S. HRG. 108–926

PRESERVING TRADITIONAL MARRIAGE: A VIEW FROM THE STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JUNE 22, 2004

Serial No. J–108–84

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

43–000 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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PRESERVING TRADITIONAL MARRIAGE: A VIEW FROM THE STATES

TUESDAY, JUNE 22, 2004

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

The Committee met, pursuant to notice, at 10:05 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

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

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Good morning, and welcome to this very important meeting on the status of traditional marriage in the United States. Healthy marriages, and the young citizens reared within them, are the foundation of our country and, for that matter, any stable political community. Traditional marriage, however, is under attack, and in this hearing we will focus on the nature and the extent of the threat and how to address the problem.

This battle is being waged on several fronts. Local officials—contrary to the explicit direction of their own elected legislators—have ordered the recognition of same-sex marriage. Eleven States face court challenges to their marriage laws. A lawyer in Florida has launched a challenge to the Federal Defense of Marriage Act. And in the most infamous case, the Supreme Judicial Court of Massachusetts rewrote the State constitution in the *Goodridge* decision to impose same-sex marriage on the citizens of that State.

And by doing so, four unelected judges, in effect, imposed this experiment on the entire Nation. Courts and renegade public officials, not conservative activists, have made this a national issue, and if we are to protect and strengthen the institution of marriage, there appears to be no way around a constitutional solution to this problem.

Now, we are pleased to have the Governor of Massachusetts, Mitt Romney, with us today to provide a report of exactly what is happening in his State and to help us understand the national ramifications of the *Goodridge* decision.

Eight years ago, when the Defense of Marriage Act, or DOMA, was passed and signed into law by President Clinton, there were no States with same-sex married couples, as you can see on this chart, not any. But thanks to a small minority of local officials flouting the law and four liberal judges in Massachusetts rewriting

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the law, same-sex married couples now live in 46 States. My concern is that this pronounced proliferation of States adopting a de facto product of support for same-sex marriage may dramatically undermine the role of traditional marriage and families.

Now, regardless of one's view on the issue—and I understand there are honest differences here—I hope everyone agrees that judges should not have the final word in this debate. The conflict over same-sex marriage involves the question of who decides important matters of public policy in a democracy. Every school-age child knows that the legislative branch, not the judiciary, properly makes the laws. And I fear and many do fear that we have lost sight of this essential truth.

Now, some, including, as I understand it, former Representative Barr—and we are happy to welcome you here, Bob—the primary sponsor of DOMA, argue that the Defense of Marriage Act will be sufficient to maintain traditional marriage. I wish I had as much faith that our courts will uphold this legislation. Even many of Mr. Barr's colleagues—including the ACLU, with whom I understand he is now affiliated—do not agree with him on this particular point.

Now, this chart includes just a sampling of liberal commentary on the constitutionality of DOMA. The two Senators from Governor Romney's home State are adamant that this measure is unconstitutional. During the debate on DOMA, Senator Kerry wrote, "DOMA does violence to the spirit and letter of the Constitution."

Our friend Senator Kennedy, a member of this Committee, former Chairman of this Committee, added on the floor of the Senate that "scholarly opinion is clear: [DOMA] is plainly unconstitutional."

The ACLU called it "bad constitutional law...an unmistakable violation of the Constitution," and Evan Wolfson, former director of the Lambda Legal Defense Marriage Project argued that DOMA is "hasty, illogical, and unconstitutional."

Scholars from across the political spectrum believe that DOMA is unlikely to survive and that traditional marriage laws themselves will not likely prevail.

The bottom line is that, absent a constitutional amendment, this issue will be resolved by the United States Supreme Court, and many believe it will likely be resolved in favor of same-sex marriage. I am convinced that after the *Goodridge* decision the choice is no longer to amend the Constitution or leave the issue to the States.

The choice now appears to be between popular resolution of the effort to protect traditional marriage or judicial resolution of this question in favor of same-sex marriage. I believe that it would be flatly irresponsible for us to sit idly by as courts advance a social experiment explicitly rejected in State after State and in every region of the country.

Now, this is another chart. The response of the American people to experiments with traditional marriage has been overwhelming. In 1996, the Defense of Marriage Act passed with massive bipartisan majorities, and it was signed by then-President Clinton. Since 1996, 40 States have explicitly acted to shore up traditional marriage.

Many believe the single biggest error in the *Goodridge* decision was its conclusion that there is no rational basis for maintaining marriage as between a man and a woman. In fact, there is a very simple reason that the institution of male-female marriage has been the norm in every society for over 5,000 years. Marriage is not just a personal affirmation. Society does have an interest in future generations, and the conjugal act between men and women creates them. This is what underlies laws that promote and protect traditional marriage. Decoupling procreation from marriage ignores the very purpose of marriage.

Now, I am sympathetic to concerns from the gay community that they do not always feel fully accepted by society, and I have worked extensively to pass compromise legislation that protects against discrimination based on someone's sexual orientation. For example, my work on AIDS legislation taught me many lessons about why it is important not to discriminate against the gay community in health care and other areas. But preserving traditional marriage is not discriminatory. By its very nature, marriage is an institution unique to male and female unions. Marriage is about the well-being of children, and legislatures should be permitted to take reasonable steps to maintain the institutions that support them.

Now, even leading Democrats in this country understand that there is value in reserving marriage to what it has always been: the union of a man and a woman.

They know something that advocates of the Federal Marriage Amendment know: with the stakes as high as they are, unproven family forms should not be mandated by unelected judges.

When same-sex marriage advocates claim the sky did not fall on May 17th when the Massachusetts court required these marriages to begin, they miss the point. The point is not that civilization will come to a screeching halt, but that people begin an unprecedented and unwise slide into accepting a divorce between marriage and child-rearing. For this reason, many believe that same-sex marriage will likely act to undermine the health of families over time. And I think those beliefs are justified. The public policy interest in preventing this development seems obvious to everyone but a few judges and State officials insulated from public opinion.

Those who want to impose this radical change—which has yet to be embraced by any society—have the burden of showing that this experiment will not weaken traditional marriage. In my view, they do not even come close to doing so.

Now, I support the Federal Marriage Amendment sponsored by Senator Allard in the Senate. I urge all of my colleagues and the public to support the FMA when it comes up for a vote. And this is an important area. As you can see, I do draw the line when it comes to traditional marriage, although I do not believe it is fair to discriminate against anybody in our society. I do think that line needs to be drawn, and we will just have to see how this all works out.

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

With that, we will turn to our distinguished Senator from Vermont.

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

Senator LEAHY. Thank you, Mr. Chairman.

I was noticing on the schedule we are now convening our fourth hearing in the last 10 months on whether we should have the Federal Government set the law for marriages and whether we should have the Federal Government tell our 50 States what is going to be their law on marriages. In the last 10 months, as questions continually surfaced about the Bush administration's handling of the war against terrorism, its decision to invade Iraq, and its homeland security system charged with protecting citizens, this Committee has set as its priority the States' marriage laws.

Instead of holding long-promised hearings—long-promised but never held hearings—on enemy combatants, FISA, or detainees at Guantanamo Bay, this Committee has focused much of its energies on proposals to amend the Constitution, narrowing the rights of individuals. Instead of hearings on the abuses at Abu Ghraib, the FBI's extremely troubling and very costly computer problems, or the FBI lab problems, or the FBI foreign translation problems—all issues under the jurisdiction of this Committee—or the bipartisan SAFE Act, or any of the other legislative proposals to modify the PATRIOT Act, we have held hearings on flags and outlawing same-sex marriages.

We have held no hearings on civil rights matters, including important aspects of the Voting Rights Act. Of course, we wasted two opportunities to hold some of these hearings by letting the hearing room sit empty after this hearing was rescheduled twice and then postponed to accommodate Governor Romney's busy schedule. And now we are being asked to devote another morning of hearings on proposals to undercut civil unions and partnerships and, of course, to scapegoat gay and lesbian Americans for political gain.

Now, I would note also my objection to the Chairman's decisions to deny our side an equal number of witnesses for this hearing and to put former Representative Bob Barr on a separate panel. Congressman Barr served in for 8 years. He worked closely with this Committee on many issues, and he deserves more respectful treatment. Again, I would renew my request that he be allowed to testify along with Governor Romney.

But we have convened and we will hear from the Governor of Massachusetts. We will hear about State law developments in Massachusetts. I am sorry the Governor has to devote so much of his time this week to fly to Washington to testify before this Committee about matters which, of course, are transpiring in his own legislature and his own courts and among the people of his State of Massachusetts.

Now, I am not a Massachusetts resident, but like all the southern States, southern to Vermont, I have great respect for Massachusetts. But I don't think the sky has fallen. I imagine most Americans have not felt any effects from developments in Massachusetts. Many would be mystified and dismayed by this Committee's fascination with this topic.

If media reports are correct, their dismay and mystification will only deepen in coming weeks. We understand that the Majority Leader will bring the Federal Marriage Amendment to the floor on

July 12th with, or far more likely without, the approval of this Committee. We are going to take a constitutional amendment up that has not even been voted on by the Committee that has jurisdiction. Apparently, the Chairman has no objection to this backhanded treatment of his Committee, but that is up to him. But it appears that Committee consideration of constitutional amendments is another tradition that the Republicans are set to discard.

Now, I have heard no one suggest that the FMA is even close to obtaining the required two-thirds support in this body. In fact, Congress Daily reported last Friday that floor debate on the FMA was not expected to pose a scheduling problem for the majority because the Majority Leader "likely will fall well short of the 60 votes needed to begin debate." Now, both supporters and opponents know that the FMA will fail, but with only seven legislative weeks left in this session, they are going to take it up.

Now, we are spending time on the FMA because the Republican political leadership thinks it can inflict political damage upon those who oppose the amendment and curry favor with those who support it. This debate is not about preserving the sanctity of marriage. It is about preserving a Republican White House and Senate. Let's be honest. Senator Santorum, the architect of this effort, has said openly that he wants to "put people on record" as opposing the amendment, apparently including the many Republicans who have expressed reservations about the FMA or oppose it outright.

The American people should understand that this continuing spectacle is designed to enhance the political prospects of President Bush and some Republicans in the House and Senate, and to raise the national profile of some State office holders. I think Senator Chafee exhibits New England understatement and candor when he said about his leadership's handling of the amendment: "They may bring it up just for political posturing." I admire Senator Chafee and the other Republicans—inside and outside Congress—who have bucked this partisan effort and defended the Constitution.

One such Republican we will hear from today is former Representative Bob Barr of Georgia. Congressman Barr and I have always been friends, but we disagreed on a whole lot of things during his career and mine in Congress. I suspect there are a lot of issues we still would disagree on. But there is one area that we have agreed on completely and consistently. It is about this constitutional amendment. We share a high regard for the rights of States to make their own decisions about who should be allowed to marry, regardless of whether the Federal Government agrees with those decisions. And we also agree that the Constitution should not be used to enshrine the policy preferences of any generation, even though we are seeing repeated efforts to deface it for political purposes. I mean, how else do you explain 100 or more constitutional amendments just in the last year or so?

Republicans from both the conservative and moderate wings of their party oppose this amendment, which only damages and divides our Nation to play politics at the expense of groups within our society. Tolerance is an American ideal, and the Constitution should reflect and enhance that ideal, not undercut it. It has been our long tradition to use the constitutional process to expand rights

on extremely rare occasions, and never to restrict them. We should not abandon that for short-term political gain.

In fact, it is telling that President Bush won't take a position. He won't tell us what constitutional amendment language he supports. I wrote him months ago, in February, asking for his proposed language. They refuse to say what language he supports. In addition, while we will hear from the Governor of Massachusetts this morning, we have yet to hear from any representative of the Bush administration on this matter. In four hearings, no witness from the Department of Justice has come forward to testify or endorse specific language of a constitutional amendment.

But the Committee will return to this matter again. This seems to be the time of this election year in which the Republican majority has chosen to focus attention on constitutional amendments to score some political points. Having politicized the selection of judges, they now seek partisan advantage at the expense of our fundamental charter—the fundamental charter of this country—the United States Constitution. This is one of several such amendments we are being required to consider.

Given the chance, I will vote against the FMA. I do not share Governor Romney's desire to strip the States of their longstanding power to define marriage or to use the Constitution to deprive people, gay or straight, of rights. Marriage is and always has been a State issue, and it should remain so.

My wife and I were married 42 years ago in Vermont, under Vermont law. Nothing in Vermont law or Massachusetts law or changes in Vermont law has in any way damaged, I might say to the distinguished Chairman, the health of our marriage or our family. Should we set constitutional amendments telling States ages of marriage? Should we tell them how many spouses they might have, or others? There are a lot of issues we could say.

At this juncture, 49 States allow marriages only between a man and a woman. Massachusetts is working to develop a consensus on this issue through a State constitutional amendment process. I fail to see how this constitutes a crisis worthy of this Committee's obsessive focus or justifies a narrowing amendment being grated onto the charter that protects the rights of all Americans—the Constitution. Forty-nine States. Why should we be amending the Constitution at this point?

Now, Governor Romney has made the trip to Washington. He is a distinguished Governor. Of course, we are glad to have him here. I think there is one other issue I hope he may refer to. Given Attorney General Ashcroft's May press conference in which he emphasized the threat of terrorist incidents, noting specifically the July Democratic National Convention in Boston as a potential target, I hope the Governor will also address those circumstances. I hope he will tell the Committee whether he has been given any specific, credible information or whether he is, like Homeland Security Secretary Tom Ridge, unaware of any specific threats.

Of course, the very day last month that the Attorney General was scaring Americans with his pronouncement that al Qaeda plans to attacks in the United States in the next few months and "hit the United States hard," the Secretary of Homeland Security was urging Americans "to go out and have some fun" during the

upcoming summer months and enjoy living in this wonderful, wonderful country we are blessed to live in. So I will be interested to know the view of the Governor of Massachusetts: Should America's families dig deep into their pockets to fill up the family station wagon with $2-per-gallon gasoline and travel to the beaches of Massachusetts, or should they buy duct tape and bottled water and hunker down until after the fall elections?

I am disappointed by this Committee's priorities. While the Bush administration has to apologize for its errors and abuses that have made the American people less safe, the Committee spends its time on proposed constitutional amendments to ban gay marriage and flag desecration. The American people deserve better from their Congress.

Thank you, Mr. Chairman.

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

Chairman HATCH. Thank you, Senator.

We are happy to welcome the Governor of Massachusetts here, Governor Romney. We look forward to hearing your testimony. You have had an interesting time up there, and we appreciate your taking time to come here and talk generally about this subject and some of the experiences that you have had in Massachusetts for the benefit of the whole country and for the benefit of this Committee. This is an important issue. I think when you start talking about families, you cannot talk about anything more important in our society. And there are a lot of feelings, perhaps both ways on this issue, and we would like to resolve it in the best possible way we can.

So, Governor Romney, we will be glad to take your statement at this time, and then we will have some questions. You need to press that little button.

STATEMENT OF HON. MITT ROMNEY, GOVERNOR, COMMONWEALTH OF MASSACHUSETTS

Governor ROMNEY. Thank you, Mr. Chairman, and also Senator Leahy, Senator Kennedy of my home State, and other distinguished members of the Committee. Thank you for asking me to join with you today.

First, I would ask that my written remarks be inserted into the record of this hearing.

You have asked for my perspectives on the recent inauguration of same-sex marriage in my State. This is a subject about which people have tender emotions, in part because it touches individual lives. It is also a subject that has been misused by some as a means to promote intolerance and prejudice. This is a time when we must fight hate and bigotry, when we must learn to accept people who are different from one another. Like me, the majority of Americans wish both to preserve the traditional definition of marriage and to oppose bias and intolerance directed toward gays and lesbians.

Given the decision of the Massachusetts Supreme Judicial Court, Congress and America now face important questions regarding the institution of marriage. Should we abandon marriage as we know it and as it has been known by the Framers of our Constitution?

Has America been wrong about marriage for 200-plus years?

Were generations that spanned thousands of years from all the civilizations of the world wrong about marriage?

Are the philosophies and teachings of all the world's religions simply wrong?

Or is it more likely that four people among the seven that sat in a court in Massachusetts have erred? I believe that is the case.

And I believe their error was the product of seeing only a part, and not the whole. They viewed marriage as an institution principally designed for adults. Adults are who they saw. Adults are who they saw in the courtroom before them. And so they thought of adult rights, equal rights for adults. If heterosexual adults can marry, then, of course, homosexual adults must also be able to marry in order to have equal rights.

But marriage is not solely about adults. Marriage is also for children. In fact, marriage is principally for the nurturing and development of children. The children of America have the right to have a mother and a father.

Of course, even today, circumstances can take a parent from the home, but the child still has a mother and a father. If the parents are unmarried or divorced, the child can visit each of them. If a mother or a father is deceased, the child can learn about the qualities of their departed parent. His or her psychological development can still be influenced by the contrasting features of both genders.

Are we ready to usher in a society indifferent about having mothers and fathers? Will our children be indifferent about having a mother and a father?

My Department of Public Health has recently asked whether we must rewrite our State birth certificate to conform to our court's ruling. Must we remove "father" and "mother" and replace them with "parent A" and "parent B"?

What should be the ideal for raising a child: not a village, not "parent A" and "parent B," but a mother and a father.

Marriage is about even more than children and adults. The family unit is the structural underpinning of all successful societies. And it is the single most powerful force that preserves society across generations, through centuries.

Scientific studies of children raised by same-sex couples are almost non-existent. And the societal implications and effects on these children are not likely to be observed for at least a generation, probably several generations. Same-sex marriage doesn't hurt my marriage or yours. The sky is not going to be falling. But it may affect the development of children and thereby future society as a whole. Until we understand the implications for human development of a different definition of marriage, I believe we should preserve that which has endured over thousands of years.

Preserving the definition of marriage should not infringe on the right of individuals to live in the manner of their choosing. One person may choose to live as a single, even to have and raise her own child. Others may choose to live in same-sex partnerships or civil arrangements. There is an unshakable majority of opinion in this country that we should cherish and protect individual rights with tolerance and understanding.

But there is a difference between individual rights and marriage. An individual has rights, but a man and a woman together have a marriage. We should not deconstruct marriage simply to make a statement about the rights of individual adults. Forcing marriage to mean all things will ultimately define marriage to mean nothing at all.

Some have asked why so much importance is attached to the word "marriage." In part, it is because changing the definition of marriage to include same-sex unions will lead to further far-reaching changes that would also influence the development of our children. For example, school textbooks and classroom instruction may be required to assert absolute societal indifference between traditional marriage and same-sex unions. It is inconceivable that promoting absolute indifference between heterosexual and homosexual unions would not significantly affect child development, family dynamics, and societal structures.

Among the structures that would be affected would be religious and certain charitable institutions. Those with scriptural or other immutable principles in their founding would be castigated. Ultimately, some may founder. We need more from these institutions, not less, and particularly so to support and strengthen those in need. Society can ill afford erosion of charitable institutions.

For these reasons, I join with those who support a Federal constitutional amendment. Some may retreat from the concept of amendment. While they say they agree with the traditional definition of marriage, they hesitate to amend. But amendment is a vital and necessary aspect of our constitutional democracy, not an aberration.

Our Framers debated nothing more fully than they debated the reach and boundaries of what we call federalism. States retained certain powers upon with the Federal Government could not infringe. By the decision of the Massachusetts Supreme Judicial Court, our State has begun to assert power over the other States. It is a State infringing on the powers of other States.

Same-sex couples legally married in Massachusetts will, of course, move into other States. In States with Defense of Marriage Acts, presumably State government marital benefits will be denied them. But are their marriages automatically dissolved, including all the rights and obligations of one party to the other and to their children? That remains to be seen.

For each State to preserve its own power in relation to marriage within the principle of federalism, a Federal amendment is necessary.

I am not a scholar to have reviewed all of the proposed pieces of language relating to amendments, but I must admit that of the ones I have seen, I prefer the modified most recent Allard language. It permits the voters and the legislature of my State, for example, to provide any and all benefits of our choosing to same-sex couples.

This is not a mere political issue. It is more than a matter of adult rights. It is a societal issue. It encompasses the preservation of a structure that has formed the basis of all known successful civilizations.

With a matter as vital to society as marriage, I am troubled when I see an intolerant few wrap the marriage debate with their bias and prejudice.

I am also troubled by those on the other side of the issue who equate respect for traditional marriage with intolerance. The majority of Americans believe marriage is between a man and a woman, but they are also firmly committed to respect, and even fight for the civil rights, individual freedoms, and tolerance of others. Saying otherwise is wrong, demeaning, and offensive. As a society, we must be able to recognize the salutary effect, for children, of having a mother and a father while at the same time respecting the civil rights and equality of all our citizens.

Thank you.

[The prepared statement of Govenor Romney appears as a submission for the record.]

Chairman HATCH. Thank you, Governor. We will have a round of questions.

Could you explain the State's rationale for maintaining marriage exclusively between men and women and whether you believe it is grounded in sound consideration of public policy in Massachusetts?

Governor ROMNEY. Well, as I have said in my testimony, I believe the importance with regard to the marriage institution is that it relates to the development, the care, and the nurturing of children, and that the State's interest in preserving marriage as a relationship between a man and a woman is a reflection of our interest in the development of children and the preservation of that development process through future generations.

I would note that it is not unprecedented for the Federal Government to have a say in what happens in States as it relates to marriage. There was a long time ago a State that considered the practice of polygamy, and as I recall, the Federal Government correctly stepped in and said that is not something the State should decide. We have a Federal view on marriage. And this was not left to an individual State.

Likewise, I believe the Federal Government has a say about matters relating to marriage to assure that it is a relationship between a man and a woman. And that is primarily devoted to or related to the development of children.

I would note that we will not see any immediate results of same-sex marriage in my State. In my view, it is going to take a generation or generations until social scientists are able to evaluate the developmental implications of children not having mothers and fathers. But as those studies are completed and reviewed, then is the time to consider such a dramatic change, if ever, in an institution as fundamental to our society as marriage.

Chairman HATCH. Well, some advocates of same-sex marriage may deny it, but the *Goodridge* case in Massachusetts made marriage a national issue. When citizens of one State are married in Massachusetts and then return to their home State hoping that their out-of-state marriage will be recognized, this has become an interstate or a national issue. Whether we like it or not, that is what it is.

One of the concurrences in *Goodridge* took this point on directly, explaining that there was no need to worry since the Massachu-

setts Code prohibited marriage licenses to out-of-state same-sex couples.

Now, did that judge underestimate the national effect of the *Goodridge* decision? And just to put it in even more stark terms, do you believe that this is a national problem rather than just a Massachusetts Court problem?

Governor ROMNEY. Well, I think absolutely it becomes a national problem. There are two ways in which citizens of other States—or that the same-sex marriage of Massachusetts will be exported into other States. One is simply through the application of our laws as they currently exist, which is individuals living in Massachusetts, intending to live in Massachusetts, will be married under our laws and ultimately may choose to move and go to other States. We have 130 colleges and universities, for example. Students may marry there while attending college, same-sex couples, and move to other States. And, therefore, we will have same-sex marriages which will be going into other States.

There is another avenue by which same-sex couples would reach into other States, and that is an avenue which has been held off or closed by virtue of a statute which exists on our books and was referenced by the court. It is a statute written in 1913 which says that people cannot come to Massachusetts from other States, who live in other States and intend to return to that other State, and come and be married in Massachusetts if the laws of their home State would not have permitted that marriage. That particular law has been enforced I believe now by all of the cities and towns in Massachusetts, and so we do not have large numbers of people coming from across the country living in other States, becoming married in Massachusetts, and returning to their homes. That is being prevented, by and large, by the application of this law.

It is being challenged before our court system. An action has already been brought against that particular statute, and whether it will withstand that challenge or not, I cannot predict.

But, ultimately, on either avenue, there will be individuals who are legally, lawfully married in Massachusetts of the same gender who will move to other States and thereby other States will receive married couples from Massachusetts. And the Defense of Marriage Act as it exists perhaps in one of those other States, it is really questionable as to how it is going to deal with someone who has been married in Massachusetts, who has moved to their State. Is their marriage dissolved? Are there obligations that they have towards their child and towards one another? Can they get a divorce in that State if the State does not recognize their marriage? Do they have to go back to Massachusetts to get a divorce? Can a child that is born to that union that lives in another State expect to get child support if the parents divorce from each of the parents?

These are questions which are not yet resolved, and this represents some of the legal confusion. I am sure it can be sorted out with time, but surely the idea that a State can have same-sex marriage and that that will not affect or be imported into other States is not an accurate and fair characterization.

Chairman HATCH. Thank you, Governor.

We will turn to Senator Leahy.

Senator LEAHY. Thank you, Governor. I appreciate the history lesson on polygamy. I was intrigued by Senator Hatch's comment to the press that he knows a lot of those polygamists in one part of Utah and that they are fine people. We have certain laws that were recommended at the time when States are allowed into the Union that then are basically still looked at by the States to determine whether they are going to be enforced or not.

Now, gay marriage is legal only in Massachusetts. You have taken steps to prevent out-of-state couples from marrying in Massachusetts. You have been supported in this by the Democratic Attorney General of Massachusetts. So as we sit here today, the only gay couples marrying in your State, the only ones that do, are residents of your State. And, of course, you made some reference to religion. Any church can say that they are not going to have same-sex marriage, whether it is legal or not, just as any church can say a marriage between a man and a woman of a certain age is perfectly legal, but you cannot marry in our church because you are not both of the same faith or you are not—neither one of you are, or whatever the reasons. We have always protected that. We have always allowed churches and synagogues and mosques to determine who can or cannot be married in there. So that is kind of a straw man. That is not going to change.

In addition, the normal constitutional process proceeds in your State in an effort to overturn the *Goodridge* decision. So if all that is going on, I don't see what is the national crisis. Can you give me that answer in a sentence or two?

Governor ROMNEY. Yes, I actually believe that marriage is fundamental to our society, and for people who think it is just an accessory to life in this country and it is a social—

Senator LEAHY. I am saying why is Massachusetts such a crisis for the country.

Governor ROMNEY. Well, because Massachusetts has redefined marriage for the entire country, and that is because people who live in Massachusetts or intend at some point to live in Massachusetts will be married there legally and move to other States. And, therefore, the definition of marriage will be applied in other States as it is in Massachusetts. And the Defense of Marriage Act presumably will not—

Senator LEAHY. Wouldn't it be a good idea to wait and see if that happens? You said in your February 5th op-ed—

Governor ROMNEY. I can guarantee you that there have already been people legally married in Massachusetts who have gone to other States. And, therefore, the definition of marriage of Massachusetts is already provided in other States.

Senator LEAHY. But in your February 5th op-ed article in the Wall Street Journal, you said that it would be disruptive and confusing to have a patchwork of inconsistent marriage laws between States. Well, we have had that for over 200 years. I mean, some States have different ages. Some States have different requirements to get married. It is a patchwork.

Now, you are enforcing in your own State the 1913 law to prevent same-sex couples who do not reside or intend to reside in Massachusetts from marrying. As Chief Executive, of course, that is your right.

Am I correct that that 1913 law was originally passed to prevent out-of-state interracial couples from marrying in Massachusetts?

Governor ROMNEY. I actually haven't researched the origin of that law. My understanding is, according to the Boston Globe, that is the case, and according to the Boston Herald, that is not the case. So you will have to choose which journal you have more—

Senator LEAHY. I was asking—

Governor ROMNEY. I was not there. I may look old, but I was not there so I do not really know what the—

Senator LEAHY. Governor Romney, I was asking you as the Chief Executive and the keeper of the laws in Massachusetts if you knew.

Governor ROMNEY. I do not know what the derivation was of all of the members of the legislature who passed that bill back in 1913.

Senator LEAHY. Now, if you have a heterosexual couple that comes in to marry in Massachusetts, do you have requirements to make sure they meet the requirements for a marriage in their home State?

Governor ROMNEY. Yes. On the certificate or the license for marriage, there is a line which says that they know of no impediment for their being able to be legally married. And presumably an individual that comes into our State that would not be allowed to be married in their home State would sign that under penalty of perjury if they were aware of some impediment. And the impediment as it relates to gay marriage is obviously far more substantial in terms of numbers of individuals. We really do not have, we believe, sufficiently different laws related to marriage to justify that being an issue in other cases.

Senator LEAHY. So you have researched that, and I appreciate that you have researched it, and I appreciate your answer.

Incidentally, as I mentioned, the U.S. Attorney General stated last month that the Democratic National Convention in Boston was a potential target for terrorist attack. Afterward, when Secretary Ridge was before us, he suggested that, one, the law requires him to make such pronouncements, not the Attorney General; and, secondly, on the same day, he was saying go out and enjoy the summer.

Have you received specific, credible threat information about attacks at the Convention? Or are you, like Homeland Security Secretary Ridge, unaware of such threats?

Governor ROMNEY. You may have to give me some guidance on this, Senator. I have received top security clearance and have received briefings with regards to various threats. And I do not believe that I am at liberty, given that top security clearance, to describe those—

Senator LEAHY. I agree. Don't go into classified things. Could you just tell us who is right? They both gave conflicting statements that day. Who is right—Tom Ridge or John Ashcroft?

Governor ROMNEY. Well, perhaps you are going to have to rephrase the question for me then, because I am not sure I am going to be able to pick which is right in that setting. The question is?

Senator LEAHY. Well, one said go out and enjoy the summer; the other said we have these—

Governor ROMNEY. Oh, I am sorry. Well, I would go out and enjoy—

Senator LEAHY. —threats including the Democratic National Convention.

Governor ROMNEY. I would definitely go out and enjoy the summer, because I am not sure where you can hide given the nature of the enemy that we face. I believe that there is an enemy upon this Earth that would like to bring down the Government of the United States, would like to impoverish our Nation, would like to kill as many Americans as they can. I do not know how we are going to keep that from happening in every corner of our country, let alone my own State. I know we are going to do our very, very best. But I believe we have to go on with our lives and live them well. But I do believe that there are real and severe threats that face our Nation and our citizens, not just associated with the Democratic Convention, but the Republican Convention and every other large gathering of individuals. It is a sorry state of affairs.

Senator LEAHY. I suspect it will be the state of affairs for the rest of our lives.

Governor ROMNEY. I am afraid you are right. I certainly hope not.

Let me note one other thing, and that is, I do concur that I do not believe any religion would ever be required or compelled to provide marriages of same-sex couples. I do not believe that would be the case. My point in my testimony was that religions that refused to do so and that continue to acknowledge in their views that same-sex couples should not be married, or those religions that take even more fundamental stands in that regard, would be subject to verbal castigation and abuse and intolerance, and that that would be harmful to those institutions. But I certainly do not believe that they would be likely to be required to perform marriages which violate their basic tenets.

Senator LEAHY. Not from this Committee they will not be, from any one of us, either side of the aisle.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator.

Senator Cornyn?

Senator CORNYN. Thank you for being here, Governor, and I particularly want to commend you on your forthright statement that you believe that these two concepts can peacefully co-exist. One is a belief in the essential worth and dignity of every human being and, second, the benefits to children and to families of traditional marriage. I believe you have got it exactly right.

There are some who have stated that this is really a political issue and have questioned the timing in which this matter has arisen. But I want to refer you to some language in the case of *Lawrence* v. *Texas* that was decided last June upon which the *Goodridge* court in Massachusetts relied in finding this right to same-sex marriage under the Massachusetts Constitution.

And referring back to the *Casey* decision in 1992, the court said, "The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education." It goes on to explain that the Constitution

demand autonomy of the person in making these choices and says, "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

My own belief is that this is the genesis of the Massachusetts Supreme Court decision that relied upon this language and what Justice Scalia called "the sweet mystery of life" provision of the 14th Amendment.

But I want to ask you whether the language that was used in the Massachusetts Supreme Court decision reflects what you believe to be the views of the people of Massachusetts, where the court said that, "Neither may the government under the guise of protecting traditional values, even if they be the traditional values of the majority, enshrine in law an invidious discrimination that our Constitution as a charter of governance for every person properly within its reach forbids."

The court goes on to say, "There is no rational reason for limiting marriage in traditional sense. The marriage laws of the Commonwealth"—"There is no rational reason that the marriage laws of the Commonwealth discriminate against a defined class. No amount of tinkering with language will eradicate that stain." So they call traditional marriage discrimination, they call it a stain that must be eradicated, and they call it invidious discrimination.

I recall that John Adams was, as I recall, the principal author of the Massachusetts Constitution back in 1780, as I recall, the oldest written Constitution still in existence in the world. And I just wonder if John Adams would be surprised that in 2004, all of a sudden four Justices on the Massachusetts Supreme Court have discovered this new constitutional right that did not exist before and considered it a stain that must be eradicated. Could you comment on your views of that?

Governor ROMNEY. Well, you know, I think the people of my State and the people of America generally sometimes find it difficult to listen to the rhetoric on both sides of important issues like marriage. And perhaps some of the language of our court is a little over the top when it talks about traditional marriage being a stain or discriminatory and so forth. And I think people generally—and maybe I am drawing too much from conversations with a number of people I have spoken with. People generally want to accept other individuals who are different than themselves with love and appreciation and respect.

At the same time, they recognize a value in having a mother and a father associated with the development and care and nurturing of a child. And they reject the notion that if they believe in this traditional definition of marriage that somehow they become intolerant or discriminatory. They believe that we have to find a middle ground that recognizes the inalienable rights of all of our citizens to make their own choices, to join in partnerships or unions of some kind and to have a relationship between one another, perhaps even to raise children, but at the same time to say that our National standard for the raising of our generations will aim to include a mother and a father.

It is that temperate zone, if you will, between the two extremes that I hope we could find, one that says we accept people, we will fight for tolerance, we will fight for civil rights, we will assure that

people are not discriminated against, that there are not hate crimes perpetrated against individuals based on their sexual orientation. And at the same time, we want to preserve marriage in our society as an institution between a man and a woman. That is where I think the great majority of American citizens lie. And perhaps they are little confused that the choices they are given seem to be so extreme by some, in some cases anger and bias, and in the other, accusations of intolerance and lack of civil rights.

Neither one seems to reflect what I feel about myself or what I believe our citizens feel about themselves.

Senator CORNYN. I share your hope. My time has expired.

Thank you, Mr. Chairman.

Chairman HATCH. Senator Kennedy?

Senator KENNEDY. Governor, thank you very much for joining with us today. We have opportunities to work together on some important matters in our State. I enjoy that. And we also have areas of difference, and we have a healthy respect for each other's views, and that is the way it should be.

You have heard from our good friend and my Ranking Member, Senator Leahy, about his frustrations that the fact is that we have given a great amount of time considering this constitutional amendment when many of us here, both on the Judiciary Committee and also in the Senate, find that we are facing some extraordinary challenges here at home and abroad. Our President is going to the EU and NATO. We have new phases taking place in Iraq. We have an economy that is sputtering. We have health care costs out of control. We have too many children, as you well know, that are facing great challenges in terms of their education experience. And there are many, many important national kinds of issues and questions.

I respect your view that you think that we ought to be about amending the Constitution that has only been amended 17 times in the history of our country, outside of the Bill of Rights, 17 times. And this is enormously significant, the document that is the basis of so much of what is right about our country. So we have to give it a great deal of focus and attention before we are going to, I think, take those steps.

I am one that has been here long enough where the courts have made a major difference in terms of guaranteeing the rights and liberties of citizens. I am not just talking about the Supreme Court of the United States, although they have—I think not long ago the 50—I guess we were at the 50th anniversary of *Brown* v. *Board of Education*. I am aware of the decisions that were made by circuit courts during that period of time building up to *Brown* v. *Board of Education*. I am aware of the Court's decision also in terms—the Supreme Court in guaranteeing equal rights to citizens, one man, one vote, and also about interpreting the right to privacy, which I think has made an enormous difference in terms of guaranteeing new rights to women in our society.

So I am not one of those that believes that the courts, including the court of Massachusetts, six of whose seven judges were appointed by Republicans, only one Democrat, six by Republican Governors, that they are wrong. I happen to be one that supports their judgment decision.

I do not know a church in Massachusetts that has been required to violate its principles in terms of the issues of civil unions. I do not know a mosque or a synagogue, I do not know a single one that was required. The sanctity of marriage is recognized and respected by churches and religions, including my faith. They are certainly respected on that. But we are talking about a range of how we are going to treat people and whether the commitments to equality are inscribed in the Massachusetts Constitution of John Adams, and the Massachusetts court said they are.

Now we have the different activities to try and sort of deal with that issue or to try to change it or override it. And I want to just understand clearly about your views about the Massachusetts amendment and also about where you are testifying today, because we have the situation where the proposed amendment to our Massachusetts Constitution says that, "Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions of same-sex persons are established by this article and shall provide equally the same benefits, protections, rights. All laws applicable to marriage shall also apply to civil unions."

So are you supporting the constitutional amendment to the Massachusetts Constitution?

Governor ROMNEY. This is not the amendment which I would have brought forward. I will answer your question directly. This is not the amendment as I would have drafted it. Speaker Finneran's amendment, which he put out first, was the one I proposed. Right now I have two choices in Massachusetts: I support this one or I support gay marriage. Between the two, I prefer this one.

Senator KENNEDY. Okay. Well, that is what life is about here. There are usually two choices, yes and no.

Governor ROMNEY. Yes. Of the two, this is the one I—

Senator KENNEDY. And those are tough ones sometimes.

Governor ROMNEY. Yes.

Senator KENNEDY. Yes or no. So, on the one hand, you are supporting the Massachusetts, which will—is an amendment to the Constitution of our State which will permit the civil unions. Now, on the constitutional amendment to the United States, the one that we are considering that you mention here—

Governor ROMNEY. Is this the modified language?

Senator KENNEDY. This is the modified language. It says, "Marriage in the United States shall consist only of a union of man and a woman. Neither this Constitution, nor the Constitution of any State, shall be construed to require that marriage or the legal incidents"—and that has been interpreted as civil unions—"thereof be conferred upon any union other than the union of a man and a woman." That recognizes the civil unions. So how can you—I am trying to figure out what your view is. If this prohibits, which it does, civil unions and yet Massachusetts and the Massachusetts people are going through a process now, a duly set process of our Constitution to permit it, how can you have it both ways?

Governor ROMNEY. Well, Senator, because that does not prohibit civil unions. That is it quite simply. That amendment does not prohibit civil unions.

Senator KENNEDY. Well, we are going to hear from—

Governor ROMNEY. That amendment, as I understand it, allows civil unions, and I would—

Senator KENNEDY. Well, this is interesting—

Governor ROMNEY. And I would, as I indicated in my testimony, I would be very pleased with having the States have the rights, as I would like our State to have, to provide whatever benefits, including full and equal benefits, to its citizens that are joined in civil unions, if the States wish to do so.

Senator KENNEDY. All the Federal rights, too?

Governor ROMNEY. The State, so far as I understand, does not have the ability to—

Senator KENNEDY. Well, do you support those which—

Governor ROMNEY. —bind the Federal Government.

Senator KENNEDY. Okay. But would you want those—do you think they ought to be excluded from the Federal rights, too, so you have people that are going to get treated differently?

Governor ROMNEY. I am not sure—what question would you like me to ask—or answer? I am sorry.

Senator KENNEDY. I want you to answer that one, that one that would treat them differently, for example, on Federal taxes and Social Security.

Governor ROMNEY. I would not favor a State amendment demanding that the Federal Government provide Federal rights.

Senator KENNEDY. So they will be treated differently.

Let me come back—

Governor ROMNEY. No, I would very simply indicate that the State—

Senator KENNEDY. Okay.

Governor ROMNEY. —doesn't have the power to bind the Federal Government.

Senator KENNEDY. I am just interested in your overall view. I understand that the State—

Governor ROMNEY. I think you know exactly what my overall view is.

Senator KENNEDY. No, I do not. I certainly don't. But let me come back to this, the question about the incidents—I know my time is up, but this is just the—we are going to hear from Congresswoman Musgrave who is the principal sponsor of the Federal Marriage Amendment. This is going to be a very interesting debate on the floor because we have had a variety of different interpretations, including yours. She has stated, has testified that the phrase "or the legal incidents thereof" means the right, benefits, protections, privileges, responsibilities of marital status that have been historically provided by law. Her definition is nearly identical to the definition of the rights provided to the same-sex couples under the proposed State amendment.

So how can you say that the Federal Government would have no effect on the Massachusetts amendment?

Governor ROMNEY. Well, of course, the Federal Government can have an effect on the Massachusetts government, but let's go to the language itself. Now, I am not a constitutional lawyer here—

Senator KENNEDY. Well, we are—

Governor ROMNEY. Let me—let me—

Senator KENNEDY. That is what this is all about.

Governor ROMNEY. Senator—

Senator KENNEDY. What we are having—

Governor ROMNEY. Let me respond. Let me respond then. I came—

Chairman HATCH. Senator, your time is up, so let him respond.

Governor ROMNEY. I came to—I did not come to provide a constitutional legal interpretation. I will let the lawyers do that. But given the fact that I struggled through law school and remember some of it, I will give it a try.

That paragraph says, the second sentence, "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..." Now, that says "required."

What this particular amendment says, so far as I look at it, it says that the Constitution of a State shall not be construed to require that marriage or civil union is required. But it does not say it is prohibited. To prohibit a State, that a State may not through its own auspices put in place a civil union. That is my reading of that language. If a constitutional lawyer thinks that is not the right way to read it, then let's write it in such a way that it does. But my view is quite simple, and let me just state what it is. Marriage and the term "marriage" should be reserved for a relationship between a man and a woman. States should be free to provide whatever benefits that they can provide as a State to individuals of same sexes. And if a State decides they want to provide extensive benefits, they have the right to do so. And if they decide they want very limited benefits, they have the right to do that. States should not be permitted to provide—to tap into the Federal treasury, if you will, and make the decision for the Federal Government. That, of course, would be in the Federal Government's hands.

One other brief point, if I may, Senator, just on a matter that was handed to me, the miracles of BlackBerrys. With regards to Senator Leahy's question, I have received a note that says, "The Democratic Attorney General of Massachusetts has researched the origins of the 1913 law and said, 'There is no evidence whatsoever that a racial purpose motivated the legislature in passing that law.'" So while I have not researched it, apparently my Attorney General has and reached that conclusion.

Thank you.

Chairman HATCH. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, this is the fourth hearing held in this Committee on this subject in the last several months, and as I have said at the three prior hearings, I think it is unfortunate that we are devoting so much time to this issue. I continue to believe that a constitutional amendment on marriage is unnecessary and aimed at simply scoring points in an election year.

That is unfortunate for the American people who are struggling every day with so many more pressing issues that deserve the Senate's attention and action. My concern that this is a politically motivated exercise was heightened, Mr. Chairman, last week when I learned that the Senate leadership wants to bring the Federal Marriage Amendment to the floor on July 12th. It now seems clear that the Senate leadership intends to bypass the Committee process to meet this schedule.

Mr. Chairman, I hope that before agreeing to a floor vote you will bring this amendment through the Judiciary Committee and would also allow Senator Cornyn first to hold a markup of the amendment in the Constitution Subcommittee. You have previously permitted the Constitution Subcommittee to be the first stop for constitutional amendments, and we have so far taken up three amendments this Congress in Subcommittee: the victim rights amendment, the continuity of government amendment, and just recently the flag amendment.

The Federal Marriage Amendment should be given the same scrutiny and consideration as those other amendments. Committee review is absolutely essential in this case because the Senate will be considering this proposed constitutional amendment, Mr. Chairman, for the first time. There is still significant uncertainty about the meaning and the effect of the amendment.

Indeed, there is a strong argument that even with Senate Joint Resolution 30, the revised version of the amendment introduced in March by Senator Allard, would prohibit, would actually prohibit, the kind of solution now pending in Massachusetts, which Governor Romney has discussed.

This is precisely the situation where Committee markup is critical. Committee process, Mr. Chairman, should not be bypassed to meet a politically designed schedule.

Mr. Chairman, Governor Romney has testified about how his State has handled this issue. Last fall, the highest court in Massachusetts ruled that the State must grant marriage licenses to same-sex couples. This was a controversial decision, and the Massachusetts Legislature has responded. In March, it approved a proposed amendment to the State Constitution defining marriage as between a man and a woman and also recognizing civil unions. For this State amendment to become law, the legislature must approve it again in the next session, and then the last step will be a Statewide referendum.

Mr. Chairman, I think Massachusetts should be allowed to complete its constitutional amendment process, and other States should also be permitted to handle this issue as their citizens see fit, without interference by Congress or the Federal Government in accord with the founding principles of our Nation. We do not need Congress to legislate for all States for all time on a matter that has been traditionally handled by the States and religious institutions since the founding of our Nation.

As Professor Brilmayer testified at a prior hearing, whether there might someday be a conflict between States that might justify a constitutional amendment is still hypothetical because no court—no court—has required a State to recognize a same-sex marriage performed in another State. None of the witnesses who testified at prior hearings made a compelling argument for immediate action a constitutional amendment on this sensitive topic. So I will continue to listen today to see if any new argument is made, but thus far it has not been made.

Governor Romney, I am having difficulty understanding your position on this issue. I share the concerns that Senator Kennedy has expressed. On the one hand, you have stated repeatedly that the people should be empowered to define marriage. You have said that

the Massachusetts Legislature, in approving a proposed State constitutional amendment, was taking the right step. And as you know, the proposed amendment to your State's constitution would both define marriage as between a man and a woman and recognize civil unions. That proposed amendment must now be approved by the next session of the legislature and then, as I said, by statewide referendum.

On the other hand, the Federal Marriage Amendment would prohibit a court from construing a State constitutional provision to recognize civil unions. In other words, the marriage amendment to the United States Constitution, which you have said you support, could effectively, in my view—and I think Senator Kennedy agrees, nullify the will of the people of your State.

How is your support of the Federal Marriage Amendment consistent with your statement that the people of Massachusetts are deciding this matter, as they should be? Do you support or do you not support allowing the people of Massachusetts to decide this issue?

Governor ROMNEY. I am absolutely committed to the principle that States should have the right to define marriage and the people of the State should have the right to define marriage. And that is precisely why I am insisting that I fully support a constitutional amendment that allows States to do just that.

When Massachusetts courts indicate that we are required to marry same-sex couples in Massachusetts and they move to other States, States lose that power. Massachusetts, the decision of Massachusetts is now infringing on the rights of other States and citizens of other States, plain and simple. And, therefore, my view is that a constitutional amendment, properly drafted, would allow each State to make its own decisions with regards to the rights associated to same-sex couples, but that marriage should be reserved for a man and a woman. I fully support the ability of my legislature and my State citizens to provide benefits of various kinds to individuals in various classes. I do not believe that the amendment as written would prohibit that. But I am not going to try and become a constitutional scholar on the language of a particular form of an amendment other than to say I strongly believe that marriage, in order to be preserved as a relationship between a man and a woman within the bounds of a State that wishes to make its own choices, has to have the support of that amendment.

Let me also note that the timing—and a great deal of attention has been placed on the timing of this matter, and I do not begin to want to weigh in on the timing with regards to Congressional action. But I certainly would acknowledge that it was not my hope that our court would have brought this matter forward at the time it did. I sort of hoped this sort of thing would come up after I was no longer Governor because, frankly, I want to spend my time devoted to working in our schools and helping our kids, finding ways to provide more prescription benefits for our senior citizens, doing a better job to provide a strong economy and more jobs to our citizens. Those are our highest priority.

But when our Supreme Judicial Court acted, they brought forward a change in a definition of an institution which is fundamental to my State, fundamental to our Nation. And in order to

preserve the rights of respective States to set their own policies with regards to marriage, I believe this amendment or one of a similar nature is necessary.

Senator FEINGOLD. I know my time is up, but let me just follow up.

Chairman HATCH. It is up.

Senator FEINGOLD. If you were convinced that the Federal Marriage Amendment would nullify the Massachusetts amendment, would you support it?

Governor ROMNEY. Well, the challenge with that question I have is that if this amendment were to say that Massachusetts and the voters of Massachusetts could not provide any benefits whatsoever to same-sex couples, then I would oppose it. But I do not believe it does that.

Senator FEINGOLD. I think that is exactly what it does, Mr. Chairman. Thank you.

Chairman HATCH. I do not agree with you.

Senator Schumer?

Governor ROMNEY. I would note that that is—well, I disagree with that interpretation.

Chairman HATCH. Okay. Senator Durbin first, and then Senator Schumer.

Senator DURBIN. Governor, thank you for joining us today. I have listened carefully to what you have said, and I cannot follow it. You said at one point, "States should have the right to define marriage." And then you went on to say, "And marriage should be defined as between a man and a woman." Now, wait a minute. Which is it? Now—

Governor ROMNEY. Well, if I—oh, I am sorry. I thought that was the question.

Senator DURBIN. It will come to a question.

Governor ROMNEY. Okay.

Senator DURBIN. Trust me.

Under this proposed Federal Marriage Amendment, you prohibit the States from construing marriage under certain circumstances, including your own State. So saying that you want to give the States the power and then turn around and take it away, I do not follow it.

Sitting behind you is former Congressman Barr, who, when he was a Member of the U.S. House of Representatives, authored a bill that I voted for, the Defense of Marriage Act. The Defense of Marriage Act, which he will testify later, has never been successfully challenged in court. But the Defense of Marriage Act says explicitly that no State could force another to recognize marriages of same-sex couples. Each State has its own power to define marriage, which is a law on the books passed and signed by President Clinton, and a law which protects what you say you want, to allow States to define marriage.

This amendment does not recognize that. This amendment says, no, we will take away the authority of the Commonwealth of Massachusetts, the State of Illinois, the State of New York to define marriage. That is the difference.

I just might say parenthetically, we have passed 27 amendments to the Constitution of the United States, and if you take the ten

in the Bill of Rights and set them aside, of the 17 remaining, only three have been enacted in Presidential election years. And they are generally not all that controversial. The fact is that Members of the Senate and Congress have generally said this is too highly charged a political atmosphere to be amending the Constitution of the United States. And now we are going at breakneck speed to try to get this amendment up on the floor before there is a Senate Judiciary Committee markup.

Does it strike you that perhaps all of this turmoil and all of the conflicts that are involved here are about the political theater of this year and a little less about the merits of the issue? Please.

Governor ROMNEY. Thank you, Senator. As I said a moment ago, the timing certainly is not mine. It is not timing I would have requested. I would have hoped that matters of this nature would have never come up, but if they had to come up, I wish they had come up either under prior Governors or subsequent Governors. But it happens to be that during my tenure, when I am trying to focus on other matters, this becomes an issue before us.

There are marriages going on right now in Massachusetts because, as you know, our constitutional amendment process will not be complete for two and a half years. So I cannot wait and say, gosh, let's just deal with this later, because the practice of same-sex marriage is occurring within Massachusetts today. And it is being sent to other States throughout the country today. It is not something that is going to be happening two and a half years from now. It is happening today. For people—

Senator DURBIN. So what about the Defense of Marriage Act, Governor?

Governor ROMNEY. For people who believe that that is not an important matter, then they can say, gosh, let's just wait until later. But those—

Senator DURBIN. Governor, what about the Defense of Marriage—

Chairman HATCH. Let him answer the question.

Governor ROMNEY. But those who feel that marriage is a fundamental aspect of our society and important to the development of our children, they believe that this is something which should be dealt with on a basis that is timely.

With regards to the Defense of Marriage Act, I do not think we can predict what the courts in all 50 States will say, or the other 49 States will say as a couple legally married in Massachusetts, a same-sex couple, moves into a State that has a Defense of Marriage Act, what the status of that couple will be. Will they be deemed to be married for purposes of, let's say, child obligations, rights to their children? Will there be a right to divorce in that State? Will they—

Senator DURBIN. Has that happened, incidentally?

Governor ROMNEY. There are individuals who moved from Massachusetts to other States.

Senator DURBIN. But has the result that you have just described happened so far?

Governor ROMNEY. Well, as to what the rights of those people are, certainly there is a question as to what the rights of those people will be. We do not know what that will be. Have there been

lawsuits filed? I do not know whether there have been lawsuits filed or not.

Senator DURBIN. Governor, let me just say—

Governor ROMNEY. Senator, there are people who were married in Massachusetts who are moving from Massachusetts to other States. And, therefore—

Senator DURBIN. I do not question that. Let me just say—

Governor ROMNEY. But you asked a question and then you said—

Senator DURBIN. I will give you—

Governor ROMNEY. I am going to finish—

Senator DURBIN. We do filibusters, and I would like to give you an opportunity to—

Chairman HATCH. Well, let him—

Senator DURBIN. —respond, but I would like to say this.

Governor ROMNEY. You said that you did not understand what my position was. My position is very simply—

Senator DURBIN. No, I understand what you have said.

Governor ROMNEY. —marriage is—marriage should be defined as a relationship between a man and a woman, and the only way a State is going to be able to provide that definition within their State is if there is a Federal amendment which indicates that marriages legal in Massachusetts do not have to be imported into their State.

Senator DURBIN. So you do not believe States should define a marriage. You think States should define a marriage as you believe it should be defined. The Defense of Marriage Act is still on the books, never been successfully challenged. It says that your State and mine do not have to—or at least my State does not have to recognize what your State calls a marriage.

Now, let me just say—

Governor ROMNEY. No, I don't—

Senator DURBIN. Please, let me just say, we have a preemptive foreign policy. I don't think we ought to have a preemptive Constitution. And that is what you are arguing for here. We ought to put a provision in the Constitution to preempt the possibility that the Defense of Marriage Act will be found unconstitutional and force on some other State the definition of marriage. And that I think is entirely premature and totally political.

Why aren't we taking the time to see how this plays out in this politically charged atmosphere instead of rushing to judgment to bring an amendment to the floor without Committee markups, without deliberation, to amend the Bill of Rights? We are taking a roller to a Rembrandt, and we do it time and again in this Committee. And I hope that we have the good sense and wisdom on both sides of the aisle to at least stop, catch our breath, and realize that we swore to uphold this Constitution, not to make a mess of it.

Chairman HATCH. Governor Romney, you can answer the question now. His time is well over. And then we will go to Senator Schumer.

Governor ROMNEY. The perspective on this issue I think all relates to how critical you believe the existence of a setting with a mother and a father are to the development of children, and how big the cost you think is of individuals having a mother and a fa-

ther in a family setting. I believe that it is essential in our society to indicate that mothers and fathers are associated with the development and raising of children, and for that reason I believe this is an important matter to come before our country.

There is repeated mention of a small number of amendments to our Constitution, and I cannot imagine amending our Constitution at every turn. It is quite a process. It is a long and laborious process. But if there is ever a time when amendments should be considered, and in my view, adopted, it is when something as fundamental to society as the development of our children and the institution of marriage and family are being redefined by a court in Massachusetts.

Chairman HATCH. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

My questions are two different ones, but they go to the same point, and that is the importance, the heaviness, the weightiness of amending the Constitution, and I am sure you agree with that. You just said that a minute ago. The Founding Fathers set a very high barrier to amending the Constitution, and this Senate has rejected constitutional amendments that might be popular because they do not belong in the Constitution.

Just most recently, there was a big move here a couple of years ago to have a victims' rights constitutional amendment. I believe strongly in victims' rights. I have been one of the leaders in that issue, I believe, when I was in the House and here. But because there was such a consensus, not just among people who have my views, but people who are conservative, that it did not belong in the Constitution, that you could accomplish things by statute. It has been withdrawn.

We have an amendment that we will probably deal with on flag burning. That is another one that people feel strongly about. It is obviously popular, but when the Senate last got that, I was not here. That was rejected too.

I just want to go back to two points here, and I will ask them both and then let you finish. One is, on something as weighty as this, whatever our views are, and obviously they differ, do you think it is a good idea not to have it go through the relevant Subcommittee, not to have it go through the relevant Committee and go right to the floor? I do not know if there is a political timetable or not, and I am less concerned with the political timetable, and I am with the actual timetable. This is a serious amendment to the Constitution. I would argue it is unlike any other amendment we have had. You are talking about family and children. I cannot think of any specific amendment that deals with family or children. That has been something traditionally left to the States in the Constitution.

Let me ask you, do you not think it would be wiser to take a little time here, have this go through the relevant Subcommittee, go through the Committee? Maybe there are arguments against it, maybe there are even arguments for it that have not come up yet.

What is your view of that? You are a chief executive. You work with the legislature all the time. Somehow it seems a little strange that we have said, well, we have to do this in the middle July before we even have a markup in this Committee for a constitutional

amendment, a controversial constitutional amendment, and one I would argue that is different than any other type of constitutional amendment we have had. What do you think of that one?

Then my second question is this: Do you think DOMA is unconstitutional, and if you do—well, do you think it is unconstitutional? Because I just want to follow up on Senator Durbin's argument. There is a principle that has guided this country for 200 and whatever—

Senator KENNEDY. Twenty-eight years.

Senator SCHUMER. Twenty-eight years. Thank you. The senior Senator from Massachusetts knows just about everything including mathematics.

[Laughter.]

Senator SCHUMER. But 228 years. We do not put amendments in the Constitution till something has been declared unconstitutional. So those are my two questions for you.

Governor ROMNEY. Senator, thank you. I would not presume to tell you what process should be pursued.

Senator SCHUMER. Do you think it should be slow and deliberate?

Governor ROMNEY. It depends on the nature of what is at stake.

Senator SCHUMER. For this amendment.

Governor ROMNEY. And what is at stake right now, I believe, relates to the definition of marriage including a man and a woman. I believe that is very important. I must admit that I do not imagine that lengthy hearings and long debates will change a lot of views in Washington. My guess is this is something where people know where they stand without a lot of discussion. So I am not sure that a long and extensive series of hearings and debates is going to change a lot of viewpoints.

Senator SCHUMER. Just to tell you, I think you are wrong on that. On a Whip count that I saw there are 20 members who list themselves as undecided and they may not be the balance here, but they may decide whether there is a majority or not a majority for this amendment.

Governor ROMNEY. For one more reason then, I would not presume to counsel the Senate on what process you pursue in evaluating this process.

Senator SCHUMER. Go to the second one.

Governor ROMNEY. With regards to DOMA, I believe—

Senator SCHUMER. Do you think it is unconstitutional?

Governor ROMNEY. I believe DOMA is constitutional. I also believe that it is very likely that a court in a specific State will find it unconstitutional within their State and that the Federal Circuit Courts and ultimately Supreme Court may well find it unconstitutional. I think it is actually—even if it is constitutional and found by a particular State to be constitutional within its State, then there is a real question about how it applies to someone who moves in from another State that has been legally married, and I believe in that case, that it is going to be very difficult for that marriage not to be recognized under the Full Faith and Credit Clause of the Federal Constitution.

Senator SCHUMER. Are you aware of any State's highest court, Supreme Court, in my State they call it the Court of Appeals, or

any Federal court at any level that has said DOMA is unconstitutional?

Governor ROMNEY. Not yet, no.

Senator SCHUMER. Then why should we have a constitutional amendment when DOMA has not yet even been decided in the courts, and it deals with what you were talking about before, the ability of States to decide these issues within certain confines themselves?

Governor ROMNEY. Recognizing the personal problem in even raising this topic, but let me use it as an example. If my State had begun polygamous marriages and we were providing polygamous marriages right now, I would believe that people would recognize that there was a need to have an immediate constitutional amendment to prevent that. I would certainly support an immediate constitutional amendment to prevent that. I believe the Federal Government and the people of the United States have an interest in having a marriage definition which is consistent across the Nation, on matters of that significance. I believe that was something that was decided a long time ago with regards to a State that had that kind of provision.

Our State is currently—

Senator SCHUMER. There was no constitutional amendment.

Governor ROMNEY. And that was because the Supreme Court found it unconstitutional. The Supreme Court said, no, you cannot do that. If the Federal Supreme Court were to step in and say, "Massachusetts, you are wrong; you cannot have same-sex marriages," we would not need this amendment. But the United States Supreme Court did not step in to do that and did not take the matter forward. It was brought before the Federal courts and was turned away.

Senator SCHUMER. But you are arguing—and I know my time has expired—you are arguing that DOMA is constitutional, but at the same time we ought to pass a constitutional amendment.

Governor ROMNEY. Yes, that's—

Senator SCHUMER. I think the two arguments, one directly contradicts the other, unless you believe we should amend the Constitution willy-nilly before stare decisis rules.

Governor ROMNEY. I guess I am having some difficulty making the point that we are already performing same-sex marriages in Massachusetts. And the issue on marriage is not just will it go to other States, which I believe it will, but is it going to continue in Massachusetts? That is one reason for a constitutional amendment, relates to Massachusetts itself. In addition, whether or not DOMA exists, you will have same-sex marriages from Massachusetts go to other States. And does the DOMA suggest that people legally married in Massachusetts will have their marriage dissolved by going across State lines? I do not think they think that is going to happen.

Chairman HATCH. Senator, your time is up.

You want to make a unanimous consent request?

Senator CORNYN. I do. Thank you, Mr. Chairman.

Briefly, I would like to ask unanimous consent that a copy of the Complaint for Declaratory Judgment and Claim of Unconstitutionality in the case of *Sullivan* v. *Bush*, filed in U.S. District Court,

Southern District of Florida, Miami Division, the relevant portions of that challenging the Defense of Marriage Act on Federal constitutional grounds, citing *Lawrence* v. *Texas* be made part of the record.

Chairman HATCH. Without objection.

We are going to let you go, Governor because we have a vote, but let me just sum up. If I understand you correctly, what you seem to be saying is that the Defense of Marriage Act has been enacted by 40 States. You believe that to be constitutionally sound legislation. So do I.

But you are saying that under the Full Faith and Credit Clause, Article IV of the Constitution, of the original Constitution before the Bill of rights, that it is likely that some State or other States may find DOMA to be unconstitutional, and if it is taken all the way to the Supreme Court of the United States with the current Court, you believe that there is a possibility that the Supreme Court, pursuant to its interpretation of the Full Faith and Credit Clause, Article IV of the original Constitution, may rule DOMA unconstitutional.

Governor ROMNEY. That is correct.

Chairman HATCH. Just so we understand that, almost every constitutional expert I know agrees with you. Now, there are those who do not. We are going to get to Congressman Barr, who will explain this from his perspective. I have a great deal of respect for him, but let me just say this. I personally believe that it is likely that the enactments of 40 States will be thrown out the window because of the enactment of a decision by four Justices, unelected Justices, on the Massachusetts Supreme Court, binding every State and imposing same-sex marriage on every other State through marriages in Massachusetts.

If the Full Faith and Credit Clause is the reason DOMA is thrown out, then that means that every State in the Union will have to recognize marriages performed in Massachusetts. And if we wait for the two or 3 years it may take to have the Supreme Court finally decide this issue on the question of DOMA, even if they would decide it the way you and I might think is more credible, that could take two or 3 years, where we would have a mish-mash in this country, in states throughout the country, who have defined marriage as only between a man and a woman, having to deal with all of the panoply of laws and difficulties of those laws that apply to marriage in this new realm of same-sex marriage.

Have I kind of summed it up?

Governor ROMNEY. I believe you have, Senator.

Chairman HATCH. I think you have done a very good job of expressing yourself on these issues. There are sincere people on both sides of these issues. I personally do not want to see discrimination against anybody, but I do draw the line when it comes to traditional marriage, as you do. I think it is that important, and I think the children are left out of this equation by those who argue the other side.

With that, we will recess until we can get back from the vote, and then we will proceed to Congressman Barr and Congresswoman Musgrave.

[Recess.]

Chairman HATCH. We will begin the latter half of this, and I apologize to both of you for the delay. We had two votes in a row, and that is why the delay.

Former Congressman Bob Barr is a familiar name and face to all of us. He was a Representative from the 7th District of Georgia from 1995 to 2003, where he served on the Judiciary Committee. He has been a good friend, and I appreciate him and have a lot of respect for him.

He now holds the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, and consults on privacy issues with the ACLU, among other activities.

Bob, we welcome you back to Congress. We appreciate you taking time from a busy schedule to be with us today.

Mr. BARR. Thank you, Senator.

Chairman HATCH. We are honored also to have Congresswoman Marilyn Musgrave on this panel. She is the primary sponsor of the Federal Marriage Amendment. Congresswoman Musgrave represents her home State of Colorado. She sits on the House Committees on Agriculture, Small Business, and Education and the Workforce. She is also the mother of four, the grandmother of four. I think I have that right.

Representative MUSGRAVE. Five.

Chairman HATCH. Five now. Ours keep going up too. We are looking for our 22nd now.

Representative MUSGRAVE. Wow.

Chairman HATCH. We welcome you, and we know this has been a difficult issue and a tough issue. We look forward to hearing your testimony. Should we call on you first or second?

Representative MUSGRAVE. First if you would, sir.

Chairman HATCH. We will call on you first.

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

Representative MUSGRAVE. Thank you, Mr. Chairman.

Chairman Hatch, Ranking Member Leahy, and other distinguished members of the Judiciary Committee, thank you for the privilege to come before you today.

The Declaration of Independence states that all are created equal and endowed by their Creator with certain unalienable rights, including life, liberty and the pursuit of happiness. The very foundational document of our Nation assumes that our rights exist within the context of God's created order. The self-evident differences and complementary design of men and women are part of the created order. We were created as male and female, and for this reason a man will leave his father and mother and be joined with his wife, and the two shall become one in the mystical, spiritual, physical union we call marriage.

The self-evident biological fact that men and women are designed to complement one another is the reason that until recently, for the entire history of mankind, in all societies, at all times and in all places, marriage has been a relationship between persons of the opposite sex. In a very real sense it is impossible for a man to marry a man or a woman to marry a woman. The very meaning of the

word "marriage" necessarily contemplates a relationship between a man and a woman.

For nearly 228 years every State in the Union has followed this millennia old tradition. Not once in the history of this Nation have the people, speaking through their elected representatives or otherwise, passed a single law altering this tradition in the slightest way.

If this is the case, why is the Federal Marriage Amendment necessary? Sadly, the answer to that question lies in the fact that certain judges do not seem to care about the text and structure of the Constitution or the unbroken history and traditions of our Nation. Instead, they seek to use their power to interpret the Constitution as a means of advancing a social revolution, unsought and unwanted by the American people.

Senator Allard and I have introduced the Federal Marriage Amendment to stop this judicial activism and preserve the right of self-determination for the American people with respect to vitally important laws governing marriage, the most important and basic of all of our social institutions.

Some opponents of the Federal Marriage Amendment charge that it is a violation of the principles of federalism. Mr. Chairman, I am a strong supporter of federalism and I would not support, far less sponsor, this amendment if that charge was true. It is not.

To say that the States are sovereign unless the Constitution says otherwise says nothing about when the Constitution should in fact say otherwise.

Certain moral propositions are so fundamental that they deserve to be protected by our fundamental law when they come under attack. One such moral proposition is that marriage is a sacred institution designed by the Creator as the union of a man and a woman. This moral proposition, indeed civil marriage itself, is under attack in this country. Therefore, one instance in which the Constitution should "say otherwise" is to prevent unelected, unaccountable judicial activists from legislating from the bench a social revolution unsought and unwanted by the American people that will radically redefine our most basic and important social institution.

In the 1996 case of *Romer* v. *Evans* the United States Supreme Court stripped away from the States their power to prevent their own political subdivisions from enacting special civil rights protections for homosexuals. Then 1 year ago, in *Lawrence* v. *Texas*, the Supreme Court reversed its own precedent and took away from the States their power to regulate homosexual sodomy. In *Lawrence* five members of the Supreme Court stated that persons in a homosexual relationship may seek personal autonomy, just as heterosexuals do, with regard to marriage, procreation, contraception, family relationships, child rearing and education.

Given the clear trajectory of the Supreme Court's jurisprudence in this area, it is truly ironic that some oppose the Federal Marriage Amendment on the grounds that it would nationalize the definition of marriage, because a national definition of marriage is exactly what the activists on our courts are on the verge of achieving.

It is therefore no answer to say that marriage has always been a State issue. The service has already taken some aspects of this

issue away from the States and doubtless will take away others in the near future. Therefore, leaving this matter in the hands of the States where it has always been is no longer an option that is open to us.

As I testified last month in the House, the Constitution of the United States of America is about to be amended. The only choice we have in the matter is whether it will be amended de jure, through the democratic process for proposing and ratifying amendments that have been set forth in Article V of the Constitution itself, or de factor by judicial fiat.

Some have said it would cheapen the sacrosanct nature of the Constitution to treat it as a place to impose publicly contested social policies. Some seem to believe that States should always be free to create their own solutions with respect to any matter concerning a publicly contested social policy. Fortunately, this position is supported by neither the history, text or structure of the Constitution, nor the traditions and character of the American people.

If being publicly contested prevented a social policy from being enshrined in the Constitution, the Constitution would have never been amended at all, much less 27 times. We all know sufficient minorities thought that each State should be able to decide for itself whether black people or women should be allowed to vote, but we ratified the 15th and 19th Amendments anyway. This was not only a phenomenon in the 19th century either. Within the living memory of most of the people in this room, a significant minority of Americans though that each State should be free to impose a poll tax as an obstacle to voting by poor people, but that did not prevent us from ratifying the 24th Amendment in 1964.

But of course, the 13th Amendment to outlaw slavery is the quintessential example of a social policy that was enshrined in the Constitution after a rather intense public contest. At the end of the day the American people decided that slavery was so antithetical to our National character it could no longer be tolerated. Therefore, we amended our fundamental national charter to forever eradicate the institution of legal human bondage in this Nation.

Similarly, same-sex marriage is antithetical to our National character. It goes without saying that for thousands of years of human history until recently marriage has at all times and in all places been reserved as a union between male and female. In the American experience, from the beginning of the Republic until last month, there has never been a same-sex marriage. Even then it took four members of a lawless court to impose a same-sex marriage on the people. The people of Massachusetts did not seek such a law, and they do not want it.

Traditional marriage as the union of a man and a woman is a fundamental aspect of the American national ethos. Indeed, it is so fundamental that there would be no need for a constitutional amendment at all if it were not for the officious meddling of judicial activists, who used their position on the bench as a place to engage in moral preening, and who used their power to interpret the Constitution, not to uphold the law, but to undermine it by imposing their policy choices on the poor benighted masses who disagree with their vision of radical social engineering.

The purpose of the Federal Marriage Amendment is to give the people a change to take their country back. With the FMA the people have an opportunity to say to their would-be masters on the bench, "No, you shall not take away the institution of marriage from us." And a vote against the FMA in the Congress is a vote to deny that opportunity to the people.

The Federal Defense of Marriage Act became law on September 21st, 1996. Only four month earlier, on May 20th, 1996, the United States Supreme Court began planting the seeds for undermining the law when it issued its opinion in *Romer* v. *Evans*, and with last year's decision in Lawrence v, Texas, there can be little doubt that the Court is now poised to reap the harvest and impose full-blown same-sex marriage on the Nation.

In a publicly declared strategy, homosexual activists intend to use *Lawrence* and *Goodridge* decisions as the basis for a nationwide attack on traditional marriage. Already homosexual couples from more than 27 States have been married in Massachusetts and the first wave of lawsuits has already begun. Based on the recent trajectory of Supreme Court cases discussed at length in my written testimony, it is very likely that the Supreme Court will strike a State or Federal Defense of Marriage Act down as unconstitutional.

In a recent Newsweek interview, Representative Barr acknowledged that State courts are thumbing their noses at the law in a way that no one anticipated in 1996 when DOMA was enacted. Inexplicably, however, he believes things are different in the Federal Courts and there is no need to, "presume that the Defense of Marriage Act will be held not to be constitutional."

The legal landscape has changed radically since 1996, not only in the State courts but also in the Federal courts. For example, in 1996 the *Bowers* decision remained firmly in place, but only eight short years later the Supreme Court surprised almost all court watchers when it overruled *Bowers* in *Lawrence*.

Even more importantly, five members of the Court have already stated that homosexuals have the right to personal autonomy when it comes to decisions involving marriage.

It seems odd to me that we would not take them at their word. I, for one, believe that when they say they are about to impose same-sex marriage on this Nation, and I urge you to believe them also, and act accordingly.

A Federal Marriage Amendment is the only way left to preserve the marriage policy that the States clearly want from a Judiciary not willing to reserve legislating to those of us in Congress.

Thank you, Mr. Chairman.

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

Chairman HATCH. Thank you, Congresswoman. We appreciate you taking time to come over and be with us today, and we appreciate the courage that you have in handling this matter. I know you have to get back, but we appreciate you coming.

Representative Barr, we turn to you now.

STATEMENT OF BOB BARR, FORMER U.S. REPRESENTATIVE, AND 21ST CENTURY LIBERTIES CHAIR FOR FREEDOM AND PRIVACY, AMERICAN CONSERVATIVE UNION, SMYRNA, GEORGIA

Mr. BARR. Thank you very much, Mr. Chairman. I appreciate being here before the Committee. I enjoyed very much listening to Governor Romney's testimony and the questions and commentary, eloquent as always, from all members of the Committee on both sides, and always learn something from it. So I appreciate both the invitation to sit in on the previous testimony, as well as to be here now.

Might I ask, Mr. Chairman, that my written testimony, which I will not read entirely, be placed in the record?

Chairman HATCH. Without objection, we will do that.

Mr. BARR. Thank you. If I might, with your permission, Mr. Chairman, then, basically limit my preliminary remarks to addressing a couple of the issues that certainly seem very appropriately to be on the Chairman's mind and the mind of members of the Committee.

First and foremost is the issue of the Defense of Marriage Act which I suspect is one of the reasons, if not perhaps the primary reason, why my presence was requested here today, having been the primary author and sponsor of the Defense of Marriage Act back in 1996.

The Full Faith and Credit Clause of the Constitution, which was the basis on which we proposed and enacted the Defense of Marriage Act makes very clear by its terms, as I know all members of this Committee are aware of, that Congress has specific constitutional authority to define the parameters of the Full Faith and Credit Clause. I think that is important to keep in mind, even though, of course, as Representative Musgrave just indicated, none of us ever know what the Supreme Court is going to decide. That is painfully obvious to a lot of us almost every term of the Supreme Court.

But I do think, Mr. Chairman, that presuming at this point, preemptively, as Senator Durbin said, to use his word, that the courts will in fact strike down a very narrowly drafted and very carefully construed statute law passed by this Congress and signed by a former President is untimely, if not unseemly.

I do think that the Defense of Marriage Act, which as the Chairman perhaps I'm sure recalls, was the subject of very significant debate back in 1996, and there were a lot of members, certainly in the House side on our side of the aisle, that wished to have the Defense of Marriage Act amended from the way we proposed it, to a proactive piece of legislation that told the States what to do. We resisted that based on principles of federalism and based on the fact that it was not necessary, given what was likely to happen at that time in Hawaii, which is what has now happened in the Commonwealth of Massachusetts.

But we drafted the Defense of Marriage Act, resisting those pressures, very narrowly to simply define, strictly speaking for Federal law purposes what marriage is, that is it will continue to mean for Federal law purposes the union between a man and a woman, and in the specific exercise of the specific power under the Full Faith

and Credit for the Congress to—or granted to the Congress by our founding document to define the Full Faith and Credit Clause, we defined it so that it provided that federalist protection for each State to refuse to recognize, if it so desired, a same-sex union from another State.

Now I know the Chairman has indicated that in his view the statute, the Defense of Marriage Act, is not likely to withstand constitutional challenge, and I know he is joined in that view by some very, very eloquent and very learned jurists, far more learned than I am. Robert Bork I know feels the same way. I was at a conference with Judge Bork just several weeks ago. But I do that the Defense of Marriage Act is a sound piece of legislation, and I do not think it would be appropriate, through a constitutional amendment, to leapfrog over that process, and leapfrog over a duly passed piece of legislation signed by a President into law simply because we are dealing here with—and I certainly agree that this is a very important issue.

So I think that we ought to allow the normal course of events to proceed. If in fact the Defense of Marriage Act I struck down as unconstitutional, which I do not think it will be because it is very narrowly and specifically crafted, then at that time certainly it would be appropriate for this Committee and for its counterpart on the House side to look at remedies.

I also believe though that if in fact the Defense of Marriage Act is struck down as unconstitutional, the problems that we face in this country go far deeper than simply a constitutional amendment. It would indicate I think a serious problem with the respect for law in this country by our court system. It would indicate perhaps that we do have a very, very serious problem in our society defining fundamental social relationships, and at that point I think we would be beyond a point at which even a constitutional amendment would rectify the situation. We would have a very fundamental problem in our society.

Chairman HATCH. Could I just interrupt you on that point because it is a crucial point. That is what I am worried about, is that if we are wrong and a couple of years from now DOMA is overturned, we are going to be in a heck of a mess. This is one of the things that concerns me because it seems to me that it is going to be too late because you will have gay marriages all over the country, in virtually every State, and it is going to be very, very difficult at that particular point for any court or anybody to be able to rectify or resolve the situation.

I did not mean to interrupt you, but just on that point, I just want to get your viewpoint on it because I am concerned that, let us say you are wrong, that—and I agree with you that DOMA has been carefully crafted. It is narrowly crafted. I believed it to be constitutional as did Governor Romney, but let us say that we are wrong and that the Supreme Court—and I personally believe the current Supreme Court is likely to overrule it under the Full Faith and Credit Clause, but that is going to be certainly years away unless there is some way of making this a rapid consideration, and I do not see that as an easy way. Then those who believe that traditional marriage must be preserved for the benefit of children and society as a whole, I mean their arguments are going to just be

completely gone down the drain and they will be too late. That is one of the things I kind of want you to address, and you are doing that.

I should not have interrupted you, but I just feel like that is what worries me, the argument that it is premature to do anything about this because DOMA's on the books, and maybe the other States will not have to conform to the Massachusetts decision. What if they do? What if DOMA is overturned two or 3 years from now? This will all be mush. I mean there will not be any way you can change the situation, and we will have a major sea change in societal sociology in folkways and mores that you just will never be able to get back to what I think the majority of people in this society believe, according to all polls that I have read, is essential to our society. I am trying to put that in articulate terms. I have not done a very good job, but respecting you as I do, I would like to just, as part of your address here today, address that as well, because I am concerned about it.

Mr. BARR. I do not know whether that genie is already out of the bottle, Senator.

Chairman HATCH. It may be. But the point is, if it is already out of the bottle, then there has to be at least a monumental effort by those who believe contrary—let us put it this way—by those who believe in traditional marriage, there has to be a monumental effort to try and solve this problem now, not 2 years from now, or two-and-a-half years when Massachusetts may very well say that constitutionally that court was wrong. I doubt that they will do that at that point because it will be too late.

Mr. BARR. I share the Senator's concern, as I shared the concerns as Governor Romney spoke, and Representative Musgrave. I am not a supporter of same-sex marriage, and I believe that the fundamental building block of our society and all civilized society is the family, and that is why it pains me greatly to see what is happening in our society with the move to cheapen marriage from the standpoint of redefining it essentially out of existence. I share the Chairman's concern and the concerns I suspect of all members of the Committee.

But I also have tremendous regard for our system of Government and our system, both the substance of the system and the process of the system, whereby Congress enacts laws, and we addressed these questions eight year ago. Granted the one thing that has changed now is in 1996 we were faced with the likelihood that the State of Hawaii would do what Massachusetts has now done, so that certainly is different. But what has changed in the interim? What has changed in the interim is there has been a move taking hold in our society, notwithstanding the very strong majority view against it to create this creature called a same-sex union. But I just do not think that we ought to throw out the constitutional bath water, so to speak, in order to—because there is a possibility that a statute might be held unconstitutional, to change what really has always been the highest regard that this body and that the people of this country have for the Constitution, which is why it has been amended so few times

Notwithstanding all that, Mr. Chairman, I do not see a great rush by the States to adopt or to jump on the bandwagon, small

as it might be, that the Commonwealth of Massachusetts court system has put together, cobbled together here. As a matter of fact, I see the country going from a legal standpoint in the opposite direction. States are in the process of protecting themselves against the possibility of what has happened in Massachusetts coming into their States. The vast majority of States have—Georgia just recently, in this past legislative session, passed a proposed constitutional amendment to make absolutely certain that the people of Georgia are on record as defining marriage as the lawful union between a man and a woman. Other States are doing the same.

That is really ultimately, whether we have a constitutional amendment or not, that is all that we can do, is work at the community, at the family, at the grass roots level to ensure that we who believe in a particular viewpoint, have done all that we have done to shore up our system of Government to protect those rights, and from that standpoint a constitutional amendment is not necessarily going to change anything.

I do think that the particular language of the constitutional proposal before this body does raise questions that were somewhat difficult for Governor Romney, obviously, to answer, because at a minimum the language of the proposal would raise the question about whether or not Massachusetts would be prohibited from doing what it is proposing to do in its constitutional process. Whether or not that ultimately will be the case, none of us here know, but at a minimum I think one cannot help but look at the language of the two amendments, the Massachusetts proposal and the Federal Marriage Amendment proposal and not see a conflict there. I think there inherently is.

Finally, Mr. Chairman, with the tremendous respect that I have for this Committee as its counterpart in the House, I would strongly urge the Committee to not allow itself to be bypassed in any manner of speaking, to hold hearings, to hold markups, whatever is necessary on this important proposal. Times in the pst when either the Senate and/or the House have seen fit to rush something through without full and deliberate consideration by particularly the Judiciary Committees, regardless of whether or not one supports a proposal—and I have in mind, for example, the PATRIOT Act—it causes problems that perhaps could have been resolved or avoided by taking a more deliberative approach, and I think that this proposal cannot help but benefit from having that deliberative look by this Committee. That is what this Committee is here for, to protect that constitutional process, and I would strongly urge the Committee to do that.

And also not allow this Congress to be used by the Governor of any State, whether it is Massachusetts or any State, to protect himself or herself or themselves. It is almost as it the Governor is saying, protect us from ourselves. Step in here and protect us, like the bumper sticker, "stop me before I shoot somebody."

There is a process at work in Massachusetts. Granted the courts, I agree with the Governor, the courts in Massachusetts have gone beyond what ought to be their mandate, but there is a process in Massachusetts, cumbersome as it might be, to address that, and I do not think that this body ought to, the Congress generally, ought

to allow itself to be used to step in and be used by a Governor to protect that Governor or that State from itself.

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

Chairman HATCH. I appreciate your comments. I did not interpret Governor Romney's comments that way. I believe what he is saying is that we have had a four-to-three decision by four liberal Justices, who are not elected but appointed, and that binds our whole State, even though our State probably would not, if the people had a say in the matter, would not go that direction. I have been interested in the comments of our colleagues on the other side of this table. They keep saying that, well, the people ought to make this decision, as though the four Justices on the Massachusetts Supreme Court are the people. They are not the people. They should not be making law.

Senator Kennedy I think was probably the most honest about this issue because he basically said that many times the courts have to make the laws. Well, that is not the way our system is set up, although there have been cases where, like *Brown* v. *Board of Education*, where I think they could have written the opinion in a much better way to accomplish what they did within the law, rather than, as some think, make the law, but nobody would disagree with that opinion.

On the other hand, many of our friends on the other side, and even some on our side from time to time, love to have the courts do for them that which they could never get through the elected representatives of the people. In this particular case, as your experience shows with DOMA with 40 States basically approving it, I doubt that they could get this change in the law of marriage away from traditional marriage to same-sex marriage. I doubt that they could get that in any State in the union through the elected representatives of the people. So they are counting on unelected judges to do this for them, and that is what bothers me.

As you are more than well aware, as one of the original cosponsors of the Defense of Marriage Act, that was inspired by one State's decision, Hawaii, its legal recognition of same-sex marriage, and its possible effect on the laws of other States. Today it is Massachusetts. Back then of course it was Hawaii. During that debate you said the following, quote: "For those who say it is just a hypothetical issue, look here, many same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country, expecting full legal recognition of their unions. That is their plan. They are bent on carrying it out. I kid you not, they will try to do it. That is of course what is a major concern for Governor Romney as well, and I think every other Governor in this country."

My question would be, haven't these same groups that advocated judicially imposed same-sex marriage first in Hawaii and now Massachusetts, now made it part of their plan to bring legal challenges against DOMA? What will happen if part of this plan, a court strikes down DOMA, and I do not think even you doubt that there will be some courts on the circuit level that would strike down DOMA—take the Ninth Circuit, just for an illustration—what if

that happens, as so many legal scholars are predicting, that we then have DOMA stricken down as unconstitutional, and it is already being challenged in the courts right now, and the current Supreme Court, which probably will decide this issue, with its current makeup, Judge Bork may be right, decides that the Ninth Circuit Court of Appeals or whatever circuit it is that strikes it down is correct? That is going to happen years later, or at least many, many months later, and it may be almost impossible to rectify the situation, especially in the eyes of those who do not want to see traditional marriage overthrown just by four Justices in Massachusetts?

And to add to that, if the current Supreme Court hears this case, let us say in the next year, let us say we are lucky and we can get it up, and they decide that Article IV of the Constitution really does apply, but the Full Faith and Credit Clause mandates that they overturn what 40 States, you and I and the vast majority of Congress have said is constitutional, and they overturn that, will it not be almost impossible to ever return to traditional marriage by then? I mean these are some of the issues that worry me. They worry Governor Romney. I think he made a very articulate case here today about his worries, while still saying that he believes there are ways we could resolve some of the problems of gay people in a good fashion that would give them rights that currently many States do not grant?

Mr. BARR. These are very worrisome, and I share the Chairman's and the Governor's worries about these challenges to the fundamental social fabric of our Nation. But again, I do have very strong faith that the people of this country will find a way to address that.

First of all, I still believe that even though with as many Federal Courts as we have and as many Federal judges in those Federal Courts as we have around the country, with as many viewpoints expressed among those judges as we have, certainly there is a chance that in terms of forum shopping, a judge and consequently a panel of Federal judges could find the Defense of Marriage Act to be unconstitutional.

I do not think that is going to be the case at least initially. I do think that the courts will find it constitutional, but if not, even in the case of Massachusetts, again, even though it is a cumbersome process, as the Federal process is. I mean, this Federal process, even if the proposal before this Committee and its counterpart in the House comes before both bodies before the end of this session of the Congress, one, I do not know what the odds are of it passing. I certainly have not done and am not privy to any Whip counts, but as I understand it, the support probably is not there to pass them by the requisite constitutionally mandated majorities, and then one would have probably several years at least before the State process could work its will.

So the bottom line is, Mr. Chairman, any way we cut this, there is going to be some water under the bridge by the time it is resolved one way or the other. But I do think that the people of the States, as the people of Massachusetts are doing, and if in fact we had some opinion out in California, which I agree with the Chairman is certainly a likely forum whereby such an opinion could come from, I think that the people of those States will not simply

stand idly by and let this sort of thing be rammed down their throats. I do think that the people will make their voice heard, again, regardless of whether we try and force the issue through a constitutional amendment.

Chairman HATCH. What worries me is that—you have argued that marriage is a quintessential State issue, and I have too. And for that reason at the time you rejected proposals to prohibit same-sex marriage back in 1996. But knowing that the liberal, legal establishment and their friends in the Judiciary believe that DOMA is unconstitutional, as they have said lately, very outspoken about it.

Would it not be the height of legislative irresponsibility to wait until that day comes, rather than acting now to secure the people's will in the States? We know what the people's will is. Every poll tells us that, and DOMA is the people's will. They have acted in 40 States, and I believe that we would get the other 10 States as well over time. Furthermore, is it not difficult to argue that a Federal constitutional amendment tramples States' rights when three-quarters of the State legislatures will ultimately have to ratify that amendment?

Just having raised those issues, let me make one comment. I believe that if a constitutional amendment would pass preserving traditional marriage as between a man and a woman, I believe that would be one of the most quickly ratified amendments in history. I do not think it would take a lot of time. I believe virtually every State would ratify that amendment.

Now, that is a lot of questions and a lot of statements by me, but I think what worries a lot of us is that if we do not handle this right, we are going to wind up with a societal change that is detrimental to children, detrimental to families, and may even be detrimental to everybody, imposed by, in essence, four liberal Justices on the Massachusetts Supreme Court in a four-to-three decision. I have raised enough issues. I did not mean to give you too much here to chew on, but those are some of the concerns I have.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman, for your—

Chairman HATCH. If you will forgive me, Bob, I have got to leave, and Senator Sessions will close the meeting down.

Senator SESSIONS. Thank you.

Mr. BARR. Thank you, Chairman.

Senator SESSIONS. You know, our colleagues raise a question of tolerance, and I think we should think through that question. Is this amendment an intolerant amendment if it were to be passed? I reject that because I believe it simply provides a guarantee that States can provide an affirmative support to a marriage that the State defines as one that involves families. I think you personally agree with that philosophy, as you stated, Mr. Barr.

Mr. BARR. I do.

Senator SESSIONS. I do not think that is intolerant at all. I do not believe tolerance is the question at all.

Some have suggested, and we have begin hearing a little talk about, politics. It is the political season, and we ought not to bring it up because it has something to do with the people and what the people want. But we did not pick the time of this. And, Mr. Barr,

you have complained that we might be moving too fast, and my colleagues on the other side are saying we spent too much time on it. We have had four hearings in the Judiciary Committee on this question, and three in other committees dealing with marriage. So we have had seven hearings, and everybody knows it is out there, and they have been thinking about it and wrestling with it and asking themselves what to do.

And, frankly, what is wrong with letting the people be engaged? What is wrong with having politicians go before the electorate this year and announce to them where they stand on this issue? That is what America is all about. People are held accountable. What is really disturbing, what I really am troubled by is unelected lifetime appointed judges setting public policy, who are not accountable to the people, who are not held accountable in any way, yet they can alter the established social policy of America. No legislature, no State, Mr. Barr, since the founding of this Republic, has ever voted to define marriage other than between a man and a woman, and I think you are concerned about that.

Let me ask this. With regard to the debate that is going on in Massachusetts, are you prepared to say whether you personally support the amendment introduced by the Massachusetts legislature to reverse the decision of the Massachusetts Supreme Judicial Court with regard to marriage?

Mr. BARR. Certainly not being from the Commonwealth of Massachusetts, but the great State of Georgia, it is not my position to tell them, but I would agree very much with the Senator from Alabama that what the Court in Massachusetts has done is improper. They are setting social policy outside the parameters or the purpose for having the court system there in the first place. And I would agree wholeheartedly aside from the specific language of the amendment, that the people of Massachusetts, if in fact appears to be the case, disagree with what the court has done, then absolutely they ought to move forward with the process in their State, and insofar as my opinion might mean anything, I would wholeheartedly support them in that.

Senator SESSIONS. I think that is the proper action for the people, if they are concerned about the rulings of courts, especially when rulings deal with the reinterpretation of the meaning of the Constitution. The Massachusetts Supreme Judicial Court declared that the Constitution's Equal Protection or Due Process Clause override the State legislature's decision about marriage. They just declared it so. They said that is what the Constitution said, whereas you and I know when that clause or that amendment was adopted nobody ever gave a thought to the idea that it might overrule the definition of marriage established by the legislature. So that is the frustrating thing here, and I do believe that the American people deserve an opportunity to speak on the issue. And if we do not give them that opportunity through this amendment, we have denied them the power of democracy.

I am going to follow up a little bit more, and I will let you go to the question I think we will be getting to, which is the question of the Federal side of it.

Mr. Barr, if the Supreme Court of the United States, five members of that nine-member court, were to rule that same-sex mar-

riage is protected and guaranteed under the Equal Protection Clause or Due Process Clause of the Constitution, the State constitutions and DOMA would fall; is that correct?

Mr. BARR. The Defense of Marriage Act, yes, because the only way that the Court could reach the decision that the Senator has just indicated would be to find the Defense of Marriage Act unconstitutional.

Senator SESSIONS. And any constitutional amendment that the people of the State of Massachusetts or any other States dutifully pass according to their complex procedures for amending their constitutions, would be wiped out also, would it not?

Mr. BARR. But does the Senator—

Senator SESSIONS. As the Federal Constitution protection—

Mr. BARR. Does the Senator really believe that the Supreme Court is going to find that? I would think that, understanding the Supreme Court as we do, and recognizing that we can never tell in advance what they are going to decide or where they are going to be coming from, it would seem to me that even if one presumes that the Defense of Marriage Act is going to be found unconstitutional, which I do not concede, why does the Senator think that they would find it unconstitutional with such a broad ruling? I do not think they would do that.

Senator SESSIONS. I am amazed that the Court seems to be moving in that direction, but my question to you was—and I do not think you dispute it—that if the Supreme Court found a constitutional equal protection right in the Federal Constitution to same-sex marriage, it would trump any State constitutional amendment, and it would be the law of the land.

Mr. BARR. I mean the way the Senator set up the question, yes, he is right. Again, I do not see the courts, this particular court, in any reasonable interpretation of where these judges are coming from, and I know it is difficult sometimes, that they would reach that broad a ruling if they were going to find the Defense of Marriage Act unconstitutional—

Senator SESSIONS. I think this is—

Mr. BARR. —and they would do it on much narrower grounds.

Senator SESSIONS. I think this is part of what we need to think about.

Mr. BARR. I agree we do need to think about it.

Senator SESSIONS. A lot of people in this Senate do not think, cannot believe, cannot comprehend that the Supreme Court would do this, but a Massachusetts court has done it, and look what they said in *Lawrence* v. *Texas*, Mr. Barr. This is what the Supreme Court of the United States, the Majority of that Court wrote in *Lawrence* v. *Texas*: "Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."

The Court went on to classify these decisions as being part of the "liberty protected by the Due Process Clause."

And then the Court held this. This is the majority of the U.S. Supreme Court: "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Then they did note, but this is not much of a caveat in my view, that *Lawrence* "does not involve whether the Government must give for-

mal recognition to any relationship that homosexual persons seek to enter."

So they said we are not deciding that, this case does not involve that. But the principle that they set is very troubling, and in fact, Justice Scalia, in his dissent, noted this: "This case does not involve the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."

In other words, he says sheer principle and logic of the language of the Supreme Court, even though marriage was not before it, clearly indicates where they are going to come out in the end.

Would you disagree with that?

Mr. BARR. No, I do not, and I always find it difficult and troubling to disagree with somebody as smart as Justice Scalia, and I know I do at my own risk. But I think the grounds on which the Court rendered its decision in *Lawrence* v. *Texas* were much narrower. Granted, there is general language, and I disagree with a lot of the language in the opinion that brought in foreign precedent and policy, public policies of other countries. That indeed is troubling. But I think—

Senator SESSIONS. That is really weird, is it not?

Mr. BARR. I mean it is completely irrelevant for one thing, and so in that standpoint, yes, it was kind of weird.

But I think the basis on which the majority ultimately rendered its decision was one that has very strong conservative constitutional basis, and that is the privacy, and that is different from the issue of marriage, and that is why I think the notation that the Senator was referring to is an important one. I do not think it is a minor one. I think it is an important one because it makes the decision in *Lawrence* very, very different from one that would go to the issue of marriage. I do not think that upholding the constitutionality of homosexual or same-sex marriage follows from Lawrence. I think they were two very different categories.

Senator SESSIONS. I just read you their own language, Mr. Barr. I just read you their own language. And Justice Scalia says it does, and he went on to say, he does not see a "justification. . . for denying 'the benefits of marriage to homosexual couples exercising the liberty protected by the Constitution,'" in their decision.

So I think at best we can say that the traditional definition of marriage is in jeopardy by a majority of the Supreme Court of the United States. I do not see how we can argue it any other way. I believe the American people have an opportunity now, if we give it to them, to have their will be heard. And I know you are concerned about States' rights, and I read written remarks that you made a part of the record carefully, and clearly, this is Federal intervention overruling State actions. Any constitutional amendment that would be passed by three-fourths of the States, maybe all of the States, as Senator Hatch said, would in fact allow them to define marriage as they have always defined it. I do not see how there is anything wrong with that. I think it would be healthy for the Supreme Court to know the American people are not going to be run over, that they have values and ideas too, that they are not forming those based on what the European Union thinks, and that they are going to have an opportunity to vote on it. If they choose

not to vote on it, then so be it. That is the way the system works. But the States vote to confirm a constitutional amendment, and an overwhelming vote is required in the Congress.

Mr. Barr, a vote is going on, and you know how that can mess us up. And I would love to spend some more time with you because I respect you, but I think really that you have your libertarian hat on when you need to be thinking about the American people, where they are on this issue, and that the net result of all this is that the courts, if allowed to continue, will alter the historic definition of the fundamental social entity in this country. That is the family, and it is something that the American people, I think, have a right to be heard on. I do not believe the Founders ever considered the Due Process Clause or the Equal Protection Clause would put us in this position.

The record will remain open for 7 days if you have any additional comments. And if you have a brief comment now, since I have hogged the time, I will give you a chance to sum up.

Mr. BARR. Certainly mindful of the Senator's duty on the floor, I do not want to take a lot more time. I simply would say that the Senator's arguments, as eloquent as they are, flow from a premise that I still do not accept, and that is the strength and constitutionality of the Defense of Marriage Act. I understand the Court's decision in *Lawrence*. I think there was a lot of dicta in that decision. I think that Justice Scalia, to some extent, was sort of venting his frustration and giving us his personal view of something, but I think there is—if and when, and certainly a case involving the Defense of Marriage Act will get to the Supreme Court probably as early as a year from now in its fall term, to be decided next year. I do think that the law that the Senator voted for and I voted for when last faced legislatively with this issue back in 1996, is a sound law. I just do not understand why so many people up here who voted for it and who understood it, and we made these arguments 8 years ago, have so little faith in this law.

Senator SESSIONS. A majority of the Massachusetts Supreme Judicial Court has declared that the constitution of their State, which I believe uses the same language as the Federal Constitution on this issue, overrides the statute, and the Supreme Court in *Lawrence* has indicated they agree with that. That is the problem, and I agree with Senator Hatch. If we end up having to start a constitutional amendment after the Supreme Court rule, we will go years of creating relationships that would have to be undone, and besides, what is wrong with the American people passing this? I see it as no threat to our liberties and—

Mr. BARR. I think we have a process. Congress has passed a law here. We voted for it. I think it is a sound law, and if in fact—and the Senator may very well be right, that whenever—if and whenever a Federal Marriage Amendment is presented to the States, they may move it forward very, very quickly, that I presume would not change the Senator's view of that. Nor would the reality if in fact the Federal Marriage Amendment is presented on a more timely basis, and that is if in fact the Defense of Marriage Act is found unconstitutional, I mean it would move forward, I presume, just as quickly if not more quickly then.

Senator SESSIONS. I do not agree with that. I think there are a lot of complications, as Senator Hatch indicated.

Thank you for your contribution to your country and your courage on many issues of importance facing our Nation. You have always been frank and outspoken, and we appreciate that. My time is out on this vote, so I had better hurry.

Mr. BARR. Thank you, Senator.

Senator SESSIONS. We are adjourned.

[Whereupon, at 12:58 p.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

EXTENDED TESTIMONY OF U.S. REPRESENTATIVE MARILYN MUSGRAVE
"Preserving Traditional Marriage: A View from the States"
United States Senate Judiciary Committee
Tuesday, June 22, 2004
Dirksen Senate Office Building Room 226

Senator Durbin Question One:

1. In your testimony, you wrote that "certain judges do not seem to care about the text and structure of the Constitution" and that "there can be little doubt that the court is now poised to...impose full-blown same-sex marriage on the nation." At the same time, you note that the outcome to legal challenges to the Defense of Marriage Act is "far from certain." The Constitution has been amended only 17 times since the Bill of Rights was adopted. The Supreme Court—and indeed no federal court—has ruled on the issue of same-sex marriage.

   Wouldn't this be the first time we amended the Constitution in response to a state court decision? Why do you believe it would be appropriate to amend the Constitution preemptively, before federal courts have ruled in this matter?

Rep. Musgrave Answer to Question One:

I do not lightly propose to amend the Constitution, because simple prudence dictates the Constitution should be amended only as a last resort. Indeed, I wish devoutly that the Federal Marriage Amendment ("FMA") were unnecessary. Unfortunately, leaving the Constitution unaltered is not an option that is open to us. For better or ill the Constitution is on the verge of being amended, and the only choice we have in the matter is whether it will be amended *de jure* through the democratic process for proposing and ratifying amendments set forth in Article V of the Constitution itself, or *de facto* by court ruling.

The question, therefore, rests on an unsound premise – i.e., that if we do not act the Constitution will be left unamended. This is plainly not the case. The trajectory of the courts' decisions is unmistakable. It appears clear that certain American Court have embarked upon a campaign to force same-sex marriage upon an unwilling American public. The Court's campaign began with the case of *Romer v. Evans* and continued in *Lawrence v. Texas*, and the Court is unlikely to stop until it has imposed full-fledged same-sex marriage on the entire nation. As Justice Scalia explained in his dissent in *Lawrence v. Texas*:

> [T]he Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' . . . Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to 'personal decisions relating to *marriage*, procreation, contraception, family relationships, child

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> rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do . . . 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. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples[?]

Only five months after *Lawrence* the Massachusetts Supreme Judicial Court answered Justice Scalia's poignant question. In *Goodridge v. Dept. of Public Health*, relying in part on the *Lawrence* ruling, the Massachusetts court decreed by judicial fiat that for the first time in the history of this nation a state will be required to issue marriage licenses to same-sex couples.

In summary, therefore, only by willfully closing our eyes to the courts' clear intent to force a redefinition of marriage on the American people can we fail to see the clear and present danger to our Constitutional order. This clear and present danger is why we must reluctantly act to amend the Constitution now. It is far better to prevent the harm from occurring than trying to repair the harm after the fact.

Senator Durbin Question Two:

2. Over the past decade, constitutional amendments relating to a balanced budget, term limits, flag desecration, and victims rights have all been considered by the Judiciary Committee prior to receiving floor consideration. The only amendments that received a floor vote without first being marked up in Committee were Sen. Hollings' proposed constitutional amendments regarding campaign finance, which were discharged from the Committee by unanimous consent so they could be debated on the floor during debate on campaign finance reform legislation. With this history in mind, all nine Democratic members of the Senate Judiciary Committee sent a letter to Chairman Hatch, asking that the proposed Federal Marriage Amendment (FMA) receive the thorough consideration that all proposed constitutional amendments should receive, by being marked up and reported by our Committee.

   Do you believe it is appropriate for the Senate to bypass the Judiciary Committee and bring the proposed Federal Marriage Amendment straight to the floor, even though it has never been debated and marked up in the Judiciary Committee? Why or why not?

Rep. Musgrave Answer to Question Two:

As a member of the House of Representatives I have confidence in Senator's Frist's ability to manage the procedures in the Senate.

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Senator Durbin Question Three:

3. The revised FMA (S.J. Res. 30), which you testified last month you "fully support," consists of two sentences. The first sentence states that "Marriage in the United States should consist only of the union of a man and a woman." [*sic*] The second sentence states that "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." These two sentences are contradictory. The first sentence states that marriage must be between a man and a woman, but the second sentence suggests that marriage other than between a man and a woman would be permissible as long as that recognition occurred via statutory rather than constitutional means.

   Do you believe that, if ratified, the FMA would permit a state to enact a law that would permit marriage to consist of the union of same-sex couples? Why or why not? If so, how do you explain the internal contradiction in the FMA? What would be the purpose of its first sentence?

Rep. Musgrave Answer to Question Three:

The first and second sentences of the FMA are not contradictory. The first sentence states that marriage in the United States shall consist only of the union of a man and a woman. The second sentence prevents activist courts from interpreting the United States constitution or any state constitution to require that marital status or the legal incidents of marriage be conferred on any union other than the union of a man and a woman.

To answer the first question, if the FMA were ratified a state would not be permitted to enact a law permitting marriage to consist of the union of same-sex couples. It is obvious that this would be prohibited by the first sentence of the FMA.

It is not possible to answer the second question because it assumes a contradiction that does not exist.

Senator Durbin Question Four:

4. Last month, you testified before the House Judiciary Constitution Subcommittee that the first sentence of the FMA is "designed to ensure that no governmental entity at any level of government shall have the power to alter the definition of marriage so that it is other than a union of one man and one woman." However, Representative Barr noted in his written testimony that this sentence is not limited to state actors and "appears to bind everyone in the United States to one definition of marriage."

   Please explain the impact of extending this constitutional prohibition to private persons.

Rep. Musgrave Answer to Question Four:

Mr. Barr was wrong. The FMA is not intended to reach private action and in fact would not do so. See the July 11, 2004 opinion letter from Kevin J. Hasson, Chairman of the

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Washington, D.C. based Becket Fund for Religious Liberty, to Margaret A. Gallagher. A copy of this letter is attached to this statement and can be found on the web at http://www.becketfund.org/other/FMAOpinionLetter.pdf.

Senator Durbin Question Five:

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

   What does the phrase "legal incidents" of marriage mean? Under this language, please explain whether a state could adopt a state constitutional amendment to establish civil unions. Under this language, please explain whether a popular referendum could alter the state constitution to establish civil unions. Under this language, please explain whether a state legislature could pass a law to establish civil unions. Many health insurance plans include coverage for spouses and partners. Under the language of S.J. Res. 30, would health insurance coverage then be considered a "legal incident" of marriage that then cannot be conferred on a partner in a civil union or domestic partnership?

Rep. Musgrave Answer to Question Five:

On May 13, 2004 I testified concerning the FMA before the House Judiciary Committee's Subcommittee on the Constitution. In that testimony I explained that the phrase "legal incidents thereof" means the rights, benefits, protections, privileges and responsibilities of marital status that have been historically provided by law. There are hundreds of legal incidents of marriage, and it is impossible to set forth a definitive list. However, the following is a non-exclusive list of many of the legal incidents of marriage:

1. Rights and duties relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety;
2. Rights and duties relating to causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;
3. Rights and duties under probate law and procedure, including nonprobate transfer;
4. Rights and duties under adoption law and procedure;
5. Rights and duties relating to group insurance for public and/or private employees;
6. Rights under a state spouse abuse program;
7. Rights relating to prohibitions against discrimination based upon marital status;
8. Rights relating to victim's compensation;

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9. Rights relating to workers' compensation benefits;
10. Rights under laws relating to emergency and nonemergency medical care and treatment, and hospital visitation and notification;
11. Rights under "terminal care documents" and durable powers of attorney for health care execution and revocation;
12. Rights under family leave benefits laws;
13. The right to public assistance benefits under state and federal law;
14. Rights and duties laws relating to taxes imposed by the federal government, a state or a municipality such as the right to file a joint tax return;
15. Rights under laws relating to immunity from compelled testimony and the marital communication privilege;
16. The homestead rights of a surviving spouse;
17. Rights under laws relating to the making, revoking and objecting to anatomical gifts by others;

Under the FMA all or some of these legal incidents of marriage could be conferred upon unmarried persons by a legislature if it chooses to do so through appropriate legislation. However, no court could construe the federal or state constitution to require it to do so.

There is nothing in the language of the FMA that would prevent a state from adopting (by popular referendum or otherwise), a constitutional amendment establishing so-called civil unions. The second sentence states that the federal and state constitutions may not be "construed to require" that a civil union statute be enacted by a state legislature.

Thus, at its core the second sentence of the FMA is designed to prevent abuses of the judicial power such as occurred in *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999). In that case the Vermont Supreme Court held that the Vermont state constitution requires the state to extend to same-sex couples the benefits and protections of marriage under Vermont law. As a direct consequence of this ruling the Vermont legislature enacted Vt. Stat. Ann. tit. 15, §§ 1201 *et seq.*, which confers upon parties to a so-called civil union "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage."

In *Baker v. State* the Vermont Supreme Court construed the Vermont state constitution to require that marital status or the legal incidents of marriage be conferred upon unmarried persons. The Vermont legislature responded by enacting a statute that did just that. Under the FMA, the Vermont legislature would still have the power to enact a statute such as Vt. Stat. Ann. tit. 15, §§ 1201 *et seq.* if it chooses to do so. The difference would be that the Vermont Supreme Court would not have the power to construe the Vermont state constitution to require the legislature to do so.

However, if the people of Vermont were to amend their constitution to expressly and explicitly establish civil unions, such an amendment would be enforceable. In such case the state constitution would not be "construed to require" civil unions. Instead, the

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constitution would by its express terms establish civil unions. Even if this were not the case, however, the legislature of any state would be free to enact civil union statutes.

The terms of a health insurance contract are a private contractual matter between an insurance company and the proposed insured. As explained above, the FMA would have no effect on purely private transactions. Thus, there is nothing in the FMA that would prevent a private company from contracting with a private insurance carrier for health insurance benefits for its employees who are involved in a civil union or domestic partnership. Moreover, nothing in the FMA would prevent a state legislature from conferring health insurance benefits on members of a civil union or a domestic partnership. The only effect the FMA would have in this area is that courts would have no power to construe the federal or state constitutions to require that such benefits be conferred upon unmarried persons.

Senator Durbin Question Six:

6. Your version of the Federal Marriage Amendment (H.J. Res. 56/S.J. Res. 26) would prohibit marital status and its legal incidents from being conferred upon "unmarried couples or groups." However, the second Allard version (S.J. Res. 30) only prohibits marriage and its legal incidents from being conferred upon "any union other than the union of a man and a woman."

   What is the effect of this change? Do you believe this new language of the Federal Marriage Amendment (S.J. Res. 30) expressly prohibits polygamy? Why or why not?

Rep. Musgrave Answer to Question Six:

There is no substantive difference in the phrase "unmarried couples or groups" in H.J. Res. 56 and the phrase "any union other than the union of a man and a woman" in S.J. Res 30.

Both versions of the FMA would prohibit polygamy, but this result has nothing to do with the language you quote. The first sentence of both versions of the FMA states: "Marriage in the United States shall consist only of the union of a man and a woman." The use of the singular article in the phrases "a man" and "a woman" means that marriage in the United States would consist of only a single man and a single woman.

Senator Durbin Question Seven:

7. In your testimony, you stated that "Traditional marriage as the union of a man and a woman is a fundamental aspect of the American national ethos." One hundred and fifty years ago, "traditional marriage" in America did not include the ability of African American slaves to marry. One hundred years ago, "traditional marriage" in some Western states did not include the ability of Asian Americans to marry. Forty years ago, "traditional marriage" in many states did not include the ability of African Americans to

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marry whites. Would you concede that "the traditional definition of marriage" has changed over time in this country?

Rep. Musgrave Answer to Question Seven:

No, the traditional definition of marriage has never changed in this country from the beginning of the Republic until May 17, 2004, when the Massachusetts Supreme Judicial Court imposed same-sex marriage on the people of that state under the flimsiest of constitutional pretexts.

Biologically it is impossible for a man to "marry" a man or a woman to "marry" a woman. The very meaning of the word "marriage" necessarily contemplates a sexual relationship between a man and a woman, and in all the situations you cite men were seeking to marry women and women were seeking to marry men. Thus, these cases involved people seeking to take advantage of the benefits of traditional marriage, not to change it into something it has never been and can never be.

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July 11, 2004

Ms. Margaret A. Gallagher
President
Institute for Marriage and Public Policy
1413 K St. NW
Suite 1000
Washington D.C. 20005

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

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

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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

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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.

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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.

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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.

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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).

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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,

THE BECKET FUND FOR RELIGIOUS LIBERTY

BY: KEVIN J. HASSON
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Follow-up Written Questions from Sen. Richard Durbin
Senate Judiciary Committee
Hearing – "Preserving Traditional Marriage: A View from the States"
July 6, 2004

Questions for Governor Mitt Romney

1. Governor Romney, in your testimony, you stated that you wish to preserve "the traditional definition of marriage." One hundred and fifty years ago, "traditional marriage" in America did not include the ability of African American slaves to marry. One hundred years ago, "traditional marriage" in some Western states did not include the ability of Asian Americans to marry. Forty years ago, "traditional marriage" in many states did not include the ability of African Americans to marry whites. Would you concede that "the traditional definition of marriage" has changed over time in this country?

2. You have expressed strong support for the revised Federal Marriage Amendment, introduced in the Senate on March 22, 2004. The revised FMA consists of two sentences. The first sentence states that "Marriage in the United States should consist only of the union of a man and a woman." The second sentence states that "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

At your hearing, you and I disagreed about whether the FMA would permit state constitutions to allow civil unions. Our disagreement served to underscore the concern that I and many on both sides of the aisle have that the FMA is vague and ambiguous.

The FMA is also internally contradictory. The first sentence states that marriage must be between a man and a woman, but the second sentence suggests that marriage other than between one man and one woman would be permissible as long as that recognition occurred via statutory rather than constitutional means.

A. Do you agree that, if ratified, the FMA would permit a state to pass a law that would permit marriage to consist of the union of same-sex couples?

B. Since the first sentence of the FMA states that marriage can be only between a man and a woman, but the second sentence suggests that same-sex marriage can be legalized via state statute, would you concede that the FMA is internally contradictory?

3. In your testimony you stated that "marriage is principally for the nurturing and development of children. The children of America have the right to have a mother and a father."

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A. Are you opposed to adoption by unmarried persons? If not, how do you reconcile your support of such adoptions with your testimony?

B. Does the sexual orientation of the adopting person make any difference in your position? Why or why not?

4. In your testimony, you stated: "Scientific studies of children raised by same-sex couples are almost non-existent." The American Academy of Pediatrics disagrees with that assessment. According to a report issued by the Academy in 2002:

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

In light of the report by the American Academy of Pediatrics, are you willing to concede that you were mistaken in your statement that "[s]cientific studies of children raised by same-sex couples are almost non-existent"?

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SUBMISSIONS FOR THE RECORD

OFFICE OF BOB BARR

Member of Congress, 1995-2003

TESTIMONY SUBMITTED TO THE SENATE JUDICIARY COMMITTEE

BY
BOB BARR
FORMER MEMBER OF CONGRESS, 1995-2003,
FOR THE SEVENTH DISTRICT OF GEORGIA
June 22, 2004

Thank you for offering me the opportunity to tender my views on the perspective from the states on same-sex marriage.

My name is Bob Barr and, until last year, I had the pleasure and the honor of serving in Congress, and on the House counterpart to this august committee, as the representative from the Seventh District of Georgia.

Prior to my tenure in Congress, I served as a presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice.

Currently, I am again a practicing attorney, *Of Counsel* to the Law Offices of Edwin Marger, in Jasper, Georgia. I also hold the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union. I am on the boards of the National Rifle Association and the Patrick Henry Center, serve on the Legal Advisory Board of the Southeastern Legal Foundation, and consult on privacy issues for the American Civil Liberties Union.

Before I begin, I would like to commend the committee for its willingness to thoroughly deliberate on this issue during four hearings. In the midst of a heated presidential campaign, it would have been very easy for this debate to suffer from the vague sound-bites and generalized talking points that surround so many contentious issues these days.

But I am disturbed by speculation that, in a rush to get the Federal Marriage Amendment to the floor, its supporters intend to bypass any further consideration by this Committee. I respectfully submit that it would be a

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mistake to cut out the Committee most qualified to assess the wisdom of a fundamental change to our nation's most important document. I urge you, Mr. Chairman, to oppose efforts to circumvent your Committee on an issue of such monumental, lasting and wide-ranging importance.

I appear before you today as a proud conservative whose public career has long been one dedicated to preserving our fundamental constitutional freedoms and ensuring that basic moral norms in America are not abandoned in the face of a creeping "contextual morality," especially among our young.

I am not new to my conservative principles. No one has ever tried to accuse me of being a liberal Republican or a moderate Republican; I have only been a conservative Republican. And, as a conservative Republican, I have never compromised my basic principles – limited government, the free market, steadfast adherence to civil liberties including the right to keep and bear arms and the rights of the states – in the search for higher office. I appear before you today in that spirit of consistency with conservative ideals.

In-line with those conservative principles, I authored the Defense of Marriage Act, which was signed into law by President Clinton in 1996. DOMA, as it's commonly known, was designed to provide individual states individual autonomy in deciding how to recognize marriages and other unions within their borders. For the purposes of *federal benefits only*, DOMA codified marriage as a heterosexual union.

In the states, it allowed legislatures the latitude to decide how to deal with marriage rights themselves, but ensured that no one state could *force* another to recognize marriages of same-sex couples.

It was a reasonable and balanced measure, mindful of federal interests but respectful of principles of federalism. It has never been successfully challenged.

Importantly, at the time of its drafting, many of my colleagues in Congress tried to make DOMA a pro-active, punitive law that would force one particular definition of marriage on the states.

We rejected such an approach then, and we ought to now as well. Simply put, DOMA was meant to *preserve* federalism, not to dictate morals from Washington. In our federal system, the moral norms of a given state should

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govern its laws in those areas where the Constitution confers sovereign power to the states or does not expressly grant it to the federal government.

Part of federalism means that states have the right to make bad decisions – even on the issue of who can get married in the state. Resisting the temptation to use the federal government to meddle in state matters is the test of this conservative principle. Indeed, it is the test separating conservative federalists from hard-line social conservatives, willing to sacrifice the Constitution in their understandable anxiety over the sorry state of modern morality.

DOMA was and is faithful to federalism. Even with the maverick actions of a few liberal judges and rogue public officials, the self-correcting balance embedded in federalism remains in place. Already, we are seeing state supreme courts and state legislatures refusing to go along with any broad changes in their marriage laws.

By many accounts, it looks like reasoned argument and democratic deliberation, not unilateral action by misguided activists, will win the day in the marriage debate.

That said, however, we also cannot repeat Gavin Newsomian mistakes by going too far in the opposite direction. The Massachusetts Supreme Court and the mayor of San Francisco were wrong because they took the decision-making process out of the hands of the people.

Matters of great importance, such as marriage, need to reflect the will of the people, and need to be resolved within the democratic process. People need to be able to weigh the merits of the opposing arguments, and vote on those merits. They do not deserve – as Americans – to have one side foisted on them by fiat.

And the states themselves have checks in place against a few rogue individuals. The California state courts are putting the brakes on Mayor Newsom--and the state legislature in Governor Romney's state has already had a lengthy constitutional convention to debate democratically this very issue.

However, some of my fellow social conservatives are today pulling a Newsom with the Federal Marriage Amendment, and even more indefensible from a conservative perspective, they are trying to use the Constitution as their tool.

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Conservatives must ask themselves why they abhor the actions of a few "black-robed usurpers," as I called the members of the Massachusetts Supreme Judicial Court when it declared same-sex marriage unconstitutional. We reject this judicial activism because it ignores, outright, general public sentiment and the long-standing values of the community.

Yet, the amendment supported by Governor Romney does *the exact same thing.* It takes a moral decision out of the states, where it is most likely to be made with the optimal benefit to everyone, and hands it to a couple of lone elected officials. To be frank, I do not appreciate their presumption to dictate morals to my fellow Georgians through misuse of the federal Constitution.

To be clear, I am absolutely not a supporter of granting marriage rights to same-sex couples, which makes my decision to oppose the FMA all the harder. I do not enjoy opposing people who I agree with in substance on matters of process.

Yet, the Constitution is worth that lonely stand.

As currently drafted, the Federal Marriage Amendment would impose a single constitutional definition of marriage for the entire country, and also prohibit any court from applying the U.S. Constitution or any state constitution to provide any of the "legal incidents" of marriage to same-sex couples.

Governor Romney essentially is here to ask the Congress to step in and have the federal government invalidate the actions of the highest state court in his state, and also to strangle before its birth the proposed state constitutional amendment that his own state legislature passed this year. That state constitutional amendment, if passed next session and ratified by his state's voters, would deny marriage rights to same-sex couples, but also provide civil unions. The Federal Marriage Amendment, however, would invalidate any civil union provided by the Massachusetts state constitution, and of course would also invalidate all same-sex marriages in the state.

Thus, the Governor is pleading for this Congress and the federal government to protect him against the Massachusetts state constitution, the Massachusetts legislature, the Massachusetts Supreme Judicial Court, and most ironically, the people of Massachusetts if they eventually ratify the proposed Massachusetts constitutional amendment. I urge this Committee to refuse this request and

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have Massachusetts resolve its own problems without invoking the full weight of the federal government.

I, along with many other conservative opinion leaders and lawmakers, strongly oppose the Federal Marriage Amendment for three main reasons.

First, by moving what has traditionally been a state prerogative – local marriage laws -- to the federal government, it is in direct violation of the principles of federalism. Second, in treating the Constitution as an appropriate place to impose publicly contested social policies, it would cheapen the sacrosanct nature of that document, opening the door to future meddling by liberals and conservatives. Third, it is unnecessary so long as DOMA is in force.

I will deal with each of these objections in order.

First, marriage is a quintessential state issue. For the purposes of federal laws and benefits, a measure like DOMA is certainly needed. However, individual states should be given an appropriate amount of wiggle room to ensure that their laws on non-federal issues comport with their values. The Federal Marriage Amendment is at fundamental cross-purposes with such an idea in that, simply put, it takes a power away from the states that they have historically enjoyed.

As conservatives, we should be committed to the idea that people should, apart from collective needs such as national defense, be free to govern themselves as they see fit. State and local governments provide the easiest and most representative avenue to this ideal. Additionally, by diffusing power across the federal and state governments, we provide impersonal checks and balances that mitigate against the abuse of power.

To be clear, I oppose any marriage save that between one man and one woman. And, I would do all in my power to ensure that such a formulation is the only one operative in my home state of Georgia. However, do I think that I can tell Alaska how to govern itself on this issue? Or California? Or Massachusetts? No, I cannot. Those states are free to make their own decisions, even if they are decisions I would characterize as bad.

Federalism means that, unless the Constitution says otherwise, states are sovereign. This pertains to marriage.

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The second argument against the Federal Marriage Amendment is just as damning. We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place.

The Founders created the Constitution with such a daunting amendatory process precisely because it is only supposed to be changed by overwhelming acclamation. It is so difficult to revise specifically in order to guard against the fickle winds of public opinion blowing counter to basic individual rights like speech or religion.

Not cluttering the Constitution, and not setting the precedent that it can be changed to promote a particular ideology, is doubly important for us conservatives.

We know that the future is uncertain, and our fortunes unclear. I would like to think people will think like me for a long time to come, but if they do not, I fear the consequences of the FMA precedent. Could liberal activists use the FMA argument to modify the Second Amendment? Or force income redistribution? Or ban tax cuts?

Quite possibly.

And the dangers are even greater when we have not fully thought through the ramifications of an amendment. I am particularly disturbed that the first sentence of the Federal Marriage Amendment is not limited to state actors. In other words, it appears to bind everyone in the United States to one definition of marriage. From reviewing transcripts of previous hearings, it does not appear that any member of the committee or any witness explored the potential impact of extending a federal constitutional prohibition to private persons. In my review of the Constitution, it appears to me that only the Thirteenth Amendment's abolition of slavery binds even private parties, and appropriately so.

Finally, changing the Constitution is just unnecessary -- even after the Massachusetts decision and the San Francisco circus. DOMA is a perfectly good law on the books that defends marriage on the federal level, and protects states from having to dilute their definitions of marriage by recognizing other states' same-sex marriage licenses.

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As its author and sponsor, I have perhaps more pride than most that DOMA has never been invalidated--and have great confidence that the careful deliberations that resulted in DOMA have more than adequately prepared the statute for its eventual journey to Supreme Court review.

We should also take note that the recent attempts to recognize same-sex marriages do not, despite broad media coverage, prefigure any sort of revolution against traditional marriage.

In addition to the federal DOMA, 38 states prohibit same-sex marriage on a state level and, invoking the federal DOMA, refuse to recognize any performed in other states. A handful of states recognize domestic partnerships, most with only minimal benefits like hospital visitation or shared health insurance. One state authorizes civil unions and a couple of others may or may not have marriage on the horizon. Rumors of traditional marriage's untimely demise appear to be exaggerated.

And, truthfully, this is the way it should be. In the best conservative tradition, each state should make its own decision without interference from Washington. If this produces different results in different states, I say hurray for our magnificent system of having discrete states with differing social values. This unique system has given rise to a wonderfully diverse set of communities that, bound together by *limited*, common federal interests, has produced the strongest nation in human history.

In spite of his second-term election change on the issue, I think Vice President Cheney put this argument best during the 2000 election:

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

I worry, as do many Americans, about the erosion of the nuclear family, the loosening influence of basic morality, and the ever-growing pervasiveness of overtly sexual and violent imagery in popular entertainment. Divorce is at an

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astronomical rate – children born out of wedlock are approaching the number born to matrimony. The family is under threat, no question.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

Thank you again for inviting me to submit comments.

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News From:

U.S. Senator
Russ Feingold

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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on
"Preserving Traditional Marriage: A View from the States"

June 22, 2004

Mr. Chairman, this is the fourth hearing held in this Committee on this subject in the last several months. As I have said at the three prior hearings, I think it is unfortunate that we are devoting so much time to this issue. I continue to believe that a constitutional amendment on marriage is unnecessary and aimed simply at scoring points in an election year. That is unfortunate for the American people, who are struggling every day with so many more pressing issues that deserve the Senate's attention and action.

My concern that this is a politically motivated exercise was heightened when I learned last week that the Senate leadership wants to bring the federal marriage amendment to the floor on July 12. It now seems clear that the Senate leadership intends to bypass the committee process to meet this schedule. Mr. Chairman, I hope that before agreeing to a floor vote, you will bring this amendment through the Judiciary Committee and would also allow Senator Cornyn first to hold a markup of the amendment in the Constitution Subcommittee. You have previously permitted the Constitution Subcommittee to be the first stop for constitutional amendments, and we have so far taken up three amendments this Congress in Subcommittee – the victims' rights amendment, the continuity of government amendment, and, just recently, the flag amendment. The federal marriage amendment should be given the same consideration as those other amendments.

Committee review is absolutely essential in this case because the Senate will be considering this proposed constitutional amendment for the first time. There is still significant uncertainty about the meaning and effect of the amendment. Indeed, there is a strong argument that even S.J. Res. 30, the revised version of the amendment introduced in March by Sen. Allard, would prohibit the kind of solution now pending in Massachusetts. This is precisely the situation where a committee markup is critical. The committee process should not be bypassed to meet a politically designed schedule.

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Mr. Chairman, Governor Romney will today testify about how his state has handled this issue. Last fall, the highest court in Massachusetts ruled that the state must grant marriage licenses to same-sex couples. This was a controversial decision, and the Massachusetts legislature has responded. In March, it approved a proposed amendment to the state constitution defining marriage as between a man and a woman and also recognizing civil unions. For this state amendment to become law, the legislature must approve it again in the next session, and then the last step will be a statewide referendum.

Mr. Chairman, Massachusetts should be allowed to complete its constitutional amendment process and other states should also be permitted to handle this issue as their citizens see fit, without interference by Congress or the federal government, in accord with the founding principles of our nation. We do not need Congress to legislate for all states, for all time, on a matter that has been traditionally handled by the states and religious institutions since the founding of our nation.

As Professor Brilmayer testified at a prior hearing, whether there might some day be a conflict between states that might justify a constitutional amendment is still hypothetical, because no court has required a state to recognize a same-sex marriage performed in another state. None of the witnesses who testified at prior hearings made a compelling argument for immediate action on a constitutional amendment on this sensitive topic. I will be listening today to see if any new argument.

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

June 22, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on

"PRESERVING TRADITIONAL MARRIAGE: A VIEW FROM THE STATES"

Good morning, and welcome to this very important hearing on the status of traditional marriage in the United States. Healthy marriages, and the young citizens reared within them, are the foundation of our country, and for that matter, any stable political community. Traditional marriage, however, is under attack, and in this hearing we will focus on the nature and extent of the threat and how to address the problem.

This battle is being waged on several fronts. Local officials – contrary to the explicit direction of their own elected legislators—have ordered the recognition of same-sex marriage. Eleven states face court challenges to their marriage laws. A lawyer in Florida has launched a challenge to the federal Defense of Marriage Act. And in the most infamous case, the Supreme Judicial Court of Massachusetts rewrote the state constitution in the Goodridge decision to impose same-sex marriage on the citizens of that state.

And by doing so, four unelected judges in effect imposed this experiment on the entire nation. Courts and renegade public officials, not conservative activists, have made this a national issue, and if we are to protect and strengthen the institution of marriage, there appears to be no way around a constitutional solution to this problem.

I am pleased to have the Governor of Massachusetts, Mitt Romney, with us today to provide a report of exactly what is happening in his state and to help us understand the national ramifications of the Goodridge decision.

Eight years ago, when the Defense of Marriage Act, or DOMA, was passed and signed into law by President Clinton, there were no states with same-sex married couples. But thanks to a small minority of local officials flouting the law, and four liberal judges in Massachusetts rewriting the law, same-sex married couples now live in 46 states. My concern is that this pronounced proliferation of states adopting a de facto policy of support for same-sex marriage, may dramatically undermine the role of traditional marriage and families.

Regardless of one's view on the issue—and I understand there are honest differences here—I hope everyone agrees that judges should not have the final word in this debate. The

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conflict over same-sex marriage involves the question of who decides important matters of public policy in a democracy. Every school age child knows that the legislative branch, not the judiciary, properly makes the laws. I fear that we have lost sight of this essential truth.

Some, including, as I understand it, former Rep. Barr, an original sponsor of DOMA, argue that the Defense of Marriage Act will be sufficient to maintain traditional marriage. I wish I had as much faith that our courts will uphold this legislation. Even many of Mr. Barr's colleagues – including the ACLU, with whom I understand he is now affiliated – do not agree with him on this point.

Let's review just a sampling of liberal commentary on the constitutionality of DOMA. The two senators from Gov. Romney's home state are adamant that this measure is unconstitutional. During the debate on DOMA, Senator Kerry wrote, "DOMA does violence to the spirit and letter of the Constitution."

Senator Kennedy added on the floor of the Senate that "scholarly opinion is clear: [DOMA] is plainly unconstitutional."

The ACLU called it "bad constitutional law…an unmistakable violation of the Constitution," and Evan Wolfson, former director of the Lambda Legal Defense Marriage Project argued that DOMA is "hasty, illogical, and unconstitutional."

Scholars from across the political spectrum believe that DOMA is unlikely to survive and that traditional marriage laws themselves will not likely prevail.

The bottom line is that absent a Constitutional amendment, this issue will be resolved by the United States Supreme Court, and many believe it will likely be resolved in favor of same-sex marriage. I am convinced that after Goodridge the choice is no longer to amend the Constitution or leave the issue to the states.

The choice now appears to be between popular resolution of the effort to protect traditional marriage or judicial resolution of this question in favor of same-sex marriage. I believe that it would be flatly irresponsible for us to sit idly by as courts advance a social experiment explicitly rejected in state after state, and in every region of the country.

The response of the American people to experiments with traditional marriage has been overwhelming. In 1996 the Defense of Marriage Act passed with massive bipartisan majorities, and it was signed by then President Clinton. Since 1996, 40 states have explicitly acted to shore up traditional marriage.

Many believe the single biggest error in the Goodridge decision was its conclusion that there is no rational basis for maintaining marriage as between a man and a woman. In fact, there is a very simple reason that the institution of male-female marriage has been the norm in every society for over 5,000 years. Marriage is not just a personal affirmation. Society has an interest in future generations, and the conjugal act between men and women creates them. This is what

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underlies laws that promote and protect traditional marriage. Decoupling procreation from marriage ignores the very purpose of marriage.

I am sympathetic to concerns from the gay community that they do not always feel fully accepted by society, and I have worked extensively to pass compromise legislation that protects against discrimination based on someone's sexual orientation. For example, my work on AIDS legislation taught me many lessons about why it is important not to discriminate against the gay community in health care and other areas. But preserving traditional marriage is not discriminatory. By its very nature, marriage is an institution unique to male and female unions. Marriage is about the well-being of children, and legislatures should be permitted to take reasonable steps to maintain the institutions that support them.

Even leading Democrats in this county understand that there is value in reserving marriage to what it always has been: the union of a man and a woman.

They know something that advocates of the federal marriage amendment know: with the stakes as high as they are, unproven family forms should not be mandated by unelected judges.

When same-sex marriage advocates claim the sky did not fall on May 17 when the Massachusetts court required these marriages to begin, they miss the point. The point is not that civilization will come to a screeching halt, but that people begin an unprecedented and unwise slide into accepting a divorce between marriage and child-rearing. For this reason, many believe same-sex marriage will likely act to undermine the health of families over time. The public policy interest in preventing this development seems obvious to everyone but a few judges and state officials insulated from public opinion.

Those who want to impose this radical change—which has yet to be embraced by any society—have the burden of showing that this experiment will not weaken marriage. In my view, they do not even come close to doing so.

I support the Federal Marriage Amendment sponsored by Senator Allard in the Senate. I urge all of my colleagues and the public to support the FMA when it comes up for a vote.

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from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
June 22, 2004

CONTACT: David Smith/ Jim Manley
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY ON "PRESERVING TRADITIONAL MARRIAGE: A VIEW FROM THE STATES"

Senate Committee on the Judiciary

I welcome Governor Romney to our Committee, but I regret that he is joining such a partisan and divisive effort.

We know the many urgent challenges our country faces. The war in Iraq has brought new dangers, imposed massive new costs, and is costing more and more American lives each week. Here at home, unemployment is a crisis for millions of our citizens. Retirement savings are disappearing. School budgets are plummeting. College tuition is rising. Prescription drug costs and other health costs are soaring. Federal budget deficits extend as far as the eye can see.

There are many issues on which I believe all members of the Committee would welcome Governor Romney's thoughts and proposals. What additional steps can we take to improve security in our cities and states? How can we provide needed emergency communications equipment and protective gear to first responders? What can we do about the recent rise in homicides in Boston, or the epidemic of cheap heroin in Massachusetts and other states?

I regret that instead of addressing these issues, the Committee is holding its fourth hearing on proposals to amend the Constitution to prohibit same-sex marriage.

In March, faced with the reality that their earlier proposal had little support, conservative organizations offered a new proposal.

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But the bottom line hasn't changed. There is absolutely no need to amend the Constitution on this issue. As news reports from across the country make clear, Massachusetts and other states are already dealing with the issue, and doing so effectively, and doing so according to the wishes of the citizens of their states.

Contrary to the claims of the amendment's supporters, no state will be bound by the rulings or laws on same-sex marriages in any other state. Long-standing constitutional precedents make clear that states have broad discretion in deciding to what extent they will honor other state laws in dealing with sensitive questions about marriage and raising families. The federal statute enacted in 1996, the Defense of Marriage Act, makes the possibility of nationwide enforceability even more remote.

If it's not *necessary* to amend the Constitution, it's necessary *not* to amend it.

In more than two hundred years of our history, we have amended the Constitution only seventeen times since the adoption of the Bill of Rights. Many of those amendments have been adopted to expand and protect people's rights.

Having endorsed this shameful proposed amendment, in an effort to divide Americans and assist his re-election campaign, President Bush will go down in history as the first President to try to write bias back into the Constitution.

Following President Bush's wishes, the Republican leadership recently announced its intention to bring the Federal Marriage Amendment to the floor for a vote during the week of July 12th. It appears that the leadership intends to skip the usual process of debating and marking up proposed constitutional amendments first in the Constitutional Subcommittee, then the full Judiciary Committee. According to press reports, Republicans know they don't have the 2/3 majority they need to pass the amendment, but they're rushing it to the full Senate anyway in an effort to embarrass Democrats before our convention at the end of the month.

It's Republicans who should be embarrassed. As Chairman Hatch observed earlier, it "denigrates the committee process" to bypass the Judiciary Committee, "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." Trying to write discrimination into the Constitution is bad enough, but throwing the Senate's rules out the window and proceeding with a discriminatory amendment that the majority of Americans don't want and a majority of Senators don't support – solely for the purpose of trying to score points in a presidential election campaign – demeans this institution and all who have served in it. This debate is about politics – an attempt to drive a wedge between one group of citizens and the rest of the country, solely for partisan advantage. We've rejected that tactic before, and we should reject it again.

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In the Goodridge case, the Massachusetts Supreme Judicial Court was interpreting the *Massachusetts* Constitution, not the U.S. Constitution. As a rule, the federal government has no authority to tell states how to interpret their own laws and constitutions. The Federal Marriage Amendment would change this fundamental principle of state sovereignty by imposing a rule of construction on state courts. Even if a state like Massachusetts amended its constitution to authorize civil unions for same-sex couples, the revised amendment would overturn such an arrangement by requiring the state's courts to "construe" the state constitution in a manner that prohibited same-sex couples from receiving "the legal incidents of marriage." There is no precedent in our democracy for the federal government to dictate to state courts how they must interpret their own state constitutions.

Supporters of the proposed amendment claim that religious freedom is somehow under attack by states that uphold equal rights and benefits for same-sex couples. But as the First Amendment makes clear, no court, no state, no Congress can tell any church or religious group how to conduct its own affairs. No court, no state, no Congress can require any church to perform a same-sex marriage.

The real threat to religious freedom is posed by the Federal Marriage Amendment itself, which would tell churches they *can't* consecrate a same-sex marriage, even though some churches are now doing so. The amendment would flagrantly interfere with the decisions of religious communities and undermine the longstanding separation of church and state in our society.

Those who oppose gay marriage and who disagree with the court's recent decision in Massachusetts have a First Amendment right to express their views. But that's no justification for attempting to undermine the separation of church and state in our society, or to write discrimination against gays and lesbians into the United States Constitution.

The decision by the Massachusetts Supreme Judicial Court addressed the many rights available to married couples under state law, including the right to be treated fairly by the tax laws, to share insurance coverage, to visit loved ones in the hospital, and to receive health benefits, family leave benefits, and survivor benefits. In fact, there are now more than a thousand federal rights and benefits based on marriage.

Gay couples and their children deserve access to all these rights and benefits. Supporters of the amendment have tried to shift the debate away from equal rights, by claiming that their only concern is the definition of marriage. But many supporters of the amendment are against civil union laws as well, and against any other rights for gay couples or gay persons.

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For example, even though last week's hate crimes amendment to the Defense Authorization Bill was supported by a total of 18 Republicans, none of the current 16 Republican co-sponsors of the Federal Marriage Amendment voted for this needed measure to prevent anti-gay and other hate-motivated violence, and none are co-sponsors of our bipartisan bill to protect gays and lesbians from job discrimination.

Too often, this debate over the definition of marriage and the legal incidents of marriage has ignored the very personal and loving family relationships that would be prohibited by a constitutional amendment. More and more children across the country today have same-sex parents. What does it do to these children and their well-being when the President of the United States says their parents are second-class Americans?

Congress has better things to do than write bigotry and prejudice into the Constitution. We should deal with the real issues of war and peace, jobs and the economy, and the many other priorities that demand our attention so urgently in these troubled times.

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Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing on "Preserving Traditional Marriage: A View from the States"
June 22, 2004

Oversight Opportunities Lost

Today, we convene for our fourth hearing in the last 10 months on federalizing marriage law. In the last 10 months, as questions continually surfaced about the Bush Administration's handling of the war against terrorism, its decision to invade Iraq and its homeland security system charged with protecting citizens, this Committee has decided to set the states' marriage laws as its priority. Instead of holding long-promised hearings on enemy combatants, FISA, or detainees at Guantanamo Bay, this Committee has focused much of its energies on proposals to amend the Constitution to narrow the rights of individuals. Instead of hearings on the abuses at Abu Ghraib, the FBI's troubling and costly computer problems, FBI lab problems, FBI foreign translation problems, the bipartisan SAFE Act or any of the other legislative proposals to modify the PATRIOT Act, we have held hearings on limiting free speech by banning flag desecration and outlawing same-sex marriage. We have held no hearings on civil rights matters, including important aspects of the Voting Rights Act. Of course, we wasted two opportunities to hold some of these hearings by letting the hearing room sit empty after this hearing was rescheduled twice and then postponed to suit Governor Romney's schedule. And now we are being asked to devote another morning of hearings on proposals to undercut civil unions and partnerships, and to scapegoat gay and lesbian Americans for political gain.

At the outset, I would like to register my objection to the Chairman's decisions to deny the minority an equal number of witnesses for this hearing, and to put former Representative Bob Barr on a separate panel. Having served in Congress for eight years and worked closely with this Committee on many issues, he deserves more respectful treatment. I renew my request now, that he be permitted to testify along with Governor Romney on the first panel.

We have convened to hear from the Governor of Massachusetts. We will hear about State law developments in Massachusetts. I am sorry the Governor is devoting so much of his time this week to flying to Washington to testify before this Committee about matters transpiring in the legislature and courts and among the people of his State.

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A Sky That Has Not Fallen

I have to say that as a non-Massachusetts resident it does not seem like the sky has fallen. I imagine that most Americans have not felt any effects from developments in Massachusetts, and that many would be mystified and dismayed by this Committee's fascination with the topic.

Sadly, if media reports are correct, their dismay and mystification will only deepen in coming weeks. We understand that the Majority Leader will bring the Federal Marriage Amendment to the floor on July 12 with, or far more likely without, the approval of this Committee. It appears that Committee consideration of constitutional amendments is another tradition that the Republicans are set to discard.

I have heard no one suggest that the FMA is even close to obtaining the required two-thirds support in this body. Indeed, *Congress Daily* reported last Friday that floor debate on the FMA was not expected to pose a scheduling problem for the majority because the Majority Leader "likely will fall well short of the 60 votes needed to begin debate." Both its supporters and opponents know that the FMA will fail, but with only seven legislative weeks remaining in this session, they will take it up, nonetheless.

Squandering Time For Political Points

Obviously, we are spending time on the FMA because the Republican political leadership thinks it can inflict political damage upon those who oppose the amendment, and curry favor with voters who support it. This debate is not about preserving the sanctity of marriage – it is about preserving a Republican White House and Senate. Senator Santorum, the architect of this effort, has said openly that he wants to "put people on record" as opposing the amendment, apparently including the many Republicans who have expressed reservations about the FMA or oppose it outright.

The American people should understand that this continuing spectacle is designed to enhance the political prospects of President Bush and some Republicans in the House and Senate, and to raise the national profile of some State officeholders. Senator Chafee exhibited New England understatement and candor when he said about his leadership's handling of the amendment: "They may bring it up just for political posturing." I admire Senator Chafee and other Republicans – inside and outside Congress – who have bucked this partisan effort, opposed the FMA, and defended the Constitution.

We will hear today from one such Republican – former Representative Bob Barr of Georgia. Congressman Barr and I did not always agree during his career in Congress, and I can only assume the same is true today. We agree, however, about this constitutional amendment, and we share a high regard for the rights of States to make their own decisions about who should be allowed to marry, regardless of whether the federal government agrees with those decisions. We also agree that the Constitution

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should not be used to enshrine the policy preferences of any generation. I believe we are seeing repeated attempts to deface it for political purposes.

Republicans from both the conservative and moderate wings of their party oppose this amendment, which only damages and divides our nation to play politics at the expense of groups within our society. Tolerance is an American ideal, and the Constitution should reflect and enhance that ideal, not undercut it. It has been our long tradition to use the constitutional process to expand rights on extremely rare occasions, and never to restrict them. We should not abandon that tradition for short-term political gain.

Bush Administration Silent On Support

In this regard, it is telling that we cannot get President Bush to tell us what constitutional amendment language he supports. I wrote him months ago, in February, asking for his proposed language, and I still have not received an answer. In addition, while we will hear from the Governor of Massachusetts this morning, we have yet to hear from any representative of the Bush Administration on this matter. In four hearings, no witness from the Department of Justice has come forward to testify or endorse specific language of a constitutional amendment.

Yet the Committee is returning to this matter, again. This seems to be the time of this election year in which the Republican majority has chosen to focus attention on constitutional amendments they believe will score them some political points. Having politicized the selection of judges, they now seek partisan advantage at the expense of our fundamental charter, the United States Constitution. This is one of several such amendments the Committee is being required to consider. Along with federalizing marriage law, the Committee– for the fifth time in recent years – is considering a flag desecration constitutional amendment that undercuts the First Amendment.

A State Issue

If given the chance, I will vote against the FMA. I do not share Governor Romney's desire to strip the States of their longstanding power to define marriage or to use the Constitution to deprive people – gay or straight – of rights. Marriage is and always has been a State issue, and it should remain so. At this juncture, 49 States allow marriage only between a man and a woman. Massachusetts is working to develop a consensus on this issue through a State constitutional amendment process. I fail to see how this constitutes a crisis worthy of this Committee's obsessive focus, or justifies a narrowing amendment being grafted onto the charter that protects the rights of all Americans -- the Constitution.

Since Governor Romney has made the trip to Washington, I would like to raise one other issue before finishing my remarks. Given Attorney General Ashcroft's May press conference in which he emphasized the threat of terrorist incidents, noting specifically the July Democratic National Convention in Boston as a potential target, I hope the Governor will also address those circumstances. I hope he will tell the Committee

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whether he has been given any specific, credible threat information or whether he is, like Homeland Security Secretary Ridge, unaware of any specific threats. Of course, the very day last month that the Attorney General was scaring Americans with his pronouncement that al Qaeda plans to attack in the United States in the next few months and "hit the United States hard," Secretary Ridge was urging Americans "to go out and have some fun" during the upcoming summer months and enjoy living in this wonderful country. I will be interested to know the view of the Governor of Massachusetts: Should America's families dig deep into their pockets to fill up the family station wagon with $2 per gallon gasoline and travel to the beaches of Massachusetts, or should they buy duct tape and bottled water and hunker down until after the fall elections?

I am disappointed by this Committee's priorities. While the Bush Administration has to apologize for its errors and abuses that have made the American people less safe, this Committee spends its time on proposed constitutional amendments to ban gay marriage and flag desecration. The American people deserve better from their Congress.

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STATEMENT OF U.S. REPRESENTATIVE MARILYN MUSGRAVE

"Preserving Traditional Marriage: A View From The States"

United States Senate
Committee on the Judiciary

Tuesday, June 22, 2004, 11 a.m.
Dirkson Senate Office Building Room 226

Introduction

Chairman Hatch, Ranking Member Leahy and other distinguished members of the Judiciary Committee, thank you for the privilege to come before you today.

The Declaration of Independence states that all men are created equal and endowed by their Creator with certain unalienable rights, including life, liberty and the pursuit of happiness. The very foundational document of our nation assumes that our rights exist within the context of God's created order. The self-evident differences and complementary design of men and women are part of that created order. We were created as male and female, and for this reason a man will leave his father and mother and be joined with his wife, and the two shall become one in the mystical spiritual and physical union we call "marriage."

The self-evident biological fact that men and women are designed to complement one another is the reason that until recently for the entire history of mankind, in all societies, at all times, and in all places marriage has been a relationship between persons of the opposite sex. In a very real sense it is impossible for a man to "marry" a man or a woman to "marry" a woman, and the very meaning of the word "marriage" necessarily contemplates a relationship between a man and a woman.

For nearly 228 years every state in the union has followed this millennia-old tradition. Not once in the history of this nation have the people – speaking through their elected representatives or otherwise – passed a single law altering this tradition in the slightest way.

If this is the case, why is the FMA necessary? Sadly, the answer to that question lies in the fact that certain judges do not seem to care about the text and structure of the Constitution or the unbroken history and traditions of our nation. Instead, they seek to use their power to interpret the Constitution as a means of advancing a social revolution unsought and unwanted by the American people.

Senator Allard and I have introduced the FMA to stop this judicial activism and preserve the right of self-determination for the American people with respect to the

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vitally important laws governing marriage, the most important and basic of all our social institutions.

The Federal Marriage Amendment Does Not Undermine Federalism.

Some opponents to the Federal Marriage Amendment charge that it is a violation of the principals of federalism. Mr. Chairman, no one is a stronger supporter of federalism than I, and I would not support, far less sponsor, this amendment if that charge were true. It is not.

To say that the states are sovereign unless the Constitution says otherwise says nothing about when the Constitution should in fact say otherwise.

Certain moral propositions are so fundamental that they deserve to be protected by our fundamental law when they come under attack. One such moral proposition is that marriage is a sacred institution designed by the Creator as the union of a man and a woman. This moral proposition, indeed civil marriage itself, is under attack in this country. Therefore, one instance in which the Constitution should "say otherwise" is to prevent unelected, unaccountable judicial activists from legislating from the bench a social revolution unsought and unwanted by the American people that will radically redefine our most basic and important social institution.

In the 1996 case of *Romer v. Evans* The United States Supreme Court stripped away from the states their power to prevent their own political subdivisions from enacting special civil rights protections for homosexuals. Then, one year ago in *Lawrence v. Texas* the Supreme Court reversed its own precedent and took away from the states their power to regulate homosexual sodomy. Ominously, in *Lawrence* five members of the Supreme Court stated that persons in a homosexual relationship may seek personal autonomy – just as heterosexuals do – with regard to marriage, procreation, contraception, family relationships, child rearing and education.

Given the clear trajectory of the Supreme Court's jurisprudence in this area, it is truly ironic that some oppose the Federal Marriage Amendment on the ground that it would "nationalize" the definition of marriage, because a national definition of marriage is exactly what the activists on our courts are on the verge of achieving.

It is, therefore, no answer to say that marriage has always been a state issue. The Supreme Court has already taken some aspects of this issue away from the states and doubtless will take others away in the near future. Therefore, leaving this matter in the hands of the states where it has always been is no longer an option that is open to us. As I testified last month in the House, the Constitution of the United States of America is about to be amended, and the only choice we have in the matter is whether it will be amended *de jure* through the democratic process for proposing and ratifying amendments set forth in Article V of the Constitution itself, or *de facto* by judicial fiat.

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The Amendment Process is Not Anti-Democratic.

Some have attacked the Federal Marriage Amendment using politically loaded language. They have said that it is an attempt to "foist by fiat" a definition of marriage on the American people, or that it is an effort to "impose morals" from Washington.

The premise underlying these attacks seems to be that those who support the Federal Marriage Amendment are anti-democratic, that they are seeking to impose their minority view on the American people through the amendment process. As one of our opponents said in an interview given to *Newsweek* magazine, "having failed to convince a majority of the population of our position, we have turned to amending the constitution to buttress our argument." Now think about that. We are accused of having failed to win the support of the majority of the people. Never mind that public surveys show that a majority of the people support the policy of the FMA. Then we are accused of turning to the amendment process in a sinister scheme to thwart the clear will of the majority. This statement borders on the silly. Amending the Constitution requires the approval of 2/3 of both houses of Congress and then ratification by 3/4 of the state legislatures. Therefore, if the FMA is ultimately ratified it will be because it is approved not by mere majorities, but by super-majorities at both the state and federal levels. No process could be more democratic.

Again, there is irony in our opponents' position. They accuse us of seeking an anti-democratic solution to the same-sex marriage issue, when in reality it is the federal judges – none of whom have ever faced a voter in their life – who are using their power to interpret the Constitution to impose their policy preferences on the people by mere fiat.

It is Appropriate to Set Forth Our Fundamental Social Policies in the Constitution.

Some have said it would cheapen the sacrosanct nature of the Constitution to treat it as a place to impose "publicly contested social policies." Some seem to believe that states should be always be free to create their own solutions with respect to any matter concerning a publicly contested social policy. Fortunately, this position is supported by neither the history, text or structure of the Constitution, nor the traditions and character of the American people.

If being "publicly contested" prevented a social policy from being enshrined in the Constitution, the Constitution would have never been amended at all, much less 27 times. We all know significant minorities thought that each state should be able to decide for itself whether black people or women should be allowed to vote, but we ratified the 15th and 19th Amendments anyway. This not only a phenomenon of the 19th century either. Within the living memory of most of the people in this room, a significant minority of Americans thought that each state should be free to impose a poll tax as an obstacle to voting by poor people, but that did not prevent us from ratifying the 24th Amendment in 1964.

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But of course the 13th Amendment to outlaw slavery is the quintessential example of a social policy that was enshrined in the Constitution after a rather intense public contest. At the end of the day, the American people decided that slavery is so antithetical to our national character it could no longer be tolerated. Therefore, we amended our fundamental national charter to forever eradicate the institution of legal human bondage in this nation.

Similarly, same-sex marriage is antithetical to our national character. It goes without saying that for thousands of years of human history until recently marriage has at all times and in all places been reserved as a union between male and female. In the American experience, from the beginning of the Republic until last month there has never been a same-sex marriage. Even then it took four members of a lawless court to impose a same-sex marriage law on the people. The people of Massachusetts did not seek such a law and they do not want it. In fact, in not one instance in the history of this nation has a democratically-elected legislature ever come close to enacting a same-sex marriage law, and every time the issue has come before a vote of the people traditional marriage has been upheld by overwhelming margins.

Traditional marriage as the union of a man and a woman is a fundamental aspect of the American national ethos. Indeed, it is so fundamental that there would be no need for a constitutional amendment at all if it were not for the officious meddling of judicial activists who use their position on the bench as a place to engage in moral preening, and who use their power to interpret the Constitution not to uphold the law but to undermine it by imposing their policy choices on the poor benighted masses who disagree with their vision of radical social engineering.

The purpose of the Federal Marriage Amendment is to give the people a chance to take their country back. With the FMA the people have an opportunity to say to their would be masters on the bench, "No, you shall not take the institution of marriage away from us." And a vote against the FMA in the Congress is a vote to deny that opportunity to the people.

DOMA Will Not Stop Activists Judges Bent on A Social Revolution.

The Federal Defense of Marriage Act ("DOMA") became law on September 21, 1996. Only four months earlier, on May 20, 1996, the United States Supreme Court began planting the seeds for undermining the law when it issued its opinion in *Romer v. Evans*, and with last year's decision in *Lawrence v. Texas*, there can be little doubt that the court is now poised to reap the harvest and impose full-blown same-sex marriage on the nation. How we got to this point requires some background.

In 1986 the Supreme Court upheld Georgia's sodomy law against constitutional attack in *Bowers v. Hardwick*, 478 U.S. 186 (1986). For all practical purposes the constitutional attack on Texas' sodomy law in *Lawrence* was no different from the attack the court had already rejected in *Bowers*, and many observers believed the court would follow its precedent in *Bowers* and uphold the Texas law. Instead, the court overruled

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Bowers and struck the Texas law down. The question therefore is, what happened between 1986 and 2003?

The answer is that the court decided two cases after *Bowers* upon which it relied in overruling its own precedent. The first case was *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), in which the court reaffirmed *Roe v. Wade*. In *Casey* the court announced that in matters having to do with personal sexuality it would follow a rule of radical individual autonomy. In the infamous "sweet mystery of life" passage in *Casey* the court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

The second post-*Bowers* case was *Romer v. Evans*, 517 U.S. 620 (1996), in which the court struck down Colorado's Amendment 2, a state constitutional provision that prohibited Colorado cities and counties from enacting special civil rights protections for homosexuals. The court held that Amendment 2 violated the Equal Protection clause, because the law was the product of nothing but "animus" toward homosexuals and therefore had no legitimate governmental purpose.

In *Lawrence* the court used these decisions to overrule *Bowers* and strike down the Texas sodomy law. The court held that under *Casey* homosexuals have a right to individual autonomy in making their sexual choices, and the court held that under *Romer* a law against homosexual sodomy serves no legitimate government interest and therefore violates the Equal Protection clause.

The combination of *Casey, Romer* and *Lawrence* makes it fairly clear that any law that imposes any disadvantage on a person because of his personal sexual choices (especially if the person is a homosexual) is very likely to be struck down by the Supreme Court.

On its face, the court's opinion in *Lawrence* does not address homosexual marriage or civil unions generally or DOMA specifically. Also, the court specifically disclaimed that its decision had any implications for the issue of homosexual marriage. The Court's assertion is obviously false, however, as Justice Scalia explained in dissent:

> [T]he Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' . . . Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which

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> notes the constitutional protections afforded to 'personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. . . . (emphasis added). 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. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples[?]

123 S.Ct. at 2498 (Scalia, J., dissenting).

Justice Scalia's dissent turned out to be prophetic. In November 2003, relying in large part on the logic of *Lawrence*, the Massachusetts Supreme Judicial Court declared a right for homosexuals to marry in that state in *Goodridge v. Massachusetts Dept. of Public Health*.

In a publicly-declared two-pronged strategy, homosexual activists intend to use the *Lawrence* and *Goodridge* decisions as the basis for a nationwide attack on traditional marriage. First, Article IV, Section 1 of the United States Constitution (the Full Faith and Credit Clause) requires the states to recognize the public acts, records and judicial proceedings of every other state. The activists will attempt to use this clause to force other states to recognize the marriages of couples married in Massachusetts. Already homosexual couples from more than 27 states have been married in Massachusetts, and the first wave of Full Faith and Credit lawsuits will begin soon. In the second prong of the attack homosexual persons married in Massachusetts will seek federal marriage benefits (e.g., the right to file a joint tax return).

The states will defend against the Full Faith and Credit strategy by using the first part of federal DOMA, state DOMAs (passed in 38 states) and the legal doctrine allowing states to refuse to recognize the judgments of another state that violate a strong local public policy. The federal government will defend against the federal benefits strategy by using the second part of DOMA.

The outcome of these defenses is far from certain. As Justice Scalia pointed out in his dissent, the *Lawrence* court specifically stated that persons in a homosexual relationship may "seek autonomy" under *Casey* in personal decisions relating to marriage just as heterosexual persons do. Moreover, as noted above, in *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court struck down a state law that prohibited giving special minority status to homosexuals on the ground that it was "born of animosity" toward homosexuals and had no rational relation to a legitimate governmental purposes. In addition, now that homosexuals will be **married** (as opposed to partners in civil unions), they will have another arrow in their quiver: the doctrine in *Loving v. Virginia*, 388 U.S.

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1 (1967). In *Loving* the court held that the right to marry is a fundamental right protected by the Due Process clause of the Fourteenth Amendment.

Thus, homosexual activists will make three main arguments against DOMA: (1) DOMA's discrimination against homosexual marriages violates the "personal autonomy" doctrine of *Casey*; (2) DOMA's discrimination against homosexuals serves no legitimate governmental interest and therefore violates the Equal Protection clause under *Romer* and *Lawrence*; and (3) DOMA's discrimination against homosexual marriage imposes an undue burden on the fundamental right to marry and is therefore a violation of the Due Process clause under *Loving*.

It is highly likely that one or more federal courts (the extremely liberal Ninth Circuit comes immediately to mind) will use one or more of these grounds as the basis for declaring DOMA unconstitutional within the next year. Furthermore, based upon the recent trajectory of Supreme Court cases discussed above, it is very likely that the Supreme Court will affirm a case striking DOMA down as unconstitutional.

In a recent *Newsweek* interview Representative Barr acknowledged that state courts are thumbing their nose at the law in a way that no one anticipated in 1996 when DOMA was enacted. Inexplicably, however, he believes things are different in the federal courts, and there is no need to **quote** presume that the Defense of Marriage Act will be held to not be constitutional **end quote**.

Given recent events this is a very curious position indeed, and is, I think, based more on wishful thinking than on a close reading (or even a cursory reading for that matter) of the Supreme Court's decisions.

The legal landscape has changed radically since 1996 not only in the state courts, but also in the federal courts. For example, in 1996 the *Bowers* decision remained firmly in place, but only eight short years later the Supreme Court surprised almost all court watchers when it overruled *Bowers* in *Lawrence*.

Even more importantly, five members of the Court have already stated that homosexuals have the right to personal autonomy when it comes to decisions involving marriage. It seems odd to me that we would not take them at their word. I for one believe them when they say they are about to impose same-sex marriage on this nation, and I urge you to believe them as well and act accordingly.

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"Preserving Traditional Marriage: A View from the States"

Written Testimony of

Governor Mitt Romney
Commonwealth of Massachusetts

Before the Judiciary Committee
U.S. Senate

June 22, 2004

Chairman Hatch, Senator Leahy, Senator Kennedy, distinguished members of the committee, thank you for inviting me to testify today.

As you all know, last November a divided Massachusetts Supreme Judicial Court reformulated the definition of marriage according to their interpretation of the Massachusetts Constitution.

As I am sure you also know, I believe that decision was wrong. Marriage is not "an evolving paradigm," as the Court said, but is a fundamental and universal social institution that bears a real and substantial relation to the public health, safety, morals, and general welfare of all of the people of Massachusetts.

The Court said that the traditional idea of marriage "is rooted in persistent prejudices" and "works a deep and scarring hardship on a very real segment of the community for *no rational reason*." Marriage is "a caste-like system," added the concurrence, defended by nothing more than a "mantra of tradition."

And so the Court simply redefined marriage, and, based on their reading of the Massachusetts Constitution, declared that "the right to marry means little if it does not include the right to marry the person of one's choice."

This is no minor change, or slight adjustment. It is a fundamental break with all of our laws, experiences and traditions.

When some in the state Senate asked whether a "civil unions" bill would satisfy the ruling, the Court rejected the alternative, writing that traditional marriage amounts to "invidious discrimination" and that "no amount of tinkering would remove that stain."

In response, our legislature proposed a constitutional amendment that "only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts," and establishing civil unions for same-sex couples. While I do not think civil unions should be written into the constitution, the main and laudable effect of the amendment would be to overturn the Court's decision.

This was the first step in the legitimate process, by which the *representatives* of the people turn to the *sovereign* people to decide this momentous issue. But it takes time to amend the constitution in Massachusetts. The legislature must pass this amendment again, and then it would be submitted to the people for consideration.

Because it will take time to follow the process of constitutional amendment in the Commonwealth, I asked the Massachusetts Attorney General to call for the Court to withhold their pronouncement until the people could consider the question, so that they would not be excluded from a decision as fundamental to our societal well-being as the definition of marriage. He declined to do so.

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Several last minute challenges to the decision were also summarily rejected.

So, as a result, on May 17, the Commonwealth of Massachusetts began issuing marriage licenses to persons of the same sex. These licenses are valid for up to 60 days and are filed with the State Department of Public Health two months after a marriage has taken place. Therefore, we do not have official statistics and information yet from our Department of Public Health. However, the Boston Globe recently surveyed the 351 cities and towns in Massachusetts and the results of their survey do provide some information on the activity since May 17.

According to the Globe, in the first week that the issuance of marriage licenses to same-sex couples became legal, over 2,400 such licenses were issued. The vast majority of these licenses were issued to Massachusetts residents, because our state does have a law which prohibits couples from entering into valid marriages in Massachusetts if there is an impediment to marriage in their home state. Applicants are required to sign a form signifying their intent to reside in Massachusetts in order to receive a license.

Originally, we were aware of six communities where the clerks refused to honor that law. The Globe reports that at least 164 out-of-state couples, from 27 states and Washington, DC, were issued licenses by these clerks. 56 of those couples specified on their application that they do not intend to move to Massachusetts. For those couples whose unions would not be recognized in their home state, according to Massachusetts law, their marriage is null and void.

At my request, the Attorney General directed the city and town clerks to comply with the existing Massachusetts law, and it is my understanding that currently, all the cities and towns are in compliance. Legislation is pending in the Massachusetts legislature which would repeal this residency law and, although it has passed the Senate, it doesn't appear likely to pass the House in the short period remaining before adjournment.

Nevertheless, other actions are underway to eliminate the residency requirement. Two suits have been filed against this law, one from a dozen Massachusetts towns and another from several same-sex couples from Maine, New Hampshire, New York, Rhode Island and Connecticut. The couples argue that this new right is so powerful that denying it to non-residents violates the Massachusetts Constitution, as well as the Privileges and Immunities Clause of the US Constitution.

With the inauguration of same-sex marriages, a plethora of legal and regulatory issues are now arising. Although we will eventually be able to sort these issues out, it will take time. And, more importantly, we must move through many of these issues without the benefit of adequate time for full consideration of all the impacts. I expect that we will continue to see new issues arising for the foreseeable future as the Commonwealth struggles to understand all the changes that will now be sought due to this judicial ruling.

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A number of the issues we are now reviewing relate to state benefits. In some cases, we have been in contact with the federal government to understand their position on the eligibility for benefits that are provided by the state but funded by the federal government. For example, we have been told that we cannot use federal funds to provide meals for an elderly same-sex spouse if the person's eligibility for the services is due to their spousal status. We have not heard yet from the Veterans Administration as to whether we can bury two same-sex spouses at our state Veterans cemeteries. Medicaid is a particularly interesting situation. Under our state laws, we use federal income eligibility guidelines. In this case, since the marriage is not recognized by the federal government, the person will be deemed eligible for Medicaid based on their individual income, not their two-spouse income. And, CMS has confirmed that federal matching funds will be available in this instance. However, if the person is eligible for Medicaid due to their spousal relationship, federal matching funds cannot be used since the federal government does not recognize the marriage. Similarly, CMS has notified us that federal transfer of asset rules regarding spouses will not apply, nor will spousal impoverishment provisions apply, to same sex spouses.

There are other very troubling issues. We now must consider whether to amend our birth registration process, which currently requires the name of a mother and a father. Should we change our birth registration documents to read "Parent A" and "Parent B"? What impact would this have on child support enforcement, considering that birth certificates are a critical tool that are used to find and force absentee fathers to provide child support.

A number of legal issues are expected related to divorce and inheritance rights, particularly regarding those couples who move out of Massachusetts to states where there marriage is not recognized. The private sector is also beginning to grapple with ramifications of this change. We have been told anecdotally that some companies may be dropping domestic partnership benefits now that same-sex couples can wed, thus eliminating a benefit that was available in the past. Pension issues are also expected to arrive, particularly for surviving spouses who do not meet the requirement for number of years married when marriage was not legal prior to May 17.

These issues will not be confined to Massachusetts alone. Our state's borders are porous. Citizens of our state will travel and may face sickness and injury in other states. In those cases, their spousal relationship may not be recognized, and it would be likely that litigation would result. Massachusetts residents will move to other states, and thus issues related to property rights, employer benefits, inheritance, and many others will arise. It is not possible for the issue to remain solely a Massachusetts issue; it must now be confronted on a national basis.

We need an amendment that restores and protects our societal definition of marriage, blocks judges from changing that definition and then, consistent with the principles of federalism, leaves other policy issues regarding marriage to state legislatures.

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The real threat to the states is not the constitutional amendment process, in which the states participate, but activist judges who disregard the law and redefine marriage in order to impose their will on the states, and on the whole nation.

At this point, the only way to reestablish the status quo ante is to preserve the definition of marriage in the federal constitution before courts redefine it out of existence.

Congress has been gathering evidence and considering testimony about the need for a constitutional amendment to protect marriage. The time fast approaches for debate, and then decision.

The decision you will make will determine whether the American people will be allowed to have a say in this matter, or whether the courts will decide this matter for them.

At the heart of American democracy is the principle that the most fundamental decisions in society should ultimately be decided by the people themselves. Surely the definition of society's core institution, marriage, is such a decision.

Let me conclude with this point: Despite the warning signs, the Massachusetts Legislature hesitated, and refused to act. But the court had no such reluctance, and acted decisively. Now on the defensive, the legislature has begun the long and difficult process of amending the Constitution to undue what the Court has done. But it may soon be too late.

This is what happened in Massachusetts. It is in your hands to determine whether or not this will be the fate of the nation.

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