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DEFENSE OF MARRIAGE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 3396

DEFENSE OF MARRIAGE ACT

MAY 15, 1996

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DEFENSE OF MARRIAGE ACT

WEDNESDAY, MAY 15, 1996

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

The subcommittee met, pursuant to notice, at 1:48 p.m., in room 2237, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, Michael Patrick Flanagan, F. James Sensenbrenner, Jr., Martin R. Hoke, Bob Goodlatte, Barney Frank, Melvin L. Watt, John Conyers, Jr., and Patricia Schroeder.

Also present: Representatives Bob Barr and Sheila Jackson Lee.

Staff present: Kathryn A. Hazeem, chief counsel; William L. McGrath, counsel; Jacquelene McKee, paralegal; and Mark Carroll, staff assistant.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will come to order.

There are two fundamental questions raised by the topic of today's hearing. The first is the substantive policy issue of whether we as a society will permit same-sex relationships to be recognized as marriages. And, second, quite apart from the substantive decision, is the critical question of who shall decide. The Defense of Marriage Act speaks to both of these important issues. As to the issue of how we will define "marriage," the act simply restates the current and long-established understanding that marriage means "a legal union between one man and one woman as husband and wife." The bill adopts that definition for purposes of Federal law only. It does not intrude on the ability of the States to define marriage however they choose.

I expect—and, in fact, I hope—that most Americans will think it quite odd that we are actually considering legislation to define marriage as an exclusively heterosexual and monogamous institution. Simply stated, in the history of our country, marriage has never meant anything else. It is inherently and necessarily reserved for unions between one man and one woman. This is because our society recognizes that heterosexual marriage provides the ideal structure within which to beget and raise children. This fundamental, unavoidable fact of our human nature belies any attempt to betray this bill as a defense of some archaic social construct. Marriage exists so that men and women will come together in the type of committed relationships that are uniquely capable of

producing and nurturing children. This is the simple wisdom reflected in section 3 of the act.

But let us assume that we don't all agree that marriage should be confined to opposite-sex couples. Let's assume what we know to be true: that some among us believe that same-sex unions should be given the status of marriage. How should we, in our democratic republic, decide that question? Should we let three judges in Hawaii decide to redefine marriage, not only for the people of Hawaii, but for the rest of the country as well. Or do we let the States decide this for themselves?

This is the issue addressed by section 2 of the Defense of Marriage Act. It says, simply, that no State shall be required to recognize as valid a marriage between persons of the same sex that was entered into in a different State. Each State can do what it wants. The bill merely provides that the States can deliberate and decide this issue free from any constitutional compulsion that might arise under the full faith and credit clause of the U.S. Constitution. I really can't imagine how anyone, in good conscience, oppose the proposition that the States should be able to deny the status of marriage to same-sex unions. Do the opponents of this bill really believe that three judges on Hawaii's Supreme Court should be permitted to redefine marriage for the entire country?

And make no mistake about it, that is the strategy that gay-rights lawyers have been pursuing. They have made no attempt to conceal that strategy. They intend to wage a concerted legal battle to force other States to recognize same-sex marriage licenses obtained in Hawaii. Not only would such a transformation in the institution of marriage be disastrous policy, to effect that transformation in this manner would be profoundly undemocratic.

I am very gratified to learn that the Clinton administration has apparently come to the same view. Just yesterday, we received a letter from the Justice Department indicating that the administration believes that the Defense of Marriage Act is constitutional and otherwise raises no legal difficulties. And a report in this morning's Washington Times indicates that the President actually supports the bill. According to the report in the Times, the President's spokesman, Michael McCurry, said yesterday that the President's, quote, "evaluation of the bill would be consistent with his personally-stated view that he opposes same-sex marriage." I am pleased to know that the President does not oppose this bill. This is an important issue, and I look forward to working with President Clinton and other Democrats, and all Members of Congress, as this bill works its way through the legislative process.

[The bill, H.R. 3396, follows:]

I

104TH CONGRESS
2D SESSION

H. R. 3396

To define and protect the institution of marriage.

IN THE HOUSE OF REPRESENTATIVES

MAY 7, 1996

Mr. BARR of Georgia (for himself, Mr. LARGENT, Mr. SENSENBRENNER, Mrs. MYRICK, Mr. VOLKMER, Mr. SKELTON, Mr. BRYANT of Tennessee, and Mr. EMERSON) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To define and protect the institution of marriage.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defense of Marriage Act".

SEC. 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.—Chapter 115 of title 28, United States Code, is amended by adding after section 1738B the following:

1 **"§ 1738C. Certain acts, records, and proceedings and**
2 **the effect thereof**

3 "No State, territory, or possession of the United
4 States, or Indian tribe, shall be required to give effect to
5 any public act, record, or judicial proceeding of any other
6 State, territory, possession, or tribe respecting a relation-
7 ship between persons of the same sex that is treated as
8 a marriage under the laws of such other State, territory,
9 possession, or tribe, or a right or claim arising from such
10 relationship.".

11 (b) CLERICAL AMENDMENT.—The table of sections
12 at the beginning of chapter 115 of title 28, United States
13 Code, is amended by inserting after the item relating to
14 section 1738B the following new item:

"1738C. Certain acts, records, and proceedings and the effect thereof.".

15 **SEC. 3. DEFINITION OF MARRIAGE.**

16 (a) IN GENERAL.—Chapter 1 of title 1, United
17 States Code, is amended by adding at the end the follow-
18 ing:

19 **"§ 7. Definition of 'marriage' and 'spouse'**

20 "In determining the meaning of any Act of Congress,
21 or of any ruling, regulation, or interpretation of the var-
22 ious administrative bureaus and agencies of the United
23 States, the word 'marriage' means only a legal union be-
24 tween one man and one woman as husband and wife, and

1 the word 'spouse' refers only to a person of the opposite
2 sex who is a husband or a wife.".
3 (b) CLERICAL AMENDMENT.—The table of sections
4 at the beginning of chapter 1 of title 1, United States
5 Code, is amended by inserting after the item relating to
6 section 6 the following new item:

"7. Definition of 'marriage' and 'spouse'.".

○

Mr. CANADY. Mr. Frank.

Mr. FRANK. We are dealing with a couple of related events today: this legislation and Senator Dole's apparent resignation from the Senate. They are both indications that the Republican national campaign is not doing very well and there is a significant effort to change the subject.

There are issues that ought to be discussed around the question of same-sex marriage. They ought to be discussed in a reasonable and unhurried way. First, let's be clear that the crisis that is being invoked to justify this drafting of this committee into the Republican campaign effort is greatly exaggerated. Same-sex marriage is nowhere legal in American today and is not likely to become legal within the next couple of months in a final and binding way. Why the hurry then? Particularly "Why the hurry?" in a Congress which has not been known for its capacity rapidly to dispose of important issues. Because we have a campaign that is hurting, and this is part of that effort.

That's reflected, in part, in the very nature of the bill. There's a desperate effort here to find an issue, so we are, apparently, going to be asked to give the States a power which everybody who's for the bill thinks the States already have. We are told we must empower the States to reject, under their acceptance of the full faith and credit clause, marriages in Hawaii. But everybody who is talking about giving the States that power, in fact, thinks the States already have it.

What my friends have here is an elephant stick. Now an elephant stick is the big stick someone is carrying walking around the White House, and when asked what it's for he says, "Well, it keeps all the elephants off Pennsylvania Avenue." And when the answer is, "There are no elephants," they say, "See, my stick worked." Well, that's what they've got. They seek to empower the States to do what they believe the States can already do. In fact, if you took this seriously, it would be undermining the States' power. Because if, in fact, you accept as a reality that the States have the power to do this—and everybody here that's pushing for this bill accepts that: legislators accept it; States have already acted on it—if you accept that, what we are now saying to the States is, "Oh, no; you must get permission from us." Authors of this bill have written and said, "This is a bill to allow the States to do this."

Well, passing a bill that allows the States to do something logically assumes that the States cannot do it in the absence of that permission. If we need to pass a bill to allow the States, then the States apparently can't do it without us. And no one thinks that. So why are we passing a bill to do what the people who want the bill passed think the States can already do? Because, what they're worried about is not what the States decide to do with regard to marriage; they're worried about how the State decides to allocate its electoral votes, and this is an effort to influence not marriage in the States, but whether the Democratic or Republican tickets win.

We'll deal with that more, but I also want to talk about the substance. This is entitled "protect the institution of marriage." You define and protect. With "define" I would have no semantic objection; we could debate this. But the notion that same-sex marriage

somehow constitutes an assault on marriage between a man and a woman is very bizarre. Apparently, the only logic I could think of is that people are afraid that men and women who are now married or who are contemplating marriage will, if they learn that they could get a tax advantage for marrying someone of the same sex, change their minds about marrying someone of the opposite sex and go off and marry someone of the same sex. Because how could it be—against what are you protecting marriage?

I mean, those who believe in the importance of a man and a woman in love coming together in a union that is emotional and reinforced legally, how in the world is it a threat? And I will say, in terms of the priorities here—and I understand why they want to change the subject; things aren't going well with regard to medicare, or the environment, or education, or a lot of other issues. I've talked, obviously, as others do, to people in my district and I have people tell me, "I am worried about losing my Medicare;" "I am worried about losing my job;" "I am worried about the lack of safety on the Streets;" "I am worried that there is not enough money now to continue with toxic waste cleanup."

Never yet has someone come up to me and said, "Congressman, I am terribly threatened; there are two women who are deeply in love a couple of miles away from me, and if you do not prevent them for formalizing their union, this will be terrible for me and, in fact, will threaten my marriage." I know of no heterosexual marriage—the form of marriage that we have that has sustained us—that is threatened by this. Herb and I entertained on Sunday 21 members of my family.

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 2 additional minutes.

Mr. FRANK. I appreciate the courtesy of the chairman.

We entertained 21 of our relatives. A large majority of them were, in fact, heterosexual couples and the children of those heterosexual couples. I must tell you that having spent several hours in Herb's and my company, none of them left with their marriages in jeopardy. In no case were the marital bonds any weaker than before. In no case did these people who range in age from a couple of toddlers, who might be too young, but from a 4-year-old to a 20-year-old and on to Herb's parents—in no case was this disruptive.

So that's why I reiterate that this is largely political in motivation. There is no need to empower the States to do what the States want. I do believe there is a constitutional issue here, but the constitutional issue is not one where there is a role for the Congress. There are people who believe that under the full faith and credit clause the States must accept same-sex marriage if any State does it. There are other people who believe that under the public policy exceptions that States have been allowed to have, that that would not be binding. That is something that will be litigated directly between the States and the Supreme Court. There is no constitutional role for the Congress in this.

Apparently, what this is is an amicus brief. I never heard of Congress passing an amicus brief and calling it a law, because that's all it could mean. So this part about the States is either a nullity, if you believe that the States have no such power, or, if you believe that the Supreme Court would uphold the States' rights here, as

it has in other cases, then it's totally unnecessary. So, we have a totally unnecessary bill to ward off something, which is not now in effect, being rushed through a Congress which is unable to even get the gas tax repealed because they are unable to function, and, therefore, they are looking desperately for an alternative political issue—and that's it.

And it is, I think, an issue which, in addition, is exaggerated in its defense because the notion that two men who have an emotional bond live together—or two women—threatens marriage is of a piece with the illogic of the rest of this bill.

Mr. CANADY. Mr. Hyde.

Mr. HYDE. I have no statement.

Mr. CANADY. Mr. Sensenbrenner?

Mr. SENSENBRENNER. Mr. Chairman, I wish I could concur in the gentleman from Massachusetts's statement that there is no urgency in this. There is an urgency in this, and I'd like to ask unanimous consent to insert in the record at this time a memorandum dated April 19 from the Lambda Legal Defense and Education Fund, Inc., called "Winning and Keeping the Freedom To Marry for Same-Sex Couples—What Lies Ahead After Hawaii, What Tasks Must We Begin Now?"

Mr. CANADY. Without objection.

[The information follows:]

Lambda Legal Defense
and Education
Fund, Inc.

National Headquarters

666 Broadway, 12th Floor
New York, NY 10012
212-995-8585 (voice)
212-995-2306 (fax)

BRIEFING: **Winning and Keeping The Freedom to Marry for Same-Sex Couples -- What Lies Ahead After Hawaii, What Tasks Must We Begin Now?**

FROM: **Evan Wolfson, Director, The Marriage Project**
212-995-8986 (work), 212-995-2306 (fax)

DATE: **April 19, 1996**

Thank you for the opportunity to brief you on the status of Lambda's Hawaii marriage case, and the challenges, opportunities, and work that lie ahead for our equality movement. Throughout the country, we must begin preparing now to defend the freedom to marry, which we are on the verge of winning. Lambda looks forward to working with you, others in our movement, and our allies, and is available as a resource to assist you and others, in organizing and preparing at this historic moment in our equal rights struggle.

Update on the Hawaii Marriage Case

In May 1993, the Hawaii Supreme Court ruled that the State's refusal to issue civil marriage licenses to same-sex couples under the Hawaii marriage law presumptively violates the state constitutional guarantee of equal protection. Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993). The Court held that the "different-sex restriction" on marital choice constitutes unconstitutional sex discrimination, much as the analogous "same-race restriction" prevalent just a generation ago constituted unconstitutional discrimination based on race.[1] Unless the State can show a "compelling" reason why it should be allowed to continue discriminating, it will have to stop. Any justifications the State comes up with must undergo "strict scrutiny," the strongest review. The case is now back in the trial court, scheduled for trial on August 1, 1996 -- which gives us real, although limited, time to organize and educate the public.

Given what the State has come up with so far as its "compelling" reason for discriminating,[2] my co-counsel, Hawaii Equal Rights Marriage Project (HERMP)'s Daniel R. Foley, and I are hopeful that we will win in the lower court. Indeed, the official government Commission created by the legislature and appointed by the Governor issued a Report in December 1995 concluding that there is no legitimate justification for the discrimination in marriage. This Commission Report, a historic first, is a useful tool in public education as Americans begin to examine marriage discrimination against same-sex couples for the first time. The Report makes clear that the State is unlikely to win in the lower court. On appeal, the Hawaii Supreme Court is likely to follow through on its earlier holding, and will probably thus uphold a trial court decision ending the "different-sex restriction" on civil marriage. That final ruling will likely come within the next two years. Equal marriage rights for same-sex couples would then be a reality in the Nation's fiftieth state.[3]

---

[1] See Loving v. Virginia, 388 U.S. 1 (1967) ("same-race restriction" on choice of a marriage partner violates U.S. Constitution, both as denial of equal protection and as intrusion on fundamental right to marry).

[2] See, e.g., 1994 Haw. Sess. Laws 217, 1994 Hi. H.B. 2312 (June 1994) (legislature asserts that marriage statute is "intended to foster and protect the propagation of the human race through male-female marriages"). Because this is neither compelling nor true, the law is unlikely to impede the progress of the litigation, still very much on track. The official Commission created by the legislature concluded that neither this nor any other reason put forward so far justified the government's discrimination in marriage. See Report of the Commission on Sexual Orientation and the Law (Haw. Legis. Ref. Bur. 12/8/95); see also David W. Dunlap, "Panel in Hawaii Recommends Legalizing Same-Sex Marriage," N.Y. Times, Dec. 11, 1995, p.A18.

[3] Because the case involves state, not federal, constitutional questions, the Hawaii Supreme Court has the final word. There can be no appeal in Baehr to the U.S. Supreme Court, nor can the legislature alter the outcome (notwithstanding legislation such as that it adopted in June 1994 reiterating its desire to discriminate), short of a highly unlikely constitutional amendment.

Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work.

In the wake of this landmark victory, many same-sex couples in and out of Hawaii are likely to do what different-sex couples do all the time: get married in Hawaii.[4] The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full and equal legal nationwide recognition of their lawful civil marriages. Despite a powerful cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, there will likely be waves of backlash at both the federal and state level, possibly in almost every state. These questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that civil marriage entails be available and enforceable in other jurisdictions for people married in Hawaii?

We at Lambda believe that the correct answer to these questions is "Yes." To support that answer, common sense and people's general intuitions both back us up and and are there for us to tap into: marriage is marriage; it's a fundamental right; if you're married, you're married; this is one country, and you don't get a marriage visa when you cross a state border. However, we also know that, as always, lesbians and gay men will have to fight against the tendency of some in politics and the judiciary to create a "gay exception" to even the clearest principle of constitutional law or fairness. ***Throughout the country***, we must now undertake public education, political organizing, and just plain asking people and groups for support, while combatting the political and cultural backlash that the religious extremists have already launched in many states.

Legal Tasks

Lambda has prepared a summary of the legal issues and theories that will be invoked regarding nationwide recognition of marriages validly contracted in Hawaii, as well as a bibliography of articles on various aspects of equal marriage rights. Identifying the legal tasks ahead,[5] we have also already begun work to:

- develop networks of attorneys, law professors, and law students to research on a state-by-state basis the legal arguments available against backlash and in favor of recognition
- collect materials in a national clearinghouse for future battles
- promote, develop, and publish law review articles and spin-offs to mainstream idea of equal marriage rights, recognition, and related constitutional and federalist positions
- enlist legal scholars, former law clerks, etc. to do this mainstreaming work and reach judges through conferences, publications, trainings, and create a "buzz"
- prepare materials for legislatures, ranging from briefings to explanatory materials to draft legislation directly on issue and on related issues, i.e., marriage validation.

Political Tasks

At the same time, it is vital that all of us, and our allies, begin work ***now*** on the political tasks (i.e., public education, national and local organizing) that will shape the legal outcome. On the national, statewide, and local levels, all of us must begin now to:

- send wake-up calls to our national and local community organizations, and our allies (through, for example, conferences, ad hoc forums, contacts, and briefings such as this)
- create a non-defeatist sense of entitlement and expectation, and a climate of receptivity and

---

[4]There is a vast demand among lesbians and gay men, as among non-gay people, for the freedom to choose whether and whom to marry. See, e.g., Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique," 21 N.Y.U. Rev. L. & Soc. Change 567 (1994-95). Marriage brings with it a host of legal and social benefits and protections otherwise largely unattainable. And even those in our movement who may not have chosen to fight to win this right are undoubtedly not willing to see us lose it -- with all the potential damage such a setback could entail across a range of lesbian and gay concerns.

[5]Lambda and the other legal groups strongly recommend that, for now, people not file or precipitate marriage lawsuits. The strategy for now is to do the nitty-gritty work of political organizing and public education, to accompany the legal work in progress.

inevitability (along with a commitment to the long haul) -- tap into power of marriage as issue and personal desire even for those less politicized people in our communities
- work in local-state-national partnership through our **National Freedom to Marry Coalition**
- identify "key contacts" to work in partnership with national organizations through the Coalition, taking the lead in convening others to organize in each state and community; where no state or local group can or will do marriage work, form a group and work with us
- organize public forums for outreach, and working meetings to develop local action plans
- develop lists of targets, teams for visiting, and talking points, in order to reach out in repeated meetings with potential allies, engaging them on this civil rights cause and asking for their support and endorsement of the Marriage Resolution; "snowball" the Resolution
- organize and conduct trainings to assist local groups in doing this political, educational, coalition-building, and "mainstreaming" work
- prepare and circulate briefing packets, organizing manuals, talking points
- develop successful, truthful "messages" on the themes of marriage, lesbian and gay families, equal rights, fairness, people's expectations for their partners and children, and federalism -- these are themes that work for us, and a chance to show who we are, frame the battle as we want, address our issues, and present our lives and love affirmatively -- tap into more comfortable, genuine rhetoric for mainstream
- marshal evocative stories of how being denied the right to marry affects real people
- prepare and begin public education campaigns, promote and publish op-ed pieces, features, etc.
- reach out repeatedly in meetings with other opinion-shapers: community leaders, churches and religious groups, unions, professional organizations (i.e., social workers, teachers, psychologists)
- initiate repeated meetings with editorial boards (following advance prep work through networks, with briefing packets and explanatory memoranda)
- develop ***defensive legislative strategies*** for state legislatures and Congress

Although there are many challenges ahead, including the current legislative backlash battles, there are also terrific opportunities for organizing and for taking our movement to a new and positive plane. Most Americans, gay or non-gay, have not yet had to give real thought to the validity or meaning of same-sex couples' marriages, or of gay people's being denied the equal freedom to marry. While the initial reaction of many will range from incredulous to hostile, we also have much going for us: the fairness and rightness of respecting family relationships and committed, caring unions; the ability to present these stories in a compelling, positive, warm, and sympathetic manner (asking people how they would resolve the Catch-22 created by a denial of the right to marry); the logic, indeed, imperative of not requiring people to choose between marriage and movement from state to state; the sense that marriage is marriage, and this is one country in which if you are married, you are married; and a number of sound constitutional, statutory, common law, and fairness arguments. Before we have even begun to do the public education work necessary, polls show that one-third of the public is already with us, and at least another third is reachable. We must solidify our supporters, and reach out to the persuadable, open-minded middle.

We must begin asking people and groups -- first, our own communities and our allies, later, other opinion shapers and reachable neutrals -- for their support. The very ***first step*** has to be bringing ourselves, our local and national community groups, and then our allies up to speed on what will follow a win in Hawaii, and on these legal and political tasks that we must undertake now. We get out in front, and avoid the unpreparedness that was apparent in the 1993 battle over our right to serve in the military. This time, we have some lead time in which to prepare.

The ***next step*** is to identify local "key contacts" to begin an action plan to organize in each community, in partnership with the Coalition. ***In states where "anti-marriage bills" are pending, we must defeat them, and keep reaching out to persuadable non-gay people, for support!***

Please join us now, either on your own, or by helping to create a local Freedom to Marry Coalition to work together!

Each of us should get as many organizations as possible to endorse this short and simple Marriage Resolution:

THE MARRIAGE RESOLUTION

Because marriage is a basic human right and an individual personal choice.

RESOLVED, the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage.

The Marriage Resolution serves as a vehicle for: (1) promoting the necessary discussion and consideration of our freedom to marry among gay and non-gay people (and organizations), (2) collecting signatories as evidence of a growing coalition (Lambda maintains the list of signers, which we will share with you upon request), and (3) giving people a tool and a task in building that coalition and approaching others. *All* the national gay/lesbian groups, state and local organizations, and hundreds of groups and religious leaders nationwide have already signed on, including such impressive examples as the Japanese-American Citizens League (the nation's largest Asian American civil rights group), the National Organization for Women, and a mainstream religious denomination, the Federation of Reconstructionist Congregations and Havurot.

Please use the Resolution, contact us to sign up your group, and get others on board! One effective approach is to send the Resolution with some materials to ten groups, asking them to sign on (give them a form to fax or mail back to Lambda) and then send a similar letter and the Resolution to ten others. This really does work (especially with a response form that they can send right in). Contact us for materials.

I cannot emphasize enough the urgency of this; the ***backlash has begun*** before we have won our freedom to marry. In 1995, radical right legislators introduced bills in the legislatures of South Dakota, Utah, and Alaska purporting to render "void" any marriages between members of the same sex, measures intended not only to thwart recognition of our marriages down the road, but also to both frame and squelch the issue before we have had a chance to do the necessary public education and organizing.[6] In 1995, we won two and lost one. ***Already this year, the battle is on*** in more than half the state legislatures; we are winning many, but will lose some. We cannot allow them to catch us offguard in other states. Instead, we must mobilize, and work to shape the public discussion (the December 1995 Report of the government Commission that studied the issue in Hawaii, concluding that there is no legitimate reason to withhold the freedom to marry, is a helpful starting point for public education).

As activists and committed organizers, you and your organizations have a critical role in preparing the groundwork NOW for when this issue comes to your home state, as it will. This landmark civil rights battle cannot be left just to lawyers, nor is this is an issue only for Hawaii. Every state, every gay person, every person who cares about equality will be called upon to defend the rights we will have won. The backlash could happen anywhere, any time.

Lambda and other organizations in the **National Freedom to Marry Coalition** are available to assist you in your leadership at this historic juncture. We need "key contacts" to lead this work in every state and community, in partnership with the Coalition. Contact Lambda's Marriage Project, and ask for our ***Resource List***, copies of our Marriage Resolution Brochure and "talking points," our legal summaries, or press kit (with the ever-increasing coverage from media across the country, including Newsweek, USA Today, the NY Times, etc.). Contact NGLTF for a "how to" Marriage Organizing Manual (202-332-6483). Get a copy of the official Government Commission Report recommending equal marriage rights (808-587-0662).

Please help organize, educate, and promote the Resolution in your community and state NOW! ***Let's win and keep the freedom to marry!*** (1/96)

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[6] See David W. Dunlap, "Some States Trying to Stop Gay Marriages Before They Start," N.Y. Times, Mar. 15, 1995, p. A18, col.1.

Lambda Legal Defense and Education Fund, Inc.

Marriage Project: *Historical Parallels*

Over the years, the laws governing civil marriage (as distinguished from religious marriage, which is appropriately left to each denomination) have evolved. Americans increasingly recognize that each individual should have the right to marry the person she or he loves and cares for, regardless of race, class, religion and the like. But this has not always been the case; loving relationships some deemed "immoral" or "unnatural" historically were proscribed. In our lifetime, it was illegal for individuals of different races to marry. Before that, it was illegal for African-Americans to marry at all.

Today, the freedom to marry continues to be unavailable to same-sex couples. Through a landmark case underway in Hawaii, lesbians and gay men are on the verge on winning the freedom to marry, with all its implications. A victory in the case will open the door for same-sex couples around the country to share in the same benefits and responsibilities available to different-sex couples.

Just as every historic step toward inclusion triggers some backlash, the first wave of what is expected to be a major political battle has already begun. By mid-1995—even before the equal right to marry in Hawaii has been won—radical right legislators in three states proposed anti-marriage legislation aimed at thwarting recognition of the lawful marriages of same-sex couples. In Utah, an anti-marriage bill was furtively brought to the floor minutes before midnight and passed into law; similar bills have been introduced in Alaska. In South Dakota, legislation purporting to block recognition of same-sex couples' marriages was defeated, an exciting early victory.

These opening skirmishes are revealing. The South Dakota bill read:

> **"Be it enacted by the legislature of the State of South Dakota:... Any marriage between persons of the same gender is null and void from the beginning."** S. D. House Bill 1184.

It bore a disturbing resemblance to the Virginia law that prohibited marriages between people of different races:

> **"All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."** Va. Code Ann. § 20-57.

Such miscegenation laws were common several decades ago. Shortly after getting married in 1958, Mildred Jeter, a black woman, and Richard Loving, a white man, were arrested for violating Virginia's miscegenation law (a felony) and faced up to five years in prison. A court upheld their conviction by relying on attitudes about "unnatural" relationships that are directly parallel to those that are today used against same-sex couples:

> **"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races show that he did not intend for the races to mix."**

As punishment for the "crime" of marrying the "wrong kind of person," the trial judge forbade the couple from setting foot in their home state for 25 years! Their case, *Loving v. Virginia*, went to the U.S. Supreme Court, which in 1967 overturned the laws in sixteen states containing such "same-race restrictions" on people's choice of a marriage partner.

As lesbian and gay couples around the country demand their freedom to marry, it should not be forgotten that the arguments used against same-sex marriages were once used, not long ago, against those who wished to marry a person of a different race. The freedom to marry, the right to a civil marriage license from the state, and the choice of whom to marry, should belong to each man and women, not the government.

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WINNING AND KEEPING EQUAL MARRIAGE RIGHTS:
WHAT WILL FOLLOW VICTORY IN BAEHR V. LEWIN?
A Summary of Legal Issues ▼ March 20, 1996
Evan Wolfson, Director of the Marriage Project[1]

BACKGROUND

In May 1993, the Hawaii Supreme Court ruled that the State's refusal to issue marriage licenses to same-sex couples under the Hawaii marriage law presumptively violates the state constitution's guarantee of equal protection. Baehr v. Lewin, 852 P.2d 44, 58, 68 (Haw. 1993). The Court remanded the case to the trial court for strict-scrutiny review as to whether Hawaii's alleged compelling state interest(s) justify the statute's discrimination, and whether the means furthering the asserted interest(s) are narrowly drawn. Id. at 74-75.

The State's attorneys have alleged a variety of compelling interests and claimed that the means furthering those interests are narrowly tailored.[2] My co-counsel Daniel R. Foley of Honolulu and I are hopeful that the plaintiffs will be able to defeat these allegations on remand. Indications are that within the next two years, the Hawaii Supreme Court is likely to follow through on its earlier holding, and will thus uphold a trial court decision ending the "different-sex restriction" on marriage. Equal marriage rights for same-sex couples would then be a reality in the Nation's fiftieth state.[3]

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[1] Thanks to Gregory v.S. McCurdy, law students Robert Murphy and Camille Massey, and my Lambda colleagues Jon Davidson and Jenny Pizer for their contributions to this legal summary.

[2] See, e.g., 1994 Haw. Sess. Laws 217, 1994 Hi. H.B. 2312 (June 1994) (legislature asserts that marriage statute "intended to foster and protect the propagation of the human race through male-female marriages").

[3] Because the case involves state, not federal, constitutional questions, the Hawaii Supreme Court has the final word. There can be no appeal in Baehr to the U.S. Supreme Court, nor can the legislature alter the outcome (notwithstanding legislation such as that it adopted in June 1994 reiterating its desire to discriminate), short of a highly unlikely constitutional amendment.

Lambda Legal Defense and Education Fund is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men and people with HIV/AIDS, through impact litigation, education and public policy work.

Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory.[4] The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions. Despite a powerful cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: Will these people's validly-contracted marriages be recognized by their home states and the federal government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?

We at Lambda believe that the correct answer to these questions is "Yes." To support that answer, there is much common sense and people's general intuitions both to back us up and for us to tap into: marriage is marriage; it's a fundamental human right; if you're married, you're married; this is one country.

However, we also know that, as always, lesbians and gay men will have to fight against the tendency of some in politics and the judiciary to create a "gay exception" to even the clearest principle of constitutional law or fairness. Indeed, our religious-political extremist opponents have already launched an aggressive state-by-state backlash, before we have even won the basic freedom to marry others take for granted. Thus, throughout the country, we must now undertake the public education, political organizing, and just plain asking people and groups for support, while preparing, too, for the litigation that will follow.

This summary briefly surveys the legal grounds for gaining nationwide recognition of the marriages same-sex couples contract in Hawaii.[5] These grounds include the U.S. Constitution, the

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[4] As among non-gay Americans, there is a vast demand among lesbians and gay men for the equal right to choose whether and whom to marry. See, e.g., Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique," 21 N.Y.U. Rev. of L. & Soc. Change 567 (1994-95). Marriage brings with it a host of important legal, economic, and social benefits and protections otherwise largely unavailable to families, no matter how long they have been together or need the protections that come with marriage. Id.

[5] For fuller discussion of these and other issues, see the material identified in the bibliography of equal marriage rights maintained by Lambda; see also Evan Wolfson & Gregory v.S. McCurdy, "'Let No One Set Asunder': Full Faith and Credit for the Validly Contracted Marriages of Same-Sex and Different-Sex Couples" (forthcoming); Jennifer Gerarda Brown, "Competitive Federalism and the Legislative Incentives to Recognize Same-Sex

common law, and statutory law. Because the better answers are on our side -- and because the legal battle, as well as people's serious consideration of what is involved in marriage and respect for the marriages of gay people, are just beginning to take shape -- it is important we begin to marshal and mainstream our arguments without ceding ground. On this critical front, we have just begun to fight.

I. THE U.S. CONSTITUTION

> "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."
>
> - Justice Robert Jackson[6]

A. The Full Faith and Credit Clause

The Constitution specifically declares what Americans have come to expect, that this is one country and you do not shed your rights as you cross a state border:

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

U.S. Const., Art. IV, § 1. Successfully establishing that the Full Faith and Credit Clause requires all states to recognize a marriage legally contracted in another State would yield the most

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Marriage," 68 S. Cal. L. Rev. 745 (1995); Barbara J. Cox, "Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?," 1994 Wisc. L. Rev. 1033; Joseph W. Hovermill, "A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages," 53 Md. L. Rev. 450 (1994); Deborah M. Henson, "Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin," 32 U. of Louisville J. of Family L. 551 (1994); Thomas M. Keane, 47 Stanford L. Rev. 499 (1995).

[6] Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting).

sweeping possible outcome, and, as a constitutional holding, the one most immune from legislative tampering.

We believe that full faith and credit recognition is mandated by the plain meaning of the Full Faith and Credit Clause, and by basic federalist imperatives that unite this into one country and permit us to travel, work, and live in America as we have come to today. Simply put, all Americans, gay and non-gay alike, would be best served by assuring full faith and credit for marriages validly contracted in any U.S. state.

1. Applying the Full Faith and Credit Clause

Marriage qualifies for recognition under each prong of the Full Faith and Credit Clause, partaking as it does of each of the three categories: public Acts, Records, and judicial Proceedings:

- Creation of a marriage is a "public Act" both because it occurs pursuant to a statutory scheme, and is performed in most states by a public or legally-designated official, and because the marriage is itself an act -- a *res*, a thing or status itself created by a State (which thus acts).

- The marriage certificate is the "Record" of that *res*, recording (with delineated legal effect) that a marriage has been validly contracted, that the spouses have met the qualifications of the marriage statutes, and that they have duly entered matrimony. (Along with marriage certificates, analogous public records of even lesser consequence, ranging from birth certificates to automobile titles, have been accorded full faith and credit).

- Finally, celebrating a marriage is arguably a "judicial Proceeding" in at least those sixteen states in which judges, court clerks, or justices of the peace officiate. Perhaps more important, marriage partakes of important elements of a "judgment," the state "act" or "judicial Proceeding" that has received with least question the greatest "full faith and credit" from the Supreme Court.[7]

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[7] Experts agree that judgments receive the most immediate, unquestioned full faith and credit. See, e.g., Lea Brilmayer, "Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context," 70 Iowa L. Rev. 95, 97 (1984).

Application of the Full Faith and Credit Clause to require recognition of marriages is consistent with the intent of the Framers and with Supreme Court precedent. The Court has stated that the Full Faith and Credit Clause

> altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application.

Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).[8]

The Supreme Court has never ruled on the issue of whether marriages must be accorded Art. IV, § 1 respect, but state courts and lower federal courts often have, even in instances where the marriages would not be recognized under the laws of the forum state.[9] The Supreme Court's silence on the full faith and credit due marriage reflects, I believe, both the country's history of racism and aversion to interracial marriage,[10] as

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[8] Magnolia was partially overruled on other grounds. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980).

[9] See, e.g., Parish v. Minvielle, 217 So.2d 684, 688 (Ct. of App. La. 1969) (Louisiana does not recognize or permit common-law marriages but must give effect to them when validly contracted in Texas); Guidry v. Mezeal, 487 So.2d 780, 781 (Ct. of Appeals La. 3rd Cir. 1986); Succession of Rodgers, 499 So.2d 429, 495 (Ct. of Appeals La. 2d. Cir. 1986); Commonwealth ex rel. Alexander v. Alexander, 289 A.2d 83, 86 (Pa. 1971) (Jones, J., concurring) (Pennsylvania must give full faith and credit to a Georgia marriage certificate); Orsburn v. Graves, 210 S.W.2d 496 (Ak. 1948) (Arkansas must give full faith and credit to validly contracted Texas common-law marriage). Although New York does not recognize common-law marriages, it gives Art. IV § 1 full faith and credit to marriages that are valid under the laws of other states. Thomas v. Sullivan, 922 F.2d 132, 134 (2nd Cir. 1990); Ram v. Ramharack, 571 N.Y.S.2d 190 (N.Y. Sp. Ct. Queens Cty 1991).

[10] See Robert H. Jackson, "Full Faith and Credit -- the Lawyer's Clause of the Constitution," 45 Colum L. Rev. 1, 7 (1945) (Full Faith and Credit Clause under-invoked in contexts such as marriage because "the slavery question and [Jim Crow laws] had begun to distort men's view of government and of law. Talk of 'state sovereignty' became involved in the issue.").

well as the resultant general neglect of the Clause itself[11] -- burdens our adversaries should be forced to carry.

Just like a corporate charter or even a divorce, states must respect marriages lawfully celebrated in other states. Many of us remember the days when people had to travel to Reno to get a legal divorce; even then, other states had to recognize the divorce when they came home.[12] Should out-of-state divorces be recognized, but lawful marriages not?

If the anti-marriage (anti-gay) extremists prevail, those opposing recognition of same-sex couples' validly-contracted marriages ineluctably stand to create a legal and practical nightmare, whereby Americans have to get a "marriage visa" stamped when they cross a state border, or where they (or their parents) are simultaneously married and unmarried in different reaches of the country.[13] Such a situation is simply untenable, both in terms of federalism and the meaning and expectations around marriage, itself a fundamental right.

For example, imagine if married couples had to worry if their right to inherit from each other remained valid, or their right to make medical decisions for each other (or their children) would be respected, or their family health plan was in force -- merely because they chose to move to or visit another state. Imagine the difficulty for a bank in their home state that had loaned money based on a spousal guarantee that was enforceable in that state, only to learn it would not be enforced by a sister state. How could a company maintain coherent personnel policies if its offices were required by conflicting state laws to treat the same employee differently depending on the office in which he or she is working? How could a couple be

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[11] Id. at 3 (former Supreme Court justice observes that the Full Faith and Credit "[C]lause is a relatively a neglected one in legal literature.... The practicing lawyer often neglects to raise questions under it, and judges not infrequently decide cases to which it would apply without mention of it."). Indeed, the whole idea of enforceable rights is itself relatively new, as is the constitutionalization of family and marriage law, both largely arising since the heyday of non-recognition cases.

[12] Cook v. Cook, 342 U.S. 126 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1951); Williams v. North Carolina (I), 317 U.S. 287 (1942).

[13] Thus, even more than developing any technical legal argument, it is critical that we collect and explain evocative real life examples of how burdensome, or indeed impossible, it would be to have the status of one's marriage, or one's parents' marriage, vary from state to state.

sure their expectations for social security or veterans' benefits, child or spousal support, property and insurance rates would be honored? The Full Faith and Credit Clause, the constitutional right to interstate travel, and other federalist provisions prohibit a state from putting individuals in such dilemmas.

2. Implementing Statutes Under the Full Faith and Credit Clause

Congress has implemented the Full Faith and Credit Clause by means of 28 U.S.C. §§ 1738, 1738A, 1739 ("the Statutes"). Because the Statutes are not part of the Constitution, they can of, course, be altered by Congress.

Section 1738 provides, in part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of [such jurisdiction] from which they are taken.

This statute is most notable for clarifying that full faith and credit obligations apply to all courts in the United States, thus requiring federal courts also to give complete faith and credit to State acts, records and judicial proceedings.

The Statutes elaborate on the meaning of "full faith and credit" by defining it as the same faith and credit given by law and usage in the courts of the state producing the act, record, or proceeding. For example, other states must accord a marriage license issued in Hawaii the same weight and consequence that certificate receives in Hawaii.

The U.S. Supreme Court first applied the principle of according full faith and credit to out-of-state acts, records, and proceedings in the context of judgments. For example, to determine what full faith and credit judgments should receive "[i]t remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered."[14] But full faith and credit is not limited to judgments; over time the Court has extended the same analysis to other acts, records, and

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[14] Mills v. Duryee, 7 Cranch 481, 11 U.S. 481, 484, 5 L.Ed. 411 (1813); see also Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 429 (1910).

proceedings.[15] In each instance, a court in the forum state must accord the act, record, or proceeding the same effect it has in the state where issued.

By statute Hawaii regards a marriage certificate issued pursuant to its marriage law to be prima facie evidence of a validly contracted marriage.[16] Therefore, the courts of all other states must also recognize the certificate as prima facie evidence of a validly contracted marriage.[17]

B. "Conflicts of Law" as an Alternate Analysis

States resisting recognition of same-sex couples' marriages will probably argue that the Full Faith and Credit Clause does not require them to treat such marriages as an act, proceeding, or record to which they must give effect, but rather allows them to invoke their own marriage laws as applicable. That argument arises because the U.S. Supreme Court has distinguished between the application of the Clause to out-of-state determinations of the legal status, rights, and responsibilities of specific persons, and to choice-of-law decisions in litigation. In my view, the argument is misplaced, as what is at issue is not whose law should govern, but rather what respect must be accorded a res, a marital status, that the couples now possess and embody.

In this "conflicts of law" context, the Supreme Court has recognized

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[15] See Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (holding that "public acts", including plaintiff's corporate charter, must be given same effect as in issuing state).

[16] See Haw. Rev. Stat. §§ 527-1 and 572-13 (c) (1985); see also Conn. Gen. Stat. Ann. § 46b-35 (1958). For a list of states statutorily prescribing what full faith and credit their marriage certificates should receive see Evan Wolfson and Gregory v.S. McCurdy, "'Let No One Set Asunder': Full Faith and Credit for the Validly Contracted Marriages of Same-Sex and Different-Sex Couples" (forthcoming).

[17] Another set of issues may arise if states take the position that people do, on the face of it, appear to be married, and then pass statutes giving benefits to different-sex married couples while denying them to same-sex married couples. Challenges might arise under gender discrimination, sexual orientation, and other equal protection theories, as well as due process and fundamental right to marry theories. Naturally, the fall-out in these battles may also prompt reconsideration of the use of marriage as the unique criterion for access to family benefits and protections.

> that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved.

Hughes v. Fetter, 341 U.S. 609, 611 (1951). The issue in Hughes was whether Wisconsin could under its wrongful death statute deny a cause of action to the estate of an Illinois descendent, where Illinois law would have permitted the suit. In ruling that Wisconsin must allow the suit, the Court balanced

> the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states

against the policy of Wisconsin "against permitting Wisconsin courts to entertain this wrongful death action." Id. The Court noted that "if the same cause of action had previously been reduced to judgment, the Full Faith and Credit Clause would compel the courts of Wisconsin to entertain an action to enforce it" without balancing any policy interests. Hughes, 341 U.S. at 612 n.4.

Thus, when asked to recognize an unfulfilled or general right or duty based on another state's statute or case law (such as the cause of action that would have been available to Hughes in Illinois), states may weigh the competing interests before deciding which rule of law to apply. But, when state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of specific parties, the other states must give those acts, records, or proceedings the same effect they would have at home. The status has been created, the judgment rendered, the record recorded, and rights established -- no question of what legal regime may be invoked is pertinent. What is then at stake is protection of the partners and their *res*.

Since a marriage -- whether as a certificate, an act, or a judgment-like *res* -- falls into the category of such adjudications or creations, there can be no policy balancing regarding their recognition. That this is the right result is reinforced by the fact that people could easily have a "judgment" outright were Hawaii to accompany its celebration of marriages with a mechanism whereby married couples could speedily obtain, as suggested by Hughes, a declaratory judgment of marriage. Couples could then return home with their certificate, their

newlywed status, their snapshots, and a court order.[18] Hence, "conflicts" or "choice of law" is not the proper analysis for cases involving marriage, and the marriage laws of the forum State cannot be used to displace an accomplished act (also recorded and "adjudged") under Hawaii's marriage law.

C. Other Constitutional Grounds

A State's refusal to recognize a marriage validly contracted under the laws of Hawaii would place a direct and tangible obstacle in the path of interstate migration and burden people's now-not-merely-abstract right to marry, thus implicating other constitutional provisions relating to due process, the right to travel and move freely throughout the nation, equal protection (sex discrimination as well as sexual orientation discrimination), interstate commerce, and privileges and immunities,[19] as well as the fundamental right to marry itself. For example, a married couple in Hawaii who wished to travel in or to another state would essentially have to choose between their marriage and their right to travel.

The rights to marry and to have that marriage recognized are of fundamental importance, both in and of themselves,[20] and in part because marital status includes substantial economic and practical protections and benefits, upon which may depend the couple's ability to live as they want, raise children as they want, or even subsist. By refusing to recognize a couples's marriage, a State would, for example, "unduly interfere with the right to 'migrate, resettle, find a new job, and start a new life." Shapiro v. Thompson, 394 U.S. 618, 629 (1969);[21] see

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[18] Professor Henson has also noted this point. 32 J. of Family L. at ___. There is also an argument to be made regarding the anomaly in requiring states to recognize divorces, but not marriages.

[19] U.S. Const., art. IV, §2. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

[20] Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 438 (1965); Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987).

[21] In Shapiro v. Thompson, the Court grounded the right to travel in the Equal Protection Clause and employed strict scrutiny analysis. The Court stated: "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Id. at ___. At issue in Shapiro were state and federal provisions denying

also Edwards v. California, 314 U.S. 160 (1941)[22]; Crandall v.

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welfare benefits to persons who had not resided within the jurisdiction for at least a year. The requirement both deterred and penalized travel. In addition, none of the government's reasons were found to be compelling. The Court said that families could not be "denied welfare aid upon which may depend the ability...to obtain the very means to subsist," solely because they were members of a class which could not satisfy a one-year residency requirement. Id. at 627.

In Dunn v. Blumstein, the majority declared that "it is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. Shapiro did not rest upon a finding that denial of welfare actually deterred travel...In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of [the right to travel]...'" 405 U.S. 330, 339-340 (1972) (quoting Shapiro, supra, at 634). The Dunn Court overturned Tennessee's state and local durational residency requirements for voting, and stated "whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the state must show a substantial and compelling reason for imposing durational residence requirements." Id. at 335. Further, since the residency requirements impinged on the fundamental rights of both voting and travel, they faced a double-barreled assault of strict scrutiny. Likewise, a State's refusal to recognize same-sex couples' marriages from Hawaii would also impinge upon at least two fundamental rights: the right to marry and the right to travel.

[22] Edwards involved California's attempt to slow travel into the state by prosecuting citizens who knowingly brought into the state any indigent nonresident. The Supreme Court unanimously upheld the constitutional right to cross state lines, but disagreed on the constitutional provision abridged. The majority relied on the Commerce Clause as prohibiting "attempts...of any single state to isolate itself from difficulties common to all of them...by the single expedient of shutting its gates to the outside world." Id. at 173. The two concurrences found the Privileges and Immunities Clause of the Fourteenth Amendment to be the applicable constitutional text, and focused on individual rights in finding that right to free movement between states is a right of national citizenship. Mobility, Justice Douglas argued in his concurrence, is basic to any question of freedom of opportunity and to prevent the indigent from seeking new horizons would "contravene every conception of national unity." Id. at 181. This takes on even greater force when linked to marriage.

Nevada, 73 U.S. 35 (1867).[23]

Whatever cluster of constitutional grounds ultimately proves successful, it is clear that those opposing recognition of same-sex couples' marriages are advocating a position that could do great damage not only to the individual couples and children involved, but also to the institution of marriage, family relationships, and the links and mobility vital to our federal union.[24] For all these reasons, the position that the Constitution mandates full faith and credit for validly contracted marriages is right and should be developed.

II. The Common Law

Although there are a number of marriage-recognition decisions invoking the Full Faith and Credit Clause (and none explicitly rejecting it), the vast majority of cases regarding

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[23] In Sosna v. Iowa, the Court applied rationality review in upholding a one-year durational residency requirement for divorce. 419 U.S. 393 (1975). In distinguishing previous cases in which durational residency requirements held invalid, Justice Rehnquist explained that the recent traveler was not "irretrievably foreclosed from obtaining some part of what she sought; her access to the courts was merely delayed." Id. The Court's distinction seemed to turn on the perceived significance of the burden on the right to interstate migration. In the Court's view a "mere" one-year's delay in securing a divorce was not a sufficient "penalty" on travel as to merit strict scrutiny. On the other hand, in Boddie v. Connecticut, the Court held that Connecticut could not, consistent with the obligations imposed by the Due Process Clause, deny access to a divorce court based on ability to pay a fee. 401 U.S. at 380. A State's refusal to recognize a same-sex couple's marriage from Hawaii, would penalize, not merely delay, those individuals who have exercised their right to move freely throughout our country.

[24] The best things our opponents have going for them are, of course, (1) people's ignorance and hostility regarding gay issues, and (2) the fact that, as a historical matter, marriage recognition has not largely been treated as a constitutional matter. We must address this latter point by showing (a) the parallels to non-recognition in other circumstances, i.e., race, and (b) the increasing constitutionalization of marriage and other rights. The fact that the Full Faith and Credit Clause was muzzled in the past does not justify its non-invocation in the future, if needed. Cf., e.g., Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987) (Court reverses precedent of over a hundred years to reestablish view of federalism less deferential to states' rights).

marriage recognition have proceeded under common law. Under that approach, marriages that are validly contracted in one state are given, at least, a strong presumption of validity in all other states. 52 Am.Jur.2d Marriage § 3 (1970).[25] We must be prepared to make arguments under the common law, although we should not, in doing so, concede the validity of abandoning the Full Faith and Credit Clause and its federalist imperatives.

The rule at common law has been that a marriage valid where contracted (under the "*lex loci contractus*") is valid everywhere (i.e., in the "forum state" or under "*lex fori*").[26] This general rule of course helped obviate the tensions that flow from non-recognition of people's marriages, and thus any need to invoke the Full Faith and Credit Clause. In addition, many states have subscribed to the Uniform Marriage and Divorce Act, or adopted some version of its requirement that all marriages validly contracted in one state will be valid in the forum state.[27]

Under some common law approaches, this general rule contains a disfavored loophole, what I call the "states' rights 'public policy' exception." Under this exception, although there is a presumption for recognition, states may elect not to recognize a marriage that is valid where contracted if recognition would contradict a strong public policy of the forum state or (in the Second Restatement's formulation) of the state "which had the most significant relationship to the spouses and the marriage at the time of the marriage."[28] Restatement, Second, Conflict of

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[25] See also, 52 Am.Jur.2d Marriage §80 (1970); Restatement, Second, Conflicts of Laws §283 (1969).

[26] Patterson v. Gaines, 6 How. 550, 12 L. Ed. 553 (1848) and see, e.g., Franzen v. E.I. DuPont De Nomours, 146 F.2d 837 (3rd Cir. 1944); 52 Am.Jur.2d Marriage § 80 n9 (1970); Krug v. Krug, 296 So.2d 715 (Ala. 1974).

[27] The Uniform Marriage and Divorce Act expressly repudiates any "public policy" exception, and thus precludes invalidation of marriages whether or not they could have been celebrated under the law of the forum state.

[28] The distinction between "forum state" and "state with most significant relationship" could actually in theory be pivotal, if the "forum state," i.e., the state where recognition is being demanded, is not the state that had the most contacts at the time of the marriage (and thus does not have "standing" under the Restatement to invoke the "public policy exception"). In any case, the Second Restatement identifies factors to be considered in evaluating the strength of an asserted public policy, while emphasizing the strong policy in favor of recognition.

Law § 283 (1969).[29] This states' rights exception arose at least in large part from the historical desire not to have to recognize interracial marriage.

Citing the local "public policy exception" -- and ignoring the Full Faith and Credit Clause -- forum states have sometimes refused recognition to out-of-state or foreign marriages that either violated the forum's own marriage laws, or would not have been capable of celebration under those laws, regarding polygamy and bigamy, incest, miscegenation, age, prior divorce, common law marriage, capacity, and proxy marriages. On the other hand, the force of the general rule has often led other courts to recognize marriages that violated the forum's provisions regarding those same subjects.[30]

In keeping with this mixed pattern, some states undoubtedly will recognize same-sex couples' marriages, while others may attempt to deny recognition, invoking states' rights and adducing a public policy out of miscellaneous anti-gay aspects of their law. There are, of course, no legitimate public policies served by telling a couple that they are not married, or withholding equal protection, respect, and treatment.

If they are permitted to pursue this aconstitutional approach, courts would have to determine whether recognition of an out-of-state marriage offends a "strong public policy." They might consider whether the marriage was expressly or impliedly prohibited by local statute or case law,[31] and possibly (if

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[29] The First Restatement contains a much more narrowly worded version of the "state's rights exception," requiring that a marriage be recognized unless it "not only [is] prohibited by statute but [also] offend[s] a deep-rooted sense of morality predominant in the state." At least fifteen states follow the First Restatement.

[30] As my colleague Matt Coles suggests, this fact sets up a case for a "public policy parity" argument: Where recognition was granted in one analogous case, it must be accorded in another, as the "public policy" purportedly justifying denial of recognition of a same-sex couple's marriage is no greater than that previously ignored in recognizing some other marriage (i.e., ones that were miscegenous, "evasive," between parties closely related, etc.). Thus, it is important to be prepared to probe the elements of the claimed "public policy," distinguishing, for example, between an outright prohibition on same-sex couples' marriages and a mere tradition of applying a silent statute solely in favor of different-sex couples.

[31] The First Restatement requires that there be explicit statutory prohibition.

seemingly unconstitutionally) whether such marriages are contrary to "morality," "natural law," the traditions of "Christiandom," or "Judeo-Christian teachings."[32] They might consider whether the forum state has somehow adopted (or in a meaningful way countenanced) a strong policy of anti-gay discrimination somehow related to same-sex couples' marriages.

However, given the strong interests in favor of ensuring that marital status enjoy uniform recognition throughout the states -- to protect parties from charges of unlawful cohabitation and adultery, to ensure orderly disposition of property in the event of death or divorce, to protect the interests of children, to facilitate mobility, and generally to protect the expectations of the parties -- states have generally recognized marriages (even if contrary to state law or public policy), refusing to recognize validly contracted marriages only on grounds of strong local public policy. 52 Am.Jur.2d Marriage §§ 80, 82 (1970); Restatement, Second, Conflict of Laws § 283 cmt. b (1969).

When challenged with a claim of "public policy," advocates should respond with the strongest countervailing policy and justice arguments available under the specific circumstances of the case, as well as general arguments. The policy balancing may occur in the context of the specific right, benefit, or responsibility of marriage arising in the litigation, e.g. intestate succession rights, insurance proceeds, tax status, or maintenance. See Restatement, Second, Conflict of Laws, § 283 (1969). Under this approach, advocates may wish to focus on the policy advantages of recognizing the marriage for purposes of the specific incident (e.g. the orderly disposition of descendent's property in a case of intestate succession), and critical elements related to the parties' expectations and fair reliance interests, as well as on recognition of the status of the marriage itself. We might also argue that the "public policy" is not sufficiently strong, as evidenced by how it is expressed (i.e., as a civil rather than criminal statute, or only by inference from other state laws or policies rather than expressly or on point), or that an analogous "public policy" was disregarded in an analogous (albeit non-gay) case.

The states' rights exception to the common-law rule of presumptive recognition has not actually been invoked in decades, has received sharp, serious, and sustained scholarly criticism, and should, if necessary, be challenged on constitutional grounds. A product of a shameful past of racism, national disunion, and relatively less mobility, the states' rights

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[32] Such language from the cases, of course, betrays the archaic and offensive roots of the states' rights public policy exception.

exception contradicts the basic premise of federalism that the states cannot treat each other like foreign countries.[33]

III. Statutory Law

The Uniform Marriage and Divorce Act ("the Act") effective in at least seventeen states[34] provides that:

> All marriages contracted within this State prior to the effective date of the Act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were

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[33] See Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 313 (1992); see also 45 Colum. L. Rev. 1, 27 (1945) ("[i]t is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to" the public policy exception); Gary J. Simson, State Autonomy in Choice of Law: A Suggested Approach, 52 So. Cal. L. Rev. 61, 70 n.51 (1978) (because it prevents consistent results, public policy exception is inconsistent with Full Faith and Credit Clause); Jennifer Gerarda Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage 3/14/94 DRAFT at 52 n.157 (on file with Lambda) (article also analyzes economic benefits to state celebrating and recognizing same-sex couples' marriages).

[34] See Ariz. Rev. Stat. Ann. § 25-112 (1991); Ark. Code Ann. § 9-11-107 (Michie 1993); Cal. Family Code § 308 (West 1994); Colo. Rev. Stat. Ann. § 14-2-112 (West 1989); Idaho Code § 32-209 (1993); Kan. Stat. Ann. § 23-115 (1992);Ky. Rev. Stat. Ann. § 402.040 (Michie 1984); Mich. Comp. Laws § 551.271 (1993); Mont. Code Ann. § 40-1-104 (1993); Neb. Rev. Stat. § 42-117 (1992); N.M. Stat. Ann § 401.4 (Michie 1993); N.D. Cent. Code § 14-03-8 (1993); S.D. Codified Laws Ann. § 25-1-38 (1993); Utah Code Ann. § 30-1-4 (1993); Wyo. Stat. § 20-1-111 (1993); Walker v. Walker, 44 N.E.2d 937 (1942); Ind. 50 Op. Att'y Gen. 346 (1967); Vital v. Vital, 319 Mass. 185, 65 N.E.2d 205 (1946). Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 3/14/94 Draft, at 49 n.143. See also, e.g., Conn. Gen. Stat. Ann. § 466-28 (1958) (marriages contracted in the foreign country where one or both parties are Connecticut citizens "shall be valid" provided (1) both parties have the legal capacity to marry in Connecticut and the marriage is celebrated in conformity to the law of the country of celebration; or (2) the marriage is celebrated in the presence of an American diplomat by ordained clergy). Hawaii's analogous statute is entitled "Contracted without the State." HRS §572-3.

> contracted or by the domicile of the parties, are valid in this State.

9A U.L.A., § 210 (1979). The Act has a great advantage over the common law rule in that its authors explicitly declared:

> the section expressly fails to incorporate the 'strong public policy' exception of the Restatement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.

Id., official comment. In interpreting the Act an Illinois court stated that:

> Out-of-state marriages are recognized as valid, thereby giving full faith and credit to a sister State's laws, if they were valid when contracted. However, the statute further extends what marriages are valid, even if the marriages were not valid where contracted, if the marriages were subsequently validated, either by the law of the State where contracted or by the law of the State where the parties to the marriage were domiciled. By allowing prohibited marriages to become validated, the purpose of the Illinois statute, i.e., to "strengthen and preserve the integrity of marriage and safeguard family relationships" is furthered.

Estate of Banks, 1994 Ill. App. Lexis 265, (App. Ct. Ill. 5th Dist. 1994) (citation omitted, emphasis added).[35]

Given that a significant number, indeed a plurality, of states are thus bound (independent of constitutional obligation) to respect marriages celebrated elsewhere, there are ample federalist arguments in favor of having a clean rule based on

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[35] Similarly, in determining eligibility for social security benefits the U.S. Department of Health and Human Services recognizes as valid a marriage that would be recognized as valid by the courts of the state in which the wage earner was domiciled. Thomas v. Sullivan, 922 F.2d 132, 136 (2d Cir, 1990), citing 42 U.S.C. § 416(h)(1)(A). But see Adams v. Howerton, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982) (court says same-sex couple not legally married under state law, nor would INS be obligated to recognize such marriage for purposes of immigration). Because immigration law has changed since Adams, because it lacked the benefit of cases such as Turner and Baehr, and because it is dicta, the assertions in Adams regarding congressional intent, the meaning of marriage, and the government's obligations are of dubious validity.

people's clear expectations regarding marriage and American union.

CONCLUSION

Most Americans, gay or non-gay, have not yet had to give real thought to the validity or meaning of same-sex couples' marriages and having the equal right to marry. While the initial reaction of many will range from incredulous to hostile, we also have much going for us: the fairness and rightness of respecting family relationships and committed, caring unions; the ability to present these stories in a compelling, positive, warm, and sympathetic manner (asking people how they would resolve this Catch-22); the logic, indeed, imperative of not requiring people to choose between marriage and movement from state to state; the sense that marriage is marriage, and this is one country in which if you are married, you are married; and a number of sound constitutional, statutory, common law, and fairness arguments.

Whether under the Full Faith and Credit Clause, other constitutional provisions, or the common law presumption of recognition, we should not give up on this fight before we have even begun to wage it. And we must begin to wage it, not just through legal preparation, but through public education and political organizing. Above all, we must frame the discussion so as to put forward what works for us, while casting our enemies in their true colors -- the same crowd that, hiding behind the banner of "states' rights," has always been hostile to others' equal rights and pursuit of happiness.

Mr. SENSENBRENNER. Mr. Chairman, this memorandum does outline a strategy for the use of the full faith and credit clause for same-sex couples to go to Hawaii, to get married, and then come back to their home States and claim that their marriage is valid. That, I think something that should be decided in each legislature around the country. The bill that has been introduced by Mr. Barr of Georgia, and which I have cosponsored, does preserve the right of each State to determine its own marriage policy and not to be boot-strapped into same-sex marriages by Federal court suits because marriages were performed in Hawaii and there is a Hawaii marriage license that the couple would present.

What the bill does is two things: It allows the other 49 States which have not legalized same-sex marriages, either through legislation or through court decision, to determine for themselves whether or not to recognize same-sex marriages, whether performed locally or performed in Hawaii. It doesn't overturn any law, anywhere, and in this way I think is the ultimate States' rights proposal.

There is precedent for the Congress acting in this area and some of it's 100 years old. The admission of Utah to the Union was delayed for several years until such time as Utah agreed to abolish polygamy and not to legalize polygamy once admitted to the Union. The fear of the Congress over a hundred years ago was that polygamous marriages solemnized in Utah would have to be recognized in the other States of the Union under the full faith and credit clause of the Constitution, and Congress made sure that that would not take place.

The second part of this bill frankly defines marriage for the purpose of obtaining Federal benefits to be a "legal union between one man and one woman." The word "marriage" appears approximately 800 times in the United States Code; the word "spouse" appears over 3,000 times in the United States Code. When all of these benefits were passed by Congress—and some of them decades ago—it was assumed that the benefits would be to the survivors or to the spouses of traditional heterosexual marriages, and these include Social Security survivors and Medicare benefits, veterans' benefits, pension benefits, and health insurance benefits for Federal or other governmental employees.

Going to same-sex marriages as a result of a court decision in one State will have a very profound impact on these types of spousal benefit programs. And it seems to me that a court decision should not impact on what the Congress decides and should not impact on the status of our trust funds and the status of those benefits that are paid out of the U.S. Government's general fund. The Social Security Medicare Trust Fund is going broke—according to the trustees, very soon. Sometime in the next century there is going to have to be a fix-up of the Social Security Old-Age Pension and Survivors' Fund, and I think we ought to know what the impact of broadening these benefits will be before that becomes the law as a way of protecting the benefits that are being paid to those who have earned them and those who are presently receiving them.

Finally, I will plead guilty to my bias for maintaining and strengthening traditional heterosexual marriage. And I genuinely feel as an individual this bill does it and that same-sex marriages

derogate it. Traditional heterosexual marriage, in one form or another, has been the preferred alternative by every religious tradition in recorded history. Marriage laws have been passed by governments at both the State and National level all around the world to protect women and children from men leaving them and going with another woman. And I think that one of the problems our society faces today is the erosion of the family and the erosion of marriage because marriage is the bond that keeps the family together, and that's why I strongly support this legislation and respectfully disagree with those who oppose it.

I thank the chairman for giving me this time.

Mr. CANADY. Are there other members of the subcommittee wishing to make an opening statement?

Mrs. SCHROEDER. Mr. Chairman.

Mr. WATT. Mr. Chairman.

Mr. CANADY. Mr. Watt.

Mrs. SCHROEDER. Go ahead.

Mr. WATT. Mr. Chairman, members of the committee, this, in a number of ways, is a very sad day from several different perspectives. I don't know why this bill has been introduced at this time or why we are considering this bill. I suspect that it is a nice sound bite. Obviously, the people who have brought it here have succeeded in that way: the audience is large; the people are standing outside; the cameras are here, even though yesterday when we had a serious hearing about protecting and preserving our youth, not a camera showed up and very few people. So, I guess you've identified a good sound bite, and if that's what this is about, you have succeeded.

But for me, it just seems that this is another step in the direction of doing what we have been doing throughout this term of Congress, which is fanning the flames of intolerance and seeking to divide people against each other in our country and, perhaps, thinking that that will somehow yield political victory or sustain the majority that currently exists in the House. There is a price to be paid for that. The price exists between individuals; it exists between races; it exists between people of different religious philosophies, different views, and it undermines a basic tenet of our country which was constructed on diversity and has prided itself, historically, in supporting diversity. I'm saddened that we have come today to fan the flames of intolerance.

The second point is that I'm not sure that I yet understand how this doesn't fly in the very face of the things that the Republican majority has said they hold dear. I keep hearing people talk about how important States' rights are and I keep seeing this majority act inconsistently with that. This has never been an issue of Federal import; it has always been a matter of States' rights and, in fact, there is a provision of the Constitution which obligates us in certain circumstances to give full faith and credit to the laws of the States, which brings me quickly to the third point that it seems to me our majority is consistently inconsistent about, and that is claiming on the one hand that they are the preservers of conservatism and, constantly, on the other hand, attacking the most conservative document that exists in our lives, other than perhaps the Bible, the Constitution itself.

So we're engaged in this constant attack on constitutional principles that to me has always—and throughout this term I've articulated it a number of times—been totally inconsistent with any kind of conservative philosophy that I have ever been able to understand or deal with. Finally, some of us do believe that there——

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

Mr. WATT. I ask unanimous consent for 30 seconds.

Mr. CANADY. Without objection.

Mr. WATT. There are some of us in this Congress who believe in individual rights, and I had thought that some of those people were in the majority. And every time I turn around there is that principle that you are being totally inconsistent about. So, on all of those fronts I am saddened that we are here, and I'd like to be talking about some things that really have some substantive value to them, rather than just making political sound bites, and I feel that that's what we're here about today.

Mr. CANADY. Are there other members wishing to make a statement?

Mrs. SCHROEDER. Mr. Chairman.

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I thank you for holding these hearings on this important issue.

This is not—contrary to what the previous speaker has indicated—an attack on the Constitution. You can't attack the U.S. Constitution by statute; you can't amend the U.S. Constitution by statute. What you can do, however, is that you can clarify the meanings of previous statutes, previous acts of Congress, in terms of what they mean and what their imposition may be upon the State legislatures. And in that respect, this is very much a States' rights issue because, simply, the step we are taking clarifies that in terms of the States interpreting their responsibility regarding interpretations that may be given to issues in other State courts. On this issue they will be able to preserve and protect the values that they hold dear in their State and we should preserve and protect that. This is a States' rights issue and I very strongly commend the chairman for bringing the issue forward.

Mr. CANADY. Thank you.

Mrs. SCHROEDER. Mr. Chairman.

Mr. CANADY. Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I don't think—let's not even talk about the Constitution. What this bill is doing today is attacking the very foundation this Republic sits upon. You know, every day in the House we say "The Pledge of Allegiance," and we talk about liberty and justice for all. And today I'm asking what part of "all" don't you guys understand? I see absolutely no reason for this bill except to create a divisive issue in America, one more thing to stir people up, to get hate radio going, to get everybody moving around. I wore my scarf trying to show that I'm proud of the diversity in this Nation. It has been its strength, and yet somehow people think it's its weakness and we must divide and classify people so we have people that we can hate or bash or attack and that's the way we make political points.

You know, I've been married to the same man for 34 years; I've been in this body 24 years. I'm going to stay in my marriage; I want out of this body. [Laughter.]

I want out of this body. My husband and I are not threatened by two other adults standing up and saying they want to be responsible for each other for the rest of their lives. We think that's a positive value, that people will take responsibility for another human being, and I would hope people would be talking about that and saying they're not threatened. If someone is threatened by that, I want to hear why. If there is someone in this room who thinks there's a lot of benefits that come from the Federal Government for being married, let me tell them about the marriage penalty tax that's in the Federal Code.

Let me point out that those of you worried about Social Security—the reason there is a surplus in the Social Security Trust Fund is because of working spouses who put money in there but that don't get it back under their own name; they get it back as a dependant. Social Security would really be in trouble if we didn't discriminate against married couples and what they put in there. No, the Federal Government makes money on married couples through the Tax Code and the Social Security Code, and if you don't believe me, the Congresswomen's Caucus can point that out. We've been talking about economic equity in that area forever.

Let me also say, if you're saying marriage should be for people who have children only, fine, then that's a whole new concept; let's debate that. But that will push a lot of people out. Pat Buchanan couldn't claim marriage; a lot of people couldn't claim marriage. So, you know, what is all of this about? And the fact that Hawaii is 2 years away from coming down one way or another, we've got to hurry to do this right now? Now let me tell you. I want to know when we're going to have the witchcraft trial and when we're going to have the other ones; that's probably next week—and on and on and on. This is getting to be ridiculous.

Let me say, in all seriousness, if this Congress really wants to do something about family values, I'll tell you what we can do. We can support the bipartisan Congresswomen's bill that we keep trying to push to get strong child support enforcement. Now that's an urgency—right now. That's a very high percentage of people who are on welfare because we're allowing adults who were in a marriage to suddenly decide they don't want to support their children, or who were a parent and not in a marriage and still don't want to support their children. We go "wink-wink" and the Federal Government pays for that. I think every American is a whole lot more concerned about that than they are about finding more wedge issues.

Look, let's be honest as to what this is about. This is about nothing but 30-second ads. And any Member of Congress who votes against this bill, you are all ready to do the 30-second ads; you've probably already got the generic ad in the can to try and shock people and startle people. But, why? What good does that do? What do we gain by pitting one American against another? Aren't we all in this Republic together? If for over 200 years this Republic has been able to stand without this kind of a law, what urgency is there that we have to do it right now, when we can't get a balanced

budget, when we can't get child support enforcement, when we can't get all sorts of things that have a whole lot more to do with our survival than this? I am very sorry I have to give this speech, and I am very glad I am leaving this place.

Mr. CANADY. The gentleman from South Carolina.

Mr. INGLIS. Mr. Chairman, thank you. I want to congratulate you on holding these hearings and congratulate the authors of this bill on an excellent bill, and I'm going to yield in a moment to Mr. Barr who may wish to make some comments.

I think that I'd simply respond to the gentlelady from Colorado by noting that this Republic was founded on some basic statements of truth, and it's really interesting that in the Declaration of Independence it made some rather bold assertions: "These are truths that are self-evident." In other words, there was no debate about those things and there was no sort of uneasiness about asserting that there are some things that are true and right and some things that are wrong.

And that, I would submit, Mrs. Schroeder, is what's been one of the strengths of this Nation—is the ability to distinguish between right and wrong and that's what it's about here.

Mrs. SCHROEDER. Would the gentleman yield?

Mr. INGLIS. I'd be happy to yield, but briefly, because I want to yield to the gentleman from Georgia.

Mrs. SCHROEDER. I thought it said that all people were created equal, and it didn't say anything, I think, about marriage at that point and the Republic has survived these 200 years without dealing with it.

Mr. INGLIS. Let me reclaim my time. One of the reasons the Republic has survived so well is that for a long time in this country there was a generally accepted view of what is right and wrong. And folks that you're associated with for a long time have attempted to now undo that sort of understanding, and that's part of what's happening here.

Mrs. SCHROEDER. Will the gentleman yield further? Who am I associated with? Is it guilt by association?

Mr. FRANK. I'm sorry if I'm ruining the gentlelady's reputation.

Mr. CANADY. I'm sorry, the time is controlled by the gentleman from South Carolina.

Mr. BARR. Would the gentleman yield to me?

Mr. INGLIS. I'd be happy to yield to the gentleman from Georgia.

Mr. BARR. I thank the gentleman for yielding, and I thank the chairman for allowing me to participate to the extent of listening to the testimony, which I think will be very enlightening, on this important piece of legislation, and I congratulate the chairman for holding this hearing—knowing full well of the attacks that would be made upon him and this very institution—by bringing forward to the American people, and through the most appropriate forum possible, a piece of legislation that is based directly on explicit language in the Constitution which grants to this very body in which we sit precisely the power to do precisely what we are doing today, and that is to determine the scope of the full faith and credit clause of the Constitution of the United States.

I would point out to those that have already argued in opposition, this was not an issue that we sought out—it was presented

to us, presented to the American people and to the Congress of the United States by acts which have occurred over the last 3 years and which are occurring even today in the State of Hawaii as that society, and basically their court system, fashions a vehicle to direct a frontal attack on the institution of marriage in the United States of America.

The bill that we have crafted—Mr. Largent, Mr. Sensenbrenner, others, on both sides of the aisle—in response to that threat is a reaction and not an overreaction. It addresses the issue in precisely the terms in which it must be addressed, and no further. The remedy that we have fashioned is very respectful of principles of federalism; it does not tell any State what to do or what not to do. It forces no State to do anything; it mandates no State to do anything. It simply provides—in anticipation of confusion in our court system when these issues are presented to it as inevitably they will be by the homosexual activists—that no State can be forced to accept a definition of homosexual or same-sex marriages based on the full faith and credit clause of the Constitution.

Secondly, it provides a response to something that we also know will be coming very quickly after the case in Hawaii is decided very shortly, and that is applications for Federal benefits based on that new definition of marriage crafted by the courts in Hawaii. The legislation, therefore, proposes a definition in the United States Code for purposes of Federal benefits and Federal laws only that reaffirms explicitly that marriage for purposes of Federal laws shall be a union between a man and a woman only.

Mr. Chairman, again I commend this body for taking up this issue, and I would again urge everybody to look at what the legislation actually does and not be drawn off track by the activists, by many in the liberal media, to make it appear as if it does something that it does not. Thank you, Mr. Chairman, and I thank the gentleman for yielding.

Mr. CANADY. There is a vote on the floor. The subcommittee will stand in recess and will reconvene immediately after the vote.

[Recess.]

Mr. CANADY. The subcommittee will be in order.

Mr. CONYERS. Mr. Chairman.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Good afternoon. Might I be accorded some time for some comments, please?

Mr. CANADY. The gentleman from Michigan is recognized.

Mr. CONYERS. Thank you very much.

Ladies and gentlemen of the committee, I come here amazed that this proposal to modify the full faith and credit clause is being considered. As the author of the bill, Mr. Barr, said, "It wouldn't hardly change much; it wouldn't prevent any State from doing what it wanted to do." I think that is the most modest undervaluation of what this provision would do that I have ever heard. This provision is an incredible incursion into the Constitution and I am surprised that with only about 30-some-odd legislative days left in the 104th Congress, this issue would be rushed to a hearing in the Judiciary Committee for this kind of debate.

Now Mr. Barr and the leaders of this Congress—the Republicans—are the same people who have given us more conservative

constitutional amendments—amendments that would abridge the rights of the citizens of this country—than any other Congress, except the one they were in control of 40 years ago. And so I question whether this was necessary, except maybe for political reasons. And if this bill is politically motivated, then I think that we ought to consider it for what it is and I think that that diminishes the value of these hearings and the purpose for the bill itself.

Remember, this is the same leadership that has given us 16 continuing resolutions in 1 year to fund and operate the Federal Government. This is the same leadership that has, in effect, closed down the Government on two occasions. This is the leadership that has moved forward to diminish civil rights activity in this country, to demean affirmative action as a noxious and harmful remedy for existing discrimination. These are also the people who have done very little to examine the militia movements, those reactionary organizations of hate and violence many of which, as a matter of fact, advocate that weapons be used to protest the jurisdiction of the United States of America.

And, so in that context I'm very delighted to get an opportunity to hear from one of my State's legislators, Representative Whyman, whom I welcome before the committee that I have served on for some period of time. I look forward to Ms. Whyman's comments that would give rise to her notions about what the Constitution and the Federal Government ought to do to protect the rights of not only the citizens of Michigan, but of the entire country. I also look forward to hearing from another panelist, the Honorable Terrance Tom, from the Hawaii State House of Representatives, who in his patriotic imagination has created a bill that would deny marriage licenses to persons who are biologically incapable of procreation. Wonderful idea, Tom. Let's hear more——

Mr. CANADY. The gentleman's time has expired. Without objection, the gentleman will have 1 additional minute.

Mr. CONYERS. Thank you, Mr. Chairman. I doubt if I'll need it, but since you've given it to me——

[Laughter.]

Mr. CONYERS. The constitutional amendments that we've considered here under the Republican leadership of this committee, the first Republican leadership in 40 years—and some have suggested that as a cycle—it's cyclical—about every 40 years—the balanced budget amendment; oh, that's one we really needed badly; the two-thirds limit to increase taxes; the flag desecration amendment, now that was a biggy; school prayer—we got a deal with that; and term limits, introduced by some of the most senior Members of the Congress. Why, I remember the day that Senator Thurmond came out for term limits; it was a very touching moment.

[Laughter.]

Mr. CANADY. The gentleman's additional time has expired.

Mr. CONYERS. I thank the chairman for his generosity.

Mr. CANADY. Thank you.

On our first panel today, we have a number of distinguished witnesses from around the country. First, we will hear from the Honorable Terrance Tom of Hawaii's State House of Representatives. Representative Tom is the chairman of Hawaii's House Judiciary Committee. Next, we will hear from the Honorable Edward Fallon,

representing the 70th district of the Iowa State House of Representatives. Then the Honorable Marilyn Musgrave will testify. She is a member of the Colorado State House of Representatives and a member of the education committee. Representative Musgrave sponsored legislation relating to same-sex marriages.

Next, we will hear from the Honorable Ernest Chambers, a member of the Nebraska State Senate. He represents Nebraska's 11th senate district and sits on the State's senate judiciary committee.

Finally, on this panel, we will hear from the Honorable Deborah Whyman. Representative Whyman represents the 21st district in the Michigan State House of Representatives and serves as the vice chairman of the human services and children's committee.

I want to thank each of you for coming hear today. Some of you have come from great distances and we are very grateful for your attendance. Without objection, your full statements will be made a part of the record, and I would ask that you summarize your testimony in no more than 10 minutes.

Mr. Frank?

Mr. FRANK. Just unanimous consent for my request, Mr. Chairman, to put into the record the testimony of the National Gay and Lesbian Task Force in opposition to this bill.

Mr. CANADY. Without objection.

[The prepared statement of the National Gay and Lesbian Task Force follows:]

PREPARED STATEMENT OF THE NATIONAL GAY AND LESBIAN TASK FORCE

Mr. Chairman and Members of the Subcommittee, my name is Helen Gonzales and I am Public Policy Director of the National Gay and Lesbian Task Force (NGLTF). We respectfully request that this statement be made an official part of the record for today's hearing.

NGLTF, the nation's oldest national gay and lesbian civil rights organization, with 35,000 Members, strongly opposes H.R. 3396, entitled "The Defense of Marriage Act." We urge this Subcommittee, and the Congress as a whole, to join with the majority of the states in rejecting the political extremists who seek to have their narrow view of families become the law of the land.

NGLTF has been working on family issues since its inception in 1973. We were also pleased to join with our colleagues at Lambda Legal Defense and Education Fund as founding members of the National Freedom To Marry Coalition and have produced the widely used manual, *To Have and To Hold,*" which has been spotlighted by a national Right-wing group, The Report, in its recently released gay-bashing video. The work of the Task Force in defeating anti-marriage legislation has also received the attention of another of the Right-wing groups, Focus on the Family.

H.R. 3396 is legislation seeking to address a problem that does not even exist, while at the same time raising constitutional questions. Same-gender couples are currently not allowed the freedom to marry anywhere in the country. The courts in Hawaii, where this issue has been raised most visibly, are not likely to settle this issue for another

year or more, so this legislation is at best premature.[1] Should same-gender couples be allowed to marry in the future, this legislation would deny these couples benefits provided to heterosexual couples, resulting in unprecedented legal discrimination against lesbian and gay couples. H.R. 3396 also seeks to overturn the "Full Faith and Credit Clause" of the U.S. Constitution - - which requires every state to legally recognize the public acts, records, and judicial proceedings of every other state - - through statutory directive, an action which is clearly unconstitutional.

This bill would short-circuit the important national conversation which is occurring in our country about family issues. This is a debate which needs to occur but in a thoughtful and comprehensive manner. H.R. 3396, and the environment in which it is being introduced, does not provide, nor is it intended to provide, the proper forum for discussing this most important issue. Instead, H.R. 3396 is clearly one piece of a larger agenda of the Radical Right to attack and undermine millions of American families, including gay, lesbian, bisexual and transgender families, single parent households, families in which grandparents are raising children and couples without children.

The Radical Right's View of Family

The view of the extreme Radical Right is that the only "right family" is that which fits its definition. If one examines statements by representatives from the various extremist organizations which form the national campaign against marriage, a picture of this "perfect traditional family" emerges. It is a family composed of a working man and a woman staying at home with their children. While this is a

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[1] In May 1993, the Hawaii Supreme Court ruled that Hawaii's refusal to issue marriage licenses to same-gender couples violates the state's constitutional guarantee of equal protection. ***Baer v. Lewin.***

perfectly valid and positive description of many families, it is by no means a description which fits the majority of families. In fact, according to the Census Bureau, fewer than 30% of American families fit the traditional definition of family: two parents living with children under 18.[2] Yet, political extremists continue to push for local, state and national legislation which seeks to impose policies that punish and demean families which do not fit their perfect view of the so-called "traditional family."

According to Concerned Women of America (CWA), for example, traditional marriage has been under attack over the past few decades, in great part because of the changes in state divorce laws. "We see no-fault divorce splinter families, leaving women struggling to provide for their children--and kids longing for a daddy in the home," said Jim Woodall of CWA. [3]

In a recent television interview broadcast by the Family Research Council, Robert Knight, FRC's Director of Cultural Studies made the argument, raised often by anti-marriage advocates, that the sole, or main, purpose of marriage is to procreate and raise children.[4] This argument, however, fails on two counts. First, many men and women marry and never have children, either because they choose not to do so or for other reasons. One assumes that a childless marriage is not valid in the eyes of these anti-marriage crusaders. Second, as pointed out below, many gay and lesbian couples are involved in raising children.

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[2] *See* U.S. Census Bureau, 1990 Household Information Survey and the 1991 report from the Marriage and Family Division of the Census Bureau.
[3] Jim Woodall, Vice President of Management, CWA, *Lawfully Wedded?* (undated paper)
[4] *See* transcript from video tape of *Same-Sex Marriage?* Straight Talk from the Family Research Council. Broadcast aired April 10, 1996.

Anthony Falzarano, Executive Director, Transformations Ex-Gay Ministry claims that, ". . . the homosexual, let's say the political gay community, is out to destroy the traditional marriage, heterosexual marriage, that God has designed for us. God deemed that the male would leave his parents and cling onto the female and the two would become one."[5]

Marriage is both a civil and religious institution. Though some religious denominations do recognize and perform same-gender ceremonies, organizing for marriage is absolutely not a fight to force any religious institution to perform or extend religious recognition to any marriage union. This is about the freedom of two people who love each other to have a civil marriage license issued by the state. Just as the state should not interfere in any way with religious ceremonies, religious groups, such as the ones behind this anti-marriage campaign, should not govern who gets a civil marriage license.

The Defense of Marriage Act does nothing to strengthen the institution of marriage. Instead it attacks the integrity of lesbian and gay families. Throughout the United States, millions of lesbians and gay men have formed loving, committed relationships. They are caring for each other in good times and bad, contributing to the welfare of their communities, and paying taxes to support government services at every level. Yet they are systematically denied the benefits and rights of marriage. Lesbians and gay men can be turned away at the hospital when a partner has had an accident or illness, lack access to "family" health coverage and other forms of insurance, are denied the benefits of inheritance and taxation that surviving heterosexual spouses automatically enjoy, have no rights to a range of government benefits,

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[5] *Id.*

and cannot make use of immigration law provisions to secure entry for partners who are citizens of other countries.

Large numbers of lesbians and gay men are also raising children. Estimates of the number of lesbian mothers range from about 1 to 5 million; of gay fathers, from 1 to 3 million; and of children of lesbian and gay parents, from 6 to 14 million. [6] Data gathered from exit polling after the 1992 presidential election found that while one-third of heterosexual voters had children under 18 living with them, one-quarter of lesbian, gay, or bisexual voters did as well.[7] In other words, a population not thought to be at all involved with parenting, is only 25% less likely to be raising children than heterosexual adults. The "Defense of Marriage" proponents claim to have the best interests of children and their families in mind. Yet, their legislative solution will penalize and stigmatize the millions of children with lesbian, gay, bisexual and transgender parents.

Genesis for this Legislation

The extreme Right, armed with anti-marriage draft legislation, has used this issue to attack gay, lesbian, bisexual and transgender communities around the country. Their anti-gay marriage crusade was kicked off publicly at a rally held at the First Federated Church in Des Moines, Iowa, on the eve of the presidential primary election held in that state. The rally, organized by the Christian Coalition and seven other national political organizations, became a vehicle for demonizing gays and lesbians and same-gender marriage as "the source of all ills in America." The national audience was asked to "send this evil life style

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[6] *See* American Psychological Association, *Lesbian and Gay Parenting: A Resource For Psychologists*, 1995.
[7] *See* 1992 Voter News Service exit poll data, as reported in *Power at the Polls: The Gay/Lesbian/Bisexual Vote*, by Dr. John D'Emilio, Director, Policy Institute, National Gay and Lesbian Task Force, 1996.

back to Satan where it came from." Every GOP Presidential candidate, with the exception of Senator Richard Lugar, endorsed the event, either in person or by pledging to support their anti-gay marriage campaign.

Since the beginning of the election season it has been clear that the issue of same-gender marriage would be used as a wedge issue between fair-minded Americans and those who promote hatred and intolerance in this country.

It is also clear that groups such as Concerned Women of America, Focus on the Family, and the Report have developed a clear plan to pass model legislation against same-gender marriage in each state. As Beverly LaHaye, founder of Concerned Women for America, has said, "CWA is involved in the National Campaign to Protect Marriage coalition. Working with other pro-family organization, this coalition is designed to take this issue state by state to ensure that traditional marriage is not weakened by homosexual marriage." [8] This year such legislation was introduced in 34 state legislatures, with seven states adopting anti-marriage laws (the eighth state is Utah which adopted such a law in 1995). [9] It is important to note, however, that in 17 states anti-marriage bills that were introduced were later withdrawn, defeated or otherwise killed.[10] These religious political extremists now come to Congress, seeking on the federal level the restrictive and discriminatory legislation which they could not obtain from most state legislatures.

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[8] This statement appears at "The Political Pulse," a Christian Internet Resources web page.
[9] See attached map for status of this legislation on a state-by-state basis.
[10] *Id.*

While NGLTF is not surprised by this proposed legislation, we are distressed that Congress is once again being used to promote the agenda of a small band of narrow-minded extremists in this country.

While the Radical Right would have us believe that they seek to preserve "traditional marriage," the truth is that they seek to impose their own narrow agenda on every American by playing on people's real fears and concerns about the changing American family.

Family Politics: The View From the Right[11]

From almost every quarter of American society comes a sense that "the family," however it is defined, is in crisis. It is not surprising that concerns about family have such deep resonance among Americans, since there is hardly an area of domestic policy that doesn't fall into the orbit of family: jobs and wage levels, health care and education, sexual values and behavior.

The understanding of the crisis varies. For some it is a question of stagnant wage levels, underfunded schools, the lack of affordable child care, and the skyrocketing cost of health care. For others the family crisis is about increases in divorce, out-of-wedlock births, female-headed households, and visible gays and lesbians.

In the hands of the extreme Right, "family" serves as both a symbol and a weapon: a symbol of an imaginary past when everything was fine, and a weapon to divide society into good people and bad, the moral and the immoral, the productive citizen and the social parasite.

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[11] The information in the following sections are based on a paper on gay and lesbian families being drafted by Dr. John D'Emilio, Director of the NGLTF Policy Institute.

Bashing gays, lesbians, bisexuals, transgenders and their families has become a key method through which the extreme Right builds its membership and its fundraising capacity. Concerned Women of America launched a major fundraising campaign in response to the National Education Association's endorsement of Gay, Lesbian, and Bisexual History Month. Lou Sheldon of the Traditional Values Coalition won a commitment from Newt Gingrich to hold Congressional hearings on "parenting, values, and the schools," and then milked those hearings for publicity and fundraising.

At the same time, the family politics of the Radical Right casts a wide net in its search for demons. It uses a rhetoric of "traditional family values" to condemn the immorality of single mothers and to campaign for punitive welfare reform. It attacks government programs such as publicly funded day care and the working mothers who need it. The Right supports a "parental rights" movement that impractically would put day-to-day school policy-making in the hands of every single parent, rather than in the hands of parent or community representatives, such as Parent-Teachers Associations (PTAs).

Another Look at "Traditional American Families"

The Right-wing vision of traditional American families is as far removed from the real historical experience of most Americans as is the Right's view of religious history. For large numbers of Americans over the last three centuries, family has not been isolated, nuclear and independent. Instead, families have been deeply embedded in a web of community relationships. Americans have had expansive definitions of who constituted family and "disruption" of the nuclear family structure has been commonplace.

Americans created social systems in which the boundary between family and community was very porous. They maintained cultural traditions in which it was understood that families survive and are strong to the degree that they are not isolated, independent, and separate, but are connected to others who are "like family."

This experience of family is a long distance from historical myths of the self-sufficient, sturdy, individualistic American family. And for a reason - - families in the past experienced upheaval all the time, life expectancy was shorter, and many children could expect to lose one or both parents. Women frequently died in childbirth. Working-class men died on the job or were seriously injured at an alarming rate. Many working-class occupations took men away from home for extended periods of time. In an era when strict divorce laws kept the divorce rate low, many husbands simply deserted their wives and children.

In other words, extended family relationships and broad, flexible understandings of kinship were necessary as insurance in a world that couldn't be controlled. And, in a contemporary world in which economic activity is organized around the earning power of the individual, the need for dependable extended family ties are even more necessary for many Americans.

The Contemporary Crisis of the Family Revisited

With this angle of vision, the contemporary crisis of the family begins to look very different. Today's "crisis" has little to do with a collapse in moral values, or changing gender roles, or the creation of visible gay communities. Rather, it comes from elevating a particular and, historically, very unusual family form - - the isolated suburban family of the post-World War II generation - - into a norm and a

tradition, and adopting public policies that see other family forms as deviant and broken.

The post-World War II nuclear family, lacking extended kinship ties and without deep connections to community forms of support, broke sharply with American traditions of family and community. It was viable in that generation because of the unique prosperity of the post-World War II decades. A series of special economic circumstances - - the productive capacity that the war created, full employment and massive wartime savings, a generous GI Bill of Rights, high levels of unionization, and large defense budgets that fueled the economy - - extended prosperity to millions of families for the first time.

Looking back from the vantage point of the 1990s, it is possible to see what commentators at the time denied: that the prosperity of the post-World War II generation was not a permanent condition. But, treating the free-standing, isolated nuclear family as the most desirable norm has left American families poorly equipped to cope with the changing economic and social conditions of the last generation, and with conservative efforts to further weaken the support systems that families need.

Today's "family crisis" is less about a breakdown of the nuclear family and a collapse of moral values than it is a story of the collapse of community systems of support for families in a time of economic stagnation.

Conclusion

As noted earlier, Mr. Chairman, it is important to understand not only the legislation itself but the context in which it is being put forth by the Radical Right.

Gay, lesbian, bisexual and transgender family issues, such as marriage, adoption and custody, are here to stay. We face family issues because they speak to the aspirations of same-gender couples, just as they do for all committed couples. Most importantly, however, these issues will continue to arise because they reflect the real circumstances of lesbian and gay family lives. We face family issues also because an extremist Right-wing political movement has chosen to target our families in its quest for power in American society. And, we face family issues because, throughout the history of the United States, family diversity has been a persistent fact, even in the face of an ideology that claimed otherwise.

Addressing the needs of gay, lesbian, bisexual and transgender families is an essential part of the fight against homophobia and of the continuing effort to create a just, compassionate, and humane society. Moving these issues forward not only will improve the lives of lesbians, gay men and their families. It will also bring us closer to a society in which family diversity is recognized for the precious social and cultural resource that it is.

Again, Mr. Chairman, we urge this Subcommittee and other Members of Congress to reject the voices of extremism, just as the majority of state legislatures have by rejecting H.R. 3396, which is not only anti-family but also mean-spirited. It is clear that promotion of this legislation at this late date in the congressional year is nothing but a shrewd political ploy.

Mr. CANADY. Representative Tom.

STATEMENT OF REPRESENTATIVE TERRANCE TOM, HAWAII STATE HOUSE OF REPRESENTATIVES

Mr. TOM. Thank you very much. Chairman Canady, ranking member Frank, members of the House Subcommittee on the Constitution, aloha.

Thank you for the opportunity to speak with you this afternoon, and on behalf of the legislature and people of the State of Hawaii, I bring with me our fondest aloha for all of the members of this subcommittee.

As chair of the house judiciary committee for the State of Hawaii, it has been my responsibility for the last 3 years to address the issue of same-sex marriages, and I am happy to respond to the subcommittee's invitation to share the Hawaii experience on this issue. Same-sex marriage was not an issue that arose by the submission of proposed legislation to the people's representatives. Instead, it arose because in May 1993 two members of our State Supreme Court issued an opinion unprecedented in the history of jurisprudence. These two individuals declared that the equal rights amendment to our State constitution, which was adopted to ensure the equality of women before the law, was a mandate to the State of Hawaii to issue marriage licenses to couples of the same sex and directed the lower court to conduct a trial to determine whether the State could show a compelling interest in denying licenses to same-sex couples.

In response to this judicial activism, the 1994 Hawaii Legislature, Democrat and Republican alike, overwhelmingly voted to reject this clearly erroneous interpretation of our State constitution and amend our marriage statutes to make clear that a legal marriage in our State can be entered into only by a man and a woman. This decision by the legislature followed extensive public hearings held under my leadership of the judiciary committee of the house throughout all of the Hawaiian Islands. Thousands of Hawaii's citizens have submitted testimony to the State legislature over the last 3 years. It was clear then, and it is clear now, that the people of Hawaii do not want the State to issue marriage licenses to couples of the same sex.

This committee should understand that the people of Hawaii are not speaking out of ignorance or uncertainty. Both of our daily newspapers are strong supporters of same-sex marriages and have editorialized repeatedly in favor of issuing marriage licenses to couples of the same sex. Yet, polls commissioned by the newspapers, themselves, show that opposition to same-sex marriages has grown as the trial on this issue nears. The most recent poll, taken in February, shows that 71 percent of the Hawaii public believe that marriage licenses should be issued only to male-female couples. Only 18 percent believe the State should license same-sex marriages.

Yet, despite the adoption of legislation prohibiting same-sex marriages, neither the trial court nor the Hawaii Supreme Court has taken any action to dismiss the same-sex marriage case; instead, trial in this matter is expected to begin in September of this year. It is this fact, I am sure, which has led this committee to consider the bill before you today. I have already heard comments that the

matter is premature, that Congress should stay out of the marriage issue and leave it to the States.

Mr. Chairman, Congress is already involved in the marriage issue. Numerous Federal statutes have been adopted to throw a legal safety net around the most fundamental unit of society—the marriage of a man and a woman. All such statutes were adopted under the universal understanding that marriages were designed to encourage and to support the union of a man and a woman as the basic building block of the family. I do not have a crystal ball. I cannot predict with certainty what decision will be made by the trial judge in Honolulu this September. But I do know this: no single individual, no matter how wise or learned in the law, should be invested with the power to overturn fundamental social policies against the will of the people.

If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. If inaction by the Congress runs the risk that a single judge in Hawaii may redefine the scope of Federal legislation, as well as legislation throughout the other 49 States, failure to act is a dereliction of the responsibilities you are invested with by the voters.

Mr. Chairman, the State of Hawaii has a long and proud history of tolerance and protection of minority rights placed into law by the voters and by the State legislature. These laws are a natural expression of a multiracial, multicultural society, whose beliefs we in Hawaii describe as "the spirit of aloha." Homosexual men and women make up a valued part of our Hawaiian community. We in the Hawaii Legislature have addressed their needs in the past by adopting legislation prohibiting discrimination in employment on the basis of sexual orientation. I have no doubt that the Hawaii legislature will continue to address their concerns in the future, just as we address the concerns of the poor, the elderly, the disabled, and others in our community.

But these issues properly belong to the people, and not to judicial activism. I have listened to the claims that same-sex marriage is a civil right and that to deny a marriage license to a homosexual couple is discrimination against a minority, but I know, perhaps more than anyone in this room, what it feels like to be discriminated against as a minority, for I am blind. Who in this room has been thrown out of a classroom by his teacher because he is blind and told that there was no place in school for people like me? What person here knows what it is like to be denied the right to read public documents because they are printed in a form that I cannot read?

But these concerns of the minority blind and disabled are properly addressed by legislation, carefully drawn to balance the interests of society as a whole, and not by sweeping pronouncements by judges who seek to impose their personal political views upon an unwilling public under the guise of the interpretation of the Constitution. Changes to public policies are matters reserved to legislative bodies and not to the judiciary. It would, indeed, be a fundamental shift away from democracy and representative government, should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several States, based upon a fundamentally flawed interpretation

of the Hawaii State Constitution. Federal legislation to prevent this result is both necessary and appropriate.

Again, I would like to thank the chairman and the members of this Subcommittee on the Constitution for the opportunity to share Hawaii's experience on this issue. Aloha.

Mr. CANADY. Thank you, Representative Tom.

[The prepared statement of Mr. Tom follows:]

PREPARED STATEMENT OF REPRESENTATIVE TERRANCE TOM, HAWAII STATE HOUSE OF REPRESENTATIVES

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amended our marriage statutes to make clear that a legal marriage in our State can be entered into only by a man and a woman.

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If this Congress can act to preserve the will of the people as expressed through their elected representatives, it has the duty to do so. If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of federal legislation, as well as legislation throughout the other forty-nine states, failure to act is a dereliction of the responsibilities you were invested with by the voters.

Mr. Chairman, the State of Hawaii has a long and proud history of tolerance and protection of minority rights, placed into law by the voters and by the State Legislature. These laws are a natural expression of a multi-racial, multi-cultural society, whose beliefs we in Hawaii describe as the spirit of aloha.

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Federal legislation to prevent this result is both necessary and appropriate.

Again, I would like to thank the Chairman and the members of this Committee for the opportunity to share Hawaii's experience on this issue.

Mr. CANADY. Representative Fallon.

STATEMENT OF REPRESENTATIVE EDWARD FALLON, IOWA STATE HOUSE OF REPRESENTATIVES

Mr. FALLON. Thank you. My name is Ed Fallon. I'm a State legislator from Des Moines and I'm serving my second term in the Iowa House.

While I would prefer that such legislation were not before Congress, I do thank the members of the committee for the opportunity to speak with you today, and if for any reason you or anyone else would want to visit with me later, I'll be in Washington until tomorrow afternoon, and I'm staying at the Dorothy Day Catholic Worker House on Rock Creek Road.

I understand the main reason that I've been asked to testify today is because of a speech I gave on similar legislation considered by the Iowa House earlier this year. A few people asked for a copy of that speech. They apparently circulated it among friends and eventually it found its way onto the Internet, and in early March I began getting responses. To date, I've received about 2,000 E-mail messages, letters, and phone calls from all across the country—probably from more than half the States—and it's still coming in. About 60 percent, I would say, are from homosexuals; the other 40 percent are from heterosexuals. Out of all of this correspondence—over 2,000 communications—only four have been negative.

So, for those of you who fear there is no public support if you take a stand against attacks on the civil rights of gays and lesbians, I say, take heart. My own experience over the past 3 months has convinced me that there is a significant number of Americans who find this type of legislation unnecessary at best, and dangerous at worst. I'd like to make it clear that I am heterosexual and have been married to the same woman for 11 years. To my knowledge, I have no family members who are homosexual; in short, I have no personal agenda that would compel me to stand up for gays and lesbians.

I simply believe that I was elected by my constituents to stand up for all people, including those who are disenfranchised and marginalized, whether they be gays and lesbians, working men and women who've been downsized, children, racial minorities, the poor, the homeless, or family farmers. But of all of these groups, it is clear to me that gays and lesbians are currently on the bottom of the social pecking order, and by singling out gay and lesbian marriages as a union unacceptable in the eyes of the law, proponents of this bill are guilty—perhaps unwittingly, but guilty nonetheless—of fueling the fires of ignorance, intolerance, and hatred.

A message I recently found on the Internet read as follows, "I hate faggots, too. If we need to kill a fag, the first is John Smith from Independence, IA. Give him a call and give him threats about his faggotry." Just as TV violence encourages real-life violence, legislative attacks on the rights of gays and lesbians encourage real-life attacks on gays and lesbians. And the violence isn't confined to the Internet; it seeps into the streets and alleys of our cities and towns where real gay men get a real gay-bashing, shed real blood,

and sometimes die real, painful, horrible deaths. And I fear that the message this legislation sends to the public is that it's okay to discriminate against and revile homosexuals, even though that's the way they were born and there's nothing they can do to change it.

And for those who might argue that homosexuality is a choice, I ask you, do you really believe that anyone in their right mind would choose to be in a class of people who are constantly made fun of, despised, fired from their jobs, denied housing, prevented from marrying, beaten up, and even killed? For gay and lesbian people, this array of abuse is par for the course. I submit to you that if you really believe homosexuality is a personal choice, then you have not tried very hard to see this issue from a gay or lesbian person's point of view.

I'd like to speak for a minute, too, about my own personal experience. Though I've never hated homosexuals, I used to fear them. When I was a kid growing up, the worst name you could call somebody was a "gay loser." And the stereotype that still pervades the minds of many Americans, that of a highly aggressive, promiscuous gay man seeking countless anonymous relationships, is the stereotype I grew up with and which still contributes to volumes of ignorance and fear throughout this land of ours. Over time, I came to know that this stereotype, like most, is based on fear, not fact. And the rogues who may fit the previous description are the exception to the rule, just as there are male heterosexual rogues who are aggressive, promiscuous, and constantly hitting on and harassing women.

In my evolving experience with homosexuals, familiarity has displaced ignorance and dispelled fear. I now count as friends and constituents many same-sex couples. Some have children; most are in long-term stable relationships. All are very decent, kind, and normal people, but because they are unable to legally marry, they are in many ways second-class citizens.

I'd like to read a couple of quotations from some of the 2,000 correspondences I've heard from. One man writes, a homosexual man, "We don't require special treatment; we want equal treatment. We want the right to determine health care for our partners, or they for us, when we are sick or injured. We want our life partners to have the right of survivorship, rather than have it passed back to 'blood family' that we may be isolated from and rejected by. We want our pension funds to recognize that our partners, who have contributed so much to our lives, have the rights to benefit from the sometimes-forced savings plans that we have invested in. We think that as human beings we are entitled to these rights."

A woman writes, "My partner recently died and I have to come to appreciate the protection a legalized marriage could offer a gay couple, as I lose my house, et cetera." Now, it seems to me, if anything, we should be here discussing whether to legalize same-sex marriages. I could go on. This testimony here is full of such stories that have really opened my eyes even further. And though you may have personal or religious reasons why the arrangement that I've described are distasteful to you, there is absolutely no way you could rationally argue that they are not stable, happy, healthy families.

Personally, I don't understand homosexuality; I'll admit that. Nor do I know what it's like to be elderly or black or a woman or blind, but that hasn't stopped me from accepting people who are different. This country was built on a foundation of freedom and diversity, and if we start denying certain basic freedoms, certain civil rights to one group, it's just a matter of time before we deny those God-given rights to other people as well. I fear the course that we are on in this country.

I'd also like comment, briefly, on the official description of this legislation, stated on the title page as, quote, "A bill to define and protect the institution of marriage." Ladies and gentlemen, this is not a marriage protection bill, as Mr. Frank has said. It is emphatically an antimarriage bill. What are we trying to protect heterosexual marriages from? It isn't as if there's a limited amount of love in the world. Love is not a nonrenewable resource. If Amy and Barbara, or Mike and Steve love each other, it doesn't mean that John and Mary can't. It isn't as if marriage licenses are distributed on a first-come, first-served basis. Heterosexual couples don't have to rush out and claim marriage licenses now, before they're all snatched up by gay and lesbian couples.

The truth is, heterosexual unions will continue to be predominant regardless of what gay and lesbian couples do. And to suggest that homosexual couples in any way, shape or form threaten to undermine the stability of heterosexual marriages is patently absurd. To those in our Congress, and to our President, who may know or who may feel, at any rate, in their hearts and conscience that this bill is wrong and yet are afraid to vote against it because of possible political consequences, I ask you to consider the great moral challenges and changes that have occurred in this country over the past 200 years.

Ask yourself when you would have felt safe to speak in favor of the separation of the original colonies from Great Britain? When would you have taken a public stand for the abolition of slavery? When would you have spoken in favor of women's suffrages? When would you have had the courage to join Martin Luther King and others in calling for equal rights for African-Americans? And even closer to the issue at hand, when would you have spoken out against laws banning interracial marriages?

While the choice of whether to support or oppose this legislation may be difficult for many of us, as it was for many of my colleagues in the Iowa Legislature, it is nowhere near as difficult or dangerous as the choices faced by the many great American freedom fighters who paved the way before us. We, as elected officials, whether we serve at the local, State, or Federal level, are elected not to follow, but to lead. We're elected to take what might sometimes be difficult, challenging and politically inexpedient stands on emotional issues——

Mr. CANADY. I'm sorry, your 10 minutes has expired. If you would conclude your remarks in about 30 seconds, I would appreciate it.

Mr. FALLON. I can do it in less than that.

Mr. CANADY. Thank you.

Mr. FALLON. We're elected to represent our constituents when they're right, and, I believe, to vote our conscience regardless of

whether our constituents are right. I'll leave you with a quote from Dr. Martin Luther King, Jr., who once said, "A time comes when silence is betrayal." I believe that by taking a stand in opposition to this bill, even in a losing cause, you can help break the silence and stand with those who often have too few willing to stand with them. Thank you.

Mr. CANADY. Thank you, Representative Fallon.

Representative Musgrave.

STATEMENT OF REPRESENTATIVE MARILYN MUSGRAVE, COLORADO STATE HOUSE OF REPRESENTATIVES

Ms. MUSGRAVE. Thank you, Mr. Chairman, and committee members.

In Colorado I represent a five-county district out in the rural plains—we do have areas other than mountains in Colorado—and when I got into the legislature—I am a freshman, I've just completed my second year—in my wildest dreams I could not have imagined the experience that I had in this last session. I chose to sponsor house bill 1291, which reaffirmed the prohibition of same-sex marriage recognition in Colorado. And this was a bill that if you think a person would carry for political reasons, you'd have to be dreaming. It was a very difficult bill to carry; I have the scars to prove it. I had the threatening phone calls; I had the intense atmosphere, much more than we're experiencing right now, but it was quite an experience to carry that bill. I would not have chosen to do that except that I felt very strongly about this issue.

I believe that when you're a representative that you should represent your district and you should also exhibit leadership. There are many people who are not concerned about same-sex marriage recognition, but there are many people who should be, because, indeed, it is a profound issue of our day. It passed out of the house of representatives; it passed in the senate; it came back with minor amendments; we approved it again and it went to Governor Romer in Colorado and he chose to veto that bill. Governor Romer is of the opposite party than I am, but he's a very popular Governor even though the Republicans are the majority in the legislature. Governor Romer received over 20,000 phone calls and many faxes and letters in regard to this issue, but he chose to ignore the overwhelmingly huge majority of Coloradoans that supported my bill.

As the Governor vetoed the bill, he mentioned that he did respect and reaffirm the institution of marriage for one man and one woman, but as he went on in the four-page veto, he also said that my bill was mean-spirited and divisive. Well, I haven't heard the term "mean-spirited" yet, but I'm sure it will be coming forth today. You know, it's getting to be where if you take a strong stand anymore in preserving a traditional institution like we're trying to do today when we reflect on marriage in our history, you're mean-spirited and divisive. But I would ask you, have the homosexuals not had the opportunity to bring forth laws, just like anyone else? Haven't they had the opportunity to operate in a legislative arena to accomplish their goals?

But, rather, I felt, when I carried the bill in Colorado, that this was an end-around run to get their complete agenda in one fell-swoop. And I find it rather amazing that people would say that I'm

divisive and I'm mean-spirited, when I would carry a bill like this, when it is very obvious that they want a judicial decision to go in their favor when they're well aware that legislatively and in the general populace that is not what people want. And I ask you, if we redefine marriage in our country, I can't even imagine all the ramifications that that would have. I think it's rather disingenuous to be cavalier about it and say, "Well, I'm not worried about it and how does that threaten you?"

What about the education of our children? What about health education? What about Madison Avenue? What about advertising? The cultural changes will go on and on if we choose to redefine marriage. I took a strong stand in Colorado; there were many that stood with me. The Governor chose to veto that, for whatever reason, and the people in Colorado are not happy about that. Our Governor will be term-limited, so he doesn't have to look at reelection, but I'll tell you, I am proud that I carried that bill. I did it for the right reasons; I know my motives; I know my heart, and I thought it was the right thing to do.

Mr. CANADY. Thank you, Representative Musgrave.

Senator Chambers.

STATEMENT OF SENATOR ERNEST CHAMBERS, NEBRASKA STATE SENATE

Mr. CHAMBERS. Mr. Chairman and members of the subcommittee, I also am pleased to be here, and I'm glad somebody let me know what that "Hon." in front of my name stood for. I read not too long ago that a black lady who worked in a cafeteria somewhere around here was fired because she referred to some individual as "baby," and so I thought maybe this was to show that certain terms of endearment would be allowable and it was an abbreviation for "honey." [Laughter.]

But they tell me that it means honorable, and it's hard for my colleagues to accept it, but it reminds me of a situation where this old gentleman was testifying in a court. He was known as the town character and he was ridiculed. People treated him like a fool, but he was smart enough to recognize how they mistreated him and how little they thought of him. He was referred to as "Colonel," and his last name happened to be Smith—no relationship to the gentleman from Texas probably, but the judge leaned over and said, "Colonel Smith . . ."

And the old gentleman said, "Yes?"

He said, "How do you come by this title 'Colonel'? You don't look old enough to have been in World War II, but you look too old to have been in the Korean War. So just how do you come by this title 'Colonel'?"

He said, "Well, Judge, it's just like 'the honorable' in front of your name; it don't mean nothing." [Laughter.]

And in many instances these honorific titles are really horrific when you look at what those of us with the power to protect the rights of all people will do in terms of misusing that power.

I know that there are appeals to religion, but I'm skeptical when that is done by those of us who legislate because those of us who make laws are involved with legislation, not salvation. Leave that to the churches. But if you do want to go to religion, and you talk

about the Judeo-Christian underpinnings of this society, the man through whom came Jesus Christ, King David, had more wives than he could number and many mistresses. His son, Solomon, told to the world to be the wisest man who ever lived, had several hundred wives and several hundred concubines. Abraham, Isaac, Jacob—it comes right down through the Old Testament, from which flow a lot of the attitudes that people say formulated this country's laws. We find your laws arrogant man trying to deny to me what God allowed to the greatest men of the Old Testament. What right do you have to do that? So I think it would be wise to leave religion out of it because many times when we scratch at those snakes, they turn around and bite us.

I think that it's not necessary for me to talk about all the things that others will say to today, and I'm pleased with that because it's too much to say in the 10 minutes that we're allotted.

The gentleman from Hawaii had said something about polls and other people talked about polls. He had thought that maybe a court decision should be rendered a certain way because of a popularity poll, but we'll, on the other hand, want to talk about the independence and integrity of the judiciary. The U.S. Supreme Court has said on numerous occasions that these strong, important rights of human beings are not to be settled on the basis of a popularity poll, and that's why there are protections written into the Constitution. I do believe that legislation of this kind implicates constitutional provisions, not only the full faith and credit provision, but also equal protection. Either, a marriage is a marriage.

I offered a bill, unlike that of my colleague to the right—well, I meant based on how she's sitting in relationship to me at the table. [Laughter.]

I offered a bill to legalize same-sex marriages. By the way, I've been in the legislature 26 years, more years than most of you have been in the world, and I was just resentenced to four more years last night as a result of the election because I'm running unopposed. But, nevertheless, I have always been willing to speak for those who have no voice, no friend, those who are unpopular. If you were to convert every setback that I have had into a scar, you'd be looking not at starman, but at scarman. I would be one large scar.

But I'm not here to try to get your sympathy for me or to try to play on your sympathy toward our lesbian and gay brothers and sisters. Yes, they're our brothers; they're our sisters, our aunts, our uncles, our fathers, our mothers—because gay people, in trying to be traditional, have married as a cover and reared children. So they do everything we do. They even commit crimes. They go to the electric chair. There are judges who send them there. There are guards who mistreat them in prison who are homosexual. They're everywhere. Everywhere we are, they are. Everything we do, they do.

What we should avoid doing is using a sledgehammer to slay a gnat. Many of those who don't want to have legislation to protect the rights of our lesbian and gay brothers and sisters will talk about how few of them there are, so why pass legislation giving them special rights? Well, you can't have it both ways. If there are so few, why this sledgehammer approach when it will affect so few

people? And how can so few people do anything to damage the institution of marriage?

I have to tell all of you here—and it's not by way of a regretful statement, and I can't say that I'm happy about it, but I'm a divorced man, and based on my experiences, not just in marriage—my wife was a very good woman. If anybody could have lived with a man such as me successfully, she could have. Her failure indicates that I'm a lost cause. But, based on my attitude, I don't know why anybody wants to marry anybody. [Laughter.]

I feel something like the lion in a den of Daniels today because I don't think it takes courage to bring a bill to ban gay marriages. I don't think it takes courage to bring a bill such as this. This is the kind that is—and I'm not referring, please understand, to the gentlemen and ladies who bring this legislation; I assume that, and presume, it was done in good faith, but I'm looking at the nature of the legislation. I think it's cynical, political, and hypocritical.

Look at those of us who are in public life talking so much about marriage and look how many divorces there are in this country. And since homosexual marriages are not legal, the only ones who can divorce are heterosexuals, and they have not done such a great thing with marriage. Look at the number of heterosexual parents who abuse their own children sexually, physically, psychologically. When we hide behind all these shibboleths and will not look at the real dynamics that move people to do certain things, that cause divisions and destructiveness in the society, then we are the hypocritical politicians who are caricatured in the cartoons except that our conduct sometimes is so reprehensible that we cannot be caricatured. Nobody can present us in a way that is worse than the way we conduct ourselves.

I think what is happening here is a fooling with the Constitution, and I think it is more dangerous to fool with the Constitution than it is to fool Mother Nature. What we were told this morning, that the President supposedly said, or that a spokesperson for the President said, I view to be double hearsay, maybe triple hearsay. I think that spokesperson must have misunderstood this President, who has spoken out and taken action to defend the rights of gay and lesbian people, who vetoed the late-term abortion law. So why in the world are you going to try to make me believe that this man is cringing and cowering and going to back away from doing his duty to protect the Constitution and the laws of this country and the system itself? You tell me he'll back away from vetoing this bill. I expect him to veto it, and I expect him to veto it resoundingly.

I think he was misheard by that spokesperson, or the spokesperson misstated it. I think whatever that reporter wrote in the Post, the Washington Post, was erroneous. And I think we would make a mistake to accept that as the President's position. I believe he's going to do the right thing and he's going to show that leadership.

I know that we can be asked questions, but I probably won't be fortunate enough to have any addressed to me. So I've got a couple more things that I'll try to go ahead and say without waiting for the question. [Laughter.]

Marriage in Nebraska law is defined as a civil contract, but the State supreme court has said it is not contractual; it creates a social status. That means it's based on a relationship voluntarily entered into by people, and when they go through certain ceremonial steps, there flows from that relationship rights, privileges, and obligations.

My time is up, but thank you for what you gave me.

[The prepared statement of Mr. Chambers follows:]

PREPARED STATEMENT OF SENATOR ERNIE CHAMBERS, NEBRASKA STATE SENATE

Mr. Chairman and Members of the Subcommittee,

On its legislative plate, Congress has H. R. 3396, misleadingly dubbed the "Defense of Marriage Act" which fails to disclose what it is defending against. Marriage is defined as "only a legal union between one man and one woman as husband and wife", and decrees that no State need recognize a same sex marriage that is "treated as a marriage under the laws" of another State.

The peculiar phraseology is significant and disingenuous because some Members supporting the proposal hail from States which "treat as a a marriage under the laws", open and notorious heterosexual "shacking up" without the benefit of formal solemnization, even when not provided for by statute. Out the window flies the political posturing about "traditional moral values" and deliterious effects on children of "sanctioned immorality". What are the children to think? Should not the fragile "institution of marriage" be defended from such blatant "living in sin"?

CONSTITUTIONAL CONSIDERATIONS

Comments in this regard will be brief because the Supreme Court will be the ultimate decider of this issue. Supporters of H. R. 3396 suggest that because Congress is empowered to enact legislation touching on matters arising under the "full faith and credit" provision of the Constitution, that anything enacted is, ipso facto, constitutional. No specific examples of the flaw in such a proposition are required, in view of the numerous Congressional enactments

struck down by the Supreme Court. However, the "Utah experience" which has pertinence, will be discussed later.

I believe that "equal protection" also is implicated. Either all marriages which are legal under the laws of State "A" must be accorded full faith and credit or none of them--for a marriage is a marriage is a marriage. Again, the Supreme Court will have the last word.

Interesting ramifications attach to the pernicious theory underlying H. R. 3396. (A) If a married same sex couple from State "A" has adopted a child and moves to State "B" which recognizes adoptions only of married couples--and does not recognize same sex marriage--what is the effect on the adoption and parental rights of the couple? (B) State "B"'s Legislature enacts a ban on "no fault" divorce and denies recognition of such a divorce obtained in another State. A person who obtained a no fault divorce in another State and moves to State "B" and gets married is a bigamist and subject to whatever sanctions are provided by the law of State B. (C) Leaving the realm of the theoretical, **what is the status of a same sex marriage (under terms of H. R. 3396) which is legal under the laws of another country?** Must it be accorded recognition by every State since the only Congressional enactment on the subject is silent? Will a person from a foreign country be accorded greater legal protection than a citizen of this country?

The ill-conceived, misbegotten, politically-inspired H. R. 3396 should not be enacted into law. And if it is, the President should veto it.

It is not the role of the State to uphold the tenets of any religion nor to base its laws on a particular religious belief.

The proper province of the State is legislation, not salvation. The State is not the church and does not accept its orders from God. America is not a theocracy, and it is not the State's business if a person marries a member of the same sex. In short, Caesar has no responsibility for souls.

MARRIAGE

Contrary to propaganda advanced by some supporters of H. R. 3396 and its restricted definition of "marriage", various forms of marriage, including polygamy and polyandry have been recognized throughout history, the World and even in this country. Some Christian sects have sanctioned polygamy and polyandry

[The "Utah experience" is an interesting sidelight which casts doubt on the efficaciousness of H. R. 3396. Because it was feared that if Utah became a State while having legal polygamy, the full faith and credit provision would compel other States to recognize such marriages contracted in Utah between Mormons. So Utah, as a condition to being admitted as a State, had to outlaw polygamy. If Congress lacked the power back then to allow other States to withhold recognition from polygamous marriages contracted in Utah, from whence comes the power to authorize such "withholding" today?]

Heterosexual marriage often has been an "institution" of exploitation rather than of societal uplift and stabilization. Marriages, for the purpose of sexual exploitation, have been and are arranged between an old lecher and a very young female. (Every heterosexual marriage terminates either in death or divorce.) If Elizabeth Taylor's previous husbands, the seventh of which she recently divorced, each was named Henry, if the next one has the same name, he will be Henry the eighth.

Heterosexual marriage has openly and forthrightly settled down to the flinty, cold and calculating business of pre- and post-nuptial contracts to protect one's goods from spousal plundering. Love still may be blind, but it has grown careful of its pennies. The ship of matrimony commences its tumultuous voyage on a treacherous sea of mutual mistrust. And the domestic violence between heterosexual spouses cannot be buried -- as are increasing numbers of its victims. But H. R. 3396 makes not even a feint at "defending" marriage from such critical threats.

Since heterosexual couples have blundered and so terribly messed up everything with reference to the "institution of marriage", are supporters of H. R. 3396 seriously contending that this "institution" in such disastrous condition already, will be worsened if same sex couples are allowed to enter it? It is conceivable that they may be able to teach heterosexual couples something about how to improve marriage. They certainly cannot make matters worse.

During his sojourn on Earth, Jesus's foes propounded "trick" questions to catch him in his words. A similar tactic is employed in the same sex marriage debate. The "trick" question involves polygamy. Opponents of same sex marriage suggest that the Bible established marriage as a union between one man and one woman, blithely ignoring the multiplicity of spouses of Leading Men of the Old Testament, inluding Kings David and Solomon.

Ironically, the best handling of the "trick" question was provided by an early Muslim ruler who was permitted under Islamic law to have four wives. He took only one wife, explaining that if he had taken four, he could have treated them the same, given them the same garments and goods and spent the same amount of time with each;

but the vagaries of the human heart would have led his affections to favor one more than the others. Unfairness would have befallen the others no matter how things might appear outwardly. Eventually, conflict would breed disruptions and confusion; and domestic tranquility would take flight like a startled bird.

Although a rational basis may be deduced for limiting a person to one spouse, the argument does not hold when an effort is made to make it support limiting marriage to members of the opposite sex. It should be kept in mind that no illegality attaches if a man or woman has numerous paramours simultaneously. Illegality rears its noggin oly if one attempts to go through the solemnization ceremony to make the arrangement(s) legal and more or less permanent. Thus, society has determined it is better that a woman have a thousand lovers, and a man a thousand mistresses instead of multiple spouses.

Another argument against same sex marriage is that procreation is impossible and that procreation is the main reason for marriage. The obvious response is that neither presupposes the existence of the other since each can exist without the other. For example unmarried popes sired children, and sterile people marry.

Marriage is nothing mystical or magical. It is a social relationship voluntarily entered into by two people intending to establish a monogamous, stable, ongoing relationship whose purpose is to undertake mutual support, comfort, duties and responsibilities. The sex of the parties should be as irrelevant to legality as is the sex of the members of a limited partnership or corporation. Legal recognition of same sex marriage will help stabilize relationships and reduce promiscuity while making available the rights and benefits which are created by law and flow from it.

As shocking as it may be to those whose minds are locked on the crotch, far more is entailed in same sex marriage than sex; for example: Social Security and Medicare; joint insurance policies (health, home, auto); family leave; pension benefits; the right to make medical and burial decisions for a spouse; wrongful death benefits; tax advantages; hospital visitation when limited to a family member or spouse; domestic violence protection orders; child support, alimony and other rights flowing from a divorce; inheritance rights.

If the American preoccupation and obsession with the crotch and sexual intercourse can be overcome, meaningful progress can be made toward tolerance, understanding and respect.

MY LEGISLATION

Clearly, same sex marriage is a traumatizing concept and even "repugnant" to some. Nevertheless, my intent is to keep the State of Nebraska on the forward-facing cutting edge of the sickle rather than the blunt posterior. The proposal died in committee when the Legislature adjourned sine die in April 1996.

An acquaintance took me to task for offering such a piece of legislation, and the following colloquy ensued. I asked, "This bill doesn't even affect you, does it? Are you gay?" His emphatic denial, "No, I'm not gay!" I continued, "Do you want to marry a gay man?" "Hell, no!" he exclaimed. I ended the exchange with, "Well, I don't think any of them wants to marry you, either--so let them marry each other."

I believe gay and lesbian people have taste. I mean, in the same way that a heterosexual person is not sexually attracted to every member of the opposite sex, gay and lesbian people do not view

every member of their sex as a sexual object.

Argument is rife at all levels over whether homosexuality is genetic or a matter of choice. Scientific and medical opinion prances around on both sides. The staid American Medical Association fled the ranks of **Neanderthalus Ignoramus** when it yielded to accumulating evidence of genetic underpinning and abandoned the untenable judgment that homosexuality is a disorder to be treated.

If, as many argue, every human being is "created" heterosexual; that "God makes no mistakes" and that the locus of sexual orientation is in the genitals, **what is the "genetic" sexual orientation of the hermaphroditic person who is "created" with both female and male sexual organs?** Would not such a person be "homosexual" regardless of which gender was preferred? And would it not be "genetic"?

The religious community is no less fractured than the scientific. Not a single religious outfit, whether Catholic, Native American, Jewish, Muslim or Protestant is comprised of members uniformy hostile toward gay and lesbian people and same sex marriage. Battles are raging within Christian sects because many of the adherents take seriously the idea that if Jesus died to redeem everybody, "everybody" includes gay and lesbian people.

Religious representatives testified on both sides of my proposal during the hearing before the Judiciary Committee. If the attitude of the Catholic Church and the Pope during the Renaissance had been the same as that of some in the Church today, the magnificent paintings adorning the ceiling of the Sistine Chapel would be nonexistent because Michelangelo would have been reviled and shunned due to his homosexual orientation. Nor would there be a Paradise Lost or a Paradise Regained by John Milton who derived inspiration from Michelangelo's stunning depictions of the Creation of Adam, the

Final Judgment and other dramatic scenes culled from Biblical lore.

Attitudes can be funny things. In Nebraska recently, a former legislator's gay son died of AIDS. Legislators expressed a degree of sympathy which was not in keeping with their generally homophobic orientation. Old ultraconservative Barry Goldwater drastically altered his view, upon learning that one of his young relatives was gay. A human face on things toward which a person entertains negative attitudes that are superstitious, uninformed and misinformed, will tend to moderate and become more reason-based.

I confess that I have no radar that tells me anybody's sexual orientation. Furthermore, I don't care what it is. My interest does not extend to bedrooms or wherever people partake of intimate activities. Much happens behind locked doors which is nobody's business but that of they who participate. I have no inclination to pry into others' affairs or to try to dictate their personal conduct.

If heterosexual couple A-and-B wish to marry, they have no right or legitimate interest in putting their dipper into the bucket of same sex couple C-and-D who wish to marry. And if A-and-B keep their dipper out of C-and-D's bucket, how can that cause their bucket to spring a leak? Busybodies and meddlesome politicians should keep their noses out of other people's bedrooms.

RACIAL/GENDER DISCRIMINATION VIS A VIS ANTI-GAY/LESBIAN DISCRIMINATION

Opponents of my legislation chided me with the assertion that it "dilutes" my efforts on behalf of those who suffer racial and gender discrimination. They argued that discrimination against gay and lesbian people is not "on a par" with the other types. But it is no less hurtful and wrong. As a Black man who has been discriminated against for so many years in so many ways, I simply do not wish to

see anybody go through it.

I am resentful when some people with their hard-hearted, intolerant religious morality want to proclaim to me their concern for the welfare of "minorities" while at the same time endorsing discrimination against gay and lesbian people. No people who discriminate against any other person or group because of what they are can make me believe that they have a genuine interest in the welfare of "minorities".

Those offering the "not-on-a-par" argument do not do so for the purpose of opposing racial and gender discrimination, but rather to justify discrimination against gay and lesbian people by suggesting that it is less pernicious than the other types. Tellingly, the people who advance that argument are, more often than not, the same intolerant ones who are prejudiced against "minorities".

"THE ELEPHANT MAN"

Years ago, I saw a black-and-white movie about a man named John Merrick. Throughout his body, he was grotesquely misshapen by huge tumors, some of which caused his skull to take on a deformed appearance such that he was called "The Elephant Man". He hid his deformities under a cloak and a hood made of burlap or canvas with one large eye hole cut into it. At some point, he was kidnapped from the English doctor who cared for him and was taken to America where he was put into a circus, physically abused and displayed in a cage as a sideshow freak. Dwarfs, a bearded lady, a strong man and others who themselves were treated as freaks, understood his degradation and humiliation and took pity on him. They freed him from his cage and managed to obtain passage for him on a steamship to England.

While waiting in the station for his train, he was accosted by a group of small boys afflicted with the cruelty which besets children who reflect what they observe in their elders. Wearing a cloak and unable to walk well, Merrick shuffled and staggered along a crowded sidewalk, drawing stares because of his hood, cloak and peculiar gait. Other little boys joined the chase like hounds after a fox. A little girl crossed his path, and he accidentally bumped into her, knocking her to the ground. Her mother began screaming hysterically and shouted, "Get him! Get him!" And the pursuit was on in earnest. More and more people took up the hue and cry and began chasing after the ugly, deformed, hideous mass of grotesquery down the street.

Terrified and lost, Merrick stumbled down a flight of stone steps, limped through a corridor, came finally upon a locked metal gate which barred his path. Escape was impossible. Frightened and trembling, he turned and faced his tormentors. Someone snatched off his hood. As the cornered man beheld the gaping mouths and horrified expressions of those who had him at bay, John Merrick cried out in an anguished voice, the barely understandable words: "I am not an animal! I am not an animal! **I AM A HUMAN BEING!**" The heart-rending quality in his anguished cry stunned the mob into remembrance of their, and recognition of his humanity.

All I am trying to say is that we are dealing, not with diseased things or animals, but with human beings. Congress should pass no law which degrades our brothers and sisters by setting them apart and placing them outside of the human family.

Thank you.

Mr. CANADY. Thank you, Senator.
Representative Whyman.

STATEMENT OF REPRESENTATIVE DEBORAH WHYMAN, MICHIGAN STATE HOUSE OF REPRESENTATIVES

Ms. WHYMAN. Good afternoon, and thank you, Mr. Chairman and members of the committee, for allowing me to speak on this most important issue.

In way of introduction, I'm Michigan State Representative Deborah Whyman. I'm currently serving in my second term in the Michigan House of Representatives.

As a member of the Michigan Legislature, I frequently find myself reacting to actions taken here in Washington requiring our body to comply with Federal mandates. My colleagues and I are seldom pleased with these edicts from Washington. However, we can take some small measure of comfort in knowing that we can vote for or against these individuals who impose these burdens on the States.

Today we are discussing a very different kind of mandate being imposed upon the several States. This mandate may well be imposed on every State in the Union by the court system of one State. This kind of imposition must not be permitted.

I'm, of course, speaking of the same-sex marriage cases currently winding their way through the Hawaiian courts. If Hawaii's Supreme Court rules that the State law prohibiting same-sex marriage provides—violates the Hawaiian constitution, that State will be the first to allow this practice. Consequently, if Hawaii permits same-sex marriages, every State would then be forced to recognize these unions under the full faith and credit clause of the U.S. Constitution.

Article IV, section 1, of the U.S. Constitution states that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and effect thereof."

Extremist homosexual groups are relying upon article IV, section 1, to open the floodgates for same-sex marriage. These groups are trying to accomplish, through judicial fiat, what they could never accomplish through the legislative process. I'm here today asking you to stop the extremists and allow the States to regulate marriage without the interference of another State's court.

In Michigan I've introduced house bills 5661 and 5662. These bills specifically prohibit marriage between individuals of the same sex and refuse to recognize the same such unions that may be legally valid in another State. An overwhelming majority of those individuals contacting my office about these bills favor their passage.

Since I've introduced these bills, the homosexual extremists have demanded such things as my expulsion from the legislature. I realize they are a very vocal group. While they are loud, they are small in numbers. The vast majority of Americans reject their extremism.

I come here today asking that you also reject the extremists in the homosexual movement. I wish to lend my support to H.R. 3395—I'm sorry, 3396. As you recall, article IV, section 1, gives Congress the right to regulate how acts, records, and proceedings

are reciprocated throughout the States. I urge you to restrict the recognition of same-sex marriages to States where the practice is allowed. No one State should be allowed to inflict its bizarre social experimentation upon unwilling participants.

Extremists will insist that every act, record, and proceeding is covered under the clause. To demonstrate the fallacy of this argument, let's examine the State where the heterosexual marriages are performed 24 hours a day under the glare of neon lights. In Nevada, State law permits prostitution except where prohibited by county government. Only Clark County prohibits legal prostitution. Since prostitution is permitted in Carson City, is it then also legal in all other States? Of course not. A license to perform acts of prostitution in Nevada's capital city is not valid in Michigan or any other State.

I, for one, am furious with Hawaii's attempt to abolish thousands of years of legal tradition. Many Americans are disgusted with this attempt to destroy every other State's laws regulating marriage. For this reason, I have launched a boycott on the Hawaiian tourism industry, and I'm urging individuals who support the traditional family to travel elsewhere until the State government of Hawaii can end this madness. If the homosexual extremists can boycott the State of Colorado, the other 95 percent of the population can boycott Hawaii.

With that, I'll close. Thank you for the opportunity to speak before you today.

[The prepared statement of Ms. Whyman follows:]

PREPARED STATEMENT OF REPRESENTATIVE DEBORAH WHYMAN, MICHIGAN STATE HOUSE OF REPRESENTATIVES

Good morning. Thank you Mr. Chairman and members of the committee for allowing me to speak on this most important issue.

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Consequently, if Hawaii permits same sex marriages, every state would then be forced to recognize these unions under the Full Faith and Credit clause of the United States Constitution.

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Since I've introduced these bills, the Homosexual extremists have been demanding such things as my expulsion from the legislature. I realize that they are a very vocal group. While they are loud, they are also very small in numbers. The vast majority of Americans reject their extremism,

I come here today asking that you also reject the extremists in the homosexual movement. I wish to lend my support to House Resolution 3396. As you recall, Article IV, Section 1 gives Congress the right to regulate how Acts, Records and Proceedings are reciprocated throughout the states. I urge you to restrict the recognition of same sex marriages to states where the practice is allowed. No one state should be allowed to inflict its bizarre social experimentation upon unwilling participants.

The extremists will insist that every Act, Record, and Proceeding is covered under the clause. To demonstrate the fallacy of this argument, examine the state where heterosexual marriages are performed twenty-four hours a day under the glare of neon lights. In Nevada, state law permits prostitution except where prohibited by county government. Only Clark County prohibits legal prostitution. Since prostitution is permitted in Carson City, is it also then legal in all other states? Of course not. A license to perform acts of prostitution in Nevada's capitol city is not valid in Michigan or in any other state.

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Thank you for this opportunity to address this issue.

Mr. CANADY. Thank you, Representative Whyman.

Again, I want to thank each member of this panel for your testimony. Your testimony has been very helpful to us.

In the opening remarks of certain members and in some of the comments made by the witnesses on this panel, questions have been raised about the constitutionality or the legality of the bill that is before the subcommittee today. I want to quote the letter which I referred to in my opening remarks, a letter from the Department of Justice to Chairman Hyde of the Judiciary Committee, in which the Department of Justice and the Office of Legal Counsel concludes, and I quote, "The Department of Justice believes that H.R. 3396 would be sustained as constitutional and that there is no legal"—I'm sorry—"that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department."

That's very short, but to the point. And I believe that the claim that there's a constitutional issue here is a claim that is made without due consideration of the plain text of the Constitution. And we're going to have a legal panel later which will focus on that, but I think that there is much scholarship on this issue that supports the position that is taken in this bill.

I'd like to address a question to Representative Tom. And, Representative Tom, I want to especially thank you again for coming the great distance that you have come on such short notice. We appreciate that very much.

In your testimony, Representative Tom, you said that opposition to same-sex marriage in Hawaii has increased as the debate on this subject has progressed. Why do you think that has happened? Now there are those who argue that opposition to same-sex marriage is based on ignorance and intolerance. If so, one wouldn expect opposition to lessen as the debate goes on and more information is brought forward to the public on this subject.

Could you comment on that, Representative Tom?

Mr. TOM. Yes. What happened is that the Supreme Court came out with its decision in May 1993. Before the decision was made on this issue, there was really no discussion about what marriage meant. I mean, no one was really aware of the situation. No one was talking about it. But after the decision, I felt it was incumbent on my part as house judiciary chairman to, first of all, study the decision of the high court to see what it based its reasoning on in requiring such a high requirement for the State to show why marriage licenses were issued only to couples of opposite sex.

As a result of that, I went throughout the islands, island by island, all four islands, conducted five long hearings regarding this issue of same-sex marriages, and numerous people throughout the public came out and spoke for and against the issue. It was very, very difficult. It was heart-wrenching. People spilled their guts out both ways on this issue.

And I think because of the wide discussion on this issue following the court decision, that is why more people familiarized themselves with the issue, which is a very complex issue. And as more people spoke about it, as more polls were taken, as more discussion developed, there was stronger and stronger opposition to same-sex marriage.

I'd like to also amend my statement by saying that in March of this year a subsequent poll was taken by the Star Bulletin. Both papers, The Advertiser and Star Bulletin, spoke out for same-sex marriages. And in that poll, 74 percent of the population in the State who were interviewed spoke against same-sex marriage. So it has not shrunk, but it has—the opposition in Hawaii has continued to grow against issuing marriage licenses to same-sex couples.

Mr. CANADY. Thank you, Representative Tom.

Senator Chambers, I do have a question for you. Am I to understand from your remarks and your testimony that you would support polygamy?

Mr. CHAMBERS. Are you going to give me the opportunity to answer the question? Polygamy——

Mr. CANADY. Yes, that's why I asked it.

Mr. CHAMBERS. OK. I mean, it's not a yes or no answer. That's the point that I'm making.

When you look at the way a State is organized, we all know that a State is just a political entity that outlives any of us and it has the power to coerce obedience and punish disobedience. So it's able, because of its power, to dictate what is going to be in the social realm, whether it's right or not. So it could be determined that if you allow one person to have several spouses, it would create contention within that very family. So it would not be wise to allow one person to have more than one spouse, whether the one is a man or a woman.

Mr. CANADY. My time has expired. Mr. Frank.

Mr. FRANK. Let me ask Representatives Whyman and Musgrave, who have filed laws to say that same-sex marriage wouldn't apply if it did in Hawaii, do you believe—well, I'll ask Representative Musgrave: if the Governor had signed that law, would it have been effective, in your judgment? Would it have been binding on the State of Colorado?

Ms. MUSGRAVE. Yes, I believe it would have.

Mr. FRANK. Representative Whyman, if your law were to pass, would it be binding on the State of Michigan?

Ms. WHYMAN. Yes, I believe so.

Mr. FRANK. So what do you need this for? I mean, that just proves my point. You both already believe that you have exactly the power that this statute purports to confer on you, and that——

Ms. MUSGRAVE. Yes, but——

Mr. FRANK. Excuse me, but you answered the question; I appreciate it.

I didn't say this is unconstitutional. I said it was legally unnecessary and meaningless. In fact—and I'll get to the second problem with it—but that's the point I want to make. I said it is not unconstitutional; it is politically motivated, this part of it, because we have here—Ms. Musgrave, Ms. Whyman, they've filed these bills. Apparently, Ms. Musgrave, people called you mean-spirited. Ms. Whyman, people said you should be expelled. It's tough world and people say those things about those of us in life and office. But you passed those—you put those bills through. You don't think we need this, and I think you're right in that, if the clause invalidates what you do, it's because of some direct constitutional interpretation. I don't think that this is at all necessary.

And let me ask you this, though, because if it is necessary or if it is binding, I think from the standpoint of States' rights you've got a problem here because it says on page 2, "No State shall be required to give effect to any public act, record," et cetera. I assume if we can pass a law that says no State shall be required to do so, we could pass a law that says a State shall be required. If we can say you're not, we can say you are.

Would you think it would be constitutionally binding on you if the Congress passed a law saying you must give full faith and credit to Hawaii, Representative Musgrave?

Ms. MUSGRAVE. I would just like to comment.

Mr. FRANK. No, I'd like you to answer my question. My question is this: you're supporting a law which says we, the Congress, allow you to not accept the Hawaii decision. You tell me you don't think that's necessary, and I agree with you. But my question here was, since you're supporting that as a law, doesn't that mean that we would then have the right to do the opposite and pass a law that said we direct Colorado and Michigan to accept Hawaii's decision? Do you think that if we passed a law that said every State, territory, and possession shall be required to give effect, et cetera, that that would be binding on you?

Ms. MUSGRAVE. Sir, you and I both know how laws are made. Yes, if we made one law, if you made one law, you could make another.

Mr. FRANK. No, but I'm asking you a question about—you're a State legislator and we're here talking about a statute. I'm asking you a question directly relevant to the statute. See, I think that for political purposes the majority is doing something that they really don't want to do, which is announcing that Congress has a power that they don't really think it has, and, in fact, by announcing it here, they are weakening rather than strengthening States' rights because they are announcing that it's up to Congress to decide whether or not you will give full faith and credit. I think the appropriate policy is that that's a State-by-State decision.

But I am asking you for a question—and I know you don't want to answer my question; I appreciate that. But I would still—I'll try one more time. Do you agree, or would you agree, that Congress has the right to pass a statute, the right to pass a statute directing all the States to give full faith and credit to Hawaii's marriage policy?

Ms. MUSGRAVE. That is not how I interpret this bill.

Mr. FRANK. Well, that's what it says. It says——

Ms. MUSGRAVE. And so it's difficult for me to answer it in that way. I already answered your question——

Mr. FRANK. No, you didn't. The bill says no State, territory, or possession shall be required to give effect to any public act. And it has generally been my assumption, if we could do that, we could change it and say every State, territory, or possession shall be required. I'm changing "no" to "every." And you're telling me it's constitutionally binding if we say "no," but it's not constitutionally binding if we say "every?"

Ms. MUSGRAVE. What I said to you was, if the law can be passed in the way that this one would be passed, yes, the other one could be passed.

Mr. FRANK. It could? OK.

Ms. MUSGRAVE. It's just the arena——

Mr. FRANK. All right, well, I appreciate it. Representative Whyman, do you agree with that?

Ms. WHYMAN. Well, first of all, you asked me if I thought that my bill was binding, and the answer is yes. But my bill has not been signed into law. We're having a hearing next week.

Mr. FRANK. I understand, but this statute would still require you to pass a separate bill. This statute is not a replacement for your bill. This statute purports to enable you to do what you believe you can do anyway.

Ms. WHYMAN. We can look to the Federal Government for leadership——

Mr. FRANK. No, no, excuse me. [Laughter.]

But that's—you can, and I thought you were sort of antimandate there, but I'm glad you want to look to us for leadership, but that's not what this says. This says it's up to you. This amendment, this statute—I mean, I am sorry—I understand it's a little inappropriate of me in this political rally to be reading the text of the statute—[laughter]—but we are a congressional committee, and I thought I could do that, and that's what it says: it's up to you, which you think it already is.

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

Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Senator Chambers, another question for you——

Mr. CHAMBERS. Thank you.

Mr. INGLIS. I thought it was interesting in the exchange with the chairman about the polygamy question—apparently, you would say that it's OK not to permit polygamy because polygamy will create certain deleterious societal effects, I take it is what you're saying. In other words, that there are reasons that we won't—we don't want polygamous relationships countenanced in the law. Is that correct?

Mr. CHAMBERS. He posed—oh, excuse me—he posed a hypothetical question, and I answered it in that fashion. I think before decisions are made of that kind which are going to take the force and effect of law, there should be careful study given to it. So accepting as a premise for my answer the premise that—can I wait until that finishes [referring to the noise of many beepers in the hearing room]?

Mr. INGLIS. Yes.

Mr. CHAMBERS. OK. Accepting the premise of his question as the premise for my answer, I was saying that, if that were to be done and you say that polygamy is not going to be allowed, you could give a rationale for that on the basis of the kind of confusion that could result if several spouses are within one family and there's only one spouse who belongs to all of them.

Mr. INGLIS. In other words, you're saying that there are certain deleterious societal effects that accrue to a polygamous relationship, and, therefore, it's OK for the State to proscribe that activity?

Mr. CHAMBERS. No, I said what I said, and that's within this specific family and not that, if this is a polygamous family here, it would necessarily affect a family over there. I'm saying within this

entity, this discrete unit we're talking about, problems would be created therein, but if you're talking about what we're discussing in terms of gay marriages, you have two individuals voluntarily in that relationship——

Mr. INGLIS. But I understand all that——

Mr. CHAMBERS [continuing]. And it is not likely because of the makeup——

Mr. INGLIS. Right, I understand all that.

Mr. CHAMBERS [continuing]. It will lead to these problems.

Mr. INGLIS. I understand all that. But I'm very interested in following up with Mr. Fallon's comment now about applying the principle that you're not enunciating, I'm enunciating for you, but I think it's a principle that you really must believe in. And that is it's OK to proscribe polygamous relationships.

Now, Mr. Fallon——

Mr. CHAMBERS. No, that's—I've stated what I've stated——

Mr. INGLIS. I know that's not what you said, but that's what I say. So let's see what Mr. Fallon says about this: let's assume somebody has some insatiable appetite for spouses. They just must have more spouses.

Mr. FALLON. I can't understand that. My wife can barely handle one husband.

Mr. INGLIS. Right, OK. So the idea is now—in other words, what you would—I assume, based on your testimony, is that's then just the way I am. I can't help it. So, therefore, if I am under such a cloud of victimization and I just can't help it, it's the way I am, then why is it that our society is allowed to proscribe polygamous relationships? What if I just wanted more and more wives? Can you explain to me why it is that we can outlaw that?

Mr. FALLON. I think the distinction is between whether one is naturally attracted to members of the same sex or of the opposite sex, and, clearly, most of us are attracted to members of the opposite sex.

Mr. INGLIS. Oh, wait, wait. OK, I understand all that. I understand the rationale. But what I'm asking is, why can society proscribe a polygamous relationship if you assert that we cannot proscribe a homosexual relationship?

Mr. FALLON. Well, I—I haven't thought about that in much detail. Polygamy is not a big issue in my district. [Laughter.]

Mr. INGLIS. Wait a minute now. OK, so, in other words, you're not certain about that. Let me give you time to think about it.

Mr. FALLON. But same-sex marriages are. I have a lot of couples——

Mr. INGLIS. Let me give you time to think about it while I read something to you, very interesting, that I got recently from a member of PFFLAG. It says—it's an article from somebody who's making an argument that—basically, the argument that you make, and it is the party line: "I can't help it; I'm just this way," which actually, of course, is a secondary argument. The primary argument, and the better argument——

Mr. FRANK. Will the gentleman yield?

Mr. INGLIS [continuing]. For the homosexual cause—in just a moment—would be it's OK; in fact, it's good to be homosexual. See, that's not the argument. The argument is the secondary argument,

which must, in fact, admit that the first argument is wrong, that it is not good, because they immediately shift to the secondary argument, which is "I can't help it. I've got this terrible thing called homosexuality, and I can't help it." You see, if it's—if you make the primary argument, it would be it's good, and the more the better. But that's immediately conceded by the homosexual agenda, and it goes to "I can't help it."

Now listen to this. This is what I find so fascinating in this little piece from somebody who's making this argument. Just a moment——

Mr. FALLON. There is a question in here somewhere?

Mr. INGLIS. Yes, there will be.

Mr. CANADY. I'm sorry, the gentleman's time has expired.

There's a vote, actually a series of votes, proceeding on the floor. The subcommittee will stand in recess and will reconvene immediately after the votes.

Mr. FRANK. And, Mr. Fallon, you have to keep thinking about that.

Mrs. SCHROEDER. Mr. Chairman, may I yield my 5 minutes to the gentlewoman from Texas?

Mr. CANADY. If you're here, you may, when we return—at that time. You can't yield to her now because we're going to the floor.

The subcommittee will stand in recess.

[Recess.]

Mr. CANADY. The subcommittee will be in order. The subcommittee will be in order.

I recognize the gentleman from Wisconsin.

Mr. SENSENBRENNER. Maybe I ought to take that back. I have a couple of questions for Representative Fallon. Is he still around?

Mr. CANADY. I understand that he will be back.

Mr. SENSENBRENNER. Well, then, may I defer until he does come back?

Mr. CANADY. Could someone find, attempt to find, Representative Fallon? OK, we will—yes, we'll suspend until he is here.

[Pause.]

Mr. CANADY. The gentleman from Wisconsin is recognized.

Mr. SENSENBRENNER. Mr. Chairman, I have a couple of questions for Representative Fallon.

Is there anything in H.R. 3396 that would prohibit the Iowa Legislature from passing legislation authorizing the issuance of marriage licenses to people of the same sex?

Mr. FALLON. I believe this is a variation on what Representative Frank was talking about?

Mr. SENSENBRENNER. This is a question that I'm asking.

Mr. FALLON. Yes.

Mr. SENSENBRENNER. Is there anything in this bill that would prevent Iowa from passing a bill that would authorize marriage licenses to people of the same gender?

Mr. FALLON. I haven't had the benefit of studying it with any legal counsel, but, as I read it, no.

Mr. SENSENBRENNER. OK. Do you think the bill's constitutional?

Mr. FALLON. Again, I can't answer that question.

Mr. SENSENBRENNER. We've been told by Janet Reno's Justice Department that it is constitutional and there's no legal impedi-

ment to the passage of this legislation. I just want to tell you that this legislation is the ultimate States' rights legislation. Every State is allowed to make its own determination on whether to legalize same-sex marriages. It does not overturn what the practice may be in Hawaii, should the courts decide to legalize same-sex marriages, but it simply would allow Iowa and the other 48 States to ignore a same-sex marriage that has been performed in Hawaii, and it would be up to the Iowa Legislature to make a determination of whether to change what the law is in Iowa.

Now the second question that I have, after the discussion that we've had on polygamy with the previous couple of questioners, is: say a State legalized polygamy. Do you think that under the full faith and credit clause it would be proper for someone who is married and had a family in Iowa to leave his family and to go to the State that legalized polygamy to take another wife, and then to come back to Iowa and reside with wife No. 2 as husband and wife without having divorced wife No. 1?

Mr. FALLON. Well, again, we're talking extremely hypothetical here.

Mr. SENSENBRENNER. No, we're talking about the legal issue that is presented, Mr. Fallon.

Mr. FALLON. Well, I'm——

Mr. SENSENBRENNER. The legal issue that is presented is whether the full faith and credit clause of the Constitution, absent this type of legislation, would require States that have rejected a social experiment that one of the other States has decided to embark on to have to recognize the results of that social experiment. And I'm asking you a question if a State legalized polygamy, absent legislation, do you think Iowa should recognize that polygamous marriage under full faith and credit?

Mr. FALLON. Well, first of all, I regard marriage as a contract between two people, and I would also suggest that one reason that people do couple up is to provide care, to provide the support, sustainability——

Mr. SENSENBRENNER. That's not the issue, sir.

Mr. FALLON. And when you involve more than——

Mr. SENSENBRENNER. We're dealing with laws here, and it is obvious——

Mr. FALLON. I think it is the issue.

Mr. SENSENBRENNER [continuing]. From the announced statements of those people who are in opposition to this legislation that they would like to see same-sex couples go to Hawaii, if the court finally rules in favor of same-sex marriages there, get married in Hawaii, and then come back and get the benefits of a married couple in the other 49 States that have not done that. And my question is: let's forget about the business of same-sex marriages. Let's talk about polygamous marriages, because the law and the Constitution would be the same. Do you think that that ought to be allowed?

Mr. FALLON. Well, I know you're going to cut me off just as soon as I say what I want to say, but I think you're confusing issues.

Mr. SENSENBRENNER. No, I'm not. This is a legal issue, and that's what we're dealing with here, sir, and I don't think you understand, with all due respect.

Mr. FALLON. Polygamy is not a reality in today's—in this country today. Homosexual marriages, homosexual relationships, are. We're dealing with reality.

Mr. SENSENBRENNER. But 100 years ago, reality was that polygamy was allowed in Utah, and Utah was not admitted to the Union by this Congress until the Utah Legislature abolished polygamy, which was sanctioned by the Mormon church, and still might be. I'm not a member of the Mormon church, but it was sanctioned by the Mormon church then. Because of the fear of the Representatives and Senators who sat in this Capitol Building that polygamous marriages in Utah would be required to be recognized by the other States under the full faith and credit clause—this is the legal issue that we're dealing with here.

I yield back the balance of my time.

Mr. CANADY. The gentleman from North Carolina is recognized. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. OK, I'm sorry, I was consulting with my——

Mr. FRANK. Senator Helms is only here in spirit; he is not here in person to be recognized. [Laughter.]

Mr. WATT. I'm in search of Ms. Whyman. Why, man, is she not here? [Laughter.]

Has she left us? She's gone.

Mr. CANADY. I understand that she is gone.

Mr. WATT. All right.

Mr. FRANK. The witnesses—gee, I'm kind of disappointed we get witnesses and we don't get to question them. The members ought to be entitled to question the witnesses.

Mr. WATT. Ms. Musgrave seemed to have had a similar position to Ms. Whyman. What would the law that you proposed have done, had the Governor—it was your Governor that failed to sign it, Governor Romer? Am I getting you mixed up with Ms. Whyman?

Ms. MUSGRAVE. What my bill would have done, if it would have been signed into law, it would have clarified Colorado law listing as a specific prohibition, much like the law on polygamy, bigamy, that same-sex marriages would not be recognized in Colorado; and, further, Colorado would not be forced to recognize same-sex marriages performed in other States.

Mr. WATT. And what impact do you think it would have had if we at the Federal level had passed a law that said that Ms. Whyman's State or some other State shouldn't recognize your law?

Ms. MUSGRAVE. I believe that the bill that we are discussing today would have made my——

Mr. WATT. I'm not talking about the bill we're discussing today. I'm just asking you, what impact would it have had on your proposed legislation if we had passed a law at the Federal level saying that, in effect, the law that you adopted at the State level was meaningless and that North Carolina should ignore it?

Ms. MUSGRAVE. As I think about your question, it's kind of circuitous. I'm trying to figure this out. If the law had been signed in Colorado—and, sir, tell me again, and what would have happened in North Carolina? What did you say?

Mr. WATT. We passed a law at this level, the Congress passed the law, that basically told all the other States in America to ig-

nore the law that you passed. Would that have been—I mean, do you think we had the authority to do that?

Ms. MUSGRAVE. I think that my law, my bill that would have been signed into law, pertained to Colorado. If you at the Federal level had told the other States to ignore that, I'm not sure what impact that would have had on Colorado. We would have a law in Colorado on the books that would have said one of the prohibitions, a type of prohibited marriage in Colorado, one that Colorado would not recognize, would be same-sex marriage. Further, Colorado would not be forced to recognize same-sex marriages performed in other States.

Mr. WATT. OK. So your bill went beyond just controlling what happened in Colorado; it said, if we have a law in North Carolina that says the contrary to what your State law says, then you're not obligated to recognize that?

Ms. MUSGRAVE. That's correct. It is my understanding that different States have different laws in regard to what types of marriage are recognized.

Mr. WATT. And what happens now is your understanding when that occurs, when there is a difference in the States' laws, for example, where one State says you've got to be 16 years old to get married and another State says you've got to be 21, if somebody gets married that is 16 and it's sanctioned in that State where they were married, is it your understanding that the State where you are obligated to be 21 years old before you can get married can just disregard the law of the other State?

Mr. CANADY. I'm sorry, the gentleman's time has expired.

I want to thank all the members of the first panel for being with us today. We will now move to our second panel.

If the members of the second panel would be prepared to come forward and take your seats—I'm sorry, we're going to need to move to the second panel, and if you wish to conduct a conversation, you'll need to conduct it in the hallway.

The testimony from our second panel today will begin with Dr. Hadley Arkes. Dr. Arkes is the William Nelson Cromwell professor of jurisprudence and the Edward Ney Professor of American Institutions at Amherst College. Dr. Arkes is known to a large audience through his writings in the Wall Street Journal, the Washington Post, and the National Review, where he is contributing editor.

Our second witness on this panel will be Mr. Andrew Sullivan. Mr. Sullivan is the editor of the New Republic and the author of the book, "Virtually Normal," which makes a case for same-sex marriage.

Following Mr. Sullivan, Mr. Dennis Prager will testify. Mr. Prager hosts a radio talk show for KABC radio in Los Angeles, and he is both editor of the bimonthly journal "Ultimate Issues" and the author of two books.

The final witness on our second panel will be Nancy McDonald from Tulsa, OK, who is here to speak on the subject matter covered in H.R. 3396.

Again, I thank each of you for being with us today. I would ask that each of you present your testimony in no more than 5 minutes. I wish we could give you more, but we will, due to the lateness of the hour, we ask that you limit yourself to 5 minutes. Your

full written statement will be made a part of the record, without objection.

Dr. Arkes.

STATEMENT OF HADLEY ARKES, EDWARD NEY PROFESSOR OF JURISPRUDENCE AND AMERICAN INSTITUTIONS, AMHERST COLLEGE

Mr. ARKES. Well, thank you, Mr. Chairman. And since we have only 5 minutes, I may have to use an old device of mine and compress this talk hebraically—by omitting the vowels. [Laughter.]

Matters are being pressed on us now by the courts and by the movement of litigation, and by that, I don't mean the litigation in Hawaii, which has been ripening now for several years. This whole matter may be affected decisively now by a case already before the Supreme Court, argued last October, the case from Colorado, *Romer* v. *Evans,* which on the surface has nothing to do with marriage. We'll get different accounts of what that case involves, but in my own reading that case involves the right of people in their private settings to honor their own moral and religious judgments on the matter of homosexuality.

If that decision runs against the State, it's likely that the decision will be read by many judges to extract this lesson: that the State may not incorporate anywhere in its public policies or its laws an adverse judgment on homosexuality, and it may not refuse to accord to homosexuality the standing and the legitimacy that attaches to that sexuality "imprinted in our natures."

If the Court makes that move, it will affect profoundly this matter of gay marriage because it will remove the prop under which the States may refuse to credit marriages from other States. Under the full faith and credit clause, we would expect that States would be obliged to respect these marriages from outside unless there is some ground of moral objection that may be expressed in public policy. But with the decision in Colorado, that ground of exception would be removed. And that, may I say, is the answer to the question Mr. Frank was posing today to the women—to the legislators, on the earlier panel, and I really find it hard to credit the innocence he was affecting on that point.

The categories of the Constitution must be filled in with the substance of what we're talking about, and it becomes impossible to speak about marriage and sexuality in these cases without using the "N" word: "nature." We understand that this is not about love. There are abiding relations of love between brothers and sisters, parents and children. And in the nature of things, those loves cannot be diminished as loves because they're not attended by penetration or because they're not expressed marriage. Marriage has something to do preeminently with the establishment of a framework of lawfulness and commitment for the begetting and nurturance of children. This is the plainest connection between the idea of marriage and what has been called the natural teleology of the body, the fact that we are all, as the saying goes, engendered. We are men and women; and only two people, not three, only a man and a woman, can beget a child. There is a coherence in this scheme that is not impaired in the least when the couple are incapable of bearing children.

But my main point is this: if we detach marriage from that natural teleology of the body, on what ground of principle could the law confine marriage to couples? On what ground would the law say no to people who profess that their love is not confined to a coupling, but woven together in a larger ensemble of three or four? I think that our previous speakers have already indicated they're not aware of any ground of principle in which the law would say no. If that arrangement were made available to ensembles of the same sex, it would have to be made available to ensembles of mixed sexes, which is to say we'd be back in principle to the acceptance of polygamy.

Now I want to make clear that I'm not offering a prediction. I'm not saying that, if we accept gay marriage, we will be engulfed by polygamy and incest and other exotic arrangements. I'm raising a question of principle about the ground on which the law says no. It couldn't simply be "that's not what we do here," because that answer suffices right now.

Let me go further. Let me say I would not impute to the people on the other side of this question even the remotest interest in promoting polygamy or anything more exotic. But this much can be said properly about their position: that it is at the heart of their rhetorical strategy and the logic of their argument to deny that there is any defining ground in nature for sexuality or any defining limits in nature for sexuality, and it's their strategy to keep pushing that understanding to the limit, to keep establishing the point that all these relations are ultimately matters of convention. That we know we can count upon: that there will be activists out there testing the limits and pushing it to the next level. And we know we can count on it precisely for the reasons expressed here: that no one around the panel seems to be quite clear about the ground of principle on which the law would say no.

As for the bill before us, I'd have to refer you to my extended written testimony, but let me compress it to this, Mr. Chairman: it's hard to imagine any statute on the subject dealing with the matter with more——

Mr. CANADY. Without objection, we'll give you one additional minute.

Mr. ARKES. That will carry me through.

This statute upsets no judgment of the courts. It makes the least possible intrusion into the domain of State law. This Congress might have invoked its power under the 14th amendment to contest this issue in the States in the way that an earlier Congress once dealt with polygamy.

The studied silences in this bill, the simplicity and spareness of its moves, serve to convey even more powerfully its significance as a legislative act. The Congress makes precisely clear what it reaches, and even more clearly what it forbears from reaching. In making its point with that discipline, it teaches even more strikingly lessons running deep.

[The prepared statement of Mr. Arkes follows:]

PREPARED STATEMENT OF HADLEY ARKES, EDWARD NEY PROFESSOR OF JURISPRUDENCE AND AMERICAN INSTITUTIONS, AMHERST COLLEGE

Chairman Canady, Members of the Committee:

My name is Hadley Arkes. I am currently the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. I've taught at Amherst for the past thirty years, with the exception of several years in which I have been in Washington on leave and visiting at places like the Brookings Institution, the Woodrow Wilson Center at the Smithsonian Institution, and Georgetown University. My main interests as a writer and a teacher have been focussed on political philosophy, public policy, and constitutional law. I have written, in that vein, several books, published by Princeton University Press, including The Philosopher in the City (1981), First Things (1986), Beyond the Constitution (1990), and The Return of George Sutherland (1994). My principal concerns in recent years have been with the so-called "life issues," of abortion and euthanasia, and it is only lately that I have been drawn into a discussion of the issues surrounding gay rights and marriage for people of the same sex. But the main concern in my work, threading through all of my writing, has been a concern for the moral ground on which the laws would have to find their justification. With that interest, I was invited to participate as a consultant to the law firm of Shaw, Pittman, Potts & Trowbridge in the recent litigation over Issue 3 in Cincinnati; and along with other academics on both sides of the issue, I testified in the trial in the federal district court. I am appending to these remarks a list of some of my publications that may bear on the issues that

are touched by this bill.

Lincoln once remarked, with an unwarranted modesty, that he had been more controlled by events rather than commanding, on his own, the power to control them. That we are meeting today to discuss the definition of "marriage" in the federal code, or the question of "same-sex marriage," is something that even the most prescient among us could hardly have anticipated three or four years ago. That it should require any further need to explain in the law that a "marriage" means a relation between a man and a woman, is something that could barely have been imagined even then. This is not a subject we have sought out with high spirits, or even a subject that we have been overly willing to speak about, in private settings or public. And yet, it is a subject that has been pressed on us by events. Or to be slightly more exact, it has been pressed on us by the judges and courts and the movement of litigation.

I am not referring here to the litigation famously ripening in Hawaii over the last couple of years. The politics of Hawaii have been churning about the question of gay marriage, but it appears that the legislature in Hawaii will produce no decisive judgment, and that this matter will be played out within the cast determined by the courts. That course seems as predictable today as it was when the Court in Hawaii came forth with its decision in Baehr v. Lewin [852 P.2d 44 (1993)]: The Equal Rights Amendment to the Constitution of the State is likely to be

taken finally as a bar to any refusal to tender a license of marriage to a couple of the same sex. It will likely be found, in the end, that the State can supply no compelling interest to offset this presumptive conclusion, which is taken now to spring from the Constitution of the State. And of course, even the most emphatic expression of sentiment, conveyed in a statute, would still not override a principle that is thought to be planted in the Constitution. Barring, then, a constitutional amendment, we must reasonably expect that the State of Hawaii will soon deliver, as its gift to the nation, this novelty called "same-sex marriage." Timing is all, and it remains mainly for the judges to determine, with their exquisite political sensitivities, the most apt moment for springing their creation.

In the meantime, local newspapers in Washington have borne ads for groups running charters to Hawaii for couples with an interest in marrying under this new regime. The expectation, of course, is that the Full Faith and Credit clause of the Constitution [Article IV, Section 1] may help them bring their marriages back to their States on the mainland.

But all of that has been in the making for three years, and it is not the momentum of that litigation in Hawaii that accounts for the sense of urgency and brings forth, right now, this bill for the Defense of Marriage. The spur to act in this season has been supplied by the recent, rocky litigation over gay rights in Colorado and Cincinnati. Both cases involve constitutional amendments--to the constitution of the State in Colorado, and the

city charter in Cincinnati. In both cases, the voters sought to put beyond the reach of legislators the authority to treat gays and lesbians as a victimized class on the same plane as the groups that have suffered discrimination on the basis of race, religion or gender. The vehicle in both instances was a measure that barred legislatures from creating, for gays and lesbians, "any claim of minority or protected status, quota preference or other preferential treatment." So read Amendment II in Colorado, and with slight differences, Issue 3 in Cincinnati. Amendment II was held invalid by the Supreme Court of Colorado, not of course on the grounds of the State Constitution, which had been amended by Amendment II, but on the basis of the federal Constitution. Issue 3 in Cincinnati was held unconstitutional on virtually identical grounds by a federal district judge in Cincinnati, but that judgement was later overruled by the Court of Appeals in the Sixth Circuit. That case is now under appeal to the Supreme Court of the United States, but the Colorado case, Romer v. Evans, was already argued before the Court this past October, and a decision in that case is expected any week now. And indeed, it is the prospect of that decision, prefigured last fall in the oral argument, that sets off tremors in the land, and impels the Congress to act.

On its face, of course, that case does not strictly involve gay marriage. But the resolution of that case could have a profound effect on the way that the Full Faith and Credit clause works upon the States on the matter of gay marriage. It will

come as no surprise that the opponents of Amendment II in Colorado will offer a strikingly different account of that measure from the one I have offered here. They find, in the Amendment, a provision that withholds from gays and lesbians an "equal" right to participate in the political process. But they find this subtle denial of rights without the presence of those devices that awakened our sensitivities in the past: The Amendment disfranchised no one. It offered no literacy tests or contrivances to block voters from the rolls. It removed from no person the right to run for office, contribute money or buy advertising to support any candidate or any proposition put before the voters. Judge Bayless noted in the county court in Denver, in December 1993, that gays and lesbians were about 4 per cent of the population of Colorado, and yet they had attracted to their side about 46 per cent of the vote on Amendment. As Bayless remarked, "that is a demonstration of power, not powerlessness."

Still, it is argued that Amendment II would impair the freedom of gays to participate in politics because it would make it notably harder for them to secure legislation to advance their interests. But the interests of gays may well be protected by measures that do not pick out gays for special mention, and it has been pointed out that nothing in those protections has been diminished. The laws, say, that bar discrimination based on race would still apply to gays who suffer discrimination based on race. As Justice Scalia pointed out during the oral argument,

it requires no special provision to protect gays from "gay bashing." Gays are protected here by the same laws on assault that protect, in their sweep, the "bashing" of anyone. Gays and lesbians would indeed be hampered if they sought legislation to pick out gays for a "quota preference" or "preferential treatment" (in the words of Amendment II). But they remain free to campaign and vote for the repeal of Amendment II. In the meantime, they suffer a burden here in securing legislation only in the way that other groups suffer similar burdens when a constitution has placed certain ends beyond the reach of a legislature. We need only remind ourselves that the 13th Amendment had the most emphatic effect in removing, from a distinct class of persons, the possibility of securing legislation to advance or protect their interests. The holders of property in slaves suddenly found swept away all of the local laws and statutes that cast protections around their peculiar property. We cannot complain of such sweeping effects, in protecting interests, or foreclosing legislation, unless we can complain about the substance of the constitutional amendment itself.

And there, the defenders of Amendment II will suffer no strain in contending that the measure was amply justified. The Amendment licensed no regimen of criminal prosecutions directed at gays and lesbians, and indeed it would be more accurate to describe this measure as part of a policy of broader tolerance: It could be said, with more strictness, that the Amendment merely

preserved for people, in their private settings, the freedom to respect their own moral and religious judgments on the matter of homosexuality. Yet, this sense of the matter seemed to elude Justices Kennedy and O'Connor during the oral argument last October, and indeed these justices seemed to suffer a certain bewilderment in grasping this Amendment in Colorado. Their evident burdens in understanding this case begat the sober reckoning that the judges were about to stumble yet again into a momentous decision, with reasoning that bore only the most infirm connection to the issues at hand.

The tea leaves suggest so far that the Court has no intention of overruling Bowers v. Hardwick, that notable case, in 1986, in which the Court declined to overturn the laws on sodomy in the separate States. But if the Court strikes down the Amendment in Colorado, my own reading is that that the decision will be understood, in effect, as the overuling of Bowers, even if the Court does not care yet to acknowledge what it has done. For several years, judges at all levels in the country have shown a willingness to strike at any law that casts an adverse judgment on homosexuality, without being overly fastidious about their reasoning. Without any prodding or direction from the Supreme Court, the judges have been acting as though it were already wrong, on constitutional grounds, to take an illiberal view of gay rights. And if the Court now strikes down the Amendment in Colorado, we can count on the fact that many judges, throughout the country, will extract from that decision this principle:

that it is now immanently suspect, on constitutional grounds, to plant, anywhere in the laws, a policy that casts an adverse judgment on homosexuality, or accords to homosexuality a lesser standing or legitimacy than the sexuality "imprinted in our natures."

But any judgment of that kind, emerging from the case in Colorado, would be amplified in its importance through the workings of the Full Faith and Credit clause. Under that provision of the Constitution we typically presume that the driver's license awarded in California would be honored in Massachusetts--or that the marriage performed in Kentucky will be respected in Maine. And yet, not always: Some of these arrangements, springing from other States, may be at odds with certain moral understandings, shared within the community, and planted deeply in the laws and public policy of the State. It is taken then, as rather clear, that a State may refuse to recognize incestuous marriages. When it comes to the prospect of homosexual marriage, most States show traces of the moral concerns that would bear on this question. Many States retain their laws on sodomy; or they refuse to extend rights of adoption to couples of the same sex; or they suggest in other ways that the laws will not endorse or promote homosexuality. One way or another, then, the States would hold now a ground for refusing to credit gay marriages imported from other States. But that is exactly the prop that could be removed by a decision, in the coming month, in the case from Colorado.

If that decision runs against the State, a federal judge, armed with that decision, could strike down anything in the laws or public policies of a State that implies an adverse judgment on homosexuality. In effect, the State could be denied the right to cast any moral judgment at all on this matter. And with that ground of objection swept away, there would be, within the laws of the State, no tenable ground for holding back and refusing to credit gay marriage.

Of course, the "problem" here would dissolve as a problem if the understanding of marriage could simply be broadened to encompass people of the same sex. And if marriage were simply an artifact of the "positive law," if it could mean just anything the positive law proclaimed it to mean, then the positive law could define just about anything as a marriage. It could discard, as so many arbitrary vestiges of the past, the restrictions placed on the age of the married partners, or their degree of blood relation. If it were simply a matter of promulgating, through the positive law, a definition of marriage and the partners, why shouldn't it be possible to permit a mature woman, past child bearing, to marry her grown son? In fact, why would it not be possible to permit a man, much taken with himelf, to marry himself? Enough people, about us, have already fallen into a certain kind of "dualism"--as when they tell us, for example, that they are "at ease with themselves"--so that it requires no conceptual stretch these days for a man to

wed himself. The notion of a no-fault divorce later may raise stickier problems, but the marriage itself may be easier to entertain. Of course, certain sticklers for language are likely to wonder whether a "marriage" or "wedding" must not imply at least two persons. But when matters are taken back to an original ground, we may raise the question of just why the law would be justified in attaching such decisive importance to numbers: Why would it be warranted then in withholding then the blessings of marriage from a man who had not yet found a spouse?

But even people of ordinary wit will quickly suspect that we are not dealing here merely with the conventions of our language: They may suspect, with common sense, that the notion of marriage may not be altered to fit marriage di solo without altering the defining logic of marriage. And in the same way, I would suggest that the notion of marriage could not be stretched to encompass people of the same sex without altering out of shape the definition that represents the coherence and meaning of marriage. The irony then for gay activists would be this: Were the notion of marriage so altered as to accommodate them, the move would set off deeper changes in the definition of marriage, and as a consequence, marriage would lose the special significance that makes it an object of such craving, right now, for many gays and lesbians.

This matter is not inscrutable or mysterious, and we can test it for ourselves with a kind of thought-experiment. First, we need to remind ourselves that what is in question, on this

issue, is not the matter of love. There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves beecause they are not attended by penetration, or because they are not expressed in marriage. Nor do these people suffer an unwarranted discrimination if they are not permitted to manifest their love in a marriage.

The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage. That character, and those ends, cannot be separated from the fact that we are, as the saying goes, "souls embodied," and that certain bodily acts must carry within themselves a significance that cannot be trivialized. The matter may be muted, but we all suspect that, one way or another, this question cannot be discussed without getting back to the "N-word" [nature]. Any discussion of sexuality must take its bearings from the meaning of sexuality in the strictest sense, which is the sexuality imprinted in our very natures--in the obdurate fact that we are all, as the saying goes, "engendered." We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose

of sexuality. And that is the function and purpose of begetting. At its core, it is hard to detach marriage from what may be called the "natural teleology of the body": namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child. We do not need a marriage to mark the presence of love, but a marriage marks something matchless in a framework for the begetting and nurturance of children. It means that a child enters the world in a framework of lawfulness, with parents who are committed to her care and nurturance for the same reason that they are committed to each other. By that we used to mean: they have foregone their freedom to be quit of these responsibilities when it suits their convenience. And even at those moments when marriages break down, this framework of law has the advantage at least of assigning responsibility for the care of children.

This is not to say, of course, that every marriage must produce children, and I'm afraid that gay activists have lured themselves into a false serenity in their conviction that a sterile couple proves the falsity of distinguishing between heterosexual and gay couples on the matter of marriage. But even people not covered over with college degrees have been able to grasp over the years the natural correspondences that establish the coherence in the design of marriage: There is a natural correspondence between the notion of marriage and the sexual coupling, the merging of bodies, in the "unitive significance" of marriage; and there is the plainest, natural

connection between that act of coupling and the begetting of children. The children embody the "wedding" of the couples by combining in themselves the features of both parents. These meanings are so evident, these natural correspondences so fixed, that nothing in them is impaired if a couple happens to be incapable of begetting children. Their marital acts retain the same significance in the unitive scheme of marriage. And much the same understanding probably lies behind our surety that nothing in the significance, or the meaning, of rape is altered in the slightest degree if the female victim turns out to be sterile.

My argument, in any event, is that there is finally no getting around the fact that the meaning of marriage must be connected to that "natural teleology of the body." And if marriage is detached from that connection, it loses the defining features, in principle, that cabin its meaning and establish its coherence. This is where we could put more precisely that thought-experiment I suggested, and we would put it through these questions: If marriage were detached from that natural teleology of the body, <u>on what ground of principle could the law confine marriage to "couples"</u>? If the law permitted the marriage of people of the same sex, what is the ground of principle then on which the law would rule out as illegitimate the people who profess that their own love is not confined to a coupling of two, but connected in a larger cluster of three or four? The confining of marriage to two may stand out then as nothing more

than the most arbitrary fixation on numbers. But if that arrangement of plural partners were permitted to people of the same sex, how could it be denied in principle to ensembles of mixed sexes? That is to say, we would be back, in principle, to the acceptance of polygamy. And while we are at it, we might ask how the law, on these new premises, rules out marriage between parents and their grown children.

The point is easily and often mistaken, and so I would underscore the fact that I am not offering here a prediction, or invoking a "parade of horribles." I am not predicting that, if gay marriage were allowed, we would be engulfed by incest and polygamy. What is being posed here is a question of principle: What is the ground on which the law would turn back these challenges? It cannot be, "That isn't what we do here," for that answer would suffice right now about same-sex marriage. And again, I do not expect that many people will be pressing, at least initially, for polygamy or even more exotic forms of "marriage." More than that, I will not suppose that our colleagues on the opposite side of this issue have even a remote interest in promoting polygamy or incest. But one thing can be attributed to the gay activists quite fairly and accurately: and that is that they do have the most profound interest, rooted in the logic of their doctrine, in discrediting the notion that marriage finds its defining ground in "nature." Their rhetorical strategy, their public arguments, have all been directed explicitly to the derision of that claim that sexuality in the

strictest sense involves the sexuality "imprinted in our natures." And for that reason, we can count on the fact that there will be someone, somewhere, ready to press this issue to the next level by raising a challenge in the court and testing the limits even further.

The argument for gay rights has been that nature is indeed more malleable than we have supposed, more open to reshaping or deconstruction, in the culture. In this construction, marriage does become a matter solely of convention and opinion, and therefore it can be given virtually any shape by the positive law. Under those conditions, there would be no ground on which to reject, in principle, any of the more exotic possibilities I have suggested here as potential new marriages. The gay activists do not intend, I am sure, to bring back polygamy or introduce novelties even stranger. But they show a willingness to break down the barriers of principle and even they may not grasp the fuller sweep of the changes they are triggering.

Yet, apart from these notable problems, it seems not to have occurred to the proponents of gay marriage that, in the sweep of their argument, they have moved decisively away from the ground marked off by the Supreme Court as the only ground on which judges may vindicate rights of "privacy" and sexual freedom. In this field, everything seems to begin with Griswold v. Connecticut, dealing with contraception and marital privacy. At the end of his opinion for the Court, Justice Douglas sought to reinforce his argument that the Court was dealing here with a

freedom that did not depend on the positive law, because it was older than the law, and perhaps even antecedent to civil society:

> We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a combining together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. ...

The Court claimed the authority, in Griswold, to override the policy enacted by elected officials in Connecticut, even though the Court could not cite any right of marital privacy mentioned in the text of the Constitution. Douglas's argument has been taken to suggest that he and his colleagues were appealing then to a freedom that did not depend on the positive law, even the postive law of the Constitution. He was appealing to a notion of rights that ran quite beyond the positive law itself, because they were in some sense antecedent to civil society and "older than the Bill of Rights" because they were older than the Constitution itself. The language was foreign to judges appointed to the Court in the era of the New Deal, but Douglas was invoking all of the properties of an argument grounded in "natural right." He seemed to be appealing, that is, to "nature" and a ground of right that would justify judges in overturning the judgments made by majorities in legislatures.

But if we are to take the word of gay activists and the advocates of gay marriage, there is not the slightest claim that the rights they seek are grounded in nature. In fact, that notion is quite explicitly disclaimed and ridiculed. Yet, if

they turn away from that ground of argument, what exactly would be the ground on which judges invoke the Constitution to overturn policies like Amendment II in Colorado? Clearly, the right to gay marriage cannot be found in the text of the Constitution, and it is even clearer that it cannot be found in the "traditions" that have informed our laws. By their own word, the gay activists insist that the ground of rights is not to be found in "natural law" but convention or positive law. And those who would live by the positive law should suffer the implications: If there are no moral truths grounded in nature; if all moral truths depend on local opinion and positive law; then the only test of Amendment II, or the Defense of Marriage Act, is whether those policies can claim the support of the majority. In the case, the, of the Defense of Marriage Act, we can simply get on with the vote.

Still, some of us think that the positive law must be measured and justified by a more demanding standard, and so we would fill in the reasons that would justify this new bill. The Defense of Marriage Act has been brought forth to deal with a crisis running deep in our culture and jurisprudence, and it has sought to engage that crisis in the most modest and economical way. The crisis in our culture involves an erosion of the traditional understandings that have enveloped sexuality, the family, and indeed life itself, in the sense of creating new franchises for the destruction of life in the name of "personal autonomy." To be more strictly accurate, we have a campaign

waged to transform the culture through the law, or through the control of the courts. The new ethic of "autonomy" goes along with a new detachment from the moral tradition on the matter of sex and the family. That new ethic finds its main centers of support in the federal judiciary, and among the class that controls the leading universities and major media. As a class the members show a remarkable leaning toward the most expansive, unqualifed right to abortion, to assisted suicide, to gay rights. The surveys persistently reveal a profile of opinion that sets this political class apart from the opinions that prevail among most other Americans. And that may suggest, precisely, why this program of cultural change cannot be accomplished through legislatures and elections. No voting public in this country has ever voted to install abortion on demand at every stage of the pregnancy, and it is hard to imagine a scheme of same-sex marriage voted in by the public in a referendum. These things must be imposed by the courts, if they are to be imposed at all, and that concert to impose them has been evident, on gay rights, over the last few years. In this respect, it became hard to ignore the trend marked by Romer v. Evans and Equality Foundation of Cincinnati v. City of Cincinnati: a college of judges has evidently been busy at work advancing an agenda for the rest of us, and giving Providence a Helping Hand.

In the presence of this movement, this flexing of judicial power, the Defense of Marriage Act represents the most restrained and modulated effort to meet the crisis. It engages

that crisis by forcing a debate on the central question: the moral ground of marriage, and the meaning of sexuality. The Act offers a response on that issue; it offers a counter to the movement of the federal judges; it invites a debate on the main question. And yet it does not overreach: It does not touch the full range of authorities that Congress can invoke--and it touches nothing more than it strictly needs to touch in addressing these issues right now. The Congress does not invoke its authority under the Fourteenth Amendment to contest the issue of marriage in the separate States. Instead, it leaves the States free to settle their own policy on gay marriage. If Hawaii proceeds to authorize marriage for couples of the same sex, the Congress would not threaten to disturb that judgment. The Congress chooses to engage the question only by engaging the instruments, or authorities, that must fall clearly within the reach of the national government.

It must be taken as an argument freighted with irony, if not an outright jest, that the opponents of this bill have railed against the move to "federalize" the issue of marriage. It surely cannot represent a stretching of the federal authority for the Congress simply to address the meaning that attaches to the notion of "marriage" wherever that term is used in the federal code. Apart from that, it is the Full Faith and Credit Clause, a clause of the federal Constitution, that promises to act now as the engine that spreads same-sex marriage from Hawaii to other States. The problem would not be with us were it not for that

clause in the Constitution. Nor would the "promise" for gays: The gay activists who have been promoting the litigation in Hawaii, or indeed charters to Hawaii, have been weaving into their plans the operation of the Full Faith and Crédit Clause. It must be counted as political theater when the same activists profess surprise and outrage now that anyone should "federalize" this issue. Plainly, the Full Faith and Credit clause is central to the scheme of amplifying gay rights; and if Congress may not legislate under this federal clause, what other institution could possibly claim the authority to legislate?

I have heard it remarked, in complaint, that this legislation, defining marriage in a federal statute, is "unprecedented," and I find myself straining to discover what that could possibly mean. It surely cannot be a novelty to make explicit what has ever been our tradition, that marriage "means only a legal union between one man and one woman as husband and wife." That cannot be the earth-shaking novelty here. The legislation is unprecedented only in the sense that, since the days of polygamy in Nevada, the point never seemed to be in need of stating. That is, until the last two or three years. What is novel, again, is not the point that the Congress is restating, but the need even to restate it. In the curious inversion that seems characteristic mainly of our own time, the act of restating, the act of confirming the tradition, is itself taken as an "irregular" or radical move. That we should summon the nerve simply to restate the traditional undertstanding is taken

as nothing less than an act of aggression. Apparently, the public is meant to be put into a condition in which it will accept the remodelling of our laws that the courts have been quietly, and discreetly, arranging--and accept all of this without making a scene.

What is truly more novel, or at least more unusual, in this bill is the flexing of congressional power under the second sentence of the Full Faith and Credit Clause: "And the Congress may be genral Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The use of this passage is unfamiliar, because Congress has rarely made use of it. Nevertheless, there it stands, as part of the Constitution, and it is invoked here because it has the most evident bearing on the operation of the Full Faith and Credit Clause. The only question then is whether this happens to be an apt or legitimate use of that authority. The framers of the act point to the two most recent precedents, which have already claimed the support of Congress: Congress acted in 1980 to fix the terms that shall be accepted in determining the custody of children, when those terms are in dispute between two States. [28 U.S.C. Sec. 1738A] More recently, in 1994, the Congress made similar provisions in fixing the terms for enforcing orders for the support of children. [28 U.S.C. Sec. 1738B] And in the same year, Congress sought to use the Full Faith and Credit Clause for the sake of crediting, in another State, the orders that were

isssed in cases of domestic violence, in protecting a spouse or intimate partner. [See 18 U.S.C. Sec. 2265] In all of these instances, Congress was evidently dealing with the fallout of marriage and divorce, and the rupture of families. It is not a stretch then to suppose that, if Congress can deal in this way with the effects of divorce, or with the custody of children, it can act in a similar way to fix the terms that a State need not honor in a marriage. Again, Congress can take this step without invading the authority of the States. The States that wish to honor gay marriage will suffer no restriction in this measure, But on other hand, this provision on the part of Congress may supply the only ground of support for a State in refusing to credit same-sex marriage, especially if the federal courts move to strip from the States every other source of resistance.

I think I can anticipate, though, the most earnest question that may be raised about this attempt on the part of Congress to legsilature under the Full Faith and Credit Clause. It may be argued that this provision in the Constitution was probably meant mainly for the purpose of regulating procedures and forms. It is not likely that it was meant as a grant of power to legislate deeply on the substance of what was in dispute in the laws of the States. The laws on marriage and divorce were confined mainly to the States. It is hard to believe that the Full Faith and Credit Clause could have been understood as a grant of power to Congress to fill out a federal law on marriage and custody to supplant the laws in the States. By that construction, the Full

Faith and Credit clause could itself stand as a source of the power to displace the States and legislate on every branch of law in the province of the States.

That kind of argument may be fairly sounded, but it cannot settle the problem here. For one thing, any power to settle a conflict of laws cannot be detached from a power that must touch in some way on the substance of the issue. For the Congress to speak on the terms of assigning custody for children is ... to legislate on the custody of children. An even more dramatic instance of the problem was supplied in 1803, when Congress barred the shipment of slaves into any state that itself prohibited the import of slaves. The problem did not arise for States in the North where slavery was prohibited, for there was no point in shipping slaves into those States. The problem arose for States in the South, where slavery was protected under the law, but where there was an effort to ban the import of more slaves. Under the Constitution, of course, a State could not cast up barriers to trade across the boundaries of the States. Only Congress had the power to regulate interstate commerce, and so the power of Congress was called in here as an annex to the policy of the State in forbidding the import of new slaves. Yet, under the Constitution, Congress could exert no authority over the import of slaves from abroad until 1808. And it was widely assumed that Congress had no authority to legislate directly on slavery within the States. Clearly, Congress was nout thought to possess the authority to legislate on the substance of slavery

within the States; it could deal only with the problem of fugitive slaves, moving from one State to another. But just as clearly, Congress alone could close off the borders of a State to slaves shipped from other States, and that authority had to be the source then of this interstitial power to legislate on the substance of slavery.

It seems to me that no more or less has been claimed in this case, with the Defense of Marriage Act. There is no way to avoid touching upon the substance of marriage, and yet the legislation bears all the marks of an effort simply to touch this matter in the most minimal way. It is evident that the drafters assert no authority here to legislate more fully on the subject of marriage. The purpose, plain to any onlooker, was to make the least intrusion into the powers of the States.

In contrast, there have been rather emphatic intimations, in other parts of our law, that the federal government could indeed reach far more widely in the domain of marriage and the family. Chief Justice Marshall once remarked in passing, in the Dartmouth College case (1819) that an apt question might arise under the Contract Clause if a State passed an act, say, "annulling all marriage contracts, or allowing either party to annul it without the consent of the other." [Dartmouth College v. Woodward, 17 U.S. (4 Wheaton) 518, at 629] When the federal courts strike down arrangements, in the States, to assign custody to children on the basis of race, they engage the Constitution in this matter, and with the effect of remodelling, in substance, the

laws of custody in the States. [Palmore v. Sidotti, 466 U.S. 429 (1984)] With this act in Defense of Marriage, the Congress uses but the slightest portion of the authority it might it claim to act in this field. And again, that deliberate confining of its reach must be taken as a measure of the intent of the drafters to move with the lightest hand, in touching nothing more than Congress needs to touch.

But as restrained, and as limited, as the reach of Congress is in this case, this move on the part of Congress is quite telling. In fact, the studied silences in this bill, the simplicity and spareness of its moves, serve to convey even more powerfully its significance as a legislative act. For it represents nothing less than a willingness of Congress to take up again its warrant to act as an interpreter of the Constitution, along with the courts and the Executive. Against the concert of judges, remodelling on their own the laws on marriage and the family, the Congress weighs in to supply another understanding, and a rival doctrine. But it happens, at the same time, to be an ancient understanding and a traditional doctrine. The Congress would proclaim it again now, and suggest that the courts take their bearings anew from this doctrine, stated anew, brought back and affirmed by officers elected by the people.

The Congress would suggest here rather forcefully to the judges that they bring an end to their reign of inventiveness. And in posting those fences for the courts, the Congress revives for us, on this question, a public sphere of discourse and

debate. One notable spokesman for gay rights remarked the other day, with an edge of anger, that the Congress, with this move was silencing the debate. But his grievance was quite evidently the reverse: The Congress has removed this issue from the cloister of the courts, where it has been controlled by the judges and their allies, and with the news safely muffled from the public by a sympathetic press. The Congress, with this move, brings this issue back into a public arena of deliberation; it makes this issue a subject of discussion on the part of citizens, and not merely of judges and lawyers.

We fully expect, of course, that the discussion will encompass the arguments, made by the opponents of this bill, that Congress does not really possess the power it is claiming to legislate under the Full Faith and Credit clause. But the irony of this argument right now is that it actually confirms the deeper argument about the obligation of Congress to participate in the interpretation of the Constitution. In the face, for example, of these constitutional challenges, the proponents of the bill might turn to the opponents and say: "Let us test the matter--let us enact this bill, let it be challenged in the courts, and let us see what the courts decide. After all, the function of settling the meaning of the Constitution is their business, not ours. The measure seems sensible and germane; let us vote for it on that basis and leave the rest to the judges." No one would reasonably expect the opponents of this bill to settle for that argument. If they have doubts about the

constitutionality of this bill in any of its parts, they would think themselves entitled to vote against the bill on that basis alone.

And yet, that sense of the matter merely confirms again the axioms taught by Chief Justice Marshall in Marbury v. Madison: It was not that the judges possessed some unique license to strike down acts of legislation; it was rather the fact that the judges were obliged to weigh any statute against the "basic law" of the Constitution. For the basic law was the law that told us just what constitutes a "law." That a "law" is established, for the United States, by a bill passing two houses of Congress and being signed by the President, is something that can be determined only by the Constitution, which creates the two houses and the President and lays down the procedure for making laws. The Constitution, or the basic law, would claim a certain logical precedence then in comparison with an ordinary statute; and Marshall's critical point was that this logic entailed at the same time the obligation to make the comparison. As Marshall put it,

> Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if the law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. [1 Cranch 137, at 177-78]

Marshall remarked that this discipline was of "the very essence of the judicial duty." But he never said that judges alone bore this responsibility to weigh the law against the Constitution. And indeed, the logic made explicit by Marshall had to cover any officer, any legislator or executive, under the Constitution: If the President were presented with a bill providing for the conscription only of members of a racial minority, would he be obliged to consider only the utilitarian question of whether this measure would work? Or would he be obliged also to consider whether it was compatible with the principles of the Constitution? By the logic made clear by Marshall, Presidents no less than judges would be obliged to consider that question of the basic law--and so, too, would the members of Congress as they pondered their judgment in voting for the bill.

But all of that is to remind ourselves that, under the logic of the Constitution, Congress must bear a responsibility in interpreting the Constitution. It has, then, every bit as much responsibility as the judges to articulate the principles of our law and form a judgment on this matter of marriage within the framework of our laws. With that understanding, Congress takes up its warrant again here, and takes it up with a decorous sense of economy and restraint. It shores up the authority of the States, while making not the least intrusion in the domain of State law. It imparts a lesson to the federal judges, but it

disturbs the judgment in no case, and it addresses only the laws made by Congress; the laws that come distinctly within the reach of Congress to interpret and explain. The Congress provides then, altogether, an example of the legislative discipline: In moving with restraint and delicacy, it makes precisely clear what it reaches, and even more clearly what it forbears from reaching. And in making its point with that discipline it teaches, even more strikingly, lessons running deep.

Mr. CANADY. Thank you, Mr. Arkes.
Mr. Sullivan.

STATEMENT OF ANDREW SULLIVAN, EDITOR, THE NEW REPUBLIC

Mr. SULLIVAN. Chairman Canady, members of the committee, let me say, first of all, how honored I am, both as a writer and an editor and as a person who happens to be gay, to be here today on this historic moment.

You will hear this afternoon and in the coming days, I'm sure, many things about gay men and lesbians, both in this country and around the world: that we are opposed to the traditional family; that we want to subvert America; that we're a powerful lobby that aims to destroy, beguile the sacred institution of marriage.

But that is not the truth of who we are. We are your sons and daughters, your brothers and sisters, your aunts and uncles, in some cases even your mothers and fathers. We are your coworkers and fellow Members of Congress, your teachers and factory workers, your soldiers, and nurses, and priests. We are in every town and city in America, in every church and synagogue and mosque. We are in every American family somewhere.

And, like anybody else, we do not seek to destroy the institution of marriage. We seek to strengthen it. We do not seek equality in marriage because we despise the institution of marriage, but because we believe in it and cherish it and want to support it.

People ask us: "Why do you want marriage?" But the answer is obvious. It's the same reason why anybody wants marriage. After the crushes and passions of adolescence, some of us are lucky enough to meet the person we truly love, and we want to commit to that person in front of our family and country for the rest of our lives. It is the most natural, the most simple, the most human instinct in the world. The real question, then, is surely why would gay men and lesbians want the right to marry. The real question is: why on earth would anyone want to exclude us from it?

You will be told that since the Torah marriage has been between a man and a woman, and that Western society has been built upon that institution, but we do not dispute that. Like you, we celebrate it. We were all born into the heart of the heterosexual family and we love our mothers and fathers. We seek to take away no one's right to marry; we only ask that those of us who are gay, through no choice of our own, be allowed the same opportunity.

You will be told that marriage is, by definition, between a man and a woman, and that that is the end of the argument. But that cannot be the end of the argument. For centuries, marriage was, by definition, a contract where the wife was the legal property of her husband, and we changed that. For centuries, marriage was, by definition, between two people of the same race, and we changed that. We changed these things because we recognized that the human dignity of a person is the same whether that a person is a man or a woman, black or white. We are arguing today, for the first time here in some ways with this issue, that the human dignity of gay people is as profound as anyone else's and that marriage should begin at last to recognize that fact.

You'll be told—you have been told—that to approve of same-sex marriage is to approve of polygamy—polygamy. And they said the same thing, of course, when we legalized interracial marriage. But polygamy is, of course, a completely different issue. The issue of whether to have more than two spouses is completely separate from whether in the existing institution the government should seek to discriminate against some of its citizens.

You'll be told that this is a slippery slope toward all sorts of immoralities and evils: pedophilia, bestiality. But, of course, same-sex marriage is the opposite of those things. The freedom to marry would mark the end of the slippery slope for gay men and lesbians, who right now have no institutions to guide our lives and loves, no social support for our relationships, no institution that can act as a harbor in the emotional storms of our lives.

As many conservative thinkers have noted, and I've argued in many places, this is an essentially conservative measure. It seeks to promote stability, responsibility, the disciplines of family life among people——

Mr. CANADY. Mr. Sullivan, your 5 minutes has expired. Could you please conclude in 1 more minute?

Mr. SULLIVAN. Yes.

What could be a more conservative project than that? Why, indeed, would any conservative seek to oppose those very family values for gay people that he or she supports for everybody else?

These, of course, are arguments that we as a society have only begun to grapple with. They are matters of great importance that we need to debate carefully and seriously. Even if you disagree with me about the value of same-sex marriage, you should still oppose this bill. Let us debate this in the calm outside of an election year. Let us debate this in the States. Let us debate in the courts, where the Constitution is rightfully decided. Let us treat each other with the respect that we deserve, and do this in all due time and calmness.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF ANDREW SULLIVAN, EDITOR, THE NEW REPUBLIC

Members of the committee

Let me say first of all how honored I am to be here today. I immigrated to this country as a student twelve years ago and never dreamt I could be a part of this historic discussion. It says something particularly to me about this country's extraordinary capacity for inclusion and for freedom of speech that I can be here. I have come to love my adopted country and to believe in its promise - in its being a beacon to the world of the virtues of inclusion and equality, which are what, I believe, in part, we are discussing today.

You will hear this afternoon and in the coming days, many things about gay men and lesbians both in this country and around the world: that we are opposed to the traditional family, that we want to subvert

America, that we are a powerful lobby that aims to destroy the sacred institution of marriage.

But that is not the truth of who we are.

We are your sons and daughters, your brothers and sisters, your aunts and uncles, in some cases even, your mothers and fathers. We are your co-workers and fellow members of Congress; your teachers and factory workers; your soldiers and nurses and priests. We are in every town and city in America; in every church and synagogue and mosque. We are in every American family - somewhere.

And like anybody else, we do not seek to destroy marriage; we seek to strengthen it.

We do not seek equality in marriage because we despise the institution of marriage - but because we believe in it and cherish it and want to support it.

People ask us why we want marriage, but the answer is obvious. It is the same reason that anyone would want marriage. After the crushes and passions of adolescence, some of us are lucky enough to meet the person we truly love. And we want to commit to that person in front of our family and country for the rest of our lives. It's the most natural, the most simple, the most human instinct in the world.

The real question, then, is surely not: why would gay men and lesbians want the right to marry?

It is: why on earth would anyone want to exclude us from it?

You will be told that, since the Torah, marriage has been between a man and a woman and that Western society has been built upon that institution. But we do not dispute that. Like you, we celebrate it. We were all born into the heart of the heterosexual family and we love our mothers and fathers. We seek to take away no-one's right to marry; we only ask that those of us, who are gay, through no choice of our own, be allowed the same opportunity.

You will be told that marriage is <u>by definition</u> between a man and a woman and that that is the end of the argument. But that cannot be the end of the argument. For centuries, marriage was <u>by definition</u> a contract where the wife was the legal property of her husband. And we changed that. For centuries, marriage was <u>by definition</u> between two people of the same race. And we changed that. We changed these things because we recognized that the human dignity of a person is the same, whether that person is a man or a woman, black or white. We are arguing now that the human dignity of gay people is as profound as anyone else's and that marriage should begin at last to recognize that fact.

You will be told that marriage is only about the rearing of children. But we know that isn't true. We know that our society grants marriage licences to people who choose not to have children, or who, for some reason, are unable to have children. And that is as it should be. So the question is: why should two gay people who cannot have children be treated any differently?

You will be told that this is a slippery slope toward polygamy and other things - pedophilia or bestiality. But of course, same-sex marriage is the opposite of those things. The freedom to marry would mark the <u>end</u> of the slippery slope for gay men and lesbians, who right now have no institutions to guide our lives and loves, no social support for our relationships, no institution that can act as a harbor in the emotional storms of our lives.

As many conservative thinkers have noted, and I have argued in many places, this is an essentially conservative measure. It seeks to promote stability, responsibility, and the disciplines of family life among people who have been historically cast aside to the margins of our society. What could be a more conservative project than that? Why indeed would any conservative seek to oppose those very family values for gay people that he or she supports for everybody else?

These, of course, are arguments that we as a society have only begun to grapple with. They are matters of great importance that we need to debate carefully and seriously - around the kitchen table, in our homes and in the states where marriage has always been decided.

Which is why this bill is such a radical and unconservative measure.

Even if you disagree with me about the value of same-sex marriage, you should still oppose this bill. It is designed to shut down our public debate before it has even begun; it is intended to raise the issue in an election period where it is most difficult to treat these issues with the calm and depth they deserve; it is intended to divide Americans on an issue where we haven't even had a chance to have a full and measured discussion.

There is, after all, no rush. There are no same-sex marriages anywhere right now in the United States. The earliest any change could happen is toward the end of 1998, when the final appeal to the supreme court of the state of Hawaii is likely to be decided. Why do we have to force a decision now?

Let us take the next two years to let the people and the states decide for themselves.

If there is a question about the full faith and credit clause of the constitution, let the Supreme Court decide, as it alone can, the constitutionality of the matter.

Let us not use this issue as a political football to score cheap points off people's lives and dignity. Let us instead treat each other with the respect we deserve, and debate this issue in calm and due time. I urge you to vote against this bill.

Mr. CANADY. Thank you, Mr. Sullivan.
Mr. Prager.

STATEMENT OF DENNIS PRAGER, AUTHOR AND RADIO TALK SHOW COMMENTATOR, KABC, LOS ANGELES, CA

Mr. PRAGER. Thank you. I, too, would like to say how honored I am, which is why my wife and I came from Los Angeles.

And following Andrew Sullivan is difficult because, quite honestly, though I support this measure and oppose same-sex marriage, I believe that just about everything he said has validity. I only wish that Representative Schroeder and others would accord those of us who are for preserving heterosexual marriage the same respect that many of us feel toward Andrew Sullivan and his arguments. It seems impossible in the United States of America at this time to support measures like this and not be called hatemongers. If that does not outhate anything on radio, since hate radio was mentioned, and I happen to be a radio talk show host, I don't know what hate is. To declare ipso facto that to support heterosexual marriage as the norm is to be a hatemonger, is to be filled with hate, is to be a bigot and an intolerant bore, a quasi-Fascist, is to my mind an expression of precisely those sentiments. It's a precise expression of hatred on its own.

I honor Andrew Sullivan. I honor the arguments that I don't agree with. They are powerful. They tug at the heart. I don't agree with them. Tugging at the heart is one thing, and what society should encourage is another.

The question is asked repeatedly, as Representative Schroeder did, "Hey, I'm married; I don't feel threatened by same-sex marriage. What are all these heterosexuals threatened by?" I'm not threatened, either. My wife's with me. I will not leave her for a man should this bill not pass. That is not a danger that I perceive.

I perceive a different danger. It's the danger that is regarding human sexuality, which is a nonissue here. I interviewed a professor of psychiatry at UCLA before coming here to check whether my research on this was valid, and he said, and I quote Prof. Stephen Marmor, UCLA Medical School:

"Human nature is largely bisexual." In the 18,000-word paper I wrote on homosexuality 3 years ago, I discovered something that I never knew. Judeo-Christian civilization is unique in human history in saying that sexuality should be exclusively channeled to the opposite sex and in monogamous marriage. I repeat, it is unique.

Homosexuality and bisexuality have been normative throughout human history. Judeo-Christian civilization alone said: channel the polymorphous sexual urge that the human nature has into marriage with someone of the opposite sex. If we wish to dismantle that, it is not, Representative Frank, a political gesture in a Republican Congress. I don't care who is President nearly as much as I care whether the society tells its next generation of children: we would like you to marry the opposite sex.

Does my heart go out to those who cannot love sexually a member of the opposite sex? Yes, it does. My heart goes out to anyone who cannot fulfill a standard that society sets for its good, but I will not drop the standard. I am a talk show host; stutterers cannot

be. It's not fair to them, but I will not drop the standard that you have to be able to articulate in certain ways to be one.

You're all lucky. You have your faculties. You could be Congresspeople. There are people who cannot be. It is not fair, but we don't lower standards in order to allow everybody to do something. To dismantle the structure is awesome. Mr. Watt is right; it is a sad day. It is a sad day when you're called a hatemonger if you think men and women should marry and that should be the standard.

And what about children? It hasn't even been mentioned. Do children deserve a mother and father? Obviously, the day after same-sex marriage is allowed, same-sex parents will be allowed to adopt. You can't be discriminatory. So compassion for gays is non-compassion for children. Or do you hold, as some of the listeners on my radio show do—"Dennis, where are the studies to show that mothers and fathers are better for children? Why not two loving fathers?"

"Where are the studies?" That is a mantle of ignorance. It is not ignorant to say, Where are the studies to show that a loving mother and father are better for children? Is it not obvious that the day Hawaii passes—and it won't pass by its legislature; it will pass by two or three judges—its fiat, that anybody who wants to marry anybody can do so—the day after, then anybody can adopt anybody? Do children not deserve a mother and father because of compassion for gays?

I sit here in the United States and I wonder, Have the words "compassion" dismissed all of our values? All you need is compassion? Is compassion owed to children?

Mr. CANADY. Without objection, you'll have 1 additional minute.

Mr. PRAGER. I have no objection. That's all I need to take. [Laughter.]

Mr. CANADY. You can go on for an additional minute.

Mr. PRAGER. All right, I will. [Laughter.]

I would like to know, since the polygamy argument was raised, why not have compassion for bisexuals? A bisexual is not fulfilled unless he or she marries a member of both the opposite sex and the same sex. Why is that not next? [Laughter.]

Is it not discriminatory against bisexuals to say, "I'm sorry, you have to have one partner."? That's not fair. Half of their nature is unfulfilled.

I rest now. [Laughter.]

[The prepared statement of Mr. Prager follows:]

PREPARED STATEMENT OF DENNIS PRAGER, AUTHOR AND RADIO TALK SHOW COMMENTATOR, KABC, LOS ANGELES, CA

The question before the United States of America with regard to same sex marriage is really this: Should this society redefine marriage and announce that it sees no difference whatsoever between same-sex bonding and opposite sex bonding?

The questions of economic benefits are real, but they mask the real issue, which is whether this country will equate the uniquely successful male-female based family and society with that of any two persons (and, one day, undoubtedly three or more persons of any sex).

The yearning of homosexuals who want to live as much like heterosexual families as possible is sincere. The desire of homosexual couples to have the same economic benefits as heterosexual marrieds is understandable. The love of children on the part of many homosexuals, and their consequent desire to adopt them, pull at the heart of any of us who love children. And the pain of homosexuals in not having their relationships regarded by the larger society as equally desirable as male-female relationships is real and undeniable.

For many people of good will, these compelling and emotional facts suffice in convincing them to ask the American people to redefine marriage.

For those who focus on the pain of homosexuals, the redefining of marriage and family and the destruction of the male-female sexual ideal are small prices to pay if that pain can be alleviated.

For those who focus on society and children, however, the redefining of marriage, the replacement of the mother-father model for raising children and the overthrowing of the male-female sexual ideal are enormous, society-threatening developments.

We live at a time when the prevailing doctrine is that whenever there is a conflict between a social value and compassion for individuals who cannot or choose not to live by that value, the value must be removed. Thus, if the value is that each child begin with a mother and a father, and a single girl or woman decides to become pregnant and raise that child, rather than keep the value and look askance at her behavior, we have decided to jettison the value lest we not show sufficient compassion to that single mother.

Recently a father sued his daughter's high school because the school choir would not permit her to join; the girl was tone deaf. The school relented. The value of tonal singing was jettisoned in favor of compassion for the tone deaf girl.

Indeed, this principle even applies now to the fully, not merely the tone, deaf. The deaf community, in the name of equality and compassion, the two dominant values of those who propose same sex marriage, has come out against the cochlear implant, an operation that could bring hearing to many deaf young people. The deaf community's argument is that hearing is no better than deafness; merely different. Thus, the value of hearing has been supplanted by compassion for the deaf; lest the hearing ideal injure them emotionally.

So, too, the argument of those for same sex marriage is that homosexuality is no different and certainly no worse than male-female love. To hold that it is different is to oppose egalitarianism and compassion for gays. Therefore, we must drop the male-female ideal.

Western society fought long and hard to take bisexual – "human nature is largely bisexual," asserts Professor of Psychiatry Stephen Marmer, UCLA Medical School (who incidentally treats numerous gay patients, but opposes same sex marriage) – non-monogamous human nature and channel it into exclusively heterosexual and monogamous marriage.

How Homosexuality, Though Universally Accepted, Came To Be Rejected

The Hebrew Bible (Old Testament) was the first social/religious document to call for exclusive heterosexuality. In every society contemporaneous to the Hebrew Bible, homosexuality was either tolerated or venerated.

When the Hebrew Bible demanded that all sexual activity be channeled into marriage, it changed the world. It is not overstated to say that the Bible's prohibition of non-marital sex made the creation of Western civilization possible. Societies that did not place boundaries around sexuality, especially male sexuality – female sexual expression had already been somewhat limited by male-dominated society – were stymied in their development. The subsequent dominance of the Western world can, to a significant ex-

tent, be attributed to the sexual revolution, initiated by Judaism and later carried forward by Christianity.

Human sexuality, especially male sexuality, is polymorphous, or utterly wild (far more so than animal sexuality). Men have had sex with women and with men; with little girls and young boys; with a single partner and in large groups; with immediate family members; and with a variety of domesticated animals. They have achieved orgasm with inanimate objects such as leather, shoes, and other pieces of clothing; through urinating and defecating on each other (interested readers can see a photograph of the former at select art museums in America exhibiting the works of the gay photographer Robert Mapplethorpe); by dressing in women's garments; by watching other human beings being tortured; by fondling children of either sex; by listening to a woman's disembodied voice (e.g., "phone sex"); and, of course, by looking at pictures of bodies, or parts of bodies. There is little, animate or inanimate, that has not excited some men to orgasm.

For all intents and purposes, the Bible may be said to have invented the notion of homosexuality, for in the ancient world sexuality was not divided between heterosexuality and homosexuality. That division was the Bible's doing. Before the Bible, the world divided sexuality between penetrator (active partner) and penetrated (passive partner)

As Martha Nussbaum, professor of philosophy at Brown University, recently wrote, the ancients were no more concerned with people's gender preference than people today are with each other's eating preference: "Ancient categories of sexual experience differed considerably from our own. . . . The central distinction in sexual morality was the distinction between active and passive roles. *The gender of the object. . . is not in itself morally problematic.* Boys and women are very often treated interchangeably as objects of [male] desire. What is socially important is to penetrate rather than to be penetrated." (emphasis added). Martha Nussbaum, "The Bondage and Freedom of Eros," (*Times Literary Supplement* [London], June 1-7, 1990).

Other than the Jews, "none of the archaic civilizations prohibited homosexuality per se" (Greenberg, p. 124).

It is Judeo-Christian sexual values, not homosexuality, that historically has been deviant.

As I have written a long essay on homosexuality, which contains a detailed review of the ubiquity of same sex love throughout the world, I offer here only a brief summary:

The Acceptance Of Homosexuality Outside Of The Judeo-Christian World

- In Hinduism the god Samba, son of Krishna, seduced mortal men. In Greek beliefs, Zeus married Hera and abducted the beautiful young male, Ganymede. Poseidon married Amphitrite, pursued Demeter, and raped Tantalus. In Rome, the gods sexually pursued both men and women.
- Throughout the ancient Near East from very early times, anal intercourse formed a part of goddess worship. (David E. Greenberg, *The Construction of Homosexuality*, University of Chicago, 1988, p. 99.)
- In the fourteenth century, the Chinese found homosexual Tibetan religious rites practiced at the court of a Mongol emperor. Walther Heissig, *A Lost Civilization: The Mongols Rediscovered*, Basic, 1966, p. 52-53.
- Until it was made illegal in 1948, when India gained independence, Hindu temples in many parts of India had both women and boy prostitutes. (For citations of all these examples, see Greenberg, pp. 92-93, 95, 99. He lists over 25 sources.)
- Among the Mayans, there was widespread male homosexuality. See J.E.S. Thompson, The Rise and Fall of Mayan Civilization, University of Oklahoma, 1966.
- "A strong homosexual component pervades close friendships of young married Mayan men as well as bachelors in southern Mexico and among Guatemalan Indians." Greenberg, p. 71.
- Among the Aztecs, "sodomy . . . was virtually universal, involving even children as young as six. Cortez also found sodomy to be widespread among the Aztecs, and admonished them to give it up — along with human sacrifice and cannibalism. . . . One of the Aztec gods, Xochipili, was the patron of male homosexuality and male prostitution" (Greenberg, p. 164-5).
- In Mesopotamia, Hammurabi, the author of the famous legal code bearing his name, had male lovers (Greenberg, p. 126).
- Egyptian culture believed that "homosexual intercourse with a god was auspicious." Having anal intercourse with a god was the sign of a man's mastery over fear of the god. Thus one Egyptian coffin text reads, "Atum [a god] has no power over me, for I copulate between his buttocks." (Cited by Greenberg, p. 130.)
- Homosexuality was not only a conspicuous feature of life in ancient Greece, it was exalted. The seduction of young boys by older men was expected and honored. Those who could afford, in time and money, to seduce young boys, did so. Graphic pictures of man-boy sex (pederasty) adorn countless Greek vases. See the illustrations in K. J. Dover, Greek Homosexuality, Harvard, 1978, 1989, the modern classic on the subject.

• "Sexual intimacy between men was widespread throughout ancient Greek civilization. . . . What was accepted and practiced among the leading citizens was bisexuality; a man was expected to sire a large number of offspring and to head a family while engaging a male lover." (Sussman, p. 15.)

• "Atheneus remarked that Alexander the Great was indifferent to women but passionate for males. In Euripides' play The Cyclops, Cyclops proclaims, 'I prefer boys to girls.' The philosopher Bion (third century B.C.) advised against marriage and restricted his attention to his (male) pupils. The stoic philosopher Zeno. . . was also known for his exclusive interest in boys." (Greenberg, p. 145.)

• "The Greeks assumed that ordinarily sexual choices were not mutually exclusive, but rather that people were generally capable of responding erotically to beauty in both sexes. Often they could and did." Greenberg, p. 144.

• In Sparta, homosexuality "seems to have been universal among male citizens." (Greenberg, p. 142.)

• "Within the framework of Epicurean philosophy. . . no distinction was made between homosexual and heterosexual partners." (Greenberg, p. 204.)

• The Stoics "held the sexual function of the body to be morally indifferent, just like other bodily functions — from which it followed that love of men or women was to be viewed strictly from the point of view of expediency." (Greenberg, p. 205.)

• The founder of cynicism, Antisthenes, a student of Socrates, "considered homosexual affairs acceptable provided the partner was worthy, and so did his disciple Diogenes (412-323 B.C.)." (Greenberg, p. 205.)

• Homosexuality was so common in Rome, that Edward Gibbon, in his History of the Decline and Fall of the Roman Empire, wrote that "of the first fifteen emperors Claudius was the only one whose taste in love was [not homosexual]." (Edward Gibbon, History of the Decline and Fall of the Roman Empire, Vol. 1, London, 1898, p. 313, note 40. Cited in Boswell, p. 61.)

• According to Sussman, "In contrast to the self-conscious and elaborate efforts of the Greeks to glorify and idealize homosexuality, the Romans simply accepted it as a matter of fact and as an inevitable part of human sexual life. Many of the most prominent men in Roman society were bisexual if not homosexual. Julius Caesar was called by his contemporaries every woman's man and every man's woman." (Sussman, p. 19.)

• Polybius, the Greek historian who visited Rome in the second century BCE, wrote that most young men had male lovers. (John Boswell, Christianity, Social Tolerance, and Homosexuality, Chicago, 1980, p. 64-65.)

• As testified to by the fifth century priest, Salvian, the Carthaginians "gloried in pederasty." (Quoted in Greenberg, p. 225, note 254.)

• "According to Aristotle, the Celts esteemed homosexuality." (Politics 2.9.7. Cited in Greenberg, p. 111.) And writing in the first century, BCE, Diodorus Siculus wrote: "The men are much keener on their own sex; they lie around on animal skins and enjoy themselves, with a lover on each side. Furthermore, this isn't looked down on, or regarded in any way disgraceful." (Cited in Gerhard Herm, The Celts, St. Martin's, 1977, p. 58.)

• "The people of England," wrote St. Boniface in 744, "have been leading a shameful life, despising lawful marriages, committing adultery and lusting after the fashion of the people of Sodom." (Peter Coleman, Christian Attitudes to Homosexuality, 1980, SPCK (London), p. 131. Cited in Greenberg, p. 250.) According to Greenberg, this was because "there was no prejudice against it [homosexuality]."

• According to Robert H. Van Gulik in his classic *Sexual Life in Ancient China*, during the last centuries BCE and the first century CE male homosexuality was quite fashionable in China.

• Sex historian Arno Karlen reports that "two Arab travelers trekked through India and China in the ninth century, and in their chronicle said the Chinese were addicted to sodomy and even performed it in their shrines." (Arno Karlen, Sexuality and Homosexuality, 1971, Norton, p. 229.)

• During the Five Dynasties Period, 907-960, man-boy sex was generally accepted. (Greenberg, p. 161.)

• Six hundred years later, "When the Jesuit Matteo Ricci visited Peking in 1583 and again in 1609-10, he found male prostitution to be altogether lawful, and practiced openly. To his dismay no one thought there was anything wrong with it. Several hundred years later, European travelers still reported that no one was ashamed of homosexuality." (Greenberg, p. 162.)

• The year 1806 saw the publication of Travels in China, written by Sir John Barrow, later the founder of the Royal Geographical Society: "Many of the first officers of state seemed to make no hesitation in publicly avowing [homosexuality]." (Sir John Barrow, Travels in China, T. Cadell & W. Davies (London), 1804. Cited in Karlen, op. cit., p. 229.)

• Sir Richard Burton summed up the Chinese in these words: "their systematic bestiality with ducks, goats and other animals is equaled only by their pederasty." (Sir Richard Burton, The Erotic Traveler, 1967, Norton. Cited in Karlen, op. cit., p. 230.)

• It also is extremely important to recognize that one reason for homosexuality's acceptance in China (and in Japan) was Buddhism. "Chinese Buddhism considered homosexuality to be a minor transgression." (Wolfram Eberhardt, Guilt and Sin in Traditional China, 1967, University of California, pp. 29-32. Cited in Greenberg, p. 261, note 101.)

• "[In Japan,] during the feudal age, it

[homosexuality] flourished among the military aristocracy....Sometimes samurai fought duels on behalf of their lovers." (Greenberg, p. 260.)

- "Japanese Buddhism appears to have disregarded it [homosexuality] altogether." (Greenberg, p. 261, note 101.)
- "Buddhist monks were not allowed to have intercourse with women; but as male partners were not explicitly prohibited, many monks took youthful male lovers, a practice that was considered quite acceptable....Legal codes of the period do not even mention homosexuality." (Greenberg, p. 261.)
- In the Arab and Islamic worlds, male homosexuality has been "pervasive and highly visible." (Greenberg, p. 175.)
- "In nineteenth-century Algeria, 'the streets and public places swarmed with boys of remarkable beauty who more than shared with the women the favor of the wealthier natives.'
- "A psychiatric survey [reported in 1971] of Iraq found male and female homosexuality to be common among men and women. (See Greenberg, p. 178-9, for sources.)
- Greenberg summarizes the situation quite directly: "A de facto acceptance of male homosexuality has prevailed in Arab lands down to the modern era."
- As for non-Arab Islam, "the situation," Greenberg concludes, "has been little different."
- In Northwest Pakistan, men "consider the most satisfying form of sexual gratification to be anal intercourse with a *bedagh* [passive male partner]." (Greenberg p. 31.)
- A visitor to Persia the late seventeenth century, John Chardin, reported that he had found "numerous houses of male prostitution, but none offering females;" and "some of the greatest Persian love poetry is written to boys." (Greenberg, p. 180.)
- Louis Dupree, perhaps the West's leading scholar on Afghanistan, wrote in his 1973 book on Afghanistan that male homosexuality remains common there. (Louis Dupree, Afghanistan, Princeton University, 1973, p. 198.)
- Among the Moguls (Muslims who ruled in India), a Dutch traveler wrote that male homosexuality "is not only universal in practice among them, but extends to a bestial communication with brutes, and in particular with sheep." (Johan Stavorinus, Voyages to the East Indies, G. G. Robinson (London), 1798, pp. 455-57. Cited in Greenberg, p. 180.)

In contrast to rest the world, the Bible maintained that in order to become fully human, male and female must join. In the words of Genesis, "God created the human . . . male and female He created them." (Genesis 1.27.) The union of male and female is not merely some lovely ideal; it is the essence of the Jewish and Christian outlooks on the human experience.

This produced among Jews (and later Christians) a very different culture form that of their neighbors. No detail more eloquently reveals how different Jews were from their neighbors than the law in the Talmud that prohibited Jews from selling sheep and slaves to non-Jews, in order to protect them from bestiality and homosexuality.

In the *Syballine Oracles*, written by an Egyptian Jew probably between 163 and 45 BCE, the author compared Jews to the other nations: The Jews "are mindful of holy wedlock, and they do not engage in impious intercourse with male children,-as do Phoenicians, Egyptians, and Romans, specious Greece and many nations of others, Persians and Galatians and all Asia.." (Cited in Greenberg, p. 200, footnote 88.)

Compassion, Choice and Homosexuals

Empathy and compassion for any behavioral minority, even one that has not chosen its behavior, is a characteristic of elementary decency.

But compassion and tolerance are one thing and acceptance is another.

It may be necessary to oppose actions even if they are not performed voluntarily. We do it all the time, and in all spheres of life. To cite an example, many people who chronically overeat have little choice about their eating habits. But the fact they have not voluntarily chosen to overeat does not mean that overeating is a good thing. It only means that we have to have compassion for the compulsive overeater.

The issue of whether homosexuals have any choice may be terribly important, but even if we were to conclude that they do not, that conclusion would in no way invalidate any of the objections Judeo-Christian/Western civilization raises against homosexuality. *Whether or not homosexuals choose homosexuality is entirely unrelated to the question of whether society ought to regard it as an equally valid way of life.*

If Judaism's and Christianity's arguments against homosexuality are valid, then even if we hold that homosexuals have no choice, we will have to conclude that nature or early nurture has foisted upon some people a tragic burden. But how to deal with a tragic burden is a very different question than whether Judaism, Christianity and Western civilization should drop their heterosexual marital ideal.

It is even possible that some homosexuals might agree with this position. For when they stress that homosexuality is not freely chosen, they are really implying that it is not an equally desirable way to live a life. If it were equally desirable, why dwell on not having a choice? Why not simply insist that homo-

sexuality is just as good as heterosexuality?

The fact is that "We have no choice" is a justification of behavior, not a statement of equality. When blacks argued for their equality, they never argued that they had no choice but to be black. That would have been a pronouncement of inequality. Instead, they argued, as they should have, that being black is every bit as valid as being white.

But to society at large, gays do not generally argue that a homosexual life is entirely as valid as a heterosexual life. Even if they believe it is, few heterosexuals would agree. So, gays offer the argument that garners the most heterosexual sympathy — that homosexuals have no choice.

And to those homosexuals who truly have no choice, we do owe sympathy. But sympathy is one thing, and the denial of our value system is quite another.

Chosen or not, homosexuality remains opposable. If chosen, we argue against the choice; if not chosen, we offer compassion while retaining our heterosexual marital ideals.

If homosexuality is determined by biology, how is one to account for the vastly differing numbers of homosexuals in different societies? As far as we know, most upper-class men practiced homosexuality in ancient Greece, yet there has been practically no homosexuality, for example, among Orthodox Jews.

Wherever homosexuality has been encouraged, far more people have engaged in it. And wherever heterosexuality has been discouraged, homosexuality has similarly flourished, as for example, in prisons and elsewhere: "High levels of homoeroticism develop in boarding schools, monasteries, isolated rural regions, and on ships with all-male crews." See Greenberg, p. 283, and notes 218-222, where he cites 18 sources for these examples.

Many lesbian spokeswomen argue passionately that lesbianism is a choice to be made, not a biological inevitability. To cite but two of many such examples, Charlotte Bunch, an editor of *Lesbians and the Women's Movement* (1975), wrote: "Lesbianism is the key to liberation and only women who cut their ties to male privilege can be trusted to remain serious in the struggle against male dominance." And Jill Johnston, in her book, *Lesbian Nation: The Feminist Solution* (1973), wrote: "The continued collusion of any woman with any man is an event that retards the progress of women's supremacy."

"Homophobia"

When the term "homophobic" is used to describe anyone who believes that heterosexuality should remain Western society's ideal, it is quite simply a contemporary form of McCarthyism. Named after the U.S. senator who called his critics "Communists" rather than respond to their arguments, McCarthyism has been adopted by those who label "homophobic" anyone who holds that society ought to hold heterosexual marriage as its ideal.

In fact, it is more insidious than the late senator's use of the term "Communist." For one thing, there was and is such a thing as a Communist. But "homophobia" masquerades as a scientific description of a phobia that does not exist in any medical list of phobias. I have no doubt that there are people who have a pathologic fear of homosexuals, and should such a phobia ever be medically verified, the term can be used to describe such people.

But its insidiousness lies elsewhere. It abuses psychology in order to dismiss a human being whose values the name-caller does not like. It dismisses a person's views as being the product of unconscious pathological fears. It is not only demeaning, it is unanswerable. Indeed, the more one denies it, the more the label sticks.

Whenever I hear the term, unless it is used to describe thugs who beat or otherwise oppress innocent homosexuals, I know that the user of the term has no argument, only McCarthy-like demagoguery, with which to rebut others.

To hold that heterosexual marital sex is preferable to all other expressions of sexuality is no more "homophobic" than it is "siblingphobic" to oppose incest, or "animalphobic" to want humans to make love only to their own species.

Finally, those who blithely throw around the term "homophobic" ought to recognize the principle of "that which goes around comes around." We can all descend into name-calling. Shall we label male homosexuals "womenphobic" and "vaginaphobic," and lesbians "menphobic" and "penisphobic?" It makes at least as much sense, and it is just as unworthy a tactic.

Good people can differ about the desirability of alternate modes of sexual expression. There are many good people who care for homosexuals and yet fear the chiseling away of the West's family-centered, sex-in-marriage ideal. They merit debate, not the label "homophobic." And there are good homosexuals who argue otherwise. They, too, merit debate, not the label "faggot."

The creation of Western civilization has been a terribly difficult and unique thing. It took a constant

delaying of gratification and a re-directing of natural human instincts. These disciplines have not always been well received. There have been numerous attempts to undo Judeo-Christian civilization, not infrequently by Jews (through radical politics) and Christians (through antisemitism) themselves.

And the bedrock of this civilization has been the centrality and purity of family life. But the family is not a natural unit as much as it is a *value* that must be cultivated and protected. The Greeks assaulted the family in the name of beauty and Eros. The Marxists assaulted the family in the name of progress. And, today, gay liberation assaults it in the name of compassion and equality. I understand why gays would do this; life has been unfair to many of them.

What I have not understood was why Jews or Christians would join the assault. I do now. They do not know what is at stake. At stake is our civilization. It is very easy to forget what Judaism has wrought and what Christians have created in the West. But those who do not value this civilization never forget. The Stanford University faculty and students who chanted, "Hey, hey, ho, ho, Western civ has got to go," were referring to much more than their university's syllabus.

And no one is chanting that song more forcefully than those who believe and advocate that sexual behavior doesn't play a role in building or eroding civilization.

The acceptance of homosexuality as the equal of heterosexual marital love signifies the decline of Western civilization as surely as the rejection of homosexuality and other non-marital sex made the creation of this civilization possible.

Conclusion

The indisputable fact is that when society holds that homosexuality and heterosexuality are equally acceptable, there is an enormous increase in homosexual behavior. It has already begun in America, as the Washington Post reported (July 15, 1993) – "Teens Ponder: Gay, Bi, Straight?" – many young men and women no longer know what they are sexually, and have embraced sexual relations with both sexes. Since exclusive heterosexuality is cultivated, i.e., it is not a biological given, it is no longer a behavioral given. For those of us who believe that male-female love is the highest ideal to aspire to, this is a catastrophe.

If same sex marriage is accepted, the announcement will be official – American civilization no longer cares whom you engage sexually.

If same sex marriage is accepted, American civilization will have announced that children do not need a mother and a father. Two mothers or two fathers are just as wonderful. This, in turn, means that men and women are identical except for their anatomy, that neither has anything unique to give to children or to one another. This, too, is a catastrophe.

If same sex marriage is accepted, the same concern for compassion for the individual will have to lead to "marriages" of bisexuals with a member of each sex. Why should we deny bisexuals equality? Same sex marriage will have to lead to other forms of polygamy as well. Why should society deny people the right to marry as many partners as they want? Once love rather than heterosexual monogamy becomes the sole standard for marriage, who are we to deny people's love for more than one partner?

All of this emanates from an even larger tragedy. Much of our educated elite has lost its moral moorings. To paraphrase G.K. Chesterton on the loss of faith of in God, when Westerners stop believing in Judaism and Christianity religion, they don't believe in nothing, they believe in anything. There is no moral social guideline other than compassion. But compassion, by definition, is very selective; one cannot show all people equal compassion; if the handicapped, correctly, are shown compassion, non-handicapped aren't. In this instance the compassion shown to gays means that less compassion is shown children, since children will now be adoptable at birth by fathers and no mothers, or by mothers and no fathers.

Norms no longer exist. Thus millions of well intentioned, bright and rudderless Americans really wonder whether it is important for children to have a father and mother, as opposed to parents of the same sex. By affirming same sex marriage, the answer will be clear: No, children don't need a mother and a father: the sexes are interchangeable.

We have lost our way with a speed that is awesome. What took thousands of years to build is being dismantled in a generation. And all because of insurance benefits.

Dennis Prager does a daily talk show on KABC Radio, Los Angeles, writes bi-monthly The Prager Perspective, *has written* The Nine Questions People Ask About Judaism *(Simon & Schuster) and most recently,* Think a Second Time, *43 Essays on 43 Subjects (HarperCollins). He is a co-director of Empower America.*

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Mr. CANADY. Thank you, Mr. Prager.
Ms. McDonald.

STATEMENT OF NANCY McDONALD, NATIONAL VICE PRESIDENT, PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, TULSA, OK

Ms. McDONALD. Mr. Chairman and members of the committee, good afternoon, and thank you for the opportunity to address you about this very important piece of legislation.

My name is Nancy McDonald, and I'm a wife, a mother, an educator, a long-time community volunteer from Tulsa, OK. And I'm also vice president of Parents, Families, and Friends of Lesbians and Gays.

First and foremost, as mother and a wife, I know the value of marriage. I know that marriage is one of the most important institutions on which our society is founded. I know that I rely upon my family for emotional and financial support, and I expect my government and my community to recognize the commitment that my husband and I have shared for 39 years.

It is because marriage is so important to me that I hoped all of my children would be able to marry. In fact, all of my children except one have married. My fourth child, Morva, is not allowed to marry in any State in this country. You see, she is a lesbian. And, as her mother, I wish the bill before us today was a bill that would grant equal marriage rights for all citizens. I know that I speak for the thousands and thousands of other parents who have gay and lesbian children.

But that's not why we're here today. We are here supposedly to defend marriage. And if I felt you as legislators did not understand the value of marriage in our society, I would spend my time convincing you that it is the foundation for many American families and an important valued institution. But you don't need me to tell you that. I find, instead of defending marriage, I need to defend people, gay and lesbian people, who are being denied the right to marry.

I do not believe that we would be here today if our society did not have a deep bias against gay and lesbian persons. I say that not to lay blame, but to recognize the fact that we are really in a civil rights discussion about gay and lesbian persons.

I have heard the talk that we would face a cultural meltdown if gay and lesbian persons were allowed to marry. We do, indeed, face that meltdown, but not because people want to love and commit to one another for a lifetime; we face a meltdown in this country because we have yet to overcome our intolerance and our bigotry. We have yet to recognize the richness in the diversity of all of our citizens.

This bill is yet another piece of legislation that tells the American people in no uncertain terms that we do not value the contributions of gay and lesbians. The bill tells me that the Federal Government does not consider all Americans equal. The bill tells me that ultimately it is OK to beat up on gay and lesbians.

I am asking you to understand that lives that are perceived to be of lesser value are at risk. Our gay and lesbian children risk not only discrimination in the workplace, in the community, and in the

home, but they are at risk for violence committed against them, and sometimes even death.

A young man, a certified public accountant, has his picture appear on the front page of the Tulsa World, as he participated in an AIDS candlelight march. And the next day his partners asked for his resignation because of their fear of losing clients because they now would know that he is a gay man.

Another young man is brutally beaten and left to die because a group of younger men thought it would be fun—thought it would be fun—to beat up a gay, thought they had the right to beat up a gay man.

And now let me share with you a story about our own family. Three years ago Joe and I got a call from the emergency room.

Mr. CANADY. Without objection, you'll have an additional minute.

Ms. MCDONALD. My son Jason was grocery shopping at 5 o'clock in the afternoon when someone thought he was gay—this is my straight son—and proceeded to beat him up on the parking lot. When Jason got on the phone to announce to his parents what had happened, he was, indeed, shaken and disturbed, but he reminded me that the work that we do on behalf of gay and lesbian equality was not just for Morva, that no one is safe from antigay violence.

We live in a house divided. My three heterosexual children share in equal rights and responsibilities of American citizenship; my lesbian daughter does not enjoy those rights. If you pass this bill, you are telling me that the state of affairs in America is OK. You are telling me now that it is OK to treat the members of my family differently, and you are telling me and all America that the gay and lesbian members of families and communities are not worthy of dignity, of respect, and are not valued. I think we can do better.

Thank you.

[The prepared statement of Ms. McDonald follows:]

PREPARED STATEMENT OF NANCY MCDONALD, NATIONAL VICE PRESIDENT, PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS

Good afternoon and thank you for the opportunity to address the committee about this very important piece of legislation. My name is Nancy McDonald and I am a wife, mother, educator, and long time community volunteer from Tulsa, Oklahoma.

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I do not believe that we would be here today if our society did not have a deep bias against gay and lesbian people. I say that not to lay blame, but to recognize the fact that we are really in a civil rights discussion about gay and lesbian persons.

I have heard the talk that we would face a "cultural meltdown" if gay and lesbian people were allowed to marry. We do indeed face that meltdown, but not because people want to love and commit to one another for a lifetime. We face a meltdown in this country because we have yet to overcome our intolerance and our bigotry. We have yet to recognize the richness in the diversity of all of our citizens.

This bill is yet another piece of legislation that tells the American people, in no uncertain terms, that we do not value the contributions of gay and lesbian Americans. The bill tells me that the federal government does not consider all Americans equal. The bill tells me that ultimately it is OK to beat up on gay and lesbian Americans.

I am asking you to understand that lives that are perceived to be of lesser value are lives at risk. Our gay and lesbian children risk not only discrimination in the workplace, in the community and in the home, but they are at risk for violence committed against them, and sometimes even death.

- A young man, a certified public accountant, has his picture appear on the front page of the Tulsa World participating in an AIDS candlelight march. The next day, his partners ask for his resignation because of their fear of losing clients because they will now know he is gay.

- Another young man is brutally beaten and left to die because a group of younger men thought it would be fun to beat up a gay – they told the judge that they thought they had a right to beat up a gay man.

- And let me share a difficult story about our own family. Three years ago I got a call from the emergency room. My son Jason was grocery shopping at five o'clock in the afternoon when someone thought he was gay and proceeded to beat him up in the parking lot. When Jason got on the phone with me he was shaken and disturbed. He reminded me that my work on gay and lesbian equality was not just about Morva -- no one is safe from anti-gay violence.

We are not engaging in an abstract conversation about family and marriage. We are discussing people, and real families – like my daughter -- who are not yet valued as citizens of America with all the rights and privileges and protections this great country offers.

We live in houses divided.

My three heterosexual children share in the equal rights and responsibilities of American citizenship. My lesbian daughter does not enjoy those rights.

If you pass this bill, you are telling me that this state of affairs in America is OK. You are telling me now that it is OK to treat the members of my family differently. You are telling me -- and all America -- that the gay and lesbian members of families and communities are not worthy of dignity, of respect, and are not valued.

I really think we can do better. I think we can value equality, and practice equality. As a parent, as a citizen, I try to do that every day. I am asking you as a Representative and a political leader to *also* value equality, to practice equality. As members of this subcommittee you will decide if this piece of legislation moves forward.

Focus instead on the challenges of the economy, of education, and health care that face all of us. Engage the American public in the work of doing right by every person, for every family, and every community.

In conclusion, I want to share information about another member of our family -- a young African American boy that I tutored eventually and whom came to live with us as our son. He is now a professional basketball player and married to a white woman. They have three children -- just a wonderful family. I am reminded that they would not have been allowed to marry thirty years ago and today my lesbian daughter faces the same discrimination -- she too is not allowed to marry her partner.

Thank you.

Mr. CANADY. Thank you, Ms. McDonald.

And I want to thank each of you for your very valuable testimony. I think this has been a very helpful panel, and your testimony has been very thoughtful.

Mr. Sullivan, let me ask you if you're familiar with a memorandum prepared by the Legal Defense and Education Fund entitled, "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr* v. *Lewin*." Are you familiar with that? It's been referred to earlier in the hearing.

Mr. SULLIVAN. It's been referred to, but I'm not familiar with it.

Mr. CANADY. OK. Let me—if you're not familiar with it, I won't dwell on the contents of this, other than to say that this lays out the strategy for ensuring equal marriage rights for same-sex unions throughout the Nation based on the action of the courts in the State of Hawaii, combined with the operation of the full faith and credit clause. And there is dispute about exactly what will happen if Hawaii does what we suspect Hawaii will do. There is uncertainty about that. And we are here trying to address that uncertainty in a particular way, obviously.

Do you think, however, that this is the sort of issue that should be settled along the lines of the strategy I've outlined, so that the Supreme Court of Hawaii decides this and then that decision is effectively imposed on the rest of the Nation? Is that—you have made a passionate case for what you believe in, but do you think that is the way in this country the decision about this should be made?

Mr. SULLIVAN. I think there should be a reasoned debate like this in every State of the Union and we should have the time to do that. Happily, this court case is not due to decide until the end of 1998. So we have that time to have this full public discussion in every State of the Union around the kitchen table, and so on.

Mr. CANADY. But—but, Mr.——

Mr. SULLIVAN. This bill would try and stop that happening.

Mr. CANADY. But, Mr. Sullivan, the strategy here is not to have a debate in the full 50 States of the Union. If you'll look at this—this is not a secret document; this is a public matter. If you'll look at this, the strategy is to obtain the result in 50 States by action in one State. Now I have a problem with that.

There is some dispute about the time table also. I don't think anyone really knows how fast this is going to move in the State of Hawaii. We've heard very eloquent testimony from the chairman of the house judiciary committee from Hawaii.

But am I to understand that you do want a debate in 50 States, because our bill would guarantee a debate in 50 States? If that's what you really want, it seems to me that you would support our bill, because the legal strategy is to cut off the debate around the country.

Mr. SULLIVAN. Well, this issue depends upon the full faith and credit clause of the Constitution, whether it would be imposed or whether it would not be on every State, and I think that the proper way to decide the Constitution is for the Supreme Court of the United States to interpret the Constitution.

Mr. CANADY. But, Mr. Sullivan——

Mr. SULLIVAN. It's not the role of the Federal Government to interpret the Constitution.

Mr. CANADY. Well, I understand and I believe the Supreme Court certainly has a role to play in this. But have you read the second sentence that's included in that full faith and credit clause? I think if you read that, you will see that the Congress has an important role to play, and I'm not going to dwell on that here. We have a panel of legal experts. But I think that there is strong legal support for what we are doing in this legislation. The Clinton administration, Department of Justice, says there is no constitutional or other impediment to this legislation.

But I go back to the point, if you really believe that a debate should take place—debates don't take place in the courts. You're talking about something going on around the country in the 50 States where the people are involved if you're talking about a debate. This legislation is what will ensure that.

And the opponents of this legislation have a very different strategy, a strategy of winning big in Hawaii, and then seeing that imposed across the Nation. That is what I have a problem with. I have a problem with what's going on in Hawaii on its own merits. I oppose the concept of same-sex marriage, but, beyond that, there is a great problem here with the process that is going on, and it is not the way an issue such as this should be decided in our country.

Mr. SULLIVAN. It seems to me that popular discussion and the courts both have a role to play in this discussion, as they had a role to play in interracial marriage, where the debate took place over 10 years of civil rights disturbances and arguments and also the Supreme Court. And I think we should allow all those forces to come into play and not curtail the discussion with this bill.

Mr. CANADY. My time has expired. Mr. Frank.

Mr. FRANK. Mr. Prager, you said you want to preserve heterosexual marriage. Is it your position, then—because so do I; I think everybody wants to preserve heterosexual marriage—is it your position that allowing same-sex marriage would lead to the end or the serious erosion of heterosexual marriage?

Mr. PRAGER. It would, and if——

Mr. FRANK. How?

Mr. PRAGER. The Washington Post, this is one example and I'll be very brief because I don't want to take from your time. If it doesn't take from your time——

Mr. FRANK. If you'd stop telling me it would be brief, we would have gotten to the answer. So why don't you just go right ahead?

Mr. PRAGER. OK. The Washington Post, July 15, 1993, "Teens Ponder Gay, Bi, Straight: Social Climate Fosters Openness, Experimentation." And it speaks—psychologists at schools have been speaking about how frequent now teens will say, "Hey, I don't know what I am. I could be anything. So I'll try anything." And that, as I said earlier—I was quoting the professor of psychiatry—is human nature and that's what will happen.

Mr. FRANK. So I understand your position is that people are really not basically heterosexual, the great majority, but that—and that they've got to—that if they knew that they had the option, they would experiment; is that——

Mr. PRAGER. From an early age, there is no doubt in my mind.

Mr. FRANK. OK. Well, the problem is, it seems to me you prove from your standpoint too much. You say you're against marriage, but you agree with a lot of what Mr. Sullivan said—because doesn't your argument mean more than banning marriage? Doesn't it mean that you want to make it illegal and enforce the law against people being openly gay and living together? I mean, Herb and I, who's here——

Mr. PRAGER. God forbid.

Mr. FRANK. Excuse me, please. I'm going to finish my question.

Mr. PRAGER. Sorry.

Mr. FRANK. We are not legally married. We haven't sought to be. We don't intend to become it. We don't need those legal protections; other people might. But I suppose, from your standpoint, we're as bad an example on these teenagers that the Washington Post is writing about than a married couple. So why would you stop at simply not allowing gay marriage? If you are afraid that the example of people being allowed to be gay and lesbian with no disability will encourage too much growth, why aren't you for banning more than simply not allowing gay marriage?

Mr. PRAGER. Because I believe that we should only use laws to ban that which causes evil.

Mr. FRANK. Well, but you said that. I'm just—Mr. Prager, you're being inconsistent.

Mr. PRAGER. I don't——

Mr. FRANK. You're being inconsistent. Excuse me.

Mr. PRAGER. One sentence, allow me one sentence. That's all I want.

Mr. FRANK. No, because I——

Mr. PRAGER. We shouldn't ban adultery, and I certainly am not proadultery.

Mr. FRANK. Well, you'd be for repealing all the laws against adultery——

Mr. PRAGER. That is correct, sir.

Mr. FRANK [continuing]. And I understand it's illegal in many States. Well, then, see, here's the inconsistency: what you're saying is, do not legally recognize gay marriage. Allow gay people—I presume you would say let two men or two women live together fairly openly with no legal penalty; correct?

Mr. PRAGER. That is correct.

Mr. FRANK. All right. Then your logic leaves me totally puzzled because what you're saying is—unless you think these kids in the Washington Post is writing about saying, "Oh, wait a minute, those two people are living together and they appear to be having a good time and they appear to be successful, but they're not legally married, so I won't experiment, but if they were legally married, I'd experiment." [Laughter.]

That's the problem with your argument. You seem to argue that the added increment that's going to lead to this experimentation is the marriage certificate——

Mr. PRAGER. Yes.

Mr. FRANK [continuing]. And that I think doesn't make any sense.

Mr. PRAGER. Oh, I think it makes total sense. What society says is honored—marriage is an honorific, as Representative Schroeder, who did not have the time to stay after she threw her rhetorical bombshells, but as she said, there is no benefit any longer to being married. Therefore, it's an honorific in society.

Mr. FRANK. Well, except I—first of all——

Mr. PRAGER. For society—I can't—if you ask me——

Mr. FRANK. OK, but I have to ask you——

Mr. PRAGER. Tell me how long I have for an answer now, 30 seconds——

Mr. FRANK. No, excuse me. Excuse me.

Mr. PRAGER [continuing]. 10 nanoseconds.

Mr. FRANK. No——

Mr. PRAGER. Tell me how much I have. [Laughter.]

Mr. FRANK. I'll tell you how much time you have: as much time as you take to answer me and not attack Pat Schroeder when she's not here. So I'm not going to give you time——

Mr. PRAGER. No, I'm attacking her for not being here.

Mr. FRANK. Excuse me. No, you're attacking Mrs. Schroeder for things that she said when you were here, and she's not here now, and I'm not going to be part of that because I also think you're avoiding my question.

And it's this: you're telling me now that teenagers will be adversely affected only if they think society honors it. Boy, you've got a different set of teenagers in mind than the ones that I think we're dealing with. [Laughter.]

It is not my experience that teenagers say, "Oh, well, I wouldn't dare experiment with this because society has not put its honorific on it." [Laughter.]

I mean, I think your argument shows that there's something more here than what you're arguing because——

Mr. PRAGER. Right.

Mr. FRANK [continuing]. What you're saying is, the force of example will be a problem. And there are other honored people in the society—I mean, there are people, prominent athletes, entertainers, others, politicians—it would seem to be—do you think that we're having a bad influence on people? When two respected lesbians or two respected gay men, prominent in their community, when they are public about what they do, and people appear to be nice to them and not pick on them, do you think they're having a bad influence on teenagers?

Mr. PRAGER. I think that they have a confusing influence on what, in fact, sexuality is. But so long as society says, look, we have beautiful people who are either built differently or become different through psychological experience at a young age, I do not have a problem with that fact. I could still say to my kids——

Mr. FRANK. And you think—OK——

Mr. PRAGER. Yes, I do believe there is no comparison between saying some people live X or Y life, but the society does not give its stamp of legal approval to it. There is no comparison between the differences, aside from the issue of——

Mr. FRANK. But there is in terms of——

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

Mr. Hyde.

Mr. HYDE. Mr. Chairman, Professor Arkes seemed to have something more to say, and since I have 5 minutes to ask questions, I'm happy to yield to Professor Arkes for—give him another 5 minutes.

Mr. ARKES. I'm not sure—well, I might respond to a few other things and maybe respond again to Mr. Frank's point.

Once again, there was a family—there was a situation in Virginia not long ago of a 40-year-old mother married to her 19-year-old son, and they were forced to separate. I suppose people could argue that their presence wasn't going to disintegrate the institution of marriage.

To make our point again, we're not predicting that there's going to be an erosion of marriage, but I think the melancholy point is this: that the notion of marriage will not be extended to accommodate the concern for gay marriage without setting off many other kinds of changes. And, as a result of those changes, I think we'd find that marriage would not have that special kind of significance that makes it an object right now of such craving.

As Dennis suggested, it's not that you're going to undercut families that exist, but as the society keeps offering many alternatives and notions of sexuality outside a framework of marriage, we move away from the sense that there is something portentous about the generation of new life, something that commands that this project be pursued within a framework of commitment, where the child understands that her parents are committed to her nurturance for the same reason that they are committed to one another: that they have quit their freedom to be rid of that relationship when it no longer suits their convenience.

Now if you think that all of this might undercut in time or erode our conviction about the importance of that framework, about the generation of children, as opposed to a notion that our children are simply spawned with no particular responsibility—we remind ourselves what is at stake. And we recall that even in those melancholy situations when marriages dissolve, the framework of lawfulness at least has this advantage: that it fixes the question of who bears responsibility for the children.

Another point I just might make, in response to Andrew—and, again, Andrew is a man of impeccable arguments, and I respect his judgments on many things, but I thought the concern here is about the debate being stifled by having it drawn into the cloister of the courts, where it's handled according to the formulas that are familiar to lawyers and judges. I thought it would be more consistent with the spirit of liberalism, as Justice Brennan used to say, "that robust arena of public discussion," that we bring things out of the cloister of the courts and back into the public arena of discussion, where it's a matter of discussion not merely for lawyers.

Mr. HYDE. And, Professor, I've known people in my life who have been deeply in love, not married, men and women——

Mr. ARKES. Right.

Mr. HYDE [continuing]. An enduring love, a powerful love, into their old age. What's stopping people, two men who love each other or two women, from having that commitment of the soul, as well as of the body? What do they need marriage for to solemnize it? Why can't they have this relationship which can be as fulfilling as if they have gotten a marriage license and taken an oath? And

that's all marriage is, is swearing to each other before an official witness that they'll love, honor, and obey or cherish, or whatever the word is. You can see how long ago it was that I got married. [Laughter.]

But what's the big deal?

Mr. ARKES. I think you're inviting me to—I don't want to go back about ground I've already traversed, but simply to point out that, as I said, we understand that there are many relations of deep love between men and men, between women and women, grandparents and grandchildren. And, as I said, in the nature of things, not merely a matter of opinion, in the nature of things, those loves cannot be diminished as loves because they are not manifested properly in marriage. So I think I'd agree with that wholly.

Mr. HYDE. How does same-sex marriage legitimize homosexuality? Isn't that one of the objections, that some people don't want it legitimized? And the notion that the State sanctifies, if I may use that word—"recognizes" is probably more important—this relationship officially, doesn't that connote or denote approval of homosexuality?

Mr. ARKES. Yes, I think so, though I think it's worth saying, as Dennis suggested, that one's position on this——

Mr. CANADY. I'm sorry, the gentleman's time has expired.

Mr. Watt.

Mr. WATT. Mr. Chairman, I yield 2 minutes to Ms. Jackson Lee for purposes of a unanimous consent request and whatever other purposes she wants to use it for, and I yield 3 minutes to Mr. Frank—in that order.

Ms. JACKSON LEE. Mr. Watt, I thank you very much for your kindness.

I am not a member of this committee or subcommittee; I am a member of the House Judiciary Committee. And so I think, because of the moment and the striking confusion that this brings to me, that it would be worthy of trying to solicit from those who would present their efforts, to try to listen and discern the reason for this legislation.

Quickly, let me say that I hope, through one of the members, that I might submit a statement for the record. So I will be as brief as the 2 minutes will allow me.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF HON. SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I want to thank the Chairman and the members of the Committee for allowing me to participate in this hearing today to consider the issue of same-sex marriages. This is a difficult issue, and strong opinions exist on both sides of the debate. I hope that this hearing on the "Defense of Marriage Act" will help to shed some light on the purpose of this legislation and help us to determine whether federal legislation is truly necessary.

No one can deny that the family as an institution has changed dramatically since the days when our own parents were children. Today, there is no single definition of family that applies to all individuals. A family may be made up of two parents and their children, grandparents caring for grandchildren, single mothers or single fathers raising their children, couples without children, foster parents and foster children, or individuals of the same-sex living together and sharing their lives a couple.

We need to respect the human rights of all these American families. We should not make laws which are based on an antiquated notion of what constitutes a fam-

ily. It is disrespectful not only to gay and lesbian Americans but to all Americans who believe in the democratic principles this country was founded upon—freedom, equality, and tolerance. The cry for this legislation is minimal at best. If there is some need, it is rightly left to the states, a political entity closest to the people.

Some Members of this Congress have suggested that this legislation reaffirms family values, to the contrary, it fosters the worst values hatred, intolerance and "scapegoating." It seems to push the federal government, with all of its mandates, onto ground it need not trend.

As a wife and a mother, I believe in the human family—however it is defined. The institution of marriage should be cherished and respected, however, same-sex relationships in no way take away from the sanctity of the institution of marriage. This legislation is simply not needed, it is intrusive and political. It would seem a more needed piece of legislation would be the National Anti-Divorce legislation—abolishing all divorces. I ask Congress to rise above this unconstitutional violation of a citizen's right to privacy and to end this political pandering. Thank you.

Ms. JACKSON LEE. Coming from the 18th District in Houston, I can say to you that babies are born and birthed and people are married and people are buried every day, and none of them have come to me to indicate that the impact of someone else's life has caused them to not do those things.

One statement charged me more than any other, and I'm sorry she is not here, and I don't say this in her absence, the honorable lady from Colorado: that this is a profound issue of the day. I would take great issue. The issue of hunger and war, the issue of the violence, the issue of the Freemen in Montana may be a profound issue of the day, but loving individuals trying to respect each other is not that.

Mr. Prager, you are here, and I don't have time to ask you a question, but I would only say to you that I welcome the physically challenged to be Congresspersons. I think they do very well. I think a stutterer could, in fact, be someone who would be very good and an incentive and someone to encourage those who stuttered to be a talk show host. I would call in.

I think that this legislation is a travesty of sorts. I think that we all can worship our spiritual leader as we desire, and I think this legislation is to do what it intends to do: to bring out the worst of all of us.

I respect your opinion, and your opinion is yours——

Mr. CANADY. The gentle——

Ms. JACKSON LEE [continuing]. But I don't think the Federal Government——

Mr. CANADY. The gentlelady's——

Ms. JACKSON LEE [continuing]. Has to reinforce your opinion.

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

Ms. JACKSON LEE. Thank you. I yield back my time.

Mr. CANADY. Mr. Frank.

Mr. FRANK. Well, first, I want to address a point that the gentleman from South Carolina made earlier. He seemed to think that when people acknowledge that sexual orientation was not something of choice, but that it was just a fact of life, that that somehow meant we were conceding that it was a bad thing. And I know the logical standards are not excessive around here, but that one seemed to me to fail even our looser test.

I will tell you now that I am left-handed. I do not remember ever choosing to be left-handed. I remember a kindergarten teacher who tried to switch me over to being right-handed, and it didn't work; I'm left-handed. It's just a fact of my life. And I do not regard it

as a negative fact. I mean, there are a lot of things about me which are facts of life which I do not regard as negative.

So this notion that by acknowledging that something was not a choice, but a fact about one's self which one discovered, we've somehow decided that that's a bad thing. I guess I just find that very difficult to understand. I discovered at some point in life that I was of the white race. It was not a choice that I made. I do not remember experimenting with it. [Laughter.]

I don't remember reading in the paper that there were respectable people who were white and this would be a nice thing to be. I don't remember being confused about my race. I just accepted the fact that I was a white person, and I don't think there's anything bad about that; I don't think there's anything great about it or good about it. It's just a fact of my life. So this suggestion that, because something is simply a fact—it seems to me strange that that means it's bad.

But I'm also struck again by, frankly, the extent to which the two witnesses here who are for this legislation seem to think that love between a man and a woman is somehow so fragile a flower that, absent heavy fertilizing by the Government, it won't bloom. I must say, their understanding of human sexuality is very different than mine; I have understood it to be a very powerful force that seeks out satisfaction; that, in particular, in our society, and given our nature, seeks it out in the long term with one other person.

I think I am interested to hear polygamy talked about so much. I think that people should understand the major significance of the fact that opponents of gay marriage talk so much about polygamy is they have a hard time demonizing gay marriage to the extent they'd like to, so they have to use polygamy in here. If they, in fact, could make the case against gay marriage more lucidly, they would not have to drag in the—I was going to say "strawman," but I guess I should say "straw men and women" of polygamy. It's a set of straw figures.

But this notion that people's sexuality is so flimsy that the government is really going to tell them who to love and how I think betrays a fundamental lack of logic and understanding of human beings.

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

Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Sullivan, I want to follow up on the hypothetical that Mr. Prager posed earlier; this is fascinating. Let's assume someone is bisexual. And following up on Mr. Frank's comments, they say that they're not making the primary argument that it is a good thing; they're going to make the secondary argument that this is just the way I am; "I can't help it," which must assume it's some deleterious condition. But let's assume that they are making that secondary argument. Do you think it's OK for society to proscribe a bisexual marriage; in other words, a bisexual individual's ability to marry two people, one of the various sexes?

Mr. SULLIVAN. Yes, I do.

Mr. INGLIS. Tell me why.

Mr. SULLIVAN. Like almost every single proponent of this institution and its equality, I oppose polygamy. I do so because I think that the essence of marriage is the commitment to one other human being.

Mr. INGLIS. Well, no, wait a minute. OK, hold on just a second. I understand that. But now we're positing here a situation where we're saying that this bisexual says to us, the State, "This is the way I am." Tell me exactly what you say to that person about why it is that you will stop him or her from exercising—not a choice, again, because you maintain, as the party line does, that this is not a choice. Tell me what you say to that person.

Mr. SULLIVAN. Well, first of all, that's not a party line; it's the truth.

Mr. INGLIS. Well, no, don't answer that. Answer what you would say to that person.

Mr. SULLIVAN. And I don't need any party to tell me the truth about my own sexual orientation.

But, secondly, I would say, no, it is destructive of a human being involved in——

Mr. INGLIS. OK.

Mr. SULLIVAN. Let me finish——

Mr. INGLIS. No, no. I'm——

Mr. SULLIVAN. Let me finish the sentence.

Mr. INGLIS. Go right ahead.

Mr. SULLIVAN. It is destructive of a human being to want to commit themselves to two separate individuals for their entire life.

Mr. INGLIS. OK.

Mr. SULLIVAN. We know that to be true.

Mr. INGLIS. OK, then, enough of that. Let me ask you this then: what you have just said is it's OK for a society to say that some things are right——

Mr. SULLIVAN. Yes.

Mr. INGLIS [continuing]. And some things are wrong?

Mr. SULLIVAN. Of course. No one's disputing that.

Mr. INGLIS. And I'm here to tell you that I think it's pretty clear that the homosexual community is admitting that homosexuality is wrong because you are not making the primary argument.

Mr. SULLIVAN. I make the primary argument——

Mr. INGLIS. If you were the primary——

Mr. SULLIVAN [continuing]. I'm a gay person——

Mr. INGLIS. I want to shift——

Mr. SULLIVAN [continuing]. And I have no shame about it at all.

Mr. INGLIS. I want to shift from you to Ms. McDonald because this is a fascinating point, I think, about the primary versus the secondary argument. Primary would be, Ms. McDonald, this is a wonderful lifestyle and we encourage everyone to be a lesbian or homosexual. The secondary argument admits that there's something wrong, that there is something terribly wrong, about homosexuality, and, therefore, you drop back to the secondary argument, which is: I can't help it. If you can't help it, it must be there's something wrong.

But let me point this out: this is why I'm so interested in talking to you about this. We had a letter recently from a PFFLAG member, and it's got an apologetic in it from somebody that's talking

about how it's not a choice; it's a condition. And it says this: "I have known well over a thousand gays and I have never heard one of them say that he chose to be gay." Parenthetically, "Well, at one PFFLAG meeting a lesbian did say that she had 'decided' to be gay and was proud of it, until her sisters coraled her during coffee break and helped her understand the question."

"Oh, no, I didn't choose to be gay. I meant, after I realized I was gay, I chose to accept, not to deny or lie about it."

Isn't this a wonderful moment of honesty? This lesbian was making a statement of honesty. She chose a behavior.

So what's your—how would you answer this objection that—would you also stop a bisexual man from marrying a woman and a man? This is not a choice; this is a condition he has.

Ms. MCDONALD. This is very interesting because this is not a debate about sexuality. You know, this is a debate——

Mr. INGLIS. Oh, no, we're—let me make sure——

Ms. MCDONALD. We're talking about——

Mr. INGLIS. Let me sharpen it, so that you understand the question. We are here deciding whether it is OK for a State by one judge to decide to unleash homosexual marriage on the whole country such that people travel from South Carolina to Hawaii to be married and then return and expect full faith and credit in South Carolina. So one State is going to decide that, one judge.

So what we're asking here, the question I want to know an answer to is, why it is OK—do you agree, first, with Mr. Sullivan that it's OK to say to a bisexual person you can't marry a man and a woman? Do you agree with that?

Ms. MCDONALD. That is defined by our law.

Mr. INGLIS. No, that's currently—unless Hawaii changes it, this one judge changes it in Hawaii, I suppose——

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

The gentleman from Wisconsin is recognized.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

First, let me apologize for being absent for a half an hour, but there were constituents who made an appointment with me about a month ago that came into town from Wisconsin, and I thought I'd better see them.

But I have a question of you, Mr. Sullivan. You're a very thoughtful and very eloquent advocate of same-sex marriages, and I think that you are a tremendous asset to this debate. Do you think that the way many of the gay rights groups are attempting to achieve the legal recognition of same-sex marriages, through litigation in Hawaii and using the full faith and credit clause of the Constitution, is the right way to go about it?

Mr. SULLIVAN. Well, I don't think they really chose it because two women asked for a marriage license in Hawaii, two ordinary people. Nina and Janora are their names. They started this. This wasn't invented by activists. This was invented by human beings seeking merely to seek the equality before the law that the Constitution promises them.

Mr. SENSENBRENNER. Well, Mr. Sullivan, it might have been invented by human beings, but litigation is expensive, and I am certain that there is some outside financing to help the litigation along. I have read the legal and political briefs of the Lambda

Legal Defense and Education Fund, which is a self-proclaimed gay activist organization, and their brief that says, "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr* v. *Lewin*," on page 2, says: "Many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions. Despite a powerful cluster of expectations, logistics, rights, constitutional obligations, and federalist imperatives, these questions are likely to arise: 'Will the people's validly-contracted marriage be recognized by their home States and the Federal Government, and will the benefits and responsibilities that marriage entails be available and enforceable in other jurisdictions?' We at Lambda believe that the correct answer to these questions is yes."

Now this means that the forum that counts are the lawyers' arguments, first, in the Hawaii trial court and then in the Supreme Court of Hawaii, and then in the Federal courts in other States where there is an attempt made to get those other States to recognize that union under the full faith and credit clause, rather than being a debate in the forum of public opinion and having the people's elected representatives in Congress and the State legislature make the ultimate decision.

What's your preference on this? Should it be done in court or should it be done in the forum of public opinion?

Mr. SULLIVAN. I think that where there is a matter of public policy, it should be debated in every State legislature and home in the country. I think that where there is an issue of the Constitution of the United States, the correct procedure is to go through the courts and the Supreme Court. The interracial marriage argument took place in people's homes and all around the country, but also ultimately in the Supreme Court of the land, where people's fundamental rights are finally decided. So the answer is both, sir. And I hope that this body does not curtail that important debate.

Mr. SENSENBRENNER. I think that by introducing this bill and having this hearing we're furthering this important debate, and I think that most of my constituents had no idea this was happening in Hawaii and what the consequences were until I cosponsored the bill and there's been the publicity in southeastern Wisconsin. I would like to see this debate furthered, and I think you should, too, because it will give you an opportunity to give your case, even though I happen to disagree with the position that you've taken.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. CANADY. Thank you, Mr. Sensenbrenner.

Again, I thank each member of this panel for your very helpful and thoughtful testimony.

We'll now move to our third and final panel of the day. And if the members of the third panel would come forward and be prepared to take your seats? If the witnesses would please take their seats as soon as possible?

Those of you that wish to converse will need to converse in the hallway.

For our final panel, we were scheduled to hear testimony from Prof. Maurice Holland. Unfortunately, Professor Holland is ill and

unable to travel from Oregon to be with us today. In fact, Professor Holland was taken ill on his way to the hearing, and our thoughts and prayers are certainly with Professor Holland.

Without objection, Professor Holland's written testimony will be made a part of the record.

[The prepared statement of Mr. Holland follows:]

PREPARED STATEMENT OF MAURICE J. HOLLAND, PROFESSOR OF LAW, UNIVERSITY OF OREGON SCHOOL OF LAW

1. Introduction. My name is Maurice J. Holland. I reside in Eugene, Oregon, where I am professor of law and former dean of the University of Oregon School of Law. Among the subjects I teach is Conflict of Laws. This statement is submitted solely on my own behalf, and not that of the University of Oregon, its School of Law, or any other institution with which I am affiliated.

This statement is submitted in support of Sec. 2 of H.R. 3396, relating to full faith and credit to state law, and takes no position regarding Sec. 3 of this bill. Two distinct issues seem to me to be presented by Sec. 2: first, whether its enactment would be within the constitutional powers of the Congress, and secondly, whether, assuming that question is answered in the affirmative, its enactment would constitute sound public policy.

2. Constitutional Power of Congress. There seems to me not the slightest room for doubt but that enactment of Sec. 2 would be within the constitutional authority of the Congress. The relevant provision of the Constitution, the so-called "full faith and credit clause,"[1] could not be more explicit than by providing: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof* (emphasis added). It is true that the first sentence of the full faith and credit clause, "Full Faith and

[1] U.S CONST. art. IV, § 1.

Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," appears to state an independent and absolute constitutional mandate, but this has not been how it has been understood or judicially interpreted. Were it were so understood, that would render nugatory or anomalous the second sentence of the clause, empowering Congress to prescribe by legislation "the Effect" of one state's statutes and judicial decisions in other states. The most reasonable understanding of the first sentence of the full faith and credit clause is that it prohibits any state from making its own, independent determination of the content of any other state's law, but must make such determination by reference to the latter's "public Acts, Records, and judicial Proceedings." The phenomenon of one jurisdiction's assuming that the law of a different jurisdiction is identical to its own would have been familiar to the Framers from the English common law background.

A comparison of the full faith and credit clause with the "supremacy clause"[2] is instructive. The latter's constitutional mandate of the supremacy of federal over contrary state law is absolute, and is not subject to any Congressional power to add to, subtract from, or modify its command. This doubtless reflects the Framers' considered judgment that the supremacy of federal law is so fundamental a postulate of the federal union they were creating as not properly to be subject to legislative qualification or adjustment. The much more problematic questions presented by interstate recognition and enforcement of sister-state law among the several states were understood to be unsuited to resolution by means of an absolute constitutional mandate in the same manner as the supremacy of federal law.

Under the Framers' design, in other words, the obligation of

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[2]U.S. CONST. art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

states to subordinate their respective bodies of law to overriding federal law was seen as essential to create and preserve a genuine federal union, something that is truly one nation, as opposed to a loosely confederated league of sovereign states. The constitutional obligation of the several states comprising the federal union to subordinate their own to one another's laws, however, was perceived to be a very different and much more delicate matter, since the states retain under the Constitution the status among themselves of equal and coordinate jurisdictions. As with such other questions as the existence and jurisdiction of inferior federal courts, the Framers understood that resolving the occasional conflicts certain to arise from the states' concurrent exercise of their respective legislative powers could not sensibly be accomplished by means of an axiomatic constitutional mandate similar to that of the supremacy clause, but that this was a task that should be confided to the Congress as the body best able to legislate adjustments responsive to evolving circumstances and to maintain the optimum equilibrium between the *pluribus* and the *unum*. They understood that there would be occasions when the legislative power of two or more states would overlap, thus engendering actual or potential conflict. The delicate, and largely political, task of resolving such conflicts was therefore confided to the Congress, with the expectation that it would function as a kind of referee for their settlement when required.

The Congress has carried out this function by enactment of three statutes: 28 U.S.C. § 1738, first enacted in 1790,[3] 28 U.S.C. § 1738A, enacted in 1980 to deal with child custody decrees, and, most recently, 28 U.S.C. § 1738B to deal with child support orders. Only the first of these statutes, 28 U.S.C. § 1738, is pertinent to Sec. 2 of H.R. 3396. The reason for its pertinence

[3]What is now 28 U.S.C. § 1738 remained substantially the same from 1790 until amended in 1948 to add "The Acts of the legislature of any State, Territory, or Possession of the United States" to their "records and judicial proceedings" as entitled to "the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

is that it provides, in substance, that the "Acts of the Legislature of any State," a term that clearly includes state constitutions as well as statutes, "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." The apparently clear meaning of the language quoted is that, unless the Congress expressly legislates to the contrary, a state whose own law and public policy prohibits marriage between persons of the same sex would nonetheless be required by 28 U.S.C. § 1738 to recognize as valid such a marriage between two of its residents if the marriage were performed in a state whose constitution or statutes validated it.[4]

3. Enactment of H.R. 3396, Sec. 2, would constitute sound public policy and safeguard the interest of federalism. Concluding that Congress has undoubted power to enact Sec. 2 of H.R.3396 does not, of course, establish that its enactment would constitute sound public policy. The following reasons lead me to conclude, however, that it would.

Everyone is presumably familiar with the circumstance that has prompted calls for this legislation. It appears likely that the State of Hawaii's law will soon be changed, by judicial interpretation of the Hawaiian constitution, to validate gay or same-sex marriages performed in that state. If and when this change occurs, it would put the law of Hawaii at odds with the

[4]It must be conceded that decisions of the Supreme Court of the United States have left the matter in considerably greater doubt than the apparently clear and mandatory language of 28 U.S.C. § 1738 would suggest. Thus, in *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804, 99 L.Ed. 1183 (1955), the Court held that a forum state is not obligated by 28 U.S.C. § 1738 to apply the law of a sister state having a contact with the case provided the former has sufficient contacts to justify applying its own rule of decision. *See also, Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L.Ed.2d 416, *reh'g. denied*, 441 U.S. 917, 99 S. Ct. 2018, 60 L.Ed.2d 389 (1979) (California not obligated by 28 U.S.C. § 1738 to apply Nevada's rule limiting amount of damages recoverable from state). The fact that the scope of the obligation imposed by 28 U.S.C. § 1738 remains unclear in light of these and other U.S. Supreme Court cases argues in favor, not against, the usefulness of the clarification that would be afforded by enactment of H.R. 3396, Sec. 2.

current laws of all other states of the Union. Accounts in various news media report that large numbers of gay couples, currently resident in states whose laws restrict eligibility to marry to persons of the opposite sex, are planning to travel to Hawaii temporarily[5] for the specific purpose of celebrating their marriages there, and then, in most instances, return to their states of residence, where they intend to claim that their states of residence are compelled by 28 U.S.C. § 1738 to recognize their married status, regardless of any contrary law or public policy of such states. The question for this Subcommittee, obviously, is whether this would be a fitting or proper use of full faith and credit, of 28 U.S.C. § 1738 in particular, for the current wording of which the Congress naturally bears entire responsibility.

To answer the question thus posed, this Subcommittee should consider where in this nation's federal design the institution of marriage, and laws governing it, have traditionally figured. Viewed from that perspective, it would be difficult to identify any subject that has consistently been viewed as more exclusively or intensely a matter for regulation by the laws of the several states than marriage has been. Since the beginning of the United States as a nation, state laws have differed among themselves in a variety of important ways, including the minimum age at which marriage can be contracted, prohibited degrees of consanguinity, and the waiting period for entering into a new marriage following divorce. Far more essential than these differences more or less of degree has been the restriction of marriage, under the laws of all states of the United States, to persons of the opposite sex. Indeed, it is fair to say that the latter has never been regarded as an incidental matter of detail, but rather as going to the essence and very definition of the marital status.

Differences among the states regarding marriage have long and

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[5]Hawaiian law currently requires no period of prior residence in that state in order to celebrate a marriage there. Nor does it include any requirement of establishing an intent to reside in Hawaii indefinitely, or for any definite period following celebration of marriage.

generally been recognized as legitimately reflecting differences of the local sensibilities and policy judgments shaping them. Reflecting the absence of any felt need to "nationalize," or make uniform throughout the United States, the law of marriage, with only one important exception,[6] federal law has not directly intruded upon the authority of states to regulate marriage. Perhaps that will someday change, and a national consensus will emerge in favor of same-sex marriages, or on some other aspect of marriage, to the point where Congress will intervene directly by enacting a federal statute prescribing eligibility to marry. Apart from the, to say the least, significant doubt whether the Congress has constitutional authority to enact a national marriage law, members of this Subcommittee need only ask themselves how many votes could be mustered in the House of Representatives for such a statute validating same-sex marriages to see how distant is any national consensus of this sort. Similarly, the day might sometime arrive when the U.S. Supreme Court will decide, as a matter of federal constitutional law, that state law prohibitions on same-sex marriages are as discriminatory, arbitrary and invidious as the state law prohibition on marriage between persons of different races struck down in *Loving v. Commonwealth of Virginia*.[7] Whatever one's view concerning the desirability either of an enactment of a national marriage statute, or of a Supreme Court decision of the kind suggested, and however imminent or remote one might judge them to be, either would at least represent a legitimate and proper way by which the traditional autonomy of state law in this area might be curtailed in the interest of emerging, altered national norms and sensibilities.

Allowing a change in the law of Hawaii, or any other state,

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[6]*See, Loving v. Commonwealth of Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L.Ed.2d 1010 (1967) (striking down state "anti-miscegenation" statute as violative of fourteenth amendment guaranty of equal protection of the law).

[7]*See*, note 6 above.

to preempt the legislative authority of all other states in this matter would emphatically be the wrong way to force legal change in the latter. With all due respect to the State of Hawaii, that would be a classic case of the tail wagging the dog. There appears to me no good reason to coerce Oregon or Rhode Island to recognize as validly married residents of those states when those marriages are contrary to their own laws and deeply felt public policies simply because they were celebrated during a brief stay in Hawaii intended only for that purpose. Hawaii should be no more entitled to settle the marital status of couples resident in other states than should those other states be entitled to determine their marital status in Hawaii and for purposes of Hawaiian law.

It is important to note that Sec. 2 of H.R. 3396 is commendably consistent with the interest of sound federalism it would safeguard by not in any manner prohibiting domiciliary states from recognizing as valid Hawaiian same-sex marriages as a matter of their own choice-of-law decisionmaking. In fact, the well entrenched choice-of-law rule in the United States, which is a matter of state law, is that of *lex celebrationis*, meaning that a marriage valid by the law of the jurisdiction where celebrated will be regarded as valid elsewhere.[8] However, this rule is subject to an important qualification, namely, that a marriage valid by the law of the place where celebrated will not be recognized as valid elsewhere, especially by the domicil of a purportedly married couple, if recognition would violate a strongly held public policy, as well as the law of, such domicil. It should be noted that, were some domiciliary state to deny validity to an Hawaiian same-sex marriage, this decision would in no way impugn its validity in Hawaii, because no state can dictate to Hawaii, or any other state, about the validity of marriage celebrated on their territory. There is no better reason why

[8]This is the rule incorporated in Restatement, Second, Conflict of Laws § 283(2) (1971).

Hawaii, or any other single state, should be empowered by 28 U.S.C. § 1738, or any other provision of federal law, to dictate to other states concerning the validity of marriages between their residents.

Assuming that Sec. 2 of H.R. 3396 is enacted, and states are thereby clearly left free to engage in their own decisionmaking, it is difficult to predict the response on the part of other states to Hawaiian same-sex marriages. That response will depend in part on assessments by state court judges of whether, and if so how powerfully, recognition of same-sex marriages between their residents offends the public policy of states where recognition is sought. Apart from judicial responses, there are likely to be legislative responses in the form of statutes expressly prohibiting judicial recognition of same-sex marriages between residents, but celebrated in another state, especially where the duration of residence in the other state was of brief duration. Some legislative or judicial responses on the part of states where same-sex marriages are invalid might be hospitable to them as a matter of comity or choice-of-law, but present indications are that, for the most part, the response is likely to be hostile, particularly in state legislatures. But whether that response is hospitable or hostile, legislative or judicial, the freedom of other states to determine for themselves how to treat same-sex marriages will be entirely consistent with where the design of American federalism places this decisionmaking authority. Should the Congress find the states' response to the expected change in Hawaii's marriage law unacceptable, its recourse would then be to confront the issue straightforwardly by testing its constitutional authority to override and preempt state law in this area. For the present, the responsibility of Congress is to make explicit what its will is concerning the scope of Hawaii's lawmaking authority and the propriety of its displacing the lawmaking authority of all the other states of the union, in other words, to perform its essential role under the full faith and credit clause of

politically accountable referee of conflicts and collisions of legislative authority among the several states.

Whatever one's views are concerning the morality of same-sex marriages, or from the perspective of sound public policy, no one could characterize the legal change anticipated on the part of the State of Hawaii as other than revolutionary. That change would drastically alter the nature and character, indeed the very definition of, the most important institution of human civilization, the family. If a revolution of such magnitude should come to the United States, it would be of utmost importance that it be accomplished by a method or process widely understood to be a legitimate way in which fundamental legal change is accomplished in this country. Forcing states which retain the traditional view of what marriage is all about to subordinate themselves to whatever Hawaii, or any other single state, might decide for itself, would be a gross misuse of 28 U.S.C. § 1738, and a lamentable distortion of the workings of our federal system. For this reason, I strongly support enactment of Sec. 2 of H.R. 3396, and appreciate this opportunity to present my views to your Subcommittee.

Mr. CANADY. We will hear testimony from Prof. Lynn Wardle. Professor Wardle teaches family law, biomedical law, and conflicts of law at Brigham Young University Law School.

Next to testify will be Ms. Elizabeth Birch. Ms. Birch is executive director of the Human Rights Campaign and former cochair of the National Gay and Lesbian Task Force. She also founded the AIDS Legal Services.

Then we will hear from Rabbi David Saperstein. Rabbi Saperstein is the director of the Religious Action Center of Reform Judaism for the Union of American Hebrew Congregations.

Our last witness for today is Mr. Jay Alan Sekulow. Mr. Sekulow is chief counsel for the American Center for Law and Justice. In addition to his work with the ACLJ, he is an author and host of the radio program "A Call to Action."

Without objection, your full statements will be made a part of the record. We would ask that each of you summarize your testimony in no more than 5 minutes.

We, again, thank you for being with us today.

Professor Wardle.

STATEMENT OF LYNN D. WARDLE, PROFESSOR OF LAW, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL

Mr. WARDLE. Chairman Canady and distinguished members of the committee, it's a privilege to be invited to testify before this subcommittee today. As a law professor who teaches family law and conflicts, I have been invited to give my professional opinion about this bill and what it would do. I want to express my—the opinions I am going to give today are my own, and not those of any institutions with which I am associated.

I think I will, in the interest of time, focus on federalism first. I want to focus on section 3 of H.R. 3396, which defines "marriage" and "spouse" for purpose of Federal law and for purpose of Federal programs. All I will say about that is that it's a perfectly routine function of any legal system and emphasize that this does not impose upon any State the definition of marriage that is used for Federal law.

H.R. 3396 does not impose its definition of marriage on any State, I repeat, but rather defines a term used in Federal law, for purpose of Federal law only. Section 3 says only that if a State chooses to legalize same-sex marriage within its own jurisdiction, which it may, that will not force the Federal Government to use that radical redefinition of marriage in Federal law and in Federal program. This is a straightforward application of federalism in action.

Section 3 doesn't interfere with the ability of the States to define and regulate marriage for themselves, nor does it deprive Congress of the ability to define marriage in some other way in any particular legislation in the future. It sets a default standard that I think is very consistent with the history, a very accurate standard about what Congress has intended when it has passed—used the term "marriage" over the decades and over the centuries. It is absolutely clear that Congress could not have and did not contemplate that the term "marriage" would include same-sex marriages when it adopted legislation over the past 200 years. This simply clarifies it.

The need—you need to be aware that lawsuits have been filed already asserting that Federal legislation should be interpreted to include same-sex marriage. That kind of litigation will only continue if a State legalizes same-sex marriage. I think that Congress has a responsibility to speak on this subject and to clarify what the intent of Federal law is, because if Congress doesn't speak, some other agencies or bodies will.

Now with respect to section 2, I'd like to emphasize another dimension of the relations between the States. It's important that advocates of same-sex marriage not be allowed to use Federal conflicts law as a tool, as a wedge, as a vehicle to force other States to recognize same-sex marriage and deprive those States of the right to make the decision themselves whether or not to recognize same-sex marriage.

The issue to which section 2 is addressed is whether the Federal Government's full faith and credit power should be used to force one State's acceptance of a radical new form of marriage upon other States. Section 2 answers no. It clarifies the effect that Federal full faith and credit rules require a State to give public acts, records, and judicial proceedings from another State.

A couple of things should be noted. First, section 2 prohibits any State from recognizing—does not—nothing in section 2 prohibits any State from recognizing same-sex marriage or recognizing another State's legalization of same-sex marriage. Each State is free to do so if they so choose.

Second, section 2 specifies that Federal full faith and credit does not require other States to recognize or enforce same-sex marriages legalized in another State. In other words, section 2 is a neutrality rule. It says that Federal full faith and credit principles will not be used to force States to decide this one way or another; they decide it for themselves.

Mr. CANADY. Without objection, you'll have one additional minute, if you'd like it.

Mr. WARDLE. Thank you, Chairman Canady.

Mr. CANADY. Don't feel compelled. [Laughter.]

You may proceed.

Mr. WARDLE. I may proceed? Thank you.

Actually, I appreciate the invitation, but I will defer because it is late and I have a written statement. And so I'll be happy to answer questions.

[The prepared statement of Mr. Wardle follows:]

PREPARED STATEMENT OF LYNN D. WARDLE, PROFESSOR OF LAW, BRIGHAM YOUNG UNIVERSITY SCHOOL OF LAW

I am honored to be invited to submit this written statement concerning H.R. 3396 to this Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. House of Representatives. By way of introduction, I am a law professor and I have taught courses in and relating to Family Law, Conflict of Law, and the Origins of the Constitution for many years.[1] H.R. 3396 happens to touch on all three of those fields. Thus, I have been asked to give my professional comment and analysis regarding H.R. 3396. Of course, the opinions I express are my own professional views, I do not speak for any of the institutions or organizations with which I am associated.

H.R. 3396 has been denominated "the Defense of Marriage Act," but I would call it "the Protection of Federalism in Family Law Act." The bill contains two operative sections.

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[1]I am a Professor of Law at Brigham Young University. I also have taught family law and conflicts law or related subjects at Howard University School of Law (as a Visiting Professor), at Sophia University Faculty of Law in Japan, (as Visiting Professor), and at the University of Aberdeen in Scotland (as Visiting Research Fellow). Family Law is my primary area of scholarship. I have written or co-authored several books and several dozen law review articles or chapters in books about family law. Two of my most recent publications (published this year) are law review articles examining constitutional arguments for same-sex marriage, Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U.L.Rev. 1-101, and the rules and practices regarding international recognition of marriages, Lynn D. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, Family Law Quarterly, vol. 29, pp. 497-517 (Fall 1995). Additionally, I have served for several years as an officer or executive council member of the leading international scholarly organization in the field of family law, the International Society of Family Law, and I have served actively in the American Law Institute consultative group that is working on a "Family Law Project."

Section 3 aims to eliminate a potentially serious ambiguity in federal statutes, federal regulations, and federal programs, while section 2 attempts to resolve a potentially serious controversy concerning federally-mandated marriage recognition rules. Both sections leave undisturbed the power of each state to define and regulate marriage for itself, and to control the incidents of marriage provided by state law. However, H.R. 3396 clearly establishes that if a state chooses to legalize same-sex marriage, it may not force that radical redefinition of marriage upon the federal government or upon other states. It preserves the right of the others states and of the federal government to choose whether to legalize or recognize same-sex marriage. The main principles underlying both sections are respect for federalism and for respect for the right of each state to settle the same-sex marriage definition question for itself.

This Statement will begin with a brief review of the principle of federalism in family law. Next it will review the apparent need for and effect of Section 3, which defines "marriage" for purposes of federal laws and programs, will assess how this section relates to established practice and principle, and consider the propriety of the section. Then, this Statement considers Section 2 in terms of what would and would not do, the apparent need for such legislation, and some of the potential criticisms of the section. This brief Statement concludes with a preliminary recommendation.[2]

Federalism and Full Faith and Credit:

[2]Because of the very limited time provided to prepare this Statement in order to meet the tight legislative schedule, my review of all these points is necessarily brief. The subjects could and should be considered in much more comprehensive detail, with more fully-developed discussion of each of the points raised herein.

Constitutional Protections for State Authority to Regulate Family Law

The constitutional allocation of governmental authority between the national government and the governments of the states, called *federalism*, is one of the most brilliant and fundamental principles of the Constitution of the United States. It is the core concept in our system of shared sovereignty between states and the federal government, one of the essential "balances" of power-against-power that prevents the abuse of power by either repository of governmental power. Federalism defines the constitutional relationship of the states and federal government. The general demarcation between the authority of the national government and the authority of the state governments provided by the Constitution is the line between external and internal governmental concerns. In the Federalist Papers, James Madison put it this way:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State.[3]

Hamilton suggested in Federalist No. 17 that the national government would be concerned with matters of "[c]ommerce, finance, negotiation, and war" while the States governments

[3]The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). In the same paper, Madison also noted: "[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty." *Id.* at 290.

would have priority in regulation "[t]he administration of private justice between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . ."[4]

Since 1789-the broad, general authority of the states to regulate family relations. and the absence of virtually any authority of the federal government to directly regulate family relations has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law. Indeed, the Supreme Court of the United States has observed, not infrequently, that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states."[5] Thus, the enforcement of family law is left primarily to state courts, and the bulk of the governing rules are state, not federal, laws. For many years, even federal courts have declined to exercise diversity jurisdiction over suits directly involving certain core family relations issues,[6] and even in cases involving federal question jurisdiction some federal courts have hesitated to hear domestic disputes.[7] Behind these federalism practices are such strong policy values as respect for the value of and

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[4]The Federalist No. 17, *id.*, at 118-120 (Alexander Hamilton).

[5]Sosna v. Iowa, 419 U.S. 393, 404 (1975); *see also* Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982); Moore v. Sims, 442 U.S. 415 (1979); Barber v. Barber, 62 U.S. (21 How.) 582 (1859).

[6]Ankenbrandt v. Richards, 504 U.S. ___, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992).

[7]*See* CHARLES A. WRIGHT, ARTHUR R.MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE ¶ 3609 (1984 & Supp. 1996); Martin Guggenheim, *State Intervention in the Family: Making a Federal Case Out of It*, 45 Ohio St. L. J. 399 (1984); *see also* Thompson v. Thompson, 484 U.S. 174 (1988).

appreciation of the need to preserve what Alexander Hamilton described as , "the constitutional equilibrium between the general and the State governments,"[8] desire to preserve and foster pluralism, belief that laws regulating families should reflect local values, respect for the expertise of state courts, and belief that the federal government has more than enough other important problems to address. H.R. 3396 appears to respect and protect these principles.

That does not mean, however, that the federal government is unable to exercise its constitutionally-delegated share of governmental authority whenever its action would indirectly affect family relations. Proper federal legislation and regulations dealing with matters clearly entrusted to the federal government such as commerce, defense, health, taxes, immigration, social security, and many other federal programs often have an indirect but very definite impact upon family relations. Likewise, the definition and protection of individual liberties protected by the Constitution under the Fourteenth Amendment sometimes means that federal law profoundly affects state family law. For example, some state laws regulating family relations have been invalidated, and state domestic relations rules and statutes modified or enjoined by or because of the proper federal exercise of powers delegated by the Constitution to the federal government.[9]

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[8]The Federalist No. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[9]*See, e.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Loving v. Virginia, 388 U.S. 1 (1967); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Zablocki v. Redhail, 434 U.S. 374 (1978); Orr v. Orr, 440 U.S. 268 (1979); Kirchberg .v Feenstra, 450 U.S. 455 (1981); Pickett v. Brown, 462 U.S. 1 (1983); Idaho v. Wright, 497 U.S. 805 (1990). This is not to suggest that the federal courts have never improperly crossed the federalism line in this area and invalidated state family laws when the constitutional basis for federal authority is tenuous or lacking. Fortunately, perfection is not required of either the

Because family law in the United States has developed separately within each state, by its own local courts and local legislature, American family laws vary significantly in both substance and procedure. Of course, no state has developed its family law entirely independently. Such factors as persuasive sister-state judicial opinions, effective new legislation enacted-in other states, proposals for uniform legislation, federal programs providing support and incentives for states to take a particular policy position, federal constitutional standards, national media, national special interest influences, and other homogenizing factors have produced many multi-state and national trends in the family laws of the various states. Nevertheless, despite these homogenizing influences the family laws of the American states remain remarkably diverse in policy and practice. Family law is a prime example of the "fifty different laboratories" idea of how federalism usually generates solutions to social problems much more quickly, how it preserves valuable cultural pluralism much more effectively, and how it fosters individual liberty much more fully than do centralized forms of governments.[10] Thus, federalism in family law is a structural principle required by the Constitution, established by the political and legal precedents of our nation, essential to the proper equilibrium of our government, and critical to the well-being of families in our nation.

There is a second structural principle that operates to preserve the constitutional balance and preserve the role and responsibilities of the states. That is the Full Faith and

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federal or state governments in order for the federal system to function generally well.

[10]*See generally* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy -- Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463-476-484 (1983).

Credit Clause. As the federalism principle polices the vertical relations of the national government and the states, the full faith and credit principle operates to police the horizontal relations of the states with other states. As the federalism principle protects the integrity of the states from possible overreaching by the national government, the Full Faith and Credit Clause protects the states from possible overreaching by each other. In a sense, federalism provides the longitudinal coordinate and full faith and credit provides the latitudinal coordinate defining the position of the states in the union under the compact of federation we call the Constitution. Both principles function together like a gyroscope to define the relational position of the states and the federal government, to protect and preserve the position of each individual states and the national government within the constitutional system that has functioned so successfully for so many generations in this great country.

If the federal government encroached upon the authority of the states that would distort the equilibrium along one axis, and if the states encroached upon each other that would damage the alignment along the other dimension. If one state were to encroach upon another and do so in the name of federal authority, that would be doubly distorting and damaging. That very situation is developing right now. The situation concerns a proposed radical redefinition of marriage (same-sex marriage) which one state may adopt, and the asserted mandatory imposition of that highly controversial and revolutionary deconstruction of marriage upon all other states in the name of the constitutionally-mandated marriage recognition principle of the Full Faith and Credit Clause. Closely related to that is the problem of the potential to impose same-sex marriage on federal law and programs by interpretation of ambiguous terms in federal laws as incorporating such a definition. These

are the problem to which H.R. 3396 is addressed.

Section 3 of H.R. 3396: Preserving the Balance of Federalism in Family Law

Section 3 of H.R. 3396 provides in pertinent part that: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." This clarifies that the terms "marriage" and "spouse," when used in federal laws, do not encompass same-sex unions. It defines what those marriage terms mean when used in federal law only. This is a routine function of any legal system.

H.R. 3396 does not impose its definition of marriage upon any state or state law, but applies only to federal law. Section 3 says only that if a state chooses to legalize same-sex marriage within its own jurisdiction (as it clearly may), that will not force the federal government to use that radical definition of marriage in federal programs and laws. This is a straightforward application of federalism in action.

There are four fundamental questions to ask about this section. First, is it accurate and true? Second, is there a need for this legislation? Third, does Congress have the power to do this? Fourth, is it is prudent as a matter of policy and language?

Accuracy. The first point is fairly straightforward. The terms "marriage" and "spouse" are used many times in federal law. Some of the provisions are decades, even centuries, old. Many of these federal laws were passed when homosexual relations were

criminally prohibited by all the states, and punished in federal law as well. Even today, with homosexual relations still criminally prohibited in nearly half of the states and same-sex marriage allowed in no state (or nation -- anywhere in the world), it is beyond question that Congress has never actually intended to include same-sex unions when it used the terms "marriage" and "spouses." Section 3 appears to reflect quite accurately the actual historical intent and expectation of Congress and federal law generally that when these marriage terms are used in federal laws, same-sex couples are not included.

However, sometimes these terms are used in federal law in a manner that suggests that Congress believed that the definition of "marriage" used in state law would be satisfactory for the federal law. Since the differences in state marriage laws (though numerous) were relatively minor, and since no state allowed such radical reconstruction of marriage as same-sex marriage, the passive presumption of adoption of state law has worked quite well. If some state legalized same-sex marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based -- namely, the essential fungibility of the concepts of "marriage" from one state to another. Section 3 accurately declares the premise upon which two centuries of federal legislation using marriage terms has been predicated.

Need. The fact that the federal law was passed when such marriages were not only not allowed but in most cases when such marriages were not even seriously considered, plus the persisting strong policy in many states against such unions would provide ample evidence that it would not be consistent with Congressional intent to include same-sex unions within the meaning of those familial terms. But that is just one of several possible interpretations.

Same-sex marriage advocates have already argued in several cases (such as immigration cases) for inclusion of same-sex marriages as "marriages" are defined in federal law. If a state legalizes same-sex marriage that pressure will only grow and intensify. It is reasonable to expect that some courts and agencies, given the opportunity, would interpret federal laws using the terms "marriage" and "spouse" to include same-sex couples who were married in a state that allowed such marriages. Congress needs to speak now and clearly.

For example, it would not be implausible to presume in many cases that Congress generally intended when it used a marriage term to include any type of marriage that the states allowed -- to defer to and simply incorporate the state definition of marriage. When defining domestic relations terms for federal law, courts often apply a presumption that the federal law intended to adopt the state law definition of the domestic relations term. For example, in an oft-cited case, the Fifth Circuit had to find a definition of "widow," for purposes of the Federal Employees Group Life Insurance Act.[11] It noted that some courts "following the lead of De Sylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956), which held that federal courts should look to state law in defining terms describing familial relations."[12] That presumption has its limits -- the limits of what Congress reasonably had in mind when it used the generic marriage term. And it is quite reasonable to argue that Congress had in mind only heterosexual nonincestuous unions involving one man and one woman generally (regardless of the details of consanguinity restriction, age

[11]Spearman v. Spearman, 482 F.2d 1203 (1973).

[12]*Id.* at 1204. *See also* Metropolitan Life Insur. Co., v. Jackson, 896 F.Supp. 318 (S.D.N.Y. 1995).

restriction, etc.). However, clearly, in some instances the question whether same-sex marriage if legal in a state where performed or recognized must be accepted in a particular federal statute or program could be a genuine issue. It is important enough that it should be decided *before* the cases arise, before the horse gets out of the barn.

The presumption that when using marriage terms in federal legislation Congress generally intended to defer to the relevant state definition of marriage underscores the need for Congress to clarify that it does not intend to include same-sex unions when it uses marriage terms in federal laws. In the absence of clear language courts could rule that same-sex unions valid in one state must be deemed marriages for purposes of federal statutes, regulations, programs, and agencies. That could create a transportable marriage status, good wherever federal law applies in all 50 states.

Section 3 provides specific legislative direction. It explicitly declares that Congress does not intend to include same-sex unions when it or federal agencies use the terms "marriage" or "spouses" in federal laws. That clarifies any ambiguity that would arise about the meaning of "marriage" in federal law should a state legalize same-sex marriage.

Congressional Authority. The power of Congress to adopt such legislation as Section 3 of H.R. 3396 is also clear (although there are some exceptions that could cause confusion if care is not taken to remember the very narrow scope and application of the provision). The principle of federalism has two dimensions. Just as it defines and protects the role of the states within the hybrid state-federal system, it also defines and protects the role of the federal government within the same hybrid system. The states cannot dictate to the federal government how it must regulate behavior, define terms, what standards it will use to grant or

restrict benefits in federal programs, agencies and laws.

For example, Congress has established a taxation system that gives particular benefits and persons to "married" couples," and it is federal law (incorporating some state law as a matter of federal choice) that defines what "married" means for purposes of the federal tax system.[13] This is true even though the direct regulation of marriage is clearly outside of the scope of federal authority. While states have the sole and exclusive authority to regulate domestic relations within the state, the federal government has the sole and exclusive authority to regulate the federal tax system.[14] When the federal government uses the term "marriage" or "married" in federal tax law, it is not creating marriage or domestic relations law; it is creating tax law. It may define the term "marriage"however it chooses (within other constitutional limits) for purposes of the tax law, in light of the policies and objectives underlying the federal tax system.

Likewise, in Bankruptcy law, it is well-established that "what constitutes alimony, maintenance, or support will be determined under the [federal] bankruptcy laws, not state law."[15] For another example, federal immigration law give certain valuable priorities and

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[13]For example, persons who are married under state law but are legally separated are not treated as "married" for purposes of federal income tax law. I.R.C. §§ 71 (b), 7703(a)(2), (b). Likewise, a couple who consistently obtains a divorce at the end of the year to obtain "single" status for tax filing, but remarries early the following year, will be considered "married" (regardless, apparently, of state law). Rev. Rul. 76-255, 1976-2 C.B. 40.

[14]Congress and federal court often incorporate state domestic relations law definitions of family law terminology used in federal laws and programs, but they do so *as a matter of federal law*. The federal law-maker can change the definition when it wishes and depart from state law when it wishes.

[15]H.R.Rep. No. 595, 95th Cong., 1st Sess. 364 (1977), U.S. Code Cong. & Admin News 1978, pp. 5785, 6319, *cited in* Harrell v. Harrell, 754 F.2d 902 (11th Cir. 1985); *see also* Williams v. Williams, 703 F.2d 1055, 1056 (8th Cir. 1983) ("whether a particular debt is a

benefits to persons who are married to American citizens. Congress, however, intended only to give those benefits to persons who have a bona fide lifetime commitment marriage, not people who get married temporarily just to get the immigration advantage. In some states, however, persons who get married solely to get an immigration advantage, who do not intend to live together as husband and wife, may have a valid marriage under local marriage law. If that state definition of "marriage" were imported into the federal immigration laws, it would undermine the policy of the federal law and thwart the design of the federal immigration system. Thus, Congress has deliberately defined in the immigration laws the kinds of marriages to which it gives immigration benefits and that definition is much more narrow than any of the states define marriage.[16] That is not an improper regulation of marriage by Congress, because it is not really the regulation of domestic relations at all. Rather, it is the regulation of federal immigration policy, which is clearly within the constitutionally-delegated authority of the federal government.

In a related field dealing with divorce, a few years ago questions arose concerning whether state courts could include certain federal retirement and disability benefits when dividing marital or community property upon divorce. Division of property incidental to divorce is another area of domestic relations long understood to be under primary control of

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support obligation or part of a property settlement is a question of federal bankruptcy law, not state law.");Shaver v. Shaver, 736 F.2D. 1314, 1316 (1984) (Bankruptcy courts look to Federal law, not state law to determine whether an obligation is actually in the nature of alimony, maintenance or support).

[16]*See, e.g.*, 8 U.S.C. §§ 1151(b), 1153-1155, 1186(a)(1), (b) (1988); Azizi v. Thornburgh, 908 F.2d 1130 (2d Cir. 1990); 1 Lynn D. Wardle Christopher L. Blakesley, Jacqueline Y. Parker, CONTEMPORARY FAMILY LAW §2:30 (1988).

the states. When state courts in California went ahead and included those federal benefits in the division of the community property, however, the Supreme Court of the United States reversed those judgments holding that the control and division of federal pensions and employment benefits was governed by federal law, and finding that Congress had not intended those benefits to be treated as divisible community property.[17] A short time later, Congress amended several of the relevant federal laws to provide that railroad and military benefits may be divided upon divorce as community or marital property, and went much further to reform what should be done with federal employment benefits when the federal employee is divorced or dies.[18] That legislation further underscored that the regulation of federal benefits is a matter of federal law, even when it uses family terms or is incorporated into state family property law and dissolution procedures.

These are just a few of hundreds of examples in which Congress or federal agencies use marriage and other domestic relations terms in federal law and the meaning of those term is ultimately determined as a matter of federal law.[19] The question is what did Congress intend. This is not a novel principle, it is as old as our Republic; it is well-established, settled

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[17]*See* Hisquidero v. Hisquidero, 439 U.S. 572 (1979); McCarty v. McCarty, 453 U.S. 210 (1981); Mansell v. Mansell, 490 U.S. 581 (1989).

[18]*See, e.g.*, 45 U.S. C. § 231 (1986); 10 U.S.C. § 1408 (1983 & Supp. 1995) *see further* 5 U.S.C. § 8345(j) (19__); 22 U.S.C. §§ 4054, 4069 (19__); Brett R. Turner, EQUITABLE DISTRIBUTION OF PROPERTY § 6.06 (2d ed. 1994).

[19]*See generally* Southern Pacific Transportation Co. v. United States, 462 F. Supp. 1193, 1208 (1978) (state laws that directly conflict with the purposes of the Federal Regulatory program are inappropriate for adoption, and a court face with conflicting state laws would adopt a Federal Rule); Burnett v. Gratton, 468 U.S. 42, 56 (1984) (the court is presented with this task because Congress has seen fit not to prescribe a specific statute of limitations to govern actions under most of the Federal Civil rights statutes, instead directing courts to apply state law if "not inconsistent" with Federal Law).

doctrine.[20] It is settled by the Supremacy Clause of the Constitution.

Conceptually, there is a profound difference between the power of states to define and regulate the status of marriage and the extent to which state benefits, burdens, programs, and privileges will be offered incidental to such status, and the power of Congress to define and regulate whether and to what extent some or any federal benefits, programs, and privileges will be available to individuals, to married couples, to other couples, and to other groups. Section 3 of H.R. 3396 reaffirms and protects this federalist distinction.

If Congress were attempting to impose the definition of "marriage" upon the states, to make them use that definition in their marriage and domestic relations laws, a serious constitutional issue would arise. In such cases, federal law supersedes state family law only upon a strict showing of deliberate preemption. As the Supreme Court noted in Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979): "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. Wetmore v. Markoe, 196 U.S. 68, 77 (1904)." In McCarty v. McCarty, 453 U.S. 210, (1981) the Court reiterated that "'[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.' Hisquierdo, 439 U.S., at 581." Moreover, "[a] mere conflict in words is not sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to

[20]This preemption principle is true in other areas of federal law as well. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988) (natural gas regulation).

require nonrecognition." *McCarty,* 453 U.S. at __ (citing *Hisquierdo*, 439 U.S., at 581-583). Justice Rehnquist noted in his dissent in *McCarty* that he could find only five instances in which that kind of preemption (forcing federal standards upon state law) had occurred in the history of community property disposition. 453 U.S. at 237. But this is not such a case. H.R. 3396 does not impose federal law onto state law, but seeks to prevent the imposition of one specific possible state law definition of marriage upon federal programs, laws, and agencies.

Propriety of Policy and Language.

Section 3 does not interfere with the ability of the states to define and regulate marriage for themselves. Nor does it deprive Congress of the ability to define marriage some other way in any particular legislation if Congress were to decide that for some particular program even same-sex unions should be included as marriages. Section 3 only sets the default definition, the general standard. Since the actual presumption of both history and of contemporary American society is that marriage does not entail same-sex couples, that presumption is the only reasonable presumption.

Allowing federal laws and programs to be construed to include same-sex unions as marriages would be extremely divisive. It would be perceived as, and have the effect of transporting same-sex marriages from one state to another for purpose of federal laws (possibly as broad as social security, pension laws, tax laws, bankruptcy laws, commercial law, public assistance programs, etc.). That would create conflict and resentment in states with strong policies in favor of heterosexual marriage only. It would have the effect of imposing same-sex marriage upon the states to the extent that state laws and programs are integrated with federal laws (for instance AFDC programs, medicaid and medicare programs,

pension laws, etc.). Given the intense feelings that could be aroused by such a cram-down of same-sex marriage upon the states, that could weaken and severely undermine the cohesiveness of (if not begin the dismemberment of) the union.

Moreover, this is the kind of issue that is best resolved before the cases arise. Waiting until after some state legalizes same-sex marriage and a flood of cases are filed demanding that same-sex unions formed in such a state be treated as "marriages" for purposes of federal laws would be very unwise. It would invite a multitude of unnecessary litigation, and create confusion, inconsistency, and unfairness. Different courts in different districts and circuits might reach contradictory conclusions adding to the uncertainty. It could put at risk a number of couples. For example, what would be the situation of a same-sex couple who marry where it is legal and begin to get a federal benefit based on the interpretation of the term "marriage" in the local law if that couple moved to another jurisdiction where the court had ruled that such unions are not "marriages" for purposes of federal law? Clearly, the wisest interpretative course to follow would be to decline to incorporate that radical redefinition of "marriage" into federal law. And equally clearly, it is best to clarify this in advance.

When the federal government uses a term that is generally associated with family law, it is often presumed to use the term as it is commonly used by the sovereigns (states) who have the primary power to regulate in that area, as previously noted. But that presumption is merely a rebuttable presumption that arises only in the absence of manifest congressional intent. Section 3 clarifies the congressional intent that for the specific purposes of federal law, same-sex unions are not deemed "marriages", even if for purposes of some state's laws they are considered marriages. That is the most accurate historical definition, the most reasonable,

and the most consistent with public understanding and expectations.

As a matter of word-crafting, I wonder if the language might be a little more direct. For example, it might be more plain if everything after the word "marriage" in line 23 were deleted and replaced by the following: "does not include same-sex unions, and the terms "spouse," "husband" and "wife" do not include persons in same-sex unions."

Section 2 of H.R. 3396 Clarifies That Federal Full Faith and Credit Principles Permit But Do Not Compel Others States to Recognize Same-Sex Marriages

Section 2 of H.R. 3396 provides, in pertinent part, that:

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

The issue to which this Section is addressed is whether the federal government's full faith and credit power should be used to force one state's acceptance of a radical new form of "marriage" upon the other states. Section 2 answers, "*No,*"as a matter of congressional authority and intent.

What Section 2 Would Do. Section 2 clarifies the "effect" that federal full faith and credit rules require a state to give to public acts, records and judicial proceedings from another state that establish or recognize or give legal effect to a same-sex relationship as a

marriage. Three details should be noted. First, nothing in Section 2 prohibits any state from recognizing same-sex marriage or recognizing other states' acts, records or judicial proceedings treating same-sex unions as marriages. Each state is still free to give such effect to another states's legalization of same-sex marriage if it chooses to do so. A state may have or create statutory or common law conflict of laws rules that recognize same-sex marriages if legal in other states, and Section 2 does not interfere with that at all. Second, Section 2 specifies that the federal full faith and credit rules do not require other states to recognize or enforce same-sex marriages legalized or recognized in another state. Thus, H.R. 3396 takes a "neutral" position, that federal full faith and credit neither prohibits nor requires any state to recognize same-sex marriage acts, records and judgments from other states. Third, Section 2 applies not only to laws from others states (choice of law) but also to judgments. Thus, if a same-sex couple were married in Hawaii (to continue the earlier hypothetical) and got a declaratory judgment recognizing their "marriage" as valid, or if they got a divorce and award of alimony arising out of the same-sex marriage relationship, Section 2 would allow, but not require, others states to recognize (or to not recognize) that judgment. Again, it would simply remove the potential federal compulsion (one way or the other) and leave it up to the second state to decide for itself what effect to give such judgments.

Need. If one state legalizes same-sex marriage (for purposes of example, let us assume that Hawaii were to legalize same-sex marriage), it is certain that many homosexual couples from many other states would go the Hawaii, get married in Hawaii, then return back to the states they came from and demand that those states recognize their "marriage" for purposes of the second state's laws (e.g., for purposes of marriage, divorce, adoption, custody,

guardianship, visitation, health, education, alimony, property division, state taxes, probate, wills, trusts and estate law, etc.) Many same-sex couples living and married in Hawaii also, in time, would move to other states and demand recognition of their marriages by the other states. Lawsuits would be filed in federal and state courts by same-sex marriage advocates demanding that the courts order the second state to recognize same-sex marriages from Hawaii even if the second state explicitly prohibited same-sex marriage. They would argue that the full-faith and credit clause of the U.S. Constitution compels those states to recognize a same-sex marriage if such marriages are legal in the state of celebration. If they had obtained a judicial decree recognizing their relationship as a marriage or awarding legal rights arising out of a marital relationship, they might have a good argument (at least plausible) using federal full faith and credit law to force others states to recognize that marital status or incident, even against the statutes or policies of the second state.

As a matter of constitutional law, it is my professional opinion that it would not violate the full faith a credit clause of article IV, section 1 of the Constitution for a second state to refuse to recognize a same-sex marriage legalized in Hawaii when the second state has a strong public policy against same-sex marriage and when the same-sex couple lives in or has some other significant contact with the second state. I believe that the constitutional history and case precedents overwhelming confirm that the second state constitutionally could refuse to recognize the same-sex marriage if it chose to do so, or it could recognize the same-sex marriage, if it chose to do so. The Full Faith and Credit Clause would not compel the state either way.

In the case of a judicial decree, the question is much closer under existing case law.

In that situation, the interest (probably the clearly greater interest) of the second state would have to be shown, and the public policy of the second state would have to be very strong, very clear, and very important. For example, to continue the earlier hypothetical, suppose a same-sex couple from Utah flew to Hawaii, got married, got a declaratory judgment of the validity of their marriage (or some other legal entitlement based on the status of marriage), then returned to Utah (which by statute not only prohibits same-sex marriage but also prohibits recognition of same-sex marriage if legal where performed) and demanded that Utah recognize their marriage or that incident of their marriage. In my opinion the interest of Utah in not recognizing that evasive marriage that would flaunt and undermine a strong public policy of Utah (which strongly favors and protects heterosexual marriage exclusively) would be sufficient to justify Utah's refusal to recognize the same-sex marriage.

Briefly, the basis for my general opinion is the text and history of the Full Faith and Credit Clause, and a long-established line of decisions by the Supreme Court of the United States. For example, in *Allstate Insurance Co. V. Hague*,[21] the Court approved the application of a forum state's law in a case in which another state clearly had the greater weight of contacts with the parties and incidents giving rise to the legal issue. The Court held that the forum state could apply its own law so long as it had "significant contact or a significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its law.[22] That doctrine is reflected in many other Supreme Court decisions

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[21]449 U.S. 302 (1981).

[22]*Id.* at 308.

dating back many decades.[23] Moreover, it is worth noting that even the state of Hawaii, where the same-sex marriage controversy is centered in both the state courts and the state legislature, has officially taken the position in the pending *Baehr* litigation about same-sex marriage that "it may reasonably be expected that, at a minimum, other jurisdictions will not recognize Hawaii same-sex marriages as valid . . . ."[24] Much scholarly commentary is in accord. From this perspective, Section 2 states the obvious and some could very reasonably ask why it is even necessary.

However, again, there are other opinions on the subject. In recent years, especially since 1990, quite a number of same-sex marriage advocates have written law review articles asserting that if Hawaii or any other state legalizes same-sex marriage, all other states would be required by the Full Faith and Credit Clause of the Constitution to recognize same-sex marriage. In other words, if any state were to legalize same-sex marriage, they would force all other states to do so also through the Full Faith and Credit Clause. For example, in a recent law review article Deborah M. Henson argues that "the Supreme Court has allowed far too much laxity with the full faith and credit mandate."[25] She believes that Article IV, § 1

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[23]*See, e.g.*, Carroll v.Lanza, 349 U.S. 409, 413-14 (1955); Richards v. United States, 362 U.S. 1, 15 (1962); Nevada v. Hall, 440 U.S. 410 (1979); Griffin v. McCoach, 313 U.S. 498, 506 (1941); Pacific Employers Insurance Co. V. Industrial Accident Commission, 306 U.S. 493 (1939).

[24]Baehr v. Lewin, Civil No. 91-1394-05, Defendant's Response to Plaitniffs' First Request for Answers to Interrogatories 8,9 (Dec. 17, 1993).

[25]Deborah M. Henson, *Will Same Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitation on States' Choice of Law regarding the Status and Incidents of Homosexual Marriage Following Hawaii's Baehr v. Levin*, 32 U. LOUISVILLE J. FAM. L. 551, 584 (1993-1994) (hereinafter "Henson").

should and can be interpreted to compel other states to recognize same-sex marriage if Hawaii or some other state legalizes same-sex marriage.[26] Several other writers in law review and other publications have made similar arguments calling for "invigorating" the Full Faith and Credit Clause to require states to recognize same-sex marriages,[27] asserting compulsory recognition and enforcement in all states of "marital decrees" recognizing same-sex marriages,[28] or asserting that "[i]f Hawaii legalizes same-sex marriages, the effects will be felt across the country since other states must recognize gay marriages performed in Hawaii under the Full Faith and Credit Clause of the U.S. Constitution."[29]

This is not a minor or speculative concern. It is a very serious matter to propose to use federal authority (the Full Faith and Credit Clause) to force unwilling states to recognize same-sex marriages. This concern is substantial enough that within the past year or so (mostly within the past five months) bills have been introduced in at more than 20 state legislatures specifically addressing the issue of same-sex marriage, to prohibit same-sex

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[26]*Id.* at 584-590.

[27]Nancy Klingeman & Kenneth May, *For Better of For Worse, In Sickness and in Health, Until Death do Us Part: A Look at Same-Sex marriage in Hawaii*, 16 U. HAW. L. REV. 447 (actual pg # not on WL, but at West Law 16 UHILR 447, it is on pp. 40-45).

[28]Habib A. Balian, Note, *Til Death Do Us Part: Granting Full Faith & Credit to Marital Status*, 68 S. CAL. L. REV. 397, 401, 406-408 (1995).

[29]Anne M. Burton, Note, *Gay Marriage -- A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil & Political Rights*, 3 IND. J. GLOBAL LEGAL STUD. 177, 195 (1995); *but see id.* n.22. *See further* Evan Wolfson, *Crossing the Threshhold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Debate*, 21 N.Y.U. Rev. L. & Soc. Change 567, 612 n. 196 (1994-95) (referring to another forthcoming article arguing that Full Faith and Credit mandates interstate recognition of same-sex marriage). Barbara J. Cox , *Same Sex Marriage and Choice of Law: If We Marry in Hawaii are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1041 n. 23 (1994). Similar claims are made in non-legal literature; but I confine myself herein to reviewing the law reviews.

marriage and sometimes to declare specifically that a particular state will not recognize same-sex marriages even if entered into in states where they are legal because same-sex marriage violates such strong public policy. At least seven states (most within the past few months) have adopted legislation declaring that they will not recognize same-sex marriages because of strong public policy[30]

Additionally, there is grave concern that some states or courts will interpret the federal Full Faith and Credit rules one way, and others another way, creating enormous confusion in federal law. Moreover, there will undoubtedly be enormous resentment and backlash against Washington and the federal government if the radical interpretation (that federal Full Faith and Credit requires states to recognize same-sex marriage) proposed by some of the law review writers is accepted. Moreover, "the State of Hawaii is concerned that adoption of same-sex marriage in Hawaii would render not only same-sex marriages authorized in Hawaii under such law unenforceable in other States or elsewhere, but would render all Hawaii marriages unenforceable in one or more jurisdictions."[31] Thus, there clearly is a need for this legislation.

Power of Congress. There is no serious doubt that Congress has the power to enact legislation defining the "effect" of other states' laws, records and judgments. Sentence two of the Full Faith and Credit Clause of the Constitution (Article IV, §1) explicitly provides that

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[30]Lambda Legal Defense and Education Fund, Inc., Anti-Marriage Bills 1996 -- State-By-State Report, Evan Wolfson, Director of the Marriage Project (May 8, 1996) at 1. (This report lists seven states which has recently adopted same-sex marriage non-recognition laws and another that apparently has prohibited same-sex marriage.)

[31]Baehr v. Lewin, Civil No. 91-1394-05, Defendant's Response to Plaitniffs' First Request for Answers to Interrogatories 8 (Dec. 17, 1993).

"[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof*." The Congressional Research Service of the Library of Congress has stated: "Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States."[32] A host of scholarly authority for many decades concurs with this assessment.[33] A recent law review article by Professor Douglas Laycock very eloquently and thoroughly makes this point.[34] I concur unequivocally that this kind of "effect" legislation is clearly within the power of Congress to enact.

Supreme Court precedent supports the authority of Congress to enact H.R. 3396. In Sun Oil Co. v. Wortman,[35] for example, the Court noted: " *that Congress [can] legislate to that effect under the second sentence of the Full Faith and Credit Clause . . . .*"" Likewise, in Thompson v. Thompson,[36] the Court affirmed another "effects" clause enactment and declared:

> Because Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations, the

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[32] CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 869-870 (1987).

[33] *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 24-26 (1991); Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 24 YALE L.J. 421 (1919); Brainerd Currie, *Full Faith and Credit Chiefly to Judgements: A Role for Congress*, 1964 SUP. CT. REV. 89.

[34] Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 301 (1992).

[35] 486 U.S. 717, 729 (1988).

[36] 484 U.S. 174, 182-183 (1988).

> Act is most naturally construed to furnish a rule of decision for courts to use in adjudicating custody disputes and not to create an entirely new cause of action. . . . The language and placement of the statute reinforce this conclusion. The PKPA, 28 U. S. C. § 1738A, is an addendum to the full faith and credit statute, 28 U. S. C. § 1738. This fact alone is strong proof that the Act is intended to have the same operative effect as the full faith and credit statute. Similarly instructive is the heading to the PKPA: "Full faith and credit given to child custody determinations." As for the language of the Act, it is addressed entirely to States and state courts. Unlike statutes that explicitly confer a right on a specified class of persons, the PKPA is a mandate directed to state courts to respect the custody decrees of sister States. . . . We agree with the Court of Appeals that "[i]t seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738."

Similarly in Sherrer v. Sherrer, 334 U.S. 343, 366 (1947) the Court declared: "We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court." (Frankfurter, J., dissenting). Also, in Pacific Employers Ins. Co. v. Industrial Accident Comm'n,[37] the Court observed:

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[37]306 U.S. 493, 502 (1939) (emphasis added).

> And in the case of statutes, the extrastate effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

More than one hundred eighty years ago, the Supreme Court in Mills v. Duryee,[38] noted: "It is manifest however that the constitution contemplated a power in congress to give a conclusive effect to such judgments." Thus, it is clear that Congress has the authority under the Constitution to declare the "effect" which the acts, records or judicial proceedings of states that legalize same-sex marriage must be given in other states, and that is precisely what Section 2 of H.R. 3396 would do.

Propriety of Statutory Language. Section 2 of H.R. 3396 takes a neutral position about interstate recognition of same-sex marriage. It does not require or prohibit any state to recognize or give effect to same-sex marriage, but it does prevent federal full faith and credit principles from forcing states to take one position or the other. It establishes clearly a "hands-off" federal position -- that federal authority will not be manipulated to compel states to take either a pro- or contra-same-sex marriage position. Thus, it lease the matter to each state, individually, to determine for itself.

This is a modest and prudent approach. It is generally consistent with the history of

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[38] 11 U.S. (7 Cranch) 481, 485 (1813).

interstate recognition of marriage on difficult issues, and harmonious with the federalism principle that federal power ought not override the authority of each state to establish its own law of domestic relations. It is fair. And it is timely.

However, some might argue that the language of Section 2, lines 6-8: "respecting the relationship between persons of the same sex that is treated as a marriage" could be more precise, to clarify what is meant by "respecting," for example. By "respecting" I believe that Section 2 apparently means "giving marital status, incident or other legal effect in law to same-sex relationships." Perhaps this should be clarified in text (best, or statutory prologue or legislative history).

Also, perhaps a "significant contact between the second state and the case , parties or matter in controversy could be required in the text (best, or statutory prologue or legislative history). It would be extremely rare for a second state to not have a significant contact sufficient to justify application of its own strong policy against recognizing same-sex marriage. However, if such a rare case occurred, in which the second state was totally without any significant contacts, and the only interested state recognized same-sex marriage, full faith and credit might arguably preclude nonrecognition.

Conclusion. H.R. 3396 is clearly within the power of Congress to enact. There is a need. And it is prudently written, in general. Thus, based on my review and analysis to date, I recommend that it be fine-tuned, and enacted.

Mr. CANADY. Thank you, Professor.
Ms. Birch.

STATEMENT OF ELIZABETH BIRCH, EXECUTIVE DIRECTOR, HUMAN RIGHTS CAMPAIGN

Ms. BIRCH. Good afternoon, Mr. Chairman and members of the committee. As you've heard, my name is Elizabeth Birch and I'm executive director of the Human Rights Campaign, which is the Nation's largest lesbian and gay political organization. And I do want to clarify for the committee that, indeed, I was aware that I was a lesbian very, very young, and I certainly regard it to be a gift from God.

I'd like to also give special thanks to Evan Wolfson and the Lambda Legal Defense and Education Fund for their very hard work on these matters over the last several months.

I appreciate the opportunity to offer testimony today on H.R. 3396, which has been inappropriately labeled "Defense of Marriage Act." It is more appropriately labeled "The Federal Intrusion Act of 1996" or perhaps "The Dole Campaign Rehabilitation Act of 1996." The definition and administration has in all previous times in our history been left to the States of this Nation. The proposed legislation is not only a bad idea, it is an absolutely unprecedented intrusion into State sovereignty and is unconstitutional for those reasons. The States don't need you, they have never needed you in over 200 years, to figure out substantive definitions of marriage and they do not need you now.

Although I plan to address the legal and constitutional considerations and issues with regard to this bill, I'd also like to briefly present the true state of affairs with regard to being a gay citizen in America as we head toward the 21st century. You should all know that lesbian and gay Americans are your constituents; they are on your staffs; indeed, they are in the Congress of the United States and in thousands and thousands of American homes, including many of yours. We are members of your own families. Gay Americans are found in every community, in all walks of life. We are conservatives; we are liberals, Christians, Jews. We are Democrats; we are Republicans and Independents, and we are of every race.

And being gay does not even affect the extent to which someone cherishes the true values of this Nation, the most sacred of which are fairness and nondiscrimination. There have always been gay Americans in the history of this country, and there will always be gay Americans.

The real issue is: What does a nation do with its lesbian and gay sons and daughters? Part of what I want you to know is that those of your constituents, and perhaps your own children, who are gay and lesbian are strong and gifted. They are heroic in the way they have conquered barriers to their own self-respect and the courage with which they have set out to serve a higher good. All were created by God, and you have a very lofty responsibility to represent each and every one of them.

You should also know, and the American people should know, that it is very precarious to be gay in America today. No Federal law protects gay or lesbian people in the workplace, and I'd love

to see this committee take up that issue. Beyond loyalty and commitment, beyond productivity and innovation, you can be fired from your job in this country simply because you are gay.

Neither are the other basic protections in place, such as in the areas of housing or public accommodation. If we serve in the armed forces of this Nation, we can expect to be subjected to a gag order known as "don't ask; don't tell." We face violence and, as the Bush administration established, young gay and lesbian people are at particular risk for severe abuse and suicide.

And there is another important right we are denied: the freedom to choose to marry, the right to enter into a civil legal union, the right to assume the duties and responsibilities regarding the person with whom we share a lifelong commitment. We are denied the right to put into practice the values embodied in any civil marriage: the values of caring, commitment, mutual interdependency, and love. We are continuously accused of lacking stability and the deepest kind of commitment in our relationships. Well, let me assure all of you our relationships are nothing short of miracles, given all that tears at them.

But that is not why we are here today or what this legislation is about.

Mr. CANADY. Without objection, you'll have 1 additional minute.

Ms. BIRCH. Let's tell the truth about this legislation. Nowhere in this Nation can two members of the same gender marry. One State, Hawaii, is considering this. We will not know that decision for 2 years. This is nothing more than a campaign ploy to rip apart this country, divide, and to scapegoat one group of Americans. The political climate is marked by demagoguery, hatred, ignorance, and upheaval—with the scapegoating of gay Americans on the rise. The public overwhelmingly rejects that kind of scapegoating. But there are those who continue to fan the flames of prejudice by trading on the most cruel and extreme images, as though they reflect the fullness of our community. What you are trying to do with this law is patently unconstitutional, absolutely unconstitutional. Never before—never—has the Congress of the United States entered into the substantive definitional issue under the guise of marriage, under the guise of full faith and credit, and you should not do it now.

[The prepared statement of Ms. Birch follows:]

PREPARED STATEMENT OF ELIZABETH BIRCH, EXECUTIVE DIRECTOR, HUMAN RIGHTS CAMPAIGN

Good afternoon Mr. Chairman and members of the committee. My name is Elizabeth Birch and I am Executive Director of the Human Rights Campaign, the nation's largest lesbian and gay political organization. I would like to give special thanks to Evan Wolfson and Lambda Legal Defense & Education Fund for their hard work on this important issue over the past many months.

I appreciate the opportunity to offer testimony today on HR 3396, which has been inappropriately labeled the "Defense of Marriage Act." It is more appropriately labeled "The Federal Intrusion Act of 1996." The definition and administration of marriage has in all previous times in our history been left to the states. The proposed legislation is not only a bad idea, it is an unprecedented intrusion into state sovereignty and is

unconstitutional. Although I plan to address the legal and constitutional considerations at issue with regard to this bill, I would like to take a moment to briefly present state of affairs with regard to gay citizens as we head toward the 21st Century in America.

Lesbian and gay Americans are your constituents, your sports heroes, your co-workers, your neighbours -- and in thousands and thousands of American homes, including many of yours, we are members of your own families. Gay Americans are found in every community, in all walks of life, at every income level and in all age groups. We are conservatives, liberals, Christians, Jews, Democrats, Republicans and independents -- and of every race.

And being gay does not even affect the extent to which someone comes to love this nation or cherish its values -- the most sacred of which are fairness and nondiscrimination. We work hard and pay taxes. There have always been gay Americans. There will always be gay Americans. The real issue is what does a nation do with its lesbian and gay sons and daughters?

Part of what I want you to know is that many of your constituents, your staff or family members -- perhaps your own children -- who are gay and lesbian are gifted and strong. Some are famous; most are not. But many are heroic in the way they have conquered barriers to their own self respect and the courage with which they have set out to serve a higher good. All were created by God. And you have the lofty responsibility of representing each and every one of them.

You should also know and the American people should know that being gay in America is still a very precarious legal situation. No federal law protects gay, lesbian or bisexual Americans in the workplace. Beyond loyalty and commitment, beyond productivity and innovation, you can be fired from your job simply because you are gay. Neither are there other basic protections which most Americans take for granted -- such as in the areas of housing and public accommodation. If we serve in the armed forces of this nation, we can expect to be subjected to a gag order known as "Don't Ask, Don't Tell." We face violence

and, as the Bush Administration established, young gay and lesbian people are at particular risk for severe abuse and suicide.

And there is one other important right we are denied -- the freedom to choose to marry -- the right to enter into a civil legal union -- the right to assume the duties and responsibilities regarding the person with whom we share a life long commitment. We are denied the right to put into practice the values embodied in any civil marriage -- the values of caring, commitment, mutual interdependency and love. We are continuously accused of lacking stability and the deepest kind of commitment in our relationships -- let me assure you, our relationships are nothing short of miracles when one considers all that tears at them.

And this is not the first time in our country that a group of people have been denied the freedom to marry. There was a time during the cruelest episode in our nation's history -- slavery -- when African-Americans were not permitted to marry, even each other. There was a time when Asian-Americans were not permitted to marry in some Western states. And in our lifetime, it was illegal in many states for members of different races to marry -

- in our lifetime! It was not changed until 1967. And there was a time when a woman who married became the legal property of her husband. The legal institution of marriage has been used to discriminate and control people in America for most of our history. And at each juncture, most American people thought those laws were sound and their wisdom self evident. The good news is we as a nation have a capacity to learn and grow -- and it is my prayer gay Americans can hang on to this hope.

But that is not why we are hear today or what this proposed legislation is about. Lets tell the truth about the context of this bill. In no state in this country are two people of the same gender permitted to marry legally. One state -- Hawaii -- is looking at this issue because of a case moving through its courts. No final decision is expected for two years. This bill would do nothing to change that.

Most important, in the entire history of this nation -- for over 200 years -- never has the federal government intervened in the state regulation of marriage. Never.

We must also acknowledge that we are at a watershed time in our history as a country -- and a critical hour for those of us who are gay and lesbian in America. The political climate is marked by increasing demagoguery, hatred, ignorance and upheaval -- with the scapegoating of gay Americans on the rise. Although the American public overwhelmingly rejects such scapegoating, there are those who continue to fan the flames of prejudice by trading on the most cruel and extreme images as though they reflect the fullness of our community.

So what is really going on here? I am afraid this legislation will be viewed as a mean-spirited, cynical election year ploy to divide the nation, to score political points and to further scapegoat one group of Americans unnecessarily. In fact, prior to this election season, every attempt to nationalize domestic relations, whether through constitutional amendment or act of Congress, has been rebuffed as unconstitutional or an ill-advised intrusion of the federal government into an area left to the states.[1] These hearings

[1] In fact, the U.S. Supreme Court has never ruled on whether a state must provide full faith and credit (in the same manner as a final judgment) to another state. It is well-settled that all judgments, including judgments of divorce, must be accorded full faith and credit one state to the next. "With

should be viewed as the second major Dole Campaign news of the day and the bill should properly be labeled the "Dole Campaign Rehabilitation Act of 1996." Surely the Congress has much better things to do -- like attend to the business of the nation.

The Legal History of Marriage in America

Let us take a look at this bill and the issue of marriage. Throughout the history of this nation, marriage has always been defined by the laws of each of the fifty states. At no time has marriage been defined by federal law. "Without exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic." Aukenbrandt v. Richards, 112 S. Ct. 2206 (1992). It is well-established that "there is no federal law of domestic relations." De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

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regard to the extrastate protection of rights which have not matured into final judgments, the full faith and credit clause has never abolished the general principal of the dominance of local policy over the rules of comity." Bond v. Hume, 243 U.S. 15 (1917). Many states resolve the issue of whether to recognize the marriage of another state by applying a conflicts of law analysis. There is a public policy exception to such an analysis.

Indeed, this is not the first time when Congress has been pressured to federalize marriage. For example, not so long ago, there was national furor over the notion that one could go to Reno, Nevada to obtain a quick divorce. Congress exercised legislative restraint because it understood that it lacked the constitutional authority to alter the substantive definition of marriage for any purpose or for any state in the union.

The proposed legislation constitutes a radical and unprecedented intrusion by Congress into state sovereignty. Here is what the U.S. Constitution *says*:

"Full Faith and Credit shall be given in each State to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

As a doctrinal matter while the proponents of the bill purport to be protecting states' rights and interests, they are in fact diluting those rights and interests. Under the guise of protecting states' interests, the proposed statute would infringe upon state

sovereignty and effectively transfer broad power to the federal government. This was never intended.

Sentence one of the clause is very clear: Every state is required to recognize the official public acts and judicial proceedings of other states. No Congressional role is articulated in sentence one. The purpose of the clause was to promote uniformity and predictability among the states. While we tend to take the concept of a *United* States of America for granted in the latter part of the 20th Century, an early Supreme Court case sets forth clearly the reason for the Full Faith and Credit clause: The very purpose of the clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws and the judicial proceedings of the others, and to make them integral parts of a single nation." Williams v. North Carolina, 317 U.S. 287, 295 (1942).

There is no plain meaning of the first sentence of the Full Faith and Credit clause that would allow Congress to conclude it

has the authority to limit full faith and credit or provide definitional, substantive guidance to the states.

Moreover, there is no support for the proposed legislation in the second sentence of the clause. What that sentence states is that Congress may pass implementing legislation to carry out or facilitate the logistical mandate of full faith and credit. Specifically, Congress may pass laws to establish the manner in which state proceedings may be *proved* and the specific *effects* in the states of such recognition.[2] Nowhere is Congress empowered to limit full faith and credit or provide substantive, definitional guidance to the states. Indeed, the proposed legislation would be a radical and unprecedented intrusion into states rights.

Moreover, the Tenth Amendment of the Constitution states that powers not enumerated to the Federal Government are reserved to the states. The leadership of this, the 104th Congress,

[2] Indeed, every law Congress has passed in this area *implements* Full Faith and Credit. The early laws passed in 1790 and 1804 provide ways to authenticate acts and judicial proceedings and non-judicial proceedings, respectively. Modern acts share the same common denominator: all *implement or facilitate* full faith and credit; none restrict it and none provide substantive guidance. See the Parent Kidnapping Prevention Act of 1990 (states must enforce child custody determinations made by other states) and the Full Faith and Credit for Child Support Orders of 1994 (states must enforce child support determinations made by other states).

has practically made a religion of this principle -- how ironic there is now a proposal to depart from this bedrock principle with this radical bill.

If Congress can simply alter the definition of marriage at its whim, what is to stop it from deciding at some future time that in the interest of "family values," marriage should only be extended to those who can procreate or those who have entered into first marriages but not second or third?

The proposed legislation would also create interstate chaos. "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." Estin v. Estin, 334 U.S. 541, 553 (1989) (Jackson, J. dissenting). For over 200 years, the states have done a fine job of resolving when marriage will be afforded full faith and credit (or comity, its common law equivalent) without congressional intervention. Whether the U.S. Supreme court ultimately rules that like divorce all marriages must be accorded full faith and credit or whether the states continue to resolve competing interests based on a conflicts of law analysis,

what is clear is that they do not now, nor have they ever, required congressional intervention into the matter.

Other Laws Bearing On Marriage

As in the U.S. Supreme Court case of Loving v. Virginia, 388 U.S. 1 (1967), which established the right of people of different races to wed, there are other constitutional provisions which bear on whether a citizen has the right marry and whether that marriage should be recognized by the state or across states. Marriage is a human right and gay Americans should be able to order their private affairs without government interference.

Mr. CANADY. Thank you.
Rabbi Saperstein.

STATEMENT OF RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL, RELIGIOUS ACTION CENTER OF REFORM JUDAISM

Rabbi SAPERSTEIN. Well, it's a delight to be with you today to speak to this very important issue. My name is David Saperstein. I represent the National Reform Jewish Movement, the Central Conference of American Rabbis and Union of American Hebrew Congregations, representing 1.5 million Jews throughout the United States.

In the last several years, including for our rabbinic arm just last month, both parent bodies of my organization have passed formal resolutions supporting gay civil marriage, and I've included copies of those statements with the record.

Also, I'm an attorney and I teach constitutional legal issues at Georgetown Law School. I have been on the faculty there for some 18 years.

Let me quickly make a few brief points. First, the legal arguments: I stand with Elizabeth's interpretation here. It is clear this legislation would be unconstitutional. It would violate in all likelihood, the way the Court would interpret the full faith and credit provisions, it is a clear violation of the 10th amendment. From the very beginning, the courts of this country, the framers were clear: issues of marriage were issues for the States, the States to decide. It's ironic that proponents of this that normally want to keep the Federal Government out of the rights of States should be pushing a vast intrusion of the State—of the Federal Government into the State's ability to involve itself with the most intimate of relationships that human beings are involved with.

This will be a radical revision of the way the legal system in America works. It would result in a patchwork quilt of different States holding different positions about who's married and who's not married. If you can pass this law, could you pass a similar law saying full faith and credit would not have to be given to second marriages? And from there, is it possible to move into other areas of domestic relations as well? Although divorce raises different legal issues, perhaps an effort could be made that certain States would not acknowledge no-fault divorces in other States. You would end up with a hodge-podge patchwork quilt of different relationships, no one knowing where they were, where their marriage would be recognized in different States. The whole full faith and credit system of our Government was established—structure of our Government—was established to avoid that, to give universal recognitions to the judgments made by the various States.

I would also point out legally that I believe it is unnecessary. In point of fact the public policy acceptance that applies to most conflict-of-laws relations, although my own organization would oppose this interpretation—we're sorry that this is the way it is—we think that the protection of the right of people who are gay and lesbian to marry should be protected by law and should be subject to strict scrutiny, that is not the law now.

Virtually everything that this bill would hope to do is available to the States under a public policy exception that says, in recogni-

tion of conflict of laws on these issues, that a public policy exception of fundamental issues to that State would allow a State not to acknowledge this. And that is true until the Court, the Supreme Court, changes one of several doctrines. Those several doctrines are it acknowledges full faith and credit covers marriage, which it has not yet done, or it applies due process or equal protection involving strict scrutiny to these issues of sexual orientation, but if that happens, your legislation would go down.

It doesn't do anything that isn't allowed now. And if that's the case, then why are we here? And I would suggest to you it is for primarily political reasons, and Americans will see it that way. And that's a sad state.

Indeed, I would just point out—well, let me just make, then, the point, the moral point here. If this is about politics, if it is legally unnecessary for you to do this to protect the States, and unconstitutional for you to get involved at all, then this becomes a political argument, and that really is particularly sad.

It is said that we care about America's families, but there are real problems that confront America's families, and this isn't what bothers Americans. You go out into the streets of your constituency and talk to your constituents. Ask them, "What bothers you?"—even "What bothers you about families?" You're not going to hear, "Our fundamental problem is the possibility that same-sex marriages might be recognized by our State." That's not the problems that confront America.

The problems are economic insecurity and violence, the problems even of the breakdown of morality, and the problems our families face. This effort to allow gay and lesbians to marry and have families is an effort to strengthen family life, to stand against many of the patterns in our society that tear at the family.

Judaism recognizes the sanctity of every human being, whether they're gay or they're straight. It recognizes——

Mr. CANADY. Without objection, you'll have 1 additional minute.

Rabbi SAPERSTEIN. It recognizes as well—it recognizes as well—that loving relationships are what God wants. And Judaism affirms that—rejects celibacy as a norm, unlike some other mainstream religions in Western civilization, but doesn't want sex played out promiscuously outside the context of marriage. This is an effort of gays and lesbians to have families of their own that affirms the highest values of Western civilization and our religious traditions.

Whether you intended it or not, this bill will result in scapegoating. And as a people who have been the quinessential victims of western civilization, we stand with our gay and lesbian brothers and sisters in saying that this bill is unjust. A national debate over this is unnecessary and will distract America from finding real solutions to real problems. Whatever your intent, it will codify bigotry, discrimination against people on the basis of sexual orientation.

Mr. Chairman, the stamp of the Divine is found in the souls of all God's children—gay, lesbian, and straight. The love that God calls us to, the love that binds two people together in a loving and devoted commitment is accessible to all God's children. Let the State acknowledge that. This legislation betrays that vision. This

Congress deserves a better legacy, and the American people deserve a better and more loving vision.

Thank you for your consideration.

[The prepared statement of Rabbi Saperstein follows:]

PREPARED STATEMENT OF RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL, RELIGIOUS ACTION CENTER OF REFORM JUDAISM

I. INTRODUCTION

Mr. Chairman, members of the subcommittee, thank you for this opportunity to comment on the "Defense of Marriage Act" (H.R. 3396). My name is Rabbi David Saperstein, and I am Director and Counsel of the Religious Action Center of Reform Judaism (RAC). The RAC represents the Union of American Hebrew Congregations and the Central Conference of American Rabbis, the lay and clerical bodies of Reform Judaism, representing 1.5 million Reform Jews and 1700 Reform rabbis in 850 congregations nationwide. In recent years, both the parent bodies of the RAC have passed formal resolutions supporting gay civil marriage, and I have included copies of those statements as appendices to my testimony this morning.

I am also an attorney who teaches advanced Constitutional Law, especially on the First Amendment's religion clauses at the Georgetown University Law Center. Over the years, I have published a number of books and articles addressing church-state and constitutional legal issues.

I come before you today to testify against this bill. It is woefully ill-advised and it is morally wrong. Let me first address the legal concerns, lay out why this bill would likely fail to pass even the most forgiving constitutional test and why, under the current legal system, it is, unnecessary. I will then turn to some of the broader political and moral issues the bill raises.

II. LEGAL OBSERVATIONS ON THE DEFENSE OF MARRIAGE ACT

There are two key legal issues at stake in this legislation. The first is that the legislation is almost certain to be found unconstitutional both for its violation of the Full Faith and Credit clause and for its denigration of states rights as protected in the Tenth Amendment. The second issue is that it is, in all likelihood, legally unnecessary since many of its key aims would be accomplished under the "public policy exception" to the conflict of laws rules, i.e. states would be able to avoid being forced to recognize same sex marriages if they determine such marriages to be in violation of fundamental public policy interests.

A. Why Federal Government Intrusion in this Area is Unconstitutional

The key issue in this regard is whether Congress has the power to abridge in any fashion the full faith and credit accorded sister states' judgments. While it will be offered by the proponents of the legislation that the measure does not restrict states' ability to offer full faith and credit, the plain face of the Constitution does not speak of a state's right to recognize sister states' judgments; rather, it is a mandate.

As a doctrinal matter, while the proponents purport to be protecting states' rights and interests, they are ,in fact, diluting those rights and interests. The clear expression in this legislation that the Congress has a role in determining when a state may not offer full faith and credit creates a standard of Federal control antithetical to the Tenth Amendment (and to conservative political philosophy): that powers not enumerated for the Federal Government are reserved to the States. This legislation enumerates a Federal power, namely the power to deny sister state recognition, grants that power to the state, and therefore dangerously pronounces, *expressio unius est exclusio alterius*, that the Federal government in fact retains the power to limit full faith and credit and, for that matter, to regulate marital law more broadly. And it only need express that power substantive issue by substantive issue. This is an arrogation of power to the federal government which one would have assumed heretical to the expressed philosophy of conservative legislating. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government.

Further, without exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic. *Ankenbrandt v. Richards*, 112 SCt 2206 (1992) (no subject matter jurisdiction in federal courts for domestic relations cases). There is simply "no federal law of domestic relations." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the U.S." *In re Burrus*, 136 U.S. 586, 593-4 (1890). As a result, Congress has never before passed legislation dealing purely with domestic relations issues, especially marriage.

As to the second prong of the Full Faith and Credit Clause, only rarely has Congress exercised the implementing authority that the Clause grants to it. The first, passed in 1790, 28 U.S.C.A. Sec. 1738, provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government. The second, dating from 1804, provides methods of authenticating non-judicial records. 28 U.S.C.A. Sec. 1739.

Since 1804 these provisions have been amended only twice: the Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. Sec. 1739A, which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A Sec 1738B, "Full Faith and Credit for Child Support Orders" (1994). Neither of these statutes purported to limit full faith and credit; to the contrary, each of these statutes reinforced or expanded the faith and credit given to states.

The Supreme Court has not yet passed explicitly on the manner in which marriages *per se* are entitled to full faith and credit, it would appear from the face of the clause they should be afforded full faith and credit as either "Acts "or "Records." In the absence of an express constitutional protection under full faith and credit, the general rule for determining the validity of a marriage legally created and recognized in another jurisdiction is to apply the law of the state in which the Marriage was performed. Albert A. Ehrenzweig, A Treatise on the Conflict of Laws, Sec. 138 (1961).

Both Restatements support this general rule. Commentators to the Restatement urge that a choice of law rule that validates out-of-state marriages provides stability and predictability in questions of marriage, ensures the legitimization of children, protects party expectations, and promotes interstate comity. See, e.g., Hovermill. 53 Md.L.Rev- 450, 453 (1994).

B. Why the Public Policy Exception Makes this Legislation Unnecessary

There is a recognized exception to this choice of law rule: a court will refuse to recognize a valid foreign marriage if the recognition of that marriage would violate a strongly held public policy of the forum state. Restatement (Second) Conflict of Laws Sec. 283 (1971).

While we believe strongly that states should not invoke this power in this situation, that such a stance would be morally wrong and we will, accordingly, vigorously oppose all such efforts, until the Court makes a Constitutional ruling upholding same sex marriages within the rubric of a fundamental right (in which case the proposed legislation would clearly be useless), states will have a stronger argument under the public policy exception than they will under this legislation.

Those states which desire to avoid the general rule favoring *lex celebri* will rely on an enumerated public policy exception to the rule through state statute, common law, or practice, and will make a showing that honoring a sister state's celebration of marriage "would be the

approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense." *Intercontinental Hotels Corp. v. Golden*, 203 N.E. 2d 210, 212 (N.Y. 1964). The rhetoric notwithstanding, the public policy exception will provide a means for states to withhold full faith and credit, (subject to the limitations of other constitutional provisions, i.e. equal protection, substantive due process, etc.) States will express their public policy exception to recognize same-sex marriages in other states by offering such legislation as gender specific marriage laws, and anti-sodomy statutes.

Different courts have required different levels of clarity in their own state's expression of public policy before that exception could be sustained in that state's court. Some have required explicit statutory expressions, *Etheridge v. Shaddock*, 706 S.W.2d 396 (AR 1986), while others much less clearly so, *Condado Aruba Caribbean Hotel v. Tickel*, 561 P.2d 23, 24 (CO Ct App 1977).

Courts have considered a marriage offensive to a state's public policy either because it is contrary to natural law or because it violates a positive law enacted by the state legislature. Courts have invalidated foreign marriages that are incestuous, polygamous, and interracial, or marriages with a minor on the ground that they violate natural law, e.g., *Earle v. Earle*, 126 N.Y.S. 317, 319 (1910). For invalidation based on positive law, some courts have required clear statutory expressions that the marriages prohibited are void regardless of where they are performed, *State V. Graves*, 307 S.W. 2d 545 (AR 1957), and sometimes a clear intent to preempt the general rule of validation. E.g., *Estate of Loughmiller*, 629 P.2d 156 (KS 1981). Other courts create not so high a hurdle, such that a statutory enactment against the substantive issue was sufficient. *Catalano v Catalano*, 170 A.2d 726 (Ct 1961) (finding express prohibition in a marriage statute and the criminalization of incestuous marriages sufficient to invalidate an out-of-state marriage). Those states that are enacting anti-same sex marriage statutes will likely find they have satisfied the first exception to the choice of law rule validating a marriage where celebrated, *lex celebri*.

Interracial marriages were, before *Loving v. Virginia*, treated with the above choice of law analysis, and courts frequently determined the validity of interracial marriages based on an analysis of the public policy exception. "Early decisions treated such marriages as contrary to natural law, but later courts considered the question one of positive law interpretation." 53 Md LRev at 464.

How do these rules, then, apply to the question at hand? First, it would seem that states do have the ability to check the impact of the Full Faith and Credit clause as described above. However, it should be noted that where there have been such limitations those that have held up over time are those that have been aimed at protecting parties involved in the marriage (i.e. spouses and potential children) such as prohibitions against incestuous relations, marriages involving a minor, polygamy. The ban on interracial marriages -- the argument most analogous to this situation -- was aimed at protecting public mores and public morals. That shifted from a

natural law argument to a positive law argument to its rejection based on Constitutional doctrine. I suggest that this is the very direction laws related to same sex marriages are moving -- a direction we wholeheartedly approve of, but under current law the public exception doctrine would probably prevail in most states.

It should be noted, however, that in 17 states, the status of the public policy exception is called into question by the Uniform Marriage and Divorce Act, which provides that "[a]ll marriages contracted within this State prior to the effective date of the act, or outside this State, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State." 9A U.L.A. Sec. 210 (1979). The Act specifically drops the public policy exception; "the section expressly fails to incorporate the 'strong public policy' exception to the Restatement and thus may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past." Id., official comment. Of course, any state that wants to reassert a public policy exception for same sex marriages retains the right to so legislate, or not. The proposed federal bill has no effect on that.

C. Constitutional Restraints

There are several possible Constitutional limits on a state's ability to invoke a public policy exception to the general rule of validating foreign marriages under the Full Faith and Credit Clause, the Due Process Clause, Equal Protection or Substantive Due Process.

As to due process, the second state must, before it can apply its own law ,satisfy that it has "significant contact or a significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its own law. *Allstate Ins Co v Hague*, 449 U.S. 302 (1981). The contacts necessary to survive a due process challenge have been characterized as "incidental," 53 Md L Rev at 467, and the fact that the same sex couple is probably a domiciliary of the second state would be enough to satisfy the *Hague* test.

Substantive due process and equal protection can bar a state's application of the public policy exception as well. For the former, a court would have to find that there is a fundamental right for gay couples to marry. There is complete agreement that there is a fundamental right to marry, *Zablocki v. Redhail*, 434 U.S. 374 (1978), and the argument will be pursued that this incorporates marriage of gay men and lesbians to each other. ,

Turning to an Equal Protection analysis, a state's anti-same sex marriage statute could be subjected to one of three levels of scrutiny. *City of Cleburne v Cleburne Living Center*, 473 U.S. 432 (1985). If it is viewed as almost all statutory enactments, it will receive rational basis review, and will, in almost all circumstances, survive challenge. If an argument can be persuasive that the anti same sex marriage statute is discrimination based on gender, it may well receive intermediate scrutiny. No court has yet been persuaded that anti-same sex marriage laws are gender-based discrimination, e.g., *Baker v Nelson*, 191 N.W.2d 185 (MN 1971). For strict scrutiny, the court

would have to elevate, for the first time, classifications based on sexual orientation to that of strict scrutiny -- a level which we believe is appropriate in theory, but nowhere operative..

The key point here is that if our view on the standard that should prevail, becoming the standard adopted by the federal courts then the legislation before you would be invalidated just the public policy exception would be invalidated. So, again, the legislation would accomplish nothing.

D. CONCLUSION

Whatever the result of this proposed legislation, a legal quagmire awaits us. If under any of these scenarios the Full Faith and Credit Clause does not compel states to honor each other's marriages, there is virtually universal argument that it does operate to compel recognition of each other's adoption judgments, divorce decrees, and final custody determinations. We could someday find ourselves in legal situations in which a couple, considered married in one state and unmarried in another, seeks divorce in the first state and recognition of a divorce decree in a state which did not ever consider them married. This is not the uniformity one would desire from the plain language of the Full Faith and Credit clause, but the proposed legislation has no bearing on the situation anyway: Congress simply cannot change the core application of the Full Faith and Credit Clause no matter how it legislates. Until a court determines that marriage is entitled to the same full faith and credit accorded divorce or other judgments, the anomalies will remain.

III. MORAL AND POLITICAL CONCERNS

If the legislation is unconstitutional and unnecessary, why we are here today at all?

We all know that same-sex civil marriage is not an issue of overwhelming importance to our country. As we sit here today, discussing this specious proposal, our cities are mired in poverty; violence is on the rise; the middle class is shrinking and losing ground economically, talented, educated young people cannot find jobs; and incivility and divisiveness abounds in our public and cultural life. Does anyone here doubt that if we left the dignified solemnity of this room and ventured onto the streets outside the Capitol -- or onto the streets of your home states -- to ask people what most troubles them, very few, if any, would say "same-sex civil marriage."

This bill is not about protecting families. Certainly my family and your families will not be hurt by giving states the freedom to recognize the committed relationship of two loving adults. This bill is about politics, and whether it is your intent or not, this bill will surely turn out to be about gay bashing and scapegoating.

Who gives us this bill? The same people who elsewhere complain of big, intrusive government; who believe that the federal government overregulates; who stand on ideological principle for the rights of state and local governments. These same people now want to weaken state's rights by enacting a dubious and discriminatory exemption to the "Full Faith and Credit" Clause. How strange.

How odd that politicians who elsewhere wax eloquent about the sanctity of marriage and the wisdom of small government would now have the federal government massively move into an arena effecting the most intimate aspects of people's lives shattering the Constitution's protections of states' rights and legitimizing the invalidation of civil marriages of committed, loving adult couples simply because they happen to be of the same sex.

Mr. Chairman, my mind keeps returning to one question: how can two loving adults coming together to form a family harm family values? Are our families and marriages and communities so fragile and shallow that they are threatened by the love between two adults of the same sex?

Proponents of this legislation argue that families are the cornerstone of our society, and that, today, families are threatened. I agree. But what truly threatens families?

Poverty threatens families, yet we face assaults on all types of programs aimed at supporting families in economic distress.

Unemployment, underemployment and stagnant wages threaten families, yet this Congress has been tragically silent as corporations cut jobs and employees in a myopic obsession with short-term profits.

Efforts to thwart a livable minimum wage, quality child care, and lack of education threatens families, yet almost every vital part of this country's public education infrastructure, from the Department of Education to Head Start is under attack today.

Polluted air and drinking water threaten families, yet the vital environmental laws that keep our water and our air and our communities clean are similarly under attack.

And that, sadly, is what this bill is all about. It is about saying to the American people, "Pay no attention to these truly anti-family policies; gay men and lesbians are the real threats to the security and sanctity of your marriages, your homes, and your communities."

This bill is about targeting scapegoats; and as a people who have been the quintessential scapegoats of Western civilization, we stand with our gay and lesbian brothers and sisters in saying that this bill is immoral and unjust. A national debate over this unnecessary and unconstitutional bill will only distract America from finding real solutions to real problems.

Above all, the bill will only serve to codify bigotry. It has been proposed for no other reason than because some states and localities have properly interpreted the spirit, if not the letter, of the Fourteenth Amendment to the Constitution to require them to treat gays and lesbians no different under the law than heterosexuals.

Mr. Chairman, the stamp of the divine is found in the souls of all God's children -- gay, lesbian and straight. The love that God calls us to, the love that binds two people together in a loving and devoted commitment, is accessible to all God's children. Let the state acknowledge that. This legislation betrays those values. This Congress deserves a better legacy; the American people deserve a better, and more loving, vision.

Thank you for your consideration.

Appendix A

ADOPTED BY THE GENERAL ASSEMBLY
UNION OF AMERICAN HEBREW CONGREGATIONS
October 21 - October 25, 1993 - San Francisco

RECOGNITION FOR LESBIAN AND GAY PARTNERSHIPS

Background:

The Union of American Hebrew Congregations has been in the vanguard of support for the full recognition of equality for lesbians and gays in society. This has been clearly articulated in UAHC resolutions dating back to 1977. But far more remains to be accomplished. Today, committed lesbian and gay couples are denied the benefits routinely accorded to married heterosexual couples: they cannot share in their partner's health programs; they do not have spousal survivor rights; and, as seen in recent court rulings, individual lesbian or gay parents have been adjudged unfit to raise their own children because they are lesbian or gay and/or living with a lesbian or gay partner, even though they meet the "parenting" standards required of heterosexual couples.

It is heartening to note the steps being made toward recognition of the legitimacy of lesbian and gay relationships. Adoption of Domestic Partnership registration in cities such as San Francisco and New York and extension of spousal benefits to partners of lesbian and gay employees by companies such as Levi Strauss, Lotus, Maimonides Hospital in New York City, are models for adoption by other governmental authorities and corporations.

THEREFORE the Union of American Hebrew Congregations resolves to:

1. call upon our Federal, Provincial, State and local governments to adopt legislation that will:
   a) afford partners in committed lesbian and gay partnerships spousal benefits, that include participation in health care plans and survivor benefits;

   b) ensure that lesbians and gay men are not ajudged unfit to raise children because of their sexual orientation; and

   c) afford partners in committed lesbian and gay relationships the means of legally acknowledging such relationships; and

2. call upon our congregations, the Central Conference of American Rabbis and the Hebrew Union College-Jewish Institute of Religion to join with us in seeking to extend the same benefits that are extended to the spouses of married staff members and employees to the partners of all staff members and employees living in committed lesbian and gay partnerships.

Appendix B

ON GAY AND LESBIAN MARRIAGE

Adopted by the 107th Annual Convention of the Central Conference of American Rabbis March, 1996

Background: Consistent with our Jewish commitment to the fundamental principle that we are all created in the divine image, the Reform Movement has "been in the vanguard of the support for the full recognition of equality for lesbians and gays in society." In 1977, the CCAR adopted a resolution encouraging legislation which decriminalizes homosexual acts between consenting adults, and prohibits discrimination against them as persons, followed by its adoption in 1990 of a substantial position paper on homosexuality and the rabbinate. Then, in 1993, the Union of American Hebrew Congregations observed that "committed lesbian and gay couples are denied the benefits routinely accorded to married heterosexual couples." The UAHC resolved that full equality under the law for lesbian and gay people requires legal recognition of lesbian and gay relationships.

In light of this background,

BE IT RESOLVED, that the Central Conference of American Rabbis support the right of gay and lesbian couples to share fully and equally in the rights of civil marriage, and

BE IT FURTHER RESOLVED, that the CCAR oppose governmental efforts to ban gay and lesbian marriage.

BE IT FURTHER RESOLVED, that this is a matter of civil law, and is separate from the question of rabbinic officiation at such marriages.

Mr. CANADY. Thank you, Rabbi.
Mr. Sekulow.

STATEMENT OF JAY ALAN SEKULOW, CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE

Mr. SEKULOW. Mr. Chairman——
Mr. CANADY. Our last witness.
Mr. SEKULOW. The last witness, and I get the advantage of being the last witness because I've now heard everyone's testimony about this 2-year decision that's about to take place in Hawaii.

I am counsel to eight State legislators in the case in Hawaii. We currently have on appeal right now a brief on the issue of the intervention of these Congressmen. I don't know what case we're talking about, but the case I'm talking about that's going to be litigated, the trial will commence in about 120 days. In August or, at the latest, September, the case will be tried. A decision will be reached. And if, in fact, the decision that the Supreme Court of Hawaii in a fractured, but, nonetheless, binding opinion, does become the law in Hawaii, that trial court is going to have to recognize same-sex marriages.

And if my friend, Rabbi Saperstein, were to have his way, the decision of the State of Hawaii, in order to avoid this patchwork that he's so concerned about, would now be recognized in the remaining 50 States—I mean 49 States.

Florida, Wisconsin, the District of Columbia, Arizona, Minnesota, Kentucky, Washington, and Chicago currently have cases either pending or before human rights commissions right now concerning same-sex marriages. That's just the tip of an iceberg. Three justices of the Hawaiian Supreme Court are about to determine the fate of perhaps the most stabilizing institution we have in this country.

It was interesting, as I did get to listen to the testimony, that the gentleman from Iowa said that sometimes you vote your conscience rather than even if your constituents are right. That is a preposterous statement. If your constituents are right—and he also said that in his paper that he submitted to the Iowa legislation, so I've checked it twice—if your constituents are right, and your conscience is different, then maybe your conscience is wrong. And I would think that proper analysis would point to that.

Mrs. Schroeder is not here, but did say that for 200 years this body did not have to attempt to redefine marriage. For 200 years, until now, we didn't have litigation attempting to redefine marriage. There's a fundamental difference.

The point where we're coming from at the American Center for Law and Justice and our Family Life Project is we believe the ongoing reality is that this Nation, the remaining 49 States, will be embroiled in litigation, litigation that will have, Mr. Frank, devastating consequences for each of the 49 States. I don't know what bill we're talking about, but H.R. 3396 does not, in my view, require a State to do anything. It simply allows a State not to be compelled by three justices in Hawaii from making law for the rest of this Nation.

Abraham Lincoln once said that, even the Supreme Court of the United States making the law could be dangerous, and for those that were black citizens of our country in the 1800's, when the Su-

preme Court decided that blacks were not entitled to equal citizenship, he was right. But if the Supreme Court of the United States should not always be setting national policy and, rather, this institution, then certainly three judges from Hawaii, or any other State for that matter, should not be in the position of enunciating the policy for this Nation. Congress, in our view, has simply sought to recognize that in this ongoing debate by all 50 States that there needs to be a word remembered: debate. All this discussion about equal access—I would think everybody that's testified should be supporting this bill. In fact, maybe instead of calling it "The Defense of Marriage," we should call it "the equal access to State law debate bill" because that's all it does. No one's saying here the Federal Government should define what is marriage.

It is also important to note that this action in Hawaii did not originate as legislation. It is through litigation that those that are seeking this right are trying to legitimize their view and their lifestyle.

I'm going to take it a step further. Of all the people that testified—and I appreciate everybody's testimony—I'm one of the ones litigating. I should say "attempting to litigate" because thus far the State clients that we represent, the legislators that we represent, have been rebuffed. The attorney general that was defending, supposed to be defending, the State has resigned. There's supposed to be a new attorney general. There's been no discovery in this case in Hawaii—none—by the government.

Mr. CANADY. You'll have 1 additional minutes.

Mr. SEKULOW. Thank you, Mr. Chairman.

If we want a real debate on this vitally important issue, if H.R. 3396 becomes law, as the President says it may now become law—he may sign it if passed by the House and Senate—then all we're doing is giving equal access. All the eloquent language about freedom and thought and discussions should clearly be put before the people. This bill does that.

We're going to have patchwork on an issue like this. The full faith and credit clause is not a license to allow any State tribunal to make the law of the land on issues such as this. That's why we have public policy exceptions to those laws. That's why there's a clause of the first amendment. That's why there's called the petition for redress of grievances. That's why there's a clause in the full faith and credit clause that defines what Congress does and does not do as it relates to these issues.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Sekulow follows:]

PREPARED STATEMENT OF JAY ALAN SEKULOW, CHIEF COUNSEL, AMERICAN CENTER FOR LAW AND JUSTICE

I. INTRODUCTION.

Mr. Chairman and members of the committee, thank you for this opportunity to testify regarding same-sex marriage and the need for and propriety of the Defense of Marriage Act, (DOMA).

I am the Chief Counsel for the American Center for Law and Justice. The vision that guided the establishment of our organization, and that nurtures its growth, is one in which are merged a keen appreciation of sound judicial philosophy, a serious effort to live a compassionate Christian faith, and the goal of securing in this Nation the wide berth of respect traditionally afforded to life, liberty and family by our federal and local governments.

The American Center for Law and Justice has formed several projects in order to concentrate and develop its work. One of those projects is the Family Life Project. Through the Family Life Project the ACLJ focusses public attention on the role of the family as the primary social and religious institution of a just society. As Keith Fournier, the ACLJ's Executive Director has said,"the family is the first church, the first school, and the first government. It is the primary mediating institution of our society." The Family Life Project is dedicated to defending families against all efforts to undermine their nature, their sovereignty, and their importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the most important work of families: rearing children.

The American Center for Law and Justice is not alone in its view of the primacy and importance of marriages and family in our Nation and our way of life. The Supreme Court has described marraige, a matrimonial estate entered into by a man and a woman, as a "basic civil right," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and as being "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. 1, 12 (1967).

One area of significant concern to the ACLJ and its Family Life Project is

the concerted effort on the part of some to radically alter the definition of marriage, and thereby, of family. That concern has impelled the Family Life Project to follow with care and interest the litigation in Hawaii, *Baehr v. Lewin*. I hope that the information that is offered today will help you to understand the nature of the assault that is already fully underway against the well-established definition of marriage and the well-reasoned limitation of the marital relationship to couples of the opposite sex only.

As the ACLJ's Chief Counsel, I have participated in a dozen constitutional law or civil rights cases in the United States Supreme Court, and argued five of those cases. Among those cases are *Westside Community Schools v. Bridget Mergens* and *Lamb's Chapel v. Center Moriches Union Free School District*, a case in which public school officials violated federal law as part of a discriminatory scheme to deny a religious student the right to form a student bible club on campus and in which the Supreme Court accepted our arguments upholding the constitutionality of an Act of Congress (the Equal Access Act). I also presented argument to the Court in *Jayne Bray v. Alexandria Women's Health Clinic*, a case that addressed the issue of whether nonviolent activities directed at stopping abortions constituted private, unlawful, discriminatory conduct under the federal Ku Klux Klan Act of 1871. Other cases I have argued, or participated in presenting to the Court have addressed issues related to discrimination against *religious* speakers in public places. I also have litigated numerous other cases in trial and appellate courts across the country. Almost all of these cases involve significant constitutional issues.

II. *BAEHR*, FULL FAITH AND CREDIT, AND THE NEED FOR THE DEFENSE OF MARRIAGE ACT.

A. Baehr v. Lewin.

Earlier this year, eight members of the Hawaii legislature asked the ACLJ to represent them in the case of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (now known as *Baehr v. Miike*). As you are aware, the Hawaii Supreme Court issued a ruling, which I will discuss in greater detail below, that could very well require Hawaii to allow same-sex couples to have their relationships recognized as "marriages," and to accord those same-sex marriages the status and protection accorded to marriages between a man and a woman.

In 1991, *Baehr* began when same-sex couples applied to the Hawaii Department of

Health for marriage licenses. The Department denied those applications, and the couples sued. The trial court dismissed the suit, and the couples appealed that decision to the Hawaii Supreme Court.

In May 1993, a fragmented Hawaii Supreme Court reversed the trial court's opinion and remanded to the trial court for an evidentiary hearing. The court, however, did not produce a majority opinion. Judge Levinson, joined by Chief Judge Moon, reasoned that Hawaii's refusal to issue marriage licenses to same-sex couples was sex discrimination that violated the equal protection clause of the Hawaii Constitution, Article I, Section 5.[1] Thus, Judge Levinson and Chief Judge Moon decided to remand the case to the trial court for a hearing at which the state would be required to prove that it has a compelling interest for restricting marital status and the benefits and protections attendant to that status to unions between a man and a woman. *See* 852 P. 2d at 59-63.

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1. Article I, Section 5 states in relevant part that "[n]o person shall...be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of . . . sex . . . ."

Judges Heen and Hayashi, on the other hand, issued a dissenting opinion stating that Hawaii's restriction of same-sex marriage[2] did not violate the Equal Protection Clause of the Hawaii Constitution. Therefore, Judges Heen and Hayashi would have affirmed the trial court's opinion rather than reversing and remanding. *See id.* at 70-74 (Heen, J., dissenting).

> "[These same-sex couples] complain that because they are not allowed to legalize their relationships, they are denied a multitude of statutory benefits conferred upon spouses in a legal marriage. . . . Those benefits can be conferred without rooting out the very essence of a legal marriage.[] This Court should not manufacture a civil right which is unsupported by any precedent, and whose legal incidents-the entitlement to those statutory benefits-will reach beyond the right to enter into legal marriage and overturn long standing public policy encompassing other areas of pulbic concern. This decision will have far-reaching and grave repercussions on the finances and policies of the governments and industry of this state and all the other states in the country."
>
> *—from the dissenting opinion of Justices Heen and Hayashi in Baehr v. Lewin*

The swing vote in *Baehr* was that of Judge Burns. Judge Burns concurred in the judgment, agreeing with Judges Levinson and Chief Judge Moon that the supreme court should reverse and remand the case. *Id.* at 68. But Judge Burns reasoned that Hawaii's restriction of same-sex marriage violates the Hawaii constitution's equal protection clause only if sexual orientation is "biologically fated." *Id.* at 69, 70. Therefore, Judge Burns voted to reverse and remand for a hearing at which the plaintiffs would have the burden of proving that sexual orientation is "biologically fated." *Id.*

The supreme court's fractured judgment in *Baehr* makes uncertain the trial court's task on remand. Is the trial court to hold a hearing at which the state must prove a compelling state interest? Or must the trial court hold a hearing at which the

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2. When I use the term "restriction of same-sex marriage" or similar language, I am using a shorthand for the longer, and more precise formulation "restricting martial status and the benefits and protections attendant that status to unions between a man and a woman."

plaintiffs must prove that sexual orientation is biologically fated? Answering this question requires more than simply "counting the votes." As the United States Supreme Court stated in *Marks v. United States*, 430 U.S. 188, 193 (1977), "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of [a majority], 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" (Citation omitted).

If the Hawaii courts apply in *Baehr* the general rule stated in *Marks*, one can soundly argue that Judge Burns' opinion controls. Judge Levinson and Chief Judge Moon voted for remand to require a hearing at which the state must prove a compelling interest. Judge Burns, however, would not require the state to prove a compelling interest unless first the plaintiffs can prove that sexual orientation is "biologically fated." Absent this proof, Judge Burns appeared to agree with the dissenters that Hawaii could restrict marriage and its attendant protections and benefits to unions of one man and one woman. See *id.* at 70 (Burns, J., concurring). Thus, Judge Burns seems to have provided the "narrowest possible grounds" for the court's remand.

Further confusing matters in Hawaii, the Hawaii Supreme Court issued an order granting, in part, a motion by the state to reconsider or clarify the court's original opinion. That subsequent order purported to clarify the court's mandate by placing the burden on remand on the state to prove a compelling state interest. Judge Nakayama, who replaced Judge Hayashi on the court, joined with Chief Judge Moon and Judge Levinson in deciding the motion. See *id.* at 74. Despite that, Judge Burns has continued in his belief that "the only agreement by a majority of this court is that [*Baehr*] involves genuine issues of material fact . . . . [T]hat is the court's mandate . . . . [T]here is no majority agreement as to what these issues are or which side has the burden to prove them." *Id.* at 75 (Burns, J., concurring).

The upshot of all this is that if Judge Burns' opinion is the controlling opinion in *Baehr*, the plaintiffs will have to prove that sexual orientation is "biologically fated." This could well delay the result in *Baehr* as the litigants gather evidence addressing this rather complex and controversial question. If, on the other hand, Judge Levinson's opinion is treated as controlling, *Baehr* will go to trial this summer, and Hawaii will have to prove

a compelling interest for restricting same-sex marriage. In that latter circumstance, we should know relatively shortly (perhaps by the end of this summer) whether Hawaii must recognize same-sex marriages.

B. **The ACLJ's Present Role in *Baehr*.**

On behalf of the eight Hawaii legislators whom we represent, and together with local counsel in Hawaii, we filed a motion to intervene in the *Baehr* trial. Unfortunately, the trial court denied this motion. We have appealed this decision to the Hawaii Supreme Court, and the appeal is currently pending. In the meantime, we are preparing to file, with the trial court's approval, an amicus brief in the trial court on behalf of the eight legislators.

C. **Full Faith and Credit and the strategy to take *Baehr* Nationwide.**

> "Homosexuals must 'fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely . . . to debunk a myth and radically alter an archaic institution . . . . The most subversive action lesbians and gays can undertake - and one that would perhaps benefit all of society - is to transform the notion of 'family' entirely.'"
>
> *Michaelangelo Signorile* in OUT Magazine

A decision for the same-sex couples who are plaintiffs in *Baehr* will, very likely, have nationwide ramifications. Those ramifications are due to one provision of the United States Constitution, and its role in a directed nationwide effort to change the laws of fifty states regarding the nature of a legal relationship, marriage. The constitutional provision states:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records, and proceedings shall be proved, and the effect thereof.
>
> U.S. CONST. art. IV, section 1

It is possible, because nationally organized efforts are intent on pushing the issue to the limits, that under the Full Faith and Credit Clause, other states will have to recognize as valid Hawaiian "marriages" between same-sex couples, and thus accord those couples all the benefits and protections accorded any other married couples. Several writers already have advanced, or at least discussed, this argument in law review articles. *See* Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique," 21 N.Y.U. Rev. L. & Soc. Change 567 (1994-95); Barbara J. Cox, "Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" 1994 WIS. L. REV. 1033; Note, "Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages," XLVII STANFORD L. REV. 499 (Feb. 1995); Deborah M. Henson, "Will Same-Sex Marriages Be Recognized In Sister States?" XXXII U. LOUISVILLE J. FAMILY LAW 559 (1994); Joseph W. Hovermill, "A Conflict of Laws and Morals: The Choice of Law Implications Of Hawaii's Recognition of Same-Sex Marriage," LII MARYLAND L. REV. 450 (1994).

The threat that same-sex couples married in Hawaii will seek to have their marriages recognized in other states is real. Indeed, given the intensity with which the homosexual community has been focussing on the developments in *Baehr*, it is no exaggeration to suggest that *Baehr* simply is part of an orchestrated attempt to gain nationwide recognition (ultimately, acceptance) of same-sex marriages.

This strategy is not a figment of an overwrought imagination, whether mine or another's. The evidence of such a strategy is plain, for its proponents disdain to hide their purposes. The Marriage Project of the Lambda Legal Defense and Education Fund puts its goal in its name.

That organization, LLDEF and its Marriage Project, have been closely involved

> "Common sense, constitutional doctrines, and legal precedent suggest that when [same-sex] marriages are lawfully performed in Hawaii, they will have to be recognized by other states . . . ."
>
> —*from The Marriage Project: Background. Lambda Legal Defense and Education Fund, Inc.*

in the *Baehr* litigation.[3] If successful, according to Lambda, "[c]ommon sense, constitutional doctrines, and legal precedent suggest that when [same-sex] marriages are lawfully performed in Hawaii, they will have to be recognized by other states . . . ." *See* "Gaysource," *supra* n.3. Lambda's stated goal is for same-sex couples to receive "the same recognition or benefits as married couples." *See* "Gaysource," *supra* n.3.

Other statements show that homosexuals are eagerly awaiting the decision in *Baehr* to take advantage of the opportunity for "marriage" that a decision in *Baehr* may offer. For example, lesbian columnist Deb Price, referring to the plans she has with her lesbian partner, wrote, "We'll be on the first plane out! So many of us are just waiting for the day that our relationships are legally recognized." Deb Price, DETROIT NEWS, August 1995.

Moreover,

> Gays and lesbians . . . eagerly wait word from Hawaii and many plan to head for the islands once and if licenses become available. "We'd go right away," John Holden and Michael Galluccio said. "We've even asked my mother to be prepared to watch the baby at a moment's notice. And if it doesn't become legal until next year, we'll take Adam along, because by then he'll be old enough for the trip."

"Will Hawaii redefine Marriage? N.J. Gay Couples Eagerly Await Word," THE RECORD (May 9, 1996). Some have predicted not a trickle of such Hawaii same-sex marriage junkets, but a flood:

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3. According to the Washington Times, May 9, 1996 edition, at A1, "Evan Wolfson [is the] director of the Marriage Project for the Lambda Legal Defense and Education Fund . . . ." Mr. Wolfson is intimately involved in *Baehr*, according to Lambda's own information: "Honolulu attorney Dan Foley and Evan Wolfson of the Lambda Legal Defense and Education Fund, co-counsel for the [plaintiffs], expect a trial in July 1996, with a final decision from the State Supreme Court likely by 1997." (Statement available at http://www.gaysource.com /gs/ht/oct95/background.html) (hereinafter "Gaysource").

> Laurie McBride, executive director of the Lobby for Freedom and Equality, a lesbian and gay group based in Sacramento, said "California is going to have literally thousands of couples who are going to come back from Hawaii expecting their marriage to be treated with the respect and dignity given to every other marriage."

Dunlap, "Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door," N.Y. Times, Mar. 6, 1996. And one magazine targetted to the gay and lesbian community reported in 1990 that eighty-three percent of the reader-respondents to a survey stated that if same-sex marriage was legalized they would marry. *See* LXVIII SOUTHERN CALIF. L. REV. 745, 781 (1995) (citing source).

For Mr. Wolfson, who heads up Lambda's Marriage Project, the question of winning the right of same-sex couples to marry is, apparently rather more than just being allowed to marry. In a recent article, Mr. Wolfson set the tone for his piece by quoting the lyrics of a song. Those lyrics allow us to peak behind the facade of the Marriage Project's stated goal of obtaining equal marriage rights for homosexuals to the deeper and more disturbing motivations behind Mr. Wolfson's press for legalization: "How can the world change, It can change like that, Due to one little word: 'Married.'" Wolfson, *supra* at 568. Like the vapors Pandora had wished not to have let loose, Mr. Wolfson is clear about one thing: his goal of revolutionizing society, served in part by revolutionizing marriage, is a no-holds barred, take-no-prisoners struggle: "[A]s [Martin Luther King, Jr.] put it, '[]n this Revolution, no plans have been written for retreat,' we must ready ourselves to defend our victory and advance toward other goals." *Id.* (citation omitted).[4]

> "How can the world change, It can change like that, Due to one little word: 'Married.'"
>
> *Quoted in Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men"*

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4. There is a sort of shameless rush, by gay rights activists, to borrow the lights and legacy of the African-American struggle for equality and civil rights under the law. What escapes these activists is the difference between a government that classifies people according to "who" they are and a government that classifies people according to (continued...)

The point of this strategy, for homosexuals, was stated by Michaelangelo Signorile in "Out" Magazine:

> Homosexuals must "fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely . . . to debunk a myth and radically alter an archaic institution . . . . The most subversive action lesbians and gays can undertake - and one that would perhaps benefit all of society - is to transform the notion of 'family'

Thus, the strategy to recognize same-sex marriage is nothing less than a strategy to discard the traditional idea of "family" that has served to hold this society together.[5]

III. THE NEED FOR THE DEFENSE OF MARRIAGE ACT.

Will this strategy succeed? Can it be that over two hundred years of national unity and previous centuries of common law regarding the nature of marriage and the matrimonial relationship would fall victim to the latest round of judicial retrofitting of a *state* constitutional requirement of equality under the law? Right now, that is an open question. Clearly there are those who argue that, under the Full Faith and Credit Clause, states would be required to recognize same-sex marriages performed in Hawaii. To those arguments it is a fair response that there is a "public policy" exception to the Full Faith and Credit requirement. According to the *Restatement (Second) of Conflict of Laws* § 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.[6]

It is not possible to predict with certainty, however, how courts will apply this

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4. (...continued)
"what" they do.

5. "The intimate community of life and love which constitutes the married state has been established by the Creator and endowed by him with its own proper laws. . . . God himself is the author of marriage." *Gaudium et Spes* at 48 § 1.

6. So, for example, if first cousins are barred from entering into marriage in State One, than first cousins A and B, who reside and are domiciliaries of State One, cannot circumvent the laws of State One simply by taking a week-end trip to State Two, in which first cousins may lawfully marry, there wedding each other and then returning to State One to take up housekeeping and habitation together as man and wife.

exception to same-sex marriages. Section 2 of the Defense of Marriage Act removes this uncertainty by providing in essence that states are not bound, as a matter of federal law, to recognize same-sex marriages performed in another state. But that certainty does not come at the expense of state prerogatives. DOMA does not prevent states from choosing to recognize same-sex marriages. A State still would be free, as a matter of state law, to accord those marriages whatever status the state wishes. By removing the confusion surrounding the application of the Full Faith and Credit clause, the states will be free and empowered to develop their own policy on same-sex marriages. In this respect, Congress eschews any role in compelling states to adopt Hawaii's policy as their own, and insures that neither Hawaii nor any other state can cause this intended revolution through "ordinary litigation between parties . . . ."[7]

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7. Beyond the direct and odious consequences of a certain Supreme Court decision with which he disagreed, Abraham Lincoln had rather more to say about a role for the judiciary that he feared the citizenry might pass to it by default. In his first inaugural address, he explained:

> "At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to irrevocably fixed, by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal action, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court, or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs, if others seek to turn their decisions to political purposes."

Inaugural Address of Abraham Lincoln, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989 at 139 (Bicentennial Ed. U.S.G.P.O. 1989). Here, of course, the frustration found in Lincoln's words, at those who would make national policy of a decision of the *national* Supreme Court is only exacerbated as the Nation watches to learn whether *national* policy will be made by a Hawaii trial court.

The only real question here is whether Congress has the power, under the Full Faith and Credit Clause, to define what effect a same-sex marriage validly created in one jurisdiction will have in another. For these purposes, the key language of the clause states, "Congress may by general laws prescribe the manner in which such acts, records, and proceedings [of every state] shall be proved [in every other state], and the effect thereof." While this language enables Congress to regulate the effect of proofs of foreign, that is, sister-state judgments under the Full Faith and Credit Clause, Congress has only exercised this authority three times. The first usage was in 1790 when Congress codified the functions of the Full Faith and Credit clause (28 U.S.C. § 1738), again in 1980 with the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A), and finally, with the Full Faith and Credit Child Support Orders Act of 1994 (28 U.S.C. § 1738B). This bill would create 28 U.S.C. § 1738C and allow for a further exercise of Congress' authority to "prescribe the manner in which . . . acts, records, and proceedings" of one state are proved in another state.

> "Congress may by general laws prescribe the manner in which such acts, records, and proceedings [of every state] shall be proved [in every other state], and the effect thereof."
>
> U.S. CONST. art. IV, section 1

The fact that the authority is rarely used does not mean that the authority does not exist. The enabling language is clear; it has been noted, however, that "there are few clauses of the Constitution, the literal possibilities of which have been so little developed as the Full Faith and Credit clause."[8]

IV. CONCLUSION.

As the Supreme Court has stated, marriage is "fundamental to our very existence and survival" and "older than the Bill of Rights . . . older than our political parties, [and] older than our school system." *Loving v. Virginia*, 388 U.S. at 12. In confirming this

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8. Senate Committee hearings on Parental Kidnapping Prevention Act of 1980. 94th Congress, statement of Wallace J. Myheric and Nancy Lynn Hiestand.

precept, the Defense of Marriage Act has properly moved to make clear that "marriage is the legal union of one man and one woman as husband and wife." The Act also properly exercises Congress' power to determine what "effect" should be given any act or judgment of a state that defines marriage. Under DOMA states may still determine for themselves how they will define marriage, but such determinations, whether by legislation or judicial determinations, will not substitute, via the Full Faith and Credit Clause, for another state's independent determination of how marriage is to be defined. This adjustment, under DOMA, is an important and worthy balance of power and comity between the federal government and the states, on one hand, and among the various states, on the other.

The Defense of Marriage Act is a sound legislative proposal, and it is one that should be promptly enacted.

Mr. CANADY. Thank you, Mr. Sekulow.

And I want to thank each member of this panel for your testimony. It's been very helpful and very thoughtful testimony.

Rabbi Saperstein, you talked about this being a political issue, and you also vehemently stated your view that the bill under consideration here today is unconstitutional. What do you make of the conclusion of the Department of Justice and the Clinton administration that the bill is not unconstitutional? Do you think the Clinton administration is just playing politics with this?

Rabbi SAPERSTEIN. I've not had the chance to review the letter that I heard was issued today. I don't know what——

Mr. CANADY. It wouldn't take you long. I'll read all the pertinent language——

Rabbi SAPERSTEIN. Well, I suspect, then, it's not going to have the legal foundation for what their ruling is based on, Mr. Chairman, and that makes it hard for me——

Mr. CANADY. It's states a conclusion——

Rabbi SAPERSTEIN. Sure—pardon?

Mr. CANADY. It states the conclusion. I'll read it to you.

"The Department of Justice believes that H.R. 3396 would be sustained as constitutional."

Rabbi SAPERSTEIN. That's what I said; I have no idea what they based that on. I can't wait to hear this. This seems to be—this seems to be a fairly clear issue. The words to the Constitution read "full faith and credit shall be given. . . ." What that means is, when one State has a public act or a record or a judicial proceeding——

Mr. CANADY. Rabbi——

Rabbi SAPERSTEIN [continuing]. It has to be acknowledged by others.

Mr. CANADY. I'm sorry——

Rabbi SAPERSTEIN. It doesn't say it might be given; it doesn't it could be given; it says it "shall be given."

Mr. CANADY. But it also——

Rabbi SAPERSTEIN. This Congress doesn't have a right to abrogate the Constitution——

Mr. CANADY. Rabbi——

Rabbi SAPERSTEIN [continuing]. It seems clear to me.

Mr. CANADY. Rabbi, well, I would just direct your attention to the language that is also in the "full faith and credit clause which says Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Now I understand you may quarrel with the significance of that language, but, apparently, the Department of Justice believes that that language is sufficient to justify action by the Congress in this way.

But let me go back to my question. Having reached the conclusion regarding the constitutionality or the unconstitutionality of this that you've reached—you seem to think that's so obvious—do you think the Clinton administration is playing politics with this?

Rabbi SAPERSTEIN. I think the Clinton administration is wrong in its position, and whether or not it's playing politics——

Mr. CANADY. Let me——

Rabbi SAPERSTEIN [continuing]. I don't think you're playing politics by the view you hold.

Mr. CANADY. Thank you.

Rabbi SAPERSTEIN. I think playing politics is——

Mr. CANADY. OK, I'm going to go on to another question——

Rabbi SAPERSTEIN [continuing]. That the bill is unnecessary moving ahead, and the Clinton administration is not pushing the bill. It doesn't want the bill. It's saying it would sign it.

Mr. CANADY. Rabbi, I'm going to move on to another question. I appreciate your testimony.

Let me focus on what the impact of the decision in Hawaii will be. Let's assume that in Hawaii ultimately the courts determine that under the Constitution of Hawaii same-sex marriages must be recognized. Now, Ms. Birch, do you believe that under the full faith and credit clause States throughout the Union would be required to recognize same-sex unions that were formed in the State of Hawaii, pursuant to the decision of the courts of Hawaii?

Ms. BIRCH. I think that that is an open question, and I think that it is stunning, the remarkable lack of knowledge of the state of jurisprudence in terms of what you are all attempting to do.

Mr. CANADY. Well, let me——

Ms. BIRCH. And if I can just elaborate——

Mr. CANADY. Well, now, let me—let me ask a question because you've had an opportunity to testify, but I need to ask questions.

Ms. BIRCH. OK, well, ask it.

Mr. CANADY. Do you—now you mentioned the Lambda Defense Fund and you praised them for their efforts. Are you—aren't you aware that their strategy to obtain recognition for same-sex marriages throughout the Nation is based on exactly the process I have described? Do you not support that——

Ms. BIRCH. Let me—let me explain——

Mr. CANADY. Do you not support that argument?

Ms. BIRCH. Let me explain something to you.

Mr. CANADY. No. Would you answer my question?

Ms. BIRCH. Lambda Legal Defense is cocounsel in that case.

Mr. CANADY. Well, let me ask you——

Ms. BIRCH. One argument is that once——

Mr. CANADY. OK, let me ask——

Ms. BIRCH. You asked the question. Do you want an answer?

Mr. CANADY. Let me ask you——

Ms. BIRCH. You didn't allow me to answer your first question.

Mr. CANADY. Yes, the question is: Do you support the argument that States should be required to recognize same-sex unions if Hawaii takes the action we talked about?

Ms. BIRCH. OK, let me repeat for you——

Mr. CANADY. No, I'm asking the question——

Ms. BIRCH. Let me answer it.

Mr. CANADY. Please do.

Ms. BIRCH. All right, I would respect a little space to answer.

First of all, it is an open question under the U.S. Constitution, and the U.S. Supreme Court has never ruled on that question. What the U.S. Supreme Court has said is that final judgments will be accorded full faith and credit one State to another. We have the

very ironic situation that judgments of divorce are accorded full faith and credit——

Mr. CANADY. Well, let me ask you this: what did you——

Ms. BIRCH. In fact——

Mr. CANADY [continuing]. Believe the Supreme Court should decide on this issue?

Ms. BIRCH. I believe that the Supreme Court should ultimately address this question and decide that the marriage laws of one State should be respected in the next State, but they have not reached that. And I have to tell you, you——

Mr. CANADY. My time has expired.

Mr. Frank.

Mr. FRANK. Ms. Birch, I don't think it's against the rules to allow you to finish your answer. [Laughter.]

Ms. BIRCH. Thank you, Representative Frank.

My point here is that, without even understanding the state of jurisprudence, you're attempting to pass a law that is unconstitutional. Today the way these issues are resolved between States is a matter of comity, something called—there is a respectful nodding of the head between States as to marriage.

Normally, it is heavily construed in favor of recognizing the marriage of another State, but there is something called the public policy exception, and there is a weighing that goes on. That weighing can go on on any issue, and it went—for example, we have a long——

Mr. FRANK. Well, let me——

Ms. BIRCH. Sorry.

Mr. FRANK. I don't want to get off the issues. I think I want to pick up from here because that seems to me one of the central questions that I have.

I notice Mr. Holland, who unfortunately couldn't be with us, in his submitted testimony says, according to him, if Congress didn't pass this statute, Colorado's law would have been invalid and others would have been invalid. And that seems to me that's the central issue I've got for Mr. Wardle and Mr. Sekulow.

As I understand the full faith and credit clause and the public policy exception, the States now have the right to declare their own public policy difference. So the question is, that I want to ask you is: What do we add to this? Is it necessary, helpful? What would be the effect if we didn't act? Do you think the States would have the right to declare a public policy exception, Professor Wardle?

Mr. WARDLE. There are two answers, Mr. Frank: what I think a court should do and what someone else—what a court might do, because there are people who say——

Mr. FRANK. What do you think a court would do? Let me ask you that. If I was paying for a lawyer, that's what I would want to know.

Mr. WARDLE. Well, it depends on—Mr. Frank, it depends on which court we're talking about. If the question were to arise in the Hawaii Supreme Court, I suspect that they would say it must be given effect in another State——

Mr. FRANK. OK, well, that's—

Mr. WARDLE. In fact, there are a number of law professors have who said, as Mr. Saperstein has said, "shall" means shall; they must give it effect.

Mr. FRANK. OK, then——

Mr. WARDLE. I think that's very bad——

Mr. FRANK. OK, Professor Wardle, I——

Mr. WARDLE [continuing]. Constitutional analysis. I've heard people say——

Mr. FRANK. Excuse me, but—excuse me. Now you are filibustering. You've answered the question appropriately.

But the point I'm making is this: if, in fact, a court was determined to say that, and if the court said "shall" means shall, then no congressional enactment would make any difference. I'm not—in other words, if you got a court that said "shall" means shall, I think that would be wrong. I think the phrase is written more subtly than that, but then it wouldn't make any difference. But if we think it does make a difference, the question I get is: what does Congress add to this?

I, as I read it, it does say Congress shall talk about how you prove it and what the effects are. Is it your position that the appropriate, the better view would be that, where full faith and credit is concerned, Congress may by statute override what the States do, and ultimately if Congress chooses to act, it is the arbiter of what gets full faith and credit and what doesn't? Mr. Sekulow?

Mr. SEKULOW. Mr. Frank, you summarized that provision of the full faith and credit clause completely the opposite of what it actually says. So let's——

Mr. FRANK. No, answer my question.

Mr. SEKULOW. No, you asked——

Mr. FRANK. I'm sorry, I've asked you a question, and it's based on the clause itself. So take your interpretation——

Mr. SEKULOW. Well, let me take the words of the court——

Mr. FRANK. Let me ask you, Is it your view—is it your view—you can use this when you answer the question because we're going to run out of time——

Mr. SEKULOW. You've asked me a question.

Mr. FRANK. No—and I want to re-ask it because I wasn't——

Mr. SEKULOW. Because I got you to admit that you're changing the words of the clause——

Mr. FRANK. Oh, I will admit that I often jumble words. If diction is the issue, I'm in big trouble, I concede.

Mr. SEKULOW. Well, when you're talking about the clause——

Mr. FRANK. Excuse me, Mr. Sekulow——

Mr. SEKULOW [continuing]. Diction is important——

Mr. FRANK. Mr. Chairman, I would like to—I'm going to ask the witness the question he probably doesn't want to be asked, but I am going to ask it, and it's this: is it your interpretation that ultimately, if Congress chooses to, it can be the arbiter, if it gets a law enacted, of what is entitled to full faith and credit and what isn't among the States?

Mr. SEKULOW. I think that's clearly what the words and the effect thereof——

Mr. FRANK. So the answer is yes? OK. Well, I think that—we should be very clear because that's different than a lot of others,

and that's my point. Many of those who claim to be States' rights people should understand: voting for this legislation, by Mr. Sekulow's interpretation—and his interpretation is the only one that makes it valid to have such a law. If he's not right, there's no need for such a law. What he's saying is this, and people should understand that: if Hawaii does this, or any State does it, if Congress says you must give full faith and credit to this, even if the State has its own public policy exception to the contrary, that would be overridden. So, in effect, what we have now is a great undermining of State law. Isn't that what you just said?

Mr. SEKULOW. Mr. Frank, this is not a constitutional amendment we're talking about.

Mr. FRANK. No, it's a statute, and I thought——

Mr. SEKULOW. And there's two statutes involved in your example. One would be the full faith and credit clause, clearly, and——

Mr. FRANK. And the State law——

Mr. SEKULOW [continuing]. One would be a question under whether constitutionally there was this fundamental right to engage in same-sex marriages——

Mr. FRANK. No, no, no, I'm not raising that.

Mr. SEKULOW [continuing]. Which the Hawaii Supreme Court said there was not——

Mr. FRANK. I am not—I am not raising that, Mr. Sekulow. You're just fussing up the issue. I'm not raising that. I am talking now about the full faith and credit part. And the question is, and you've answered it—I would ask for 30 seconds, Mr. Chairman.

Mr. CANADY. Without objection, the gentleman will have 30 seconds.

Mr. FRANK. Thank you.

You've answered the question, and I think it's very clear. The States' right position should be to be against this bill because you are saying that, no matter—that your interpretation of the Constitution is that the full faith and credit clause does not make a State the ultimate arbiter by its own public policy decision of what gets full faith and credit and what doesn't, but that Congress by statute will decide. And I think the States wind up weaker under your interpretation than they would otherwise. To gain the short-term political gain, you're going to take something away from the States, from your perspective.

Mr. SEKULOW. May I respond? May I respond?

Mr. FRANK. I thought my time had expired. If you want to give——

Mr. CANADY. The light's still green for fleeting seconds. [Laughter.]

The light was green. Mr. Hyde.

Mr. HYDE. I have no questions.

Mr. CANADY. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I just want to get a clarification from Mr.——

Mr. SEKULOW. Sekulow.

Mr. WATT [continuing]. Sekulow about the status of the Hawaii case. Is the court in which the Hawaii case is pending a trial court or a court of appeals?

Mr. SEKULOW. The case—the court is currently the trial court. The case is on a mandate from the Supreme Court of Hawaii for a trial on the merits. That case will be begun in either August or September.

Mr. WATT. So then, once the trial is held at the lower level, then it would go back to a higher court in Hawaii?

Mr. SEKULOW. If, in fact, the attorney general for the State of Hawaii were to appeal it, yes, but there is certainly no guarantee under Hawaiian or any other law that would be applicable——

Mr. WATT. I understand that.

Mr. SEKULOW [continuing]. That there would be a State——

Mr. WATT. But there is a higher court?

Mr. SEKULOW. Yes, the higher court's ruled, though. The higher court has ruled, and it has made the determination that unless, in fact——

Mr. WATT. Now, now, Mr. Sekulow, come on——

Mr. SEKULOW. They sent that back to the trial court.

Mr. WATT. They sent it back to the trial court——

Mr. SEKULOW. For a trial on the merits, to comply with the Supreme Court of Hawaii's decision.

Mr. WATT. That's not—that's not a ruling, Mr. Sekulow.

Mr. SEKULOW. Clearly, it is, sir. Of course it's a ruling. It's a decision of the highest court of the State of Hawaii.

Mr. WATT. Well, if it's a ruling, why would they send it back to the trial court for——

Mr. SEKULOW. Evidentiary—it was sent back on an evidentiary issue of whether the State could show a compelling interest. That's it.

Mr. WATT. OK. So—and once that determination is made, it would be appealed or could be appealed if either one of the parties wanted to appeal it back to a higher court?

Mr. SEKULOW. Could it be appealed? You can appeal anything, absolutely. Is the law of the State of Hawaii already——

Mr. WATT. But, Mr. Sekulow, this is not a trick question. I'm just trying to find out the facts. I'm not adverse to you.

Mr. SEKULOW. Well, let me explain the fact to you that——

Mr. WATT. Well, you've already explained it.

Mr. SEKULOW. Hawaii has ruled on the merits of the law——

Mr. WATT. Mr. Sekulow, thank you.

Mr. SEKULOW. Thank you.

Mr. WATT. I appreciate it. I think I understand it better now that you've told me.

Mr. SEKULOW. Thank you.

Mr. WATT. And I don't think anything you're getting ready to add is going to help me anymore. [Laughter.]

And I'll yield back the balance of my time, Mr. Chairman.

Mr. CANADY. Thank you.

Mr. Inglis.

Mr. INGLIS. Ms. Birch, recently in the Greenville News your local chairwoman announced her view that the Hawaii decision, if it comes out as might be anticipated—in other words, that it permits—that no compelling interest is found and that, therefore, same-sex marriages are recognized in Hawaii—she has said that she will take the first plane out to consummate her marriage in

Hawaii. South Carolina recently, by a unanimous vote—unanimous vote—in both the house and the senate said we don't want same-sex marriages in South Carolina.

Ms. BIRCH. I'm aware of that.

Mr. INGLIS. Now are you—you say that it's an unsettled question, but I wonder, isn't it—I think you're being evasive on that point, if I may be real frank. You're saying that you won't—that there's not going to be the impact that South Carolina will have to recognize that marriage consummated by a flight out to Hawaii and then back. Is that your—you are taking that position, that South Carolina does not have to recognize——

Ms. BIRCH. I don't think it—excuse me, sir. I don't think I'm taking a position.

Mr. INGLIS. Well——

Ms. BIRCH. I think I'm describing to you the state of the law.

Mr. INGLIS. Yes, but let me——

Ms. BIRCH. Do I believe that the U.S. Supreme Court will one day rule that if, indeed, Hawaii concludes that to deny same-sex marriages in that State is unconstitutional under the Hawaii Supreme Court law—do I pray that one day that we will have a ruling from the U.S. Supreme Court that says, yes, that should be treated like a final judgment——

Mr. INGLIS. So then to be——

Ms. BIRCH [continuing]. And that should be honored——

Mr. INGLIS. So then to be real honest——

Ms. BIRCH. But the state of the law today——

Mr. INGLIS. That's enough. To be real honest, then, what you're saying is you will commit the resources of your organization to so litigate in South Carolina; is that right?

Ms. BIRCH. No. Let me be absolutely——

Mr. INGLIS. Oh, well, then, you—well, then, maybe——

Ms. BIRCH. No, that's because you don't understand the mission of my organization.

Mr. INGLIS. Well, wait a minute. Wait a minute. Wait a minute.

Ms. BIRCH. Do I think the appropriate organization should? Yes.

Mr. INGLIS. Enough of that. Hold on. Let me—let me finish the question.

Then I wonder, if you're not going to take that position, then I wonder if you'd be willing to enter some sort of confession of judgment by your organization that you will not make that argument; in other words, that we will honor South Carolina's law. See, because you can't have it both ways. What you're saying here, and earlier panel members said, is we're going to have this great debate, but the great debate's going to be shortchanged by a single decision in Hawaii, unless you're willing here to enter in a confession of judgment that, no, you will not litigate that, that you will say that, no, we will not assert in the State of South Carolina that all those house members and all those senators were wrong, and that one judge—or three judges—in Hawaii know better than the entire State house and senate in South Carolina. Isn't that really what you're arguing, what your goal is, if we're just transparently honest?

Ms. BIRCH. No. Let's be really honest here, and I think you should be honest as well. There have been very cruel episodes in

American history when marriage is denied to certain groups of people, African-Americans during the cruelest portion——

Mr. INGLIS. Yes, OK, you're not answering the question.

Ms. BIRCH [continuing]. When they were slaves——

Mr. INGLIS. You're not answering the question.

Ms. BIRCH. I am answering the question.

Mr. INGLIS. And I must tell you that it offends me tremendously to have homosexuals compare themselves to the historic struggle for civil rights among black people.

Ms. BIRCH. Why?

Mr. INGLIS. Because black people were economically disenfranchised and cut out of this society, whereas homosexuals, by most studies that I'm aware of, have a higher standard of living than heterosexuals.

Ms. BIRCH. Yes, well, your information, sir, is inaccurate——

Mr. INGLIS. It offends me tremendously——

Rabbi SAPERSTEIN. Does that make anti-Semitism OK because Judaism——

Mr. INGLIS [continuing]. That you can persist in this comparison to the historic struggle of blacks to achieve equality in this country. The fact is that is not a choice, to be black, but it is a choice—I know you don't like this, but it is obviously a choice to be homosexual.

Ms. BIRCH. Wrong.

Mr. INGLIS. And that is simply—you are wrong to assert that it's not a choice.

Ms. BIRCH. Representative, I don't think you know——

Mr. INGLIS. You are absolutely wrong to assert that. So, therefore——

Ms. BIRCH [continuing]. Anything about it.

Mr. INGLIS. Well——

Ms. BIRCH. And if you'd like to talk about the law, I would like to respond to that.

Mr. INGLIS. Well, I'd be—I just want to——

Ms. BIRCH. I don't think you know anything about the struggle of African-Americans in this country vis-a-vis——

Mr. INGLIS. I know, because you are the head victim. I know, you're in charge of victims. So you will decide who can speak on that——

Ms. BIRCH. I would expect a little dignity and——

Mr. INGLIS [continuing]. Not anybody else.

Ms. BIRCH [continuing]. Respect.

Mr. INGLIS. But I think that the point that should be made here, and really what this all boils down to, is, Is it a choice or is it a condition? And if you would please make the honest argument——

Mr. CANADY. Sorry, the gentleman's time has expired.

Mr. INGLIS. May I have 30 seconds?

Mr. CANADY. Without objection.

Mr. CANADY. If you'd make the honest argument, you'd say, listen, it's a wonderful condition; let's all be gay. But you're not making that argument. You're making the argument we're poor and pitiful, and you must accept us the way we are. So you are admitting that it is not a desirable lifestyle, and there's something wrong with it, by arguing that it's not a choice. So I think if you analyze

that honestly—it's essential to me because I hope that many can be rescued from that lifestyle and returned to where they can have a happy lifestyle, because I think it's inherently destructive.

Ms. BIRCH. Mr. Chairman, may I respond?

Mr. CANADY. I'm sorry, the 30 minutes has gone—I'm sorry, the 30 seconds has gone——

Mr. FRANK. Well, it seemed like 30 minutes, Mr. Chairman.

[Laughter.]

Ms. BIRCH. May I respond?

Mr. CANADY. Mr.——

Ms. BIRCH. May I respond?

Mr. CANADY. Mr. Flanagan is recognized.

Mr. FLANAGAN. I have just 5 minutes, and I'd like to return this to a discussion of the law.

My question is rooted in a difficulty that I'm having with this is that, whether passively or actively, the Federal Government of the United States is now going to speak on the issue of marriage. In the National Legislature we're going to have a marriage law. It doesn't matter that under this law States can do whatever they want—we're going to do this for the first time.

I guess, Mr. Sekulow, I guess my question is to you. Under what historical jurisprudence flavoring can we go to this place and not come back from it? Aren't we setting an incredible precedent?

Mr. SEKULOW. I think the appropriate response would be to understand the context of the way I understand 3396 to be, and that is simply to allow the States to make that decision. We would oppose a Federal law saying: "Marriage for the States is as follows." That's a very different question.

So I think, from that context, what we're really talking about here is a bill that, if it becomes law, will simply allow the debate to take place. There's been a number of times where Congress has sought to intervene on similar actions. I could think of one that I'm very familiar with, and that would be the Equal Access Act, which was passed in 1984, bipartisan support. Recognizing that local school districts controlled their schools, there was this concern by Congress that religious and political clubs on public high schools were being denied access. Congress intervened. They didn't mandate——

Mr. FLANAGAN. Excuse me, Mr. Sekulow, if I can interrupt you—the issue at hand is not school prayer or any other issues. I don't mean to intimate that you're trying to turn it to that.

Mr. SEKULOW. No, sir.

Mr. FLANAGAN. But I'm saying that this is peculiar, special; it is unique in its own right because of the fact that the Federal Government does not have marriage laws. We don't do this up here.

Mr. SEKULOW. Right.

Mr. FLANAGAN. Now, want to assert that the States are going to go ahead and be permitted to have the debate—and I think that that is wonderful. I think the current state of the law allows that. My question is: why are we putting or how can we put our thumbprint on the fact that we're now going to speak on the subject of marriage where for 200 years we have not?

Mr. SEKULOW. We have to speak on it because in 200 years we've not had a challenge to what is the definition of marriage. This is the first time in our Nation's history that's happened.

All Congress is doing—and you're better at telling this than I—that all Congress is doing is simply saying——

Mr. FLANAGAN. Mr. Sekulow, I mean——

Mr. SEKULOW [continuing]. Allow it to be debated.

Mr. FLANAGAN. And——

Mr. SEKULOW. Not defining marriage——

Mr. FLANAGAN. Nobody wants to stifle debate here. Nobody wants that. My suggestion, though, is that the state of the law permits that today.

For us to do that—and we have had—you know, interracial marriages have been illegal in States of the Union. We have had difficulty in all sorts of areas where we have had a marriage defined by a State and not recognized by other States. Polygamy laws, all sorts of difficulties—Congress has resisted stepping into that. Why now? What makes this such a peculiar circumstance where Congress for the first time has to announce on this subject?

Mr. SEKULOW. Because three justices of the State of Hawaii are about to, under the interpretation of many of the people we've heard today, declare what the law of the land will be, not just in Hawaii.

Mr. FLANAGAN. I probably—I cannot cite the case, I know, but I do know that the misogyny cases in——

Mr. SEKULOW. *Young* v. *Virginia*——

Mr. FLANAGAN [continuing]. I'm certain had judicial imprimatur on them, and, similar citations have been made in the past. Clearly, court intervention prompted no action on Congress' part before.

Mr. SEKULOW. But the Supreme Court in those cases said that it was fundamentally unconstitutional to deprive a black man from marrying a white woman. There is a difference, and the courts have recognized this, and the Supreme Court of Hawaii recognized this, there is a constitutionally significant difference between denying someone a special right and recognizing marriage is a special right with special status, based on who they are—black man or black woman, a white man, white woman—and what they engage in or how they engage in it. That's very, very different.

That's been for—all the civil rights cases have always drawn that distinction: you can't discriminate against somebody because of who they are, a man or a woman, but there has never been that analysis drawn to a discrimination or prohibition on—of course, we're not even at that stage with this legislation; it's simply the debate—when it comes to how people engage in conduct. Who they are and the conduct they engage in are always very different.

Mr. FLANAGAN. The distinction is fine.

Mr. SEKULOW. It's constitutional.

Mr. FLANAGAN. Well, but, as for the class distinction and the behavioral distinction I think you're drawing here, perhaps any of the other panelists would like to comment on that, because that may very well strike at the heart of this matter. Anyone else?

Mr. WARDLE. I would.

Mr. FLANAGAN. It seemed interesting to me. [Laughter.]

Mr. WARDLE. Mr. Flanagan, I think the reason why Congress needs to act now is because your assumption, I believe, is factually inaccurate. You've said Congress has never acted about this. We heard earlier that the term "marriage" is used over 800 times in Federal law, and I know that marriage is defined for tax purposes, for some purposes, differently than it is in the States. For instance, for purposes of filing a joint return, the question is——

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

Mr. WARDLE [continuing]. The question is whether you're married at the end of the year——

Mr. CANADY. Do you want 30 seconds?

Mr. FLANAGAN. No. It's in your testimony Mr. Wardle, thank you. I did see that there.

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

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I just have one question to ask each of the panel members that I believe can be answered with a yes or no answer, and I would hope that it would be answered with a yes or no answer. [Laughter.]

Mr. FRANK. Are bets in order? [Laughter.]

Mr. SENSENBRENNER. I'd never make a bet with the gentleman from Massachusetts because I lose all the time. [Laughter.]

The question is: What provision is there in H.R. 3396 that prohibits any State, including Hawaii, from legalizing same-sex marriages? Since you're off on this side, Professor Wardle, why don't you start out?

Mr. WARDLE. None, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Ms. Birch.

Ms. BIRCH. I can't answer with a yes or no, and I—but I would elaborate, if you'll allow me to.

Mr. SENSENBRENNER. No. [Laughter.]

Rabbi Saperstein.

Rabbi SAPERSTEIN. None, but it's not the question before us, the key question before us.

Mr. SENSENBRENNER. I think it is the question before this committee.

And Mr. Sekulow.

Mr. SEKULOW. None.

Mr. SENSENBRENNER. Thank you, and I yield back the balance of my time. And I should have made the bet with the gentleman from Massachusetts. [Laughter.]

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I'd like to get to the bottom line here in terms of what the responsibility of elected representatives is relative to what the responsibility of judges are. Now, as I understand it, if three judges on the Hawaii Supreme Court determine that there's no compelling State interest for the State of Hawaii under its constitution not to recognize same-sex marriages, and five Justices on the U.S. Supreme Court determine that there is no public policy reason not to honor the full faith and credit clause of the U.S. Constitution, then a total of eight people will have changed what is clearly the overwhelming majority sentiment in this country: that marriage should

be defined in a manner similar to how it is defined here for use in Federal statutes in the third section of this very short and very simple bill. And it seems to me that the vast majority of the American people would not want us to take the risk of allowing eight people to make that decision relative to what the elected representatives of 260 million people are responsible for doing.

And, Mr. Sekulow, I wonder if you would comment on that observation.

Mr. SEKULOW. My comment will be short. I agree with you 100 percent. All that is being done in this bill is allowing debate. Debate doesn't violate the Constitution. In fact, debate's protected by the Constitution. The State's not mandated to have same-sex marriages. They're not mandated if they don't want to have same-sex marriages. It simply tells State legislators and people that the full faith and credit clause—and, more importantly, the Supreme Court of Hawaii—cannot be a hammer held on the rest of the Nation.

Mr. GOODLATTE. That's correct, and you make a good point that I was not pursuing; that is, in section 2, it simply says—and I'll read it: "No State, territory, or possession of the United States or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

Now it seems to me that the vast majority of the people in the country would support the right of the individual States to do that.

Mr. Saperstein, I'll give you a fair opportunity to respond to that. Why shouldn't the elected representatives of the people not take the risk that two courts might interpret currently existing laws in a way contrary to what I think, and I believe everybody in this room would think, a majority of the people of this country views to the contrary?

Rabbi SAPERSTEIN. Well, you know, it depends on what ground the Supreme Court acts on. If it acts on a due process or equal protection, or full faith and credit applies here, it's a constitutional interpretation—are fundamental rights and not subject to majoritorian view. The courts have always changed policies—we leave to the courts to interpret policies in compliance with our Constitution, and the Constitution does say "full faith and credit shall be given" to each State.

The second sentence is an implementation sentence. That's the way it is overwhelmingly interpreted by scholars in the field. Here it does not limit the fact that it shall be given. So that would be a Supreme Court decision, but until then, States do have the power to make determinations. Your law won't change that. If the Supreme Court acts to declare the public policy exception now available to States unconstitutional, your law will go down, too. Your law does nothing right now that isn't available to the States.

Mr. GOODLATTE. Mr. Wardle. I'll come back to you, Ms. Birch.

Mr. WARDLE. Well, I think that—I think that it's clear that, under the effects language of article IV, Congress has the authority to pass this legislation.

Mr. GOODLATTE. So you disagree with Rabbi Saperstein in terms of the second sentence of the full faith and credit clause, and I agree with you——

Mr. WARDLE. I——

Mr. GOODLATTE. Go ahead and elaborate on that.

Mr. WARDLE. Yes. I think that it's very clear that the Founders and the drafters of the Constitution intended for Congress to be able to declare the effects, and that's precisely what this bill does.

It's very interesting that this bill doesn't say to the States what the substantive policy of the law must be. It simply says you do not have to give it back to the law of another State, and I think that is clearly a neutral approach and it's clearly within the power of Congress.

Now there are some fine-tuning dimensions of the——

Mr. GOODLATTE. To go beyond power, do you think it's the responsibility of the Congress to act when the vast majority of people hold a view contrary to what one State supreme court appears to be holding, and which might then be spread across the land of the rest of the country?

Mr. WARDLE. The recognition of same-sex unions as marriage would be a radical redefinition of marriage which——

Mr. CANADY. Without objection, the gentleman will have 30 additional seconds.

Mr. WARDLE [continuing]. Which I think would be—should not be enforced upon the States through some judicial interpretation or some vehicle such as a strained expression of full faith and credit. I think that should be decided by each State, by the people therein, and by Congress for purpose of Federal law.

I think that same-sex unions do not contribute to society what heterosexual marriage has contributed through the centuries and what is so important for families and for children today. And I think that this—so I think that there are good policy reasons for States not to recognize same-sex marriage, even if some jurisdiction or some court does.

Mr. GOODLATTE. Mr. Chairman, we may run out of time, but I did promise Ms. Birch she'd have the opportunity to respond as well.

Mr. CANADY. If there's no objection, you'll have an additional 30 seconds for that purpose.

Ms. BIRCH. Never before has the Congress of the United States even presumed to give substantive guidance in terms of the full faith and credit clause. Indeed, the second sentence——

Mr. GOODLATTE. But never before has the full faith and credit clause been used for this purpose with regard to same-sex marriages.

Ms. BIRCH. Every law that Congress has passed on this topic—and there have been two before this century, in 1790 and 1804—provides ways to authenticate acts, to prove the records or the acts or the judicial proceedings. That's one piece of it.

Even recent legislation—for example, the Parent Kidnapping Prevention Act does not purport to go into substance. It only purports to——

Mr. CANADY. I'm sorry, the——

Ms. BIRCH [continuing]. Facilitate the implementation of the Full Faith and Credit Act. So this is——

Mr. CANADY. The gentleman's——

Ms. BIRCH [continuing]. Not constitutionally permitted.

Mr. CANADY. The gentleman's time has expired. I think there are no other members here wishing to be recognized. So all time is expired.

I want to thank the members of this panel for your testimony. Your remarks have been very helpful.

And the subcommittee is adjourned.

[Whereupon, at 6:13 p.m., the subcommittee adjourned.]

APPENDIX

LETTER DATED MAY 14, 1996, TO CHAIRMAN HENRY J. HYDE, FROM ASSISTANT ATTORNEY GENERAL ANDREW FOIS, OFFICE OF LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 1996

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Attorney General has referred your letter of May 9, 1996 to this office for a response. We appreciate your inviting the Department to send a representative to appear and testify on Wednesday, May 22 at a hearing before the Subcommittee on the Constitution concerning H.R. 3396, the Defense of Marriage Act. We understand that the date of the Hearing has now been moved forward to May 15.

H.R. 3396 contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would essentially provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that H.R. 3396 would be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department.

Sincerely,

Andrew Fois

Andrew Fois
Assistant Attorney General

cc: The Honorable Charles T. Canady
The Honorable John Conyers, Jr.
The Honorable Barney Frank