA.

Both of these prior enactments deal with disputes arising in the area of family law. Both of these statutes are closely connected to the legal issues of marriage. The 1980 *Parental Kidnapping Act* was designed to bring national uniformity to the recognition of child custody decrees. Citing a growing number of cases which involved interstate disputes over child custody decrees and the alarming practice of "frequent resort to the seizure, restraint, concealment, and interstate transportation of children," Congress passed this law to determine which decrees would be given full faith and credit.

Congress made a substantive policy decision that child custody decrees would not be granted full faith and credit if the child had not lived in the forum for at least six months prior to the events in question. 28 U.S.C. § 1738A(b)(4) and (c)(2). A supplemental rule was adopted governing residency questions when the child had been removed from his home state by a contestant to the proceeding, i.e., parental kidnapping. §1738A(c)(2)(A)(ii).

The 1994 enactment was designed to settle disputes between states over which decrees granting child support would be enforced. 28 U.S.C. §1738B. Similar policy questions were answered to bring uniformity to a hopelessly conflicted area of litigation.

These congressional acts have guided the courts in thousands of cases. The issue of the constitutionality of these provisions has never been raised successfully.

There is nothing in the language or history of Article IV § 1 of the Constitution that would indicate that Congress must wait until there is a morass of existing cases and numerous bad experiences to bring peace and uniformity to the interstate practice of family law. In enacting the Defense of Marriage Act, Congress has acted preemptively to settle problems before they arise.

Congress either has the power to establish rules concerning the full faith and credit recognition of family law acts of the several states or it does not. There is no logical basis for concluding that, on the one hand, Congress can decree that child kidnapping shall never form the basis for a valid custody determination, yet it cannot dictate which marriages shall be deemed valid for the purposes of full faith and credit recognition.

Advocates of same-sex marriage will argue that there is a world of factual difference between such a marriage and parental self-help in a custody dispute. Such differences may indeed make a difference to courts in evaluating equal protection challenges to DOMA, but they should have no effect on a determination of whether Congress had the authority to act under

Article IV § 1. Congress has made a policy decision concerning the recognition of valid decrees concerning the custody of children. It can certainly make other policy determinations connected to the interstate recognition of other decrees and acts of other aspects of family law.

The Congressional Research Service opines in its exhaustive *The Constitution of the United States of America: Analysis and Interpretation*,

> [I]t does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

Id. at 870.

DOMA should be construed consistently with the laws concerning uniformity of custody decrees and child support awards. Congress can declare which decrees are enforceable in other states and which are not. Congress could, consistent with this legislative precedent, say that same-sex marriages will not be recognized in the United States by any jurisdiction other than the one in which it was originally performed. Congress has taken a much more modest approach. All it has said is that sister states are not compelled to recognize such marriages.

In my view, DOMA is perfectly consistent with the precedent created in the legislative history and should be held to be constitutional.

III.

Conclusion

There are times when a prudent lawyer should take his client aside and say, "[t]here are significant forces arrayed against you that have been extraordinarily successful in similar recent litigation and their arguments need to be taken very carefully. You may want to find another way to achieve your real objective." If the elected legislative representatives of this nation truly what to defend traditional marriage against an assault from the forces of judicial activism, then it seems apparent that another vehicle other than DOMA must be found.

ELECTION 2000 VICE PRESIDENTIAL DEBATE
WITH DEMOCRATIC CANDIDATE SENATOR JOE LIEBERMAN
AND REPUBLICAN CANDIDATE DICK CHENEY

LOCATION: CENTRE COLLEGE, DANVILLE, KENTUCKY

MODERATOR: BERNARD SHAW, CNN ANCHOR

TIME: 9:00 P.M. EDT
DATE: THURSDAY, OCTOBER 5, 2000

...

MR. SHAW: Senator, sexual orientation. Should a male who loves a male and a female who loves a female have all -- all! the constitutional rights enjoyed by every American citizen?

MR. CHENEY: This is a tough one, Bernie. The fact of the matter is we live in a free society, and freedom means freedom for everybody. We don't get to choose, and shouldn't be able to choose and say, "You get to live free, but you don't." And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard.

The next step, then, of course, is the question you ask of whether or not there ought to be some kind of official sanction, if you will, of the relationship, or if these relationships should be treated the same way a conventional marriage is. That's a tougher problem. That's not a slam dunk.

I think the fact of the matter, of course, is that matter is regulated by the states. I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area.

I try to be open-minded about it as much as I can, and tolerant of those relationships. And like Joe, I also wrestle with the extent to which there ought to be legal sanction of those relationships. I think we ought to do everything we can to tolerate and accommodate whatever kind of relationships people want to enter into.

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Testimony before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights Hearing "*What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?*"

September 4, 2003

By Maggie Gallagher

Maggie Gallagher is President of the Institute for Marriage and Public Policy, editor of MarriageDebate.com (a new webzine devoted to same-sex marriage debate), and co-author of The Case for Marriage: Why Married People are Happier, Healthier, and Better-Off Financially (Doubleday, 2000).

Why Marriage Matters: The Case for Normal Marriage

1. Why Marriage Matters

I am here today as an expert on marriage. I have devoted most of the last fifteen years to research and public education on the marriage issue,[1] particularly the problem of family fragmentation: the growing proportion of our children in fatherless homes, created throug divorce or unmarried childbearing.

Marriage is a key social institution, but it is also a fragile institution: with half or more of our children experiencing the suffering, poverty and deprivation of fatherlessness and fragmented families. This is a crisis that was of course not created by advocates of same-sex marriage. But the marriage crisis *is* intimately involved with how committed we as a society are to two key ideas: that children need mothers and fathers, and that marriage is the main way that we create stable, loving mother-father families for children.

After forty years of social experimentation, we now have enormous data on this question. There are not dozens, or hundred, there are thousands of studies addressing the question of family structure, which control for race, income, family background and other confounding variables. And the overwhelming consensus of family scholars across ideological and partisan lines is that family structure DOES matter. It is of course not the only variable affecting child well-being. But all things being equal, children do better when their mothers and fathers get and stay married. Both adults and children are better off living in communities where more children are raised by their own two married

[1] See for example, Maggie Gallagher, (forthcoming). *Marriage and Public Policy: What Can Government Do? Evidence from the Social Sciences* (D.C.: National Fatherhood Institute); Maggie Gallagher, 2002. "What is Marriage For? The Public Purposes of Marriage Law," *Louisiana Law Review* 62(3) (Spring); Linda J. Waite and Maggie Gallagher, 2000. *The Case for Marriage: Why Married People Are Happier, Healthier, and Better-Off Financially* (NY: Doubleday); *The Marriage Movement: A Statement of Principles*, 2000. (NY: Institute for American Values); Maggie Gallagher, 1999. *The Age of Unwed Mothers: Is Teen Pregnancy the Problem?* (NY: Institute for American Values); Maggie Gallagher, 1996, *The Abolition of Marriage: How We Destroy Lasting Love* (Washington D.C.: Regnery).

parents.[2] Both adults and children live longer, have higher rates of physical health and lower rates of mental illness, experience poverty, crime and domestic abuse less often, and have warmer relationships, on average, when mothers and fathers get and stay married.

In turn, high rates of family fragmentation generate substantial taxpayer costs. According to a report by over one hundred family scholars and civic leaders released in 2000: "Divorce and unwed childbearing create substantial public costs paid by taxpayers. Higher rates of crime, drug abuse, education failure, chronic illness, child abuse, domestic violence and poverty among both adults and children bring with them higher taxpayer costs in diverse forms: more welfare expenditure; increased remedial and special education expenses; higher day-care subsidies; addition child-support collection costs; a range of increased direct court administration costs incurred in regulating post-divorce or unwed families; higher foster care and child protection serves; increased Medicaid and Medicare costs; increasingly expensive and harsh crime-control measures to compensate for formerly private regulation of adolescent and young-adult behaviors; and many other similar costs. While no study has yet attempted precisely to measure these sweeping and diverse taxpayer costs stemming from the decline of marriage, current research suggests that these costs are likely to be quite extensive."[3]

So we can say with a fair degree of not only common sense but scientific certainty that marriage matters a great deal for children and for society. Marriage is in fact a cross-cultural institution, it is not a mere plaything of passing ideologies but in fact the word for the way that, in virtually every known human culture, society conspires to create ties between mothers, fathers, and the children their sexual unions may produce.[4]

2. How will same-sex marriage affect marriage as a social institution?

Once we acknowledge the gravity of the marriage crisis we now face, and the importance of marriage as a social institution, the single most important question on unisex marriage becomes: Will this legal transformation strengthen or weaken marriage as a social institution?

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[2] See, for example, William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, Gloria G. Rodriguez, Isabel V. Sawhill, Scott M. Stanley, Linda J. Waite, and Judith Wallerstein, 2002. *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (New York City: Institute for American Values). Available at www.americanvalues.org.

[3] *The Marriage Movement: A Statement of Principles*, 2000. (New York City: Institute for American Values).

[4] "Marriage exists in virtually every known human society. . .At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about the reproduction of children, families and society. . . .marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing or resources between men, women, and the children that their sexual union may produce." William J Doherty, William A. Galston, Norval Glenn, John Gottman et al., 2002. *Why Marriage Matters: 21 Conclusions from the Social Sciences* (NY: Institute for American Values).

For many Americans this translates into the question: How can Bob and James' marriage possibly affect Rob and Sue's marriage?

There are long, complicated and erudite answers to this question. Fortunately there is also a short simple and obvious answer. Marriage is not just a legal construct, it is socially, and culturally a child-rearing institution, the place where having children and creating families are actually encouraged, rather than merely tolerated. In endorsing same-sex marriage, law and government will thus be making a powerful statement: our government no longer believes children need mothers and fathers. Two fathers or two mothers are not only just as good as a mother and a father, *they are just the same.*

The government promotion of this idea will likely have some effect even on people who are currently married, who have been raised in a particular culture of marriage. But this new idea of marriage, sanctioned by law and government, will certainly have a dramatic effect on the next generation's attitudes toward marriage, childbearing, and the importance of mothers and fathers. If two mothers are just the same as a mother and a father, for example, why can't a single mother and her mother do just as well as a married mom and dad?

The fallacy and temptation is the belief that if we allow unisex couples to marry there will be two kinds of marriage: gay marriage for gays and lesbians, straight marriage for straights. In reality, there will be one institution called marriage, and its meaning will be dramatically different, with deep consequences for children.

Many advocates of gay marriage recognize the importance of this transformation. As one advocate for gay marriage, columnist and radio personality Michaelangelo Signorile put it in Out Magazine in December of 1994, "[F]ight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely, to demand the right to marry not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution that as it now stands keeps us down."

You may agree or disagree, but let us not fool ourselves that this is a minor amendment to marriage law. Why are courts contemplating a radical shift in our most basic social institution at a time when 25 million children sleep in fatherless homes? Here is the disturbing answer: In order to accommodate or affirm the interests of adults in choosing alternative family forms that they prefer.

Two ideas are in conflict here: one is that children deserve mothers and father, and that adults have an obligation to at least try to conduct their sexual lives to give children this important protection. That is the marriage idea. The other is that adult interests in sexual liberty are more important than "imposing" or preferring any one family form: all family forms must be treated identically by law if adults are to be free to make intimate choices. This is the core idea behind the drive for same-sex marriage. And it is the core idea that must be rejected if the marriage idea is to be sustained.

SENATE SUBCOMMITTEE ON THE CONSTITUTION

HEARING TESTIMONY
September 4, 2003

REV. DR. RAY HAMMOND, M.D., M.A.

Bethel African Methodist Episcopal Church
Boston, Massachusetts

Mr. Chairman and members of the Senate Constitution Subcommittee:

I'm very grateful for your invitation to testify at today's hearings.

My name is Ray Hammond, and I am the senior pastor of Bethel African Methodist Episcopal Church in Boston. I am a graduate of Harvard College and Harvard Medical School. I completed my surgical residency at the New England Deaconess Hospital in Boston and served for many years on the Emergency Medicine staff at the Cape Cod Hospital in Hyannis, Massachusetts.

In 1976, I completed my M.A. in the Study of Religion at Harvard Graduate School of Arts and Sciences. In 1988, I was called to be the founder and pastor of Bethel AME Church in the Roxbury neighborhood of Boston.

In my capacity as the leader of an African-American congregation in the inner city, I have a long history of involvement with youth and community activities. I am President of the Ten Point Coalition, an ecumenical group of clergy and lay leaders working to

mobilize the greater Boston community around issues affecting black and Latino youth—especially those at-risk for violence, drug abuse, and other destructive behaviors.

I am also the Executive Director of Bethel's Youth Intervention Project; and a member of several church and community boards, including the Black Ministerial Alliance Executive Committee, the Youth Ministry Development Project Advisory Board, the Boston Plan for Excellence, Catholic Charities of Boston, Minuteman Council (Boston, MA) of the Boy Scouts of America, City Year of Boston Advisory Committee, and the United Way Success by Six Leadership Council. Finally, I am a member of the Advisory Board of the Alliance for Marriage, a diverse, non-partisan coalition composed of civil rights and religious leaders, as well as national legal experts, that is dedicated to restoring a culture of intact families founded upon marriage in America.

I'm here today to speak about an issue that transcends all political and ideological categories: The importance of marriage and families to the health of our children, the health of our communities, and the health of our society.

I find it very encouraging that most polls reveal a high degree of consensus among Americans -- regardless of race, color or creed -- about the importance of families to the health and well being of our nation.

Moreover, most Americans instinctively understand that there is an integral connection between the institution of marriage and the health of families in the United States. After all, in virtually every society on the face of the earth, marriage is what makes fatherhood more than a biological event -- by connecting men to the children they bring into the world.

But the American family is in serious trouble today. At present, a historically unprecedented percentage of families with children in our nation are fatherless. In fact, over 25 million American children (more than 1-in-3) are being raised in a family with no father present in the home. This represents a dramatic tripling of the level of fatherlessness in America over the past thirty years.

Unfortunately, there is an overwhelming body of social science research data which shows that the epidemic level of fatherlessness in America represents a disaster for children and society. In fact, many of our most serious social problems -- from youth crime to child poverty -- track far more closely with fatherlessness than they do with other social variables like race, educational level, or the condition of the economy.

As compelling as the empirical evidence may be, I do not need to consult social science research studies in order to conclude that the African-American community in particular has paid a heavy price for the modern epidemic of family disintegration.

As an African-American, as a pastor, and as a founder of the Boston Ten Point Coalition, I know that we live in a time of social crisis, and nowhere is that crisis more acute than where I live—the inner city. No group experiences that crisis more profoundly than the young urban men and women I see work and worship with. It has a profound impact on the children. Theirs is a topsy-turvy world where there is a growing number of households, struggling to make ends meet with parents, often single mothers, striving to hold themselves and their families together while they try to raise boys who will not become fodder on the killing fields called urban streets and daughters who will not grow old before their time. Theirs is a world where children face high death rates, low expectations, and a future that is cloudy at best. Theirs is a world—America's underworld—where:

- Every 26 seconds a child runs away from home
- Every 40 seconds a child is abandoned or neglected
- Every 65 seconds a baby is born to unwed parents
- Every 7 minutes a young person is arrested for doing drugs
- Every 36 minutes someone is killed by gunfire

Of course, the problems of America's urban neighborhoods are well known. But the modern epidemic of family breakdown means that an increasing number of children in America are growing up under similarly difficult conditions. Indeed, for several decades, our nation has been wandering in a wilderness of social problems caused by family disintegration.

Tragically, as bad as our current situation may be, it could soon become dramatically worse. This is because the courts in America are poised to erase the legal road map to marriage and the family from American law. In fact, the weakening of the legal status of marriage in America at the hands of the courts has already begun.

This process represents nothing less than a social revolution -- advancing apart from the democratic process and against the will of a clear majority of the American people. If allowed to continue, this revolution will deprive future generations of Americans of the legal road map they will need to have a fighting chance to find their way out of the social wilderness of family disintegration.

Marriage as the union of male and female is the most multicultural social institution in the world – it cuts across all racial, cultural and religious lines.

Significantly, this common sense understanding of marriage as the union of male and female is so fundamental to the African-American community that over 70% of all African-Americans in the United States would currently favor a constitutional amendment to protect the legal status of marriage. Indeed, polls consistently show that the African-American community – along with other communities of color in the United States – lead the way in their support for a Federal Marriage Amendment to protect the legal status of marriage in America for future generations.

Of course, no one involved in the Alliance For Marriage believes that saving the legal status of marriage in America will alone be sufficient to stem the tide of family disintegration in our country. But we are convinced that protecting the legal status of marriage is a necessary condition for the renewal of a marriage-based culture in the United States.

The good news in all of this is that family breakdown is a completely curable social disease. This is one of the greatest and most prosperous nations in the world. And we can do better than accept historically unprecedented levels of youth crime and child poverty because more than one-third of our nation's children are being raised without the benefit of a married family made up of a mother and a father.

We can -- and we must -- rebuild a culture of marriage and intact families in this country while we still have time.

Thank you.

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

September 4, 2003 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Hearing on

"WHAT IS NEEDED TO DEFEND THE BIPARTISAN DEFENSE OF MARRIAGE ACT OF 1996?"

Thank you very much, Mr. Chairman. Just a few years ago, I helped pass the Defense of Marriage Act to try to prevent one state from forcing another state to adopt its definition of marriage. I believed then and I continue to believe that one state should not be able to determine for another state that it must recognize same-sex marriage. There is some concern now, however, that this aspect of the legislation may not be upheld in court, and if this is this case, we need to determine what steps we need to take to ensure that the intent of the bipartisan Defense of Marriage Act is accomplished. It's very clear to me that disintegration of the family in this country correlates with many serious social problems, including crime and poverty. We are seeing too many divorces and record out-of-wedlock birth rates that have resulted in far too many fatherless families. Weakening the legal status of marriage at this point will only exacerbate these problems. I look forward to working on this important issue with my colleagues.

Thank you.

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September 2, 2003

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

Dear Senator Cornyn:

"Attention: Mr. James Ho"

This letter comes to request, cordially, that your committee do everything possible to help the United States retain a strong commitment to marriage, as a covenant between a man and a woman.

It is my conviction that more than 90 percent of our 8.6 million United Methodists in this country would share concerns that marriage be strengthened in America. So many other issues are tied to this one key issue. As our families go, so will go the future of our nation.

Unfortunately, voices calling for a re-definition of our traditional understanding of marriage seem to get media coverage far out of proportion to their numbers. Further, many of us are concerned that a major re-definition in our understanding of marriage might come through the action of some state court. This simply must not happen. We must protect the institution of marriage in the U.S. for the abiding welfare of our nation.

I head a ministry within the United Methodist Church and can say without reservation that nearly a hundred percent of the 40,000 United Methodist Churches and families receiving our magazine would favor retaining a strong, traditional understanding of marriage.

Thank you for all you and your committee can do to protect and strengthen the American Family.

Sincerely,

James V. Heidinger II

James V. Heidinger II
President and Publisher

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SENATE
STATE HOUSE, BOSTON 02133-1053

SENATOR CHERYL A. JACQUES
NORFOLK, BRISTOL
AND MIDDLESEX DISTRICT
ROOM 109-C
TEL. (617) 722-1555
FAX. (617) 722-1054
E-Mail: CJacques@senate.state.ma.us

COMMITTEES:
STEERING AND POLICY (CHAIR)
WAYS AND MEANS
JUDICIARY
INSURANCE
TAXATION

September 2, 2003

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510

The Honorable Russell Feingold
United States Senate
506 Hart Senate Office Building
Washington, DC 20510

RECEIVED SEP 12 2003

Dear Senators Cornyn and Feingold:

On September 4, 2003 the Constitution, Civil Rights, and Property Rights Subcommittee of the Senate Judiciary Committee will hold hearings on whether further action is needed to ensure the definition of marriage remains as the union between one man and one woman. First, the legal issue is a civil issue; religious marriage is governed entirely by religious denominations themselves. Second, I am opposed to changing the federal constitution to remove law-making authority for marriage from the states. Furthermore, current law already sufficiently addresses this issue. Finally, I oppose amending the constitution for the sole purpose of restricting the rights and denying the equality of a specific group of American citizens.

The authority to regulate religious decisionmaking – including around issues of marriage – has never been in the purview of elected officials. When we refer to marriage, we are referring to the granting of civil marriage licenses, which is a legal mechanism regulated entirely by the states. Each state permits couples who may marry to enter into marriage through a civil ceremony. As many as hundreds of responsibilities, rights and benefits accrue to married couples and to their children as a result of the state's interest in the formation of families and the protection of families.

H.J. Res. 56 would strip states of their historical right to regulate civil marriage. Since the beginning of the republic, the U.S. Constitution has enumerated that specific powers related to the administration of the nation as a whole belong to the federal government while all others are reserved to the states. The power to regulate marriage is a power that historically has been reserved to the states. A constitutional amendment would take this power from the states.

Family issues, including those relating to civil marriage and children, have been properly in the province of state law-making since the founding of our nation. The right to grant marriage licenses is an important legal matter regulated in each state by our state governments. Each branch of our state governments has a role to play in regulating civil marriage within the states. Our legislature has the power to enact legislation related to marriage. Our executive branch, represented at the highest level by the governor, has the opportunity to sign or veto such legislation. And our state judiciaries have the authority to interpret state laws relating to marriage. States should be allowed to formulate their own policies in this area.

The States and localities actively regulate in the area of marriage. In fact, the states have regulated in the area of marriage, particularly in the area of marriage for same-sex couples. Thirty-seven states specifically ban marriage between same-sex couples. The other thirteen states have definitions of marriage that to date have not been interpreted to mean that a same-sex couple may marry. Should a state determine to alter that state's public policy on civil marriage that state government should be allowed to do so without intrusion from the federal government.

States and localities also actively make laws related to the recognition of same-sex couples and families headed by same-sex couples. Vermont has created the unique legal status of the civil union. Hawaii allows people to enter into a kind of domestic partnership called reciprocal beneficiaries. California has a statewide domestic partner registry. 58 localities around the country have created domestic partner registries or grant local employees domestic partner benefits.

Finally, amending the United States Constitution is a most serious matter. In our nation's history, the constitution has been amended only 27 times – only 17 times since the Bill of Rights. I oppose amending the Constitution to address an issue that should be left to the states.

Sincerely,

Cheryl A. Jacques

CAJ/am/ja

Statement of Senator Edward M. Kennedy
on "What is Needed to Defend the
Bipartisan Defense of Marriage Act of 1996?"
Senate Subcommittee on the Constitution, Civil Rights and
Property Rights
September 4, 2003

In June, in its landmark decision in Lawrence v. Texas, the Supreme Court struck down a Texas law that made homosexual conduct a crime. In a powerful and eloquent opinion, the Court made clear that discrimination against gay and lesbian people in state criminal laws is prohibited by the Fourteenth Amendment to the Constitution.

Predictably, the Court's decision has been denounced by some of our colleagues in Congress. The Republican Policy Committee in the Senate recently published a paper declaring that the decision "gave aid and comfort" to "activist lawyers" who seek to "force same-sex marriage on society through pliant,

activist courts." Only an amendment to the Constitution, the report states, can prevent this result.

The Constitution is the foundation of our democracy. It reflects the enduring principles of our country. Notwithstanding the views of some of my Republican colleagues, the Constitution does not need a makeover.

We have amended the Constitution only seventeen times in the two centuries since the adoption of the Bill of Rights. Aside from the Amendment on Prohibition, which was quickly recognized as a mistake and repealed thirteen years later, the Constitution has only been amended to expand and protect people's rights, not to take away or restrict their rights. The proposed Federal Marriage Amendment is inconsistent with our constitutional tradition and our constitutional values.

We know that some are legitimately concerned that the government may somehow interfere with the ability of their churches and religious groups to conduct their own affairs. Religious marriage is an ancient institution, and nothing in the Constitution requires any religion to accept same-sex marriage.

The separation of church and state under the First Amendment is not affected in any way by the Court's decision. If this hearing accomplishes anything, it should make this point completely clear: under our current Constitution, no court can tell any church or religious group how to conduct its own affairs. Unless the Constitution is amended, no court will ever be able to require any church to perform or grant sacramental status to a same-sex marriage.

The law of each state is what determines the legal and civil effects of marriages or civil unions. The law of each church is

what determines the religious aspects and ramifications of a sacramental marriage. Those who are concerned about preserving particular religious ceremonies and religious marriage should have no doubt whatsoever about the principle of religious freedom established by the Constitution. It makes no sense to undo our basic constitutional principles though an ill-advised and unnecessary amendment.

Far from upholding religious freedom, the proposed amendment would undermine it, by telling churches that they can't consecrate same-sex marriages, even though some churches are now doing so. Last month, the General Convention of the Episcopal Church recognized "that local faith communities are operating within the bounds of our common life as they explore and experience liturgies celebrating and blessing same-sex unions." The proposed constitutional amendment would blatantly interfere with the decisions of local faith communities and would

threaten the longstanding separation of church and state in our society.

The amendment would also undermine the nation's commitment to treating all citizens equally under the law. According to a study by the General Accounting Office in 1997, over 1,000 benefits, rights, and protections are provided on the basis of marital status in federal law. These rights include the right to file joint returns under the tax laws, to share insurance coverage, to visit loved ones in the hospital, and to receive health, family leave, and survivor benefits.

Advocates of the Federal Marriage Amendment claim that it would not prevent states from granting some legal benefits to same-sex couples. But that's not what the proposed amendment says. By forbidding same-sex couples from receiving "the legal incidents of marriage," the amendment would repeal many

existing state and local laws, including laws that deal with domestic partnerships and laws that have nothing to do with such relationships.

Just as it's wrong for a state's criminal laws to discriminate against gays and lesbians, it is wrong for a state's civil laws to discriminate against gays and lesbians by denying them the many benefits and protections provided for married couples. The proposed amendment would prohibit states from deciding these important issues for themselves. This nation has made too much progress in the ongoing battle for civil rights for gays and lesbians to take such an unjustified step backwards.

We all know what this hearing is about. It's not about how to protect the sanctity of marriage, or how to deal with "activist judges." It's about politics – an attempt to drive a wedge between one group of citizens and the rest of the country, solely for

partisan advantage. We have rejected that tactic before, and I hope we will do so again. Many of us on both sides of the aisle have worked together to expand and defend the civil rights of gays and lesbians. Together, on a bipartisan basis, we have fought for a comprehensive federal prohibition on job discrimination on the basis of sexual orientation. We have worked to expand the existing federal hate crimes law to include hate crimes based on this flagrant form of bigotry.

I hope that we can all agree that Congress has more pressing business to consider than a divisive, discriminatory constitutional amendment that responds to a non-existent problem. Let's focus on the real issues of war and peace, the economy, and the many other priorities that demand our attention so urgently in these troubled times.

THE INSTITUTE ON RELIGION & DEMOCRACY

September 2, 2003

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

Dear Senator John Cornyn:

The Institute on Religion and Democracy is an ecumenical alliance of U.S. Christians working to reform their churches' social witness, in accord with biblical and historic Christian teachings, *thereby contributing to the renewal of democratic society at home and abroad.*

We are deeply concerned about the future of the institution of marriage in this country.

We support the historic understanding of marriage as an exclusive relationship between one man and one woman. Our religious beliefs tell us that this is what God desires for us. But it is also evident to us, through reason and experience, that marriage between a man and a women enhances the well-being not only of individuals, but of our communities and nation as well.

Marriage is an essential component to establishing strong and healthy families, and thus the stability of our society as a whole. Marriage is the most fundamental and essential building block of society, providing the structure in our private lives that undergirds our public life. It is the foundation on which our families build their hopes and dreams. Strong marriages are the surest means to provide for the financial, physical, psychological and spiritual needs of children.

Polls continue to show that despite the number of hurdles before them as they approach marriage age, most of our youth want to marry and see marriage as an important goal in their lives. They see marriage not only as a means to personal happiness and an expression of loving private commitment, but also as a key social institution, by which they may participate in something larger than themselves – and so contribute to the common good.

Upholding and defending marriage is perhaps the single best way to address a host of social ills that weigh on our society. Poverty, crime and violence – with their huge social

Episcopal *Action* • Presbyterian *Action* • United Methodist *Action* • The Church Alliance for a New Sudan

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and political costs – are increased in communities where the traditional married family is weakest. There is, for example, a staggering income gap between the married and the unmarried.

Marriages in our society are beset on every side by a variety of threats. This is the worst possible time for social or legal experiments that will further erode marriage.

The victims of misguided social experimentation will be our children. Marriage as historically defined offers the single most important mechanism by which children can avoid poverty and other social pathologies. It is urgent that marriage receives all the legal support it can. Nothing else offers men, women and children the security, stability and longevity as does marriage.

The legal reinforcement of marriage as between a man and a woman would simply be extending greater protection to that institution that we know provides the best hope and opportunity for the future of our families – and our democratic experiment.

In Christ,

Diane Knippers,
President

Law Professors' Letter in Opposition to H.J. Res. 56

September 3, 2003

Dear Senate Judiciary Committee Member:

We write in opposition to H.J. Res. 56, a proposed constitutional amendment to ban same-sex marriage throughout the United States. The proposed amendment would unnecessarily intrude on the traditional state function of defining and interpreting family relationships. Furthermore, the amendment would not only impair courts' ability to interpret family relationships, but could also restrict legislatures' ability to enact statutes benefiting same-sex couples. Finally, civil marriage grants couples and their children access to over 1000 federal rights and benefits and to hundreds of state protections, rights, and responsibilities. Amending the Constitution to exclude families headed by same-sex couples from all of these protections is inconsistent with our Constitution's history and purpose.

> H.J. Res. 56 Provides:
> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.'

The proposed amendment is not necessary to protect the institution of religious marriage. Religious institutions already have the freedom, under the Establishment and Free Exercise Clauses, to determine which unions they will solemnize. The civil benefits of marriage, on the other hand, should be granted to couples in committed, long-term relationships without regard to whether they adhere to the strictures of any particular religious sect. Because certain denominations already bless same-sex unions, the proposed amendment actually undermines religious institutions' freedom to define marriage; it would single out same-sex marriages for non-recognition under state and federal law.

The proposed amendment, by enshrining discrimination in the Constitution, does not belong in a document that was designed to promote liberty and equality. Without exception, the Constitution has never been amended to exclude a particular group from the protections of the law. With the exception of prohibition (which was repealed), the Constitution has never been amended to limit basic rights. The proposed amendment is an unprecedented attempt to single out a group of people for lesser legal status. We oppose utilizing the Constitution, the founding document of our Republic, for this purpose.

The proposed amendment creates a powerful precedent authorizing the federal government to define family relationships. State law has traditionally defined

family relationships. State law determines marital status in most cases, even for the purpose of federal benefits such as Social Security. There was no federal definition of "spouse" until 1996, when Congress passed the so-called "Defense of Marriage Act," which purported to limit "spouses" to married people of the opposite sex. The proposed amendment prevents any state from defining marriage to include same-sex couples, and possibly disables state legislatures from passing *any* relationship-recognition measures. There is no reason for such significant intrusion on state sovereignty in this manner.

The proposed amendment would hamper courts in crafting equitable resolutions to the disputes before them. Proponents of the proposed amendment have argued that its purpose is to prevent courts from determining that same-sex couples are entitled to marriage equality or to "civil unions." *See* http://www.allianceformarriage.org/reports/fma/colorchart.cfm. However, in part because it would bar courts from conferring "the incidents" of marriage upon same-sex couples, the proposed amendment could in fact impair courts in resolving cases involving *hundreds* of state protections and responsibilities that are contingent upon marital status. One example of such rights is standing to sue for the wrongful death of a spouse, *see Langan v. St. Vincent's Hosp.*, 2003 N.Y. Misc. LEXIS 673 (April 10, 2003) (holding that a surviving partner to a civil union could sue for the wrongful death of his partner under the laws of New York).

The proposed amendment could invalidate popularly-enacted legislation. In recent years, numerous state and local legislatures have granted various rights and protections to same-sex partners that state law traditionally confers upon spouses. For instance, 173 state and local governments extend health benefits to the same-sex partners of their public employees. California passed legislation in 2001 that enables registered domestic partners to: adopt a partner's child through stepparent adoption; be appointed as administrator of the partner's estate, as a spouse would be; take medical leave from work to be with a sick partner (or partner's child); receive unemployment insurance benefits if he or she leaves employment to join his or her domestic partner at a remote location; file a claim for disability benefits for his or her partner; make health care decisions for an incapacitated partner; and recover damages for negligent infliction of emotional distress and wrongful death.

Although the proposed amendment would not prohibit a state from enacting such legislation, it could be interpreted to prevent a court from enforcing such legislation. . For example, if a registered domestic partner in California filed a wrongful death claim for his deceased partner, the court might conclude that because standing to sue for wrongful death is an incident of marriage, it could not constitutionally "construe" the domestic partner law to confer such standing to the surviving partner.

The proposed amendment would prohibit states from recognizing otherwise valid marriages from other countries. Belgium, the Netherlands, and Canada have all permitted same-sex couples to enter into civil marriages. Under the principle of comity, marriages that are valid where celebrated remain valid wherever the couple may travel.

The proposed amendment would require states to break with this rule and refuse to honor certain otherwise valid marriages from these countries.

For all of these reasons, we write to oppose the Federal Marriage Amendment.

Sincerely,

Professor Chai Feldblum,
Georgetown University Law Center*'

Professor William Rubenstein
UCLA School of Law

Professor Anthony Varona
Pace Law School

Professor Katherine Franke
Columbia Law School

Roger Abrams
Richardson Professor of Law
Northeastern University School of Law

William E. Adams, Jr.
Associate Dean, International, Online, & Graduate Program
Nova Southeastern University Shepard Broad Law Center

Bryan Adamson
Assistant Professor Of Law
Seattle University School of Law

Libby Adler
Assistant Professor Of Law
Northeastern University School of Law

Janet Ainsworth
Professor of Law
Seattle University, School of Law

Raquel Aldana-Pindell
Associate Professor of Law
University of Nevada, Las Vegas

Barbara Bader Aldave
Stewart Professor of Law
University of Oregon, School of Law

Penelope Andrews
Professor of Law
City University of New York School of Law

Marguerite Angelari
Director and Clinical Professor
Loyola University Chicago School of Law

Fran Ansley
College of Law Distinguished Professor of Law
University of Tennessee, College of Law

Annette Appell
Professor & Child Welfare Clinic Co-Director
University of Nevada, Las Vegas

Maria Arias
Assistant Professor
CUNY School of Law

Barbara L. Atwell
Director, Health and Policy Program
Pace Law School

Katharine Baker
Professor Of Law and Associate Dean
Chicago-Kent College of Law

Brook Baker
Professor of Law
Northeastern University, School of Law

Paris Baldacci
Clinical Professor of Law and Supervising Attorney
Yeshiva University, Benjamin N. Cardozo School of Law

Carlos Ball
Professor of Law
Penn State Dickinson School of Law

Beverly Balos
Senior Attorney
University of Minnesota Law School

Peter B. Bayer
Professor of Law
William S. Boyd School of Law, UNLV

Mary Becker
Professor of Law
DePaul University College of Law

Susan J. Becker
Associate Professor
Cleveland State University, Cleveland Marshall College of Law

John Beckerman
Associate Dean for Academic Affairs
Rutgers University School of Law, Camden

Barton Beebe
Assistant Professor Of Law
Cardozo Law School

Susan Bennett
Professor of Law
American University, Washington College of Law

Ursula Bentele
Professor of Law
Brooklyn Law School

Mary Berkheiser
Professor of Law
University of Nevada, Las Vegas

Andrew R. Berman
Professor of Law
New York Law School

Adele Bernhard
Associate Professor
Pace Law School

Arthur Best
Professor of Law
University of Denver College of Law

Brian Bix
Frederick W. Thomas Professor of Law
University of Minnesota, School of Law

Ira Bloom
Distguished Professor of Law
Albany Law School

Vincent Bonventre
Professor of Law
Albany Law School

Kristin Booth Glen
Dean and Professor of Law
CUNY School of Law

Melinda Branscomb
Associate Professor of Law
Seattle University, School of Law

Carolyn Bratt
W.L. Matthews Professor of Law
University of Kentucky College of Law

Robert Brauneis
Associate Professor of Law
George Washington University, School of Law

William Bridge
Associate Professor of Law
Southern Methodist University, Dedman School of Law

Lisa Ellen Brodoff
Clinical Professor of Law
Seattle University School of Law

Todd Brower
Professor of Law
Western State University College of Law

Mark Brown
Professor of Law
Capital University Law School

Jennifer G. Brown
Professor of Law
Quinnipiac University School of Law

Elizabeth Bruch
Practioner-in-Residence
American University, Washington College of Law

Sande L. Buhai
Clinical Professor & Faculty Public Interest Law Director
Loyola Law School, Los Angeles

Ann Burkhart
Curtis Bradbury Kellar Professor of Law
University of Minnesota, School of Law

Marilyn Cane
Professor of Law
Nova Southeastern University Shepard Broad Law Center

Jay C. Carlisle, II
Professor of Law
Pace Law School

Dale Carpenter
Associate Professor
University of Minnesota Law School

David N. Cassuto
Associate Professor of Law
Pace Law School

Francis Catania
Associate Professor of Law
Widener University School of Law

Federico Cheever
Professor of Law
University of Denver College of Law

Carol Chomsky
Professor of Law
University of Minnesota, School of Law

Margaret Chon
Professor of Law
Seattle University School of Law

Craig Christensen
Professor of Law
Southwestern University School of Law

Richard H. Chused
Professor of Law
Georgetown University Law Center

Kathleen Clark
Professor of Law
Washington University School of Law

Steve Clark
Associate Professor of Law
Albany Law School

Mark Cochran
Professor of Law
St. Mary's University, School of Law

David Cohen
Dean of Law
Pace Law School

Ruth Colker
Heck Faust Memorial Chair in Constitutional Law
Ohio State University College of Law

Nancy Cook
Associate Professor of Law
Roger Williams University, School of Law

Laura J. Cooper
McClendon Professor in Law and ADR
University of Minnesota, School of Law

Elizabeth Cooper
Associate Professor of Law
Fordham University School of Law

Peggy Cordray
Professor Of Law
Capital University Law School

Robert Correales
Assistant Professor Of Law
William S. Boyd School of Law, UNLV

Barbara Cox
Professor of Law
California Western School of Law

Susan Crawford
Assistant Professor Of Law
Cardozo Law School

Colin Crawford
Associate Professor of Law
College of Law at Georgia State University

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Professor of Law
Widener University School of Law

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Duke

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Professor of Clinical Law
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Gabrielle Davis
Clinical Instructor
University of Toledo College of Law

Robert DeKoven
Professor of Legal Writing
California Western School of Law

Claude d'Estree
Visiting Professor of Law
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James Annenberg Levee Professor of Criminal Procedure
University of Minnesota Law School

Jennifer Drobac
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Indiana Law School, Indianapolis

Kate Duba
Lawyering Process Professor
University of Denver School of Law

Rashmi Dyal-Chand
Assistant Professor of Law
Northeastern University

Eric B. Easton
Co-Director, Legal Skills Program, Coord, China Programs
University of Baltimore School of Law

Nancy Ehrenreich
Professor of Law
University of Denver College of Law

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Professor & Director, W&L Center for Law and History
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James Garland
Legal Writing Instructor
Hofstra University

Sally F. Goldfarb
Associate Professor
Rutgers Law School, Camden

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Cardozo Law School

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Associate Professor of Law
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Professor of Law
Albany Law School

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Emory University, School of Law

Sanford N. Greenberg
Lecturer
Chicago-Kent College of Law

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Lecturer in Residence
Ctr. For the Study of Law & Soc., University of California, Berkeley, Boalt Hall

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Brooklyn Law School

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Rutgers Law School, Camden

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Associate Professor of Clinical Law
George Washington University, School of Law

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Michigan State University - DCL College of Law

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E.L. Wiegand Professor of Law
William S. Boyd School of Law, UNLV

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Professor of Law
Pace Law School

Barbara Katz
Instructor, Legal Writing, Research & Advocacy Program
Emory University School of Law

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Boyd School of Law, UNLV

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NY Court of Appeals (Retired); Professor of Law
Albany Law School

Sanford Levinson
Garwood Centennial Chair in Law University
University of Texas School of Law

Marcia Levy
Director of Clinical Programs
University of Denver College of Law

Hope Lewis
Professor of Law
Northeastern University, School of Law

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Associate Professor of Law
University of Baltimore School of Law

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University of Minnesota Law School

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Clinical Professor of Law
Duke University School of Law

Marcia McCormick
Visiting Assistant Professor
Chicago-Kent College of Law

Joan Meier
Professor of Clinical Law
George Washington University, School of Law

Vanessa Merton
Associate Dean for Clinical Edu & Professor of Law
Pace Law School

Naomi Mezey
Associate Professor of Law
Georgetown University Law Center

Kristian Miccio
Assistant Professor Of Law
University of Denver College of Law

Binny Miller
Professor of Law
American University, Washington College of Law

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Professor of Law
Pace Law School

JoAnne Miner
Director, Cornell Legal Aid Clinic
Cornell Law School

Lawrence Mitchell
John Theodore Fey Research Professor of Law
George Washington University, School of Law

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Kaapcke Professor of Law
University of Oregon

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Visiting Assistant Professor
University of North Dakota School of Law

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Associate Professor
University of the District of Columbia School of Law

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Assistant Professor Of Law
Northern Illinois University College of Law

Michael B. Mushlin
Professor of Law
Pace Law School

Ellen Musinsky
Professor of Law & Externship Director
Franklin Pierce Law Center

Louis Natali
Professor of Law
Temple University School of Law

Odeana Neal
Assoc Prof of Law & Law Dir, Att'y Prac Internship Program
University of Baltimore School of Law

Marie S. Newman
Associate Professor
Pace Law School

Julie Nice
Charles W. Delaney, Jr. Professor of Law
University of Denver School of Law

Kevin Oates
Professor of Law
William S. Boyd School of Law, UNLV

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Professor Of Law and Associate Dean
Northeastern University, School of Law

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Professor of Law
University of California Davis School of Law

Victoria Ortiz
Dean of Students
University of California, Berkeley

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Professor of Law
Albany Law School, Union University

Alicia Ouellette
Assistant Lawyering Professor
Albany Law School

Margaret Paris
Associate Dean for Academic Affairs
University of Oregon, School of Law

Kathryn Penrose
Visiting Assistant Professor of Law
Chicago-Kent College of Law

Henry H. Perritt, Jr.
Professor of Law and Former Dean
Chicago-Kent College of Law, Illinois Institute of Technology

Todd D. Peterson
Professor of Law
George Washington University, School of Law

Penelope Pether
Associate Professor of Law
American University, Washington College of Law

Victoria Phillips
Professor of Law
American University, Washington College of Law

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Professor of Law
Brooklyn Law School

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Professor of Law
Georgia State University College of Law

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Professor of Law
Seton Hall University School of Law

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Professor of Law
American University, Washington College of Law

Malla Pollack
Visiting Professor of Law
University of Oregon

Terrill Pollman
Associate Professor
William S. Boyd School of Law, UNLV

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Emory University School of Law

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Southwestern School of Law

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Loyola University New Orleans School of Law

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Professor of Law
American University, Washington College of Law

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Director of Academic Assistance Program, LWRAP
Emory University School of Law

R. Anthony Reese
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School of Law, Dir of Northern Calif Innocence Project
Santa Clara University of Law

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Assistant Professor of Law
American University, Washington College of Law

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Clinical Attorney, Civil Justice Clinic
Hastings College of the Law

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University of Southern California Law School

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Professor of Law
Northeastern University, School of Law

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George Washington

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Professor of Law
George Washington

Susan Schechter
Assoc Dean for student Svcs & Clinical Professor of Law
Golden Gate University School of Law

David Schoenbrod
Professor of Law
New York Law School

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Associate Professor of Law
George Washington University, School of Law

Ora Schub
Associate Clinical Professor of Law
Northwestern University School of Law

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Professor of Law
George Washington University, School of Law

Beth G. Schwartz
Associate Clinical Professor of Law
Fordham University School of Law

Brad Sears
Director, The Williams Project
University of Califonia, Los Angeles

Jeff Selbin
Adjunct Lecturer
Boalt Hall School of Law

Charles Shafer
Professor of Law
University of Baltimore School of Law

Richard Shaffran
Assistant Dean and Adjunct Assistant Professor of Law
University of Southern California Law School

Laurie Shanks
Director, Field Placement Project
Albany Law School

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Associate Professor of Law
Seattle University School of Law

Howard Shelanski
Acting Professor of Law
Boalt Hall School of Law

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Prof of Law & Sr Advisor to the Graduate Prgm in Taxation
Chicago-Kent College of Law, Illinois Institute of Technology

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Nicholas deB. Katzenbach Professor of Law
Yale Law School

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Professor of Law
Boston University, School of Law

Stephen Simon
Clinical Professor
University of Minnesota, School of Law

David Skover
Professor of Law
Seattle University School of Law

Susan Lea Smith
Professor of Law
Willamette University College of Law

Linda F. Smith
Professor and Clinical Program Director
S. J. Quinney College of Law, University of Utah

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Lecturer on Law
Harvard Law School

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Associate Dean
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University of Connecticut School of Law

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Professor of Law
Yeshiva University, Benjamin N. Cardozo School of Law

Allan R. Stein
Professor of Law
Rutgers Law School, Camden

Joan Steinman
Distinguished Professor of Law
Chicago-Kent College of Law

Beth Stephens
Professor
Rutgers Law School, Camden

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Boyd School of Law, UNLV

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Associate Professor of Law
Pace Law School

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Kliks Professor of Law
University of Oregon School of Law

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Professor of Law
University of North Dakota School of Law

Adrienne Volenik
Clinical Professor
University of Richmond, School of Law

Robert Volk
Associate Professor
Boston University School of Law

Nancy Wanderer
Law Director of Legal Research and Writing Program
University of Maine School of Law

Tony Waters
Visiting Professor of Law
University of Denver College of Law

Susan Louise Waysdorf
Professor of Law
The University of the District of Columbia School of Law

David Weissbrodt
Fredrikson and Byron Professor of Law
University of Minnesota, School of Law

Robert Westley
Professor of Law
Tulane Law School

Douglas Whaley
Professor of Law
Ohio State University College of Law

Charles Whitebread
George T. and Harriet E. Pfleger Professor of Law
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Bryan Wildenthal
Associate Professor of Law
Thomas Jefferson School of Law

Stephanie Wildman
Professor of Law
Santa Clara University, School of Law

Carolyn Wilkes Kaas
Associate Professor of Law & Director of Clinical Skills
Quinnipiac University School of Law

Lucy Williams
Professor of Law
Northeastern University School of Law

Anthony Winer
Professor of Law
William Mitchell College of Law

Jimmy Winokur
Professor Of Law
University of Denver College of Law

Katherine J. Wise
Clinical Staff Attorney
The Ohio State University, Moritz College of Law

Mark Wojcik
Associate Professor
John Marshall Law School

Tobias Barrington Wolff
Acting Professor
University of California, Davis

Pavel Wonsowicz
Assistant Professor Of Law
Boyd School of Law, UNLV

Richard Wood
Professor of Law
Capital University Law School

Barbara Bennet Woodhouse
David H. Levin Chair in Family Law
Frederic G. Levin College of Law

Patrick Woolley
Beck, Redden & Secrest Professor in Law
University of Texas School of Law

Jennifer Wriggins
Professor of Law
University of Maine, School of Law

Danaya Wright
Associate Professor of Law
University of Florida College of Law

Christopher R. Yukins
Associate Professor of Government Contract Law
George Washington University, School of Law

Deborah Zalesne
Associate Professor
CUNY School of Law

Carol Ziegler
Associate Ptofessor of Legal Writing
Brooklyn Law School

Don Zillman
Godfrey Professor of Law
University of Maine, School of Law

Luize Zubrow
Professor of Law
George Washington University, School of Law

*Institutional affiliation for identification purposes only. The signatures do not reflect the official policy of the named law schools.

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

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(*Deceased)

Oppose the Federal Marriage Amendment

September 3, 2003

Dear Senator:

We, the undersigned organizations of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, urge you to oppose any attempt, such as the proposed Federal Marriage Amendment, to amend the United States Constitution to limit the rights of its citizens. This particular amendment would turn 225 years of Constitutional history on its head by discriminatorily intruding into the traditional authority of states in matters of family law.

The proposed amendment is also antithetical to the Constitution's guiding principle to provide equal protection for all. It proposes to use one of our nation's most revered documents as a tool of exclusion, amending the Constitution to restrict the rights of a group of Americans for the first time in history. The proposed amendment would not only prohibit states from granting equal marriage rights to same-sex couples, but apparently seeks also to deprive same-sex couples and their families of fundamental protections such as hospital visitation, inheritance rights, and health care benefits, whether conveyed through marriage or other legally recognized relationships, running afoul of basic principles of fairness as well as causing harm to real children and real families.

Amending the Constitution is a measure that is rarely used, and it is only done to address great public policy need. Since the Bill of Rights' adoption in 1791, the Constitution has only been amended seventeen times. The Constitution itself, and subsequent amendments, were designed to protect and expand individual liberties, not to take away or restrict them. Nevertheless, the resolution proposes to restrict the rights of a whole class of people.

At a time when our nation has a great many pressing issues, exerting time and energy on a divisive and discriminatory constitutional amendment seems a poor use of our resources. We implore you to focus on the important issues facing our nation, and to publicly oppose this amendment. If you have any questions or need further information, please contact Nancy Zirkin, LCCR Deputy Director/Director of Public Policy, at (202) 263-2880.

Sincerely,

Leadership Conference on Civil Rights

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American Civil Liberties Union
Americans for Democratic Action

Anti-Defamation League
Bazelon Center for Mental Health Law
Center for Women Policy Studies
Feminist Majority
Japanese American Citizens League
The Jewish Labor Committee
Labor Council for Latin American Advancement
Mexican American Legal Defense and Educational Fund
National Alliance of Postal and Federal Employees
National Asian Pacific American Legal Consortium
National Congress for Community Economic Development
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National Organization for Women
NOW Legal Defense and Education Fund
Parents, Families and Friends of Lesbians and Gays
Presbyterian Church (USA), Washington Office
People For the American Way
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cc: Members of the Senate Judiciary Committee

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The Subcommittee on the Constitution, Civil Rights and Property Rights
Committee on the Judiciary
The United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: FOR THE RECORD OF HEARINGS HELD BY THE SUBCOMMITTEE ON THURSDAY, SEPTEMBER 4, 2003, "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1999?"

Dear Members of the Subcommittee on the Constitution, Civil Rights and Property Rights:

I write on behalf of the Board of Directors and entire membership of the Lesbian and Gay Law Association of Greater New York (LeGaL), a 500-member strong professional association of the lesbian, gay, bisexual and transgender legal community in the New York City Metropolitan area. We evaluate judicial candidates and sponsor educational and social programs, an annual awards dinner, a summer internship program and walk-in legal clinics for those with low incomes. LeGaL also publishes "Lesbian/Gay Law Notes," the most comprehensive summary available of developments in law affecting the lesbian, gay, bisexual and transgender community.

LeGaL, its Board of Directors and its membership oppose any constitutional amendment to ban same-sex marriage throughout the United States as an option during your discernment as to "what is needed to defend the bipartisan Defense of Marriage Act of 1999." Using H. J. Res. 56 as an example, that proposed amendment would federalize a traditional state function: defining and interpreting family law. Furthermore, such an amendment would not only impair courts' ability to interpret family law, but could also restrict state legislatures' ability to enact statutes benefiting same-sex couples. Finally, civil marriage grants couples and their children access to over 1000 federal rights and benefits and to hundreds of state protections, rights, and responsibilities. Amending the Constitution to exclude families headed by same-sex couples from all of these protections is inconsistent with our Constitution's history and purpose.

H.J. Res. 56 Provides:
Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The proposed amendment is not necessary to protect the institution of religious marriage. Religious institutions already have the freedom, under the Establishment Clause, to determine which unions they will solemnize. The civil benefits of marriage, on the other hand, should be granted to couples in committed, long-term relationships without regard to whether they adhere to the strictures of any particular religious sect. Furthermore, because certain denominations already bless same-sex unions, the proposed amendment actually undermines religious institutions' freedom to define marriage as it would single out same-sex marriages for non-recognition under state and federal law.

799 Broadway #340 New York, N.Y. 10003 212-353-9118 fax 212-353-2970
email: LE_GAL@earthlink.net www.le-gal.org
LeGaL Foundaion is a charitable organization dedicated to the service of the Lesbian, Gay, Bisexual, and Transgender Community

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Lesbian and Gay Law Association of Greater New York, Inc.

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The proposed amendment would enshrine discrimination in the Constitution and does not belong in a document that was designed to promote liberty and equality. Without exception, the Constitution has never been amended to exclude a particular group from the protections of the law. Indeed, with the exception of prohibition (which was repealed), the Constitution has never been amended to limit basic rights. The proposed amendment is an unprecedented attempt to single out a group of people for lesser legal status. We oppose utilizing the Constitution for this purpose.

By creating federal marriage law, the proposed amendment strips states of one of their traditionally exclusive powers. Family law has *always* been the province of the states. In fact, state law determines marital status even for the purpose of federal benefits such as Social Security. There was no federal definition of "spouse" until 1996, when Congress passed the so-called "Defense of Marriage Act," which purported to limit "spouses" to married people of the opposite sex. The proposed amendment intrudes even further upon state sovereignty, preventing any state from defining marriage to include same-sex couples, and possibly disabling legislatures from passing *any* relationship-recognition measures.

The proposed amendment would hamper courts in their crafting of equitable resolutions to the disputes before them. Proponents of the proposed amendment have argued that its purpose is to prevent courts from determining that same-sex couples are entitled to marriage equality or to "civil unions." See http://www.allianceformarriage.org/reports/fma/colorchart.cfm. However, in part because it would bar courts from conferring "the incidents" of marriage upon same-sex couples, the proposed amendment could in fact impair courts in resolving cases involving *hundreds* of state protections and responsibilities that are contingent upon marital status. One example of such rights is standing to sue for the wrongful death of a spouse, see *Langan v. St. Vincent's Hosp.*, 2003 N.Y. Misc. LEXIS 673 (April 10, 2003) (holding that a surviving partner to a civil union could sue for the wrongful death of his partner under the laws of New York).

The proposed amendment could invalidate popularly-enacted legislation. In recent years, numerous state and local legislative bodies have granted various rights and protections to same-sex partners that state law traditionally confers upon spouses. For instance, 173 state and local governments extend health benefits to the same-sex partners of their public employees. California passed legislation in 2001 that enables registered domestic partners to: adopt a partner's child through stepparent adoption; be appointed as administrator of the partner's estate, as a spouse would be; take medical leave from work to be with a sick partner (or partner's child); receive unemployment insurance benefits if he or she leaves employment to join his or her domestic partner at a remote location; file a claim for disability benefits for his or her partner; make health care decisions for an incapacitated partner; and recover damages for negligent infliction of emotional distress and wrongful death.

Although the proposed amendment does not appear to prohibit a state from enacting such legislation, it could be interpreted to prevent a court from enforcing such legislation. For example, if a registered domestic partner in California filed a wrongful death claim for his deceased partner, the court might conclude that, because standing to

799 Broadway #340 New York, N.Y. 10003 212-353-9118 fax 212-353-2970
email: LE_GAL@earthlink.net www.le-gal.org
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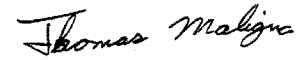
sue for wrongful death is an incident of marriage, it could not constitutionally "construe" the domestic partner law to confer such standing to the surviving partner.

The proposed amendment would appear to prohibit states from recognizing otherwise valid marriages from other countries. Belgium, the Netherlands, and Canada have all permitted same-sex couples to enter into civil marriages. Under the principle of comity, marriages that are valid where celebrated remain valid wherever the couple may travel. The proposed amendment would appear to require states to break with this rule and refuse to honor certain otherwise valid marriages from these countries.

For all of the foregoing reasons, LeGaL opposes any federal marriage amendment to the Constitution of the United States.

Sincerely,



Thomas Maligno
President
Lesbian and Gay Law Association of Greater New York

799 Broadway #340 New York, N.Y. 10003 212-353-9118 fax 212-353-2970
email: LE_GAL@earthlink.net www.le-gal.org
LeGaL Foundation is a charitable organization dedicated to the service of the Lesbian, Gay, Bisexual, and Transgender Community

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CHURCH OF GOD IN CHRIST
OFFICE OF THE BISHOP
5825 IMPERIAL AVE.
SAN DIEGO, CA 91941
619/262-2671

03 September 2003
Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D. C. 20510

Honorable Senator Cornyn:

I have been disturbed of late by the mounting attacks on one of the fundamental and foundational institutions of our nation – the institution of marriage. I understand that your Subcommittee is in a position to protect marriage as we know it and as it has been understood since our nation was declared independent over two hundred years ago.

The sacredness of marriage is particularly significant to my constituency as one of twelve members of the governing body of the Memphis headquartered, 5 Million member, International Church of God in Christ. While our membership is open to people of every race and color, we are predominately an African-American body of Christian worshippers. We know that one of the legacies of the tragic history of slavery in this country was the intended destruction of marriage between men and women of color. One of the greatest benefits of the Emancipation was the right to marry and raise our families as God has ordained.

We are opposed to any dilution of the institution of marriage presented under the guise of political correctness. We also condemn any effort to equate choices of sexual life style with the civil rights demands of those disenfranchised because of their race or nationality.

Sexual arrangements that do not allow for the possibility of the birth of children through the natural relationships of the partners are not marriages, they are conveniences of association and nothing more. They do not merit the legal status of a responsible marriage between a man and a woman because they focus only on self gratification and not upon the responsibility of preserving the nation and the culture through the natural birth and rearing of children.

We continue to pray for you and all of the leaders of our nation who have inherited their authority from God. We pray that you will have the courage and fortitude to stand up for righteousness in a day when many seem willing to compromise the truth and the virtue of our nation for peace in our time.

Very truly yours,

Bishop George D. McKinney
2nd Jurisdiction So. Ca. COGIC
Member General Board, COGIC International

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Sensenbrenner sees no need for marriage amendment

Law's enough, he says; Baldwin, Gunderson enter same-sex debate

By KATHERINE M. SKIBA
kskiba@journalsentinel.com

Last Updated: Aug. 25, 2003

Washington - F. James Sensenbrenner Jr., who chairs the House Judiciary Committee, says that in principle he opposes marriages and civil unions between same-sex couples, but there's no need now to amend the Constitution to prohibit them.

Sensenbrenner, a Republican from Menomonee Falls, said the 1996 Defense of Marriage Act, which he helped write and shepherd to passage, sufficiently defines marriage as being between a man and woman with respect to federal matters.

"It's not necessary at this time to amend the Constitution," said Sensenbrenner, whose committee has jurisdiction over proposals for such changes.

Meantime, a gay man and a lesbian elected to Congress from Wisconsin - Steve Gunderson, who left the House in 1997, and Tammy Baldwin, who entered in 1999 - say they'll take more prominent roles on the issue if the debate picks up steam.

Baldwin, a Democrat from Madison, called the proposed constitutional amendment "wholly unnecessary and divisive" and said she was "troubled" by comments President Bush made on marriage last month.

Gunderson, calling himself "rural, religious and Republican," said he wouldn't be concerned if a constitutional amendment defines marriage as an institution between a man and a woman. But he opposes an amendment outlawing domestic partnerships or civil unions for people in "long-term, loving relationships."

Issue could heat up

The issue could heat up when Congress returns from its August recess. The U.S. Supreme Court in June struck down a Texas anti-sodomy law, and Bush in July said: "I believe a marriage is between a man and a woman, and I think we ought to codify that one way or the other."

Baldwin, referring to the 1996 provision, said she was troubled by Bush's "lack of knowledge of current federal law."

Both she and Gunderson are in committed relationships, which they discussed.

A House Republican, Marilyn Musgrave of Colorado, has introduced the Federal Marriage Amendment, which has more than 80 co-sponsors. It was referred to the Judiciary panel's Constitution subcommittee, but no hearings have been scheduled.

Told of Sensenbrenner's remarks, Baldwin called them "very significant," since a committee chairman could choose not to schedule the matter "for any type of consideration."

In the Senate, meanwhile, hearings are planned on the measure.

Amending the Constitution requires two-thirds approval of both the House and Senate and ratification by three-quarters of the states.

"It's been done only 27 times in over 200 years," Sensenbrenner said. "It's very strong medicine."

He said the 1996 law defines marriage as being between a man and woman and gives states the option of not recognizing gay marriages or civil unions approved by other states.

Meanwhile, the Massachusetts Supreme Judicial Court is expected to rule soon in a case filed by two lesbians refused a wedding license, and similar cases are pending in other states.

Regardless of state court rulings, Sensenbrenner said, ultimately "this is an issue that requires the (U.S.) Supreme Court to make a decision." He said he would support a constitutional amendment authorizing marriage only between a man and woman "if there is no other way to preserve the definition of marriage in this country."

States were responsible

Traditionally, he added, marriage, divorce and family law have been the prerogatives of the states.

Baldwin, joining two other gay lawmakers, Democrat Barney Frank of Massachusetts and Republican Jim Kolbe of Arizona, made that same point in a letter to House members about the proposed amendment last month. They wrote: " . . . what is most radical about this amendment is not that it defines marriage, but that it takes away from each of the 50 states the right to decide this question and gives it for the first time in our 200-year history to the federal government."

Baldwin for almost eight years has been involved in a "permanent partnership" with Lauren Azar, a lawyer with Michael, Best & Friedrich in Madison.

When asked if she would consider formalizing the relationship, Baldwin said that was a "deeply personal and private decision" that she would announce to family and friends, not the media.

Gunderson, who had represented western Wisconsin, works for a strategic planning and communications firm in Arlington, Va. He also sits on the public policy committee of the Human Rights Campaign, the nation's largest lesbian and gay rights political group.

In 1996, he and his then-partner, architect Rob Morris, wrote a book, "House and Home: The Political and Personal Journey of a Gay Republican Congressman & the Man with Whom He Created a Family." They have since split. Gunderson said that for almost two years, he and Jonathan Stevens, who works for student loan company Sallie Mae, had been in a relationship.

Both Baldwin and Gunderson said that while polls show most Americans oppose gay marriage and civil unions, many people agree with guaranteeing rights to same-sex partners, such as hospital visitation privileges, the right to make medical decisions for incapacitated partners and the right to convey insurance and pension benefits.

Baldwin said family law remains inadequate for gay and lesbian couples with children, noting that in most states only one partner is recognized as a lawful parent and the other is barred from adopting the child.

From the Aug. 25, 2003 editions of the Milwaukee Journal Sentinel

Statement by Rep. Jerrold Nadler
Senate Subcommittee on the Constitution, Civil Rights, and Property Rights
"What is Needed to Defend the bi-Partisan Defense of Marriage Act?"
September 4, 2003

Mr. Chairman, Ranking Member Feingold, I appreciate the opportunity to present this testimony to the Subcommittee on this very important issue.

Why is there so much attention being paid to the subject of marriage between people of the same gender? No state currently confers legal recognition on such marriages, yet the mere possibility that some state at some time might extend equal rights to all Americans to marry, seems to have set off a great deal of hysteria.

Nowhere has the so-called Defense of Marriage Act (DOMA) been ruled unconstitutional, although in the absence of legally recognized marriages between persons of the same gender, it is not clear how anyone would have an opportunity to invoke much less challenge it. It is either constitutional and meaningless, or it is unconstitutional.

If the Full Faith and Credit Clause of the United States Constitution requires states to recognize marriages between individuals of the same gender officiated in other states – something that does not now exist – then a statute saying otherwise would appear to be void. If,

on the other hand, the Full Faith and Credit Clause does not require such recognition, then the Defense of Marriage Act will have merely conferred on states a power that the Constitution already gives them. It must be either one or the other. Of course, this is currently a purely hypothetical issue, because there are no same-gender marriages recognized anywhere in the United States. This question was repeatedly discussed when DOMA was considered by the Congress, and nothing has changed.

I think it is important to remember what the marriage debate is and is not about.

It is about equal rights. Married people have many rights and privileges that unmarried people do not, and cannot, have. These include rights of inheritance on the same terms as married people; the right to visit a spouse in the hospital and participate in major life decisions; the right to ensure that your partner of many decades is not deported because you are unable to marry – an issue I am attempting to address with my legislation, H.R. 832, the Permanent Partners Immigration Act of 2003. Why should people who have made a life-long commitment to each other not be able to enjoy these simple rights that every one of us takes for granted?

It is not about the "defending" marriage. My marriage does not depend on who we allow to get married any more than it does on who we allow to get divorced. Some people object to marriages between people of different races, yet we no longer prohibit such marriages, and the institution of marriage is none the worse for it. The institution of marriage is not doing very well these days, but the problem is not due to the fact that many of our neighbors are committed to each other and want to enjoy the blessings and the rights of marriage.

It is about people who believe so strongly in marriage and their commitment to each other that they are willing to fight for it. How much stronger the institution of marriage would be if more heterosexuals believed in marriage with the same intensity.

It is not about the *Lawrence* decision which simply said that intimate, non-commercial, relations between consenting adults, in the privacy of their own bedroom, is not the government's business, and the government has no right to force its way into their home and brand them as sex criminals as if they were child molesters or rapists. The Supreme Court in *Lawrence* did not take the position that the state owed anyone the right to have the state give them anything, only that they had the right to be let alone. Some have argued that this decision will open the door to a constitutional right to bestiality or incest. Can some of our colleagues really not tell the difference between an adult couple who love each other, take care of each other, and are committed to each other from what one Senator described as "man on dog" relations? I think that says something more troubling about some critics of the *Lawrence* decision than it does about the decision itself.

Finally, this is not about religious liberty. No one has proposed that any religion be forced to recognize any union, much less officiate unions between persons of the same gender, in violation of their faith. In fact, current law does violate religious liberty by denying those faiths that do wish to officiate such marriages the ability to do so. Should a state ever decide to recognize marriages between persons of the same gender, no religion will be compelled to perform such marriages for any reason. The only thing civilly recognized marriages would do would be to provide people who wish to be married – and religions now prohibited by law from

officiating those marriages – with the ability to do so.

I think it is important to take a deep breath and to remind ourselves that this so-called "radical agenda" is really very non-radical. It is about people who want to marry, have families, be active in their communities, take responsibility for each other. In short, it is about the American Dream. It is about what every other American hopes for themselves, for their children, and for their friends. It is about giving all Americans the right to a happy life that we all want and treasure. Nothing more.

I thank the Subcommittee for the opportunity to present this testimony.

Dear Senator Feingold:

We write to express our opposition to H.J. Res. 56, the proposed constitutional amendment to ban civil marriage by gay and lesbian couples throughout the United States. We represent a diverse array of faiths and do not have an official organizational position regarding same-sex marriage. However, we do have a position on discrimination and therefore, oppose the unprecedented use of a constitutional amendment to exclude a particular community of individuals from protections of the law. This amendment would write discrimination into the constitution and would prevent gay and lesbian couples (and the children in such families) from receiving over 1000 federal rights and benefits associated with civil marriage.

We are also deeply troubled by discourse that has blurred the lines between religious marriage and civil marriage. The United States Constitution's Establishment and Free Exercise Clauses, well-defined in First Amendment jurisprudence, makes clear that religious institutions have the freedom and flexibility to choose, without governmental interference, what types of unions they will solemnize. Thus, permitting gays and lesbians the right to formalize their relationships in civil marriage would not force any religious institution to recognize or solemnize these civil marriages. On the other hand, H.J. Res. 56 would express disrespect toward religious institutions that have chosen to solemnize same-sex unions, since this constitutional amendment would prevent these unions from being recognized under state and federal law.

For all of these reasons, we hope that you and your colleagues on the Senate Judiciary Committee will join us in opposing the proposed constitutional amendment. We thank you for providing us with the opportunity to share with you our concerns.

Sincerely,

Al-Fatiha
Central Conference of American Rabbis
Dignity USA
Faith Action Network of People for the American Way
Faith Temple Church
Inner City World Ministries
Metropolitan Community Churches
Soulforce, Inc.
Union of American Hebrew Congregations
Unitarian Universalist Association of Congregations
Victory Church

STATE OF ALASKA

Frank H. Murkowski, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

September 4, 2003

Dear Senator Cornyn,

Thank you for giving me the opportunity to provide comments for your hearing to discuss measures that could be employed to defend the 1996 Defense of Marriage Act being held in the Senate Judiciary Subcommittee on the Constitution.

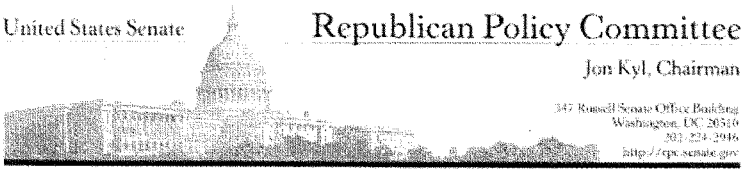
Protecting fundamental constitutional rights is the domain of the judiciary. Legislative decisions need to be left to the legislative bodies. State legislatures, including Alaska's, are providing legal definitions of marriage, consistent with the Defense of Marriage Act. *See* AS 25.05.011, 013; Alaska Const. art. I, § 25. In turn, activist courts are gradually attempting to erode marriage definitions through collateral attacks, even though the definitions impinge no fundamental equal protection or due process rights. An amendment to the U.S. Constitution would provide protection against such an erosion by the federal judiciary, fundamentally protecting the states' Tenth Amendment right to define for themselves what marriage is or is not.

Morality is determined by the people, who speak through their legislatures. Legislatures in turn define certain laws based on that morality. The Defense of Marriage Act speaks to this democratic system by defining for purposes of federal law that marriage is the legal union of one man and one woman. This definition does not preclude a future extension of federal benefits or other legal rights to other types of relationships, nor does it preclude a future definition for the union of same-sex or other types of couples. Acting on the federal level, a constitutional amendment defining marriage does not prevent states from adopting contrary definitions for state benefits or other state purposes.

Fundamental rights and liberties protected by the Constitution, including protecting the private sanctity of the bedroom, need to be and are properly addressed by the courts. The definition of marriage is properly addressed by the legislatures. An amendment to the Constitution defining marriage for federal law as between a man and a woman would not only assist in preventing the breakdown between legislative and judicial power at both the federal and state levels, but it also would not interfere with any state desiring a different state outcome.

Sincerely,

Gregg D. Renkes
Attorney General



July 29, 2003

Massachusetts Court Expected to Legalize Same-Sex Marriage

The Threat to Marriage from the Courts

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

Introduction and Executive Summary

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

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

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

[2] Slip Op. at 18.

[3] Slip Op. at 13.

[4] Slip Op. at 17.

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

Recognizing an even stronger societal consensus at the time (68 percent opposition to same-sex marriage[7]), Congress overwhelmingly passed the Defense of Marriage Act ("DOMA") in 1996. The bill passed the Senate 85-14 and the House 342-67, including the "yes" votes of 61 current Senators.[8] DOMA did two things. *First*, it recognized the traditional definition of marriage as between one man and one woman for all aspects of federal law. *Second*, it ensured that no State is obligated to accept another State's non-traditional marriages (or civil unions) by operation of the Constitution's Full Faith and Credit Clause (art. IV, sec. 1). Thirty-seven States have passed constitutional amendments or statutes commonly known as "state DOMAs" that further protect traditional, heterosexual marriage.[9]

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

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

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

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

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

[8] Only eight sitting Senators voted against that law: Senators Akaka, Boxer, Feingold, Feinstein, Inouye, Kennedy, Kerry, and Wyden. Senate Vote #280, 104th Cong., 2nd Sess. (Sept. 10, 1996). Several Senators of voted in favor of DOMA when they were House members. House Vote #316, 104th Cong., 2nd Sess. (July 12, 1996).

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

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

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

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

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

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

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

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

The Recent Activity in the Courts

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

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

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

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

The Goodridge Case: the Massachusetts Court's Looming Decision

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

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

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

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

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

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

[13] *Goodridge v. Massachusetts Dep't of Public Health*, No. 2001-1647-A (Suffolk Cnty. Super. Ct. May 7, 2002), slip op. at 24-25, available at http://www.marriagewatch.org/cases/ma/goodridge/trial/trialop.pdf.

[14] *Id.* at 25-26.

[15] See Brief of Plaintiff/Appellants available at http://www.glad.org/GLAD_Cases/Appellants_Brief.pdf.

The Supreme Court's decision helps the activists advance that agenda in two primary ways. First, the Court stated that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and it states that the Constitution demands respect for "the autonomy of the person in making these choices."[16] The Court then quoted its abortion decision in *Planned Parenthood v. Casey*, when it asserted, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[17] In *Lawrence*, the Court then held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[18] Gay marriage advocates can be expected to argue that *Lawrence* requires recognition of same-sex marriages because the Court declared that homosexuals are equally entitled to "seek autonomy" for the same "purposes" as heterosexuals.

Second, the *Lawrence* Court held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[19] While many secular, morally neutral reasons exist for opposing same-sex marriage, it is certainly true that the public's opposition is *in part* related to fundamental moral beliefs about homosexual conduct.[20] Yet as the dissenting Justices declared, "[t]his [decision] effectively decrees the end of all morals legislation."[21] Gay marriage advocates are likely to argue that opposition to same-sex marriage is, at bottom, an expression only of society's moral disapproval of homosexual conduct, and then point to the Court's decision in *Lawrence* as evidence that such reasons are constitutionally illegitimate.

Gay marriage advocates can be expected to argue that the *Lawrence* decision points towards ultimate recognition of same-sex marriage. The majority Justices in *Lawrence* stated that the case "does not involve whether the government must give formal *recognition* to any relationship that homosexual persons seek to enter."[22] It is true that the case does not directly address same-sex marriage, but the reasoning certainly bears on future consideration of that question. As the dissenting Justices wrote, "[t]his case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[23]

The Next Wave of Lawsuits to Impose Same-Sex Marriage

Gay marriage activists have developed a coordinated, nationwide strategy to force legal recognition of same-sex marriage. The long-time leader of the *Marriage* Project at LAMBDA Legal, Evan Wolfson, has formed "Freedom to Marry," a legal advocacy firm solely devoted to spreading same-sex marriage throughout the nation, in large part through litigation. Joining that group's efforts are the Gay & Lesbian Advocate Defenders, the American Civil Liberties Union, LAMBDA Legal, the NOW Legal Defense and Education Fund, Human Rights Watch, and many other activist groups. In Massachusetts, the state bar association also filed a brief in support of the

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[16] Slip Op. at 13 (emphasis added).
[17] 505 U.S. 833, 851 (1992).
[18] Slip Op. at 13.
[19] Slip Op. at 17 (quoting and adopting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).
[20] Over half the public believes that sexual relations between two adults of the same sex is immoral, and more than 30 percent of the public continues to believe that the conduct should be illegal. See AEI Studies, supra note 5.
[21] Scalia Dissent at 15 (joined by Chief Justice Rehnquist and Justice Thomas).
[22] Slip Op. at 18.
[23] Scalia Dissent at 20.

plaintiffs' claim. The gay marriage activists have a zealous leadership, a sincere belief in the justice of their cause, and more than adequate funding to continue to push their claims in the courts. They have a simple goal: the legitimization and constitutionalization of same-sex marriage, and no state or federal DOMA will dissuade them from this effort.

Strategy #1: Exporting Massachusetts Marriages and Challenging DOMA

As soon as the *Goodridge* decision is announced, some same-sex couples will marry in Massachusetts. When gay marriage advocates deem it appropriate strategically, one or more of those couples will seek recognition of a Massachusetts marriage in *another* State. Activists already have made clear that this will be their strategy.[24] When these suits are filed, the activists will challenge as unconstitutional States' preexisting right not to recognize other States' marriages under the "public policy" doctrine, federal DOMA, and the state DOMAs passed by 37 States.

The fate of the activists' constitutional challenges is uncertain. It is a well-established principle of law that a marriage valid in the jurisdiction where performed shall be valid in other States. However, it is equally well established that a jurisdiction may *refuse* to *recognize* a marriage from another State if doing so would conflict with a strong local public policy. In part to ensure that their States' "public policy" on marriage was clear, 37 States have enacted "state DOMAs" that define marriage as between a man and a woman.[25] And the public policy doctrine does not *depend* on a clear statement of policy via state DOMAs; it is quite possible that every state court in a State *without* same-sex marriage would conclude that a strong public policy barred recognition of another State's same-sex marriage.[26]

Congress was aware of the public policy doctrine when it enacted DOMA,[27] but determined that the doctrine should be bolstered through federal legislation. This was because the Full Faith and Credit clause of the U.S. Constitution requires States to recognize the "public Acts, Records, and judicial Proceedings of every other State."[28] Thus, to remove any doubt about the reach of the Full Faith and Credit clause and any possible conflict with the public policy doctrine, Congress enacted DOMA pursuant to its authority — also under the Full Faith and Credit clause — to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Section 2 of DOMA provides that States are not *required* to recognize "a relationship between persons of the same sex that is treated as a marriage" in another State "or a right or claim arising from such relationship."[29]

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[24] See Angela Couloumbis, *All Sides Await a State's Ruling on Gay Marriage*, Philadelphia Inquirer, July 22, 2003 (quoting Harry Knox, program director for activist group "Freedom to Marry" as explaining that "a victory in Massachusetts would prompt couples to go there to marry, then return to their home states and demand that those governments — as well as the federal government — recognize the new marriage licenses"). Indeed, the founder of the largest gay church in the nation, the Fellowship of Metropolitan Community Churches, has pledged to attempt to get his *Canadian* marriage recognized and to challenge federal DOMA. See Mary Ellen Peterson, *Troy Perry to Launch Court Action to Have his Marriage Recognized*, 365Gay.com Newsletter, July 24, 2003, available at http://www.365gay.com/newscontent/072403perrymarriage.htm.

[25] See statutes and constitutional amendments collected at http://www.marriagewatch.org/states/doma.htm

[26] See generally David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

[27] See speeches of Senator Barbara Boxer, Diane Feinstein, and Russell Feingold, *Congressional Record*, Sept. 10, 1996, and Judiciary Committee testimony included at S-10112 and S-10118 of the *Congressional Record* on the same day.

[28] U.S. Const., art. IV, sec. 1.

[29] P.L. 104-199, 110 Stat. 2419 (1996). Some prominent scholars also believe that another State's marriage need not be recognized under the Full Faith and Credit clause because a marriage is not akin to a "public Act, Record, or

As noted above, 37 States have also passed their own DOMAs. The reach of each DOMA varies, but all have the effect of establishing the "public policy" of each State. Four States — Alaska, Hawaii, Nebraska, and Nevada — have enacted state constitutional *amendments* that prevent recognition of same-sex marriages.[30] The remaining States passed statutes that made clear the State's refusal to permit same-sex marriage in those States and the States' refusal to recognize those marriages (and in some cases, lesser "civil unions") from other States. No state supreme court has considered whether any of the *statutory* state DOMAs comply with the *State's* constitution, however. In other words, most of these state DOMAs survive solely at the whim of state supreme courts.

Defenders of traditional marriage and of DOMA have several arguments to respond to gay marriage advocates' lawsuits, but these arguments are not foolproof. Since same-sex marriage became a national issue in the mid-1990s, proponents and their allies in the legal academy have been working to devise ways to force States to recognize other States' same-sex marriages. One widely cited article in the *Yale Law Journal* argues that the public policy doctrine is unconstitutional and States do not have the right to refuse to recognize another State's valid marriage.[31] Others have argued that if the public policy exception is applied only to exclude same-sex marriages, then the Equal Protection clause may be implicated.[32] Although most state DOMAs were passed for the express purpose of ensuring that the public policy of the State was made clear, those laws will face similar challenges. Finally, federal DOMA, often seen as a backup to the state protections, may be challenged either under the theory that Congress lacked the authority to limit the scope of the Full Faith and Credit clause, or that it violates the Equal Protection clause.[33] The Equal Protection argument would be weak under current understandings of the Constitution because only Justice O'Connor adopted such an analysis in *Lawrence*. Whether courts will seek to expand that jurisprudence in light of Justice O'Connor's concurring opinion in *Lawrence* and the Supreme Court's earlier decision in *Romer v. Evans*[34] remains to be seen.

It is difficult to predict the success of these challenges to federal DOMA, state DOMAs, and the public policy doctrine. Even the Clinton Justice Department opined that DOMA was constitutional. But through careful forum shopping, gay marriage activists can put these arguments before activist judges throughout the country. To rely solely on DOMA ultimately is to trust that *all* judges will uphold that law.

Strategy #2: Filing Copycat Suits and Reproducing Goodridge

Every state constitution contains the same basic constitutional protections found in the Massachusetts Constitution, including those provisions that the plaintiffs in *Goodridge* argue mandate a right to same-sex marriage. While other States' courts are not bound to follow

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judicial Proceeding" and because forcing recognition is inconsistent with the underlying purpose of the clause. See, for example, David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7 (1997).

[30] See http://www.marriagewatch.org/states/doma.htm

[31] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997).

[32] See, e.g., Mark Strasser, *Legally Wed: Same Sex Marriage and the Constitution*, at pp. 138-140 (Cornell Univ. Press 1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev 1 (1997).

[33] Harvard Law Professor Lawrence Tribe, for example, made the former argument at the time of DOMA's consideration in 1996. See Tribe letter made part of *Congressional Record* by Senator Kennedy on June 6, 1996.

[34] 517 U.S. 620 (1996) (holding unconstitutional a Colorado state constitutional amendment barring enactment of anti-discrimination laws aimed at benefiting homosexuals).

Goodridge, it takes little imagination to recognize that some judges — especially those protected from the wrath of voters — could be tempted to use their power to invent a new constitutional right.

Gay marriage advocates have already filed such lawsuits in Arizona, Indiana, and New Jersey, and more cases can be expected after *Goodridge* is announced. It is impossible to predict how these other state courts will rule. Many can be expected to dismiss these lawsuits as frivolous, but the results are unlikely to be uniform. After all, it was the New Jersey Supreme Court that in 1999 wrote the expansive opinion mandating that the Boy Scouts accept homosexual Scout Leaders.[35] For the 46 States that lack a state constitutional amendment barring same-sex marriage, the future of the marital institution currently resides in the state supreme courts, not in the legislatures. If the *Goodridge* case is decided as anticipated, the activists will have a "model case" upon which to rely in those other States' courts.

Strategy #3: Filing Federal Lawsuits Using the Lawrence Decision

Gay marriage advocates have yet another avenue to pursue. Homosexual federal employees surely will include those who marry in Massachusetts post-*Goodridge*. At some point, one of those employees will apply for spousal benefits such as health insurance or pension benefits. Because federal DOMA defines marriage as between a man and a woman for the purposes of all federal laws and regulations, the benefit claim will be denied. Thus, the same-sex "spouse" would have no rights as a "spouse," even if Massachusetts or another State believed otherwise.

The federal employee and his or her partner will then sue in federal court, arguing that the federal definition of marriage in DOMA is unconstitutional as a matter of federal Equal Protection and Substantive Due Process law. The plaintiffs also may argue that Congress lacks the power to "regulate" the terms of marriage because marriage is conventionally a State matter, citing the Supreme Court's recent federalism jurisprudence as support. Although federal courts should reject such claims and uphold DOMA's definition of marriage for federal purposes, it is well known that some federal jurisdictions are more activist than others. Insofar as advocates will be able to pick their courts — for example, by filing suit in San Francisco subject to review by the famously-liberal Ninth Circuit Court of Appeals — their prospects for success (even if temporary) expand dramatically. Just as with the eventual challenges to DOMA's Full Faith and Credit provision and the efforts to impose same-sex marriage through state courts, judges hold the final power absent any constitutional amendment. And in the case of any federal court challenge such as the one contemplated here, the judges are unelected, lifetime appointees. None of the political constraints that exist with most state court judges will apply.

The Willingness of the Courts to Take Pro-Same-Sex Marriage Positions

Despite public opposition to same-sex marriage, it is reasonable to expect more than a few judges will accede to the gay marriage activists' court campaign. The legal profession itself is predisposed to support a remaking of marriage. The dissenting Justices in *Lawrence* charged that the Supreme Court itself has become imbued with the "law profession's anti-anti-homosexual culture,"[36] and argued that the Court had dismissed mainstream values throughout the nation. Some members of the Supreme Court increasingly rely upon European laws and norms when crafting

[35] *Boy Scouts of America v. Dale*, 734 A. 2d 1196 (N.J. 1999), *rev'd* 530 U.S. 640 (2000).
[36] Scalia Dissent at 19.

their opinions, as was apparent in the *Lawrence* decision.[37] Although most state court judges do face the ballot in some fashion,[38] they still went to the same law schools where professors treat the advancement of homosexual rights as the next logical step in the civil rights movement. They and their young law clerks still read the same legal scholarship that so overwhelmingly advocates recognition of same-sex marriage and labors to craft ways to convince those courts to invent the right thereto. To expect *all* judges to follow popular opinion and strictly to adhere to the Constitution is an act of faith.

Ultimately the Supreme Court will rule on same-sex marriage, but that may not occur until several States and even some federal courts have altered the institution and thousands of couples have gained legal status as a result. Nor should the Supreme Court's intervention be seen as a panacea. The Supreme Court itself has shown that it will show little regard for public opinion when it takes sides in cultural divisions that emerge in society. The Court persists in upholding abortion laws that 60 percent of the public wants tightened.[39] In 2002, the Supreme Court held the execution of the mentally retarded was inconsistent with current "standards of decency" even though only 18 of the 38 capital punishment States had acted to ban the practice.[40] And the Court recently approved the University of Michigan's racial preferences regime, despite the fact that 69 percent of those polled believe that every applicant should be admitted "solely" based on merit.[41] These examples illustrate what should be obvious to any student of the Supreme Court: insofar as the Supreme Court considers public opinion at all, it considers that of the elites to the exclusion of all Americans collectively. And it is the elites who scorn traditional views on sexual orientation and who are most likely to favor same-sex marriage.[42]

The Time to Act is Now

When same-sex marriage is legalized in Massachusetts, thousands of homosexual couples from in and out of that Commonwealth will rush to marry. Any later attempts to "react" to the growth of same-sex marriage will then be construed as an effort to deprive those homosexual couples of their legal status. A constitutional amendment to ban same-sex marriage would be taking away a right that has been invented and granted by a court. It is imperative that Congress not allow the institution to spread before Congress acts; otherwise, homosexual couples will rely upon the court edicts and remake their lives accordingly. The legal complications that will ensue, as well as the risk that society will be less willing to confront the question itself when faced with the reality of thousands of same-sex marriages, argue strongly in favor of prompt action to confront this issue.

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[37] Slip Op. at 12; see also, for example, *Atkins v. Virginia* 536 U.S. 304 (2002) (relying on foreign law in evaluating American death penalty jurisprudence).

[38] Eighty-seven percent of state court judges face elections of some sort. See *Justice for Hire: Improving Judicial Selection*, at p. 1 (Committee for Economic Development 2002), available at http://www.ced.org/docs/report/report_judicial.pdf.

[39] See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down ban on partial birth abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade*); see also January 2003 CBS/NY Times poll showing 60 percent of public wants abortion availability to be tightened, or for abortion to be outlawed altogether, available at http://www.pollingreport.com/abortion.htm

[40] *Atkins v. Virginia* 536 U.S. 304 (2002).

[41] See June 2003 Gallup poll, available at http://www.pollingreport.com/race.htm

[42] See polls by Gallup showing that urban, liberal Democrats are most likely to favor same-sex marriage, and polls conducted by National Opinion Research Center showing that wealthy urban white liberal Democrats are least likely to oppose gay sexual relations on moral grounds. See AEI Studies, supra note 5.

It is important also to recognize that same-sex marriages in Massachusetts inevitably will impact the legal and social life of other States. Homosexual couples that marry in Massachusetts would have all the benefits of married couples in that Commonwealth. Many will buy property in and out of the State, adopt and rear children, get divorced, incur child support and alimony obligations, and enmesh themselves in the same kinds of legal obligations that most traditionally married couples do. It is inevitable, though, that many of those homosexual couples will move out of Massachusetts and seek to enforce those legal obligations in other States' courts. For example, it is easy to anticipate issues relating to child support, alimony, and property division at the time of divorce spilling over into other States.

What will the other States' courts do when asked to adjudicate disputes grounded in Massachusetts same-sex marriages? A complex body of law known as "choice of law" has evolved to address these matters in the context of traditional marriages. Moreover, federal and state statutes have been enacted to regularize the treatment of these kinds of obligations across State lines. In the context of same-sex marriage, where 37 States have indicated their opposition to the institution, judges may refuse to apply these statutes. (Recall that federal DOMA defines "marriage" and "spouse" for purposes of all federal laws and regulations.) But no state court will be able to put its head in the sand for long because the practical legal and human problems will proliferate — problems of children in need of child support payments, of custody disputes for divorced homosexual couples, of homosexual former spouses being denied benefits rightfully theirs under Massachusetts law, and so forth. All the efforts to craft uniform solutions to matters of family law over the past half-century could prove useless in the context of homosexual couples who have left Massachusetts. Nor is it a sufficient response to say that these couples should not leave that Commonwealth, because such a solution would threaten the right to travel among the States as recognized by the Supreme Court.[43]

Given our integrated national economy and the mobility of the nation's citizenry, same-sex marriages in Massachusetts will end up affecting the laws and cultures of all other States. As the States struggle to react, the risk of Supreme Court intervention to create a uniform standard (or at the least to permit recognition of out-of-state homosexual unions) will only increase.

The Need for a Constitutional Response

The Massachusetts court is expected to break down traditional marriage — to redefine its most historic and natural characteristic and ask society simply to hope that the institution endures. If this is the ruling, it cannot help but remake the social infrastructure of an entire State. The question that Congress must ask is whether it is willing to allow the *courts* to redefine the marital institution based on conclusions of a few judges, or whether the people's strong preference to preserve traditional marriage should be respected and preserved.

Additional Statutes Will Not Be Enough to Stop the Courts

Constitutional amendments ought to be rare — employed only when no other legislative response will do the job. However, no statutory solution appears to be available to address the current campaign through the courts. Congress already has passed DOMA, but as discussed above, its effectiveness in the face of strenuous challenges in the courts remains to be seen. Some have

[43] See *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment.").

suggested that Congress pass a "Super DOMA" — a repeat of DOMA coupled with an effort to deprive the federal courts of jurisdiction to review it under article III, section 2 of the Constitution. But such a strategy would not prevent state courts from creating same-sex marriage, and litigants surely would challenge such a dramatic effort by Congress to deny litigants the chance to have their purported fundamental rights (be they due process, equal protection, or otherwise) reviewed in federal court. Similarly, some have suggested that Congress should deny States funds unless they protect marriage through a state DOMA. Such an option would also face constitutional challenges and would have the policy effect of harming many Americans in their greatest time of need. If Congress is to prevent the courts from undoing its work and, once and for all, ensure the preservation of traditional marriage, then it should begin to consider constitutional options.

Principles to Govern the Constitutional Response

Any effort to amend the Constitution should emphasize the following principles:

Federal DOMA must be defended from the courts. DOMA ensures that (a) the traditional man-woman marriage standard governs for all federal law, and (b) States' right to deny recognition of other States' untraditional legal relationships remains intact. As discussed above, the *Goodridge* and *Lawrence* developments demonstrate that neither of these provisions is immune from constitutional challenge.

The U.S. Constitution should not be construed to change the traditional definition of marriage. The premise of this paper is that most Americans believe, and it should be United States policy, that no court — from the U.S. Supreme Court down through all federal, state, and territorial courts — should have the power to change the traditional definition of marriage. Neither the original Constitution nor any of its amendments was adopted with such an intention.

States should retain the right to grant some legal benefits to same-sex couples. The Constitution should not limit the ability of States, through their elected representatives or by popular will, to address the question of whether homosexual couples (as couples) should enjoy certain benefits, such as a right to file joint state tax returns, access to medical records, access to pension or other state employment benefits of homosexual partners, inheritance rights, or a variety of other civil benefits.

An Existing Proposal: The Federal Marriage Amendment

There exists at present a vehicle to pursue the above principles, a constitutional amendment proposed in the House called the Federal Marriage Amendment ("FMA"). H.J. Res. 56 provides:

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

This amendment would create a uniform national definition for "marriage" for purposes of federal and state law, and would prevent any state from creating same-sex marriage. However, the amendment is designed to preserve the ability of state *legislatures* to allocate civil benefits within each State. State *courts* (like Massachusetts) would not be able to create this new right. In addition,

no court at any level would be able to rely upon a state or federal constitution to mandate recognition of another State's distribution of benefits (the "legal incidents of marriage") to non-traditional couples.

The Federal Marriage Amendment is the only proposed constitutional amendment presently pending before Congress to address the likely ramifications of the *Goodridge* and *Lawrence* decisions. The FMA has bipartisan support in the House, but it also has been criticized from both ends of the political spectrum. Some social conservative groups, such as the Concerned Women for America, oppose the FMA in part because it still permits state legislatures to create civil unions.[44] In contrast, some legal scholars have questioned whether the text of the FMA *would* in fact permit civil unions.[45] And some FMA opponents argue that questions relating to marriage should be left to the States altogether, with no federal role.[46] The Senate should examine these and other questions about the details of this amendment in timely hearings in the Judiciary Committee.

Conclusion

The pace of the gay marriage activists' campaign through the nation's courts is uncertain, but it is not at all certain that DOMA or other legislation will stop determined activists and their judicial allies from pursuing this agenda — only a constitutional amendment can do that. The Senate should evaluate the Federal Marriage Amendment seriously and consider whether it, or any other constitutional amendment, is the appropriate response.

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[44] See http://www.cwfa.org/articles/1190/CWA/family/index.htm

[45] See, for example, analysis of Professor Eugene Volokh at UCLA Law School at http://volokh.com/2003_07_06_volokh_archive.html - 105788463811249190, and debate referenced therein.

[46] See, for example, http://www.aclu.org/news/NewsPrint.cfm?ID=12718&c=101.

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Foes of gay marriage renew push for a ban
'You can't rule a constitutional amendment unconstitutional'

Carolyn Lochhead, Chronicle Washington Bureau
Wednesday, August 13, 2003
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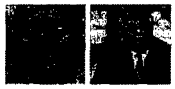


Washington -- Religious conservatives pledge an all-out drive to enshrine a ban on same-sex marriage in the U.S. Constitution, calling it the last line of defense against an inevitable court-led destruction of a fundamental social institution.

Their Federal Marriage Amendment, after dying with no action in the last Congress, has been reintroduced, this time with 75 House co-sponsors. Senate hearings are scheduled for September, and the proposed amendment has the blessing of Senate Majority Leader Bill Frist, R-Tenn.

Gay groups and opponents of the anti-gay-marriage amendment in Congress say they take it seriously and, privately, express considerable alarm.

"I think you've got this panic on both sides," said an activist who talks to religious conservatives and gay rights groups. "The groups concerned about the gay agenda need to come up with a line in the sand that works, and

gay marriage might. The gay groups don't mind politicians being against gay marriage, as long as it's not written into the Constitution. They figure they can come back in 10 years when things have calmed down and revisit it."

The Senate Republican Policy Committee, pressing for the amendment, has argued that "no statutory solution appears to be available" against what it describes as a legal onslaught on heterosexual marriage.

As the Rev. Lou Sheldon, head of the Traditional Values Coalition, put it, "You can't rule a constitutional amendment unconstitutional."

COURT RULING COULD BE KEY

If the Massachusetts Supreme Judicial Court rules -- as it could any day -- that gay couples have a right to marry in that state, the push to amend the federal Constitution will pick up more force.

President Bush and Attorney General John Ashcroft have said they are awaiting the Massachusetts court's decision to determine how to further "codify" that legal marriage remain the union of a man and a woman.

Many read that as support for a constitutional amendment, given that the 1996 Defense of Marriage Act already requires marriage to be between a man and a woman for federal purposes, such as in the case of taxes and immigration law,

and authorizes states to ignore any same-sex marriages granted by other states.

"There are two possibilities with that reference" by Bush, said Rep. Barney Frank, D-Mass. "Either he was babbling -- which I don't rule out entirely -- or he's for a constitutional amendment."

Frank and two other openly gay House members, Reps. Jim Kolbe, R-Ariz., and Tammy Baldwin, D-Wis., have circulated a letter to their colleagues denouncing the amendment.

The proposed Federal Marriage Amendment would provide a single definition of marriage for all states. It 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."

AMENDMENT FACES TOUGH SELL

Supporters acknowledge they face a daunting task to win passage of a constitutional amendment, which has happened only 17 times in American history.

Amending the Constitution requires approval of two-thirds of the Senate and House and three-quarters of the state legislatures.

But advocates of the amendment contend that a Massachusetts court decision favorable to gays, coming on the heels of Canada's recognition of gay marriage and the U.S. Supreme Court's landmark Lawrence vs. Texas ruling, which struck down state sodomy laws in an unprecedented affirmation of gay equality, would make the Constitution the only remaining potential barrier to same-sex marriage.

"There's no question that this is a monumental undertaking, but on the other hand, this is a defining moment for people of faith," Sheldon said. "I believe this issue will be a strong rally point. You won't have a problem getting people's attention."

The Family Research Council initially opposed a constitutional amendment but has reconsidered in light of the Lawrence decision and the pending Massachusetts case, as well as similar cases in New Jersey, Arizona and Indiana.

"While it seems a very arduous way to go, we at this point endorse all legal answers to what we consider a breakdown of the one-man, one-woman contract that is marriage," said Connie Mackey, head of government affairs for the Family Research Council.

Those who support the amendment "feel that there's a very short window of time in which to move to protect marriage as the cornerstone of raising a healthy society," Mackey said. "They feel that they're in a position now where they're going to have to move quickly to make sure that the courts can't overstep their bounds."

SUPPORT FOR '96 MARRIAGE ACT

Supporters say the overwhelming votes for the Defense of Marriage Act, enacted in 1996 under President Clinton's signature, give them a good shot at prevailing. DOMA, as it is known, passed the Senate 85-14, drawing in such liberals as Sens. Barbara Mikulski, D-Md., and Patrick Leahy, D-Vt., and winning the support of 62 current senators. (California Sens. Dianne Feinstein and Barbara Boxer, both Democrats, voted against the bill.) DOMA swept through the House 342 to 77. Both tallies are well over the two-thirds needed for an amendment.

Many gay activists say the marriage debate has come way too early, politically. "This is a dog issue for us," one gay activist said. "The polls are just devastating."

Baldwin said the timing for a debate on gay marriage may not be the best, but "we don't have that choice when we're talking the actions of a court. We can speculate, but we don't get that choice."

For now -- pending the Massachusetts decision -- gay activists contend they have nearly enough votes to stop an amendment in the House, where they need 146, and the Senate, where they need 34.

"We have indications from roughly 30 to 32 members of the Senate, and the numbers in the House are in the low 100s," said Winnie Stachelberg, political director of the Human Rights Campaign, the strongest gay lobbying force on Capitol Hill.

Frank puts the odds of the amendment's passage as "very slender."

To Sheldon's predictions of success, Frank retorted, "Are you in the habit of paying attention to that fool? I'm not. That's on the record."

Frank noted that DOMA passed in part on states' rights grounds: It allows a state not to recognize gay marriages from another state. A constitutional amendment forcing states not to recognize gay marriage, by contrast, "is a total flip," he said, noting the Vice President Dick Cheney argued during the 2000 campaign that marriage should remain a state domain.

Conservatives who have long warned that the federal government has too much power over the states find a constitutional amendment depriving states of one of their most long-standing jurisdictions -- marriage laws -- highly unpalatable. Even a chief DOMA sponsor, former Rep. Bob Barr, R-Ga., has said he opposes a constitutional amendment on those grounds.

Roger Pilon, vice president for legal affairs at the libertarian Cato Institute, said the problem with the amendment is that "it defines marriage for the entire country, which I find inconsistent with the federalism principle at the core of the Constitution. Family law has always been a state issue, not a federal issue."

Pilon compared the gay marriage amendment to attempts to use the Constitution to ban flag burning and protect victims' rights.

E-mail Carolyn Lochhead at clochhead@sfchronicle.com.

August 28, 2003

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

Dear Senator Cornyn:

Thank you for allowing me to write on behalf of marriage. Marriage is fundamental to all our life experiences.

Marriage as defined by a man and a woman is the ideal environment for raising and teaching children. When a child is brought home from the hospital, mother and father both assist in providing the basic needs of life. As the child grows, the marriage between his/her parents gives the child a sense of stability needed to explore all life has to offer. Throughout the child's life, mother and father play unique and distinct roles in shaping their child's character and nurturing his/her development.

No other social institution has proven itself as successful as marriage in the raising of well adjusted children. I support maintaining marriage in our culture as the principal way of providing for our youngest citizens. Every free society relies on parents --mothers and fathers-- to train the next generation. Public policies supporting marriage are necessary ingredients for providing a stable foundation for children to explore their new world.

Again, thank you for this opportunity to speak on behalf of traditional marriage.

Sincerely,

Rabbi Yoel Schonfeld
Queens Board of Rabbis
75-30 Vleigh Place
Flushing, NY 11367

STATE OF UTAH

OFFICE OF THE ATTORNEY GENERAL

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

KIRK TORGENSEN
Chief Deputy

September 2, 2003

SENT VIA FACSIMILE

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

Dear Mr. Chairman:

As Attorney General for the State of Utah, I want to express my concern that activist federal judges could impose same sex marriage on my state and on the American people. If something as critical to society as changing the definition of marriage is to be done at all, it should only be done by the people's elected representatives and never imposed by a few un-elected judges.

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

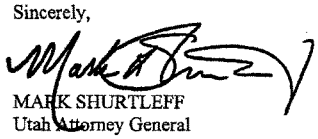
The federal system created in our Constitution protects states' rights as a way of achieving the larger goal of protecting the fundamental rights of our people. A solid majority of Americans oppose same sex marriage and they clearly have the right to determine how an institution as critical as marriage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

236 STATE CAPITOL • SALT LAKE CITY, UTAH 84114-0810 • TEL: 801-538-9600 • FAX: 538-1121

The Honorable John Cornyn
September 2, 2003
Page Two

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

Sincerely,



MARK SHURTLEFF
Utah Attorney General

MS/bj

SEP. 3. 2003 6:09PM EASTERN BAPTIST THEOLOGICAL SEMI NO. 7484 P. 1

EVANGELICALS FOR SOCIAL ACTION

RON SIDER, PRESIDENT

September 3, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
Att: Mr. James Ho
327 Hart Senate Office Bldg.
Washington, DC 20510

Dear Senator Cornyn:

I write to urge you and your colleagues to respect the millennia-old tradition of virtually every advanced civilization that marriage is between a man and a woman. This basic conviction of virtually all religions and civilizations is basic to a decent society, and it must be protected in our laws.

Thank you for making sure that our laws do this.

Sincerely,

Ronald J. Sider
President, ESA

RJS:nrm

10 EAST LANCASTER AVENUE • WYNNEWOOD, PA 19096-3495
PHONE 610-645-9390 • FAX 610-649-8090 • EMAIL esa@esa-online.org

September 05, 2003, Friday, Final Edition

SECTION: EDITORIAL; Pg. A21

LENGTH: 962 words

HEADLINE: Missing the Point on Gays

BYLINE: Alan Simpson

BODY:

For several weeks now a storm has been brewing in the Senate over just how homosexuals fit into the mainstream of American life. First, an honest debate on the criminalization of gay sex in Texas somehow gave rise to baseless fears about permitting bestiality and incest. Then, after the Supreme Court's reasonable ruling in Lawrence v. Texas that the government had no business policing people in their bedrooms, a panic developed. Some worried that the decision would lead to gay marriage, thus posing a threat to the survival of the American family.

In the view of this old Senate hand, it's time for everyone to take a deep breath, calm down and wait for this storm to head out to sea. But no such luck: Several Senate members want to create more anguish by pushing a proposal to amend the Constitution. It would set a federal definition of marriage as being a union between a man and a woman.

Like most Americans, and most Republicans, I think it's important to do all we can to defend and strengthen the institution of marriage. And I also believe it is critically important to defend the integrity of the Constitution. But a federal amendment to define marriage would do nothing to strengthen families -- just the opposite. And it would unnecessarily undermine one of the core principles I have always believed the GOP stood for: federalism.

In our system of government, laws affecting family life are under the jurisdiction of the states, not the federal government. This is as it should be. After all, Republicans have always believed that government actions that affect someone's personal life, property and liberty -- including, if not especially, marriage -- should be made at the level of government closest to the people. Indeed, states already actively regulate marriage. For example, 37 states have passed their own version of the Defense of Marriage Act.

I do not argue in any way that we should now sanction gay marriage. Reasonable people can have disagreements about it. That people of goodwill would disagree was something our Founders fully understood when they created our federal system. They saw that contentious social issues would best be handled in the legislatures of the states, where debates could be held closest to home. That's why we should let the states decide how best to define and recognize any legally sanctioned unions -- marriage or otherwise.

As someone who is basically a conservative, I see not an argument about banning marriage or "defending" families but rather a power grab. Conservatives argue vehemently about federal usurpation of other issues best left to the states, such as abortion or gun control. Why would they elevate this one to the federal level?

What's more, it is surely not the tradition in this country to try to amend the Constitution in ways that constrict liberty. All of our amendments have been designed to expand the sphere of freedom, with one notorious exception: prohibition. We all know how that absurd federal power grab turned out.

My old and dear friend Dick Cheney put it best when he said during the last presidential campaign: "The fact of the matter is we live in a free society, and freedom means freedom for everybody. . . . And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

Dick sees clearly the other reason why federalizing marriage is troublesome. The Republican Party I call home is one that purports to respect "freedom for everybody," respecting the rights and dignity of the individual. And that dignity must be respected by both the letter and spirit of our laws.

My views were formed back in my days as a kid in high school in Cody, Wyo. There was one classmate everyone would whisper about: "Jimmy, he's one of those. " And we all knew what "one of those" was. Then, one horrible day, Jimmy committed suicide. It was the worst thing, a terrible waste, a sickening tragedy. Jimmy was one who felt isolated and hounded. He deserved a helluva lot better, from those of us in Cody, and from American society as a whole.

As our country has gained honest and steady knowledge about homosexuality, we have learned that it is not a mental illness or a disease or a threat to our families. The real threats to family values are divorce, out-of-wedlock births and infidelity. We all know someone who is gay, and like all of us, gay men and women need to have their relationships recognized in some way. How are gay men and women to be expected to build stable, loving relationships as all of us try to do, when American society refuses to recognize the relationships?

Not long ago the daughter of an old family friend of mine came home for a Thanksgiving dinner with her lesbian partner -- and my friend is one of those "old cowboy" dads, too! He and his wife gently took their daughter's hand, and her partner's hand, and said grace together just as millions of American families do every year.

To reach the best understanding, the debate over gay men and women in America should focus not on what drives us apart but on how to make all of our children -- straight or gay -- feel welcome in this land, their own American home.

The writer is a former Republican senator from Wyoming and honorary chairman of the Republican Unity Coalition, a gay-straight alliance of Republican leaders whose avowed purpose is to work to encourage tolerance and to address concerns of gay and lesbian Americans.

LOAD-DATE: September 05, 2003

Written Testimony of
Professor Judith Stacey, Ph.D.
Department of Sociology, New York University
New York, New York
September 9, 2003

Senate Subcommittee on the Constitution, Civil Rights and Property Rights

For the Record on the Hearings held on
September 4, 2003 on
The Defense of Marriage Act

Thank you for the opportunity to submit this written testimony to the Senate Subcommittee on the Constitution, Civil Rights and Property Rights.

I am a Professor of Sociology at New York University. I am writing today for the record on the hearing held on September 4, 2003, ostensibly on the so-called Defense of Marriage Act. I understand that two issues related to parenting were raised at the hearing either directly or indirectly by witnesses who are opposed to marriage for same-sex couples. The first is on "fatherlessness" and the second on the parenting abilities of lesbian and gay parents.

There is no body of social science research on "fatherlessness" as a general concept. Rather, there are studies on children raised by single parents, on children whose parents divorce, and on children born to unmarried heterosexual couples. None of this research examines children raised by same-sex parents or provides any basis for concern about the well-being of children raised by same-sex parents.

There is some research that concludes that children raised in single-parent families may be at a higher risk for a variety of negative outcomes than children raised in comparable two-parent families. (McLanahan and Sandefur 1994; Amato and Booth 1997). This research compares single-mother families with two-parent heterosexual families. It does not compare same-sex parent families with heterosexual parent families.

The research shows that what places children at risk is not fatherlessness, but the absence of economic and social resources that a qualified second parent can provide, whether male or female. This conclusion is supported by numerous large-scale studies showing that with adequate socioeconomic resources, children who grow up in single-parent and other "non-traditional" family arrangements do well on average. McLanahan's (1985) analysis of the Panel Study of Income Dynamics (PSID) showed that father absence had no significant effect on children's education once income was taken into account. Bogess (1988), also using the PSID, finds no effect of living with a single mother on children's

likelihood of graduating from high school independent of the family's socioeconomic standing. McLanahan (1985: 898) concluded that her results "do not support the notion that the long term absence of a male role model itself is the major factor underlying family structure effects." In the Census-administered National Educational Longitudinal Survey, holding constant other factors, there are no differences between children from two-biological-parent homes and those from female-headed families in the odds of dropping out of high school or attending college (Painter 1998). Among the six family types included in Teachman, Paasch and Carver (1997), "divorced mother" did not directly increase children's odds of dropping out of high school, holding other factors constant.

Moreover, the research on children raised by lesbian and gay parents demonstrates that these children do as well if not better than children raised by heterosexual parents. Specifically, the research demonstrates that children of same-sex couples are as emotionally healthy and socially adjusted and at least as educationally and socially successful as children raised by heterosexual parents. Children of lesbian parents appear to have social competence and the prevalence of behavioral difficulties that are comparable with population norms. Flax, Ficher, Masterpasqua, Joseph (1995); Patterson (1998). The studies find no significant difference between children of lesbian mothers and children of heterosexual mothers in anxiety, depression, self-esteem, and numerous other measures of social and psychological adjustment.(for a review, see Stacey, Biblarz (2001). Research and biographical data also indicate that children of lesbian and gay parents may enjoy some advantages compared with other children. They have been described as more tolerant towards diversity and more nurturing toward younger children than children of parents who are heterosexual. Steckel (1987); Howey, Noelle & Samuels, Ellen, eds. 2000. *Out of the Ordinary.* New York: St. Martin's Press.

Upon reviewing such studies, the American Psychological Association issued a statement in 1995 concluding that the research indicates that children raised by lesbian and gay parents are not "disadvantaged in any significant respect relative to the children of heterosexual parents." APA, Lesbian and Gay Parenting: A Resource for Psychologists, www.apa.org/pi/parenthtml#II. More recently, the American Academy of Pediatrics issued a similar policy statement. Upon reviewing the research on children of lesbian and gay parents, the AAP concluded: "that the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and nongay parents in emotional health, parenting skills, and attitudes towards parenting." AAP, Technical Report: Coparent and Second-Parent Adoption by Same-Sex Parents (2002), www.aap.org/policy/020008t.html.

None of the studies support the claims that children raised by lesbian parents will have serious emotional, intellectual, or social development problems because of their parents' sexual orientation. The only contemporary published researchers who claim that children are harmed by being raised by lesbian or gay parents have been discredited and/or expelled from the American Psychological Association and the American Sociological Association.

In fact, many of the nation's leading child welfare, psychological and children's health organizations have issued policy or position statements declaring that a parent's sexual orientation is irrelevant to his or her ability to raise a child. Many also have condemned discrimination based on sexual orientation in adoption, custody and other parenting situations and called for equal rights for all parents and children.

Among the organizations that have done so:

- American Psychological Association (1976)
- Child Welfare League of America (1988)
- American Bar Association (1995)
- American Psychiatric Association (1997)
- North American Council on Adoptable Children (1998)
- American Academy of Pediatrics (2002)
- American Psychoanalytic Association (2002)
- American Academy of Family Physicians (2002)

Finally, I note for the record that families in the U.S. today are varied and diverse in size and composition. It is well-documented in social science research (as well as in mainstream media and popular culture) that there are married heterosexual parents, divorced heterosexual parents, remarried heterosexual parents with stepparent spouses, grandparents serving as parents, same-sex couples parenting their children, single lesbian women and gay men parenting children, kinship care providers (aunts, uncles, brothers, sisters, etc.) raising children, adoptive parents, parents who are legal guardians, foster parents, and even more legally informal parenting arrangements. It does a disservice to millions of American families to suggest that only married mother-father-with-children families are normal or can result in good outcomes with healthy, well-adjusted children.

I do not believe that taking additional legislative action to ban marriage between same-sex couples will serve the interests of children in any of these families, or in families that are headed by two heterosexual parents. The Defense of Marriage Act already poses a direct harm to the children of same-sex couples, who because of this law cannot enjoy the same legal family protections as the children of couples who are able to marry or whose marriages are honored.

Once again, I thank you for the opportunity to submit this testimony. Please do not hesitate to contact me if I can be of further assistance.

September 4, 2003

The Honorable John Cornyn
The United States Senate
Washington, DC 20510

The Honorable Russell Feingold
The United States Senate
Washington, DC 20510

Dear Senators Cornyn and Feingold,

On September 4, 2003 the Constitution, Civil Rights, and Property Rights Subcommittee of the Senate Judiciary Committee will hold hearings on whether or not further action is needed to ensure the definition of marriage remains as the union between one man and one woman. We note that the legal issue of marriage for same-sex couples is a civil issue; religious marriage is governed entirely by the religious denominations themselves, as the U.S. Constitution makes abundantly clear. We are opposed to the drastic measure of changing the federal constitution to remove law-making authority from the states in regards to marriage. Further, we believe current law already sufficiently addresses this issue. Finally, we oppose amending the constitution for the sole purpose of restricting the rights and opposing the equality of a specific group of American citizens.

State law regulates civil marriage, not religious marriage

As state lawmakers and executives, we note that the authority to regulate religious decision making – including around issues of marriage – has never been in our purview. When we refer to marriage, we are referring to granting of civil marriage licenses, which is a legal mechanism regulated entirely by the states. Each state permits couples who may marry to enter into their marriage through a civil ceremony, while all states permit a religious organization to perform the ceremony. Within each state, to encourage the formation of families and to protect families and promote family stability, as many as hundreds of responsibilities, rights and benefits accrue to married couples and to their children.

H.J. Res. 56 would strip states of their historical right to regulate civil marriage

Since the beginning of the republic, the U.S. Constitution has enumerated that specific powers related to the administration of the nation as a whole belong to the federal government while all others are reserved to the states. The power to regulate marriage is a power that historically has been reserved to the states. A constitutional amendment would take this power from the states.

Family issues, including those relating to civil marriage and children, have been properly in the province of states law-making since the founding of our nation. The right

to grant marriage licenses is an important legal matter regulated in each state by our state governments. Each branch of our state governments has a role to play in regulating civil marriage within the states. Our legislature has the power to enact legislation related to marriage. Our executive branch, represented at the highest level by the governor, has the opportunity to sign or veto such legislation. And our state judiciaries have the authority to interpret state laws relating to marriage. For the federal government to go so far as advocating changing the constitution to alter states' rights over a specific policy issue that has historically been within the states' authority is precedent-setting and unacceptable. States must be allowed to formulate their own policies in this area.

The States and localities actively regulate in the area of marriage

In fact, the states have regulated in the area of marriage, particularly in the area of marriage for same-sex couples. Thirty-seven states already specifically ban marriage between same-sex couples. The other thirteen states have definitions of marriage that to date have not been interpreted to mean that a same-sex couple may marry. Should a state, through a Constitutional process determine to alter that state's public policy on civil marriage that state government should be allowed to do so without intrusion from the federal government.

States and localities also actively make laws related to the recognition of same-sex couple families and families headed by same-sex couples. Vermont has created the unique legal states of civil unions. Hawaii allows people to enter into a kind of domestic partnership called reciprocal beneficiaries. California has a statewide domestic partner registry. 58 localities around the country have created domestic partner registries or grant local employees domestic partner benefits.

Finally, amending the United States Constitution is a most serious matter. In our nation's history, the constitution has been amended only 27 times – only 17 times since the Bill of Rights. We oppose amending the Constitution to address an issue that should be left to the states,

Sincerely,

Senator Ken Cheuvront AZ
Representative Jack Jackson Jr AZ
Representative Robert Meza AZ
Representative Wally Straughn AZ
Assembly Member Judy Chu CA
Assembly Member Jackie Goldberg CA
Assembly Member Loni Hancock CA
Assembly Member Christine Kehoe CA
Assembly Member Paul Koretz CA
Assembly Member John Laird CA
Assembly Member Mark Leno CA
Assembly Member Lloyd Levine CA

Assembly Member Sally Lieber CA
Assembly Member John Longville CA
Assembly Member Darrell Steinberg CA
Assembly Member Leland Yee CA
Senator Eric Coleman CT
Senator Bill Finch CT
Senator Mary Ann Handley CT
Senator Chris Murphy CT
Senator Melodie Peters CT
Senator Edith Prague CT
Representative James Abrams CT
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Representative Melodie Currey CT
Representative Chris Donovon CT
Representative Bill Dyson CT
Representative Art Feltman CT
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Representative John Geragosian CT
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Representative Mike Lawlor CT
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Representative Faith McMahon CT
Representative Denise Merrill CT
Representative Ted Moukawsher CT
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Representative Linda Orange CT
Representative Sandy Nafis CT
Representative J. Brendan Sharkey CT
Representative James Field Spallone CT
Representative Cam Staples CT
Representative Andrew Stillman
Representative Peter Tercyak CT
Representative Kathy Tallarita CT
Representative Diana Urban CT
Representative Pat Widlitz CT
Representative Bruce Zalaski CT
Representative Karla Drenner GA
Representative Lawrence Bliss ME
Representative Scott Cowger ME
Representative Glenn CummingsME
Representative Ben Dudley ME
Representative John Eder ME

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Senator Delores Kelly MD
Senator Verna L. Jones MD
Senator Ida Rubin MD
Delegate Liz Bobo MD
Delegate Sheila Hixson MD
Delegate James Hubbard MD
Delegate Susan Lee MD
Delegate Richard Madaleno Jr. MD
Delegate Pauline Menes MD
Delegate Shane Pendergrass MD
Delegate Carol Petzold MD
Delegate Neil Quinter MD
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Senator Ada Smith NY
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LAW OFFICES
ERICKSON & SEDERSTROM, P.C.
A LIMITED LIABILITY ORGANIZATION

DONALD B. STENBERG
OF COUNSEL

NEBRASKA ATTORNEY GENERAL
(1991 - 2002)

REGENCY WESTPOINTE
10330 REGENCY PARKWAY DRIVE, SUITE 100
OMAHA, NEBRASKA 68114-3761

HTTP://WWW.ESLAW.COM
TELEPHONE (402) 397-2200
FACSIMILE (402) 390-7137

donstenberg@eslaw.com

LINCOLN OFFICE

301 SOUTH 13TH STREET
SUITE 400
LINCOLN, NEBRASKA 68508
402-476-1000

August 26, 2003

SENT VIA FAX – (202) 228-2281

Senator John Cornyn
Chair, Subcommittee on the
Constitution
United States Senate
Washington, DC

Dear Senator Cornyn:

I am writing to express my views on the federalism implications of amending the U.S. Constitution to legally protect the institution of marriage in our nation. I am aware that there are some who argue that such an amendment would interfere with states' rights. I do not share that view.

Many of our nation's most important values are reflected in and are defined and protected by amendments to the Constitution. For example, the 13th amendment prohibits slavery, the 14th amendment requires due process and equal protection of the laws, the 19th amendment guarantees the right of women to vote and the 24th amendment abolishes poll taxes. The first ten amendments to the U.S. Constitution guarantee freedom of speech, freedom of the press, freedom of religion, the right to bear arms, prohibit unreasonable searches and seizures, guaranty a right to trial by jury, and much more.

The Constitution has historically been a place where our nation enshrines its most important values.

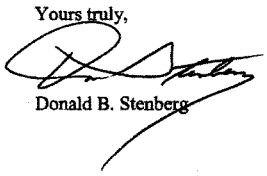
An amendment to the Constitution, unlike some federal laws currently on the books, is not a mandate imposed by the federal government on the states. To become part of the Constitution an amendment must be ratified by three-fourths of the states. This substantial state involvement is the very essence of the federalism envisioned by our founding fathers.

The threat to federalism and states' rights does not come from constitutional amendments. The threat to federalism comes from judicial activism – the imposition of social

policies by the courts in the name of the Constitution without the vote of elected representatives and without a textual basis in the Constitution.

I hope that these views of a former State Attorney General colleague will be helpful to you and your committee as you consider this important issue.

Yours truly,



Donald B. Stenberg

DBS:lks

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Sent By: ISNA; 317 839 1805; Aug-25-03 5:28PM; Page 1/1

بسم الله الرحمن الرحيم

الاتحاد الإسلامي في أمريكا الشمالية

The Islamic Society of North America

August 22, 2003

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

Dear Senator Cornyn:

Thank you for allowing me the opportunity to write on behalf of marriage between men and women. Marriage as a man and a woman is a fundamental building block of American as well as Muslim society.

There are over 8 million adherents of Islam in the United States, including the many Muslims who have immigrated here to take advantage of the many opportunities available in America. The Bill of Rights in the U.S. Constitution holds freedom of religion as a pillar for civil society—for which we are thankful. Muslims are grateful their country reinforces marriage as being the union of men and women. Marriage of a man and a woman is the one, and only one, way of establishing a family.

In Islam, marriage stresses the equality of all humans by joining together men and women. Marriage demonstrates the virtues of respect, forgiveness, kindness and truth to the next generation. The unique qualities of men and women combine to create the ideal partnership in which to raise children. Through relationships with their male and female parents, children learn to appreciate their own unique gifts and qualities.

In the Declaration of Independence, it states that "all men are created equal". Marriage between men and women is the daily application of equality for millions of Muslim-Americans.

Again, I thank you for this opportunity to speak to you regarding the importance of marriage.

Sincerely yours,

Sayyid M. Syeed, Ph.D.
Secretary General

P.O. Box 38 (mail) • 6555 South County Road 750 East (Express mail & packages) • Plainfield, IN 46168 U.S.A.
Phone: (317) 839-8157 • Fax: (317) 839-1840 • E Mail: isna@surf-in.com • Website: www.isna.net
Constituent organizations include: The Muslim Students' Association of the U.S. and Canada • The Association of Muslim Social Scientists • The Association of Muslim Scientists and Engineers • Islamic Medical Association of North America

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800 Eighth Street, N.W. Suite 318 Washington, DC 20001 Tel: 202-513-6484 Fax: 202-289-8936

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
Institute for Public Affairs

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The Institute for Public Affairs is the non-partisan public policy research and advocacy center of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization founded in 1898.

National Headquarters
11 Broadway
New York, NY 10004

September 3, 2003

Senator John Cornyn
Chairman
U.S. Senate Subcmte. on the Constitution
Washington, DC 20510
By Facsimile: 228-2881

Dear Senator Cornyn,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America – the nation's largest Orthodox Jewish umbrella organization – representing nearly 1,000 congregations, to state our support for the continued legal definition of marriage as being between a man and a woman and the necessity to protect this venerable institution by our nation's laws.

The Jewish tradition has long recognized the centrality of the institution of marriage, so much so that the term in Judaism for marriage is *kiddushin* – or, 'holiness' – our most central aspiration. Moreover, Judaism recognizes that the institution of marriage is central to the formation of a healthy society and the raising of children. Fathers and mothers are a child's first teachers and our tradition understands that a child is best served when receiving the guidance of both male and female role models.

We regret that these foundational insights, recognized over the course of millennia by virtually all faiths and societies have been called into question in our time. While it is clear that persons who choose alternative sexual lifestyles should not be subjected to invidious forms of discrimination, it is equally clear that the principle of civil tolerance should not be served by overturning commonly and broadly held values such as the definition of marriage.

The U.O.J.C.A. urges you and your Senate colleagues to consider and venerate the values held by most Americans on this matter and ensure that the fundamental institution of marriage is not undermined by judicial fiats or any other mechanisms. We believe that defense of this institution is in the best interests of our children and our posterity.

Sincerely,

Harvey Blitz Rabbi Tzvi H. Weinreb Nathan J. Diament

United Methodist *Action*
for Faith, Freedom, and Family
Chairman's Office
800-334-8920 or 563-264-8080
2610 Park Avenue
PO Box 209
Muscatine, Iowa 52761
FAX 563-264-3363
dstanley@pearlfunds.com

September 2, 2003

Senator John Cornyn, Chairman
Senate Subcommittee on the Constitution, Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20510
Fax (202) 228-2281

Attention: Mr. James Ho

Dear Senator Cornyn and Subcommittee Members:

United Methodist *Action* for Faith, Freedom, and Family is the United Methodist committee of the Institute on Religion and Democracy.

We strongly support an Amendment to the United States Constitution to define marriage as a union of one man and one woman, for all purposes.

We believe a Constitutional Amendment is now essential to protect the institution of marriage, in view of the growing danger that some courts will rewrite the Constitution to fit their own opinions and will force the nation to accept other kinds of arrangements as "marriage."

Our support for traditional marriage is based on the Bible. Jesus strongly defended, and both the Old and New Testaments strongly affirm, marriage as a God-ordained lifelong covenant between one man and one woman.

There are also strong secular reasons to protect marriage as a union of one man and one woman. A massive and growing amount of empirical research proves that children benefit greatly when they have a married mother and father, and traditional marriage benefits the community and nation.

Thank you for your consideration of our views.

Sincerely,

David M. Stanley
Chairman

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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SANTA BARBARA • SANTA CRUZ

EUGENE VOLOKH
Professor of Law
Phone: (310) 206-3926 Fax: (310) 206-6489
E-mail: volokh@law.ucla.edu

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CA 90095-1476

September 11, 2003

The Honorable John Cornyn
Chairman
Senate Subcommittee on the Constitution,
Civil Rights and Property Rights
327 Hart Senate Office Building
Washington, D.C. 20515

Dear Chairman Cornyn:

We are legal scholars who believe in states' rights and in limits on federal power. We therefore want to convey our criticisms of H.J. Res. 56, which would amend the U.S. Constitution to (among other things) provide that "Marriage in the United States shall consist only of the union of a man and a woman."

The proposed amendment interferes with the rights of states, rights that have been consistently recognized since the founding of our Nation. Under our federal system of government, family law has long been the province of the states. A basic principle of American democracy and federalism is that government actions that control a citizen's personal life and liberty—such as government actions that control people's decisions about whom to marry—should be made at the level of government closest to the citizen, rather than by the U.S. Congress or by the legislatures of other states.

States already actively regulate marriage; for example, 37 states specifically prohibit marriage between same-sex couples. That is a choice that they are now free to make. The Amendment will wrongly deny those states—which is to say, the states' citizens and their representatives—this choice.

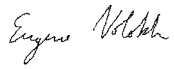
Of course, the Constitution does impose certain limitations on States, but only when this is needed to protect the national government, the national economy, or individual rights—for instance, where article I, section 10 prohibits states from creating separate currencies, or where the Fourteenth Amendment requires states to treat people equally. But **there is no need to federalize the definition of marriage**. If Oregonians, for instance, choose to define marriage more broadly than citizens of other states do, there's no reason for the federal government to step in. (Nor is such a sweeping amendment necessary to satisfy the narrow goal of letting each state choose whether to recognize out-of-state homosexual marraiges. There's no need to impose a one-size-fits-all solution on the whole nation, either by banning all homosexual marriages, or requiring them to be recognized throughout the country.)

Moreover, if marriage is federalized, this will **set a precedent for additional federal intrusions into state power**. Once even the traditionally state-law field of marriage is made subject to federal control, it will become much easier for supporters of broad federal power to argue for federalizing still more fields.

Finally, **the proposed amendment is not necessary to protect the institution of religious marriage.** Under the First Amendment, religious institutions already have the freedom to determine which unions they will solemnize. Even if a state legally allows homosexual marriage, any church within the state has the perfect freedom to refuse to solemnize such marriages (just as the Catholic Church, for instance, refuses to solemnize marriages of divorced people, even though such marriages are quite legal)

The Federal Marriage Amendment is unnecessary; it harms the rights of states and of their citizens; and it thereby undermines the longstanding traditions of American federalism. We urge you to oppose it.

Sincerely,



Eugene Volokh
Professor of Law
UCLA School of Law

Randy Barnett
Austin B. Fletcher Professor
Boston University School of Law

David Bernstein
Professor of Law
George Mason University School of Law

Dale A. Carpenter
Associate Professor of Law
University of Minnesota Law School

David Post
Professor of Law
Temple University Law School

Ernest Young
Judge Benjamin Harrison Powell Professor of Law
University of Texas School of Law

[All institutions listed only to show the signers' academic affiliations]

THURSDAY, AUGUST 21, 2003

The Washington Post

AN INDEPENDENT NEWSPAPER

Bob Barr

Leave Marriage To the States

The political right and left in America share one unfortunate habit. When they don't get their way in courts of law or state legislatures they immediately seek to undercut all opposition by proposing an amendment to the Constitution.

As they say, bad habits die hard. Apparently White House lawyers and the Senate Judiciary Committee are currently examining the merits of a constitutional amendment, pending in the House of Representatives, to deny any and all "legal incidents" of marriage (in layman's terms, any of the hundreds of legal benefits and obligations of the legal institution of marriage) to all unmarried couples, be they homosexual or heterosexual. They should reject this approach out of hand.

When I authored the Defense of Marriage Act, which was passed overwhelmingly by both chambers of Congress and signed into law by President Clinton in 1996, I was under intense pressure from many of my colleagues to have the act prohibit all same-sex marriage. Such an approach, the same one taken by the Federal Marriage Amendment, would have missed the point.

Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive.

The 1996 act, for purposes of federal benefits, defines "marriage" as a union between a man and a woman, and then allows states to refuse to recognize same-sex marriages performed in other states. As any good federalist should recognize, this law leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.

Following the Defense of Marriage Act, 37 states prohibit same-sex marriage and refuse to recognize any performed in other states, while a handful of states recognize domestic partnerships, one state authorizes civil unions, and a couple of others may have marriage on the horizon. In the best conservative tradition, each state should make its own decision without federal government interference.

Make no mistake, I do not support same-sex marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit.

No less a leftist radical than Vice President Dick Cheney recognized this when he publicly said, "The fact of the matter is we live in a free society, and freedom means freedom for everybody. . . . And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

The vice president is right. There shouldn't be a constitutional definition of marriage. As an institution, and as a word, marriage has very specific meanings, which must be left up to states and churches to decide. The federal government can set down a baseline—already in place with the Defense of Marriage Act—but states' rights demand that the specific boundaries of marriage, in terms of who can participate in it, be left up to the states.

This also means that no state can impose its view of marriage on any other state. That is the federal law already on the books. I drafted it, and it has never been successfully challenged in court. Why, then, a constitutional amendment?

I worry, as do supporters of the constitutional amendment on marriage, that a nihilistic amorality is holding ever greater sway in the United States, especially among the young. Similarly, I agree that the kernel of basic morality in America—the two-parent nuclear family—has eroded under the influence of the "me" generation, which has left us with an astronomical divorce rate and a tragic number of hurting families across the country.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

The writer was a Republican representative from Georgia from 1995 to 2003. He currently practices law in Georgia and writes and consults extensively on civil liberties issues.

The Washington Times

EDITORIALS

PAGE A16 / *WEDNESDAY, JULY 18, 2001* ★

Marriage a la mode

From an ingenious system of checks and balances, to freedom of religion and speech, the Constitution of the United States guarantees all that has enabled the American experiment to continue in perpetuity, so far, for more than two centuries. Since its ratification in 1787, and since the ratification of the first 10 amendments, known as the Bill of Rights, in 1791, this founding document has been amended 17 times, often to clarify the workings of the republic. This was done once to prohibit alcohol consumption, and once to repeal that same amendment but most notably to expand the definition of the body politic for whom the preamble's felicitously named "Blessings of Liberty" must be secured.

Last week, a group of respected clergymen and scholars inaugurated a movement to amend the Constitution for the 28th time – not to codify governmental procedure, not to widen the application of political liberty, but to define matrimony in these United States as being "a union of a man and a woman." The amendment proposed by the Alliance for Marriage would state: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

While the Bible, Webster's and common law (not to mention common sense) hold marriage to be the union of a man and a woman, it is bitterly true that this fact of life has come under assault by homosexual activists seeking to legalize "same-sex marriage" through judicial fiat. From Hawaii to Alaska to California, they have had mixed success, winning stunning court victories that have subsequently (and thankfully) been nullified at the ballot box. Only Vermont, whose state constitution resists amendment, has, under judicial order, legalized "civil union," an arrangement that approximates same-sex marriage.

This latest phase of the sexual revolution is the attempt to stretch a contemporary understanding of "tolerance" to include the legal and social assimilation of behaviors once deemed marriage. In the past decade, 34 states have enacted laws to deny recognition to same-sex marriage, while Congress has passed the Defense of Marriage Act, 1996 legislation that federally defines marriage as a heterosexual union, and further exempts any state from having to recognize any other state's same-sex marriage.

Needless to say, the Constitution doesn't mention this uniquely postmodern cause. Should it? Fearing the continuing threat from socially liberal judges, who, for example, could declare the Defense of Marriage Act unconstitutional, amendment proponents say yes. According to Alliance board member and Princeton professor Robert P. George writing in National Review, "The amendment is intended to return the debate over the legal status of marriage to the American people – where it belongs."

Mr. George is right. The debate does belong to the American people, not to judges who legislate from the bench. But this particular strategy to safeguard marriage by enshrining it in an amendment, however nobly intended, would seem to be misguided. While marriage is a building block of civilization that has been dangerously undermined, it should not fall to our guide to governance to shore it up. The Constitution may foster this republic, but it is too much to expect it to settle our most fundamental moral and behavioral questions.

Testimony of Professor Richard G. Wilkins,
J. Reuben Clark Law School, Brigham Young University

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
Hearing on "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"
September 4, 2003

Thank you for the opportunity to present brief testimony on this important issue. I would like to focus briefly on two topics that I think are particularly important and useful to the subcommittee in its effort to develop a complete record on what is needed to preserve congressional intent in passing the Defense of Marriage Act. One is the likelihood that this Act will survive a constitutional challenge. The other is the extent to which our courts are being influenced by the actions of other nations and United Nations organizations with respect to the legalization of same sex marriage.

Discussion of any public policy affecting marriage must first and foremost acknowledge that marriage has always been an essential element of strong families. As such, marriage and the family are the foundations of American society. There is no political issue that is more important than assessing and maintaining the health of these vitally important social institutions. As Brigitte Berger recently noted, "[a]lthough of late we can witness a public rediscovery of the salutary role of the nuclear family of father, mother, and their children living together and caring for their individual and collective progress, policy elites appear neither to have fully understood that public life lies at the mercy of private life, nor do they seem to have apprehended the degree to which the bourgeois virtues and bourgeois ethos continue to be indispensable for the maintenance of both the market economy and civil society." B. Berger, "The Social Roots of Prosperity and Liberty," 35 Society 44 (March 13, 1998) (available on Westlaw at 1998 WL 11168752).

The strength of America's economy and its society depend upon the strength of its marriages and families. Those who complain that focusing on preserving and promoting these vital institutions is somehow less important or less urgent than dealing with more immediate and supposedly more important issues like terrorism or the economy are ignoring the lessons history has taught across cultures and over the millennia. The truth is that our ability to deal with these or any problems is directly correlated to the strength and resilience of our society and our people. There is no issue more important than preserving and promoting such fundamental social institutions as marriage and I commend the chairman for calling these hearings to consider what steps are necessary to do that.

In 1996, Congress enacted the Defense of Marriage Act to safeguard marriage as an institution between a man and a woman. The Act does so by defining "marriage" and "spouse" for federal purposes as a union between a man and a woman and by providing

that States need not recognize same-sex marriages performed and valid in another State. Whether the Act is constitutional is subject to serious debate. While some legal scholars have asserted that the Act passes constitutional muster (see list attached as Appendix A), the preponderance of the legal literature claims that the Act is unconstitutional (See Appendix B). The constitutional validity of the Act may be determined shortly, as many observers expect that Massachusetts will become the first State to recognize same-sex marriage. *See, e.g., Goodridge v. Department of Public Health* (Supreme Judicial Court of Massachusetts, pending).

But, whatever its constitutional validity, our country now faces a fundamental question that is not answered by the 1996 Defense of Marriage Act. Is there a federal constitutional right to same-sex marriage? If the Due Process or Equal Protection Clauses of the United States Constitution are construed by the United States Supreme Court to embody a "right" to same-sex marriage, the Defense of Marriage Act's definition of marriage and the leeway the Act grants States with regard to the interstate recognition of same-sex unions become irrelevant. Recent legal developments, moreover, clearly make such a construction of the United States Constitution more likely than not.

Evidence of that is the recent decision in *Lawrence v. Texas*, No. 02-102 (June 26, 2003), in which the United States Supreme Court held that the Due Process Clause of the United States Constitution prohibits States from criminalizing homosexual sodomy. Although the precise holding of *Lawrence* does not answer the question whether the Constitution confers a "right" to same-sex marriage, the opinion – as Justice Scalia noted in his dissent – leaves the marriages laws of all 50 States on "pretty shaky ground." It does so for two reasons.

First, the Court's majority opinion suggests that the Due Process Clause endows sexual partners with a constitutional entitlement to determine for themselves their "own concept of existence, of meaning, of the universe, and of the mystery of human life." To the extent that the Court actually believes this rhetoric, this sentence – without more – is adequate to support a holding imposing same-sex marriage on all 50 States. *See, e.g.,* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=13011&c=41. I am certain that this Committee will hear extensive testimony on this aspect of *Lawrence*. Therefore, I will not dwell on this point and, instead, will move to the second reason why *Lawrence* dramatically undermines the policies adopted by Congress with the 1996 Defense of Marriage Act.

Lawrence not only announces a dramatic expansion in the reach of the Due Process Clause, it also suggests that the meaning of the Clause may be heavily influenced by the legal traditions of other nations. The *Lawrence* Court cited decisions of the European Court of Human Rights, as well as a brief filed by Mary Robinson, former UN High Commissioner of Human Rights, in support of its decision. The Court concluded that the "right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Should the Court follow this analytical path, it is only a matter of time before same-sex marriage becomes part and parcel of the United States Constitution.

Prior to the decision in *Lawrence*, the Netherlands, Norway, Sweden, and South Africa all recognized same-sex marriage. *Lawrence,* however, was handed down in the middle of a torrent of international judicial and administrative actions legitimizing same-sex marriage. Just prior to *Lawrence*, the Ontario Court of Appeal in Canada concluded that the limitation of marriage to heterosexuals is unconstitutional and ordered that the province immediately begin issuing marriage licenses to same sex couples. Thereafter, the governments of Great Britain and France announced that they would reconsider their position on same-sex marriage. Within weeks of *Lawrence*, the European Parliament issued a report, A5-0281/2003 (July 17, 2003 FINAL), calling upon all Member States "to abolish all forms of discrimination – whether legislative or *de facto* – which are still suffered by homosexuals, in particular as regards the right to marry and adopt children." A5-0281/2003 at 18/123 par. 81. The Final Draft of the proposed Constitution of the European Union (released within days of the *Lawrence* opinion) also portends Europe-wide legalization of same-sex marriage.*

In addition, many organs within the UN System openly advocate the legal recognition of same-sex marriage. Mary Robinson, whose brief was cited by the Supreme Court in *Lawrence,* gave an address while she was UN High Commissioner for Human Rights in which she extolled the virtues of the Universal Declaration of Human Rights as a "living document." In that "living document," she discovered the right to be free of "all discrimination" based on sexual orientation. Mary Robinson, *The Universal Declaration of Human Rights: A living document*, http://www.unhchr.ch/html/menu2/3/e/980127.htm (statement by Mrs. Mary Robinson, United Nations High Commissioner for Human Rights at the Symposium on Human Rights in the Asia-Pacific Region, United Nations University, Tokyo, Japan, Jan. 27, 1998).

Elizabeth Evatt, a member of the UN Human Rights Committee, has similarly declared categorically that "intolerance of homosexuality [is] a clear case of discrimination and inequality" that falls "clearly within the scope of human rights protection and there should be no debate or controversy." Press Release NGO/307 PI/1080, DPI/NGO Conference Examines Universality of Human Rights in Context of Diverse Cultures, DPI/NGO Annual Conference - 4 - Press Release NGO/307 PM Meeting PI/1080 14 September 1998, http://www.un.org/News/Press/docs/1998/19980914.ngo307.htm

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*. The Final Draft of the Proposed Constitution of the European Union was issued on June 12, 2003. Constitution, Part Two, The European Convention, CONV 797/1/03 REV 1 (English) (hereafter, "EU Constitution"). Article III-1a, EU Constitution, commits the EU to "combat discrimination based on . . . sexual orientation." *See also* Article III-5 (authorizing the EU to adopt a "European law" to "combat discrimination based on . . . sexual orientation"). Article II-9 of the Constitution commits the EU to "guarantee the right to marry and the right to found a family in accordance with the national laws governing the exercise of these rights." Articles III-5(1) and 165(3), finally, authorize a European law "to combat discrimination based on . . . sexual orientation" and both a European law and/or a European decision addressing "those aspects of family law with cross-border implications."

I have spent a considerable amount of time in Europe over the past year trying to help groups concerned about the trends in some nations and in the developing EU Constitution towards liberalized social policies such as legalizing same sex marriage and undermining what we Americans consider such basic rights as freedom of speech and freedom of religion. The same pressures by various special interests in Europe that are now manifesting themselves are also building here in the United States.

Disturbing evidence of that was the conclusion of the majority in *Lawrence* that States could no longer regulate homosexual sodomy, at least in part, because "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." With the clear trends in Europe, as well as in other countries like Canada, the same is now true (or soon will be) regarding same-sex marriage.

Opinion polls in this country clearly show that by substantial margins a majority of Americans oppose legalizing same sex marriage. That public opinion is clearly reflected in the Defense of Marriage Act. Yet, *Lawrence* suggests that, without clear action to establish that the Constitution of the United States does *not* mandate same-sex marriage, the marital policies established by Congress in that Act will survive only at the sufferance – indeed, the whim – of the federal judiciary. In a democratic system, that is completely unacceptable.

Let me conclude by answering the question that is the point of these hearings: What is necessary to defend the intent of the Defense of Marriage Act? Based on either one of the two trends I have discussed briefly here, the likely constitutional invalidity of the Act and the growing influence of international actions on federal courts, the clear answer is to amend the Constitution. But the compounding impact of the confluence of these two trends, and the damage which inevitably will result if the judiciary is permitted to dictate such a fundamental social change as legalizing same sex marriage, make it imperative to amend the Constitution to preserve the intent of Congress in this Act.

Appendix A: Law Review and Journal Articles Arguing that DOMA is Constitutional:

1. *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 Harv. L. Rev. 2028 (2003).

2. Patrick J. Shipley, *Constitutionality of the Defense of Marriage Act*, 11 J. Contemp. Legal Issues 117 (2000).

3. George W. Dent, Jr., *The Defense of Traditional Marriage*, 14 J.L. & Pol. 581 (1999).

4. Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 Geo. Mason L. Rev. 307 (1998).

5. Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges – Does the Constitution Require States to Grant a Right to do the Impossible?*, 12 BYU J. Pub. L. 309, 311 (1998).

6. Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 Creighton L. Rev. 409 (1998).

7. L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 Creighton L. Rev. 29 (1998).

8. Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45-Feb Fed. Law. 30 (1998).

9. Lynn D. Wardle, *Revisiting DOMA: Protecting Federalism in Family Law*, 58-Jun Or. St. B. Bull. 21 (1998).

10. Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 Creighton L. Rev. 187 (1998).

11. Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147 (1998).

12. Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 Creighton L. Rev. 255 (1998).

13. Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 Creighton L. Rev. 45, 57 (1998).

14. David P. Currie, *Full Faith and Credit to Marriages,* 1 Green Bag 2d, 7 (1997)

Appendix B: Law Review and Journal Articles Arguing that DOMA is Unconstitutional:

1. David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 (2001).

2. Mark Strasser, *When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 Cardozo L. Rev. 299 (2001).

3. Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. Haw. L. Rev. 185 (2000).

4. Mark Strasser, *Mission Impossible: On Baker, Equal Benefits, and the Imposition of Stigma*, 9 Wm. & Mary Bill Rts. J. 1 (2000).

5. Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 Rutgers L. Rev. 553 (2000).

6. Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 Hastings Constitution. L.Q. 419 (1999).

7. Mark Strasser, *Unity, Sovereignty, and the Interstate Recognition of Marriage*, 102 W. Va. L. Rev. 393 (1999).

8. Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 Fla. L. Rev. 799, 812 (1999).

9. Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 Creighton L. Rev. 1063 (1999).

10. Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 Wm. Mitchell L. Rev. 407, 422 (1998).

11. Evan Wolfson & Michael F. Meicher, *A House Divided: An Argument Against the Defense of Marriage Act*, 58-Jan Or. St. B. Bull. 17 (1998).

12. Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 Brook. L. Rev. 307 (1998).

13. Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment and Federal Constitutional Constraints*, 48 Syracuse L. Rev. 227 (1998).

14. Alec Walen, *The "Defense of Marriage Act" and Authoritarian Morality*, 5 Wm. & Mary Bill Rts. J. 619 (1997).

15. Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997).

16. Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 New Eng. L. Rev. 263 (1997).

17. Evan Wolfson & Michael F. Melcher, *DOMA's House Divided: An Argument Against the Defense of Marriage Act*, Fed. Law 30 (1997).

18. James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 Mich. J. Gender & L. 335 (1997).

19. Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 Cornell J.L. & Pub. Pol'y 203 (1997).

20. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965 (1997).

21. Mark Strasser, *Loving the Romer out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. Pitt. L. Rev. 279 (1997).

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