ORDER OF PROCEDURE

Mr. REID. Mr. President, I don't believe the Chair has announced the resolution is before the Senate. Is that right?

The PRESIDING OFFICER. That is correct.

Mr. REID. I ask the Chair to do that and I ask unanimous consent that Senator KENNEDY's time be counted against the unanimous consent agreement.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

FEDERAL MARRIAGE AMENDMENT—MOTION TO PROCEED

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of the motion to proceed to S.J. Res. 40, which the clerk will report.

The assistant legislative clerk read as follows:

A motion to proceed to the consideration of Senate Joint Resolution 40, a joint resolution proposing an amendment to the Constitution of the United States relating to marriage.

The PRESIDING OFFICER. Under the previous order, the time until 11:45 shall be equally divided between the chairman and ranking member or their designees.

The Senator from Rhode Island.

Mr. REED. Mr. President, I rise today in opposition to the amendment that is before us. First, Congress has already addressed this issue in a statute that has yet to be effectively legally challenged. Second, amending the Constitution should be the last resort and not the first response when it comes to an issue of this type. Third, issues involving family law matters are and have been historically the purview of State legislatures and State courts. Finally, while there is great interest on the part of some in this Constitutional amendment, our Nation faces the far more pressing threat of terrorists committed to attacking us here on U.S. soil. There is so much more we can and should do with respect to that looming threat.

Several years ago in response to developments in Hawaii and elsewhere, Congress, along with then-President Clinton's support, enacted the Defense of Marriage Act, known as DOMA. DOMA put into Federal law a clear and precise definition of marriage as follows:

. . . 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.

In the face of this clear language in the statute, it is amazing to me we would disregard the wisdom of our Founding Fathers and attempt to enshrine in the Constitution this principle without testing the constitutionality of this statute. Since it was first written and with the addition of the Bill of Rights in 1791, our Constitution has only been amended 16 times. The vast majority of these amendments dealt with the separation of powers and structure of our Government, the right to vote, power to tax, and other issues that, frankly, are only issues that can be decided through Constitutional amendment. The amendment that is before us today has not yet risen to this level of interest and concern.

First, as I indicated, Congress has already addressed the issue of what marriage is, and that law to date has not been challenged in a meaningful way. So there is no definitive finding of the constitutionality of DOMA. Indeed, typically the first step when one seeks to pursue a constitutional remedy is to determine whether the statutes are adequate. That has not been done.

Second, only one State in our Nation has recognized same-sex marriage, and that decision has yet to impact other States.

I would suggest to my colleagues that now is not the time to play politics in an election year with the Constitution of the United States.

I believe it is also important to note that the Founding Fathers in their wisdom established a Federal system of Government that intentionally left many critical issues to the control of State legislatures and State courts. This system has served our Nation extremely well, and I fear this amendment, if adopted, would lead to a succession of proposals to federalize family law and to federalize other issues that have been the purview of States since the beginning of our country.

Also, it strikes me as a misplaced priority when it comes to all the other issues that face us today—issues of funding homeland security, issues pertaining to health care, issues that are affecting the lives of every family in the country—to be here today and debating a proposal that does not have the majority support of the American public. In an ordinary time, debating any issue might be justified, but this is not an ordinary time.

As we were reminded last week by Governor Ridge and Mr. Mueller of the FBI, there are those who are plotting today to attack us in our homeland, and yet here we are talking about the issue of a relationship between two consenting adults.

We have 30 days left on the majority leader's schedule, and apparently we are going to spend our time on these types of divisive issues. That is not how I think we should properly spend our time. I think we should commit ourselves to dealing with the issues that pertain to every American family—issues of health care, issues of security, both economic and international.

Today we are spending time on an amendment which will not pass, which is not supported by the majority of Americans, and which defers us and deflects us from concentrating on the issues I think can help Americans.

Finally, I know many of my constituents are gays and lesbians in long-term relationships. While I myself believe civil unions are perhaps the best place to begin to publicly acknowledge these relationships, I want to recognize that the impetus behind the push for gay marriage comes from a desire for security and serious, committed relationships by many adult Americans.

In closing, let us heed the wisdom of our Founding Fathers. The States are simply the correct place for the regulation of marriage, and this kind of election-year politicking, which suggests an intolerance toward many of our constituents and neighbors, is plain wrong.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, when I came to the Senate I learned a new aphorism, referring to the debates and sometimes repetitive arguments you tend to hear by Members of Congress. Someone told me: ''Well, everything has been said; it is just not that everyone has had an opportunity to say it yet.''

Sometimes I wonder if that reflects the fact when we are debating important issues like this, people aren't listening or maybe they made up their minds and they are not open to the facts or persuasion or perhaps some preconceived notion they have about the motivation for legislation is flat wrong, but they have already locked in, they have already gone public, they have taken a position and then it becomes two contending adversaries across some demilitarized zone and we try to fight it out the best we can and then count the votes.

But I think two things are most important about this debate. Despite some of the repetition of erroneous arguments, we have had an important debate. I think two things will come out of this that have been very positive, regardless of what happens in the vote today.

First, we have had a debate on the importance of traditional marriage, the importance of the American family and steps we should be taking in order to preserve the traditional marriage and American family and to work in the best interests of children. That is a debate that has been long overdue. I am told it has been perhaps at least 8 years, since the passage of the Defense of Marriage Act, since this body has even talked about the most basic building block in our society. I think that has been very positive.

I also think it has been positive that we have been able to direct the American people's attention to the erosion of our most fundamental institutions by judges who seek to enforce their personal political agendas under the guise of interpreting the Constitution.

Now I come to the Senate and hear some of my colleagues, including the Senator from Massachusetts, say this is all part of a right-wing conspiracy, or words to that effect. Surely, when the Defense of Marriage Act passed in 1996 by a vote of 85 Senators, an overwhelming bipartisan consensus which defined marriage as a union of a man and a woman, that was not the product of a vast right-wing conspiracy. Indeed, that was the Senate and Congress functioning at its best, coming together to protect the fundamental institution, one we have fought hard and should continue to fight hard to preserve and protect against all challenges.

We have heard and I have read in the press that this side of the aisle has been castigated for not accepting the Democratic leader's offer to go to an up-or-down vote on this amendment. The problem is, of course, that they only tell half of the offer. The other part of the offer was banning consideration of any further amendments that might be offered in the Senate—in other words, constraining the debate, stifling the debate, and limiting the right of any Senator on any piece of legislation, whether it is a constitutional amendment or an ordinary bill, to offer alternatives for the body to consider as a means of advancing the debate.

My understanding is the majority leader countered by saying, okay, we will go to an up-or-down vote, but we are not going to limit our right to offer amendments. The amendment most talked about is the so-called Smith amendment, which is, lo and behold, the first sentence of the amendment offered by Senator ALLARD hardly a surprise to anybody—which merely defines marriage as a union between one man and one woman. Our colleagues on the other side of the aisle were apparently afraid to allow the Senate to consider alternatives as a way of advancing the debate because they were afraid an alternative, perhaps along the lines of Senator SMITH's amendment, the one-sentence amendment, would garner more votes. I am advised it would garner perhaps as many as ten new votes.

Mr. CARPER. Will the Senator yield?

Mr. CORNYN. I will gladly yield after I complete my remarks.

It is a bogus offer. It is a bogus argument that somehow by refusing their attempt to stifle the debate and stifle the amendment process that this has somehow become nothing but bare partisan politics.

There are those who would raise their voices, those who would call Members names, Members who believe it is important to defend the traditional institution of marriage, in hopes we would lose the courage of our convictions. In hopes that we would simply be silent while we see the ongoing march of litigation as part of a national strategy to undermine the traditional institution of marriage that we know is the most important stabilizing influence in our society and one that functions in the best interests of our children. But we are not going to lose the courage of our convictions. We are not doing to sit on the sidelines. We are not going to be quiet. We are not going to give up. In fact, regardless of how this vote turns out at noon today, I know of no important piece of legislation considered by Congress that has been successful the first time it has been introduced into the Senate.

What I have learned is probably the most important characteristic of a Member of the Senate is someone who is willing to persevere over weeks and months and even years until ultimately they are able to see the fruit of their labor and the legislation they have sponsored be accepted by the Senate. It is part of a building process, it is part of an awareness process that is very important.

Part of the awareness process is also to knock down some of the unfounded statements that are made during the course of the debate. It was, I believe, the Senator from Massachusetts who said that no court has called the Defense of Marriage Act into question. Perhaps he was not able to listen yesterday when I read a paragraph out of the Massachusetts Supreme Court decision in Goodridge, relying on the case of Lawrence v. Texas, that plainly calls the constitutionality of the Federal Defense of Marriage Act into question. As a matter of fact, you cannot really believe, as the court did, that the marriage laws of Massachusetts were unconstitutional and believe that the Defense of Marriage Act is constitutional as well.

To be fair, the unconstitutionality of the Defense of Marriage Act is an argument the Senator from Massachusetts made back in 1996 when he voted against the Defense of Marriage Act, as did the other Senator from Massachusetts, Senator KERRY, who voted against the Defense of Marriage Act then and who stated that if passed, it would be unconstitutional. This has been a consistent theme, although they have some of their facts wrong. I hope that helps clarify.

The question before the Senate today is simple: Do you believe traditional marriage is important enough that it deserves full legal protection? As I said, an overwhelming bipartisan consensus in 1996 voted that it did by passing that statute. President Clinton said as much by signing that legislation into law in 1996.

This debate is important. It is long overdue because we have, in essence, a stealth operation going on today. It is an effort where a handful of courts around the country, as well as those who have engaged in a nationwide litigation strategy, are basically operating off the radar screen of most Americans. The only time the American people know very much about it is when a blockbuster decision is handed down, such as the Massachusetts Supreme Court in May of this year, or when they happen to see local officials engaged in civil disobedience, for example, in San Francisco, issuing same-sex marriage licenses and same-sex marriages in that location.

This is not, despite the wishes of some of the people who are opposed to this amendment, something that can be solved at the State level. I believe in the principle of federalism. I believe people at the local level, closest to the problem, are best prepared and are in the best position to try to address that problem. But we have seen how, with one State recognizing same-sex marriage, people have moved now, we know, to 46 different States and how there are lawsuits pending in at least 10 of those States—and no one knows how many there will be in the future—seeking to compel those States, in violation of their current State law, to recognize those same-sex marriages.

Some people have said, don't worry. The Senator from New York, Senator CLINTON said, don't worry, we do not have to amend right now, we can wait until after the Federal Defense of Marriage Act is held unconstitutional. In fact, she said no one had challenged it, and I have attempted to clarify that by my earlier statements.

In the interest of completeness, let me ask unanimous consent to have printed in the RECORD the cover sheet from a lengthy petition in both cases, one filed in the Western District of Washington, in re Lee Kandu and Ann C. Kandu, and another complaint, Sullivan v. Bush, filed in Federal court, the Southern District of Florida, Miami Division, seeking to hold the Federal Defense of Marriage Act unconstitutional as a matter of Federal law.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON

In re Lee Kandu and Ann C. Kandu, Debtors; No. 03–51312; reply of petitioner Kandu to show cause order.

Petitioner Lee Kandu submits this reply to the United States Trustee's Response to the order to show cause why the joint petition should not be dismissed. As explained below, the government has failed to respond directly to the legal issues presented by this case—issues never before considered by this or (to the best of petitioner's knowledge) any other court as to the proper construction and constitutionality of the federal Defense of Marriage Act (''DOMA''). To the extent that the government does touch on the issues presented by this case, the government's arguments are based on outdated case law and lack merit.

ARGUMENT

I. Applying DOMA to Section 302 of the Bankruptcy Code Would Violate the Tenth Amendment

It is well settled that the Tenth Amendment prohibits Congress from usurping the powers not delegated to it by the Constitution. It is also well settled that ''the regulation of domestic relations has been left with the States and not given to the national authority.'' Williams v. North . . .

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

Civil Action No. 04–21118: F.D.R. ''Fluffy'' Sullivan and Pedro ''Rock'' Barrios; Cynthia Pasco and Erika Van der Dijas; Michael Solis and Jesus M. Carabeo; and Jason Hay-Southwell and William Hay-Southwell, Plaintiffs, v. John Ellis Bush, in his official capacity as Governor of the State of Florida, and Charles J. Crist, Jr., in his official capacity as Attorney General of the State of Florida; and Harvey Ruvin, in his official capacity as Clerk of the Circuit and County Courts, Miami-Dade County, Florida; and John Ashcroft, in his official capacity as Attorney General of the United States, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

CLAIM OF UNCONSTITUTIONALITY

1. This Court has jurisdiction pursuant to 28 U.S. Code 1331. This is a civil action arising under the Constitution and laws of the United States presenting a substantial Federal question.

2. Venue is properly in the Southern District of Florida, Miami Division, pursuant to 23 United States Code 1391. All of the Defendants reside in Florida and all have offices for the conduct of official business in Miami-Dade County, Florida: also a substantial part of . . .

Mr. CORNYN. Some have said there are more important issues to debate. Certainly, the Senate has debated and I hope and trust we have passed legislation that has done a lot of good on behalf of the people who sent us here. If we haven't, we have not been doing our job. I believe we have a record we can be proud of when it comes to defending America and the war on terrorism, when it comes to rejuvenating our economy to see it come roaring back the way it has, indeed, providing a prescription drug benefit to senior citizens.

We have done a lot of which we can be very proud. And for someone to stand up and say that preservation of traditional marriage is not important enough for us to talk about, to me, is breathtaking in its audacity and its sense of obliviousness to what the concerns are of moms and dads and families all across this country.

We know for years, for a variety of reasons, the American family has been increasingly marginalized. We know we have a crisis in this country of too many children being born outside of wedlock, too many marriages ending in divorce, and too many children being raised in less than optimal circumstances, putting them at risk for a whole host of social ills for which ultimately the American taxpayer has to pick up the tab. And I have not even mentioned the human tragedy involved, as some child fails to live up to their God-given potential.

I do not believe that we can remain neutral or to remain merely spectators in this further marginalization of the American family. We cannot allow for a process that puts more and more children at risk through a radical social experiment. And if we want to look for the only evidence that we know is available, we can look to Scandinavia, where less people get married, more children are born out of wedlock, and more children become, thereby, the responsibility of the State.

It is not good for them, it is not good for us, and we should not, without letting the American people have a voice in the process, merely sit back while judges radically redefine our most basic societal institution.

Now, let me click through a number of other arguments that have been made.

I know Senator DURBIN has said we should not talk about constitutional amendments during an election year. My question to him is: Isn't Congress still in session? Aren't the American taxpayers still paying us to do our job? As a matter of fact, six times Congress has successfully proposed amendments in an election year.

Some have claimed that the text that is before us—Senator ALLARD's amendment—prevents States from enacting civil unions if they should wish to do so through their elected representatives. Yet the Democrats' own legal expert, Professor Cass Sunstein, answered this very question: Of course not. This amendment does not prevent the States from enacting civil unions should they decide to do so.

Some have even gone so far as to claim that the Allard text would regulate private corporations, churches, and other private organizations. As the Presiding Officer well knows, and as virtually everybody in this body should know, the Constitution regulates State actors, not private actors. These arguments do not hold water. But they do not have to work for our opponents on this issue to say them because that is not the point. The point is, if you cannot convince them, confuse them. Their aim is to distract the American people away from the real question, which is, as I said at the outset: Do you believe that traditional marriage is important enough that it deserves full protection under law?

I would ask the opponents of this amendment, if you believe in traditional marriage—as some of you but certainly not all of you have said you do—but you do not support this amendment, what is your plan? What do you think the American people should do when courts run red lights and act in excess of their authority by legislating from the bench, redefining our most basic institutions? What are you going to do to stand up on behalf of the American family to prevent the increasing marginalization of the American family?

But I am confused by the arguments that are made by some on the other side of this issue. When some of their very own leaders say the Defense of Marriage Act is unconstitutional—such as Senator KENNEDY, Senator KERRY—when your very own leaders say, as the senior Senator from Massachusetts did yesterday, that traditional marriage is a ''stain on our laws''—repeating the language of the Massachusetts Supreme Court in saying that traditional marriage is a ''stain that must be eradicated'' because it, in essence, represented discrimination—what do the opponents of this amendment think we should do? Do you want the courts to strike down traditional marriage? What you are saying is that you do not want the American people to know about it, much less have a voice in correcting this radical social experiment.

Of course, everyone has a right to file lawsuits. But the American people have rights, too, rights preserved by Article V of the U.S. Constitution, which provides a process of amendment, particularly when courts engage in a radical redefinition of our most basic institution under the guise of interpreting the Constitution. Indeed, the only way the American people have of responding is through a constitutional amendment. So we have no choice but to offer this amendment by way of response.

I think no one should be fooled into thinking that on this side of the aisle we are afraid of a full and fair debate and a vote on the various proposals that may come to the floor. But, indeed, under the offer made by the Democratic leader last Friday, it would have cut off any amendments, would have stifled a full debate, which I think has been on the whole very positive.

I appreciate my colleague for letting me finish my prepared remarks. I do not know if he still has a question, but I would be glad to respond if he does.

Mr. CARPER. I do. I thank my colleague for yielding. There is a question I want to ask. But let my just say, first of all, I think you know how much I respect you and the high regard I have for you and how much I enjoy working with you. We agree on a lot of things. And there are one or two things we do not agree on, and that is, I think, to be expected.

The issue that you raised early in your remarks is one I want to come back to; and that is, the question of whether we should in some way have an up-or-down vote on the amendment that is before us, or if there should be opportunities for other colleagues, Republicans and Democrats, to offer their own amendments to this underlying amendment.

I think the concern for our side is that we are mindful of the possibility of this not being just a debate, an opportunity to address whether there should be a constitutional amendment as marriage being between a man and a woman, but an opportunity to consider other issues of a constitutional nature.

There are people on our side interested in amendments that deal with campaign finance, in restricting money spent on campaigns. That is one example.

As a Member of the House, when I served with Senator SANTORUM over there, we were great proponents of something called a balanced budget amendment to the Constitution, not one that mandated a balanced budget, but one that said: Shouldn't the President be required to propose a balanced

budget? And shouldn't we make it a little more difficult for the Congress to unbalance that budget?

There are a number of constitutional amendments that are floating out there on your side and on our side. Here is my question.

Mr. CORNYN. Mr. President, I would be glad to respond to my colleague's question, but I first ask unanimous consent that the time engaged in question and answer be charged to the other side, in fairness.

The PRESIDING OFFICER. Is there objection?

Mr. CARPER. I will not object.

Mr. CORNYN. I thank the Senator.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. CARPER. I just ask that the response come out of your time.

Mr. CORNYN. I would be glad to respond to that because I think that is an important issue. No one has suggested we should not make this discussion about preserving traditional marriage. I would say there was no attempt to try to limit any debate, any amendments that might be offered—for example, the single-sentence amendment, which is the first sentence of Senator ALLARD's amendment—to amendments that are germane to the preservation of traditional marriage.

So I must say that while I respect my colleague—and he knows that, and, as he said, there are many things we agree on—I simply disagree that our refusal to take the offer that would allow no amendments, whether or not they are germane to the issue of traditional marriage, in no way opens this matter up to non-germane or extraneous amendments.

I would be pleased—at least speaking personally; of course, any Senator could lodge an objection to the unanimous consent request—for us to stay on the subject because I think this has been a very helpful debate.

I would also ask unanimous consent that a letter to Ms. Margaret A. Gallagher dated July 11, 2004, and a letter from the Liberty Counsel dated July 10, 2004, be printed into the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE BECKET FUND
FOR RELIGIOUS LIBERTY,
Washington, DC, July 11, 2004.

Ms. MARGARET A. GALLAGHER,
President, Institute for Marriage and Public Policy, Washington, DC.

DEAR MS. GALLAGHER: Your Institute and others have asked us to examine whether the proposed Federal Marriage Amendment (''FMA'') would violate the principle of religious liberty. In particular, you have first asked whether the FMA would reach private action in light of the fact that the FMA contains no express provision limiting its reach to state action only. Second, you have asked us to consider what the practical consequences for religious liberty would be should the FMA become law. That is, you have asked us whether it will trigger a ''witch hunt'' against religious organizations and individuals that choose to conduct or participate in religious ceremonies which they refer to as weddings.

You have provided us with an opinion letter by David Remes (the ''Remes Letter'') which answers both questions in the affirmative. Our strong belief is that the Remes Letter is mistaken on both counts. The FMA would not reach private action, and the parade of horribles it posits is unlikely in the extreme.[1]

At the outset we wish to emphasize that the Becket Fund is a nonpartisan, interfaith, public-interest law firm that protects the free expression of all religious traditions. We have represented religious congregations that have come down on both sides of the debate over the FMA. We have for example represented Unitarians, who do not support the FMA, and more conservative congregations who do. We have represented a wide assortment of faiths, including a variety of Jewish and Christian congregations, Buddhists, Muslims, Native Americans, Sikhs, Hindus, and Zoroastrians, whose views on the FMA are unknown to us. We have also represented religious congregations who take opposing positions on the moral issue of homosexual behavior itself. We have on the one hand represented congregations that condemn not only gay marriage but also gay sex, and on the other, at least one congregation (the Come As You Are Fellowship in Reidsville, Georgia) that openly welcomes gays. Had we concluded that the FMA would violate the principle of religious liberty we would have been at the forefront of the effort against it. We have, however, concluded otherwise.

THE FEDERAL MARRIAGE AMENDMENT WILL NOT REACH PRIVATE ACTION

The Remes Letter argues that the FMA ''by its own terms'' reaches private action. The Remes Letter concludes this simply from the fact that the FMA does not state otherwise. But more than 100 years ago the Supreme Court settled the point that constitutional provisions that do not facially restrict themselves to state action cannot be assumed to reach private action. In *United States* v. *Cruikshank*, 92 U.S. 542 (1875), the United States attempted to prosecute one group of private citizens for ''banding and conspiring'' together to deprive another group of citizens of, among other things, the ''right to keep and bear arms for a lawful purpose.'' Id., 92 U.S. at 545. The government's indictment was based on the argument made by the Remes Letter—because the Second Amendment did not limit itself facially to state action, but simply stated that ''[a] well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed[,]'' private actors could be indicted for attempting to deprive others of those rights. U.S. CONST. amend. II; *Cruikshank* at 548. The Supreme Court rejected that reasoning out of hand: ''The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look [to the state police power] for their protection against any violation by their fellow-citizens of the rights it recognizes.''—*United States* v. *Cruikshank*, 92 U.S. at 553. Had the Court ruled otherwise and applied to the Second Amendment the strained interpretation that the Remes Letter applies to the FMA, much mischief would have resulted. Churches, synagogues, and mosques for example, could not prevent persons from wearing firearms on the premises without thereby violating the Constitution.

The Remes Letter theory, if true, would lead to equally strange interpretations of other Amendments. The Third Amendment, which prohibits the quartering of troops in private homes during time of peace without the consent of the owner—but which does not explicitly limit its scope to state action—would make it unconstitutional for a tenant to sublease his apartment to a military officer whom his landlord found objectionable. Every petty theft would constitute a violation of the Fourth Amendment because that Amendment does not explicitly limit its condemnation of unreasonable seizures to state actors. Excessive spanking would arguably violate not only child abuse laws but the constitution itself, because it might be construed to be cruel and unusual punishment under the Eighth Amendment, which also does not expressly limit its scope to state action. None of these examples are the law, precisely because it has long been settled that constitutional provisions that do not expressly limit themselves to state action nevertheless do not ordinarily reach private action.[2]

The sole exception—and curiously the only example the Remes Letter cites—is the Thirteenth Amendment, which bans slavery. To remove that evil root and branch, it was necessary to take the extraordinary step of a constitutional provision that reached both public and private action. See, e.g., *United States* v. *Nelson*, 277 F.3d 164, 175 (2d. Cir. 2002) (history shows that unlike other amendments, the Thirteenth Amendment ''eliminates slavery and involuntary servitude *generally*, and without any reference to the source of the imposition of slavery or servitude'' and therefore ''reaches purely private conduct.'' (emphasis added)).[3]

By contrast, to achieve the FMA's objective, it is not necessary to reach private action. The FMA is occasioned by the interplay among state court decisions requiring that civil marriage be available to same-sex couples and the Full Faith and Credit Clause of the federal constitution. That Clause requires in general that civil marriages performed in one state be recognized in all other states. Thus, without the FMA, the argument goes, same-sex couples civilly married in Massachusetts must be considered civilly married in Alaska as well. However, the Full Faith and Credit Clause simply does not apply to purely religious ceremonies. Unlike uprooting slavery, therefore, preventing civil same-sex marriage from spreading via the Full Faith and Credit Clause does not require reaching private action. The general rule of the Second, Third, Fourth, and Eighth Amendments therefore applies, and not the exception of the Thirteenth.

Put differently, the historical context of the FMA informs its construction, just as the historical context of the adoption of the Bill of Rights informs construction of the Second, Third, Fourth, and Eighth Amendments, and the Civil War and Reconstruction provide the historical context that informs construction of the Thirteenth Amendment. Indeed, the FMA refers in its second sentence to state and federal constitutions—an unmistakable allusion to the actions of the Massachusetts Supreme Judicial Court in *Goodridge* v. *Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) and other courts which have engendered the confusion to which the FMA is addressed.

In sum, it strikes us as past fanciful that courts construing the FMA would abandon the general rule adhered to in the Second, Third, Fourth and Eighth Amendments, and grasp at the exception of the Thirteenth. The FMA thus causes us no anxiety for the religious liberty of those of our clients who might wish to conduct ceremonies for gay couples.

THE FMA WILL PROTECT RELIGIOUS LIBERTY MORE THAN IT WILL THREATEN IT

We next examine the Remes Letter's suggestion that should the FMA become law, it

would occasion a witch hunt against those congregations and individuals who might seek to hold or participate in religious ceremonies for gay couples. The short answer to this fear is that the FMA does nothing but restore the status quo that has until very recently obtained in all 50 states since the Founding. We are aware of no such witch hunt ever being conducted against Unitarians or other groups who support same-sex marriage, whose tax exemptions seem to us as secure today as they ever have been. In those instances (overlooked by the Remes Letter) where same-sex marriage ceremonies have become the subject of litigation, the prosecutors have been clear that the crucial distinction lies between a purely religious ceremony, which the law will not disturb, and those ceremonies that purport to invoke state law and confer state benefits (''By the authority vested in me . . . .''), which would be illegal. See Thomas Crampton, Two Ministers are Charged in Gay Nuptials, N.Y. Times, March 16, 2004, at B1 (charges based on fact that ministers ''have publicly proclaimed their intent to perform civil marriages under the authority vested in them by New York state law, rather than performing purely religious ceremonies.'')[4] That seems to us to be the appropriate line to draw.

By contrast, in the short time since the Massachusetts Supreme Judicial Court handed down *Goodridge*, ordering gay marriage in the Commonwealth, a large number of serious questions have emerged about the rights of religious organizations who are conscientious objectors to that ruling. For example, Catholic colleges and universities there have started examining whether the schools must now provide married student housing to legally married gay couples.[5] Similarly, religious employers that provide health and retirement benefits to the spouses of married employees may risk liability for withholding those benefits from same-sex spouses.

On top of these liability risks, resisting churches are more likely to face selective exclusion from public facilities, public funding streams, and other government benefits. The Boy Scouts, whose right to exclude openly gay scouts from leadership was confirmed in *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), have been the target of state and local governments who have sought to exclude the Scouts from public benefits they have long enjoyed. Throughout Connecticut, for example, the Boy Scouts were denied participation in the state's payroll deduction charitable giving program. See *Boy Scouts* v. *Wyman*, 335 F.3d 80 (2d Cir. 2003). Similarly, the New York City Council recently passed a law to exclude any contractor from doing more than $100,000 worth of business with the City, if the contractor refuses to extend health benefits to same-sex domestic partners. As a result of their religious convictions, groups like the Salvation Army—which has provided the City with millions of dollars in contract services for the needy—will be excluded from participation in government contracts. Such sanctions can only be expected to increase under a regime of same-sex marriage.

Moreover, the *Goodridge* decision is having an impact on individuals as well. One Massachusetts Justice of the Peace has already resigned, because she could not perform same-sex marriages in good conscience and Massachusetts refuses to provide an opt-out for conscientious objectors. Thus we are concerned that, whatever religious liberty problems there might be at the margins should the FMA become law, there will be far more problems if it does not.

CONCLUSION

For the reasons set forth above, it is our opinion that the FMA would not reach private action and would sufficiently protect religious liberty from unwarranted state intrusion.

Very truly yours,

KEVIN J. HASSON,
Chairman.

END NOTES

[1] The Remes Letter raises an assortment of other objections to the FMA that are beyond the scope of this letter.

[2] See, e.g., *Katz* v. *United States*, 389 U.S. 347, 350 n.5 (1967) (''The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from *governmental* intrusion.'' (emphasis added)); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (''wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable *governmental* intrusion'' (emphasis added)); *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977) (Eighth Amendment designed ''to limit the power of those entrusted with the criminal-law function of *government*'' (emphasis added)).

[3] The same was true of Prohibition, enacted by the Eighteenth Amendment, until it was repealed by the Twenty-first Amendment.

[4] The case the Remes Letter does cite is idiosyncratic. *Shahar* v. *Bowers*, 114 F.3d 1097 (11th Cir. 1997) involved a lawyer recruited to join the office of Georgia Attorney General Michael J. Bowers (of *Bowers* v. *Hardwick* fame) who publicly championed her lesbian relationship at a time that sodomy was still illegal in Georgia. In its essence this was not a case about religious ceremony, so much as it was a case about demonstrated poor judgment. Id. at 1106, 1110. The outcome in *Shahar* would in any event have not been affected by the FMA becoming law.

[5] Rhonda Stewart, ''Catholic Schools Studying Gay Unions,'' The Boston Globe (May 16, 2004).

LIBERTY COUNSEL,
Orlando, FL, July 10, 2004.

THE FEDERAL MARRIAGE AMENDMENT PRESERVES MARRIAGE AS THE UNION OF ONE MAN AND ONE WOMAN AND IS CONSISTENT WITH CONSTITUTIONAL JURISPRUDENCE AND FEDERALISM

We write this letter on behalf of a broad coalition of policy, religious and legal organizations and individuals to address several issues raised in a June 24, 2004 Covington & Burling memorandum (the ''Covington Memo''). When read in conjunction with a July 2, 2004 letter we prepared concerning the legal attacks being waged against marriage in the courtrooms, it becomes clear that the federal marriage amendment must pass.[1]

In an effort to provide a ready reference to the arguments raised in the Covington Memo, we will address each of their arguments in order. Contrary to the conclusions reached in the Covington Memo, the Federal Marriage Amendment (''FMA'') preserves marriage as the union of one man and one woman in a way that is consistent with constitutional jurisprudence and federalism. Accordingly, in the first section of this letter, we rebut the argument that ''The FMA is Ambiguous and Self-Contradictory.'' The second section exposes the intellectual dishonesty in the argument that ''The FMA Would Threaten Private Recognition of Marriage of Same-Sex Couples, Even By Religious Bodies.'' The third and fourth sections reveal the analytical error in the arguments that ''The FMA Displaces Democratic Decision-making'' and the ''The FMA is Inconsistent with Principles of Federalism.'' The fifth section addresses the argument that ''The FMA Would Constrain All Three Branches of Government.'' The final section discusses the current legal battles taking place, which undermines the argument, that ''The FMA Would Precipitate Continuing Struggle.''

I. THE TWO SENTENCES IN THE CURRENT FMA ARE CONSISTENT

The two sentences in the current FMA are consistent with each other. The current FMA provides that ''Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.''

The first sentence is a broad declaration that marriage throughout the country is limited to a union of one man and one woman. It also acts as a broad prohibition on conferring the legal status of marriage on any relationship other than that of a man and a woman. The second sentence reinforces the first sentence. It reinforces the first by expressly stating that neither the U.S. Constitution nor a state constitution may be construed to require same-sex marriage. The decision in Goodridge v. Department of Health, 440 Mass:. 309, 798 N.E.2d 941 (Mass. 2003), exemplifies the necessity of that portion of the second sentence.

In Goodridge, the Massachusetts Supreme Judicial Court (''SJC'') stated that ''[t]he everyday meaning of 'marriage' is 'the legal union of a man and woman as husband and wife,' and the plaintiffs do not argue that the term 'marriage' has ever had a different meaning under Massachusetts law.'' Id. at 319.[2] However, the SJC reformulated ''marriage'' to mean the ''union of two persons.'' Significantly, under the Massachusetts constitution, the SJC was without authority to redefine the indisputable understanding of marriage from the ''union of a man and a woman'' to the ''union of two persons.'' See Opinion of the Justices to the Senate, 324 Mass. 746, 85 N.E.2d 761 (1949) (unambiguous words in the constitution must be interpreted according to their meaning at the time they were added to the constitution). Nevertheless, four of the seven judges held that it would ''construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of marriage.'' Goodridge, 440 Mass. at 343.[3]

The second sentence of FMA makes clear, for those looking for wiggle room in the language of the first sentence, that the FMA prohibits a repeat of the Goodridge decision. While the Covington Memo describes the first part of the second sentence as inconsistent with the first sentence, the level of judicial activism currently taking place across the country mandates a clear expression that marriage at the state and federal level is limited to the union of a man and a woman. The second sentence closes the door to any argument that the first sentence applies only to rights arising under the federal constitution, and therefore allows courts and legislatures to permit same-sex marriage under their state constitutions. This is particularly necessary given the fact that in the state marriage cases, those challenging the marriage laws as unconstitutional rely heavily on the argument that state constitutions grant broader individual rights than the federal constitution. See Covington Memo at 5 (''state courts are absolutely free to interpret state constitutional provisions to afford greater protections to individual rights than do similar provisions of the United states Constitution''). Whether or not a state constitution affords broader individual rights, the FMA reserves marriage in all fifty states as the union of one man and one woman.

The second sentence also prohibits a repeat the Baker v. State, 744 A.2d 864 (Vt. 1999) decision by the Vermont Supreme Court. In

that case, the court construed the state constitution to require the state to grant the same legal incidents of marriage to same-sex couples as are granted to marriages entered into by a man and a woman. After passage of the FMA, no court could render such a decision.[4] The two sentences of the FMA accomplish the same purpose—to reserve marriage for a union of a man and a woman. The two sentences are consistent.

II. THE FMA DOES NOT REACH PRIVATE CONDUCT NOR DOES IT THREATEN PRIVATE RECOGNITION OF SAME-SEX RELATIONSHIPS

The FMA does not reach private action nor does it prohibit private recognition of same-sex relationships. Marriage is a unique institution with a distinct definition and with distinct requirements for entry into the relationship. Two individuals may not simply declare themselves married and thus obtain the legal status of marriage. In all fifty states, a marriage may only be entered into with state sanction and approval.

A private religious group may conduct a religious ceremony to ''unite'' two persons of the same-sex, but such a union is not a marriage for legal purposes. Marriage is a public legal status. See Maynard v. Hill, 125 U.S. 190, 205 (1888) (marriage is the ''most important union in life, having more to do with morals and civilization of a people than any other institution'' and its status is conferred by the legislature); see also Loving v. Virginia, 388 U.S. 1, 7 (1967) (stating, ''[M]arriage is a social relation subject to the State's police power.'').

The Covington Memo argues that the FMA would be interpreted as the Thirteenth Amendment (regarding slavery) has been interpreted to prohibit private conduct. The Thirteenth Amendment is distinguishable from the FMA. Unlike marriage slavery does not require a state sanction—it is a purely private relationship. Because slavery may exist without state sanction or recognition, the Thirteenth Amendment applies to private conduct. Marriage, in contrast, cannot exist without government sanction. The FMA does not reach private conduct, nor would it regulate private ceremonies. A ceremony conducted by a private group is merely ceremonial or symbolic, not legal. The Second, Fourth, Fifth and Eighth Amendments are not limited by their text to state action, but it is clear they apply only to state action.

A thirteen-year-old child may not make a ''driver's license'' on a home computer and then protest when stopped by the police for driving without a license. Because the thirteen-year-old may not legally drive does not mean that private acts of playing driver off the public highways or creating a ''license'' for non-legal purposes are prohibited. However, if this person used the fake license to obtain access to a bar, then that action would come within the law. In the same way, it is impossible for a same-sex couple to conduct a private religious ceremony that legally results in marriage, and therefore, the FMA doesn't apply to the private action or ceremonies.

The FMA cannot ''punish'' religious organization:; that conduct ceremonies recognizing same-sex relationships. Nor would the FMA deny government funds to religious groups or deny charitable tax status to those organizations. The FMA also does not apply to private employment agreements providing health insurance to same-sex couples or other private contractual rights.[5] The FMA simply does not apply to private conduct.

III. THE FMA REPRESENTS THE VERY ESSENCE OF DEMOCRATIC DECISION-MAKING

The Covington Memo argues that the FMA would displace democratic decision-making. The argument seems to be that the FMA would usurp the power of the people to decide for themselves whether to allow same-sex marriage. In fact, the FMA, and the amendment process, represents the very essence of democratic decision-making. The people of the United States have the right to amend their Constitution. Once the FMA is passed through the Senate and the House, 38 states must ratify the amendment. It is the people, acting through their elected representatives, who have the right to amend the United States Constitution. This act represents the democratic process at its apex.

The Covington Memo also cites Justice Scalia's dissent in United States v. Virginia, 518 U.S. 515, 566 (1996) for the proposition that amending the Constitution prohibits the people from changing their perceptions and opinions. This argument demonstrates a lack of understanding of the democratic process. Moreover, the statement by Justice Scalia is taken out of context and twisted to mean something he did not say.[6] Justice Scalia dissented from the Supreme Court removing of the debate from the public over whether women should be admitted to military schools.

Instead of supporting the position of the opponents of the FMA, Justice Scalia's dissent supports the position of the FMA's supporters. The FMA puts the debate right where it should be—with the people and their elected representatives. The FMA represents the highest and best of the democratic decision-making process.[7]

IV. THE FMA IS CONSISTENT WITH THE PRINCIPLES OF FEDERALISM

Marriage has always been a national policy between one man and one woman. Utah's battle over polygamy is instructive. In 1862, the United States Congress passed the Morril Act, which prohibited polygamy in the territories, disincorporated the Mormon church, and restricted the church's ownership of property. See Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 19 (1890). In Reynolds v. United States, 98 U.S. 145 (1878), the Supreme Court upheld the Morril Act, stating that polygamy has always been ''odious'' among the Northern and Western nations of Europe, and from ''the earliest history of England polygamy has been treated as an offense against society.'' Id. at 164. The court noted ''it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.'' Id. at 166. To further the national policy of one man and one woman, Congress passed the Edmunds Act in 1882, and later passed the Edmunds-Tucker Bill in 1887. See Late Corporation of the Church, 136 U.S. at 19. See also Davis v. Beason, 133 U.S. 333 (1890).

As a condition to be admitted to the Union, Congress required the inclusion of anti-polygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah. See Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108. See also Murphy v. Ramsey, 114 U.S. 15 (1885). For Arizona, New Mexico and Utah, the Enabling Acts permitting these states to be admitted to the Union required that the anti-polygamy provisions be ''irrevocable,'' and that in order to change their laws to allow polygamy, each state would have to persuade the entire country to change the marriage laws. See Romer v. Evans, 517 U.S. 620, 648–49 (1996) (Scalia, J., dissenting). Idaho adopted the constitutional provision on its own, and the 51st Congress, which admitted Idaho into the Union, found its constitution to be ''republican in form and . . . in conformity with the Constitution of the United States.'' Act of Admission of Idaho, 26 Stat. 21.5. To this day, Arizona, Idaho, New Mexico, Oklahoma and Utah state in their constitutions that polygamy is ''forever prohibited.'' See Ariz. Const. art. XX, ¶2; Idaho Const. art. I, §4; N.M. Const. art. XXI, §1; Okla. Const. art. I, §2; Utah Const. art. III, §1.

When commenting on the national policy of marriage as the union of one man and one woman, the Supreme Court declared the following: ''[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.''—Murphy, 114 U.S. at 45.

The national ban on polygamy, or put another way, the national policy of marriage between one man and one woman, is enforced in many ways. A juror who has a conscientious belief that polygamy is right may be challenged for cause in a trial for polygamy, and anyone who practices polygamy is ineligible to immigrate to the United States. See Witherspoon v. Illinois, 391 U.S. 510, 536 (1968) (citing Reynolds, 98 U.S. at 147, 157); 8.U.S.C. §1182(A). That is to say, a polygamous relationship recognized in a foreign jurisdiction will not be legally recognized in the United States.[8]

Although states have traditionally regulated the edges of marriage (divorce, alimony, support, custody and visitation), they have historically never regulated or altered the essence of marriage (the union of one man and one woman). The recent exception is Massachusetts, and the act by that court now threatens the rest of the nation on this central issue of marriage. The FMA merely carries forward the longstanding national policy that marriage is the union of one man and one woman, and thus is consistent with the history of marriage in this country.

V. THE FMA CONTINUES THE NATIONAL POLICY OF MARRIAGE AS ONE MAN AND ONE WOMAN AMONG ALL BRANCHES OF GOVERNMENT

The FMA is designed to maintain the historic status quo regarding marriage as the union of one man and one woman. This core marriage policy therefore applies to all branches of government. If the Executive, Legislative or Judicial branch sought to order, enact or decree same-sex marriage, the FMA would prohibit such action. However, the FMA does not prohibit the legislature from extending legal protection or benefits to same-sex couples.

The argument in the Covington Memo that opines the FMA would tell a state court how to interpret its constitution is undercut by the admission contained in the same paragraph. The memo concedes that ''a state constitution may not permit something that an otherwise valid federal law forbids. . . .'' Our constitutional form of government has never permitted states to interpret their constitutions in a manner that conflicts with the federal constitution. The United States Constitution obviously preempts any state law to the contrary. See Good News Club v. Milford Central Sch., 533 U.S. 98, 107 n.2 (2001) (contrary state law must yield to the United States Constitution); Romer v. Evans, 517 U.S. 620 (1996) (contrary state constitutional provision must yield to the United States Constitution); Falwell v. Miller, 203 F. Supp. 2d 624 (W.D. Va. 2002) (same). The FMA is consistent with constitutional jurisprudence.

VI. THE FMA WOULD DECREASE LITIGATION OVER MARRIAGE

The FMA would limit the judicial chaos that is currently escalating throughout the country.[9] There are currently about 40 separate court challenges over same-sex marriage pending, most of which began since February 12, 2004, the day San Francisco Mayor Gavin Newsom issued licenses to same-sex couples. This number increases daily. Two more suits were filed July 12 in Florida, where three other suits were filed within the past several weeks. The suits throughout the country have one thing in common—a claim that the state and federal constitution require a state to permit two people of the same sex to marry.[10] The FMA would ensure the maintenance of the long-standing national policy; of marriage as the union of one man and one woman. The FMA is designed to bring order and stability to the marriage union and thus to halt the current litigation frenzy.

VII. CONCLUSION

The FMA preserves marriage as the union of one man and one woman, and places the decision on this important matter with the people. Passage of the FMA is the only way to protect marriage and it is entirely consistent with constitutional jurisprudence and federalism.

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FOOTNOTES

[1]The July 2 letter discusses in great detail the 33 lawsuits taking place in 12 states—with lawsuits in 9 of those states commenced since February 12, 2004, when San Francisco Mayor Gavin Newsom began issuing certificates to same-sex couples. In many cases, the most shocking aspect is the willingness of some judges to abdicate their role as judge to become legislator, and the willingness of some state attorney generals to abdicate their role as law enforcement officials to become political activists. Without question, there is a culture-changing debate taking place in this country, but it is not taking place in the state legislatures where elected representatives can debate the issue. Instead, the battle is in the courtrooms of America. Although the fact that courts, and not legislators, have been the ones making the laws granting same-sex couples legal benefits is itself shocking. The disturbing reality is that those who believe marriage should be limited to the union of one man and one woman are frequently not allowed to participate in the courtroom battles. Instead, those who support traditional marriage are often kept out of the litigation by courts, state attorney generals, and the homosexual advocacy organizations on the erroneous theory that same-sex marriage does not concern them and will not harm marriage or the country. Thus, some courts are rushing ahead without the opportunity for debate, dialogue, and with absolutely no evidence concerning the impact same-sex marriage would have on the culture.

[2]The word ''marriage'' appears in the Massachusetts constitution in the only section that places an express restriction on the authority of the judiciary.

[3]A federal lawsuit challenging the Goodridge decision as violating the federal guarantee of a republican form of government—i.e., the court usurped the powers of the legislature—was unsuccessful before the First Circuit Court of Appeals. The Court of Appeals held that absent extreme cases, such as abolishing the Legislature or creating a monarchy, there is no violation of the federal Guarantee Clause. See Largess v. Supreme Judicial Court for State of Massachusetts, 2004 WL 1453033, 1st Cir. (Mass.).

[4]That which a legislative body ''may'' enact on its own is far different than being ''required'' to act pursuant to a court mandate.

[5]The Covington Memo cites the case of Shahar v. Bowers, 114 F. 3d 1097 (11th Cir. 1997) in support of its argument that the FMA would apply to private conduct. This case suggests nothing of the sort. In Shahar, the Attorney General of Georgia withdrew a job offer from an attorney who had participated in a same-sex ''marriage'' ceremony. Absent the FMA, an Attorney General would prevail when choosing to hire or retain staff attorneys. The government as an employer is given great deference in hiring/firing under the application of the Pickering balancing test used in Shahar. The FMA would change nothing with regard to how employees are treated. The statement that people could be ''punished'' under the FMA for private ceremonies cannot be supported by the facts of Shahar—the fact is that the employee was not ''punished'' for entering into a ''same-sex'' marriage. It was a well-publicized, controversial ceremony that was attended by people in the department. Id. at 1101. The revelation that she was ''marrying'' a woman ''caused quite a stir'' in the office, causing staff attorneys to wonder about the employee's decision-making ability under the facts of the case. Id. at 1105–06.

[6]In fact, one need look no further than the Constitution itself to recognize the absurdity of this argument. The Eighteenth Amendment was ratified in 1919 to prohibit the ''manufacture, sale, or transportation of intoxicating liquors. . . .'' However, fourteen years later, the people ratified the Twenty-first Amendment that repealed the ban on liquor. Even a Constitutional Amendment may be changed over time by another Constitutional Amendment.

[7]To the extent that the Thirteenth, Fourteenth and Fifteenth Amendments violated federalism, the states consented to this act by the passage of these amendments.

[8]If same-sex marriage were sanctioned it would be virtually impossible to ban polygamy. When Tom Green was put on trial for polygamy in Utah in 2001, several articles and editorials appeared in various newspapers supporting the practice of polygamy (*The Village Voice*, *Washington Times*, *Chicago Tribune*, and the *New York Times*). Although the ACLU initially tried to minimize the idea of the slippery slope between gay marriage and polygamy, the ACLU itself defended Tom Green during his trial and declared its support for the repeal of all ''laws prohibiting or penalizing the practice of plural marriage.'' Polyamory (group marriage) is also an inevitable consequence of sanctioning gender-blind marriage. *See* Deborah Anapol, Polyamory: The New Love Without Limits. Paula Ettelbrick, former legal director for Lambda Legal Defense and Education Fund, supports same-sex marriage and state-sanctioned polyamory. Ettelbrick teaches law at the University of Michigan, New York University, Barnard and Columbia. A number of other law professors similarly promote polyamory, including Nancy Polikoff at American University, Martha Fineman at Cornell University, Martha Ertman at the University of Utah, Judith Stacey, the Barbara Streisand Professor of Contemporary Gender Studies at the University of Southern California, and David Chambers at the University of Michigan.

[9]The Civil Rights Act of 1964 began an explosion of litigation. A current search on Westlaw for only the employment provision section of the Act (Title VII) reveals 10,000 federal cases, which is the maximum number of cases Westlaw can retrieve. All of the federal and state cases would amount to several tens of thousands of cases. However, the fact that the Civil Rights Act spawned litigation is not sufficient reason to refrain from passing the Act. In the case of the FMA, the litigation is sure to decrease.

[10]One Utah case argues that polygamous marriage should be permitted.

Mr. CORNYN. At this point, I yield the floor.

The PRESIDING OFFICER. The Senator from Delaware.

Mr. CARPER. Mr. President, on the Fourth of July, as many of my colleagues, I covered my State, and, as I have done for many years on the Fourth of July, I ended up in Dover, DE. Dover, DE, on the evening of July 4 is a politician's dream. People have had a full day of parades and family gatherings, community gatherings. We are there to await the fireworks when dusk finally comes. Roughly 10,000 people gathered in front of Legislative Hall, a huge American flag that almost masked Legislative Hall in its majesty, a C–5 aircraft soon to fly overhead, and then the fireworks themselves.

I work the crowd at that gathering, and it is a lot of fun. People are in a good mood, a lot of good-natured kidding going on: Are you running for anything this year? No, I am not, I am just here because I love being in Dover on the evening of the Fourth of July.

There was one serious question, at least one that was raised to me that evening. The question was: How are you going to vote on that amendment on gay marriage? In responding to that question, I pointed to Legislative Hall and I said to the questioner: When I was Governor of this State in 1996, I signed into law our own Defense of Marriage Act that said marriage is between a man and a woman. I believed that then. I believe it now.

Later that evening I addressed the crowd, and I alluded to the Declaration of Independence. But I spoke more about the Constitution, a copy of which I hold. The Constitution of the United States was first ratified in Delaware. I told the crowd that night that the Constitution was ratified in the Golden Fleece Tavern about 300 or 400 yards from where we gathered.

We all know the Constitution does a number of things. It establishes a framework of government. It says, this is how our Government is going to work. We will have three branches of Government: a legislative, executive, and a judicial branch. It says, there are certain things the Federal Government should be doing and certain responsibilities that are left to the States.

Among the responsibilities left to the States in this Constitution are matters of family law: Who can marry, how do we divorce, how do we end those marriages, who gains custody of the children, how about visitation rights, matters of alimony, property settlement, and the like. Those are matters that we have left to the States for over 200 years.

Senator CORNYN mentioned the concern he has over the state of marriage. I share it. Half the marriages in our country today end in divorce. Too many kids grow up in families where nobody ever marries, and families are not invested enough in their children.

I also acknowledge the concern over efforts in some parts to recognize same-sex marriage. That concern has led many States to enact laws such as my State's Defense of Marriage Act and to enact here in this Congress the Defense of Marriage Act as well. That concern over proposals for same-sex marriage has led some States to actually consider constitutional amendments.

With respect to same-sex marriages, let me offer this: There are a lot of views, but two of those views are basic when you cut to the chase. View No. 1: marriage is between a man and a woman. The alternative view is marriage is between two people. I think the

view of most Americans today—not all but most Americans today—is that marriage is between a man and a woman.

The question for us to consider here today is this: Is there a clear need to amend the Constitution of our country to ensure that the view I have just stated, the majority view, prevails in States such as Delaware and others? It is a legitimate question. As we seek to answer it, let's consider a couple of examples of State laws spelling out how marriage is supposed to operate and whether those laws have been sustained over the years. Let me mention three examples.

A number of States have prohibitions against first cousins marrying. If two people live in a State where you have a man and woman who are first cousins and they want to get married, they go to another State to get married and return to their State. Their State does not have to acknowledge the validity of the marriage.

Some States have restrictions with respect to divorce. If you get a divorce, you have to wait a while before you can remarry. If you live in a State with that restriction and you go to another State that doesn't have those restrictions, you return to your State, your State does not have to recognize that marriage.

We have all seen movies about May-December marriages and how they can be interesting and entertaining, but a lot of States have a law that says a 57-year-old man can't marry a 13-year-old girl, and if you try to do that in a State where maybe you could get away with it, and you move back to your State, that marriage will not be recognized. Those State laws have been sustained whether we have a constitutional amendment.

I believe that my law in Delaware will also be sustained without a constitutional amendment. If it isn't, then this is an issue that we can revisit, and I think we will.

This Constitution that I hold in my hand is the work of man. I think it was divinely inspired. The folks who met at the Golden Fleece Tavern and the people in Constitution Hall in Philadelphia a long time ago largely got it right the first time—not entirely, but they largely got it right. This Constitution has been rarely changed. It is not easy to do. That is purposeful. Over 11,000 amendments have been proposed to this Constitution. To date, since the adoption of the Bill of Rights, 17 have actually been incorporated as amendments to this Constitution.

On the issue of marriage and divorce alone, 129 amendments have been proposed to the Constitution. None have come close to passage. All of us today and all of us who will vote today realize this proposed constitutional amendment is not going to be enacted either.

It is an important issue that has been raised. As some have said, it is one that, frankly, divides us and divides us deeply.

When the last speech is given today, when the final vote is cast around 12:15 or 12:30, my fervent hope is that we will turn to some issues that unite us and, frankly, need to be addressed. They are closely related to what we are talking about today. We need to look no further than the 1996 Welfare Act that was adopted in this Chamber which has expired and been continued with short-term extensions time and again. It needs to be reauthorized. We need a vote on it and, frankly, to improve it. It is not perfect. We can make it better. We can strengthen marriage through the provisions of that law. We can strengthen families. We can increase the likelihood that more of America's children are going to grow up in homes where both parents are deeply committed to them and to their future, that they have decent childcare. We can do that.

I hope when we finish today and this issue is behind us for a while, that we will turn to another closely related issue that will truly strengthen America's families. That is, to return to the issue of welfare reform and pass the legislation out of committee and send it to the House. Let's get on with the Nation's business.

I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. CORNYN. Could I ask for a brief unanimous consent request?

Mr. LIEBERMAN. I yield to the Senator for a request.

Mr. CORNYN. I believe we have been going back and forth to each side. I certainly want to accommodate the Senator so everyone will be able to be heard, but we also have some folks on our side.

Mr. LIEBERMAN. Go right ahead.

Mr. CORNYN. I ask unanimous consent that Senator ALLARD be recognized for 5 minutes out of the 25 minutes remaining on our side until the chairman comes to the floor and the leadership time is reserved under a previous consent, and then Senator SANTORUM be recognized as our next Republican speaker for 10 minutes on our side, and then finally the last 5 minutes of that 25-minute segment, that Senator SESSIONS be recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Colorado.

Mr. ALLARD. Mr. President, I thank the Senator from Texas for allowing me the opportunity to speak. Just to get some business out of the way, I have some materials I have submitted at the desk. I ask unanimous consent to print them in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

JULY 12, 2004.

To: Senator Orrin Hatch, Chair, United States Senate Judiciary Committee.

From: Professor Teresa S. Collett.

Re: Response to recent concerns regarding the meaning, reach, and consistency of the Federal Marriage Amendment with constitutional principles.

Having served as a witness in favor of the Federal Marriage Amendment, SRJ 40, (hereinafter ''FMA'') before the Senate Judiciary Committee on March 23, 2004, which was chaired by Senator Cornyn, I have been asked to respond to various objections regarding its passage.

There are four common objections to the FMA. Opponents claim that the FMA is self-contradictory, with the first sentence prohibiting what the second permits in certain cases. Second, they claim that the amendment prohibits private recognition of same-sex unions as marriages. Third, they argue that the amendment is anti-democratic because it removes the definition of marriage from the arena of state law and creates a uniform federal definition. Finally, and in contradiction to the last point, they argue that the amendment will increase litigation over the meaning of marriage. None of these objections have merit.

THE AMENDMENT IS NOT INTERNALLY CONTRADICTORY

The starting point for any analysis of a constitutional amendment is the text, with an intention to give effect to every word. *Marbury* v. *Madison*, 5 U.S. 137 (1803). See also *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 835 (1990). As proposed, the FMA provides:

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

The meaning of the first sentence of the FMA is clear. Opponents typically do not dispute this. Rather they assert the confusion arises because it is possible to read the second sentence of the FMA as allowing legislatures to create that which the first sentence clearly prohibits—same-sex marriage (at least insofar as it is done, not due to constitutional imperative, but rather due to some alternative legitimate legislative motivation). While such a reading is theoretically possible, it violates one of the most basic canons of construction: ''The plain meaning of a statute's text must be given effect 'unless it would produce an absurd result or one manifestly at odds with the statute's intended effect.' '' *Arnold* v. *United Parcel Service, Inc.*, 136 F.3d 854, 858 (1st Cir. 1998) (quoting *Parisi by Cooney* v. *Chater*, 69 F.3d 614, 617 (1st Cir. 1995)). Since such an interpretation would render the FMA ''self-contradictory'' and ineffectual, it should be rejected under ordinary principles of construction.

Opponents also argue that the phrase ''legal incidents'' of marriage is unclear and will require extensive judicial interpretation. Yet this is a phrase that has been used routinely in the discussion of marital rights. Justice Brennan used it in his concurring opinion in *Boddie* v. *Connecticut*, 401 U.S. 371 at 387 (1971). ''Legal incidents of marriage'' is also found in various state appellate opinions that have been rendered over the past sixty years. See, e.g., *Sanders* v. *Altmeyer*, 58 F.Supp. 67, 68 (D.C. Tenn. 1944); *Adler* v. *Adler*, 81 N.Y.S.2d 797, 800 (N.Y. Dom. Rel. Ct. 1948); *Ramsay* v. *Ramsay*, 90 A.2d 433, 435 (R.I. 1952); *Shipp* v. *Shipp*, 383 P.2d 30, 32 (Okla. 1963); *Rosenstiel* v. *Rosenstiel*, 209 N.E.2d 709, 712 (N.Y. 1965); *Perrin* v. *Perrin*, 408 F.2d 107, 110 (3rd Cir. 1969); *Merenoff* v. *Merenoff*, 388 A.2d 951, 953 (N.J. 1978); In re *Marriage of Epstein*, 592 P.2d 1165, 1169 (Cal. 1979); *Baker* v. *Baker*, 468 A.2d 944, 947 (Conn. Super. 1983); *Koppelman* v. *O'Keeffe*, 535 N.Y.S.2d 871, 873 (N.Y. Sup. App. Term, 1988); *Baehr* v. *Lewin*, 852 P.2d 44, 74 (Hawaii 1993) (Heen J. dissenting); and In re *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004).

The proper interpretation of the amendment is that offered by the sponsors and

drafters: to preserve marriage as the union of a man and a woman, while leaving to states the question of whether to legislatively create alternative legal arrangements such as civil unions or reciprocal beneficiary status for individuals who are not eligible to marry. See Senator Wayne Allard, Federal Marriage Amendment Testimony, United States Senate Judiciary Committee (March 23, 2004), at http://allard.senate.gov/issues/item.cfm?id=219463&rands__type=4; Representative Marilyn Musgrave, Federal Marriage Amendment Testimony, United States House of Representatives Judiciary Subcommittee on the Constitution (May 13, 2004) at http://www.house.gov/judiciary/musgrave051304.htm, and Robert Bork, The Musgrave Federal Marriage Amendment, United States House of Representatives Judiciary Subcommittee on the Constitution (May 13, 2004) at http://www.house.gov/judiciary/bork051304.htm. See also Rahul Mehra, Professor Helps Draft Amendment, The Daily Princetonian (Feb 18, 2004) at http://www.dailyprincetonian.com/archives/2004/02/18/news/9652.shtml.

Fair-minded opponents of the FMA have acknowledged that the current language is clear in its prohibition of same-sex marriage, and its recognition of the legislative ability to create alternative legal relationships such as civil unions. On March 22, 2004, Professor Eugene Volokh, who opposes the FMA, noted on his weblog that the amended language ''clearly lets state voters and legislatures enact civil unions by statute''. The Volokh Conspiracy at http://volokh.com/archives/archive_2004_03_21.shtml. Professor Cass Sunstein, another opponent to the FMA also agreed that the state legislature could pass a law to establish civil unions. Response to written questions propounded by Senator Dick Durbin (March 23, 2004).

THE AMENDMENT DOES NOT PROHIBIT PRIVATE RECOGNITION OF SAME-SEX UNIONS

Perhaps the most creative argument of opponents is that the FMA would allow states and other governmental bodies to ''punish religious organizations and individuals for performing or participating in religious marriages of same-sex couples. . . .'' This argument is crafted by analogizing the FMA to the Thirteenth Amendment which provides in pertinent part, ''Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.'' The Thirteenth Amendment is the exception to the general rule that constitutional provisions are limitations on state action, rather than private action. Compare *Jones* v. *Alfred H. Mayer Co*., 392 U.S. 408, 438 (1968) (Congress has power under Thirteenth Amendment to enact legislation to prohibit private acts that erect racial barriers to the acquisition of property) with *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (no violation of constitutional right to privacy occurs absent state interference with woman's right to abortion) and *United Brotherhood of Carpenters and Joiners of America* v. *Scott*, 463 U.S. 825, 831–32 (1983) (state action is necessary to establish conspiracy to violate First Amendment). Based upon this fact, and the absence of any language in the FMA expressly limiting the amendment to state action, opponents claim that any private recognition of same-sex marriages would become punishable at law.

This ignores important differences in the language of the two amendments, however. Section (a) of the Thirteenth Amendment is written as a prohibition, with a narrow exception. In contrast, the first sentence of the FMA is written as an affirmation of the nature of marriage, with the second sentence limiting the ability of courts to redefine marriage in the guise of constitutional adjudication. Rather than a distinct provision, the first clause functions as an introduction to the second. There is nothing in the language of the FMA or the legislative history to date that suggests any intent to disrupt the current ability of religious communities to determine their understanding of marriage and divorce. See *Hames* v. *Hames*, 163 Conn. 588 (Conn. 1972) (religious ceremony insufficient to constitute civil marriage); *Marazita* v. *Marazita*, 27 Conn. Supp. 190 (Conn. Super. Ct. 1967) (wife's religious belief in indissolubility of marriage not sufficient to deprive court of jurisdiction in divorce proceeding); *Knibb* v. *Knibb*, 94 N.J. Eq. 747, 748 (N.J. 1923) (suit for divorce due to refusal to marry in Church); *Victor* v. *Victor*, 177 Ariz. 231 (Ariz. Ct. App. 1993) (court without authority to order Jewish divorce); In re *Marriage of Dajani*, 204 Cal. App. 3d 1387 (Cal. Ct. App. 1988) (American court could not enforce Islamic law).

Given the long history of détente between Church and State in this country regarding the regulation of marriage and divorce, the reasonable assumption is that the FMA will control governmental actions related to civil marriage, and religious bodies will continue to define their own entry and exit requirements for marriage. To the extent there is any merit in opponents' analogy to the Thirteen Amendment, its interpretation supports this conclusion. In *Robertson* v. *Baldwin*, 165 U.S. 275 (1897) two deserting seamen argued that they could not be forced to fulfill their commitment in light of the constitutional prohibition of involuntary servitude. The Court disposed of this argument opining:

''It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional, such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.'' 165 U.S. at 282.

The continuing viability of this case is evidenced by the Court's reliance on it in *United States* v. *Kozminski*, 487 U.S. 931, 942–44 (1988) (adopting a narrow construction of coercion sufficient to constitute involuntary servitude).

While opponents raise the specter of organized persecution of religious communities that perform same-sex marriage rituals, the international experience suggests quite the opposite. It is defenders of traditional marriage that have cause to worry. Last month a pastor is Sweden was sentenced to one month in jail based on a sermon opposing homosexual conduct. In Canada there have been criminal convictions under hate speech laws for publication of an advertisement opposing same-sex marriage that merely cited Bible verses without quoting them. The Irish Council on Civil Liberties publicly threatened priests and bishops who distribute a Vatican publication regarding homosexual activity with prosecution under incitement to hatred legislation.'' In Spain, Madrid's Cardinal Varela gave a sermon condemning gay marriage. He has been sued by the Popular Gay Platform for ''slander and an incitement to discrimination on the basis of sexual orientation.'' In England, self defense was denied to a pastor who defended himself when assaulted by several attackers while carrying a sign citing Bible verses regarding homosexual conduct. Last fall, an Anglican Bishop in England was investigated under hate crimes legislation and reprimanded by the local Chief Constable for observing that some people can overcome homosexual inclinations and ''reorientate'' themselves. In Belgium, an 80-year old Cardinal was sued over his comments regarding homosexuality. In each of these countries what began with demands for ''tolerance'' has transformed into demands for acceptance at the price of religious liberty.

A similar transformation seems plausible in light of the continuing attacks on the integrity of the proponents and supporters of the FMA. Opponents of the FMA consistently seek to associate the effort of those who seek to protect the institution of marriage with those who sought to stabilize the institution of racial segregation. This charge is both insulting and inaccurate. While leadership of the African-American community may be divided over whether to support the FMA at this time, they are not divided over whether racial segregation is desirable. Although they differ in their positions on the merits of the amendment itself, Rev. Jesse Jackson, Rev. Walter Fauntroy, and Hilary Shelton of the NAACP are all unwilling to equate defense of traditional marriage with racial discrimination, as are other prominent civil rights leaders. Similarly, the willingness of a substantial majority of both chambers of Congress just a few short years ago to vote for the federal Defense of Marriage Act does not equate with bigotry, and any attempts to do so are merely activists' attempts to cut off public debate regarding the need of a child to be raised by his or her mother and father.

THE FMA IS A DEMOCRATIC SOLUTION TO THE PROBLEM OF JUDICIAL USURPATION OF THE POLITICAL DEBATE REGARDING SAME-SEX UNIONS

The FMA is the only method available to preserve the ability of the people and their elected representatives to speak on the issue. This is because of the very real possibility that the United States Supreme Court will impose an obligation on states to recognize same-sex unions as marriages in the guise of constitutional adjudication. Building on the Court's statements in Lawrence v. Texas equating heterosexual and homosexual experiences, and its statements in Romer v. Evans attributing animus to those who would make any distinctions, many constitutional law scholars have opined that the Court appears poised to mandate same-sex marriage in the upcoming years.

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

THE AMENDMENT IS UNLIKELY TO INCREASE LITIGATION

Marriage has become a question of constitutional law through gay activists' unrelenting attacks on marriage statutes in the courts. Judges in Hawaii, Alaska, Vermont, and Massachusetts have already mandated recognition of same-sex marriage. The citizens of Hawaii and Alaska responded to the actions of their courts by amending their state constitutions to correct what was largely perceived as judicial overreaching.

Vermont legislators did not afford their citizens the opportunity to correct this judicial interpretation, instead passing Act 91, An Act Relating to Civil Unions.

The most recent and troubling ruling, however, is Goodridge v. Dept. of Public Health, an opinion of the Massachusetts Supreme Judicial Court declaring that state's marriage laws unconstitutional. Chief Justice Margaret Marshall opens her opinion with a review of the recent United States Supreme Court opinion, Lawrence v. Texas. Finding there was no rational reason supporting traditional marriage, she gave the legislature 180 days to ''take appropriate action'' in light of the opinion, which was widely interpreted as an ''order'' to create a ''gay marriage''. Although a Massachusetts statute prohibits the issuance of a marriage license to non-residents whose home state would not recognize the unions, hundreds of out of state couples flocked to Massachusetts to be married. One of the first Massachusetts marriage licenses was issued to a Minnesota same-sex couple, who describe their relationship as an ''open marriage,'' saying the concept of permanence in marriage is ''overrated.'' The Massachusetts Legislature is moving forward with a state constitutional amendment, but the people of that state will not be allowed to vote on it until fall of 2006.

Unfortunately Massachusetts is not the only state where activists are currently demanding that judges redefine marriage. At this time California, Florida, Indiana, Maryland, Nebraska, New Jersey, New York, North Carolina, Oregon, Utah, Washington, and West Virginia are defending their marriage laws in the courts. Based on news reports, it is likely that Pennsylvania, South Carolina, and Tennessee may soon be defending their statutes in the courts as well. Add to these fifteen states, the three states of Hawaii, Alaska and Vermont that have already responded to judicial overreaching on this issue, and Massachusetts which remains embroiled in a political fight to return the issue to the people, as well as the states of Arizona, Connecticut, Iowa, and Texas where courts have resolved the issue—and almost half the country's laws are, or have been, under attack by a small group who want to force their will on the people in the guise of constitutional adjudication.

It seems unlikely that the passage of the FMA, which removes the definition of marriage from further judicial redefinition, could increase litigation beyond the present level.

CONCLUSION

Activists have been unable to succeed in changing the definition of marriage legislatively so they have turned to the courts. Unfortunately some judges are increasingly willing to disregard the text of the laws—as well as the political will of the people—in judicial efforts to remake the institution of marriage to suit their own particular political views. This is not the proper process to be followed in a democratic republic. It is the people and their elected representatives who should determine the meaning and structure to marriage through the process of political debate and voting.

The Federal Marriage Amendment, with its requirements of passage by two-thirds of each house of Congress and ratification by three-quarters of the states, follows the Founders' model for open, yet orderly change in our governing document. The text of the Amendment is clear and preserves the understanding of marriage that has existed throughout this nation's history, while allowing for individual states to experiment with alternative legal structures as their citizens deem appropriate. Unlike the hypothetical threats that opponents attempt to manufacture, the FMA addresses real cases and real problems that the people of this nation are encountering with the judicial usurpation of the political process.

[From iMAPP, July 12, 2004]

IS DOMA ENOUGH? AN ANALYSIS

(By Joshua K. Baker)

INTRODUCTION

Do we need a constitutional amendment to protect marriage? Some influential elites question the need for a constitutional amendment. As Senator Susan Collins (R–Maine) told the Boston Globe earlier this year, ''I don't at this point see the need for a constitutional amendment as long as the Defense of Marriage Act remains on the books.''

For people who define the problem as the involuntary spread of same-sex marriage from one state to others, a key question becomes: Are federal DOMA laws enough?

DEFINING DOMA

The federal DOMA law contains two sections, stating:

Section 1. 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.''

Section 2. 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.

The first part creates a federal definition of marriage for the purposes of federal marriage law. Considerable litigation is likely to arise from conflicts between federal law and laws in states in which courts mandate recognition of same-sex marriage, or marriage equivalents. Such cases will increase the temptation for the Supreme Court to create a national definition of marriage on equal protection grounds, as otherwise, legally married couples in different states will be treated substantially differently under federal law.

The second part of DOMA restates general conflict of laws principles: no state is required to recognize a marriage that violates its own public policy. However, it provides no additional legal protection for the people of a state whose judicial elites create a right of same-sex marriage in the state constitution or choose to recognize same-sex marriages performed elsewhere.

I. Is Federal DOMA Enough?

DOMA laws are unlikely to prevent the spread of same-sex marriage from one judiciary to the other, for the following reasons:

A. The groundwork for DOMA's demise has already been laid in the scholarly literature. Legal experts argue DOMA can be struck down in federal court because it violates principles of equal protection, liberty/due process and full faith and credit.

B. The legal threat to federal DOMA laws is now imminent, because Massachusetts has, for the first time, given plaintiffs standing to challenge the federal law. Previously, courts held that absent a legal state marriage, persons have no standing to challenge the federal DOMA law. Newspaper reports indicate that there are now thousands of couples in at least 46 states who have received marriage licenses in Massachusetts, California or Oregon, and now have standing to challenge DOMA in federal courts.

C. DOMA won't keep legal elites from creating same-sex marriage in many states. Already, in just eight months since the Goodridge decision, activists have filed cases across the country seeking to strike down state marriage laws. Today such cases are pending in at least 11 states, including six states which have adopted state DOMA legislation in recent years. Attorneys general and local officials in California, New York and elsewhere are refusing to defend state marriage laws, or are insisting that their state recognize same-sex marriages performed elsewhere.

The New York Attorney General, following the lead of a 2003 trial court judgment, has already indicated that New York law ''presumptively requires'' recognition of same-sex marriages from Massachusetts. When San Francisco Mayor Gavin Anderson and his counterparts in a handful of other cities across the country began issuing same-sex marriage licenses, the California attorney general chose to simply petition the California Supreme Court for ''resolution of these important issues,'' rather than present an affirmative defense of the state's marriage law. Shortly thereafter, the mayor of Seattle in March declared that his city (and all private groups that contract with the city) must recognize as valid the same-sex marriages of employees, wherever performed.

D. There will be a national definition of marriage, ultimately. The question is whose? Radically different marriage laws in different states are difficult to sustain over time. A federal definition of marriage that is different from state definitions of marriage produces immediate conflicts in many areas of law that the Supreme Court will be tempted to harmonize by ordering recognition of same-sex marriage on equal protection grounds. One way or the other, we will soon have a national definition of marriage. If we pass a marriage amendment, we will retain our shared understanding of marriage as the union of husband and wife, ratified by the people of the United States. If we accept judicial supremacy on the marriage question, we will probably end up with a judicially created and approved national marriage definition that redefines marriage in unisex terms.

E. Legal scholars from both sides agree: Federal courts are now poised to strike down state marriage laws. Speaking about the recent Supreme Court decision *Lawrence* v. *Texas*, Harvard Law Professor Lawrence Tribe commented, ''You'd have to be tone deaf not to get the message from *Lawrence* that anything that invites people to give same-sex couples less than full respect is constitutionally suspect.'' Georgetown Law Professor Chai Feldblum agreed, stating, ''[A]s a matter of logic and principle, there is no reason not to provide the institution of marriage for gay people. The court is leaving that open for the future.'' Professor William Eskridge of Yale Law School stated ''Justice Scalia is right'' that *Lawrence* signals the end of traditional marriage laws. Jon Bruning, Attorney General of Nebraska, testified before the Senate in March that a federal judge is likely to soon declare Nebraska's state constitutional marriage amendment unconstitutional: ''This is the first federal court challenge to a state's DOMA law. My office moved to dismiss the suit, but last November, the Court denied our motion to dismiss. The language in the Court's order signals that Nebraska will very likely lose the case at trial.''

F. Federal lawsuits attacking marriage laws have already been filed in four states. While most marriage litigation has historically been based on state constitutional provisions, in just the past year, cases in three

states (Florida, Arizona, and Nebraska) have brought federal constitutional challenges to both state and federal DOMA laws on equal protection, due process and full faith and credit grounds. In June, the same lawyers that filed the *Goodridge* case in Massachusetts also filed suit alleging that a state iaw which prevents out-of-state same-sex couples from marrying in Massachusetts violates the Privileges and Immunities Clause of the 14th Amendment.

G. It's not the full faith and credit clause, it's the 14th amendment. Scholars who have testified that DOMA is constitutional under the Full Faith and Credit Clause of Article IV of the Constitution miss the primary threat to DOMA. DOMA's greatest threat springs not from the relatively settled world of Full Faith & Credit jurisprudence, but from the Supreme Court's evolving view of equal protection and personal liberty, as evidenced by such recent cases as *Lawrence* v. *Texas*, 539 U.S. 558 (2003) and *Romer* v. *Evans*, 517 U.S. 620 (1996). As Justice Scalia noted in his *Lawrence* dissent, this evolving jurisprudence not only threatens DOMA, but also poses a substantive threat to individual state marriage laws.

H. A federal injunction to strike down DOMA will take only minutes. A Constitutional amendment takes months or years to pass. If we want to protect marriage as the union of husband and wife, the time to act is now.

Il. Does a marriage amendment violate principles of federalism?

Many legal analysts argue that a constitutional amendment that creates a national definition of marriage violates fundamental principles of federalism. In a letter to Senate Constitution Subcommittee Chairman John Cornyn last September, six law professors including Eugene Volokh of UCLA and Dale Carpenter of the University of Minnesota wrote ''[T]here is no need to federalize the definition of marriage. . . . if marriage is federalized, this will set a precedent for additional federal intrusions into state power.'' Are they correct?

No, for the following reasons:

A. Many fundamental institutions are national in scope. The Constitution already contains such fundamental institutions as representative government (through the guarantee clause, art. IV, §4) and private property (through the takings clause, Fifth Amendment). A marriage amendment would acknowledge marriage as a fundamental institution, while still leaving the states significant regulatory discretion (procedures, age, consanguinity, etc.).

B. Marriage law has always been subject to federal legal oversight. This is not unlike the federalist model which permits states to experiment with term limits, elected judiciaries, or unicameral legislatures, subject to the underlying guarantee of representative government; or varying state policies on eminent domain, taxation, and rights of way, subject to the underlying premise that government cannot take property without compensation. A marriage amendment would simply clarify that husbands and wives are an essential part of our fundamental, shared American understanding of marriage.

C. The basic definition of marriage has long been considered a national question. The Supreme Court has already affirmed the right of Congress to sustain a national definition of marriage that excludes polygamy. Without Congress' decisive intervention, upheld by the Supreme Court, we would today have polygamy in some states and not in others. Today, it is federal and state courts that threaten our common definition of marriage. As former Attorney General Ed Meese argued in favor of a constitutional amendment creating a national definition of marriage, ''If marriage is a fundamental social institution, then it's fundamental for all of society.'' As the Supreme Court stated in *Reynolds* v. *United States*, ''there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.''

III. Why not wait until DOMA has been struck down?

A. Waiting until the problem gets worse will not make it easier to solve. A patchwork of different state and local laws will sow confusion for couples, for businesses, for state and local governments. If we intend to protect marriage as the union of husband and wife, the time to settle the question is now.

B. There will never be a magic moment in which to amend the Constitution. Today opponents argue it is too early, because DOMA still exists. Three years from now, DOMA may be struck down and others will say it is too late—tens of thousands of same-sex couples will have already married.

C. The best time for affirming a common definition of marriage is before SSM becomes widespread. If it could be ratified today, a marriage amendment would merely reaffirm the law of 49 states, while undoing eight weeks of change in Massachusetts. Looking ahead, it is difficult to foresee a time where a constitutional amendment defining marriage could be adopted with less legal and personal disruption.

D. The amendment process takes time. A federal judge could enjoin DOMA tomorrow, yet it would take months and perhaps years to propose and ratify the federal marriage amendment.

E. A constitutional amendment is not a constitutional crisis. In the last century, we amended our constitution twelve times, including twice in the 1930's, three times in the 1960's, and again in 1971 and 1992. The amendment process is, by design, not a sign of constitutional crisis, but rather a great democratic and federalist process for reaching national consensus on questions of great importance. Marriage is worth it.

Mr. ALLARD. I thank some 19 cosponsors who are now on this amendment. I thank the majority leader for stepping forward and helping this particular issue. I thank the President of the United States for stepping forward early on and articulating the principles which are embodied in this constitutional amendment. I particularly thank my colleagues, Senators BROWNBACK, SANTORUM, and SESSIONS, for joining me in the late-night session last night and for Senators CORNYN and HATCH for helping manage the bill on the floor, as well as Congresswoman MUSGRAVE in the House for her leadership.

I didn't come to the decision to introduce this legislation easily. I went through a process of evaluating the issue.

I don't think it is unlike what many Members of the Senate are going through right now, or at some point in time went through, because as the initial sponsor of this legislation, I had an opportunity to talk to many Members and I think their response was very much what mine was to start with: Why do we need to amend the Constitution?

We all recognize how precious that document is. When anybody comes to you with an issue, to start with, you always wonder why do we need to do that. That is a high standard and we all recognize that.

I also remember the debate with the Defense of Marriage Act, DOMA, which was carried by Senator NICKLES on this side, and how important most Members of the Senate—85 Members—felt in that vote that we define marriage as between a man and a woman.

In this debate, I wanted to protect traditional marriage. I also had some skepticism about amending the Constitution. But after sitting down with colleagues and scholars and people who were following the courts, I came to the realization that there was a process going on in the courts that I wasn't aware of, that I just had become aware of.

I understood the potential of what was going to happen in those courts. It was, when I first got involved, that the courts were going to change the definition of marriage, which we passed by 85 votes in the Senate, and on which close to 48 States passed legislation somehow or other supporting traditional marriage. I thought this should be brought into the legislative branch—that is where the debate should occur—where we have elected representatives having an opportunity to reflect their views and the views of their constituents, whether it is in the Congress or the State legislature.

So in visiting with the constitutional scholars, academicians, professors, and whatnot, we began to put together some language for the Constitution, very carefully crafted, and the language has had an opportunity to be changed a couple of times. We brought it back into the Senate and had the staff within the Judiciary Committee reflect their views and the Senators would reflect views, always working toward a consensus. We began to realize more and more clearly what was happening in the courts.

As we move through it this year, I think it becomes blatantly evident to us that there is a process going on in the courts that will exclude the American citizens. We need to get them involved. We need to recognize that the Constitution requires a two-thirds vote in the House and Senate and three-quarters of the States to ratify.

Our forefathers realized that during an issue such as marriage, where a large percentage of Americans of all faiths, all ethnic backgrounds, support the idea of traditional marriage—the effort to change the definition of traditional marriage being between a man and a woman is certainly only being pushed by a minority of the population in this country—the way we can express our views is through a constitutional amendment. That is what we have before us today.

In this amendment I have proposed, we define marriage as a union between a man and a woman.

The PRESIDING OFFICER. The Senator has used 5 minutes.

Mr. ALLARD. I ask unanimous consent for 30 more seconds to bring my comments to a close.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ALLARD. Marriage matters to our children; it matters in America. Marriage is the foundation of a free society. The courts are redefining marriage and that will make it impossible for State legislators to address marriage. This amendment puts the issue back in the hands of the people. A vote not to move forward means the court will be the sole voice in this matter. The people will not have a voice. We need to move forward.

The PRESIDING OFFICER. The Senator from Connecticut is recognized.

Mr. LIEBERMAN. Mr. President, I rise to express my opposition to the Federal marriage amendment because I believe this effort to amend the Constitution is premature, unnecessarily divisive, and denies our States rights that they have long had.

My opposition to this constitutional amendment is, in effect, quite similar to the views stated by Vice President DICK CHENEY in our debate during the 2000 campaign. Mr. CHENEY said then, when it comes to gay marriage:

I think different States are likely to come to different conclusions, and that is appropriate. I don't think there should necessarily be a Federal policy in this area. I try to be open minded about it as much as I can and tolerant of those relationships.

He was widely applauded for those remarks, and rightly so. His wife Lynne Cheney said this just this past Sunday:

The formulation he used in 2000 was very good.

She is right.

Marriage is an issue best left to the States in our constitutional and legal frameworks.

Unfortunately, in its pursuit of this amendment, the administration has abandoned the openminded and tolerant position Vice President CHENEY took in 2000 and, apparently, he, too, has done so. That is unfortunate and it is divisive.

The Constitution is, after all, our Nation's most sacred secular document. That is a combination of words that may surprise some, to call something secular sacred. But we all know intuitively that is what the Constitution is.

In a literal way, the Constitution was adopted by its own words, to ''secure the blessings'' of liberty, which the Declaration of Independence says are the people's endowment from their Creator.

For well over 200 years, this document has provided our Government with its guiding hand, its blueprint for governing, and, equally important, a clear and enforceable articulation of the limits of Federal Government power.

Part of the genius of the Constitution lies in the fact that, as it unites us, it also stands above us and our elected representatives, articulating enduring governing principles, rather than providing a quick answer for every new day's question. The brilliance of our Nation's Founders was that they drafted a Constitution but left it to succeeding generations of legislators, both in Washington and in the States, to decide the issues of the day, with the recognition that statutes can be changed with relative ease, while a Constitution endures for the long term.

Those who wish to elevate an issue to the constitutional level, therefore, in my opinion, bear a heavy burden of showing it is absolutely necessary to do so. That is not just my view; it is the clear consensus of our Nation throughout its history. Only 27 times over the past 217 years has the Constitution been amended, and the first 10 of those amendments constitute our revered Bill of Rights, passed almost as part of the Constitution itself.

So I have concluded that we should accept the proposed amendment before us today only if we are absolutely convinced not just of its rightness but of its necessity. After looking at the laws of the land today regarding marriage and closely examining the text of the proposed amendment before us, I conclude that burden has not been met.

Let me be clear. I believe marriage is a legal status that should be granted only to the union of one man and one woman. I believe that because I also believe the marriage of a man and a woman is the best way to sustain the human race, through the procreation and rearing of children. Therefore, it is in the interest of our society to attach special benefits to the relationship of a man and a woman joined together in marriage. That is why I voted for DOMA, the Defense of Marriage Act, in 1996, and that is why I still support that law today.

DOMA makes absolutely clear that marriage, under Federal law, which is our area of jurisdiction, is a status that should be attainable only by one man and one woman, and that any State's decision to define marriage otherwise has no effect on marriage under Federal law or the laws of other States.

In other words, we already have a Federal law on the books that precludes any couple other than an opposite-sex one from claiming Federal marriage benefits and that prevents one State from seeking to impose its view of marriage on its sister States. A constitutional amendment to that effect is therefore unnecessary at this time.

There is a contemporary reality, however, that this amendment does not allow us the flexibility to recognize. Gay and lesbian couples exist. They are not going away. They also enjoy the rights promised in the Declaration as the endowment of their Creator. To say these couples and their children should be denied any legal protections or relieved of all legal responsibilities would, in my opinion, be unfair and inconsistent with the principles that were at the basis of the founding of our country.

I presume most all of us would agree, for example, that someone should not be excluded from his dying life-partner's hospital room on the ground that their decades-long relationship has no legal status. Probably many of us who have thought about it would not want to see someone who raised her partner's biological children as her own and provided the family's principal means of support be able to simply walk away without any financial obligations to the child if the couple ends their relationship.

I do not profess to know exactly how and in what form these rights and responsibilities should be extended to gay and lesbian couples. Different States are already providing different answers to those difficult and important questions. But I do know this is a discussion and a debate that will and should continue to the benefit of our country.

I understand that some argue that the Constitution's full faith and credit clause makes inevitable that one State's decision to allow gay marriage will lead to gay marriage across the Nation. I respectfully disagree. I believe that DOMA is constitutional, a view I hope is shared by the overwhelming majority of my colleagues who voted for it. If DOMA is declared unconstitutional in the future and the full faith and credit clause found to mandate national recognition of one State's definition of marriage, there will be enough time for those of us who oppose gay marriage to act statutorily or constitutionally.

In sum, this is an unnecessary amendment that wrongly and certainly prematurely deprives States of their traditional ability to define marriage. I plan to cast my vote against it and urge my colleagues to do the same.

I thank the Chair, and I yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Mr. President, I believe under the unanimous consent agreement Senator SANTORUM is to be recognized next. We discussed that. I ask unanimous consent that I be allowed to speak at this time for 5 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SESSIONS. Mr. President, I ask the question: Why are we here? The reason we are here is because of court rulings. The Massachusetts decision took effect May 17, just a few weeks ago. That is why we are here today. This is not a matter I had any intention of being engaged in 2 years ago or 6 years ago when I came to the Senate. We are here to protect the rights of legislative bodies in all 50 States to define marriage as they always have. I believe that is appropriate.

Some suggest there is not a real threat to marriage and the courts will

not strike down the traditional definition of marriage. I do not think that is something we can say. As a matter of fact, marriage, as we have traditionally known it, is without any doubt in great jeopardy by the rulings of the courts in America. It has already occurred in Massachusetts.

I would like to show the language of one of the opinions that is relevant in this situation. In the Lawrence v. Texas case, just last year, the U.S. Supreme Court ruled and said this:

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the court reaffirmed the substantive force of the liberty protected by the Due Process Clause.

That is vague language but dangerous language, in my view. They go on to say:

The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage. . . .

And then a little further on in the opinion, they say:

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.

''For these purposes'' clearly refers back to marriage in the above paragraph.

That is the U.S. Supreme Court. That decision was cited by the Massachusetts Supreme Judicial Court to justify their decision under the equal protection clause. Justice Scalia, in his comments in dissent in this case, said about Lawrence:

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. . . .

He made clear his view of what that opinion was, and he was in the conference when the judges discussed the opinion when it was decided 6 to 3. They can even lose one judge on the issue and still come down against traditional marriage when a challenge comes before them.

Second, marriage is good, Mr. President. I had a hearing in the Health, Education, Labor, and Pensions Committee. We had a host of excellent witnesses who testified about the strength and importance of marriage. The numbers and science are indisputable.

Barbara Dafoe Whitehead, who wrote one of the most important articles in the second half of the 20th century called ''Dan Quayle was Right,'' testified. She has become an expert on the subject. She said she was at first criticized, and now everybody agrees with her statistics. She gathered them from independent studies around the country. She found this:

On average, married people are happier, healthier, wealthier, enjoy longer lives, and report greater sexual satisfaction than single, divorced or cohabitating individuals.

Married people are less likely to take moral or mortal risks, and are even less inclined to risk-taking when they have children. They have better health habits and receive more regular health care. They are less likely to attempt or to commit suicide. They are also more likely to enjoy close and supportive relationships with their close relatives and to have a wide social support network. They are better equipped to cope with major life crises, such as severe illness, job loss, and extraordinary care needs of sick children or aging parents.

Children experience an estimated 70 percent drop in their household income in the immediate aftermath of divorce and, unless there is a remarriage, their income is still 40 to 45 percent lower 6 years later than for children in intact families.

She goes on and on to discuss those issues.

No reputable scientist today would dispute the fact that although single parents do heroic jobs, and many of them overcome all the statistical numbers.

The PRESIDING OFFICER. The Senator has used 5 minutes.

Mr. SESSIONS. Mr. President, I ask unanimous consent for 1 additional minute.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SESSIONS. Mr. President, I think it is important for us to know that marriage is good, that it is in jeopardy by the courts. The American people have a right to a legitimate constitutional amendment process—not the illegitimate process of courts amending the Constitution—but a legitimate process to amend this Constitution by allowing the States to vote. A constitutional amendment will not become law unless the States vote on it. Why is that not empowering States? Three-fourths of them must do so. I believe this is the right thing.

It has been a good debate, a good discussion. It is not going away. We will be back again and again. This issue will be discussed more. It will become law. We will protect marriage because it is critical to the culture of this country.

I thank the President and yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. CORNYN. Mr. President, we have additional speakers on our side who are ready, but the practice has been to go back and forth, so we would be glad to allow time for our Democratic colleagues.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I will share a few thoughts on the subject matter at hand. We are shortly going to vote, I believe, on the motion to proceed on the constitutional amendment banning same-sex marriage. I intend to oppose the cloture motion and oppose the underlying constitutional amendment, and I will lay out the reasons why.

First, I believe this constitutional amendment has no place in our founding document because it runs counter to our most sacred constitutional traditions. According to University of Chicago law professor Cass Sunstein, who testified before the Judiciary Committee:

Our constitutional traditions demonstrate that change in the founding document is appropriate on only the most rare occasions—most notably, to correct problems in governmental structure or to expand the category of individual rights. The proposed amendment does not fall into either of these categories.

For example, the first 10 amendments of the Bill of Rights guaranteed such liberties as freedom of speech, assembly, and religion, the protection of private property, and freedom from cruel and unusual punishment.

Other amendments corrected problems in the structure of Government such as limiting the number of terms a President could serve or providing for the direct election of Senators.

In fact, the only time the Federal Constitution was amended not to expand an individual right or to respond to structural concerns was to establish prohibition and then repeal it. That is the only example in the last 228 years.

If the proposed Federal marriage amendment is adopted and we are to deny rather than confer rights upon individuals, I believe it will be a step backward for all Americans concerned with the Constitution and the intended purpose of it. It would be difficult to imagine what our Federal Constitution would look like today if we had adopted constitutional amendments at the rate they are being currently proposed.

I point out that as of June 15, 2004, 61 constitutional amendments have been introduced in this Congress alone. In the last decade, 460 constitutional amendments have been offered. Even more startling is that 11,000 have been offered since the first Congress convened in 1789. That is the bad news. The good news is only 27 of those constitutional amendments have actually been adopted since 1789.

Some of these proposed constitutional amendments were controversial and divisive when proposed, and clearly discredited when viewed through the prism of historical perspective. There have been constitutional amendments to divide the country into four Presidential districts with a President elected from each, renaming the country ''the United States of the World,'' and even allow for the continuance of slavery.

If all of the proposed constitutional amendments were adopted, our founding document would resemble a Christmas tree—a civil and criminal code rather than a constitution—and the United States would be a very different nation indeed.

The Framers therefore had it right when they made the Constitution extremely difficult to amend. It is a process that ought to be very well thought out and extremely deliberate. That is why of the more than 11,000 proposals to amend the Constitution, only 27 have been adopted.

The Constitution was not intended to be subject to the passions and whims of

the moment. It dilutes the meaning of having a constitution in the first place if it is easy to amend, not to mention the fact that a lengthy constitution would be exceedingly difficult to interpret and enforce.

The Federal Constitution was construed to withstand incessant meddling and provide a stable framework of Government in the future. Certainly there must be a major crisis at hand. At the very least, the hurdle must be passed that we face a crisis.

Certainly I am willing to listen to those who say the crisis we face on this issue of same-sex marriage is so compelling that we must do something about it, and the only way we can address this crisis is by amending the Constitution of the United States. In my view, however, there is no crisis. It is a sham argument.

First, there has been no successful challenge to the Defense of Marriage Act, or DOMA. I want to direct the attention of my colleagues to this chart. Courts that have upheld Federal right to same-sex marriage, zero; States forced to recognize out-of-state same-sex marriages, zero; churches forced to perform same-sex marriages, zero; discriminatory amendments to the U.S. Constitution, zero.

Where is the crisis? There is no crisis. This is merely a political issue for some in the majority party who want to raise a question where frankly the problem is nonexistent.

Therefore, I think the issue of a Federal Marriage Amendment is certainly not ripe at all, nor is there a ''crisis'' as some of my colleagues would have us believe.

It is unfortunate that the majority party of the Senate does not share James Madison's view that the Constitution is to be amended ''only for certain great and extraordinary occasions.'' What is ''the great and extraordinary occasion'' that warrants taking this radical action today? The majority party has scheduled votes on two constitutional amendments prior to the August recess. Neither of these amendments, which concern same-sex marriage and the burning of the American flag, falls within our constitutional traditions. They have absolutely nothing to do with expanding individual rights or responding to structural concerns. They have absolutely everything to do with scoring political points before an election.

In addition, there has not been a markup or any consideration of these amendments by the full Judiciary Committee. It is extraordinary that the entire Senate would be considering amending the Constitution without the amendments having gone through the normal legislative process. In fact, of the 19 constitutional amendments considered by the Senate Judiciary Committee since 1978, all but two have been fully debated by the Judiciary Committee. The Senate considered the two that did not go through the Judiciary Committee only by unanimous consent.

Here we are taking the exceptional route of avoiding that process. Most surprisingly, the majority party is paying lip service to its cherished principle of federalism. Since the founding of our Nation, marriage has been the province of the States, and in my view it should continue to be a State issue. Yet the Federal Marriage Amendment would deprive States of their traditional power to define marriage and impose a national definition of marriage on the entire country.

According to Yale professor Lea Brilmayer, States now have wide latitude to refuse recognition of marriages entered into in other States without offending the Full Faith and Credit Clause of the Constitution. She argues that ''entering into a marriage is legally more akin to signing a marriage contract or taking out a driver's license'' as opposed to a judicial judgment, the latter of which is entitled to Full Faith and Credit. Courts have therefore not hesitated to apply local public policy to refuse to recognize marriages entered into in other States.

In addition, 49 out of 50 States allow marriage only between a man and a woman. The one holdout, Massachusetts, is currently working its way through this contentious issue in its State constitutional amendment process. For Congress to step in and dictate to 49 States how they ought to proceed in this matter runs counter to the States rights principles that many hold so dear.

I am hopeful cooler heads will prevail on this issue and the Senate will turn its attention to more pressing concerns. Having been through the process last week of trying to reform the class action system, which we spent only some 48 hours on, we have some 8.2 million out-of-work Americans; 4.5 million Americans working part time because they cannot find a full-time; almost 2 million private sector jobs lost since January of 2001; 35 million Americans living in poverty; 12 million children living in poverty; 25 million Americans who are hungry or on the verge of hunger; 43 million Americans without health insurance.

How about spending a couple of days trying to address one of these issues? And yet here we are consuming the remaining days of this session of Congress on an issue where there is absolutely no crisis.

As I pointed out earlier, looking at this chart once again very quickly, there have been no successful challenges to the Defense of Marriage Act. No court has upheld the Federal right to same-sex marriage. No state is forced to recognize out-of-state same-sex marriages. And no church is forced to perform same-sex marriages.

This issue is not ripe. It is not needed. It is a waste of our time. We ought to be dealing with far more serious issues.

My hope is that my colleagues, when a vote occurs in a few short minutes on cloture, will vote no on cloture. Let's get back to the business of what the Senate ought to be dealing with—namely, the pressing issues that our country needs to address on a daily basis. This is not one of them.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SANTORUM. Mr. President, there is no problem. We are just here because we are playing politics. We are alarmists. There is no problem out there. The Massachusetts Supreme Court didn't rule that the legislature had to change the definition of marriage. The Supreme Court didn't rule last year, for the first time, that we have fundamentally changed how we are going to construe rights with respect to homosexuals and lesbians. No, there is no problem. America, look somewhere else. Don't pay attention to what is going on. Everything will be fine. Just leave it up to us.

Us? Judges. Just leave it up to the judges. The Constitution should not be amended, said the Senator from Connecticut, on the passions and whims of the moment. That is right. What would others like to see happen? They would like to see it amended on the passions and whims of judges because that is what does happen. That is what is happening.

What has changed? The courts have changed. The courts have decided it is now their role to take over the responsibility of passing laws. What has changed? What has changed is that they now create rights and change the Constitution without having to go through this rather cumbersome process known as article V. We actually have to amend it, have to get two-thirds votes, have to get three-quarters of the States. That is what has changed.

We can sit back and deny it. No, everything is fine, zero, zero, zero—I say one, Massachusetts; two courts right now considering whether to overturn the Defense of Marriage Act. None have done it, but the cases were just filed. Why were they just filed? Because the decision was just last year.

Oh, we can wait. We can wait until more and more people enter into these unions in more and more States, after they become adopted. Then we can wait. Then, when we wait long enough, we say: Now we can't take these rights away from people. How can we be discriminatory? People have already invested in these rights.

Let's wait. Let the courts do it for us. Let's go out here and protest that we are for traditional marriage, and then do absolutely nothing, absolutely nothing to make sure it is preserved.

In fact, all but one—Senator KENNEDY said he is for the Massachusetts decision, but I don't know of any other Senator who has come out here and said they are against the traditional definition of marriage. Every other Senator to my knowledge has said they are for the traditional definition of marriage. Yet those of us who are proposing this amendment have been

called divisive, mean-spirited, gay bashing, shameful, notorious, intolerant—I could go on. Wait a minute, don't we all agree on this? Don't we all agree on the definition of marriage? If we all agree on the definition of marriage, and we just have different approaches to solving it, then why, if we all agree on the substance, are those of us proposing the marriage amendment divisive, mean-spirited, gay bashing, et cetera? Why?

Maybe we have to question whether there really is a desire to protect traditional marriage and whether we are just sort of laying back, hoping this issue is taken from us, that the courts will do our dirty work, that the courts will go about the process, which they have been now for the past couple of decades, and simply change the Constitution without the public being heard. That is what this amendment is all about.

Article V says Congress shall propose. We are proposing. We are not passing anything. We are not forcing anything on the States. As to this idea that somehow or another this is against States rights, 38 State legislatures have to approve this amendment for it to become part of the Constitution. This is not forcing anything on the States. This is not an abdication of States rights. This is allowing the States a fighting chance to preserve what every State in the Union says they would like to preserve, and that is the institution of marriage.

The idea, somehow or another, and I know others have talked about this, that James Madison would be against this because ''this is not a great or extraordinary occasion''—I would say the fundamental building block of any society is marriage and the family, and the destruction of that building block is a fairly extraordinary occasion. But even if some do not believe it is, let me refer you to the last amendment to the Constitution, the 27th amendment, which states:

> No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened.

Members of the Senate and House cannot get pay raises until their election. That was the 27th amendment. That was the great and extraordinary occasion that we amended the Constitution.

By the way, for those who say Madison would surely have opposed that because it is not a great and extraordinary occasion, what was the name of this amendment? The Madison amendment. James Madison proposed this amendment. This is a great and extraordinary occasion.

I would argue, the future of our country hangs in the balance because the future of the American family hangs in the balance. What we are about today is to try to protect something that civilizations for 5,000 years have understood to be the public good. It is a good not just for the men and women involved in the relationship and the forming of that union, which is certainly a positive thing for both men and women, as the Senator from Alabama laid out, but even more important to provide moms and dads for the next generation of our children. Isn't that important? Isn't that the ultimate homeland security, standing up and defending marriage, defending the right for children to have moms and dads, to be raised in a nurturing and loving environment? That is what this debate is all about.

I ask my colleagues who come here and rail against those of us who would simply like to protect children, those of us who would simply like to give them the best chance to survive in a very ugly, hostile, polluted world that we live in—with respect to culture—I would ask them this question: What harm would this amendment do? What harm would it do?

We don't need it; it is not ripe; it is not ready; it is divisive. What harm would an amendment which simply restates the law of every State in the country and protects them from judicial tyranny, what harm would it do? What harm will it do to do something that we know will actually protect the family? This idea that it is not ripe, this idea that it is unnecessary, this idea that it is divisive when all but at least one Member, that I am aware of, only one Member disagrees with the substance of the amendment, that is divisive? I can't think of very many things that happen around here that pass 99 to 1. It is not divisive. It is simply a restatement of what we have held true in this country since its inception and in every civilization in the history of man. What is the reluctance? Is it because this Constitution is so great and so lofty that we dare not amend it? Obviously not.

Then, what is it? Why do we hold back? Why aren't we willing to stand up and say children deserve moms and dads? The people have a right to define for themselves what the family is in America. Let the people speak. Let the people participate in this document. This is the Constitution, and judges should not be rewriting it without the people's consent. That is what article V is all about. That is what this amendment is all about. It is not about hate. It is not about gay bashing. It is not about any of those things. It is simply about doing the right thing for the basic glue that holds society together.

I plead with my colleagues. I know they have given speeches. I know there are lots of pressures out there. Certainly, the popular culture is not supporting those of us who have stood and supported this amendment. But just think about what America will look like, as we have seen in other countries around the world that have changed the definition of marriage, what America will look like with growing numbers of people simply not getting married; growing numbers of children growing up in nonmarried households.

I suggest you look at the neighbors of America where marriage is no longer a social convention, where marriage is no longer something that is expected, particularly of males, and see what the result is in those subcultures, see what the result is, see the role that government and community organizations have to play to save the lives of children, to give them some shred of hope because mom and dad aren't there.

That is the world we are looking at. That is the world that is simply around the corner if we choose to do nothing.

I said last night and I will repeat today—I ask for an additional 1 minute.

Mr. REID. Mr. President, that will be taken off the Republican time; is that correct?

The PRESIDING OFFICER. That is correct.

Mr. SANTORUM. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 1 minute.

Mr. SANTORUM. Christopher Lasch says we get up every morning and we tell ourselves little lies so we can live. Today, we have gotten up and we have told ourselves a little lie. Oh, the family is OK. Oh, this isn't right. Oh, whatever the lie is—but sometime or another we are just not going to come around to doing what we say we believe. Somehow or another we will deny what we know is true. We know that marriage between a man and a woman is true and right. It is not discriminatory and divisive. It is simply a fact. It is common sense. Yet somehow, just so we can move on to homeland security or to the next bill, we are going to deceive ourselves into believing that everything will be OK if we just do nothing. Nothing doesn't cut it. Let the people speak.

The PRESIDING OFFICER. Under the previous order, the remaining 30 minutes shall be allocated in the following order: Senator LEAHY, 10 minutes; Senator HATCH, 10 minutes; the Democratic leader, 5 minutes; and the majority leader, 5 minutes.

Mr. REID. Mr. President, Senator DODD has time remaining—5 or 6 minutes. We yield that to Senator LEAHY.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. Mr. President, I am privileged to represent a State that values families and the tradition of this country as much or more than any State in our Nation. We are the 14th State in the Union. We are a State that values and respects not only our families, but our duties to the rest of the country. In fact, during the current war in Iraq, Vermont has lost on a per capita basis more soldiers than any other State in the country. We are a very special State.

We also have a wonderful constitution, the shortest constitution, I believe, of any State in the Nation. We hold to it as we do the U.S. Constitution. We have provisions in our Vermont State Constitution which

make it very difficult to change, for a reason. It has guided us for well over 200 years, just as our U.S. Constitution has guided the nation as a whole.

When you change the fundamental role of the Federal Government to have it intrude into the lives of our people and into our separate religious institutions, that is wrong. Doing so preemptively, based on the false premise that the U.S. Supreme Court, the Supreme Court of Chief Justice Rehnquist and Justice O'Connor, is going to reach out and require States to approve same-sex marriages, is ill founded. Doing so in order to write discrimination into the Constitution is abhorrent.

Instead of a respectful and deliberative process with respect to the U.S. Constitution, we have something else going on here, something that Senator DURBIN and Senator FEINGOLD and others spoke of yesterday. None of the various proposed constitutional amendments have gone through the traditional process to help the Senate determine whether a proposed amendment is ''necessary,'' as, of course, the Constitution requires. Changing the fundamental charter of our Nation should not be proposed in this haphazard manner.

Everybody here knows that this is a political exercise being carried out on the fly. It shows little respect for the Constitution or the priorities of the American people.

Instead of taking action against terrorism, providing access to prescription drugs at lower prices, improving the criminal justice system, engaging in oversight to get to the bottom of the Iraq prison abuse scandal, providing a real Patients' Bill of Rights against the HMOs, or just fulfilling the basic requirements of the Senate by passing a budget and determining the 12 remaining appropriations bills on which the Senate has yet to act, the Republican leadership in the Senate has frittered away another week, with only 5 weeks left in the session. We have lost another week, but they know on the vote they will not win.

The American people have felt the need to amend the Constitution only 17 times since the adoption of the Bill of Rights. You would not recognize that tradition of restraint in looking at this Congress, in which dozens of proposed amendments to the Constitution have been introduced. The Senate has voted to increase the democratic rights of our citizens on several occasions, but we have only voted once to limit the rights of the American people. That was prohibition. We know that failed, and we had to come back in an embarrassed way and vote to repeal it.

This is a motion to proceed to the third version of the Federal Marriage Amendment that has been introduced in this Congress. Senator DASCHLE and the Democratic leadership offered a fair up-or-down vote on this amendment, but the Republican leaders refused. Instead, they want to have a constitutional convention on the Senate floor, with multiple votes on a variety of versions of constitutional amendments.

Yesterday, the distinguished Senator from Oregon, Mr. SMITH, indicated he was not insisting on a vote on his version of a constitutional amendment. I have not heard the distinguished senior Senator from Utah insist on a separate vote on an alternative version. I really do not understand why the Republican leadership wouldn't agree to an up-or-down vote at a certain time on this amendment, as Senator DASCHLE offered. It almost seems as if the Republican leadership can't take yes for an answer on this procedural matter.

Are we facing crises here in the United States? I suppose that we are, but they are not constitutional crises. They are real-world problems. They have more to do with international terrorism and difficult economic times for America's working families than how the people of the State of Massachusetts will determine how to work out a State constitutional amendment or other approaches to the question of marriage in their State.

No constitutional crisis exists demanding constitutional changes. Look at two of our largest States, California and New York. They have Republican Governors. Their Republican Governors are not asking us to change the Constitution. Many of the Republican Senators in this Chamber know there is not a constitutional crisis, and I commend their courage in opposing this amendment.

I compliment the Log Cabin Republicans for their forthrightness and courage. They are right that marriage is an issue for the States and for our religious institutions within their separate spheres. In fact, they are right that Vice President CHENEY and I agree on this, even though the Vice President is uncharacteristically silent at this moment.

I began this debate last Friday by urging that our Constitution not be politicized. I am saddened to see the proponents of this amendment and those trying to make this an election year issue see nothing as off limits or out of bounds, not even the Constitution. They propose turning the Constitution of the United States from the fundamental charter preserving our freedoms into a kiosk for political bumper stickers. They would reduce it to a device—in their words—to ''stand up against the culture.''

The real conservatives, the conservatives of Vermont and other States—know that conserving the Constitution is among the most important responsibilities we have. Our oath as Senators—an oath I have taken five times, and I can remember each one of them as though it was yesterday—is to ''support and defend the Constitution of the United States.''

Where is the respect for our States here? The Republican-appointed judges in Massachusetts changed their rules on marriage. But Massachusetts can decide for Massachusetts. They can change their constitution. But, of course, what we do here is going to force other States to ignore their own constitution or their own laws. Whether they like it or not, we will tell them what they have to do.

I hear many say Republicans and others on the Massachusetts Supreme Court endangered marriages. If I may be personal for a moment, I have been married for 42 years, to the most wonderful person I have ever known. In my mind, she is the most wonderful wife anyone could have. I sometimes ask myself why she has put up with me for 42 years, but she has. We have three beautiful children, two wonderful daughters-in-law, a wonderful son-in-law, all of whom we love. We were blessed this past weekend with our third grandchild. How wonderful it was to hold her literally minutes after she was born.

Like the former senior Senator from my State, Senator Stafford, I could say that everything I have accomplished in my life that has been worthwhile has been with the help of my wife Marcelle. We do not find our marriage endangered.

I do find a Constitution endangered if we start using it for bumper sticker slogans. That is what we are doing, and we must stop. The Constitution is too great a part of our heritage and our freedoms and our diversity and the democracy we love to tarnish it in this fashion.

When we vote today, we will not be voting to preserve the 42-year marriage of PATRICK and Marcelle Leahy. She and I will not be affected by this vote, but millions of Americans will be. Remember those gay and lesbian Americans across the Nation who are looking to the Senate today to see whether this body is going to brand them as inferiors in our society. Those who vote against cloture recognize the fullness of their worth and their citizenship. I will not vote to diminish other Americans in the Constitution. I urge all Senators to vote ''no.''

I have to wonder what Americans are thinking as they watch the Senate devote its limited time to debate the Federal marriage amendment. Do they think the Nation is in a midst of a crisis that only a constitutional amendment can resolve? Are they pleased that the Senate has turned away from legislation that could improve their daily lives to engage in this debate? I doubt it.

Let me review the current legal landscape in America. Massachusetts is the only State in the Union providing marriage licenses to same-sex couples, and its citizens are in the midst of the State constitutional process to overturn that policy. In addition, Massachusetts has limited same-sex marriage to couples who reside or intend to reside there. Meanwhile, none of the other 49 States has moved to legalize gay marriage during the many months

that have followed the Goodridge decision in Massachusetts.

I think most Americans would agree with me that the sky has not fallen during the 2 months during which same-sex couples have married in Massachusetts. They may support gay marriage, or like me, they may believe that civil unions are the appropriate way to recognize the seriousness of gay and lesbian relationships. Or they may oppose any recognition at all for same-sex couples. But at a fundamental level, they understand that States should have the authority to decide who can marry, and that the relationships being formed between consenting adults in Massachusetts have not harmed their own marriages or their own families.

The Rutland Herald, a Pulitzer Prize-winning newspaper in my State, wrote the following in an editorial last month:

[A] remarkable thing has happened since gay marriages began legally in Massachusetts last month: nothing. Gay and lesbian couples who have trooped to their town clerks or church altars have joined in the most significant relationship of their lives, and it has not been nothing to them. But no cataclysmic shock to society has occurred. Marriages happen as a matter of course, and though they are one of the most significant events in the life of the individual, they are a routine matter in the life of a community. Now gay marriage, too, has become routine, at least in Massachusetts.

As The Rutland Herald suggests, most Americans have not felt any effects from developments in Massachusetts, and many are surely mystified and dismayed by the Senate's fascination with the topic.

So why are we here today? We are certainly not here to legislate. Everyone in this chamber knows the Senate will not adopt this amendment. If you listen to Senator SANTORUM or Senator HATCH, you know they say we are here to ''put people on record,'' apparently including the many Republicans who have expressed reservations about the FMA or oppose it outright.

Obviously, the Senate leadership has decided that forcing a vote in relation to the FMA will benefit the Republican Party politically, from the race for the White House to the Senate races that will determine which party controls the agenda for the 109th Congress.

Ever since President Bush publicly embraced amending the Constitution to ban same-sex marriage, it has been obvious that he considered the issue of gay marriage crucial to his re-election campaign. The President's plan was clear: his right-wing base may have been alienated by his calls for immigration reform or a mission to Mars, but he would win them back by aggressively promoting a marriage amendment. And since the President's opponent is a Member of this body, it was only a matter of time before this amendment reached the floor, regardless of what procedural traditions had to be sidestepped to do it.

Of course, the President has never said what words he wants to be included in the Constitution. His Department of Justice has never testified before the Judiciary Committee of the House or Senate, and has never said what words it believes would be appropriate to include in the Constitution. The President and his administration want the benefit of supporting this discriminatory amendment without getting their hands dirty by delving into the specific and ugly words. This lack of concern about the language of the amendment is of course not limited to the White House. As I stressed in my opening statement, the language of this amendment is rather beside the point for its congressional supporters, too.

The President addressed the issue of gay marriage in his State of the Union address in January. He said, ''If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process.'' Yet, on February 24—barely a month after the State of the Union address—and without any additional court anywhere in the country ruling on gay marriage, the President flip-flopped and endorsed putting a ban on gay marriage in the Constitution. I can only assume that something turned up in the White House's polling to prompt such a dramatic about-face. Or perhaps Karl Rove's phone simply would not stop ringing with calls from the hard-right groups that compose the core of the President's support.

In any event, the day after the President endorsed the concept of a constitutional amendment, I wrote him and asked what specific language he wanted us to add to the Constitution. After all, we have only amended the Constitution 17 times since the Bill of Rights. If the President was calling on Congress to amend it for an 18th time, I thought the least he could do is make clear what language he seeks. I have waited in vain for a response.

I am not surprised by the President's conduct in this matter. He has proven himself willing over the last 3½ years to take whatever measures he finds politically expedient. He has also shown that he is more than willing to play political games with the Constitution, as we see with today's debate and we will see again in the upcoming debate on a constitutional amendment to ban flag desecration an issue that Vice President CHENEY has been campaigning on recently. The President, the Vice President, and the rest of the administration have withheld information from Congress and the public whenever it suits them. And facts have proven to be awfully malleable things when they have stood in the way of the President's political priorities. For this administration, it is all politics all the time regardless of the truth or the consequences. Let me provide three of the many possible examples.

When the facts got in the way of the President's prewar statements about Iraq, and Joseph Wilson pointed out the flaws in the President's 2003 State of the Union address concerning Iraq's alleged efforts to obtain uranium in Niger, someone in the Administration apparently told the press that Wilson's wife was an undercover agent at the CIA. The President promised that the perpetrator would be discovered and punished. But if he has made any efforts to discover the leaker's identity, we are unaware of them. Instead, he has retained counsel and allowed the investigation to grind on, perhaps in the hope that the issue will not be resolved until after election day.

When the facts got in the way of the President's proposal to expand Medicare to provide prescription drug benefits, his Department of Health and Human Services simply withheld those facts from Congress. When Congress considered the prescription drugs bill last fall, it received an estimate from the Congressional Budget Office that the cost of implementing the new program would be about $395 billion. It has since come to light that Richard Foster, the chief Medicare actuary, completed a cost estimate for the Bush administration last fall that showed the new prescription drug benefit would cost $550 billion, drastically more than the CBO estimate. In testimony before Congress, Mr. Foster explained that he was told that if he made his cost analysis public, he would be fired. The Congressional Research Service recently reported that it believes the Bush administration violated the law by withholding Mr. Foster's report and stated that it is clear that Congress has the right to receive truthful information from Federal agencies to assist in its legislative functions. It was a breach of trust with this Congress and with the American people.

And in today's papers we learn that there are administration estimates that when the purported prescription drug benefits are supposed to finally kick in around 2006, what is likely to happen is that almost 4 million retirees will, in fact, lose prescription drug benefits. That means that the Bush administration is now withholding its own estimates that one-third of all retirees with employer-sponsored drug coverage will, in fact, suffer more rather than be helped by the bill they forced through the Congress to benefit large insurance and pharmaceutical companies at the expense of our seniors.

Finally, when we in Congress raised legitimate concerns about the administration's policies on the abuse of prisoners abroad and requested documents that would shed light on the administration's policies regarding the treatment and interrogation of detainees, the White House released a small number of self-serving documents and chose to hide the rest. Then it ''disavowed'' the Office of Legal Counsel memo that laid out a strategy for evading the limits of the Torture Convention as if that document, which is legally binding on

the Executive Branch, had been nothing more than the doodling of an overly imaginative young lawyer at the Department of Justice. The administration obviously does not want the Congress or the American people to know the facts about its actions abroad or its slippery commitment to upholding American values.

Let there be no mistake: We are here today because the President wants to distract the American people from the facts of the weakened economy and reduced standing abroad that his administration has produced. He and the Senate Republican leadership prefer a political circus and seek to whip the American people into a frenzy based on the actions of a single State.

I am not so sure their political calculations are correct. I believe the American people regardless of their position on gay marriage—will be disappointed by the majority's overreaching. They will see this debate for what it is—a show produced to benefit Republicans politically while doing nothing to enhance or protect the sanctity of marriage. Senator CHAFEE predicted months ago that his leadership might bring the amendment up ''just for political posturing.'' He has proved prescient.

As I said at the fourth and final hearing the Judiciary Committee held on gay marriage, this debate is not about preserving the sanctity of marriage. It is about preserving a Republican White House and Senate and about doing so by scapegoating gay and lesbian Americans. I oppose this amendment, and I again urge my colleagues to oppose it as well.

This debate perfectly illustrates the Senate's priorities. We are spending days on a Federal marriage amendment that we all know does not have the votes to pass the Senate and that the House may never even put to a vote. I have spoken before about the divisiveness of this debate and the contempt that it shows for our constitutional traditions. This debate, however, also demonstrates the Senate Republican leadership's disregard for the needs of the American people and the institutional responsibilities of this body.

The Senate has been unable to get its own house in order. It is mid-July and we have still not passed a budget. The Senate has passed only one of 13 appropriations bills, and the leadership has suggested they may not be able to find the time to pass the others as individual bills. I do not believe we have ever passed only one appropriations bill in the Senate before the August recess, but we certainly seem to be headed in that direction.

A July 7 editorial in Roll Call lamented what it called the ''Big Mess Ahead.'' We are now stuck in that big mess. Roll Call noted that ''July should be appropriations month in the Senate.'' I agree. July has traditionally been when we got our work done and made sure that funding for the various functions of the Federal Government would be appropriated by the Congress as it exercised its responsibilities and the power of the purse. Not this year.

We have not done our part to help American employers create jobs. We have not completed work on a highway bill that could create 830,000 jobs, or on the FSC–ETI bill, subjecting American businesses to retaliatory tariffs that are increasing monthly. At the same time we have dallied on measures to expand the economy, and we have refused to extend unemployment benefits, even as 2 million Americans have exhausted their unemployment insurance.

We have not addressed the health care needs of our citizens. The majority has refused to take up either a drug reimportation bill that has the support of a majority of Senators, or mental health parity legislation that has 68 sponsors. Meanwhile, the Senate has done nothing to address the fact that 43 million Americans have not had health insurance for more than a year.

We have failed those hardworking Americans who struggle every day to make ends meet on wages that barely reach the poverty line. We have not increased a minimum wage that has remained unchanged since 1996. As inflation has risen and the economy has worsened, the working poor must struggle to live on the same wage Congress passed 8 years ago. The core inflation rate rose 2 percent in the first quarter of this year alone. In addition to allowing the minimum wage to stagnate, the majority has abandoned efforts to reauthorize the welfare reform law, leaving thousands of families in desperate need of quality childcare behind.

We have also failed our veterans. This failure begins at the top. The President has consistently proposed underfunding veterans' programs. His budget request for this year failed to maintain even the current level of services. Secretary of Veterans Affairs Principi recently testified that his department asked the White House for an additional $1.2 billion, but that request was denied. Forced to choose between our veterans and the President, the majority has sided against our veterans.

During consideration of this year's budget resolution, Senator DASCHLE offered an amendment to fund veterans programs at the level recommended by veterans' groups in the Independent Budget. Unfortunately, only one Republican voted in favor of this amendment, and it was defeated. A second amendment, offered by Senator BILL NELSON, would have increased funding for veterans by $1.8 billion. It too was defeated. Not a single Republican supported the Nelson amendment. My friends on the other side of the aisle then offered a ''smoke and mirrors'' amendment on veterans' care. Although this amendment made it seem that the Senate was voting to provide more money for veterans, we all know that this amendment did not add one red cent. The main purpose of this amendment was to provide political cover for the November election.

While the administration is shortchanging VA funding, out-of-pocket expenses for veterans are skyrocketing. Under the Bush administration, these expenses are projected to rise by an incredible 478 percent. Certain Priority 8 veterans are blocked from VA health care altogether, while others cannot receive treatment unless they pay a ridiculously high co-payment. Instead of debating polarizing issues like the Federal marriage amendment, we should be acting to provide real resources for the men and women who served this country with honor.

Unlike in 2000, the Republican majority has not even made the pretense of addressing the priorities of our Nation's immigrants. The majority leader engaged in parliamentary tricks last week to avoid a vote on Senator CRAIG's immigration reform bill and has found no time for the bipartisan DREAM Act, which would help thousands of immigrant students in our Nation. The prospect of comprehensive immigration reform is even more remote.

Sadly, the list of what we are not accomplishing goes on and on. Roll Call observed in its editorial last week that ''the second session of the 108th Congress is poised to accomplish nothing.'' The way things are going, under Republican leadership this session will make the ''do nothing'' Congress against which President Harry Truman ran seem like a legislative juggernaut.

The days we spend on this amendment could be spent more productively on any of the matters I just mentioned, but instead we are debating the FMA. We have followed this course even though there are only 6 weeks remaining in the Senate's scheduled work year.

I fear that at this point in an election year, floor time is only available for matters that advance the majority's narrow political agenda. This is a sad contrast from 1996, when we passed a minimum wage increase, a welfare reform bill, and other matters in a productive summer during which we occasionally put the election aside and took care of business for the American people. I supported some of those initiatives and opposed others, but I believed they were important matters that deserved the Senate's extended attention.

This summer, the Senate seems content to act as an extension of the President's reelection campaign. Why else would we be considering an amendment prompted by gay marriages in Massachusetts, 2 weeks before Democrats convene in Boston for their national convention? In light of all the talk about potential terrorist activity at the political conventions, we should be spending time passing appropriations bills for the Departments of Justice and Homeland Security. Instead,

this Senate will grind to a halt and ignore its pressing duties to conduct a debate whose outcome we all know.

I am not naive. I know that politics has always influenced Congress. It could not be otherwise. I fear, however, that the Republican leadership has taken the politicization of the Senate to new heights. Have we ever taken up a constitutional amendment that did not have the support even of a firm majority of this body, over the objection of the minority party, without even having the Judiciary Committee consider it?

We should reject this amendment and move on to the matters that make a difference in the daily lives of our constituents.

Mr. CORZINE. Mr. President. I wish to discuss, regrettably, the so-called Federal marriage amendment.

Regret is a key word when it comes to this amendment, for several reasons.

It is regrettable that, in this case, the United States Senate is debating an amendment that intends to turn a revered, sacred document into a political weapon.

It is unfortunate that a misinformation campaign about the consequences of this amendment has been waged upon the American public by organizations that want to play politics at the expense of gay and lesbian Americans.

Furthermore, it is regrettable that at a time of challenge and difficulty for our country—when soldiers are at risk abroad, we face threats to face our domestic security, and middle class families continue to get squeezed financially—the United States Senate is not discussing the issues that really affect American families.

The American people are a diverse lot. As I have traveled around this country, I have come to notice the vast differences that mark our Union of States.

I have always seen this diversity as one of our country's strongest points. The Constitution recognizes this as well. The political system in this country has survived for well over 200 years, because it appreciates diversity, and in fact celebrates the variety of cultures, ethnicities and lifestyles that make up America.

Our Constitution guarantees the right to celebrate and vocalize those differences. It enumerates, protects and expands the inalienable rights to life, liberty and pursuit of happiness that Thomas Jefferson had in mind when he penned the Declaration of Independence.

However, the spirit of the Constitution is threatened today by the amendment that is before the United States Senate.

As you know, some people are portraying what is happening on this issue in Massachusetts as a crisis. This is a blatantly political tactic that is used to energize political bases. In an election year, we find such a tactic being used far too often.

Unfortunately, when politics is at play—as it is in this case—good public policy often suffers. That is what we are witnessing today.

Many are trying to set off the crisis alarm by falsely claiming that the entire country will have to recognize gay marriages conducted in Massachusetts. Let me be clear, this assertion is wholly untrue.

The Defense of Marriage Act, passed by Congress in 1996, clearly affirms the individual states' rights to their particular definition of marriage.

Unfortunately, many of my colleagues have come to the floor to ''predict'' that this law will be overturned on constitutional grounds.

This is a hypothetical argument—and a disingenuous one at that—because several of the individuals who are now claiming that DOMA will be found unconstitutional are some of the same people who actively supported the passage of DOMA, and endorsed its constitutionality, almost a decade ago.

The exaggeration of the situation in Massachusetts and empty predictions about DOMA being overturned, are all part of a misinformation campaign being waged on behalf of this amendment.

Another example of this misinformation campaign is the argument that this amendment does not threaten states' rights to recognize gay and lesbian couples through other legal mechanisms, such as civil unions and domestic partnerships.

In reality, it is far from clear that this amendment will not restrict gay and lesbian couples' rights as its supporters claim.

In fact, according to the National League of Cities, the plain language of this amendment will result in the elimination of several rights and benefits that are guaranteed by states and municipalities across the country.

The second sentence of this amendment, as it sits in front of me, reads ''Neither this Constitution nor the constitution of any state, nor state or federal law, shall be construed to require that the marital status or legal incidents thereof be conferred upon unmarried couples or groups.''

What, precisely, is a ''legal incident?'' It doesn't take a legal scholar to understand that this sentence threatens gays' and lesbians' rights to visit each other in the hospital, share health insurance, or inherit each other's property.

To this amendment's drafters, ''legal incident'' may just be empty words. However, we know that every word in the Constitution has meaning.

I am reminded of a couple from New Jersey, to whom a so-called ''legal incident'' is more than just empty words.

This couple was together for 6½ devoted years.

However, their partnership came to a tragic end 6 years ago when one woman, who was pregnant, was killed by a drunk driver.

As their relationship was not legal, the hospital did not contact her partner. They instead contacted the injured woman's parents. However, the injured woman's parents did not approve of the relationship, so they did not call her partner to tell her that her companion was critically injured.

It took a long time before anyone finally called to inform her of her partner's failing condition. She finally arrived at the hospital fifteen minutes before her partner passed away. Because her visitation rights were not protected by law, however, she had no right to see her partner.

This woman was not allowed to see her partner before her untimely death. In fact, she was prevented from moving past the waiting area.

In addition, the injured woman's parents did not inform the doctor that their daughter wanted to be an organ donor, something their daughter had shared with her partner.

They also took all her belongings from the couple's house, some of which had been accumulated together by the couple.

This couple had done all they could under current law to formalize their relationship. They had formalized health care proxies and powers of attorney, but the hospital chose instead to recognize the injured woman's parents and ignore the couple's long term partnership.

These are ''legal incidents'' that are under threat: the right to see one's dying partner in the hospital, the right to make medical decisions for one another, the right to inherit property.

I am proud to note that in my home State of New Jersey, the Governor signed a domestic partnership bill that went into effect this past weekend.

The new law in New Jersey will make sure that such a situation never happens again.

It will ensure that committed gay and lesbian couples will never be stopped from spending their last moments together.

It will ensure that committed couples can make joint financial and health decisions. And committed couples will be able to own and inherit joint property.

However, the constitutional amendment we are considering this week can and will take away the rights protected by New Jersey's domestic partnership laws. Any statements to the contrary represent a fundamental misunderstanding of the vote that members of this body will be making.

If the Senate is to consider the legal status of gay and lesbian Americans, let's have that debate. This body should consider the unique challenges faced by gay and lesbian Americans, rather than toss them around like a political football.

If we are going to talk about strengthening American families, let's have that debate as well. While I have heard a lot of posturing about how this amendment strengthens families, I don't understand how beating up on gay couples accomplishes that.

I do know that families are stronger when our homeland is secure, health

care is affordable and well-paying jobs are plentiful.

New homeland security threats are becoming clearer by the day. Just last week, all Americans were reminded that we are still squarely in the crosshairs of a hidden enemy. A sobering statement from the Department of Homeland Security acknowledged that members of al-Qaida have the intention and capability to carry out a devastating attack within the borders of the United States.

All the while, the homeland security appropriations bill sits and waits. A bill I drafted that would bolster security at chemical plants sits and waits. The assault weapons ban sits and waits.

Health care and tuition costs are going through the roof, but we are not considering meaningful legislation to address these pressing needs for middle class families.

These are the priorities of the American people. Unfortunately, they do not seem to be the priorities of the United States Senate.

Why are we considering this amendment when we all know it is destined to fail? Why are America's economic and security priorities being shelved in favor of empty rhetoric on this amendment?

I wish I had a better response. However, it seems the answer is rooted in the politics of an election year.

This amendment undermines the Constitution, discriminates against gay and lesbian Americans, tramples States' rights, and is distracting this body from the important priorities that our country should be addressing.

I encourage all my colleagues to join me in voting against this amendment so that we may put the United States Senate on the record as resoundingly opposed to using our Nation's constitution as a political weapon.

Mr. CONRAD. Mr. President, over the past several months there has been much debate about the issue of gay marriage. My record as a steadfast supporter of traditional marriage and strong family values is clear and consistent. I believe marriage should be reserved to relationships between a man and a woman.

That is why I voted for the Defense of Marriage Act which became Federal law in 1996. This law gives States the authority to refuse to recognize same-sex marriages performed in other states. North Dakota has already passed laws to make it clear that North Dakota will not recognize same-sex marriages. So have 37 other States.

I strongly support these efforts by States to protect the important institution of marriage. States have historically regulated marriage, and I agree with Vice President CHENEY's statement during the 2000 election that marriage should continue to be left up to the States.

The question before us is not whether we support traditional marriage, as I do. It is not whether we support families and family values, as I do. The question before us is whether an amendment to the Constitution of the United States is necessary and appropriate to address the issue of gay marriage.

I believe the Constitution of the United States is one of the greatest documents in human history. It is the framework and the foundation upon which all of our freedoms as Americans are based. The Founding Fathers deliberately made amending the Constitution a difficult and lengthy process to preserve the integrity of the document and the freedoms it embodies. Congress has amended the Constitution only 27 times in more than 200 years, although more than 10,000 amendments have been proposed.

Throughout my career, I have held the principled position that the Constitution should be amended only when all other legislative and judicial remedies have been exhausted. Because the Defense of Marriage Act is the law of the land and has never been found to have any constitutional problems, I do not believe a constitutional amendment is needed. For that reason, despite my strong support for marriage, I will vote against the proposed constitutional amendment.

Mrs. MURRAY. Mr. President, we are less than 2 weeks away from our summer recess, and we will soon attend our respective parties' conventions. It is important to ask what we have accomplished so far this year. Very little.

We have hundreds of thousands of troops getting shot at in Iraq with no plan in place to stabilize that country.

We have sky-rocketing healthcare costs with no plan in place to help Americans get the healthcare they deserve.

And we have not done our work around the Senate: we have no budget, we have not done our appropriations, and instead of dealing with these real threats to the American people we are taking up the Senate's time on an issue that is not going to create one job, bring one soldier home, educate another child, or get a senior affordable prescription drugs.

So what are we doing? A constitutional amendment to ban States and local governments from extending legal marriage rights, responsibilities and obligations to same-sex couples.

With all the challenges we as a country currently face, this is one of the last things on which the Senate should be working. This is election-year politics pure and simple, in its crassest and worst form.

The proponents of this amendment are trying to rally those who adamantly oppose gay marriage before the fall elections and distract from an inability to deliver on the priorities of the American people.

It takes 67 votes in favor of a constitutional amendment for it to pass the Senate.

There is no expectation it will pass, yet they are stealing valuable work time from the Senate to play election-year politics.

Since this side of the aisle is not in control, we have to take what the majority brings to this floor, so we should address the basic question in this debate, which is, Should we amend the Constitution on this matter?

I say we should not. Our Founding fathers made the constitutional amendment process a difficult one. Two-thirds of both Houses of Congress, along with three-quarters of the State legislatures, must approve an amendment. Although it has never occurred, a convention can also be called by the States to amend the Constitution.

Since adoption of the Bill of Rights in 1791, the Constitution has only been amended 17 times. Our Founders wanted to use this process only in pressing matters that were serious crises impacting our Republic. As a result, in the 203 years since the passage of the Bill of Rights, amending the Constitution has always been used to protect and expand rights, not limit them. One exception was prohibition, but we repealed that amendment 14 years after it was ratified.

So we have used the constitutional amendment process to address real concerns: to establish our Bill of Rights; to end slavery; to grant women the right to vote; and to establish Presidential succession. These were real-world problems. These were issues that needed to be addressed.

The amendment we have in front of us would break with tradition—215 years worth of it—and would restrict liberties and would actually write discrimination into the Constitution. This amendment would restrict the rights not of all Americans but of one specific group. A group to whom this Senate 3 weeks ago extended hate crimes protection to as part of the Department of Defense Authorization bill.

Furthermore, unlike the pressing reasons why we have amended the Constitution in the past, invoking the process in this case is based on a hypothetical. One State—Massachusetts—had a State judicial ruling that their State constitution must allow same-sex marriage.

Again, despite the rhetoric on the other side, these are State judges interpreting state law.

Currently 38 States, including Washington State, prohibit marriage between people of the same sex.

Congress passed, and President Clinton also signed, the Defense of Marriage Act, DOMA, in 1996, which made it clear that on the Federal level marriage is defined between a man and a woman.

At least seven States will also decide this year whether to approve State constitutional amendments banning same-sex marriage.

The national conversation on this issue is still evolving, and we should not move forward with a constitutional change that would stop this discussion dead in its tracks. This is an issue that should be left to the States to decide.

States can choose how they want to define marriage, something they have traditionally done, and DOMA allows one State to reject another State's recognition of same-sex marriage.

There is a law on the books that allows States to do as they see fit. Marriage has always been within a State's jurisdiction. There is no good reason, other than politics, to try to change that.

I thought the proponents of this amendment claim to be strong State's rights advocates.

The hypothetical they have invoked in this process, the supposed constitutional crisis, is that the Supreme Court or a Federal court may rule these State laws or DOMA unconstitutional. That has not happened, nor is there any indication it will happen in the near future.

So here we are, using precious floor time, on a hypothetical. Something on which we have never used the amendment process.

This is no crisis. There is no constitutional problem. So I reject this amendment. We should not be using the amendment process on this issue. We should not be using the Constitution to restrict rights.

What we should be doing is addressing the real issues that impact the lives of Americans.

I urge my colleagues to not support this amendment.

Mr. DORGAN. Mr. President, today the Senate is deciding whether to add an amendment to our United States Constitution that would prohibit same-sex marriages.

I agree that the subject of marriage is an important matter. So, too, is the prospect of amending the United States Constitution.

I also agree with those who say that marriage is an institution that should be reserved for a man and a woman living as a husband and wife. I voted for that position when I supported the Defense of Marriage Act passed by the U.S. Congress in 1996. That is now Federal law and it clearly defines the institution of marriage for our country.

In recent months, there have been some challenges to State laws prohibiting same-sex marriages. In Massachusetts, the State Supreme Court has ruled that the prohibition of same-sex marriages violates that State's constitution. In California, New York, and New Mexico, some have tried to perform same-sex marriages in violation of State law, and authorities have taken legal action to stop same-sex marriages.

As a result, the only State in our country where same-sex marriages are now being performed is Massachusetts. But that State's legislature has begun a process to amend the State's constitution to prohibit same-sex marriages. When that is done, there will be no jurisdiction in America where same-sex marriages will be legal. I believe that the State governments, as has been the case for over two centuries, are resolving this issue in a manner that protects the institution of marriage as one that applies only to men and women united as husband and wife. Because of that, there is no need at this time to amend the United States Constitution.

The U.S. Constitution is the basic framework for the greatest democracy on Earth. Some of my colleagues find it easy to amend it. I don't. There have been over 11,000 proposals to change it over the years, 67 of them introduced in this Congress alone. But in almost 220 years we have only approved seventeen amendments to the Constitution outside of the Bill of Rights.

I am very conservative when it applies to altering our U.S. Constitution. I believe it should be amended only as a last resort. And in this case, the goal of prohibiting same-sex marriage is being achieved without the requirement to amend the U.S. Constitution.

I respect those who differ with my judgment, but I simply cannot believe it is in our country's interest to amend the United States Constitution unless it is the only alternative available to solve a problem that is urgent. The work of Washington, Jefferson, Franklin, Mason, Madison, and others is a document that has given life to the most wonderful place in the world to live. ''We the people'' should dedicate ourselves to protecting that Constitution and the things it stands for. We should not rush to alter the foundation of our democracy.

Mr. ENZI. Mr. President, when the Supreme Court in Massachusetts issued its ruling on marriage it did what no court ought to do. It set itself apart from and above the State and Federal legislatures, and went so far as to order the Massachusetts Legislature to produce a remedy in a time period it knew was unworkable and unfair. Even if the legislature is able to draft a change in the law that is acceptable to the court it will be impossible to bring the issue before the voters to obtain their consent and approval of the legislature's intrusion on the important tradition of marriage.

Regardless of what we may believe about the institution of marriage, the process of amending the Constitution, or the rights of same-sex couples to marry, there is no question that this is not what the Founding Fathers intended when they originally drafted the Constitution and established the principles of separation of powers and the right of the governed to have a voice in the laws that are written to govern them. The amendment we have before us is an attempt to remedy that situation and provide guidance and direction from the people of the States to the courts on this matter.

As we begin our consideration of this issue, we cannot help but frame the argument in terms of our own experience of marriage and our memories of the marriage of our own mother and father.

I was fortunate to have a pair of remarkable parents who worked hard and did everything they could to raise their family with a strong awareness of the principles and values of the time. One of those principles was undoubtedly the bonds that tied them together as man and wife. I know I am not the only one with such memories of growing up, or later, repeating much of the same modeling when we had families of our own. Now, as a grandfather, I am watching the traditions repeat themselves as my son and his wife raise the next generation of our family.

Simply put, that is what this legislation means to me—providing the generations to come with the same kind of advantages I had in my own life. It is not about denying rights to any group—it is about ensuring marriage, and its importance in our society continues to be encouraged and promoted.

As I have listened to the debate, I have heard it said that this is an issue that the States, not Congress, ought to be deciding. I could not agree more that the States need to be heard on this issue. That is why we are pursuing the remedy of a constitutional amendment in this matter. Even if we were to pass this legislation, however, it would still require the consent of three-fourths of the States.

In other words, the debate we begin here will be finished by the States. That way we will ensure that such a radical departure from our traditions and the norm of the institution of marriage will not be changed by the ruling of a court, but by the will of the people who will make their will known through their State legislatures.

One argument that has been raised in opposition to the legislation before us has to do with the rights of same-sex unions as defined by those States that have established civil unions. This bill will do nothing to change or alter that process. The States can continue to establish these programs as determined by the will of the people of the States that produce them.

This line of reasoning tries to obscure the point that a marriage is quite different from a civil union. Marriage is the union of a man and a woman in a partnership aimed at producing children and nurturing their growth and development. It is not about social acceptance, or about economic benefits, or an exercise in civil rights, as some would try to lead us to believe. A civil union, on the other hand, is a legal agreement that establishes a partnership between two people of the same sex to ensure their rights as ''partners'' are preserved in the eyes of the law. A civil union is concerned with matters like the right to an inheritance, retirement, death benefits, health insurance and the like. Marriage is concerned with matters involving the birth and raising of children. That is the main difference between the two. Simply put, life comes from the marriage of a man and a woman. No life can come from a civil union.

Society clearly has an interest in promoting and encouraging marriage

and the life it produces because it is the cornerstone upon which all our institutions are based. The family is also the main building block that helps form the very structure of our society. If all politics is local, you cannot get any more local than protecting and preserving the institution of marriage and the family unit it creates. The family is the basic unit from which neighborhoods are developed and strong communities are created. That is why society must continue to promote marriage and to afford it all the protections it can. Again, marriage is more than just a bond between a man and a woman, it is the basis from which life is created and children become a part of our world.

I have often heard it said that if we do not do a good job of raising our children, nothing else we accomplish during our lives will matter very much. Studies have shown that a child is better prepared for life if that child is raised in a loving, caring environment, with a father and a mother. The bonds that are formed, and the lessons learned about life from mom and dad help a child to understand his or her role in the world. It also helps a child begin to develop relationships with members of the opposite sex. A mother and father serve as role models for a child that help children understand their own role in the world as it shapes their relationships with their peers as they grow up and become adults.

Some may try to respond to those points by promoting the cause of same-sex parents. That argument tries to change the subject because that is not what this legislation is about. It is about protecting the definition of marriage as it was developed and handed down to us for more generations than any of us could count.

If we abandon marriage, we abandon the family. And when we convert marriage into a civil right for the sole purpose of indulging a perceived ''protected sphere of individual sexual autonomy,'' as some courts have tried to do, we abandon hope, not just for ourselves, but especially for future generations. If we lose our connection across the generations that have held marriage dear for so long and, as a result, the hearts of fathers and mothers are no longer turned to their children, and the hearts of children are no longer turned to their fathers and mothers, we will have suffered a great and terrible loss, indeed.

It was just over 10 months ago that I came to the Senate floor to announce the birth of my latest hope for the future, my grandson Trey. I shared my dream of his future and welcomed him into this world of promise and hope and love.

A number of my colleagues, from both sides of the aisle, came to me after that speech and shared with me their own hopes for the future as seen in the pictures of their grandchildren. My conclusion from those conversations is that all moms and dads, grampas and grammas know what it means to have that connection—the ties that bind each generation of each family together.

From where did that connection come? It was taught to us as we learned about families from our own parents and grandparents who took us under their wing and taught us what it means to be a part of a family. Simply put, they led the best way, by example, and what they taught us continues to guide us and direct us today. As I look back on those days I can see that I was their hope for the future, and they were willing to sacrifice today so that I might have a better tomorrow. It would be a tragedy for the courts to take that same opportunity away from me and my grandchildren.

The legislation we are considering today has one goal in mind—to protect the definition of marriage as it was developed and handed down to us from generation to generation. The enactment of this amendment will ensure that we pass that gift on to our children and our children's children, just as we received it.

Mr. NELSON of Nebraska. Mr. President, I address the issue that has been before the Senate for the past several days, the proposed amendment to the U.S. Constitution with regard to marriage.

Let me be clear. I support the definition of marriage as a union between a man and a woman. I fully support the concept of marriage as a sacred and solemn social institution. I support the Nebraska constitutional amendment on marriage and I support the Federal law defending marriage. But, I am not convinced we need a Federal constitutional amendment on this issue at this time.

As a former Governor, I am intimately familiar with instances where the Federal Government, Congress in particular, has interfered with the rights of States to govern. There are countless unfunded and underfunded federal mandates passed along to the States without the dollars to back them. There are tax laws and regulations that supersede state law. This is not what our Founding Fathers intended.

Thomas Jefferson, Founding Father and American President, fiercely defended the rights of States and believed that the States had the right to govern themselves on matters that were not directly authorized as the jurisdiction of the Federal Government by the U.S. Constitution.

I was pleased to see the good Senator from Arizona, Mr. MCCAIN, come to the floor to express his concerns about this amendment. I echo his sentiments by also quoting from the Federalist Paper 45, in which James Madison wrote ''the powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to 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; with which last the power of taxation will for the most part be connected. 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 properties of the people, and the internal order, improvement and prosperity of the State.''

I agree. Amending the U.S. Constitution, the document most sacred to those who love freedom and liberty, is a delicate endeavor and should be done only on the basis of the most clear and convincing evidence that a proposed amendment is necessary.

Proponents of this amendment predict activism in the Federal courts will result in the overturning of State constitutional amendments like Nebraska. I share that concern, but at this time there has been no court action overturning a State law on this matter and I remain unconvinced that this threat meets the level of urgency required for a Federal constitutional amendment at this time.

However, I plan to closely monitor the Federal courts and if evidence of judicial activism on this issue arises, I reserve the right to revisit this issue and reconsider a Federal constitutional amendment.

To the supporters of the amendment I say that I am in agreement with you; I am on your side of this issue. I have been contacted by several thousand Nebraskans over recent days, on both sides of the issue. I know that this issue sparks an emotional reaction in most. I appreciate hearing from constituents on this issue.

Senators are pressured by many and on various issues. Since coming to the Senate I have only felt the pressure to do what is right. In this case, the infringement on States rights is paramount. Until the rights of States are overruled by the courts, I believe that opposing this constitutional amendment at this time is the right thing to do.

Mr. DOMENICI. Mr. President. I rise today in strong support of S.J. Res. 40, the Federal marriage amendment. Unfortunately, because some are unwilling to address the actual amendment, we are instead holding a cloture vote on the motion to proceed to the amendment.

I have said it many times before, but I believe it is worth repeating: I do not take amending the United States Constitution lightly. This issue was forced upon the United States Congress, however, by a number of recent events.

The most visible, and disturbing event, was the decision by the activist Massachusetts Supreme Court in which they created a right not found in the State constitution or in State law. This is not the only event that has forced us to consider the drastic step of amending the Constitution. As you may know, we recently had a situation in my home State of New Mexico in which who defines marriage was made very real.

A county clerk in New Mexico decided that she would take matters into her own hands by issuing marriage licenses to same-sex couples. She did this despite the fact that neither the New Mexico Constitution nor New Mexico statutes recognize same-sex marriage. Put another way, the people of New Mexico, as represented by the New Mexico State Legislature, have not chosen to recognize same-sex marriage.

Instead, we risk a situation like that which took place in Massachusetts, where an activist court legislated from the bench. I am hopeful that the New Mexico courts will not follow the activist Massachusetts court, but it is not a certainty.

The Federal marriage amendment that we are considering today would ensure that the state legislatures, as elected representatives of the people entrusted with the legislative powers, get to decide. It is also important to remember: from a procedural standpoint, passage of a constitutional amendment by the Senate and the House of Representatives is only the first step.

When an amendment passes both Chambers with at least two-thirds of the membership present voting for passage, it is sent to the States for ratification. Then three-fourths of the State legislatures must ratify an amendment before it becomes part of the United States Constitution. This means that the States, through the elected representatives of the people, get two different chances to decide the issue.

I believe our Founding Fathers were particularly brilliant both in providing a mechanism by which the Constitution can be amended and in ensuring that it is difficult to do. Unfortunately, I am convinced the actions of a few nonlegislators have put us in the position where we must use the process of amending the Constitution.

Therefore, I will vote in favor of cloture so the Senate can have the opportunity to vote to send this amendment to the States so the State legislatures can act on behalf of the American people in deciding whether to ratify this amendment.

Mr. LEVIN. Mr. President, the Constitution is a document that should only be amended with great caution. This is one of those moments when we would be wise to submit the strong feelings on this issue to careful deliberation.

Unfortunately, proponents have chosen to do otherwise. The language we are debating was introduced less than 4 months ago. It is not clear what text we would even be voting on. The proposed language changes almost daily, like the weather. The amendment was not voted on by the committee of jurisdiction and we do not have the benefit of a committee report laying out the pros and cons of the amendment.

For purposes of comparison, the Congressional Research Service looked at constitutional amendments originating in the Senate over the last 40 years. Since 1963, 691 constitutional amendments have originated in the Senate. Including cloture votes, only 19 of these measures were voted on in the Senate. According to CRS, only four times in those 40 years has a constitutional amendment that originated in the Senate been debated in the Senate without first being reported by the Judiciary Committee. And of those four times, only the amendment providing Congress the power to limit campaign expenditures, versions of which were considered by the full Senate in the 100th, 105th, and 107th Congresses, came to the floor without earlier amendments on the same subject having been reported by the Senate Judiciary Committee. And that amendment was not adopted. The amendment we are currently debating has received less consideration than any constitutional amendment originating in and voted on in the Senate in at least the last 40 years, with the possible exception of one which was defeated.

In 1979, a constitutional amendment providing for the direct election of the President and Vice President was brought directly to the Senate floor. Senator Thurmond, then ranking member of the Judiciary Committee, protested the tactic, saying ''The Judiciary Committee is the proper machinery for referral of this resolution. It is set up under our rules for considering a measure of this kind. It should be utilized and should not be sidestepped as it attempted to do here with this procedure.'' He was joined by the then ranking member of the Subcommittee on the Constitution, Senator HATCH, who said ''To bypass the committee is, I think, to denigrate the committee process, especially when an amendment to the Constitution of the United States of America, the most important document in the history of the Nation, is involved.''

Senators Thurmond and HATCH's efforts to encourage thoughtful consideration were successful and the amendment was referred with unanimous consent to the Judiciary Committee for its consideration. Our consideration of the pending amendment would also benefit from such a process.

One purpose of the pending amendment is stated to be to protect one State from imposing its view of marriage on other States. But this debate is taking place before the courts have even had the chance to determine the constitutionality of the Defense of Marriage Act, which almost all of us voted for, which says that ''No State . . . shall be required to give effect to any public act, record, or judicial proceeding or any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.'' Defense of Marriage Act defines ''marriage'' as ''only a legal union between one man and one woman as husband and wife.''

Even though the Defense of Marriage Act has yet to be tested in court, some proponents of the pending amendment have claimed the act will be ruled unconstitutional and that the full faith and credit clause of the Constitution will force States opposed to same-sex marriages to recognize same-sex marriages established in other States. However, many experts disagree.

In her testimony before the Senate Judiciary Committee in March, Professor R. Lea Brilmayer, a Yale Law School expert on the full faith and credit clause, cited the Supreme Court in Pacific Employers Insurance Company v. Industrial Accident Commission, 1939: ''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 . . .'' Professor Brilmayer testified that less formal legal instruments, such as marriage licenses, have been ''entitled to less recognition even than legislation'' and that ''marriages entered into in one state have never been constitutionally entitled to automatic recognition in other states.''

Amending the Constitution should be a measure of last resort. The Defense of Marriage Act should be tested in court before a constitutional amendment is considered, the purpose of which is to achieve the purpose of the statute.

In addition, the language of S.J. Res. 40 itself contains a host of problems. The amendment reads, ''Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.''

Not surprisingly, given the lack of deliberation, there appear to be differences of opinion on what the amendment provides.

Some have argued that the amendment's language relative to ''legal incidents'' of marriage does not ban civil unions or the extension of other rights to same-sex couples. But here is what Professor Cass Sunstein, a leading constitutional scholar at the University of Chicago Law School, has to say:

> What is meant by ''the legal incidents thereof''? Does this provision ban civil unions? Does it forbid States from allowing people in same-sex relationships to have the (spousal) right to visit their partners in hospitals? Does it bear on rules governing insurance? At first glance, the term ''legal incidents thereof'' appears to forbid States from making cautious steps in the direction of permitting civil unions. And does the word ''require'' include ''permit''? Or consider the recent Allard amendment, which says that neither the federal Constitution nor any state Constitution shall be construed to require that marriage or ''the legal incidents thereof'' must be ''conferred'' on same-sex marriages. The most serious difficulty is that the words ''legal incidents thereof'' raise the same questions about civil unions and spousal benefits and privileges.

For all these reasons, I will vote no.

Mr. BYRD. Mr. President, today the Senate faces a cloture vote which we should never have faced. We have been put in this position by a majority leadership that is toying with the faith and the trust of people across this country. I share their faith, and I share their belief in the sanctity of marriage. I am very disappointed that we have a procedural vote, instead of a vote in direct consideration of a constitutional amendment. What these people want is a vote, up or down; what they are going to get is more rigamarole in this Senate. The majority party is manipulating the faith of many Americans, with the unwitting aid of many well-meaning religious leaders, which is one of the most disappointing aspects of this issue.

The majority party does not expect to win this cloture vote. In fact, the majority party likely does not want to win this cloture vote. The White House and the Republican leadership want to campaign on the fact that Democrats blocked this amendment, that Democrats somehow oppose marriage. How ludicrous. Yet, the Republican leadership will try to capitalize on this procedural vote with fundraising letters, campaign stops, and election-day votes. It is an abomination, an absolute failure of trust, to hatch such calculated political schemes on those Americans who genuinely believe in this issue.

The majority party wants this cloture motion to fail. I, for one, will not help in that effort. I will not help to manipulate the churches and the pulpits across this country. I will call that bluff, and vote for cloture on the motion to proceed.

While I strongly support, and will continue to staunchly defend, efforts to strengthen and preserve marriage in our society, I oppose amending the U.S. Constitution based on the resolution that is before this Senate. The resolution is rife with contradictions and ambiguities that would, with certainty, lead to nothing but confusion and endless litigation in the future. I had hoped that the Senate would have been given the opportunity to debate and to vote clearly, yes or no, on that proposal, and not cloud the debate with procedural votes that few outside of this Capitol understand.

We are in a phase in this country's history that seems to tend toward the belief that cultural conflict, deep wrenching questions about right and wrong, should be fodder for political games. That view is high folly when the legislative vehicle is the Constitution of these United States. As much as I sympathize with the deep personal and religious convictions of those who revere the institution of marriage, we must not start down the road of using our national charter to win political or culture wars. Such a course could lead to the unraveling of individual freedoms and eventually could leave our Constitution in tatters and disrepute—making our beloved Federal charter the most tragic and dramatic victim of the fierce, unprincipled, political conflicts that rage in our land today.

Mr. JOHNSON. Mr. President, I rise today to join the bipartisan majority in this Senate in opposition to the motion to proceed to S.J. Res. 40, the Federal marriage amendment, to the United States Constitution. I strongly support, and have voted for, Federal legislation that defines marriage as a union between a man and a woman; however, there is no need at this time to take the extraordinary step of amending our Constitution. Since 1996, Federal law has allowed the respective States to refuse to recognize another State's gay marriage laws, and it also expresses the congressional view that the institution of marriage should be limited to a union between a man and a woman.

I have recently been contacted by a great many religious organizations, including the Evangelical Lutheran Church of America, ELCA, my own denomination, as well as the Alliance of Baptists, the Episcopal Church, the Presbyterian Church, and the United Church of Christ, among others, asking me to oppose this proposed constitutional amendment. While I do not ''take orders'' from any religious group, including my own, this does confirm that my opposition to this amendment is consistent with the views of millions of devout Christians throughout South Dakota and America.

Further, because Senate Majority Leader BILL FRIST was unable to secure any consensus behind the specific language of any one marriage amendment, he will not allow the Senate to take a direct up-or-down vote on a marriage amendment. I commend Senator TOM DASCHLE for asking for a direct vote on this matter. However, Senator FRIST objected, and now we find ourselves in an incredible situation where Senator FRIST wants the Senate to vote on a wide range of possible amendments which could profoundly impact the Constitution. If this motion to proceed prevails, we would have endless amendments offered to the Constitution on any topic under the sun. That is utterly irresponsible, and I will have nothing to do with helping to pass Senator FRIST's motion to proceed.

Lastly, I take issue with the timing of this debate. After this vote we will have a mere 26 legislative days left in the 108th Congress. Currently, 9 of the 13 appropriations bills have not even received committee approval. Only two of those bills have passed the full Appropriations Committee and only one has passed the full Senate. Time is short. Knowing that this amendment will not even be voted on, and that the motion to proceed will be defeated by bipartisan opposition, there are significantly more important matters this body should be attending to. I am enclosing a relevant editorial on this issue from the highly respected New York Times.

There are real problems facing our Nation—job losses, health care, education, senior citizen challenges and agricultural issues among them. Yet the Senate has spent days debating an amendment that even Senator FRIST concedes will not come even close to passage. This is a politically inspired amendment—one that has not even been considered by the Senate Judiciary Committee. The American people deserve better than this mockery of a legislative process.

I ask unanimous consent to print the above-referenced editorial in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, July 14, 2004]

POLITICKING ON MARRIAGE

It is heartening to see that the Republicans who had hoped to score political points today by holding a Senate vote on adding a ban on same-sex marriage to the Constitution have run into unexpectedly broad resistance across the ideological spectrum. Liberals and moderates opposed to writing bigotry into the Constitution are being joined by a growing number of conservatives who see nothing conservative about federalizing marriage law or turning America's most essential legal document into an election-year football. With support for the amendment now well below the necessary 67 senators, the calls to put it to a vote just before the Democratic National Convention are nothing more than divisive politics. The Senate should let the Federal Marriage Amendment die a quite death.

Early in the election season, Republicans seized on gay marriage as a promising cultural issue to use against Democrats. Republicans have been working hard to put referendums against gay marriage on individual state ballots to draw religious conservatives to the polls in November. In Washington, Congressional Republicans have been eager to schedule a vote on the Federal Marriage Amendment to force Democrats—particularly Senators John Kerry and John Edwards, who oppose both gay marriage and the amendment—to take a public stand.

One great surprise of this campaign, however, has been just how little traction the issue is getting. Polls show that even many voters who oppose gay marriage do not favor the drastic step of amending the Constitution to prohibit it. And most Americans have the good sense to realize that, whatever their feelings about same-sex marriage, issues like the economy and the war in Iraq matter much more. When President Bush campaigned recently in Ohio, where conservatives are trying to put a gay-marriage ban on the ballot, he was greeted by a newspaper advertisement taken out by a gay-rights group that said: ''Jobs lost in Ohio since 2001: 255,000; gay marriages in Ohio: 0. Focus on Americans' real priorities, Mr. President.''

Even many conservative Republicans, it turns out, do not favor a constitutional amendment. In Washington State, George Nethercutt, the conservative Republican congressman running against Senator Patty Murray, has joined Ms. Murray in opposing it. Lynne Cheney, the vice president's wife and a leading cultural conservative in her own right, said recently that states should take the lead in deciding issues relating to marriage.

Now it appears that the Federal Marriage Amendment may not have the support of a Senate majority, much less the two-thirds that constitutional amendments need. Since

the effort appears futile, backers of the amendment seem to be trifling with the issue simply to rally their base. The Constitution, the embodiment of American democracy, deserves better than that.

Mr. LAUTENBERG. Mr. President, I rise to ensure that all voices are heard in the debate over the proposed amendment to the U.S. Constitution on the issue of marriage. I have received compelling correspondence from Gay, Lesbian and Bisexual Local Officials, GLBLO—a caucus of the National League of Cities—the full text of which deserves to be included in Senate consideration of this issue.

Mr. President, I ask unanimous consent that a copy of the letter from the Gay, Lesbian and Bisexual Local Officials, GLBLO, board of directors be printed in the RECORD.

JULY 14, 2004.

DEAR UNITED STATES SENATOR: On behalf of the Gay, Lesbian and Bisexual Local Officials (GLBLO) Board of Directors and members, a caucus of the National League of Cities working to influence federal policy and municipal relations, we are writing to urge you to vote ''NO'' on S.J. Res. 30 and S.J. Res. 40, respectively, a proposed constitutional amendment to ban same-sex marriage. We are also asking for a vote against ''cloture'' so that the Senate may engage in a full debate of the issue.

The first sentence of the ''Federal Marriage Amendment'' provides, ''Marriage in the United States shall consist only of the union of a man and woman.'' GLBLO is opposed to the federal preemption of states to determine marriage. The 10th Amendment of the Constitution clearly confers upon states the authority to determine marriage. The federal intrusion into the state's authority to define marriage is unnecessary. Unfortunately, this proposed preemptive language would also reverse the constitutional tradition of expanding and protecting individual liberties.

Second, GLBLO is opposed to the wording of the second sentence of the proposed amendment which would prohibit the federal government and states from conferring ''the legal incidents'' of marriage on unmarried couples. The proposed language could have the far-reaching negative effect preempting state and local laws, as well as private businesses that provide benefits to the partners of their employees. This is particularly troubling given the fact that neither the Senate Subcommittee on the Constitution nor the Senate Judiciary Committee vetted the impact of the language. The Constitution of the United States deserves more careful consideration by the Senate, especially when the proposed amendment would break from the traditional historical civil rights practice of allowing stronger state laws.

In closing, we ask the Senate to redirect its energies to address the priorities of the nation's cities—such as homeland security, transportation reauthorization, and full funding of social service programs, before taking this historical step of eroding the role of state governments in protecting same-sex and unmarried couples in their states.

Sincerely,

GREG PETTIS,
Mayor Pro Tem, Cathedral City, California, At-Large Board Member, Gay, Lesbian, and Bisexual Local Elected Officials (GLBLO).

RAND HAGLUND,
Councilmember, Brooklyn Park, Minnesota, At-Large Board Member, Gay, Lesbian and Bisexual Local Elected Officials (GLBLO).

Ms. COLLINS. Mr. President, I rise to speak on S.J. Res. 40, the Federal Marriage Amendment to the Constitution. Let me begin my remarks by plainly stating my position on the issues raised by this amendment.

First, it is my strong personal belief that marriage is between a man and a woman. Second, principles of federalism dictate that the right and the responsibility to define marriage belong to the States. Third, the proper role of the Federal Government is to ensure that each State can exercise that right and responsibility by preventing, as the Defense of Marriage Act does, one State from imposing its view on others.

The amendment under consideration would potentially affect two types of relationships that are fundamental to our society. The first is the union between a man and a woman. The second is the compact between the States and the Federal Government. In our zeal to protect the former, we must not do unnecessary violence to the latter, as it is the bedrock of our country's unique and highly successful Federal system.

We also must not overreact to the decision of a single court in a single State by rushing to amend the Constitution and stripping away from our states a power they have exercised, wisely for the most part, for more than 200 years. Let us remember that no State legislature has sanctioned same-sex marriage. Nor has there been a popular referendum to that effect in any State. Indeed, this amendment is a response to a single court decision—and a 4–3 decision at that. If just one judge on the Massachusetts court had a different view of this issue, we would not be contemplating the dramatic action of amending the Constitution.

Put differently, where is the evidence that we cannot trust the States in this area? More than 40 States have enacted laws or Constitutional amendments that expressly limit marriage to the union of one man and one woman. Maine law explicitly states that ''[p]ersons of the same sex may not contract marriage,'' and further provides that Maine will not recognize marriages performed in other jurisdictions that would violate the legal requirements in Maine. Thus, even if lawfully performed in another State, a same-sex marriage will not be valid in Maine.

In short, I respect the right of the people of Maine and the citizens of other States to define marriage within their boundaries. Were I a member of the Maine legislature, I would vote in favor of a law limiting marriage to the union of one man and one woman.

This does not mean that Congress can play no role in this area. To the contrary, Congress has two very important roles. The first is to protect the right of each State to define marriage within its own borders, and the second is to define marriage for Federal purposes.

To its credit, Congress did both of these when it enacted the Defense of Marriage Act, or DOMA, in 1996. Signed into law by President Clinton, DOMA enjoyed broad, bipartisan support in both chambers of Congress, passing by a margin of 85–14 in the Senate and 342–67 in the House. The statute grants individual states autonomy in deciding how to recognize marriages and other unions within their borders, and ensures that no State can compel another to recognize marriages of same-sex couples. Of equal importance, DOMA defines marriage for Federal purposes as ''the legal union between one man and one woman as husband and wife.'' I strongly endorse both of the principles codified by DOMA, and should legislation come before the Senate reaffirming DOMA, I would vote without reservation to support it.

Even though DOMA has not been successfully challenged during the 8 years since its enactment, many supporters of the Federal marriage amendment point to the Supreme Court's recent decision in Lawrence v. Texas as presaging DOMA's ultimate demise on Constitutional grounds. They argue that DOMA's vulnerability necessitates approving the amendment under consideration.

I reject that argument for two reasons. First, the conclusion that DOMA is inevitably destined to die a Constitutional death is inconsistent with language in the Lawrence decision. In striking down a Texas statute criminalizing certain private sexual acts between consenting adult homosexuals, the majority opinion written by Justice Kennedy was careful to note that the case before the Court:

> . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

In her concurring opinion, Justice O'Connor was even more explicit when she observed that the invalidation of the Texas statute:

> . . . does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail. . . .Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

These statements persuade me that the Supreme Court is, in fact, unlikely to strike down DOMA.

Second, even if DOMA is eventually invalidated, the answer is not to abandon our principles of federalism but rather to enshrine them in the Constitution. Thus, if we ultimately have to address this matter as a Constitutional issue, and we should do so only as a last resort, it should not be to strip the States of the right to define marriage but rather to expressly validate a role they have been playing for more than 2 centuries.

Let me end where I began. This amendment is not just about relationships between men and women but also about the relationship between the States and the Federal Government. I would not let a one-vote majority opinion of a single state court lead us to ascribe to Washington a power that rightfully belongs to the states. To the contrary, our role should be to safeguard the ability of each State to exercise that power within its own borders.

Mr. CRAIG. Mr. President, I rise in support of Senate Joint Resolution 40, the Federal Marriage Amendment. The Judiciary Committee, on which I serve, has held four hearings on the Federal Marriage Amendment. In addition, other committees have held three more hearings on the FMA. We have heard substantial and compelling testimony on the importance of traditional marriage. The time has come for this body to act. Marriage is an institution cultures have endorsed and promoted for thousands of years. It is important for us to stand up now and protect traditional marriage which is under attack by a few unelected judges and litigious activists.

Last year, the Supreme Judicial Court in Massachusetts announced the Massachusetts State Constitution requires the state to grant marriage licenses to same-sex couples. Through their activism, the court ignored the will of the people and created a new state constitutional right. This violation of the democratic process calls for a response.

I have special sympathy for the plight of the people of Massachusetts, because I see courts deciding cases wrongly on an all-too-frequent basis. Of the cases appealed and decided from the Ninth Circuit Court of Appeals this term, the circuit with jurisdiction over Idaho, the U.S. Supreme Court has overturned 15 while affirming 9. Judicial activism of the type we see in Massachusetts is not new, but this is a uniquely deep cut to the heart of society. We need to pass the Federal Marriage Amendment to restore the people to their proper and constitutional role as the only sovereign in our great nation.

I am cautious about amending the U.S. Constitution. It has served us well for more than two centuries, and I expect it to last for centuries to come. One reason it endures is its resilience in the face of changing times, thanks in large part to its amendability. We have seen fit to amend our Constitution 27 times on 17 different occasions. Each of these has addressed an issue of importance to the people. Marriage too, is an important issue to the people.

Some opponents speak of this proposed amendment as an attempt to take rights away. That is neither the purpose nor effect of S.J. Res. 40. Amending our Constitution is the way the people can correct the courts when the courts get an issue wrong. For instance, the states ratified the Thirteenth Amendment 7 short years after the Dred Scott v. Sanford decision by the U.S. Supreme Court, righting the wrong of slavery that had been perpetuated by the courts.

The amendments to our Constitution blaze a clear trail extending the people's right of self determination. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments all extended the franchise to new groups. Yet what good is the franchise, if that voice falls on deaf ears because a few activist judges choose to replace the will of the people with their own? Though I am cautious about amending our Constitution, preserving the sovereign right of the people warrants an amendment and our support.

My colleagues have eloquently set forth many good reasons to support the FMA and I will reiterate only one. We need to pass this amendment for the sake of children. Marriage encourages people to organize in the way that is best for those who may issue from, or enter into, that relationship, according to researchers studying family structures for raising children. This amendment does not criticize or undermine other kinds of families, but it acknowledges society's interest in promoting traditional marriage as the environment for child rearing.

There are several reasons I support this amendment at this time. No fewer than 42 States have defined marriage as being between one man and one woman. This amendment to the U.S. Constitution is the only way to keep this issue in the hands of the people and their elected representatives. This amendment allows the citizens of each state to establish systems to recognize same-sex relationships if they so choose, walking the appropriate line through federalism and separation of powers.

My colleagues and I did not choose the time for this debate. The judicial activists of the Massachusetts Supreme Judicial Court have brought this issue to a head. Passing S.J. Res. 40 will give the people and the states the ability to protect children, bolster traditional marriage as a social building block, and preserve the role of the people as the sovereign in our political system. I encourage my colleagues to also support S.J. Res. 40.

Mr. SPECTER. Mr. President, I seek recognition today to discuss my vote and views on the Federal marriage amendment. I am voting in favor of cloture on the motion to proceed to this amendment. I do so primarily to ensure that our debate on this mater be concluded and that we return our attention to the other pressing issues of the day, including the announcement by Homeland Security Secretary Tom Ridge that it is anticipated that al-Qaida will attack the U.S. again before the next election. We in this Chamber must grapple with many very serious issues including national security, terrorism, the economy, and our appropriations bills. It is time to return to this important work.

Voting for cloture to cut off debate means only that we take up the substance of the amendment to conclude the Senate's consideration of the matter. While the cloture vote is only procedural, I do want to address the merits of the amendment.

When the Supreme Judicial Court of Massachusetts upheld same-sex marriage earlier this year, I stated that I believed marriage was a sacred institution between a man and a woman, as evidenced by my vote in favor of the Defense of Marriage Act in 1996. At that time, I further stated that I thought that Massachusetts would amend its State constitution, which was the basis for the Massachusetts decision, that the full faith and credit clause did not apply, and that the Federal Defense of Marriage Act trumped State court decisions. I added that if the States could not uphold the sanctity of marriage between a man and a woman, I would consider a U.S. constitutional amendment. That continues to be my position today.

Both the Federal Defense of Marriage Act and the Federal marriage amendment seek to preserve the traditional definition of marriage as the union between one man and one woman. Yet amending the Constitution raises a number of issues that were not raised by legislation. All of us in this body must pause and ask ourselves whether the problem before us necessitates this extra and most serious step.

As a matter of traditional and sound constitutional doctrine, an amendment to the Constitution should be the last resort when all other measures have proved inadequate. In Federalist No. 43, James Madison warned ''against the extreme facility'' of constitutional amendment ''which would render the Constitution too mutable.'' In Federalist No. 49, Madison returned to this theme, noting that amendments to the Constitution should be reserved for ''certain great and extraordinary occasions.''

Madison's caution has been carefully followed throughout American history. To date, 11,212 resolutions to amend the Constitution have been introduced in Congress. Yet the Constitution has been amended only 27 times.

In testimony before the Senate Judiciary Committee last March, Professor Cass Sunstein of the University of Chicago Law School noted that all but two of these 27 amendments fall into two traditional categories. Most amendments to the Constitution have expanded individual rights. In this category fall the first 10 amendments—the Bill of Rights—as well as the post-Civil War amendments and the amendments extending the right to vote to women and lowering the voting age to 18. The rest of the amendments have remedied problems in the structure of government itself, such as clarifying the functioning of the Electoral College, establishing the popular election of Senators, creating the income tax, and placing term limits on our Presidents.

To date, only two amendments have fallen outside of these two categories of expanding individual rights and fixing structural problems. The first such amendment was the eighteenth amendment, which prohibited the manufacture or sale of ''intoxicating liquors'' in America. The second amendment to fall outside of the two traditional categories was the twenty-first amendment, which repealed the eighteenth amendment and ended prohibition.

As this history illustrates, when the Constitution is amended to incorporate the majority's position on the controversial issues of the day—and not to expand rights or fix a structural problem—the results do not withstand the test of time. We all must bear this in mind whenever we contemplate amending our Constitution. The Senate, after all, is intended to be the saucer that cools the tea, the necessary fence between the passions of the day and our Constitution and laws. We must pause where others would rush in.

We are having this debate on the Federal marriage amendment today because on November 18, 2003, Massachusetts' Supreme Judicial Court decided in the case of Goodridge v. Department of Public Health that same sex couples have the right to marry. In determining whether this court's recognition of same-sex marriage is one of the ''great and extraordinary occasions'' that warrants an amendment to our Constitution, we must at the outset consider whether there are other, lesser alternatives to deal with the issue. If lesser alternatives will work, then we clearly should not tinker with our Constitution. If, however, we cannot preserve the sanctity of marriage between a man and a woman by other means, then an amendment to the U.S. Constitution may very well be necessary.

Before we even look to the Federal Government for a solution, we must first evaluate whether the States themselves have the power to stop same-sex marriages. The fact is that those States in which there have been same-sex marriages have already mobilized to stop them. The Massachusetts legislature has already passed an amendment to the Massachusetts State Constitution prohibiting same-sex marriage. This amendment must be passed a second time in 2006, and then approved by the voters, before it is finally ratified. But few doubt the eventual outcome.

Some may argue that waiting until 2006 to stop same-sex marriage in Massachusetts is simply too long. Yet it is clearly simpler, more direct, and faster to deal with this issue by amending one State constitution than by amending the U.S. Constitution. To enact an amendment to the U.S. Constitution, three-quarters of the States—38 States—must ratify the amendment after two-thirds passage by the Senate and the House of Representatives. The average time of ratification is approximately 2 years, with some amendments taking as long as 3 years until ratification.

When a couple of cities outside of Massachusetts recently sought to recognize same-sex marriages, the State courts have moved in quickly and effectively to stop them. In February, 2004, Gavin Newsom, the mayor of San Francisco, permitted his city to issue marriage licenses to same-sex couples. The California Supreme Court issued an injunction ordering San Francisco to stop issuing these marriage licenses. Also in February, 2004, Jason West, the mayor of New Paltz, NY, conducted a number of same-sex marriages without licenses. The New York State Supreme Court issued an injunction ordering Mayor West to stop performing these ceremonies.

The fact is that most States in the Union have already taken some action to prevent same-sex marriage. Even before the Goodridge decision in Massachusetts, 38 States had passed laws similar to DOMA which define marriage as a union between a man and a woman and refuse to honor same-sex marriages from other States. Three States—Alaska, Nebraska and Nevada— had ratified constitutional amendments banning same-sex marriage.

Since the Goodridge decision, 21 States have taken additional action to prohibit same-sex marriage, by strengthening prior prohibitions or enacting new ones: Seven State legislatures have adopted legislation that, if approved by the people in a referendum, would amend the State constitution to prohibit same-sex marriages; three State legislatures have adopted similar constitutional language which must be re-approved in a subsequent legislative session before being placed on the ballot; six States have citizen-initiated ballot measures to change the State constitution to prohibit same-sex marriage; and five States have adopted legislation that declares or reaffirms that same-sex marriages will not be honored in the State.

Thus the States are moving effectively to preclude same-sex marriages. Even if a state fails to stop same-sex marriage, however, it is important to remember that there is a second line of defense: the remaining States of the Union would not have to recognize such marriages. In 1996, Congress enacted, and President Clinton signed, the Defense of Marriage Act, DOMA. DOMA defines marriage as a legal union between one man and one woman and specifically provides that:

> No State. . . shall be required to give effect to any public act, record or judicial proceeding of any other State. . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State. . . or a right or claim arising from such relationship.

DOMA is good law. In fact, to date no significant challenge to the constitutionality of DOMA has been filed. No civil rights group or national advocate of same-sex marriage has sought to challenge this law in court. Those challenges that have been filed to date have been localized, individual efforts. It has been reported that a private practitioner in Florida has recently filed a case challenging the constitutionality of DOMA in the District Court in Miami. It has also been reported that DOMA has been challenged in connection with a case in bankruptcy court in Washington State where the defendant is representing herself.

Thus DOMA appears poised to remain the law of the land. Even if DOMA were one day found to be unconstitutional, however, the full faith and credit clause would not obligate States to recognize out-of-State same-sex marriages. The full faith and credit clause applies to ''public Acts, Records, and judicial Proceedings.'' 28 USC 1738, which elaborates on the items to be accorded full faith and credit, specifies ''acts of the legislature,'' and ''the records and judicial proceedings of any court.'' Marriage is neither an act of the legislature nor a ''judicial proceeding.''

Traditionally, States have not been bound to recognize marriages if, a, they have a significant relationship with the people being married, and, b, the marriage at issue violates a strongly held public policy. For example, section 283 of the Second Restatement of Conflict of Laws provides that a marriage will be valid everywhere so long as it is valid in the State where it was performed, ''unless it violates the strong public policy of another State which had the most significant relationship to the spouses and the marriage at the time of the marriage.''

On this basis, States have refused to recognize the marriage of a person who has recently divorced without an intervening waiting period when such marriage violates their public policy. Other States have refused to recognize marriages between certain types of relatives, even though they were legal in the State in which they were preformed. There is no Supreme Court ruling to the effect that the refusal to recognize marriages from other States on public policy grounds violates the full faith and credit clause.

On this state of the record, it is premature to consider altering the Constitution, the most successful organic document in history which has preserved and enshrined the values of our Nation. If the States cannot preserve the sanctity of marriage between a man and a woman, I would consider an amendment to the U.S. Constitution.

Mr. MCCONNELL. Mr. President, I support S.J. Res. 40, the Federal marriage amendment. The Constitution provides the basic framework under which our society will function. With its profound implications for the ordering of society, and especially the upbringing of children, the proper meaning of marriage is no less important and deserving of protection than other basic principles protected by the Constitution.

Two decades of modern social science have arrived at the conclusion borne out by at least two millennia of human experience: that family structure matters for children and hence for society, and the family structure that helps children the most is a family headed by a mom and a dad. There is thus value for children in promoting strong, stable marriages between biological parents.

A bare majority of judges in one State, however, recently ignored the sincere and well-formed beliefs of their fellow citizens on this issue and have redefined the ages-old meaning of marriage for their State. In the process, these judges gave short shrift to the State's rational interest in wanting to encourage traditional marriage to ensure the optimum environment for children, terming the people's belief in traditional marriage as ''rooted in persistent prejudices.''

In our highly mobile and inter-connected society, these judges' redefinition of marriage risks the reordering of that institution for the rest of us. And these judges are not alone. There are currently more than 35 lawsuits in 11 States challenging State and Federal Defense of Marriage Acts and State constitutional provisions that protect the institution of marriage as it has always been known. By comparison, just a year ago, there were only five such cases.

The question, then, is whether the American people, through the democratic process, will be allowed to continue to encourage and formally sanction this ideal family structure—the union of one man and one woman—to the exclusion of other relationships that adults may choose to enter into. The issue of whether our Nation will continue under this time-tested societal order is thus before us. It is an issue not of our own making, and its timing is not of our choosing.

Just a few years ago, it was beyond dispute that the American people had both the right and the capacity to define marriage. Our constitutional structure does not leave all the important questions to the courts with the people and their elected representatives relegated to dealing with the mundane and the trivial.

Nor is this question—''What is marriage?''—something only judges are smart enough to decide. As lawyers, jurists are not experts in theology or religion or sociology. While they are entitled to express their wishes on matters like the meaning of marriage, they should do so at the ballot box, just like everyone else. Their failure to do so shows both a disdain and a distrust for the views of the people.

Opponents of this measure show a similar distrust, although they articulate other reasons for opposing it. First, they say the issue of marriage does not rise to a level of importance worthy of amending the Constitution. Really? We last amended the Constitution in 1992 with the 27th amendment, which had to do with pay raises for Members of Congress. Are we saying that pay raises for Representatives and Senators is more important than our most basic societal institution?

The experience of the countries that have departed from the marriage tradition, like Sweden, Norway, and Denmark, demonstrates the risks in failing to protect traditional marriage. According to Stanley Kurtz, a research fellow at the Hoover Institution, the onset of gay marriage in these countries has not simply accelerated a decline in the number of traditional marriages; rather, it has accelerated an abandonment of the institution itself, with the attendant problems of increased family dissolution rates and out-of-wedlock births.

Norway and Sweden instituted de facto gay marriage in 1993 and 1994, respectively. Between 1990 and 2000, Norway's out-of-wedlock birthrate rose from 39 to 50 percent, while Sweden's rose from 47 to 55 percent. Thus, most children in Norway and Sweden are now born out-of-wedlock. In addition, Denmark has seen a 25 percent increase in cohabiting couples with children since the advent of de facto gay marriage in 1989. In fact, 60 percent of first-born children in Denmark now have unmarried parents. Mr. Kurtz reports that the Netherlands has also had a steady increase in out-of-wedlock births since its adoption of registered partnerships and then gay marriage within the last 7 years.

If these statistics were not troubling enough, studies show that cohabiting couples with children break up at two to three times the rate of married parents. Thus, since the marital union is a bulwark against family dissolution, an increase in cohabitation and unmarried parenting will result in increased family dissolution.

The ultimate victims when that occurs are children, who suffer deep emotional pain, ill health, depression, anxiety, even shortened life spans. More of these children drop out of school, less go to college, and they earn less income, develop more addictions to alcohol and drugs, and engage in increased violence—or suffer it—within their homes.

The problems posed by a reordering of marriage are grave. So opponents of this measure are sorely mistaken when they assert that preserving traditional marriage is a subject that is not worthy of our time.

Second, opponents of the proposal contend that this issue is not ripe for our consideration. But the amendment process takes time, and with the onset of gay marriage in Massachusetts and the flurry of legal challenges to traditional marriage laws across the country, those who seek to protect the institution need not wait until the last possible moment to do so.

Lastly, opponents of S.J. Res. 40 argue that the meaning of marriage is a matter left to the several States. But if the past predilections of judges on important social issues are any guide, the people of the States won't be given this chance, just as they were denied it in Massachusetts. And even if they were allowed to decide, would we really want a country with a patchwork of meanings on so fundamental an institution as marriage?

The best process for answering this question is the constitutional amendment process. It is the closest thing we have to a national referendum, as any proposed amendment ultimately must be approved by three-fourths of State legislatures—the democratic institutions that are closest to the people.

In closing, Mr. President, to let four lawyers on the Massachusetts Supreme Court decide the meaning of marriage for the rest of the Nation is profoundly undemocratic. The Allard amendment allows the people to decide if they want to continue with our long-standing understanding of marriage, while allowing the States, as they often are, to be the laboratories of experiment in deciding whether and how to officially sanction other relationships. I believe the lessons from Scandinavia counsel against experimenting with marriage though. I believe the American people will agree with me. But if nothing else, they deserve a chance to be heard.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. How much time remains on both sides?

The PRESIDING OFFICER. The Senator from Utah has 10 minutes, the Senator from Vermont has 4 minutes 46 seconds, and each of the leaders has 5 minutes.

Mr. HATCH. Mr. President, we have heard that this amendment has been compared to prohibition, kiosks, and bumper stickers. We have heard some eloquent and passionate speeches in the Senate these past few days. It is obviously an issue many feel strongly about. I make a couple of things clear before we vote on whether we can even debate this amendment postcloture.

First, the proponents of this amendment are not seeking a policy change. We are simply trying to preserve more than a 5,000-year-old institution, the most fundamental in all of our society, that a few unelected, activist judges are trying to radically change.

Some of my colleagues suggest we do not need a national policy on marriage. Guess what. We have always had one. When my home State of Utah wanted to enter into this great Union, the Federal Government conditioned such acceptance on our adoption of a one-man, one-woman marriage policy. The Federal Government understood then what we still know today, that children are best off having a mother and a father.

Most of my colleagues agree. Some argue it does not belong in the Constitution. The Constitution properly deals with foundational questions of how our Nation should be organized.

Traditional male-female marriage is the universal arrangement for the ordering of society and ensuring future

generations. If a foundational institution such as this is not deserving of our protection in our Constitution, then I don't know what is.

There are others who agree on preserving traditional marriage and agree an amendment may be necessary at some point in the future. We do not need to wait. Judges have already sanctioned marriage licenses for same-gender couples and those couples have spread to 46 States. Folks, marriage has already been amended by the Massachusetts Supreme Court.

Some of my colleagues say the Defense of Marriage Act will contain the spread to other States, but we know this is a flimsy shield, at best. There are multiple actions pending against it now and legal scholars across the political spectrum agree it is only a matter of time—not if, or when—the Defense of Marriage Act will be struck down.

We should be wary of those who argued back in 1996 that the Defense of Marriage Act was unconstitutional and now are hiding behind this act to argue against the need for a constitutional amendment. Members simply cannot have it both ways. If Members believe a marriage should be between a man and a woman and Members believe the Federal Defense of Marriage Act is unconstitutional, then they should support the Federal marriage amendment.

We know from other countries that have undermined marriage the way the Massachusetts Supreme Court did that a message is sent to everyone that marriage is not important. Fewer couples get married, out-of-wedlock births skyrocket. We do not need to wait for these disastrous results to happen to our country.

We have the chance to send the message here that marriage and family do matter. This is not an irrational fear derived from an extreme religious agenda, as my colleague from Vermont, Senator JEFFORDS, suggested yesterday. We know from the benefit of experience in Scandinavia, Denmark, and elsewhere, what happens. Everyone in society benefits when we strengthen the family.

As far as I am concerned, this debate has been a triumph for democracy. We have debated these issues. I, for one, have learned quite a bit from listening to my colleagues. I hope the American people have, as well.

I urge my colleagues to vote yes on the motion to proceed. If there is a way to improve the language, the only way we can do so is to vote for cloture and have a real debate rather than the filibuster we are putting up with.

I make it clear nobody wants to discriminate against gays. Simply put, we want to preserve traditional marriage. Gays have a right to live the way they want. But they should not have the right to change the definition of traditional marriage. That is where we draw the line.

I compliment people on both sides of the debate for at least debating as much as we can, but it would be far better to vote cloture and have a full-fledged debate on this amendment. If it needs to be changed or modified, or if it can be made better, both sides then will have an opportunity to try and amend it.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Oregon.

Who yields time?

Mr. HATCH. I yield the remainder of my time to the distinguished Senator from Oregon.

Mr. SMITH. Mr. President, the majority leader asked I take a few moments perhaps even of his time to offer some closing remarks on this important debate.

I believe he asked me to do this because I have been a Republican Senator since the beginning of my service in this Chamber who has been an advocate for gay rights. I have been an advocate for gay rights while still believing the right to defend traditional marriage.

Because of that, I was drawn with interest to an editorial of the New York Times back on April 2, 2004. It frankly reflected many of my feelings. It noted in the editorial:

> The American Enterprise Institute, a conservative research and advocacy group, has been collecting poll results on gay issues going back three decades. The numbers document a profound change in attitudes, most strikingly on employment issues but also in areas like adoption rights, legal benefits and acceptance of gay relations.

The Times goes on to note, however:

> There are lots of theories to explain these more tolerant attitudes. Our own guess is that as more and more gays have acknowledged their sexual orientation, straight Americans have come to see that gays are not deviants to be feared, but valued friends, neighbors, and colleagues, who are not much different from anyone else.

I believe that, too. The Times then notes:

> Sadly, the poll data shows little easing of opposition to gay marriages in recent years, with roughly three-fifths or more of the public still opposed.

Everyone has their own theory as to why the American people remain opposed.

I would offer my theory as this: In the inner recesses of the American conscience, I think the American people understand that when we tinker with the most basic institution that governs relationships of men and women, we are tinkering with the foundations of our culture, our civilization, our Nation, and our future.

I think the American people understand what the great Roman Senator Cicero, a pagan, once described to the Roman Senate: that marriage is the first bond of society.

I think many of my colleagues have come with very interesting reasons for their positions on these votes. One of them is States rights. I say this respectfully—and I include myself in the accusation—we all invoke States rights when it serves our political ends.

My concern, however, is this: that by standing behind States rights on this issue, they are just standing aside while their States rights get rolled.

Make no mistake, our Constitution is being amended. The question is, by whom? Should it be done by a few liberal elites? Should it be done by four judges in Massachusetts? Should it be done by a few rogue mayors around the country, or by clandestine county commissioners, without public notice or public meeting, changing hundreds of years of State law and centuries of human practice?

I think many would argue reasonably that ripeness is an issue. Is it time for us to begin this debate and have this vote? I would suggest, whether it is ripe now, if I am right as to what the Federal courts will do—specifically, the Ninth Circuit that governs my State—I believe it will eventually come to every Senator to answer this basic question, and it is this; Shall marriage in the United States consist only of the union of a man and a woman? Today, I answer yes. It is just on a procedural vote, but the substance of my vote is yes. It is yes because I believe marriage, as traditionally practiced, is an ideal worth preserving. However imperfectly practiced, it is perfect in principle. And it is perfect in principle because it involves more than just consenting adults. It involves the creation of children and their natural nurture and rearing.

I believe in the United States, boys and girls still need the ideals of moms and dads.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator's time has expired.

The minority leader is recognized.

Mr. DASCHLE. Madam President, as so many of my colleagues have stated on the floor over the course of the last couple of days, marriage is a sacred union between a man and a woman. That is what the vast majority of Americans believe. It is what South Dakotans believe. It is what I believe.

In South Dakota, we have never had a same-sex marriage, and won't have any. It is prohibited by South Dakota law, as it is now in 38 other States. There is no confusion. There is no ambiguity. As others have noted, in 1996, Congress passed the Defense of Marriage Act. It defines marriage as a union between a man and a woman. It protects States from any actions taken by another State that could in any way undermine the law of their State.

What is overlooked by many is that it has never been challenged in court successfully—not once. It is the law of the land. It has been now for 8 years, and it has not once been challenged successfully.

The question then is, Is there some urgent need now, absent even one successful challenge to the Defense of Marriage Act, for us to amend the U.S. Constitution?

We have differences of opinion about the legal necessity, but there can be no difference of opinion with regard to how extraordinary a step that is. In 217

years, we have amended that sacred document only 17 times, although there have been 11,000 separate attempts. Madam President, 11,000 amendments have been offered; and 67 amendments are pending right now here in the 108th Congress to amend the Constitution of the United States.

Given all the facts, given the reality of the constitutional strength of the Defense of Marriage Act, the answer to the question, Is it now time to amend the Constitution, is no. This fundamental responsibility lies with the States. It has for two centuries.

Now, some of our Republican colleagues wish to usurp the 200-year-old power of the States to create their own laws, including those in South Dakota.

Last night, the distinguished Senator from Arizona came to the Senate floor and talked about that very issue. Here is what he said:

> The constitutional amendment we are debating today strikes me as antithetical in every way to the core philosophy of Republicans. It usurps from the States a fundamental authority they have always possessed, and imposes a Federal remedy for a problem that most States do not believe confronts them, and which they feel capable of resolving should it confront them . . . according to local standards and customs.

Madam President, he is right. We are sworn, every time we are elected, to protect, uphold, and defend the Constitution. It is the backbone of our Republic. That means insulating it at times like this from political condition or motivation. It means amending it only after careful and exhaustive deliberation, not 2 days on this Senate floor with an amendment that did not even come through the Judiciary Committee. That is our solemn responsibility. We have not met that test today, not by a mile. Senator MCCAIN is right. We should oppose this amendment today.

I yield the floor and yield back all of the Democratic time.

The PRESIDING OFFICER. The majority leader is recognized for 5 minutes.

Mr. FRIST. Madam President, since Friday, we have had a good and productive debate about marriage, the bedrock of our society. I applaud my colleagues on both sides of the aisle for the civil discussion, for the judicious discussion we have had.

The issue, very appropriately, has been elevated to this body as representatives of the American people. The issue is being clearly defined. And the fundamental issue is, Do we let four activist judges from Massachusetts define marriage, the bedrock of our society, or do we let the American people? Do we listen to their voices through their elected representatives?

We come, in a few moments, to a vote. And the question before us, in terms of the vote is, Should we consider a constitutional amendment to protect marriage as the union of a husband and a wife. If 60 Senators vote yea, we will begin to debate the specifics of the constitutional amendment. Not everyone is going to agree with every single word or every sentence of the amendment that is before us, but by voting yes today, you are agreeing that the amendment deserves to be debated, and possibly amended. If you vote no, you are saying the Senate should not even consider an amendment to protect marriage as the union between a man and a woman.

We did not ask for this debate, and we would gladly sort of wish it away and say other people can take care of it, but four activist judges on the Massachusetts Supreme Court legalized same-sex marriage on May 17. That is where the debate began, and that is why we act today.

It has become clear to legal scholars on the left and on the right that same-sex marriage will be exported to all 50 States. The question is no longer whether the Constitution will be amended; the only question is, who will amend it and how it will be amended. Will activist judges, not elected by the American people, destroy the institution of marriage or will the people protect marriage as the best way to raise children?

My vote is with the people, and thus, as majority leader, I felt and continue to feel that it is important that discussion and debate go on on the floor of the U.S. Senate which does represent the American people. Americans understand that children need mothers and need fathers. We would be foolish to permit a vast, untested social experiment on families and children to occur, untested on that institution of marriage, the bedrock, the cornerstone of our society.

I recognize that amending the Constitution is a serious matter. Again and again, people have asked why we are addressing marriage on the Senate floor or talking about changing the Constitution. It is a serious matter, and we should do not do it lightly. That is, indeed, why we should debate the issue. It was the 27th amendment to the Constitution that addressed regulating salaries, how much Members of Congress are paid; thus, it is not too much to ask that the 28th amendment be about protecting marriage and children. Do we let four activist judges define marriage for our society or do we let the American people decide? I implore my colleagues, let the Senate debate the best way to protect marriage. Let us proceed to a civil and substantive debate, but let the debate on the amendment begin. I urge my colleagues to vote yea.

I yield the floor and yield back all the time on our side.

The PRESIDING OFFICER. All time is yielded back.

Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of Rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the motion to proceed to Calendar No. 620, S. J. Res. 40, a joint resolution proposing an amendment to the Constitution of the United States relating to marriage.

Bill Frist, Orrin Hatch, Jim Talent, Wayne Allard, Mike Crapo, Mitch McConnell, Jeff Sessions, Larry Craig, John Cornyn, Craig Thomas, James Inhofe, Richard Shelby, Conrad Burns, Sam Brownback, George Allen, Robert F. Bennett, Elizabeth Dole.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the motion to proceed to S.J. Res. 40, a joint resolution proposing an amendment to the Constitution of the United States relating to marriage, shall be brought to a close?

The yeas and nays are required under the rule.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from North Carolina (Mr. EDWARDS) and the Senator from Massachusetts (Mr. KERRY) are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 48, nays 50, as follows:

[Rollcall Vote No. 155 Leg.]

YEAS—48

Alexander	Dole	McConnell
Allard	Domenici	Miller
Allen	Ensign	Murkowski
Bennett	Enzi	Nelson (NE)
Bond	Fitzgerald	Nickles
Brownback	Frist	Roberts
Bunning	Graham (SC)	Santorum
Burns	Grassley	Sessions
Byrd	Gregg	Shelby
Chambliss	Hagel	Smith
Cochran	Hatch	Specter
Coleman	Hutchison	Stevens
Cornyn	Inhofe	Talent
Craig	Kyl	Thomas
Crapo	Lott	Voinovich
DeWine	Lugar	Warner

NAYS—50

Akaka	Dodd	Lieberman
Baucus	Dorgan	Lincoln
Bayh	Durbin	McCain
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (FL)	Nelson (FL)
Breaux	Harkin	Pryor
Campbell	Hollings	Reed
Cantwell	Inouye	Reid
Carper	Jeffords	Rockefeller
Chafee	Johnson	Sarbanes
Clinton	Kennedy	Schumer
Collins	Kohl	Snowe
Conrad	Landrieu	Stabenow
Corzine	Lautenberg	Sununu
Daschle	Leahy	Wyden
Dayton	Levin	

NOT VOTING—2

Edwards	Kerry

The PRESIDING OFFICER. On this question, the yeas are 48, the nays are 50. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. REID. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. HAGEL). Without objection, it is so ordered.

Mr. REID. Mr. President, on the last vote, as I recall, there was no motion to reconsider.

The PRESIDING OFFICER. That is correct.

Mr. REID. I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DURBIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Illinois is recognized.

Mr. DURBIN. I thank the Chair.

(The remarks of Mr. DURBIN pertaining to the introduction of S. 2652 are printed in today's RECORD under ''Statements on Introduced Bills and Joint Resolutions.'')

The PRESIDING OFFICER (Mr. SUNUNU). The Senator from New Hampshire.

PENDING SENATE BUSINESS

Mr. GREGG. Mr. President, I rise today to talk about some of the issues which are pending before this Senate which are not being considered because the other side of the aisle refuses to take them up. I am going to stay on narrow issues which have not received a lot of public attention.

Obviously, there have been a lot of issues such as medical malpractice, such as the just recent decision not to go forward with the debate on the constitutional amendment, that have received a fair amount of visibility as a result of the obstruction coming from the other side and the other side deciding it does not wish to address those issues, which are quite often critical to the American people. There have, however, been four items reported out of the committee which I have the good fortune to chair, the Health, Education, Labor and Pension Committee. It is a committee of fairly disparate views—to be kind. I chair it. I have as my honorable colleague on the other side of the aisle, Senator KENNEDY from Massachusetts. To say that we have a philosophical identity would be an imaginative view.

As we go down the membership of the committee, the differences of opinions relative to philosophy of governance are rather significant. We have some of the best Members of the Senate—obviously, there are many good Members there—but we have some of our most aggressive and constructive Members serving as members of the committee, and I enjoy that. It makes the committee an interesting and challenging place in which to work. But the views are different within that committee, the views of how we approach governance.

Therefore, when we as a committee reach an agreement on something, it means it is a pretty good work product. It means there has been a consensus reached the way consensus should be reached within the Congress, which is that the different parties have sat down, they have recognized the problem, they have brought to bear their philosophies on that problem, their ideologies on that problem, and the practical nature of the way that you can resolve that problem, and they have reached what is, in most instances, a pretty good, commonsense solution to how we should move forward.

In four areas right now pending before this Senate, the committee has reached consensus. It has had a unanimous vote on a piece of legislation. Some of those have even come to the floor. We have had a unanimous vote, for example, on how we should reauthorize and restructure the special education laws of this country. It was called IDEA. It is a very complex issue, a very important issue, especially to children or parents of children who have special needs.

I can't think of anything more important than a parent who has a child who has some unfortunate issues relative to their ability to learn. For that parent and for that child, the most important event of each day is going to school and making sure that child's schooling experience is a positive one, and that it moves that child forward as that child tries to deal with the issues of learning and especially issues of life.

So the special education bill is a critical piece of legislation. It went through our committee with unanimous support. It came to the floor of the Senate. It was debated, debated aggressively, and passed. But it simply sits.

A second bill has been stopped because the other side of the aisle has refused to allow us to appoint conferees. The second bill which falls in the same area is the Work Investment Act. This is basically a bill which came out of our committee again in a unanimous way, worked on primarily by Senator ENZI of Wyoming. He did a great job on it and worked across the aisle with a number of Senators. As a result, it was unanimously passed out of our committee, came across the floor of the Senate, and again this bill has been stopped because conferees have not been appointed.

Then reported out of our committee as another very important piece of legislation relative to education is the Head Start bill. Head Start affects a lot of kids in this country today. It gives low-income kids in our country a nurturing environment during those very formative years and allows them an environment where they get decent health care and they get decent custodial care during the daytime. They have daycare services, and it teaches them socialization patterns. We have taken that concept and we have added to it an education, academic component so the kids going to Head Start will now also come out of the Head Start program after they are 3 or 4 years old moving into kindergarten and preschool. They will hopefully be up to par with their peers academically so they know their alphabet and are ready to learn.

This is an important initiative. This bill is structured to put that new component into Head Start and make that part of that initiative.

Again, this bill came out of our committee unanimously. It came to the Senate and has stopped—stopped. We negotiated to try to get it brought up in reasonable ways, one of which would allow us to give both sides amendments if they wanted them and then move it to conference. No, it hasn't happened, so that bill has been stopped.

The fourth bill which I want to talk about is the Patients Savings Act. We know that there is a problem, unfortunately, in our health care community with mistakes—unintended mistakes, but mistakes—that end up causing people harm because health care is delivered inappropriately or incorrectly to people. In fact, the estimate is that literally tens of thousands—potentially more than 100,000 people—die each year as a result of that type of situation.

One of the ways to address that is to allow the medical community to communicate with each other as to what these problems are so they can learn from each other and so we can set up a regime where if somebody has a system in place which avoids a problem, a mistake or an error occurring, they can share that with other medical providers. If there is, on the other hand, a mistake that has occurred or error that has occurred, the information relative to the investigation of that and how it can be mitigated can be shared with other providers. This sharing of information is absolutely critical if we are going to get control over the issue of how we deliver better health care in this country. Unfortunately, there are antitrust and other laws which limit the ability of that information to be shared. So we have set up this Patients Safety Act which is essentially an attempt to give patients more protection when they are in a health care facility.

This bill again was worked on effectively and aggressively by both sides of the aisle. The thoughts and initiatives were brought together. It was passed out of committee unanimously. This is a very important piece of legislation. We need to get this piece of legislation in place. Unlike the other pieces of legislation which I mentioned—the WIA bill, the IDEA bill, and the Head Start

bill, which already have programs up and running, which are effective, but can be improved significantly by those bills—in the case of patient safety there is nothing out there today which allows these medical providers to take advantage of what this law is going to bring to bear and thus reduce injuries to people. Literally, the longer this bill is kept from passing and becoming law, the more people are harmed. There is a direct numerical relationship, direct formula, direct factor relationship where if this bill were passed today, fewer people would be harmed tomorrow. It is that simple.

This bill needs to be taken up. It needs to be passed. Yet although it came out of committee unanimously, it has disappeared into the opposition on the other side of the aisle which says we are not going to listen to that. We are not going to bring that up. If you want to pass something such as that, you will have to throw on everything else and the kitchen sink that has no relationship to it. You are not going to be allowed to pass a bill that was unanimously passed out of committee.

A couple of days ago, I was reading a pamphlet which was sent to me by an ever inquisitive and creative and very unique individual in his energy level, which is much higher than mine, the President pro tempore, Senator STEVENS. He had go to some lecture or some meeting where they had been talking about quantum physics. He sent us a booklet on quantum physics. I have never understood even the term ''quantum physics.'' I opened it to the first page and read the first paragraph. I quickly got lost in the theory. But the basic statement about quantum physics was that the universe is 96 percent anti-matter. Maybe it is 98 percent. The universe—and this is a shock. This is a new theory. The universe is 98 percent anti-matter or, in other words, a black hole.

I have to tell you, under the Democratic leadership in this Senate, the Senate is becoming 98 percent anti-matter, or a black hole. When bills come out of committee, they are unanimously passed by a committee which has such a diverse viewpoint philosophically, ideologically, and regionally as our committee has, when those bills come out of that committee unanimously and will significantly improve kids going to elementary school, getting ready for school, kids in their early years, kids who have problems and who have significant issues, special-needs kids going through their school systems, people who need to be retrained in a workplace that requires constant retraining or, as in the case of the patients safety bill, will actually save lives because it will allow us to do a better job of delivering medical care—when they come out of committee and are unanimously supported by the full committee, they are unanimously supported to the extent they went through the subcommittee, to the full committee, unanimously supported, come to the floor of the Senate, and the other side of the aisle says that bill is going to be assigned to the black hole.

That bill disappears into what you might call ''Daschle Land'' where nothing comes back. Send the bill out and it is gone. Where did it go? I do not know. It went to ''Daschle Land.'' This can't continue. These pieces of legislation have to be taken up. We should consider them. We should pass them. After all, if they have unanimous approval from the committee of jurisdiction when that committee has some divergent views on it, they have to be pretty well worked out as a piece of law.

I have asked that we get the IDEA bill and the special education bill to conference. It hasn't happened. I have asked that we be able to bring up the Head Start bill. It hasn't happened. I have asked that we be able to go to the WIA bill and send it to conference. It hasn't happened.

Today I would like to ask that we be able to bring up the Patients Safety Act and pass it out of this Senate under a reasonable plan, under a reasonable set of options where we will essentially say people get a right to amend it on the substance of the bill and then move to conference.

I would like to present the following unanimous consent request relative to the Patients Safety Act.

UNANIMOUS CONSENT REQUEST—H.R. 663

I ask unanimous consent that at a time to be determined by the majority leader, in consultation with the Democratic leader, the HELP Committee be discharged from further consideration of H.R. 663, the Patients Safety bill, and the Senate proceed to its consideration; provided that upon reporting of the bill Senator GREGG be recognized to offer a substitute amendment, the text of which is at the desk; provided further that there be one first-degree germane amendment in order to be offered by Senator KENNEDY or his designee and that that amendment be subject to a germane second-degree amendment to be offered by Senator GREGG or his designee, with no further amendments in order.

I further ask unanimous consent that there be a total of 2 hours for debate, and following the use or yielding back of the time the Senate proceed to a vote on or in relationship to the second-degree amendment, to be immediately followed by a vote on or in relationship to the first-degree amendment, as amended; provided that following disposition of the amendments, the substitute amendment, as amended, if amended, be agreed to; the bill, as amended, be read the third time, and the Senate proceed to a vote on the passage of H.R. 633, as amended, with no intervening action or debate.

Finally, I ask unanimous consent that following passage, the Senate insist upon its amendment, request a conference with the House of Representatives on the disagreeing votes of the two Houses, and the Chair be authorized to appoint conferees on behalf of the Senate with a ratio of 5 to 4.

Mr. REID. Reserving the right to object, first, I understand the frustration of the distinguished senior Senator from New Hampshire. We have spent a lot of time doing nothing. This afternoon is a good example. The Senator can add up the days as well as I can on this marriage amendment.

Prior to that, we wasted a week on class action. I have said before, the Republicans had a 5-foot jump shot. Not only were they afraid to take the shot, they walked away from it.

I understand the frustration. But also understand our frustration. The schedule is set by the majority. I make a counterproposal to my friend, for whom I have the greatest admiration.

I ask unanimous consent that the request by the Senator from New Hampshire be modified, modified to have the matter, the Patients Safety Act, H.R. 663—that the HELP Committee be discharged from further consideration of H.R. 663, the patients safety bill, and the Senate proceed to its consideration, the bill be read the third time, the Senate proceed to vote on passage of H.R. 633, with no intervening action or debate.

Before my friend responds, we think the bill we got from the House is a good bill. We don't think there needs to be any amendments. We are willing to complete that right now. It would take no further action. We would not need a conference committee. Then any other matters the Senator thinks should be tied up that are at loose ends, maybe we can add to one of the appropriations bills or something like that.

I ask consent the request by my friend from New Hampshire's; Senator GREGG's request be modified as indicated by my previous statement.

Mr. GREGG. Reserving the right to object, I simply note that I don't know whether we took the 5-foot jump shot, but I state right now, if we take up this bill, it will be a 2-foot slam dunk.

That is all we need to do. This bill came out of our committee. It came out of a Senate committee unanimously. It is reasonable that the Senate should insist on hearing its bill on the floor and that the Senate should pass its bill on the floor. That is all we are asking.

That is why I must object to the Senator's proposal to modify my amendment. I would presume that the Senator, having come from the House and knowing the vagaries of the House—which is why he came to the Senate because he so much more appreciated the intelligence and thoughtfulness of the Senate—would want to hear the Senate bill on the floor rather than to simply accept the House bill in its present form.

Therefore, although I greatly admire the Senator's attempt to be constructive in his initiative, because it is a constructive step, I am forced to object. I believe we should take up the

Senate bill under the context of what we have proposed, which would be a bill that was unanimously approved by a Senate committee of jurisdiction subject to the amendment process which is outlined.

In fact, should the Senator from Massachusetts agree with the Senator from Nevada that the House bill is better than the Senate bill—which I would find interesting since he supported the Senate bill as it came out of committee—he may offer that as his germane amendment.

The PRESIDING OFFICER. The objection to the modification is heard.

The Senator from Nevada.

Mr. REID. Mr. President, in this legislative body we rarely deal with anything that is perfect. Legislation is the art of compromise.

While the distinguished Senator from New Hampshire may have some good ideas on how to improve the bill we got from the House, we should look at what we will have if we could agree to do the House-passed bill.

Basically on our side, the bill was prepared by Senator JEFFORDS and others. As I understand it, it is S. 720 over here. It is a bill to provide for the improvement of patient safety and to reduce the incidence of events that adversely affect patient safety.

I have no doubt, with the experience my distinguished colleague from New Hampshire has had as a Member of the House, as a Governor of the State of New Hampshire, and certainly a senior Senator over, that he can figure out ways to improve what the House has done. I have no doubt that is true.

But in the interim, knowing we are not going to be able to arrive at that point, I think we would be well advised to move forward with the work the House has done. As imperfect as it may be, it is still much better than nothing. Then I would be happy to work with my friend from New Hampshire on what he thinks can be done to improve this legislation that the House passed.

I met with the distinguished President pro tempore of the Senate this afternoon. He thinks there is a program that he and Senator BYRD have come up with that we can do all the appropriations bills before we adjourn in this session. If that is the case, there would be ample opportunity—and I would be happy to work with my friend from New Hampshire on even the appropriations bills to see if we could work something out. If not, there are other matters we could go through here.

We cannot let the perfect be the enemy of the good in this instance. We would be well advised to accept what my friend from New Hampshire said we need improvement in, and accept what the 435 Members of the House of Representatives have done.

A few minutes ago there were four former House Members on the floor: Senator CARPER walked off, the distinguished Member from New Hampshire, and the Senator from Nevada have all served in the House. They are good legislators.

I learned when I first came to the House of Representatives, House Members are usually better legislators than Senators. Why? The reason being, their jurisdiction is narrow compared to ours. We are a jack of all trades and master of none. In the House, they have a few masters. We should accept that.

As to this bill, with the considered experience we have had over here, we could probably improve what they have done. What they have come up with is certainly not that bad. In fact, it is good. It is a lot better than nothing. I hope my friend would reconsider the offer I made.

Let's pass right now this House-passed bill. It would be a step forward. Today we would have accomplished something. We would have accomplished making patients safer in America today—not as safe as my friend from New Hampshire thinks they should be but a lot safer.

I hope he will reconsider. I have always found him to be a very reasonable person, someone for whom I have great respect and admiration. I say it publicly all the time.

In this instance, I repeat, we should not let the perfect be the enemy of the good.

The PRESIDING OFFICER. Is there objection to the unanimous consent request of the Senator from New Hampshire?

Mr. REID. Yes.

The PRESIDING OFFICER. The objection is heard.

Mr. GREGG. Mr. President, I appreciate the assistant Democratic leader's constructive suggestion in an attempt to move this process along relative to offering the House amendment.

However, there really is no reason we should just take the House language as it stands. The two bodies have both propounded bills which are substantive. This proposal which I have put forward requires only 2 hours in order to put it across the floor and we can go into conference. As a result of that, we can meet in conference and, obviously, reach a conclusion—I think, fairly quickly—which will make a very good bill. There is no reason in this instance we should not have a very good bill.

I do regret we cannot move forward at this time on this bill in the regular course under regular order as it would be presented in the unanimous consent request which I presented.

I thank the Senator from Nevada. As in the past, his courtesy is always very generous. He is obviously a very effective spokesman for the Democratic membership of this Senate, and I admire his work.

I yield the floor.

UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. COLEMAN. Mr. President, I rise in support of the United States-Australia Free Trade Agreement. I support the agreement because 8,000 Minnesotan manufacturers, which employ some 350,000 families in my State, list the United States-Australia Free Trade Agreement as a top priority in maintaining good-paying Minnesota jobs, and that is important.

Like the JOBS bill, the highway bill, the Energy bill, as well as class action, medical malpractice, and asbestos reform litigation, the Australia Free Trade Agreement is about jobs. I was always fond of saying, when I was a mayor—and I am fond of repeating as a Senator—it is about jobs. The best welfare program is a job. The best housing program is a job. Access to health care comes with a job. Jobs are important.

While we have seen the hopes of our Nation's manufacturers dashed time and again on these other top priorities—we are still waiting for the JOBS bill to get done; we are still waiting for asbestos reform legislation to get through; we are still waiting for class action reform legislation to get through a filibuster—the reality is, we still have an opportunity to salvage the hopes of millions of working men and women in this country, men and women who could not care less about who gets the credit for keeping the economic recovery going, just as long as it keeps going.

We have grown over 1.5 million jobs in the past 10 months and in part because of the policies of this administration: the tax cuts that put money in the pockets of moms and dads, the tax cuts that allowed businesses to invest and to reinvest, the increasing expensing operations, the bonus depreciation, those things that lowered capital gains, those things that allowed businesses to say: We are going to invest, we are going to put it back in the business.

In the end, when business grows, when moms and dads have more money in their pockets, they spend that money on a good or a service, and the person who produces that good or service has a job. And that is a good thing.

So we have seen more than 1.5 million jobs in the past 10 months, but we cannot afford to rest on our laurels or wait out the results of a Presidential election. The time to act on the jobs agenda, as laid out by President Bush, is now. It is now.

The Australia Free Trade Agreement is just one component of the President's jobs agenda. This agreement builds on the $12 billion in manufactured U.S. exports to Australia and the 160,000 American jobs owing to our trade with that very important friend and ally in the global war on terror.

According to the National Association of Manufacturers, by tearing down Australian tariffs imposed against 99 percent of U.S. manufactured exports—which accounts for 93 percent of everything we sell to that country—our Nation's manufacturers stand to gain $2 billion a year in increased exports to Australia, giving us a leg up on Europe, Japan, and China.

This is not pie-in-the-sky stuff. This is very real to Minnesotans. I have 6,700 exporting companies in my State. In fact, 1 out of every 5 manufacturing jobs in Minnesota is owed to exports, and Australia is our 10th largest export market.

Let me give you some real-life examples because I think the problem most often with trade is that we vividly see jobs lost or businesses shut down, sometimes due to trade, and we need to understand that, we need to see that, we need to know the impact, and then we need to do those things to lessen that impact. But rarely do we see or hear about the jobs created or the businesses born as a direct result of our trade policy.

It is kind of like talking about tax cuts. We talk about them in abstract. We sound like accountants. We talk about trade and sound like economists. But the reality is, there is a mom or a dad who has a job opportunity because of the trade opportunities we create.

Polaris is a good example. It is a Minnesota company of which I am extremely proud. It is located way up in the northwest part of the State, about 10 minutes from Canada in a town called Roseau. Roseau has about 2,756 people at last count, the most famous being the former Secretary of Agriculture under President Carter, Bob Berglund, who is a very good friend of mine. They also grow a lot of hockey players, really talented hockey players in Roseau, MN.

Talking about former Secretary of Agriculture Berglund, lots of folks, when they get through being a Congressman or a Senator or a Secretary of this department or that department, retire to some beach in Florida, but not Bob Berglund. He went home to give back to the people of Roseau all the support he had received through his years of distinguished service.

Roseau suffered from some terrible floods not too long ago, and there was former Secretary of Agriculture Bob Berglund leading a group of folks in the town, figuring out how to deal with the flooding issue on a long-term basis. So we were not literally sticking our fingers in the dike, but we were looking beyond that. That is Bob Berglund.

In any case, Roseau would not be the town it is if it were not for guys like Bob Berglund, an indomitable spirit that pervades that place and everyone I have ever met there, and a company called Polaris.

I will go back to the flooding. When the flooding happened, the folks from Polaris did not abandon them. They were there working in the community, seeking to make a difference. They have had serious flooding over the years, and we have had to work to rebuild that town. We are still at it, and so is Secretary Berglund and so is Polaris, which is celebrating, just this year, 50 years of business. Here is what the president of Polaris, Tom Tiller, had to say about the Australia Free Trade Agreement:

> In 2004, Polaris will do over $10 million in sales to Australia. While the majority of those sales will be conducted by Polaris Sales Australia, all of the machinery sold in that distribution network is manufactured in Minnesota . . . so increased sales in Australia means more jobs in Minnesota.

Polaris is especially excited about the opportunity to sell all-terrain vehicles to the Australians under the new access granted under this agreement.

I cannot mention Polaris without mentioning another very important manufacturer in the State of which I am so proud, Arctic Cat. Arctic Cat is also located in northwest Minnesota, maybe about an hour away from Canada, in a town called Thief River Falls. Chris Twomey, with Arctic Cat, points out that:

> Due to high tariffs, Arctic Cat sells less than $5 million in products to Australia. The Australia Free Trade Agreement makes it a lot easier for us to increase our sales there and increase our production here at home.

This is another top-of-the-line all-terrain vehicle coming from another top-of-the-line all-Minnesota company. I am proud of those companies. I am proud of the people they employ. And I am proud of the expanded opportunity they will have to sell, to grow jobs, to make profit, to strengthen the lives of their employees and the lives of their communities—all of which are enhanced by the Australia Free Trade Agreement.

My paper and wood products industry is also very important to my State, starting a little west of where Polaris and Arctic Cat call home and extending all the way over to northeastern Minnesota. But for this industry and all the jobs it has provided over the years, northern Minnesota—which has seen some tough times—would have been in dire straits. Minnesota's International Paper and Blandin United Paper Mill are strong supporters of the Australia Free Trade Agreement because it will open the doors of Australia and the Pacific Rim to our paper and wood products industries. Again, those industries are part of the economic lifeblood of those communities. I want them to prosper. I want them to grow. I want them to have expanded opportunity. And they will get that from this agreement.

But it is not just northern Minnesota with a stake in the passage of this agreement. Eagan, MN, a growing suburb just south of St. Paul, also has a stake, as do communities all over my State. The Lockheed Martin manufacturing facility in Eagan had $40 million in international sales last year alone, with a part of that figure owing to the construction and sale of the P–3 Maritime Patroller to Australia. Currently, Eagan is in the running for another contract with Australia worth over $30 million to that community, and, according to Lockheed Martin, passage of the Australia Free Trade Agreement puts us one step closer to securing that contract.

And 3M, which not everyone knows stands for Minnesota Mining and Manufacturing, a great St. Paul company—in the neighborhoods of St. Paul they call it ''the mining,'' but it is Minnesota Mining and Manufacturing—notes that Minnesota companies alone will save some $5 million in Australian tariffs when they come down under this agreement.

This is not an abstract topic for Minnesota. It is very real. The Australian Free Trade Agreement has the potential to sustain and grow real, good-paying Minnesota jobs. For me, that is decisive because jobs are what it is all about. I don't want to oversell this agreement because that has been done too often with respect to trade agreements. That is important to repeat. Far too often on both sides we look at a trade agreement and we oversell it. And then if we don't reach those high expectations, people say: Well, it didn't work; it is no good.

We are talking about moving the ball forward. We are talking about moving the economy. We are talking about more progress, more economic growth, and more opportunity. We are talking about more jobs. I am not going to sell. A lot is promised under these agreements and, frankly, they usually fall somewhat short of the mark.

Let me say what I have heard from my manufacturers, what I have heard from Polaris, Arctic Cat, International Paper, and Lockheed. They have said the Australian agreement means opportunity, give us that opportunity. So today in the United States we have a chance to do just that. We ought to and, fortunately, I expect that we will. We will give them the opportunity when we consider the Australia Free Trade Agreement and get it passed.

Having said that, I would be remiss if I did not take this opportunity to underscore a very important point that I hope is not missed by my colleagues, particularly by those who are in charge of negotiating this agreement or any other trade agreement; that is, the importance of U.S. agriculture to trade. Their success is mutually and inextricably linked. I do not believe U.S. agriculture can succeed without moving forward on trade, nor do I believe that trade can move forward without U.S. agriculture.

With Minnesota in the top 10 among States for the production of nearly every commodity that can be produced in our climate, the success of my farm families is extremely important to mainstream Minnesota. It is important to me.

Let me begin with sugar. Few folks realize Minnesota is the No. 1 sugar-producing and processing State in the country. Folks sometimes think about Florida, Louisiana, and other places, but it is sugar beets which makes the same kind of sugar you buy in your local store. And more sugar is produced from sugar beets than from cane sugar. Minnesota farm families own both the production and processing sides of our

State's sugar beet industry, an industry that is directly or indirectly responsible for $2 billion in economic activity and about 30,000 jobs. The exclusion of sugar from the Australian agreement has been much maligned by folks inside and outside the Chamber, but not by this Senator. Let me tell you why.

The fact is, the reason we are able to stand here now on the cusp of passing the Australia Free Trade Agreement is in part or in whole owing to how this administration wisely handled sugar. Today, the Australia Free Trade Agreement is on the move. The sad reality is that CAFTA is up on the blocks. CAFTA is another great opportunity. We need to work to strengthen our trade opportunities with our friends in Central America. We have seen the flourishing of democracy there. Our Central American friends and allies deserve the benefit of expanded trade opportunity. CAFTA is up on the blocks. We have to figure a way to move it forward and to deal with the sugar problem in CAFTA.

When I say ''deal with,'' this is not about parochialism or protectionism. It is about common sense and equity. Common sense says if you have a world problem, as the distortion in the sugar market most certainly is, you handle the problem in a global context. In other words, the right place to deal with sugar is in the World Trade Organization, not in these bilateral and regional agreements. Equity requires that when our trade team rightly decided that discussions concerning the farm bill's safety net for other commodities, such as corn and soybeans, should be reserved for the WTO and excluded from bilateral or regional agreements, the same should hold true for sugar: Common sense and equity.

In regard to the farm bill, I would point out that this legislation is to our farm families in rural America what the JOBS bill we just overwhelmingly passed is to our Nation's manufacturers. To anyone who has gone to see the new World War II Memorial, you will notice all the wreaths that represent the two pillars of industry and agriculture. Those responsible for both are critical to this country. We must not unilaterally disarm against either in global competition, which today is not always free and not always fair.

As for my State's sugar farmers, they are among the most competitive in the world. In fact, America's sugar farmers are among the top one-third in the world in overall efficiency, as measured by the cost of production. But what they face is a dump market where the average world cost of production per pound is 16 cents while the average selling price per pound is only 6 cents. As the saying goes, something is rotten in Denmark. I don't want to blame the Danes on that, just an expression.

Meanwhile, the U.S. sugar policy has been good to taxpayers and consumers alike. The U.S. sugar policy costs taxpayers nothing and, in fact, the two times in recent history where the U.S. had no sugar policy, consumer prices received the brunt of it when prices spiked to record highs. So my deepest thanks and appreciation go out to the Bush administration and its trade team for doing what is right by America's sugar farmers, right by Minnesota, and right by this Senator. You have a good model now on sugar, one that moves the trade agenda forward. We ought to stick with it.

Dairy is another important industry in Minnesota—we are fifth in the Nation—and here again our trade team deserves thanks for working with me and other interested Senators, as well as our Nation's dairy farm families, in arriving at a more workable although not perfect solution. Maintaining the second tier tariff for Minnesota dairy farmers is an absolutely essential part of this agreement. I am pleased that we have worked with our trade team on this issue. I don't want to get into discussions of the complexity of dairy policy on the floor of this body, but this issue of a second-tier tariff was important to my dairy farmers and dairy farmers throughout America. We managed to make sure that we maintained that second-tier tariff. That was a good thing.

Under the agreement, in-quota dairy imports are estimated to equal only 0.17 percent of the annual value of U.S. dairy production, and only about 2 percent of the current value of imports. Finally, assurances by our trade team that imports will not affect the operation of the milk price support program are extremely important to me and to America's dairy farmers.

Today I have 6,000 hard-working dairy farm families who milk about half a million cows every morning and night, who can breathe a little easier, thanks to the efforts of our trade team. I stress, less than 10 years ago we had about 14,000 Minnesota families. So we have lost over half the dairy farmers in our State. I presume that pattern has been shown in other parts of the country. But those 6,000 hard-working dairy farm families can sleep a little easier tonight thanks to the efforts of our trade team.

Again, it is not a slam dunk. This agreement is not perfect, but it is more workable to my dairy farmers and cooperatives at home because second-tier tariffs were maintained and in-quota imports are expected to be low.

My cattlemen are about where my dairymen are. They are relieved, but I would say our trade team had to overcome a very difficult issue. On the whole, they worked very hard to address the concerns of Minnesota's cattlemen. They phase down U.S. tariffs over an 18-year period and phase up the amount of in-quota access, all the while providing safeguards to protect against import surges that would disrupt U.S. markets. And at the end of the 18-year period, another safeguard is put in place to protect against import surges that would otherwise depress U.S. beef prices.

As a Senator representing nearly 16,000 cattlemen and a State that ranks sixth in beef production, my support for this agreement is couched in part on my reliance that these safeguards for U.S. beef will, in fact, be allowed to work as intended and that any waiver would be undertaken only in the rarest of circumstances, circumstances that I, frankly, can't conceive of now as I speak.

Steve Brake, a good friend of mine, is president of the cattlemen. Whenever I get to cattle country, I touch base with him to where things are. He understands. It is extremely important to him and his fellow cattlemen that we strictly enforce these safeguards. I know I will hear from Steve if we don't. If I hear about it from Steve, our trade team is going to hear about it, too. The safeguards are in place. I have great respect for what has been done, and I think our cattlemen can sleep easier tonight.

I am pleased that the sanitary and phytosanitary issues that stood in the way of our pork producers' access to the Australian market have been favorably resolved, leading to the endorsement of the agreement by more than 6,000 Minnesota pork producers. I will repeat that. These issues have been resolved and have led to the endorsement of the agreement by my more than 6,000 Minnesota pork producers.

I also appreciate the work of our trade team in pressing the issue of the Australian Wheat Board, a monopolistic state trading enterprise whose time has passed. While I am disappointed we were unable to do away with the board under this agreement, I am pleased the Australians have agreed to discuss this issue in the Doha Round of the WTO.

Overall, I believe this administration had a tough job to do and it did it reasonably well—job well done—something evidenced by the likely passage of this agreement. The Australia Free Trade Agreement is a good precursor to the WTO discussions that will take place in Geneva yet this month because it underscores a point: You don't have to give away the farm to negotiate a good agreement, and you may not pass one if you do.

So the Australia Free Trade Agreement that President Bush has sent to Congress is about sustaining and growing American jobs. It is about bolstering support in the economic opportunity of our rural families, our rural communities, and the incredible work they do to produce the safest, most affordable food supply in the world.

So to the President and our trade team, I say: Job well done. To our Members and colleagues in this body, I say: Let us move forward and pass the Australia Free Trade Agreement.

I yield the floor.

RECESS

Mr. COLEMAN. Mr. President, I ask unanimous consent that the Senate now stand in recess until 4 p.m. today.