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LESS FAITH IN JUDICIAL CREDIT: ARE FEDERAL AND STATE DEFENSE OF MARRIAGE INITIATIVES VULNERABLE TO JUDICIAL ACTIVISM?

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

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LESS FAITH IN JUDICIAL CREDIT: ARE FEDERAL AND STATE DEFENSE OF MARRIAGE INITIATIVES VULNERABLE TO JUDICIAL ACTIVISM?

WEDNESDAY, APRIL 13, 2005

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

The Subcommittee met, pursuant to notice, at 2:05 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback [Chairman of the Subcommittee] presiding.

Present: Senators Brownback, Feingold, and Kennedy.

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

Chairman BROWNBACK. Thank you for joining me this afternoon. This is the first in a series of hearings, information sessions that I hope to have on the issue of a constitutional amendment regarding the protection of traditional marriage. I welcome everybody here. This is a topic that has had a great deal of discussion across the United States and promises to have a great deal more.

One of the most frequently heard refrains about the debate thus far was the assertion that the marriage protection amendment was completely unnecessary in light of the Federal Defense of Marriage Act, or DOMA, which strong bipartisan majorities in Congress passed and which President Clinton signed into law in 1996. The question was, why do we need to amend the Constitution, many of my colleagues asked, when DOMA specifically says that States and localities opposing same-sex marriage need not recognize same-sex marriages contracted outside their borders. If that is the case, why not leave marriage law up to the individual States, as is proper under our Federal system?

Allowing the people in each State to decide this important issue for themselves was precisely what Congress intended in passing DOMA in 1996. DOMA simply establishes that no State may force its own redefinition of marriage on other States or on the Federal Government over their objections. It leaves decisions about marriage law and regulation up to the people of each State, where they belong.

One of the fundamental tenets of the American legal system is that government derives their just power from the consent of the governed. This means that the American people, through their leg-

islatures, are the ones who must be able to make the laws with regard to fundamental social institutions, such as family. The argument that marriage is a matter reserved to the States and to the people only makes sense if the people are the ones who determine the definition of marriage and the laws that regulate it.

Five years ago, the Supreme Court of Vermont ruled that same-sex couples must be given the same legal status and rights as married couples. Last year, the Massachusetts Supreme Court ruled that State law restricting marriage to male-female couples had no rational basis and violated the State Constitution. Going even further, the Court subsequently required the Massachusetts legislature to enact same-sex marriages, reasoning that giving same-sex couples all the legal benefits of marriage with civil unions did not go far enough.

In California, New York, Washington, and Oregon, judges have found a right to same-sex marriage in the State Constitution, contradicting the express desires of voters to preserve marriage as a union between a man and a woman.

More such rulings are seemingly just around the corner, as eight States currently face lawsuits challenging their traditional marriage laws. Courts in at least two States have already recognized civil unions imported from Vermont, and DOMA itself is already being challenged. A Federal lawsuit in Washington State challenging DOMA's constitutionality could be before the Ninth Circuit Court of Appeals within a year.

For those who argue that the notion that DOMA is at risk is only a scare tactic put forward by those who want to stampede a constitutional amendment through, I would ask them to look at what has already occurred. When Justice Scalia asserted that the Court's decision in *Lawrence* v. *Texas* left State laws limiting marriage to opposite-sex couples on shaky ground, he was widely accused of the same type of scare mongering. Yet the Court's reasoning in *Lawrence* that judges can freely invalidate laws based on mere moral disapproval has subsequently been cited repeatedly in decisions by State judges determined to overturn marriage laws, most notably by the Massachusetts Supreme Court in *Goodridge.*.

Many scholars and citizens believe it is only a matter of time before the Supreme Court mandates same-sex marriage in every State, either by expansively interpreting the Constitution's Full Faith and Credit Clause or through yet another far-reaching substantive due process decision like *Lawrence* that so many people in so many States have recently and overwhelmingly passed marriage protection initiatives, most recently in my State of Kansas by 70 percent of the electorate. They, too, expect the Supreme Court to invalidate Federal and State DOMAs as interfering with the newfound fundamental right discovered in *Lawrence*.

In this hearing today, we will look at the legal landscape regarding the Defense of Marriage Act and the question of whether an amendment to the U.S. Constitution is necessary to protect the people's prerogatives to decide the matter for themselves.

We have a distinguished panel of witnesses before us. First, we will hear from Professor Lynn Wardle of Brigham Young University's J. Reuben Clark Law School. Professor Wardle has written extensively on the subject of marriage and has previously appeared

before both House and Senate Judiciary Committees advocating passage of DOMA.

Next, we have Kathleen Moltz, a pediatrician at Children's Hospital of Michigan at Wayne State University.

And lastly, we will hear from Professor Gerard Bradley of the University of Notre Dame Law School. Professor Bradley is widely recognized for his scholarship in constitutional law and is active in numerous organizations involving the study of law, religion, and related constitutional issues.

As I mentioned, this is the first in what I plan to have as a series of hearings on a very important subject that has involved many people around the country. I hope to dig in today just about the efficacy or lack of it for DOMA itself and really delve into that subject, and as we go along with hearings, I hope to be able to focus on a number of different subjects.

We do have a vote on the floor, which I hope my colleague has voted on, and we have the possibility of having a second and third one. We may try to bounce back and forth and see if we can just keep this going. If we can't, we will put it in recess for a short period of time and then come back and continue with the hearing.

With that, I turn it over to my colleague, Senator Feingold.

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

Senator FEINGOLD. Thank you, Mr. Chairman, and I have taken the first vote, as well.

I do want to thank you and your staff for working so collegially with us on this hearing, including the significant advance notice of it that you gave us. That is much appreciated. Again, I look forward to working well together as you chair this Subcommittee.

That having been said, there are many other, in my view, many more pressing topics that we could do well to consider instead of this one. Certainly my constituents are not up in arm about the possibility of gay marriage, at least when I speak with them. Since the beginning of this year, I have held 20 listening sessions in Wisconsin. The people who come come to talk to me primarily to talk about Social Security and health care and the war in Iraq. Only four people out of the 950 that turned out for these sessions wanted to talk about a Federal Marriage Amendment, and three of them actually opposed the amendment.

Last Congress, this Subcommittee and the full Judiciary Committee had four hearings on this issue. The problem was not a lack of hearings, but a lack of Committee consideration. Supporters of the Federal Marriage Amendment took it directly to the floor, where it failed by a large margin, rather than allowing this Subcommittee and the full Judiciary Committee, which has a long history of carefully considering proposed constitutional amendments, to consider it.

The debate on the floor was striking. Opponents of the amendment had a hard time agreeing on exactly what it would do. That is the kind of problem that can be addressed and rectified within a duly constituted Committee consideration. But the proponents of the amendment didn't allow the process to work as it usually does and as it should, and there is still no clarity on the indirect con-

sequences of the Federal Marriage Amendment. Ambiguity still remains as to whether the language of the amendment would permit States to offer domestic partner benefits or the options of civil unions to same-sex couples.

Now, for one of our witnesses here today, this is not just a hypothetical question. The Attorney General of Michigan recently issued an opinion that the constitutional amendment adopted by Michigan voters in November prohibits the State—prohibits the State—from offering domestic partner benefits. Now, that ruling has had a real impact on real people. State courts will decide whether the amendment will have that effect, which many of its supporters disclaimed during the campaign. But what has happened in Michigan makes it even more obvious than it was last year, that the full effect of the Federal Marriage Amendment must be explored and carefully debated in the Judiciary Committee before—before the Senate is asked to vote again.

The amendment's proponents insist on pushing in this Congress. I sincerely hope that this time, they will permit full Subcommittee and Committee consideration.

Now, my strong preference, of course, is that the Senate does not consider such an amendment in this Congress. Nothing has happened since the floor vote in July 2004 to indicate that a constitutional amendment is any more justified or any more necessary now than it was then.

For more than two centuries, family law has been the province of the State. In fact, the enactment of several State marriage initiatives by the voters in the last election suggests that the States are capable of addressing the issue and Federal intervention is even less needed. There is certainly no crisis warranting a Federal constitutional amendment on this issue. There is no more likelihood now than there was last year that the Supreme Court is somehow poised to strike down Federal or State marriage laws as unconstitutional.

Proponents of the amendment are asking us to make a preemptive strike on the Constitution. Because the Supreme Court might someday strike down marriage laws, we are told by witnesses here today, we must enact an amendment to the Constitution itself that will prevent all States for all time from recognizing same-sex marriage or even perhaps civil unions or domestic partnerships. Mr. Chairman, that is an extreme step and I will strongly oppose it.

With the exception of the 18th Amendment instituting prohibition, which, of course, was later repealed, the Constitution has never been amended to limit basic rights. If the Federal Marriage Amendment is ratified, it would do just that. Our Constitution is an historic guarantee of individual freedom. It has served as a beacon of hope and an example to people around the world who yearn to be free, to live their lives without government interfering with their most basic human decisions. We should not seek to amend the Constitution in a way that will reduce its grandeur.

Mr. Chairman, I again thank you for your courtesy and I look forward to the testimony today.

Chairman BROWNBACK. Thank you, Senator Feingold.

We will go ahead with the testimony. First will be the presentation by Mr. Lynn Wardle. He is a professor of law at Brigham Young University.

Mr. Wardle, thank you for joining us.

STATEMENT OF LYNN D. WARDLE, PROFESSOR OF LAW, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL, PROVO, UTAH

Mr. WARDLE. Thank you, Mr. Chairman and Senator Feingold. I am honored to be invited to prevent a statement before this Subcommittee on this very important topic.

I am a professor of law at Brigham Young University. I taught family law for 27 years and conflicts of law and origins of the Constitution legal history for nearly as long. Because both the Defense of Marriage Act, DOMA, and the proposed Federal Marriage Amendment affect all of those areas, I have been invited to give my testimony about the sufficiency of Federal and State laws protecting marriage and of the need for a Federal Marriage Amendment. Of course, the opinion I express is my own opinion. I am not speaking for any institution that I am associated with.

In the summer of 1996, I was privileged to testify before the Senate Judiciary Committee and also before the Judiciary Committee in the House of Representatives about the need for a DOMA. I believed then that DOMA would solve the problems that were facing in the country, or that were being faced then of courts attempting to legalize same-sex marriage and the threat that they would be imported from one State to another forcibly by a coercive interpretation of the Full Faith and Credit doctrine.

This Congress, as Senator Brownback has pointed out, passed overwhelmingly, by 85 to 14 in the Senate and 342 to 67 in the House, the Defense of Marriage Act. Congress was wise to anticipate the developments that have since then driven more than 40 States to enact similar State DOMAs.

I am a firm believer in the value and the importance of DOMA. It is a critical piece of legislation. But as we approach the end of the first decade since DOMA's enactment, it is now apparent that DOMA is not sufficient to prevent the Federal judicial—judicial federalization and the coerced imposition of same-sex marriages on the States. That is why a Federal Marriage Amendment is necessary, and I would like to give four reasons.

First, DOMA is endangered. DOMA is only a statute and many, quoting from the Harvard Journal on Legislation, quote, "many commentators argue that the second section of DOMA violates multiple provisions of the U.S. Constitution, including Full Faith and Credit, Equal Protection, Due Process, Bill of Attainder, Privileges and Immunities, and so forth," close quote.

In the appendix to my written statement, which I request be included in this record—

Chairman BROWNBACK. Without objection.

Mr. WARDLE. —I list 30 articles, comments, and notes that assert that DOMA is unconstitutional, and that was just based on a sampling of 20 percent of all of the law reviews that came up with hits. Court decisions in New York and Iowa have called into question the constitutionality of DOMA. In addition, two State courts in the State of Washington have ruled that DOMA, the State DOMA

there, is unconstitutional under the State constitutional privileges and immunities doctrine which is a counterpart to the Federal constitutional provision. A Federal court in Nebraska has ruled that that State's DOMA violates the prohibition against Bill of Attainders, if you can believe that.

The point is that what was expected a decade ago to be fair, honest, and consistent interpretation of the precedents and constitutional doctrines can no longer be taken for granted. DOMA is in danger because of these claims that DOMA is unconstitutional, with growing support in the judicial decisions.

Second, DOMA is necessary to protect the principle of federalism in family law that Senator Feingold articulated so well just a moment ago. I resonate to that. About two years ago, in June of 2003, I presented a paper at an academic conference at the University of Oregon Law School in which I opposed and criticized the Federal Marriage Amendment precisely on those grounds, that we need to protect the principle of federalism in family law. However, since then, the earth has changed. There has been a judicial earthquake in which it is now necessary—it is clear that this issue, whether same-sex marriage will be legalized, has been federalized. It is in the process of being federalized before our very eyes.

Courts have relied upon elastic interpretation of six different provisions of the Constitution to rule that States must legalize same-sex marriage, recognize them, or give same-sex civil unions. Additionally, lawyers have put forward two additional constitutional provisions, for a total of eight constitutional provisions that have been invoked, claiming that the Constitution mandates the acceptance or recognition of same-sex marriage. Courts in eight different States have already invoked various constitutional provisions to rule in favor of same-sex marriage. Some of those cases are still pending on appeal, and a couple were overturned by constitutional amendment. An additional eight cases are presently pending in State courts challenging marriage laws in a variety of constitutional claims.

The point is, it can no longer be said that the issue isn't being constitutionalized. It has been constitutionalized and federalized by these judicial decisions. It is absolutely clear that federalization is occurring. The only question that remains is, one, who will decide what the constitutional rule will be, and second, how will it be decided? Will it be by courts giving broad interpretation to expansive provisions of the Constitution, or the people through a narrow constitutional amendment? Will it be to protect the civil institution and protect the civil right of the people to protect marriage, or will it be to radically redefine and impose judicially a new definition of marriage on the States?

Third, DOMA is only a statute and it addressed structural provisions, yet we are seeing the substantive constitutionalization of the issue. We have seen that marriage is a great prize, a great trophy. It is such a powerful social institution that many political movements have sought to capture marriage in order to mainstream and spread their political agendas. At least twice before, extraneous movements have captured marriage, and those were just repudiated in 1967. The attempt to redefine marriage by judicial decision is a continuation of that long-established trend. Just as *Loving* v.

Virginia used the Constitution to protect marriage, so we should protect—pass a constitutional amendment to protect the institution of marriage at this time.

I have some information, but I see that my time is up. There is information, and I will just conclude, that the people want this. Eighteen out of 18 proposed State amendments that have come before the voters have been passed by margins that are overwhelming, from 57 percent to 86 percent. Not a single proposed amendment that the people have voted on has failed. Additionally, three other States will be voting this year, three more States, and 13 are in process of amendment. Twenty-six States have statutes.

Finally, marriage is the cornerstone of the sub-structure upon which the superstructure of the Constitution rests. As Francis Grund put it, "The American Constitution is remarkable for its simplicity, but it can only suffice if people habitually correct in their actions change the domestic habits of the Americans, and it will not be necessary to change a single letter of the Constitution to vary their whole form of government."

Therefore, I strongly urge this Subcommittee to recommend the passage of an amendment to the Constitution to define and protect the civil right of the institution of marriage. Thank you.

Chairman BROWNBACK. Thank you.

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

Chairman BROWNBACK. Has the vote been called? Dr. Moltz, how long is your presentation?

Dr. MOLTZ. Approximately five minutes.

Chairman BROWNBACK. If it is okay with my colleagues, let us go ahead and take your comments and then we will recess briefly and then come back.

Our next presentation will be Dr. Kathleen Moltz, Assistant Professor, Department of Pediatrics at Wayne State University School of Medicine in Detroit. Welcome to the Committee. We are delighted you are here.

STATEMENT OF KATHLEEN MOLTZ, M.D., ASSISTANT PROFESSOR, DEPARTMENT OF PEDIATRICS, WAYNE STATE UNIVERSITY SCHOOL OF MEDICINE, DETROIT, MICHIGAN

Dr. MOLTZ. Thank you for having me. I appreciate the opportunity to speak to the Subcommittee about my family. I am here as a mother, as a spouse, and as a pediatrician who has taken the oath, first, do no harm.

Dahlia, my spouse, and I have been together for almost 15 years and we are the proud parents to our four-year-old daughter, Aliana, and our two-year-old son, Itamar, who is probably running the halls. When Itamar was born, I experienced firsthand the harm caused by failure to recognize our relationship. Immediately after his birth, Itamar experienced respiratory difficulties. The pediatrician on staff refused to discuss Itamar's condition with me because I was not his real mother. I am a real mother to my children, and so is Dahlia.

In June 2004, our family moved to Michigan, where I took a job as a pediatric endocrinologist at Wayne State University. I care for

an underserved population of children with diabetes and other endocrine problems. Our family's primary purpose for moving was to allow Dahlia to stay home with our children. The domestic partner benefits promised to me as a part of my employment package made this possible. The other benefit of moving to Michigan was to be close to my parents, who currently live only eight houses down from us and who are here supporting us today.

Not long after we moved to Michigan, the State became embroiled in a campaign to pass Proposal 2, an amendment to the State Constitution that would ban marriage rights for same-sex couples. When our daughter asked what it was all about, we told her that there were people who believed we couldn't really be a family. We told her that we thought this was silly, because obviously we are a family. We share love with children and a commitment to raise healthy, happy kids.

When the results of the election came in, Aliana asked about the outcome. We told her that the amendment had passed. With tears in her eyes, she asked, "Does this mean our family has to split up?"

We were dismayed and stunned by the results of the Michigan election. We never wanted to get involved in a legal action, much less national politics—no offense intended. When anti-gay groups from outside of our State tried to use the amendment to take away the health benefits insurance I obtained through my work, I could not sit idly by. Throughout the campaign, supporters of the amendment insisted it was only about marriage and had nothing to do with domestic partnership benefits. But now the amendment is being used as a weapon to take away the health insurance upon which many families, including my own, rely.

I am here today because I am concerned that the Federal Marriage Amendment, which is very similar to Michigan's amendment, will be used to deny equal benefits nationwide. I am concerned that, as in Michigan, if such an State is passed, it will be used to target domestic partnership benefits for elimination. I do not understand how even one marriage is protected by this amendment. As a religious American with great respect for our Constitution, I don't understand why Federal law should play a role in defining for the various religions which marriages are sacred.

Every major medical association that has issued an opinion on the subject endorses increasing, not removing, legal protection of gay and lesbian families. This includes pediatric associations of which I am a member and my own field of experience includes.

I am going to finish up with a Jewish folktale. A man went about saying hateful things about his rabbi. One day, he saw the harm his words caused to the rabbi's reputation. The man went to the rabbi and begged forgiveness. The rabbi said, "You must do two things. First, get a feather pillow, cut a hole in it, and throw the feathers off the side of the cliff, then return here." The man did as instructed. When he returned, the rabbi said, "Now, you must go and gather in each and every feather." The man said, "But that is impossible, rabbi," and the rabbi replied, "Yes, it is just as impossible to take back the harm done by the words you have scattered around town."

I don't know what harm your words and actions as leaders advocating for a constitutional amendment might cause. I fear that fam-

ilies like mine with young children will lose health benefits, will be denied common decencies, like hospital visitation when tragedy strikes, will lack the ability to provide support for one another in old age. I know what this amendment will not do. This amendment will not help any family in need.

Please remember, the harm caused by words and actions can never be healed, and I pray in dealing with our precious Constitution you will follow the dictates of the oath that binds my profession. First, do no harm. Thank you.

Chairman BROWNBACK. Thank you, Dr. Moltz.

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

Chairman BROWNBACK. We are going to sit in recess. It will probably be about 15 minutes.

[Recess from 2:31 p.m. to 2:51 p.m.]

Chairman BROWNBACK. I will call the hearing back to order. My apologies for the disruption on the vote that we had on the floor, but I do appreciate your willingness to stay.

Our third testifier on this panel is Mr. Gerard Bradley, Professor of Law at the University of Notre Dame Law School at Notre Dame, Indiana.

Professor Bradley, thank you very much for joining us.

STATEMENT OF GERARD V. BRADLEY, PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL, NOTRE DAME, INDIANA

Mr. BRADLEY. You are welcome. Senator Brownback, thank you for the opportunity to explain how existing marriage protections, including the Defense of Marriage Act, are indeed vulnerable to judicial activism. They are vulnerable to being defeated by a Supreme Court ruling that would hold excluding same-sex couples from marriage is simply unconstitutional.

I would like to, in these brief oral remarks, to summarize my written testimony by making three points and then, time permitting, offer two more observations, really clarifications of what is at issue in this debate and what is not at issue.

But first, my testimony in three parts. One, there is no question that if the conclusion of the court in *Lawrence* v. *Texas* is extended to same-sex marriage, then every legal definition of marriage in this country, save that of Massachusetts, would be swept away, no question at all. Why? Because the conclusion of the *Lawrence* court was that there was no rational basis, say also no legitimate State interest involved in that case.

That is what the Constitution requires of every law. State law, State Constitutions, all Federal legislation, Federal rules—all of them have to have a rational basis. One does not need to know anything at all about, for example, Full Faith and Credit to know that any law that depends, including a Congressional law that depends on Full Faith and Credit, for example, DOMA, has to have a rational basis. No rational basis, DOMA is out.

Two, *Lawrence* was a case that started with the arrest of two men for violating a State law against sodomy. The Supreme Court invalidated that law in a constitutional ruling and overruled the prior case of *Bowers* v. *Hardwick*, but the Court did not do so on

narrow grounds. There were narrow grounds available to the Court, grounds having to do with the effective limits of criminal law, its enforcement, the privacy of one's bedroom. The *Lawrence* Court could have put its conclusion to rest on these relatively modest grounds, but it did not. The majority in *Lawrence* chose instead larger, much more potentous grounds. The respect our Constitution requires law to give to homosexual relationships, respect equal to that claim by heterosexual couples up to and including matters of marriage, procreation, and family.

Now, details and citations in support of this point are contained in my written remarks. Suffice it to say for now that the *Lawrence* majority's reasoning goes right through to same-sex marriage. That is five votes right there on the Court.

Now, Justice O'Connor's Equal Protection concurrence is a bit more obscure and she certainly needs to try harder to have the impression, or give the impression that she is not committing herself on the same-sex marriage question. But as I see it, her reasoning, too, leads to same-sex marriage, so that is six votes.

So the conclusion of *Lawrence* would invalidate DOMA and all other marriage laws save Massachusetts. The reasoning of *Lawrence* very strongly suggests that the Court would reach that conclusion in a same-sex marriage case.

Then the third point, the only remaining point, how likely is this to happen? I mean, is the Court going to take a same-sex marriage case soon and so have the chance to follow the path of *Lawrence* to requiring same-sex marriage across the country? I think the answer to this question is it is very likely.

The *Lawrence* majority did not—I should stress, did not expressly say what it would do about same-sex marriage. In my judgment, however, there can be little question that by declining to decide the case on narrow or modest grounds, by setting up the case the way it did, as one of endangered fundamental rights gasping for life in a sea of politically dominant prejudice, the Supreme Court has all but bound itself to take up the same-sex marriage question soon. To do otherwise would, I think, leave the Justices open to charges that they had betrayed the Court's own professed ideals, indeed, had reneged on a promise laid down in *Lawrence*. The only way to forestall such a climactic ruling is to amend the Constitution in plain terms so that even Justices inclined to think otherwise would have no choice but to say the Constitution permits marriage to be limited to opposite-sex couples.

Now, I turn to two observations, clarifications, really, and they are suggested to me by Dr. Moltz's testimony. One is the church-state angle on the same-sex marriage debate. It is a red herring. Dr. Moltz said in her written testimony that she was married in a Jewish ceremony and said here earlier that she is surprised the law and our constitutional system would pick and choose among religions, picking and choosing which the law would treat as sacred. Now, there are several misunderstandings of how our law about marriage works in these views.

For example, nothing in any marriage amendment I have ever seen, and I have seen quite a few, would interfere with anyone's belief that as far as that person's religious self-understanding goes, he or she is married. Now, for example, no doubt many Mormon

men in America right now consider themselves to be married to several women. Nothing in our law says that this understanding of Mormonism is somehow false and the Constitution would prevent public authority from saying that this view of Mormonism, that polygamy is permitted, is somehow false. It is just that in law, you can only have one spouse at a time.

Now, nothing in our Constitution requires law to recognize as valid any marriage whatsoever just because someone's faith says it is so. Otherwise, we would have to recognize polygamy, but we don't. Besides, our law does not pick and choose which marriages are sacred. The concept "sacred" is really foreign to the law of marriage. Now, most married people think, no doubt, that their marriages are sacred in some sense, but the law does not think that way.

Marriage is marriage in the law. Couples married by priests, by rabbis, by judges, I suppose by captains of ships at sea, they are all married just the same in law. Atheists and devout believers, married just the same. Over 18, not married to anyone else, want to marry someone of the opposite sex who is not closely related, the law says to you, go ahead. Okay. You can marry.

Now, additional religious requirements for entering into marriage simply aren't the law's concern. In fact, the law imposes relatively few specific duties upon spouses. Most religions require much more of spouses in order to be good spouses. But again, these additional duties supplied by religion are not the law's concern, and I see my time has expired.

Chairman BROWNBACK. Thank you, Professor Bradley.

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

Chairman BROWNBACK. Professor Wardle, I understand you have to catch a plane at 3:20, is that correct?

Mr. WARDLE. I need to leave at 3:20 to get a 5:00 plane at BWI, if you will forgive me.

Chairman BROWNBACK. With that in mind, we will run the time clock on questions, if you don't mind, Senator Feingold, at seven minutes, and I will direct most of my questioning to you initially and go to Senator Feingold for questions, just so we have advantage of you, and then we can go to another round or two without any problem.

Professor Wardle, let me understand clearly on your position on this because we want to look at the specific and narrow issue of is DOMA going to stand a constitutional challenge. You were initially of the opinion DOMA was sufficient. You are not now of the opinion that DOMA is sufficient for a constitutional challenge. Then you cite a body of evidence. Was there a particular issue or thing that happened that swung you on this issue, or is it just the accumulating body of judicial thought that is taking place?

Mr. WARDLE. Both. It was an accumulating body, just one case after another, all of them invoking constitutional doctrines, many of them State Constitution, but State constitutional doctrines that have counterparts in the Federal Constitution—Due Process, Equal Protection, Privileges and Immunities.

Then perhaps the most dramatic, of course, was the decision of the Supreme Judicial of Massachusetts in *Goodridge.*. The opinion

is eloquent, articulate, well-written, but includes no credible legal analysis. It is a political tract, and I was stunned that a court would go so far with so little supporting constitutional precedent.

But it was the accumulation. It just finally became undeniable. As much as I want to keep this issue entirely within the parameters of federalism and family law, that has changed. It is like pretending that we don't have automobiles today, that we have horse and buggies. The issue has been federalized by ruling after ruling after ruling, by constitutional doctrine.

I guess the decision of the Nebraska Federal court was the one that shocked me as well, Judge Battalion's decision in which he found that the Bill of Attainder Clause of the U.S. Constitution would invalidate. He said there was a substantial likelihood of success on that claim that the State DOMA is invalid under the Bill of Attainder Clause.

The wonderful testimony of Dr. Moltz, and I commend any persons who undertake the responsibility to raise children and to do so responsibly. I commend those people. But this is a matter—this is the other side of federalism and family law, that you leave it to the States to work out details. But I think that there is less threat to federalism and family law from a very narrow definition of marriage than there is from broad interpretation of expansive constitutional doctrines, which is occurring at this very time.

Chairman BROWNBACK. You cite a series of law review articles. Give me that number again and the weight of those that, in their opinion, DOMA will not stand a constitutional challenge.

Mr. WARDLE. I didn't finish—I found 269 law review articles and I got through 20 percent of them and found 30 that specifically argue that DOMA is or should be held unconstitutional. Those are in the appendix to my piece. If you extrapolate that, 30 and 20 percent, you would come up with 150 carried through. It is probably not that high, but my guess is that there are well over 100 law review articles, notes, and comments that advocate that the Constitution requires States to legalize same-sex marriage or to strike down State DOMAs or Federal DOMAs.

Chairman BROWNBACK. Given how the Court has been ruling since *Lawrence*, *Goodridge*, the series of laws that have been building up, is that correct?

Mr. WARDLE. Yes. *Lawrence* really was the trigger for an explosion, although since 1996, when Congress passed DOMA, there have been a lot of criticisms. The irony right now is that some of those early critics who said, oh, you can't do this, this is unnecessary, this is bad or unconstitutional, speaking of DOMA, are now coming and saying, oh, DOMA is okay but you don't need to do anything more, because they realize that DOMA only addresses a structural question, can States be forced to recognize same-sex marriages from other States? It doesn't address the substantive provisions of the Constitution. Does Due Process, Equal Protection force the States to legalize same-sex marriage?

Professor Bradley's testimony about one of those rulings, the *Lawrence* case, which is the most explosive, which was the first citation, not a Massachusetts case. The first case cited in *Goodridge.* was the *Lawrence* decision. Since *Lawrence* and since *Goodridge*, there has been a real, as you know, an explosion—rulings in Or-

egon, California, Washington, New York, and cases pending across the country as well as minor court decisions, trial court decisions, elsewhere.

Chairman BROWNBACK. Whenever this comes up to a vote anywhere in the country, the people go the other way. The courts are tracking clearly in the opposite direction of public opinion.

Mr. WARDLE. That is correct. Eighteen out of 18 times, when the voters of the States have had an opportunity to take a position, to vote on a proposed amendment, they have overwhelmingly passed, by majorities up to 86 percent, have passed State marriage amendments, and it is because—look at the history of our Constitution. Why do we pass amendments? One of the—the first reason probably is that when we feel that our valued rights that we have taken for granted are now threatened. I mean, today, we are not worried about having to quarter troops in our homes. In 1787, 1788, 1789, they were, and they insisted that there be protection written in the Bill of Rights that we don't have to quarter troops in our own homes.

Today, we feel that the institution of marriage is seriously threatened. That doesn't speak about whether particular benefits should be given to non-married couples, but the fundamental institution of marriage, the bedrock of our society, the basic and fundamental social unit, is under attack by a radical redefinition. And political groups have sought to capture marriage throughout history in order to mainstream and further their political ideals. This isn't anything new. And the Supreme Court has and the Constitution has been used to protect marriage against some of those efforts in the past and that is what is being proposed in the Federal Marriage Amendment.

Chairman BROWNBACK. In the law review articles that you have surveyed, the writers of these, are they of a particular political spectrum that believe DOMA will be held unconstitutional, or do they go the full political spectrum—left, right, conservative, moderate, liberal—of thought that DOMA will be considered unconstitutional?

Mr. WARDLE. Overwhelmingly, they come from the liberal tradition, but there are even some conservatives who would argue that it is. Some people consider Cass Sunstein, for instance, to be conservative, from the University of Chicago. He testified against DOMA in 1996, even though he has changed his position and testified differently within the last year or so.

Chairman BROWNBACK. So you don't see this as moving. It has been pretty well established now, you believe, in the judicial thought, so this is moving and it is going to happen. The redefinition of marriage will happen by the courts.

Mr. WARDLE. It is well underway. With this rate of opinion, the momentum is building. The tempo is increasing. I would estimate within the next 18 months, we are going to see a rash of decisions as these trial court decisions are moving up on appeal in Washington, in California. There is a case pending in New Jersey, cases in New York, as you know. This is really exploding in the courts. The courts have seen a way that they can do this and they think they can do it in a way that won't impair their independence as a judicial branch.

Chairman BROWNBACK. Let me ask you, a thought that gets thrown out a lot, and I just want to get your opinion on this because people are saying with the series of cases that has developed, it really then removes any rational basis for a legislative body to enact any sort of limitations on unions of individuals. Many will argue, I think even Justice Scalia argued that laws regarding polygamy and others will no longer have a rational—I don't think he used the term "rational basis" with it, but that being the lowest standard of possible action. You have no basis for doing that. Is that accurate on other areas of where the legislative bodies have over the years made very clear limitations on unions of individuals?

Mr. WARDLE. You are right that over the years, numerous restrictions on marriage have been upheld, but this is a particular kind of restriction and the courts are giving this very unique treatment. The problem is, in doing so, they open the door to use Federal constitutional doctrines to regulate marriage and family relations in a way that essentially completely erodes the principle of federalism in family law, that these principles can then be expanded to other areas, other kinds of regulations, other kinds of marriage regulations, other kinds of family relationships, so very expansive.

And that is why those who favor the principle of federalism in family law, as I do, realize that in order to protect that principle, a constitutional amendment is necessary, first to define marriage, to resolve that issue so that we don't have a patchwork quilt but we have a uniform definition for the entire country with regard to that very contentious issue, and then reserve all other dimensions very clearly to the State to be resolved by the democratic processes.

Chairman BROWNBACK. What about State polygamy laws? Will they be able to be held constitutional?

Mr. WARDLE. Logically, the extension of the rationale of *Lawrence* and of *Goodridge* would be no, but I think that there is a politics that informs those decisions that would draw the line at polygamy. Logically, if there is intellectual integrity, if there is intellectual honesty, the answer would have to be, yes, these kinds of relationships also will be legalized under the same rationale as the legalization of same-sex marriage in Massachusetts.

But I just don't think the courts are being honest. I think it is purely political and that there is a political difference. Those favoring the politics of polygamy are not as powerful as those favoring the politics of same-sex unions, though frankly, in my field, family law, the polyamory movement, as it is now called, is much larger and stronger than it was—than it has ever been before. It is really quite a growing—it is a minority movement, but there are advocates of same-sex marriage that try to draw a distinction. I don't think that an honest distinction can be drawn, but I believe a political distinction will be attempted and some courts will say, no, that is different. The difference is political, not intellectual, not principled.

Chairman BROWNBACK. How would you answer—this will be my final question and then I am going to go vote. We have another vote on. How would you answer those who claim that a Federal

amendment disallowing same-sex marriage would be at odds with the idea of federalism?

Mr. WARDLE. As I said, it is necessary to preserve federalism. Federalism in family law is being eroded by these decisions, and to say if Congress and the people don't do anything, federalism will be preserved, simply ignores what is happening in the courts. In order to stop the courts to prevent that excessive gymnastic interpretation of constitutional doctrine, to strike down regulation of marital relations and, by principle, other family relations, it is necessary to, I think, to pass a constitutional amendment that clarifies where the line is, that draws a bright line.

I would like to clarify one other point, and that is Mr. Bradley's point about Mormonism. As a Mormon, I would just point out that I do not know a single Mormon who advocates or practices polygamy. I know a lot of people who have left the Mormon tradition and gone into various excommunicated organizations or fundamentalist groups that do, but none from the Mormon tradition with which I am associated.

Chairman BROWNBACK. Thanks for sharing that.

I am going to go. We are going to put this in recess. We have got another vote on. When Senator Feingold gets back, if he gets back ahead of me, I authorize him to go ahead and open it back up and to start the questioning. If the other two witnesses can remain, I would be most appreciative of your doing that.

Professor Wardle, thank you for joining us and for expressing your opinion.

I apologize to all of you that we are having to do this, but we have been in a series of votes. This should be the last one, so we should be able to conduct the rest of the hearing after this. We will be in a brief recess.

[Recess from 3:14 p.m to 3:23 p.m.]

Senator FEINGOLD. [Presiding.] I call the Committee back to order. I want to thank the Chairman for his courtesy in allowing me to proceed while he is going over to vote.

First, I would like statements included in the record from Senators Leahy and Kennedy. Without objection, so ordered.

I would also like to note for the record, in addition, that Senator Kennedy did come to the hearing during the recess, as we had just recessed to vote.

Also, before I begin my questioning, I request that the written testimony of Professor Dale Carpenter of the University of Minnesota Law School, who testified before this Committee in September 2003 on the same issues covered by this hearing, be entered into the record, without objection.

In his testimony, Professor Carpenter reiterates his belief that "a constitutional amendment is unnecessary because Federal and State laws already make court-ordered nationwide same-sex marriage unlikely for the foreseeable future," unquote. He concludes that the need for such an amendment has been undermined by recent events and that States are capable of dealing with both activist State courts and local officials. Finally, he concludes that there is no greater evidence now than in 2003 that Federal courts will hold DOMA unconstitutional.

Next, I would ask that three letters in opposition to the Federal Marriage Amendment, one from a number of national religious groups, another from a number of labor unions, and a letter from the Americans United for Separation of Church and State be entered into the record, without objection.

And I ask that written testimony from Joe Solmonese, the new President of the Human Rights Campaign, also be put in the record, without objection.

Finally, I would ask that two articles written by Professor Bradley, one from Catholic Dossier, the other from National Review Online, be entered into the record, along with a copy of Professor Wardle's presentation in 1999 at the National Association for Research and Therapy of Homosexuality Conference be entered in the record, without objection.

Although I don't intend to question the witnesses extensively about their past writings, I may have follow-up written questions about them and I do think that having these items in the record is important so that the record can more completely reflect their approach to these and related issues.

Let me get to my questions. Dr. Moltz, in your testimony, you discuss the domestic partnership health benefits you were offered by Wayne State University that allowed Dahlia to stay at home with your children. Are there other domestic partner benefits that you and your family receive from the university?

Dr. MOLTZ. Yes, there are. In addition to the domestic partner health benefits, which we would consider probably one of the most important of all benefits, the Wayne policy is to treat domestic partner benefits the same as married heterosexual couple benefits. They offer reduction of tuition costs, should Dahlia care to attend Wayne State for additional education. They allow moving expenses should a professor be moving from an outside area, and we were reimbursed for moving expenses. Athletic facility membership is put on a family basis for domestic partner families the same as it is for heterosexually married couples. But our most important issue is, in fact, the health insurance. They likewise allow family medical leave if a spouse of a gay couple requires additional medical care that requires the employee of the university to take time off. FMLA is a very important additional benefit that we have access to.

Senator FEINGOLD. Thank you. Many legal scholars, including at least one of our witnesses today, believe that the constitutional amendment that has been introduced this year would prohibit States from recognizing not only same-sex marriages but domestic partnerships and civil unions. What other benefits or rights would that make permanently unavailable to you, even if the citizens of the State through their elected representatives wanted to provide them?

Dr. MOLTZ. There are numerous benefits that would be permanently off the table and therefore not available for employers to offer to their employees. One of them, I have already mentioned, FMLA, which I think we can all agree for the welfare of children and families is critically important. When tragedy strikes a family and time is needed away from the job, knowing that your job is not at risk allows you to focus your attention where it needs to be, on learning information of a medical nature, on taking care of your

family members. Anyone who cares about children will understand that FMLA benefits are mandatory, are quintessentially important for the stability of a family member who is in a medical situation.

Hospital visitation is another big issue that I think would be permanently at risk. In my testimony, I mentioned that my son's birth was complicated and he had some difficulties. In addition to that, prior to his birth, Dahlia had difficulties during her labor, and unlike a heterosexual couple, I was repeatedly asked to leave the room and was not allowed to give my spouse support during her labor and the complications that were occurring. This is not something that should occur in a family. There is nothing more anxiety-provoking or difficult than having a family member who is undergoing a difficult medical procedure or process and not being able to provide support.

Senator FEINGOLD. That is certainly a powerful example.

You mention in your written testimony that your family moved to Michigan and you took a job at Wayne State University so that Dahlia would be able to stay at home with your children.

Dr. MOLTZ. Yes.

Senator FEINGOLD. Did Dahlia work outside the home prior to your move to Michigan, and could you discuss how you as a family decided to make the move and what factored into your decision?

Dr. MOLTZ. Absolutely. Up to the time we moved to Michigan, we were both working outside the home. We had full-time jobs. When we decided to start a family, we took into account the facts that working full-time outside of the home would require us to utilize other areas—day care and friends when necessary for backup.

During the four years our daughter was alive and we were both working, the two years for our son, there were multiple situations where we really felt that they were not getting the benefit of time with their parents. People start families because they love each other, because they want to share that love with children, because they want to teach children important things about the world, and because it is an amazingly glorious thing to have a family. We felt very strongly that if an opportunity presented itself, and, in fact, we sought out an opportunity that would allow one of us to stay at home and the other one to work full-time outside the home, that this would then provide increased amount of time with parents and with a parent and kids together is the best combination whenever it is possible.

Senator FEINGOLD. You noted in your testimony the Attorney General of Michigan recently issued an opinion that the State constitutional amendment passed last fall prohibits the State and local governments from providing domestic partnership benefits to their employees. You alluded in your testimony to the fact that during the campaign on Proposal 2 in Michigan, supporters of the amendment insisted that the amendment had nothing to do with health benefits or domestic partnership.

Could you elaborate on that a bit? What was said during the campaign that you remember, and how have things changed since that amendment was passed?

Dr. MOLTZ. I can certainly elaborate. During the campaign, the proponents for Proposal 2 gave out pamphlets, gave talks, participated in media interviews, and time after time, their statements

specifically said, this is about marriage. This is about defining marriage. We don't want to hurt anyone. We don't want to take away health care benefits.

What has happened has been exactly the opposite. As soon as the amendment was passed, steps were taken to specifically target domestic partner health benefits, health benefits that are available to employees who earn these benefits. We are not asking for people to give us something free. We are not asking for special rights. I am working hard and I want my family to have the same opportunities and the same benefits that other people working similar to me have available.

The proponents for Proposal 2, which has become the Michigan amendment, have taken advantage of the ambiguity in the amendment to push forward their own personal agenda, to discriminate against one specific minority in Michigan, specifically those with domestic partnership relationships, and my fear, as I said, is that the similar ambiguity in the Federal amendment would open the door to similar targeting and discrimination against working American citizens.

Senator FEINGOLD. Thank you, Doctor. One more question for you. Can you tell us more about the kinds of things that your children have experienced as a result of the constitutional amendment debate and the increased attention to the issue of same-sex marriage?

Dr. MOLTZ. Sure. There are several ways. Like most parents, we try to protect our children, but I am pleased and proud to say that I have a smart daughter, and one of the things we believe is important is that children don't learn behaviors, like voting, like civic duties, except by seeing their parents do them.

So I mentioned that my daughter was aware of Proposal 2 and she was really quite upset after the proposal passed. We had to spend quite an amount of time reassuring her our family was not going to split up, that there wasn't a law in the country that could make her have to move away from one or the other of her parents.

Clearly, parents worrying about whether they are going to lose health care benefits or other important issues takes energy away from children, and I do believe, unfortunately, the amount of energy that this kind of issue has taken up in our family has meant there is less time for play. And my daughter says, "All talk. Why are there so many meetings?"

One last story that I will tell, and I do know we have a time limit here, I took my children trick-or-treating this year, a wonderful thing to do for kids. You dress up. You go house to house. Everybody gets to see their costumes. I overheard, and I do not know whether my children overheard, one family specifically saying that they were not going to come to our house because that is the family that wants Proposal 2 to not pass. That is the family that is against Proposal 2. That is that gay family.

Now, fortunately, my child has—my children have playmates who are accepting of our family. We have friends. We have a religious community. We have a very close family and extended family. But I know as my children grow, they are going to be faced time and time again with situations where the validity of their family situation is going to come into question, or my daughter is going

to be faced with questions about how she could have two mothers and where her father is, and the lack of legal support for our family structure is going to affect her life and my son's life for an unknown period of time.

Senator FEINGOLD. Thank you. Let me just say how nice it is to see such a delightful family before this Committee.

Dr. MOLTZ. Thank you.

Senator FEINGOLD. Let me just say, Mr. Chairman, let me make just one comment before I conclude to clarify a point made by Professor Wardle earlier. He indicated the Federal Marriage Amendment would have no impact on whether a religion can recognize a marriage. I certainly hope that that is true. But Georgetown Law Professor Michael Seidman has pointed out that there is no State actor requirement in the amendment as drafted. So that is one of the many issues that this Committee should explore if the amendment goes forward.

Mr. Chairman, thank you for the extra time and for your courtesy in letting me proceed while you were necessarily absent voting.

Chairman BROWNBACK. [Presiding.] Absolutely. You didn't move to remove me as Chairman, did you, while I was gone, or did I miss anything?

Senator FEINGOLD. I tried, but I actually didn't prevail on the vote.

Chairman BROWNBACK. Oh, good. Great.

[Laughter.]

Chairman BROWNBACK. I appreciate that.

Thank you very much for joining us, both of you. Dr. Moltz, let me just ask a couple clarifying questions here.

I looked in your testimony. You were married actually in 1990?

Dr. MOLTZ. I was married in 1996 in a traditional Jewish ceremony.

Chairman BROWNBACK. Ninety-six, okay. And then at that time, you were living in Massachusetts?

Dr. MOLTZ. Actually, we were married in Connecticut, and immediately, I believe 13 days later, we moved to Massachusetts to start a job that I held there for eight-and-a-half years.

Chairman BROWNBACK. So you lived in Massachusetts then until 2004, or thereabouts?

Dr. MOLTZ. We moved last June, June 2004, to Michigan.

Chairman BROWNBACK. Okay. And you were married in Massachusetts, then, in a civil ceremony, I take it?

Dr. MOLTZ. Yes. We had a civil ceremony several weeks after Massachusetts approved the validity of gay couples having civil union ceremonies.

Chairman BROWNBACK. And then you moved—

Dr. MOLTZ. We don't consider it a marriage, though, sir. We had our marriage. This was a civil ceremony. Our daughter calls it our little wedding, but we were married in our eyes and in the eyes of our family and in the eyes of our religious community in 1996.

Chairman BROWNBACK. And nothing prohibited that from taking place?

Dr. MOLTZ. In 1996? No, sir.

Chairman BROWNBACK. Or now.

Dr. MOLTZ. Absolutely not.

Chairman BROWNBACK. But you went ahead with a civil ceremony in 2004.

Dr. MOLTZ. We did, because we feel strongly that there is a difference between civil and religious, and our country, because there are so many different religions and because the religions have different views, it was very important to clarify that civil rights and religious freedom are integral and integrated. We, as a country, set our own moral grounds and we set up this concept of a civil marriage.

It is a fact that a friend of ours who wished to have a religious marriage and did not want to have a civil marriage—this is a heterosexual couple—did not want to have a civil marriage had difficulty finding a rabbi to perform the marriage because they were told that they were unable to perform a marriage that would not be registered in the civic arena. The number of rights and the number of FMLA, Social Security, the number of other issues you get from having a recognized civil marriage are entirely different from those benefits you get from religious marriages.

Chairman BROWNBACK. But you would recognize the dichotomy, then, that the two professors have been talking about here, about between religious and civil ceremonies, is that correct?

Dr. MOLTZ. I think there is a dichotomy, but I think there is such an overlap that when you start talking about civil marriage and religious marriage, you can have one without the other, but our country does not allow recognition of the rights of marriage without the civil ceremony, the benefits of marriage without civil ceremony, and discriminates against those who choose not to have a—or are unable to have a civil ceremony.

Chairman BROWNBACK. You, yourself, you have practiced both, the religious one much earlier than a civil ceremony?

Dr. MOLTZ. We had a religious ceremony earlier because we felt—

Chairman BROWNBACK. I am just trying to establish this, if that is—

Dr. MOLTZ. Absolutely. We had a religious ceremony in 1996 because we felt it was time to confirm our love before our family and our community. We were unable and had not at our disposal the ability to have a civil ceremony at that time. As soon as a civil ceremony became available to us, we took that step.

Chairman BROWNBACK. I am not trying to trap you. I am just trying to establish, okay, you did the religious one—

Dr. MOLTZ. We did the one, we did the other.

Chairman BROWNBACK. —you did the civil ceremony at a later time—

Dr. MOLTZ. Exactly. We would have done them both at the same time had it been available.

Chairman BROWNBACK. Do you believe that DOMA will be upheld or not upheld in its application in your particular case?

Dr. MOLTZ. Sir, I am not a lawyer. I can tell you myself that we moved to Michigan with no expectation that our civil marriage was going to be recognized by the State. We have not filed a joint income tax return, much as we, among other gay families, we would be delighted to pay you all more taxes by filing jointly. But we had

no expectation that our marriage was going to be—our civil marriage was going to be recognized by the State.

Chairman BROWNBACK. We are trying to change that so that married couples don't have to pay more in taxes, so—

Dr. MOLTZ. I understand, but we would be glad to pay more taxes.

Chairman BROWNBACK. Professor Bradley, you are a lawyer, so I want to throw then this series of questions, because you have an applicable set here. Now you have a marriage in Massachusetts that is in Michigan, a religious ceremony, then a civil ceremony, and now in another State. How does this come out in the courts in Michigan? What happens there?

Mr. BRADLEY. Well, it turns out that because of Michigan law, the Massachusetts marriage is not going to be recognized as a marriage in Michigan, although Michigan, at least to date, has a domestic partner situation which Massachusetts marriages may fold into and more or less fit comfortably. Because of Michigan law prohibiting the recognition of same-sex marriages, or to put it differently, limiting marriage to opposite-sex couples, the Massachusetts marriage, such as Dr. Moltz's, would not be recognized in Michigan.

I believe earlier I offered a few observations about the relationship between religious marriage in our country and civil marriage, and I think that, basically, it does make sense to think of those two things as occupying different spheres, or you might say, as you did, dichotomy. They are really unrelated, although there is substantial overlap.

But just for example, one way in which we could see that there is an overlap but still different is when, for example, a priest, rabbi, or minister officiates at a wedding of a couple in a church, synagogue, or Catholic parish, for that matter. That individual presides over a religious ceremony, but it is only because in addition to that fact, the individual is recognized by local law or authorized by local law to officiate at civil marriages does that religious marriage become a marriage in the State's eyes. And I suppose at the very end of religious ceremonies of the kind I am describing, the pastor, whoever it is, will say, "By power vested in me by the State of Michigan"—or Massachusetts or New York—"I pronounce you man and wife." So you have right there a religious ceremony that really is just incorporated, you might say, into law by virtue of the law's decision and according to the law's criteria and definitions to treat it as a marriage in law.

In the case of Dr. Moltz's Jewish ceremony several years ago, because it was between a same-sex couple, the law did not recognize it as a legal marriage even though it was performed by a religious official.

Chairman BROWNBACK. I have got just a couple other questions I want to ask you, but my time has expired, so I will go to my colleague and then—

Senator FEINGOLD. I simply had some follow-up questions in writing and I am done.

Chairman BROWNBACK. Okay. Professor Bradley, I want to go—because the hearing is about DOMA and whether it is going to be held constitutional or not and that has been a big point of political

debate, so we are relying on legal scholars about that narrow political issue. You are saying that the courts thus far have, by and large, put this in the rational basis test category and that is the lowest standard, and they are saying that the legislative bodies across the country or the people have no rational basis to protect traditional marriage? Is that accurate, or is that just kind of an outlying court or two that has ruled that way and the others are in differing spheres of—even a Bill of Attainers on one, or that they are making the decision, the legal basis, not a political decision, the legal basis based on—

Mr. BRADLEY. Well, I guess I am saying two things. One is about the *Lawrence* decision, which is about a criminal statute, but I think the reasoning would almost freely extend to same-sex marriage, and that was a rational basis case. The court said there is no legitimate State interest, no reason behind this law, but rather there is a kind of prejudice or animus against a particular group.

Now, we will see if the Supreme Court would apply that reasoning to same-sex marriage if there is a case within the next few years, as I think there will be. But as yet, we don't know.

Chairman BROWNBACK. Let me get this to a point, then. What have the lower courts thus far ruled on? Has it been on a rational basis test standard—

Mr. BRADLEY. Certainly, many have.

Chairman BROWNBACK. —on marriage?

Mr. BRADLEY. Many have. I mean, the case from Massachusetts, *Goodridge*, was a rational basis test. I mean, the expression might be different or it might be rational basis, another expression, but all meaning the same thing. It is arbitrary. There is no reasoned basis. There is no coherent basis for limiting marriage only to opposite-sex couples.

Now, this is a common, I don't know that—it is far from the only, but this is a common basis upon which courts rule whether in favor or against same-sex marriage and it is a question that is inescapable. Let me put it this way. Every court which treats the question of same-sex marriage, that is excluding same-sex couples from marriage, has to address the rational basis question because it is the minimum prerequisite of a valid law. So it is only after, you might say, there is a rational basis that one would consider additional, more specific legal questions and problems.

Chairman BROWNBACK. So let me get to this point, then. We have had a series of State courts that have ruled on this. All of them have applied a rational basis test and all of them have found that this limitation of marriage to between a man and a woman does not pass even this very lowest of thresholds, is that correct?

Mr. BRADLEY. Well, not all of them have ruled that way. Many have. The case in Indiana, *Morrison* v. *Sadler*, is an example where the court said there was a rational basis to limiting marriage to opposite-sex couples. But many courts, perhaps most prominently *Goodridge*, but also *Baker* v. *State*, you might say the first decision in this line of cases, from Vermont at Christmastime 1999, although using the language of equality more than anything else, because it really was rooted in the Common or Equal Benefits Clause of their Constitution.

The concept with which the Baker court worked in Vermont was rational basis. I mean, it is the same thing you see in other cases, that the State law has no reasonable grounds any longer, at least, to distinguish marriage-eligible couples from those which are not eligible simply on the basis of gender. *Baker* v. *State* is the first in the most recent line of cases, probably the first case whatsoever. It goes back ten years. The first prominent case is from Hawaii from 1995. And there, too, although again under the rubric of sex discrimination, the analysis in that case was really the same thing. This limitation in law is arbitrary, has no basis in reason, and is, therefore, unconstitutional.

Chairman BROWNBACK. So is there any question in your mind, now that you have read these court opinions, you have looked at the flow of where the judiciary is going, and it strikes me they try to generally move in a flow of opinion, that DOMA will be struck down at some point in time in the near future by a Federal court?

Mr. BRADLEY. Well, it could be a Federal or a State court, but because both are bound by the Supremacy Clause to apply the rational basis test of the Federal Constitution, but that is my opinion, is that this reasoning, that limitation of marriage to opposite-sex couples lacks a rational basis certainly is completely capable of knocking out DOMA, just as it knocked out marriage laws in Massachusetts and more or less did in Vermont. There is no additional protection to DOMA from this kind of reasoning because it is a Federal enactment or anything else. It has to possess a rational basis like any other law does. And I do think that this reasoning not only would knock out DOMA, but in my opinion—it is a prediction so therefore you can't say with any certainty—I think that is what will happen.

Chairman BROWNBACK. Has the issue been raised that the State or the Federal Government does have more than just a minimal interest here, that there should be a higher threshold of review because of the importance of the institution of marriage, because of the raising of children and its impact, as Senator Moynihan, the late Senator Moynihan, used to say, that the key focus we should have is the raising of the next generation? Doesn't that start to raise that standard up, saying, well, on an issue affecting marriage, the State has more than just a minimum threshold of interest. It has a fairly large interest in this.

Mr. BRADLEY. Well, I think the answer is no, if I understand the question right, and the reason why I think the answer is no is this, is that the courts are being asked to examine an exclusion, you might say, of certain couples or certain individuals seeking access to an important benefit or important opportunity, that is marriage. So what you have is a set up wherein the court—courts will say marriage, of course, is a fundamental right. It is very important, and the Supreme Court has said many times it is the foundation of society and a great opportunity for individuals. Therefore, courts will say, it is all the more important that any exclusion of people from marriage who want to be married be examined all the more carefully and critically.

So I think my answer is it kind of goes the other way around. Marriage being as important as it is, the exclusion, or the apparent exclusion of couples from marriage would raise the bar, you might

say, in defending the statute rather than in sort of defending the couples' position.

Dr. MOLTZ. Senator Brownback, may I make one comment about what you just said?

Chairman BROWNBACK. Yes, but I want to finish this thought here because I hadn't thought about them going back around on the other side of that rational basis argument. Would that then apply to a polygamy type of relationship, as well, because the same argument should be applicable.

Mr. BRADLEY. Well, I think it is, and I did, of course, hear the question and answer exchange between you and Professor Wardle just a while back, and I think he was right in saying that save for an arbitrary line, perhaps driven by political considerations or some other kind of consideration, but save for arbitrariness, I do think that the arguments of the type I have been describing run all the way through the polygamy.

Just to describe it as simply as I can, what I mean by that is in any of the cases in which there is a recognition of same-sex marriage, as in Massachusetts, or virtually so in Vermont, *Baker* v. *State*, or even just looking at the moving papers, the complaints of same-sex plaintiffs even in cases where they don't succeed or prevail—Indiana, my home State—there is always an account, a definition of marriage. Just, for example, and perhaps most typically, the same-sex couple's case relies upon a definition of marriage as a more or less lasting, intimate commitment of two people, or a lasting, intimate relationship, or people who share a household and an emotional life.

But there is always a definition of marriage on the side of the people advocating same-sex marriage, and even when courts adopt that position, they are always defining marriage. I mean, *Goodridge* defines marriage as much as any other law. It happens to be perhaps a different definition, or a reductionist one, but it is defined there.

And then the question you have to ask in any situation like that, just say to one's self, well, if that is what marriage is, a commitment and lasting household, is there anything intrinsic to it that disqualifies groups of people, three or more, who wish to be married and who say they share a lasting commitment from being married? So that is the way to think of it, I think. Look at a definition of marriage and ask, is there anything about it which means it is necessarily limited to two.

Now, these cases I am referring to will say couples or two persons, but the question in a lawsuit filed by a polygamist, whether he is Mormon or anything else, would be, well, it does say couple, but isn't that arbitrary? Given what marriage is, which is a lasting commitment of shared intimacy, why does it have to be two, and if three or more wish to be married and do share a life together, intimate, why can't we be married like anybody else?

Chairman BROWNBACK. Dr. Moltz, and then I want to go to Senator Feingold.

Senator FEINGOLD. Mr. Chairman, I had said I was done, but with your indulgence, I just want to ask a follow-up question of Professor Bradley. I understand you are one of the main drafters of the proposed constitutional amendment?

Mr. BRADLEY. The one in the last Congress, the FMA, I think it is called—

Senator FEINGOLD. Right.

Mr. BRADLEY. Right. Correct.

Senator FEINGOLD. Is it your understanding that under the one you drafted, that with the kinds of domestic partner benefits that Kathleen and Dahlia have, or in theory could have, that States would be prohibited from offering that under the effect of your constitutional amendment?

Mr. BRADLEY. No, that is not my understanding, but legislatures would have to do so. The FMA as it was in the last Congress, and I did help draft it, it would prohibit courts from compelling the distribution or extension of such benefits to same-sex couples, but it would not prohibit legislatures of States and then presumably Congress, if it was so inclined, from doing that. It would have to be a popular or democratic or legislative decision to extend benefits to unmarried same-sex domestic partners.

Senator FEINGOLD. Last year in the Notre Dame Journal of Legal Ethics and Public Policy, you argue that the first sentence of the FMA, which states that, quote, "Marriage in the United States shall consist only of the union of a man and a woman," unquote, would invalidate Vermont's civil union law.

Mr. BRADLEY. Right.

Senator FEINGOLD. How do you reconcile that?

Mr. BRADLEY. Well, that is because I think the Vermont civil union law is marriage in all but name. I mean, that is my position, that if you have marriage, which is what Vermont's civil unions amount to, it is the whole package. It is just called something different.

Senator FEINGOLD. So it is not really the case that the States would be free to do what they want. There would be some kind of a package of benefits, undefined, that would be okay and others would not.

Mr. BRADLEY. Well, I think the best answer to the question is the States would not be free to define marriage to include same-sex couples. In my opinion, the States would not be free to define marriage as including same-sex couples, although called something different. So I think I am agreeing with you that it leaves it wide open for legislatures to extend some, many, most, perhaps all but one, I suppose, benefit of marriage to unmarried people, but I would say, as I did last year in that article, if it is marriage in all but name, that is ruled out by the definition of marriage in the first sentence. I mean, it is not a matter—you wouldn't get around the first section by—

Senator FEINGOLD. Marriage in all but name strikes me as a very open-ended possibility of carving into some of those rights, but that is something we can look at.

Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator.

Dr. Moltz, you had a final comment?

Dr. MOLTZ. There was just one thing you said that was very disturbing to me as a pediatric endocrinologist, and I am certain that there wasn't any intent on your part, so I wanted to take the opportunity to clarify that marriage is not excluded from those who

have an inability to have children. Children are very important, but, in fact, there is no credible evidence that children raised in gay and lesbian families with gay and lesbian parents do anything but excel or fail exactly the same as children raised in heterosexual families. So the fear that we have to protect children in some way is not a valid one based upon 20 years of documented, peer-reviewed medical research in medical, sociologic, and psychological journals.

And sort of to the first part of that, your statements that marriage is about children, I take care of children with Turner's syndrome. Turner's syndrome is a condition where women cannot carry or have children of her own eggs. They don't work. It is an early menopause. And there are a lot of other issues. But I would certainly hate to go to my patients and tell them that they were not able to get married because they couldn't bear their own children or have their own children.

I am certain that wasn't your intent, but it raised a little hackle and a little concern in me because of the overwhelming interpretations that are currently being made in Michigan and the fear and the risk that the same thing could happen with the Federal Marriage Amendment, so—

Chairman BROWNBACK. Well, thank you for correcting me.

Dr. MOLTZ. —I appreciate the minute to speak on that.

Chairman BROWNBACK. Thank you for correcting me. I certainly don't mean to leave the impression that people who cannot have children, don't want to have children, can't get married, so I do appreciate that in the record.

What I was citing to was a series of studies that do cite that the best place to raise children is within a two-parent household, a mom and a dad bonded together for life, and we have had a series of studies, and we are seeing other countries, when they do redefine marriage, it generally tends to very much hurt the institutional role, and this is a vast social experiment that we would be putting forward over a huge country and with huge impact on a broad cross-section. So that is what I raised to Professor Bradley and others.

And we actually will hold a hearing on this subject so we can get in people. This was to be a legal hearing and a discussion of DOMA's constitutionality, because that is a narrow issue, but we will hold a hearing on its impact on people, on raising children and what it has done in other countries so that we can have a good airing of the studies that have been done on these subjects, so I appreciate your raising that point.

We will keep the record open for a series of seven days, if there are additional comments or questions to put forward.

Thank you all very much for joining us. The hearing is adjourned.

[Whereupon, at 3:58 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

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

SUBMISSIONS FOR THE RECORD

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

"Less Faith in Judicial Credit:
Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"

April 13, 2005

Testimony of Gerard V. Bradley
Professor of Law
University of Notre Dame Law School

The first popular political pundit in American history was a wry Irishman named Dooley. At the height of his powers around the year 1900, Mr. Dooley was impossible to caricature. He *was* a caricature, literally the pen and ink mouthpiece of journalist Peter Finley Dunn. When I was in law school 25 years ago, one of Dooley's aphorisms was often thrown about my constitutional law class. "The rulings of the Supreme Court," Dooley declaimed one day out of the side of his mouth, "follow the election returns."

Back then, maybe they did. But one does not hear Mr. Dooley's aphorism in con law classes anymore. The Supreme Court no longer (if it ever did) seeks its cues from popular beliefs and articulated political power. Quite the contrary; the modern Court defines itself as anti-majoritarian, as the bulwark of minority interests, over and against what the "people" prefer. For a generation the Court has said that it is the forum of principle, not of politics; that its concern is rights, not collective interests; that it means to vindicate principles of justice, no matter how unpopular they might seem to be. The Court styles itself as supremely nonpolitical. The Court more and more views popular beliefs about moral matters – such as marriage – very

suspiciously. As often as not, the Court brands such beliefs mere political facts, if not outright prejudices.

I do not mean to endorse all that the Court has said of itself over recent years. My point is that, as far as we can tell, that *is* the way the Court sees itself. And, if we want to get an idea of what the Court is likely to do about same-sex marriage, we better get an idea of how the Court understands its role these days in our constitutional order. Only then can we see whether Dooley's aphorism makes sense anymore.

Some people say today that there is no need for a constitutional amendment defining marriage as the union of man and woman. They say that the need (if once there was one) disappeared with the recent electoral setbacks for the same-sex marriage movement. (Kansas last Tuesday being the most recent example.) But electoral setbacks for claims of minority rights foundering upon popular "prejudice" are no caution sign for the modern Court. They are signs that the Court is more, rather than less, likely to step in to settle matters. The people who say that an amendment is no longer necessary do not really understand what the Court thinks its job in our system is.

I think that the Court, partly *because* of the way popular referenda are going, is going to take a same-sex marriage case soon. That is the signal sent by the Court in *Lawrence v. Texas*, 539 U.S. 558 (2003). The *Lawrence* Court made a radical statement about constitutional protection for homosexual relationships. Precisely against what it viewed to be widely held, but nonetheless benighted, prejudices against homosexuals, the Justices declared that homosexual acts may constitute a person's identity. Sexual conduct "can be but one element in a personal bond that is more enduring." *Id.* at 567. Penalizing these acts could, the Court also said, lead to

"discrimination both in the public and the private spheres." *Id.* at 575. Is exclusion from marriage a form of "public" discrimination against homosexuals? The *Lawrence* Court said that "persons in a homosexual relationship" have a right to the *same* constitutional liberty when it comes to *marriage, procreation, and family* that "heterosexual persons do." *Id.* at 574.

The dissenting justices argued that such reasoning would "dismantle[] the structure of constitutional law" that has permitted legal marriage only between a man and a woman. *Id.* at 604 (Scalia, J., dissenting). It is hard to deny the force of this observation.

Lawrence was the classic circumstance of modern judicial intervention: popular prejudice is said to underwrite to a law targeted at a politically defenseless group. The *Lawrence* raised the stakes higher. *Lawrence* made legal treatment of homosexual relationships practically a litmus test of our country's commitment to justice. The matter there at issue, the Court said, went to the heart of such constitutional ideals as equality, respect for individuality, liberty. The prognosis for political correction of this injustice is poor; see, e.g., the recent election results on same-sex marriage.

Lawrence v. Texas confirmed signals first sent by the Court in the case of *Romer v. Evans*, 517 U.S. 620 (1996). There the Court first shared its deep suspicion of traditional attitudes towards homosexuality. The *Romer* Court concluded that "animosity" towards homosexuals was at the root of the challenged Colorado law. *Id.* at 634. The Court spoke of a "bare . . . desire to harm a politically unpopular group" – homosexuals – and how that is never a legitimate constitutional basis for law. *Id.* at 634-35 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

That is exactly right: "a bare desire to harm" someone or some group is *not* a good reason for a law. It is not a reason at all. It is just a feeling of hostility or anger. The question is, of course, whether that is all to say about traditional attitudes towards homosexuality.

The *Lawrence* majority did not exactly say what it would do about same-sex marriage. (On the other hand, the majority recognized well enough where its reasoning pointed, and issued disclaimers about whether same-sex marriage was implied by its ruling.) In my judgment, however, there can be little question that by setting up the case the way it did – as one of endangered fundamental rights, gasping for life in a sea of politically dominant prejudices – the Supreme Court has all but bound itself to take up the same-sex marriage question, and soon. To do otherwise would, I think, leave the Justices open to charges that they had betrayed the Court's own professed ideals.

In 2003, the Supreme Court said that the Texas anti-sodomy law lacked any basis in reason, that *no* legitimate state interest was involved. It was, the Court speculated, a law which simply meant to harm a politically unpopular group. That would be the basis for any holding in favor of same-sex marriage: no "rational basis" whatsoever for limiting marriage to opposite-sex couples..

This is the federal constitutional ruling circumstance requires us to behold: not a Full Faith and Credit green light to Massachusetts "gay marriage", but a flat declaration that the Constitution does not permit exclusion of same-sex couples from marriage. Note well: the reasoning of *Lawrence v. Texas* is no less capable of invalidating a Congressional enactment – DOMA included – as it was a Texas criminal law. All laws in the United States have to pass constitutional muster. And nothing about the defect in Texas's law was specific to state statutes, to criminal laws, to sexual conduct. Any law which says or implies an adverse judgment upon

homosexuality, homosexual sex, or homosexual relationships would seem, after *Lawrence,* to be presumptively unconstitutional. All such laws lack that minimum of constitutionality – a "rational basis".

Both parts of DOMA stand in the dock, arraigned by the reasoning of *Lawrence*: the definition of marriage for all federal purposes, as well as the Full Faith and Credit norm in favor of states resisting the introduction of same-sex marriage by out-of-state judgments.

Someone might say that the Supreme Court is not necessarily going to invalidate traditional marriage laws on the basis of *Lawrence.* True enough: it is impossible to say with certainty what the Supreme Court is going to do about same-sex marriage. My point is different. My point is that as far as we can predict, the Court has implicitly committed itself to taking, and deciding, a same-sex marriage case soon. It is the kind of case which the Court's own rhetoric has made it impossible for them *not* to take. And I think almost everyone would agree that, when the Court takes that case, it could go either way. The question is: what should members of Congress do *now* about amending the Constitution, if I have described the *status quo* accurately.

Some who agree that the Court is going to hear a case soon nonetheless oppose an amendment now. "Let's wait and see" is their counsel. The Court might uphold traditional marriage, in which case no amendment would be necessary. If the decision goes against that tradition, then we can start the amendment process.

There are two kinds of problems with this "wait and see" approach. One kind is more descriptive and political than the other, which is more moral and constitutional. The first (political) type includes at least the three following considerations, which together mean that, on the day after a watershed decision in favor of same-sex marriage, an amendment will be much

harder to pass.

Consider that on the day after a watershed decision, same-sex couples will start marrying all over the United States. It will take years to enact an amendment to halt the practice. Tens of thousands of same-sex marriages will have been performed in the meantime. The amendment debate will include the question: what is to become of these "marriages," and the families grown up around them?

Second. Any watershed decision will contain language such as the Court used in *Romer* and *Lawrence:* benighted prejudice has stood in the way of justice long enough. All political and cultural debate about same-sex marriage – including debate over an amendment – will be tilted thereafter by the Court's high testimony against the gross injustice of traditional marriage.

Third. On the day after a watershed decision, the debate will not be only about marriage. It will be about the Court, its independence, and the political prudence of resorting to amendments to correct what are popularly believed to be judicial mistakes. The day after, pro-amendment forces will be denounced for their attempt to "roll back the Constitution," to "turn back the clock on human rights," for attacking the independence of the judiciary, and for tampering with the settled meaning of the Constitution.

The other kind of consideration is more important and more sublime. It has to do with the responsibilities of the United States Congress under our Constitution to make sure the Constitution says what it ought to say. Judicial review is a fair implication of constitutional structure and of the nature of Article III power to resolve cases and controversies according to law. But judicial review is not explicit in the Constitution. Nor does anything in the Constitution imply judicial review of the broad scope we find in *Lawrence v. Texas*. That case, whatever else

one might say about it, looked way outside the constitutional text to find the (arguably) deeper, more profound, meaning of that document.

What's *not* arguable is that Congress is the only body authorized by the Constitution to initiate constitutional amendments. Congress may do so either by proposing amendments to the states for ratification (as has been the practice), or by convening a constitutional convention. We have never had a constitutional convention of that sort. It is very likely we never will. Thus, for all practical purposes, Congress is the sole gatekeeper of the only authorized means of amending the Constitution.

The only body authorized by the Constitution to actually enact constitutional amendments is the American people; the people acting through state representatives ratify proposed amendments. Apart from such popular approval there can be no amendment of our fundamental charter.

It seems to me that, like it or not, the *Lawrence* Court in effect opened a "constitutional convention" on the subject of same-sex marriage. For so long as *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of Georgia's sodomy law case), was settled law, there was no possibility that same-sex marriage could be constitutionally required: the defining sexual acts of same-sex couples had no constitutional standing. But *Lawrence* expressly overruled *Bowers*. In the course of overruling *Bowers*, the *Lawrence* Court made unmistakably clear that its reasoning opened the marriage question for further, and final, constitutional scrutiny.

Perhaps the question could usefully be viewed, then, as this: *if* there is *going* to be an amendment to the Constitution about same-sex marriage – making clear that our basic law is "pro" or "con" – which body shall make that call? The Court? Or Congress and the American

people?

It is not for me to tell any member of this body that the American people are calling for a federal marriage amendment. You are more than competent to judge that. I offer to you my professional judgment, however, that making a watershed judicial ruling a condition precedent to proposing an amendment to the people is unnecessary as a matter of law, and imprudent as a matter of politics. Why should Congress wait and see whether the Court amends the Constitution first?

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FOR IMMEDIATE RELEASE
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NEWS RELEASE
April 13, 2005

BROWNBACK HEARING DISCUSSES DANGER OF JUDICIAL ACTIVISM IN PROTECTING MARRIAGE

Says DOMA laws may not be enough

WASHINGTON – U.S. Senator Sam Brownback today held a hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights, examining whether federal and state marriage protection initiatives are vulnerable to judicial activism. The hearing investigated DOMA laws across the nation and whether or not a federal remedy is needed to protect those laws.

"In the nine years since DOMA was passed, a largely unaccountable judiciary bent on imposing its own radical agenda has undermined the right of the people to deciding this fundamental social matter for themselves," Brownback said. "It has become increasingly apparent that amending the Constitution is an absolute necessity, precisely in order to defend the overwhelming public consensus in favor of preserving traditional marriage."

As the Senate debated the proposed amendment to the Constitution to protect marriage last year, one of the most frequently-heard refrains was the assertion that a marriage protection amendment was completely unnecessary in light of the federal Defense of Marriage Act or "DOMA," which strong bipartisan majorities in Congress passed and which President Clinton signed in 1996.

Many argued against amending the Constitution because, they said, DOMA specifically says that states and localities opposing same-sex marriage need not recognize same-sex marriages contracted outside their borders. Some suggested leaving marriage law up to the individual states.

Allowing the people in each state to decide this important issue for themselves was what Congress intended in passing DOMA in 1996. DOMA establishes that no state may force its own redefinition of marriage on other states or on the federal government over their objections. It leaves decisions about marriage law and regulation up to the people of each state.

Brownback continued, "The American people, through their legislatures, are the ones who must be able to make the laws with regard to fundamental social institutions such as the family. The argument that marriage is a matter reserved to the states and to the people only makes sense if the people are the ones who determine the definition of marriage and the laws that regulate it.

"DOMA, and with it the democratic principle of consensual governance, are increasingly at risk from an activist judiciary determined to run roughshod over democratically-enacted laws and referenda, well-established traditions, and the will of the people."

-more-

Five years ago, the Supreme Court of Vermont ruled that same-sex couples must be given the same legal status and rights as married couples. Last year, the Massachusetts Supreme Court ruled that state law restricting marriage to male-female couples had no rational basis, and violated the state constitution; going even further, the court subsequently required the Massachusetts legislature to enact same sex marriage, reasoning that giving same-sex couples all the legal benefits of marriage with civil unions did not go far enough.

In California, New York, Washington, and Oregon, judges have found a right to same-sex marriage in the state constitution, contradicting the expressed desire of voters to preserve marriage as the union between a man and a woman. More such rulings are seemingly just around the corner, as eight states currently face lawsuits challenging their traditional marriage laws. Courts in at least two states have already recognized civil unions imported from Vermont. And DOMA itself is already being challenged: a federal lawsuit in Washington State challenging DOMA's constitutionality could be before the Ninth Circuit Court of Appeals within the year.

"Many scholars and citizens believe it is only a matter of time before the Supreme Court mandates same-sex marriage in every state, either by expansively interpreting the Constitution's Full Faith and Credit Clause or though yet another far-reaching substantive due process decision like Lawrence v. Texas, which stated that judges can freely invalidate laws based on mere 'moral disapproval,'" Brownback said. "That so many people in so many states have recently and overwhelmingly passed marriage protection initiatives suggests that they too expect the Supreme Court to invalidate federal and state DOMAs as interfering with the newfound fundamental 'right' discovered in Lawrence.

"An amendment to the Constitution would not be federalizing an issue that has heretofore been left to the states. The principle of state autonomy in marriage law is already under a variety of constitutional attacks from judges across the country. An amendment simply would protect the right of the people to decide the issue of marriage for themselves."

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Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Subcommittee Hearing on the Federal Marriage Amendment

April 13, 2005

Mr. Chairman, I want to thank you and your staff for working so collegially with us on this hearing, including the significant advance notice of it that you gave us. That is much appreciated, and I look forward to us working well together as you chair this Subcommittee.

That having been said, there are many other more pressing topics that we would do well to consider instead of this one. Certainly my constituents are not up in arms about the possibility of gay marriage. Since the beginning of this year, I have held 20 listening sessions in Wisconsin. The people who came to talk to me wanted primarily to talk about social security, health care, and the war in Iraq. Only four people out of the 950 that turned out for these sessions wanted to talk about a federal marriage amendment, and three of them actually oppose the amendment.

In the last Congress, this Subcommittee and full Judiciary Committee had four hearings on this issue. The problem was not a lack of hearings, but a lack of committee consideration. Supporters of the Federal Marriage Amendment took it directly to the floor, where it failed by a large margin, rather than allowing this Subcommittee and the full Judiciary Committee, which have a long history of carefully considering proposed constitutional amendments, to consider it.

The debate on the floor was striking. Proponents of the amendment had a hard time agreeing on exactly what it would do. That is the kind of problem that can be addressed and rectified with committee consideration. But the proponents of the amendment didn't allow the process to work as it usually does.

And there is still no clarity on the indirect consequences of a federal marriage amendment. Ambiguity still remains as to whether the language of the amendment would permit states to offer domestic partner benefits or the option of civil unions to same sex couples.

For one of our witnesses here today, this is not just a hypothetical question. The Attorney General of Michigan recently issued an opinion that the constitutional amendment adopted by Michigan voters in November prohibits the state from offering domestic partner benefits. That ruling has a real impact on real people. The state courts will decide whether the amendment will have that effect, which many of its supporters disclaimed during the campaign. But what has happened in Michigan makes it even more obvious than it was last year that the full effect of the federal marriage amendment must be explored and debated in the Judiciary Committee before the Senate is asked to vote again. If the amendment's proponents insist on pushing it in this Congress, I hope that this time they will permit full Subcommittee and Committee consideration.

My strong preference, of course, is that the Senate does not consider such an amendment in this Congress. Nothing has happened since the floor vote in July 2004 to indicate that a constitutional amendment is any more justified or more necessary now than it was then. For more than two centuries, family law has been the province of the states. In fact, the enactment of several state marriage initiatives by the voters in the last election suggests that the states are capable of addressing the issue and federal intervention is even less needed. There is certainly no crisis warranting a federal constitutional amendment on this issue. There is no more likelihood now than there was last year that the Supreme Court is poised to strike down federal or state marriage laws as unconstitutional.

Proponents of the amendment are asking us to make a preemptive strike on the Constitution. Because the Supreme Court might some day strike down marriage laws, we are told by witnesses here today, we must enact an amendment that will prevent all states for all time from recognizing same sex marriage, or even, perhaps, civil unions or domestic partnerships. That is an extreme step and I will strongly oppose it.

With the exception of the Eighteenth Amendment instituting prohibition, which was later repealed, the Constitution has never been amended to limit basic rights. If the federal marriage amendment is ratified, it would do just that. Our Constitution is an historic guarantee of individual freedom. It has served as a beacon of hope and an example to people around the world who yearn to be free, to live their lives without government interfering with

their most basic human decisions. We should not seek to amend the Constitution in a way that will reduce its grandeur.

Mr. Chairman, again, thank you for your courtesy, and I look forward to the testimony today.

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HUMAN
RIGHTS
CAMPAIGN

News Release

FOR IMMEDIATE RELEASE, Wednesday, April 13, 2005
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HRC: NEW REPORT SHOWS HARMFUL CONSEQUENCES OF STATE AMENDMENTS DENYING MARRIAGE PROTECTIONS

"If Sen. Brownback was really concerned about families, today's hearing would focus on families who have lost healthcare and domestic violence protections because of these measures," said HRC President Joe Solmonese.

WASHINGTON – The Human Rights Campaign today released a new report highlighting the harm that several state level constitutional amendments denying same-sex couples the rights and protections of marriage have caused to families, as the U.S. Senate held a Judiciary Sub-Committee hearing designed to help further efforts to pass a similar amendment to the U.S. Constitution. Sen. Sam Brownback, R- Kan., called the hearing.

"If Sen. Brownback were really concerned about families, today's hearing would focus on families who have lost healthcare and domestic violence protections because of these measures," said HRC President Joe Solmonese. "This hearing is an attack on same-sex couples and is further evidence that the far right is controlling the Senate, and keeping our leaders from focusing on issues that strengthen the whole country."

The report highlights four states that enacted constitutional amendments last year—Missouri, Utah, Ohio and Michigan—where governmental entities and/or individuals have interpreted the constitutional amendments to:

- Deny domestic partner benefits, such as health insurance, to unmarried couples – same and different sex.
- Argue that domestic violence laws do not apply to opposite-sex unmarried couples.
- Attempts to void a custody agreement between a same-sex couple.

The language of the amendments in the four states is very similar to the proposed Marriage Protection Amendment (MPA), S.J. Res 1. A similar federal amendment was soundly defeated last year in both the U.S. Senate and House of Representatives.

Today's hearing, entitled "Less Faith in Judicial Credit: Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?" included testimony from Dr. Kathleen Moltz, a pediatric endocrinologist at Children's Hospital of Michigan. Dr. Moltz, along with her partner, are trying to protect Dr. Moltz's domestic partner health benefits in the wake of a state constitutional amendment adopted in November purporting to define marriage as being between a man and woman. Michigan's attorney general has advised that the constitutional amendment bars state and local government from providing domestic partnerships benefits – including health insurance – to their employees.

"People advocating for discrimination against same-sex couples in the Constitution always try to frame the around so-called "judicial activism" so they can gloss over the fact that millions of fair-minded Americans—a majority, in fact— oppose discrimination against same-sex couples and their children," said Solmonese.

For the full text of the new HRC report, and written testimony from today's hearing from both Dr. Moltz and HRC President Joe Solmonese, please visit www.hrc.org

The Human Rights Campaign is the largest national lesbian, gay, bisexual and transgender political organization with members throughout the country. It effectively lobbies Congress, provides campaign support and educates the public to ensure that LGBT Americans can be open, honest and safe at home, at work and in the community.

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Truth or Consequences: The Effects of Constitutional Amendments On Marriage in Ohio, Michigan, Missouri and Utah

A Report by the Human Rights Campaign
April 2005

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Truth or Consequences: The Effects of Constitutional Amendments on Marriage in Ohio, Michigan, Missouri and Utah

Executive Summary

In 2004, voters in 13 states were asked to ratify state constitutional amendments that prohibit marriage for same-sex couples. According to a new report by the Human Rights Campaign, these amendments are having consequences that go well beyond the supposed "simple" definition of marriage that proponents of these amendments claimed was the intent.

Whether or not voters intended to do so, the report documents how these amendments may actually ban all unmarried couples — gay and straight — from enjoying the most basic protections of family life, such as access to health insurance, protection from physical abuse and the right to have custody agreements upheld.

By using vague and undefined language, the proponents of these amendments have given judges, lawyers and others wide discretion to interpret their meaning. The report highlights four states—Missouri, Utah, Ohio and Michigan—where governmental entities and/or individuals have interpreted the constitutional amendments to:

- Deny domestic partner benefits, such as health insurance, to unmarried couples – same and different sex.
- Argue that domestic violence laws do not apply to different-sex unmarried couples.
- Attempt to void a custody agreement between a same-sex couple.

These examples suggest that the amendments could be used to restrict benefits and protections to all unmarried couples across an even wider range of areas of family life, including property ownership, powers of attorney, pension benefits, adoption and hospital visitation.

Truth or Consequences: The Effects of Constitutional Amendments on Marriage in Ohio, Michigan, Missouri and Utah

In 2004, voters in 13 states were asked to ratify state constitutional amendments that purportedly prohibit marriage for same sex couples. The language in many of these amendments is complicated and convoluted, prohibiting not just marriage but, for example, "...legal status identical or substantially similar to that of marriage" (Kentucky); "...other domestic union, however denominated" (North Dakota); and "legal status... which are identical or substantially similar to marital status" (Arkansas).

Proponents of these measures, at both the state and federal level, purposely introduced and advocated for broad and undefined language. In the 17 states that have amended their constitutions, 11 include language that goes beyond defining marriage. Additionally, the 2005 Marriage Protection Act (MPA), which would amend the U.S. Constitution, includes the phrase "legal incidents of marriage." By employing vague and undefined language, these amendments give judges, lawyers and others wide discretion to interpret their meaning. Even language that defines marriage as between one woman and one man could be interpreted to prohibit basic benefits and protections to all families—gay and straight.

This report examines four states where governmental entities and/or individuals have interpreted their constitutional amendments to deny much more than marriage to same-sex couples. In three of these states - Ohio, Michigan and Utah, the language of the amendments is broad. These prohibit legal recognition of relationships that "...intend to approximate the design, qualities, significance or effect of marriage" [Ohio], constitute a "similar union" [Michigan] and "domestic status or union" [Utah]. These terms are not defined and are open to various and sometimes conflicting interpretations. The language of the Missouri amendment is a one sentence definition of but it has been interpreted by a college president as intimating that the "spirit" of the amendment precludes him from providing domestic partner benefits to the college's employees.

With very little time to study the issue and in the midst of one of the most contentious Presidential campaigns in history, was it possible for voters to have the complete picture of what these amendments actually do? Did they intend, for example, to ban all unmarried couples — gay and straight — from enjoying the most basic protections of family life, such as access to health insurance, protection from physical abuse and the right to have custody agreements upheld?

Whatever voters may have thought about these amendments, the consequences of these amendments and their damaging effects on *all unmarried couples* are becoming very clear. This report highlights four states where these consequences are already being felt. The full impact of these amendments in all the states that have adopted them will take some time to unfold. It is clear that the vague and ill-defined language of these amendments will keep litigators busy for years as courts are forced to interpret what they mean.

A Snapshot of the Consequences

In the past five months, the constitutional amendments on marriage ratified in 2004 have been used by attorneys, lawmakers and public employers in Ohio, Michigan, Missouri and Utah as justification to:

- Deny domestic partner benefits, such as health insurance, to same-sex couples and all unmarried couples.
- Argue that domestic violence laws do not apply to opposite-sex unmarried couples.
- Attempt to revoke a custody agreement between a same-sex couple..

These examples suggest that the amendments could be used to restrict benefits and protections to all unmarried couples across an even wider range of areas of family life, including property ownership, pension benefits, adoption and hospital visitation. The 2000 Census illustrates that there are millions of unmarried couples in the U.S whose lives can be negatively affected by these amendments.

Unmarried Couples in Ohio, Missouri, Michigan and Utah

State	Same-Sex Couples	Opposite-Sex Unmarried Couples	Total Unmarried Couples
Michigan	15,368	186,852	202,220
Ohio	18,937	210,152	229,089
Missouri	9428	101,582	111,010
Utah	3,370	20,734	24,104

Source: Census 2000: "Married-Couple and Unmarried-Partner Households for the United States, Regions, States and for Puerto Rico: 2000."

Consequences In Four States

What follows is a summary of developments in Ohio, Michigan, Missouri and Utah, where denial or restriction of benefits and protections on the basis of the marriage amendments have been reported since the rush to pass these amendments in 2004.

Ohio

Denial of domestic partner benefits.

- The University of Toledo, which has 2,640 employees, announced that it could no longer consider granting domestic partner benefits for unmarried couples because of the constitutional amendment passed in that state. These benefits had been on the agenda for contract negotiations but the board dropped it from consideration after the amendment passed.

  Five other state universities currently offer domestic partner benefits in Ohio: Cleveland State, Miami University, Ohio State University, Ohio University and Youngstown State.

Denial of domestic violence protections

- After Frederick Burk, a 42-year-old from Columbus, was charged with assaulting his girlfriend, his lawyer asked the court to throw out the domestic violence felony charge against him on the grounds that the constitutional marriage amendment granted no such

protections to unmarried couples. In March 2005, Cuyahoga County Common Pleas Judge Stuart Friedman agreed and reduced the charge to a misdemeanor assault. The judge wrote: "By mandating that the state deny any legal recognition 'that intends to approximate the design, significance or effect of marriage' to relationships between unmarried individuals, the Ohio Constitution now appears to threaten the limited protections previously available to them by law."

Ohio's constitutional amendment states:
Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Michigan

Denial of domestic partner benefits

- Michigan Gov. Jennifer Granholm stripped domestic partner benefits for same-sex couples for state workers under new union contracts in December 2004, citing passage of the constitutional marriage amendment. There are 30,000 employees covered by union contracts in Michigan.
- In March 2005, the state attorney general issued an opinion stating that local jurisdictions and governmental entities, such as school boards, are prohibited from offering domestic partner benefits to their employees.
    - This opinion could affect the domestic partner benefits that are currently provided to public employees in Ann Arbor and Kalamazoo and the counties of Ingham and Washtenaw. They are also offered to employees of the Ann Arbor School District, the Huron Valley School District, Albion College, Central Michigan University, Eastern Michigan University, Kalamazoo College, Lansing Community College, Michigan State University, Northern Michigan University, Oakland University, University of Michigan System and Wayne State University.
- In addition, a Right-Wing law group, the Thomas More Law Center, and 17 taxpayers filed a lawsuit against Ann Arbor Public Schools, asking the Michigan Court of Appeals to stop the school district from providing domestic partner benefits to same-sex couples, citing the constitutional amendment as a rationale for its demand. The district has about 3,000 employees.

Michigan's constitutional amendment states:
To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Missouri

Denial of domestic partner benefits

- Despite the faculty of Columbia College having approved a proposal to offer domestic partner benefits to any eligible employees among its staff of 1,000, the president of the college decided to kill the proposal after the constitutional amendment was passed, citing questions about whether providing domestic partner benefits would violate the spirit of the law.

> **Missouri's constitutional amendment states:**
> *That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.*

Utah

Denial of domestic partner benefits

- At the request of a faculty committee, Utah State University was considering a proposal to offer domestic partner benefits to same-sex couples. But the proposal was killed after the university's attorney noted that it might violate the recently ratified constitutional amendment. The decision affects employees at 10 educational institutions: College of Eastern Utah, Dixie State College of Utah, Salt Lake Community College, Snow College, Southern Utah University, the University of Utah, the Utah College of Applied Technology, Utah State University, Utah Valley State College and Weber State University.

Denial of domestic violence protections

- After a man was charged with violating a court order that required him to stay away from his former girlfriend and the home they shared, his lawyer filed a motion in November 2004 saying that it was unconstitutional to uphold such protective orders for unmarried couples. The attorney cited passage of the constitutional amendment as grounds for denying such protection to unmarried couples.

> **Utah's constitutional amendment states:**
> *(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic status or union, however denominated, between persons is valid or recognized or may be authorized, sanctioned or given the same or substantially equivalent legal effect as a marriage.*

What Comes Next?

The proponents of these amendments did not appear on the scene just last year. Those advocating most vociferously for the passage of these amendments like the Community Values Coalition in Ohio and the American Family Association in Michigan have had a long standing anti-gay agenda. These ballot campaigns are the latest in a long series of legal, political and ballot efforts to attack the gay and lesbian community and stop or roll back laws and policies that treat gay and lesbian people equally and fairly.

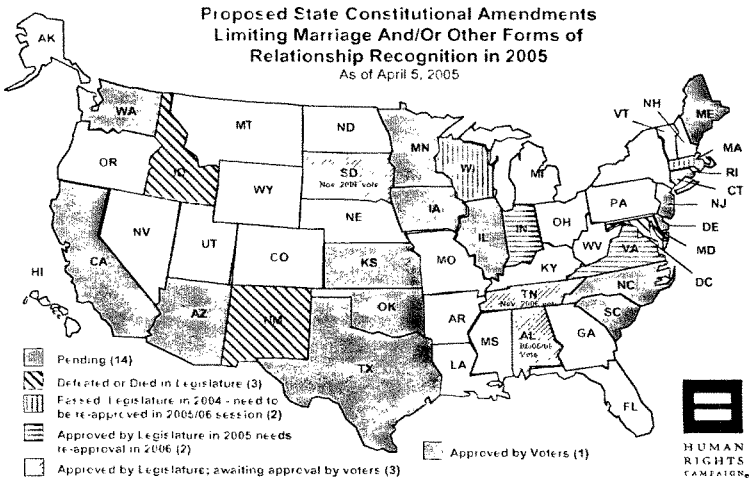
Seen in that context, there is every reason to think that similar organizations in other states will try to use their constitutional amendments to strip away even the most basic protections that all unmarried couples— gay and straight — now enjoy. In just five months the damage in four states is becoming clear. As the language of these amendments is examined more closely in other states and as courts are faced with interpreting the language, the harm being to real people and to real families in Ohio, Michigan, Missouri and Utah could be just the tip of the iceberg.

Constitutional Amendments: The Landscape

The 17 states that currently have constitutional amendments defining marriage as between a man and woman only are: Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and Utah.[1]

Meanwhile, legislators in an additional 23 states have introduced constitutional amendments in the 2005 legislative sessions. In 2004, 15 states defeated their amendments in the legislature. Some of them will do so again. Others will pass them on to the voters for ratification. The language of each amendment will need to be carefully analyzed to measure its potential impact, not just on same-sex couples, but on all unmarried couples. So far, the evidence is ominous. Perhaps knowing the full potential effects of these amendments will give lawmakers and voters reason to pause and consider more carefully what their vote will actually mean to their friends, family and neighbors— gay and straight.

1 Hawaii is often mistaken as having a constitutional amendment prohibiting marriage for same-sex couples. In fact, the state's constitution was amended in 1998 to read: "The Legislature shall have the power to reserve marriage to opposite-sex couples." It was the Hawaii Legislature that passed a law prohibiting marriage for same-sex couples.


Proposed State Constitutional Amendments
Limiting Marriage And/Or Other Forms of
Relationship Recognition in 2005
As of April 5, 2005
AK
HI
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
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LA
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IN
KY
TN
AL
OH
WV
PA
VA
NC
SC
GA
FL
NY
VT
NH
ME
MA
RI
CT
NJ
DE
MD
DC
Pending (14)
Defeated or Died in Legislature (3)
Passed Legislature in 2004 - need to be re-approved in 2005/06 session (2)
Approved by Legislature in 2005 needs re-approval in 2006 (2)
Approved by Legislature; awaiting approval by voters (3)
Approved by Voters (1)
HUMAN RIGHTS CAMPAIGN

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
April 13, 2005

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

STATEMENT BY SENATOR EDWARD M. KENNEDY:
"Less Faith in Judicial Credit: Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"

Thank you Mr. Chairman and thank you Senator Feingold.

I thank the witnesses, particularly Dr. Kathleen Dahlia, originally from Massachusetts. Her willingness to share her family's compelling story helps us understand the very real financial hardship and the personal suffering that often results from prejudice against same-sex couples, and I'm grateful for her testimony.

In many ways, today's hearing is covering ground we've covered before. In fact, this is the fourth time since September 2003 that we've convened to ask whether the sanctity of marriage is in jeopardy, whether "activist judges" are undermining moral ideals, and whether a federal law that has never been challenged in nine years – the Defense of Marriage Act – is suddenly about to fail.

There's no evidence of any significant change in the issue since the last hearing on it in March 2004.

Some, however, hope to use this issue as a wedge for partisan advantage to create divisions in our communities. Regrettably, the hearing notice describes it as an inquiry into "activist judges," but, it would be more accurate to call it an attack on the entire system of an independent judiciary.

The checks and balances so vital to our democracy are what make our constitutional scheme the envy of the world and such a potent and enduring foundation for our democracy. The recent drumbeat of harsh criticism of "activist judges" in the wake of the Schiavo case would be laughable if it weren't so ominous, since the judges in that case were being attacked for not being activists. Apparently, in right wing rhetoric, an activist judge is any judge who doesn't act the way they want.

Congress needs to address the issues of same-sex marriage, civil unions, and gay rights on the merits. It makes no sense to condemn judges for their interpretation of statutes and constitutions. That's what courts are created to do.

The Defense of Marriage Act specifically makes clear that states have no obligation to recognize same sex marriages in other states, but can do so if they wish to do so. Besides, the Full Faith and Credit Clause of the constitution has never required one state to be bound by the marriage laws of another state. No state is required to recognize marriages of other states that violate a strong local policy. For over 200 years, states have been managing these issues well. No one has challenged these principles successfully.

Within each state, the problem we are supposedly examining today is non-existent, unless Congress wants to impose its view on the people of Massachusetts. Our state's high court held that the state constitution prohibits discrimination against same-sex couples in the marriage laws, and the people of the state are now in the process of deciding whether to modify the constitution.

Some called the state judges activists for their decision, but sometimes, as we all know, the courts are able to act to carry out the intent of the constitution when bigotry infects the political process in the legislature. Imagine what America might have endured if the Supreme Court had not outlawed racial separation in 1954 in the landmark case of Brown v. Board of Education.

The magnificence of our federal system is on display. Individual states are managing the intricacies of their local preferences and political climates. There is absolutely no need for the federal government to step in and impose a one size fits all, anti-federalism edict that will prohibit local preferences from being vindicated.

It's fundamentally wrong to discriminate against gays and lesbians by denying them the many benefits and protections that the laws of the state provide for married couples. Being part of a family is a basic right. It means having loved ones with whom to build a future, to share life's joys and tears. It means having the right to be treated fairly by the tax code, to visit loved ones in the hospital, and to receive health benefits, family leave benefits, and survivor benefits. I urge my colleagues to reject efforts to write that kind of bigotry into federal law.

Statement of Senator Patrick Leahy
Subcommittee on the Constitution, Civil Rights, and Property Rights
Hearing on "Less Faith in Judicial Credit: Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"
April 13, 2005

I hope that today's hearing is not the first step in another attempt by the Republican leadership to amend the Constitution to federalize marriage. As the members of this Committee surely remember, proponents of the Federal Marriage Amendment last year could not even assemble a bare majority in support of a procedural motion to move forward with consideration of the amendment.

In the ensuing months, we have seen no States forced to recognize same-sex marriages, and the Defense of Marriage Act remains good law. Moreover, we have seen many States amend their State constitutions to ban same-sex marriage. Now – if anything, even more than last year – there is no crisis that demands or justifies altering our founding document. I continue to oppose amending the Constitution to prohibit gay marriage.

During the debate over the Federal Marriage Amendment in the 108th Congress, proponents repeatedly stated that the amendment would not affect the ability of State legislatures to create civil unions for same-sex couples, and would not deprive same-sex couples of benefits that States had chosen to provide. Today, we will hear from a witness who resides in Michigan, which has interpreted the constitutional amendment voters there approved last November as forbidding that State from extending benefits to the unmarried partners of State employees.

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

Of course, we cannot say that other State Supreme Courts will not someday follow the lead of Massachusetts and interpret their State constitutions to provide for gay marriage within their States, or to recognize same-sex marriages entered into in other States. If this is "judicial activism," however, it is of the State variety. The response should come not from the Federal government but from the States themselves.

As the Massachusetts experience has shown, the people of our States have the tools to respond to decisions they do not like without turning to the Federal government for help.

As a general matter, State Constitutions are more easily amended than our Federal Constitution, and in most States, judges are elected, providing a check on their ability to exceed the wishes of their citizenry.

We are faced with a choice, then, between dictating a Federal solution and leaving States in control of addressing the marriage issue and their own judiciaries. The particular Federal solution that has been proposed, meanwhile, is exceedingly confusing and open to interpretation. For example, who would be bound by the provisions of the Marriage Protection Amendment – State actors or private citizens, including religious organizations? What count as "legal incidents" of marriage? Can a legislature pass a "civil unions" law that mirrors its marriage law in all respects save the word "marriage?" Can the people of a State put protections for civil unions in their State constitution? What State actors are forbidden from construing their own constitutions – the judiciary only or executive branch officials as well? The list goes on and on, and each question will eventually require a judicial resolution.

Finally, we should not adopt a doctrine of constitutional preemption, in which we amend our Constitution based on predictions of what courts – State or Federal – might do. We should take the prudential course when it comes to changing our national charter.

Unfortunately, the title of today's hearing suggests both that the specter of "judicial activism" will be used to build interest in amending the Constitution, and that the gay marriage issue may be used to continue the Republican attacks on the judiciary. These attacks spare no one, neither State court judges, nor Federal judges, nor Federal judges appointed by Republican presidents, nor the Supreme Court Justices themselves. Their goal is intimidation and subservience to an ideological agenda, rather than adherence to the rule of law. Worst of all, some Republican leaders and activists have taken their rhetoric to a level that should concern all Americans, at a time when violence against judges, their families and courtroom personnel has shocked the nation. There can be no justification for violence against judges or their families. In Iraq, judges are being attacked by insurgents. In Colombia, honest judges were murdered by drug-dealing thugs. That is not a circumstance we want to see anywhere in the world, let alone in Atlanta, Georgia or in Chicago, Illinois. We cannot tolerate it and no one should be excusing or justifying it.

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Testimony of Kathleen Moltz, M.D., F.A.A.P. Assistant Professor, Department of Pediatrics, Wayne State University School of Medicine[1]
Before the *United States Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Property Rights*
"Less Faith in Judicial Credit: Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"
April 13, 2005

I appreciate the opportunity to speak to this Subcommittee about my family. I am here as the mother of two beautiful children whose welfare I am trying desperately to protect, as the partner of the wonderful woman with whom I share my life, and as a pediatrician who has taken the oath "first, do no harm."

My family's story began in October 1990, when my partner Dahlia Schwartz and I became a couple. After several years together, we were married in a traditional Jewish wedding ceremony in 1996. We recited the seven blessings, broke a wine glass, and signed a "ketubah," the Jewish marriage contract that sets forth, before G-d, community and family, our responsibilities to each other. This was years before any state recognized marriage rights for same-sex couples.

Dahlia and I were together for several more years before we decided to have children. We are now proud parents to our daughter Aliana, who will tell you that she is four and three-quarters, and our son Itamar, who is two years old. Dahlia carried Itamar through a difficult pregnancy, a precipitous labor and an emergency C-section. At several times during the delivery, I was asked to leave the room—something that a different-sex spouse would not have to go through. I cannot put into the words the agonizing emotions of not being able to be present when my partner and child were in medical distress.

Immediately after he was born, Itamar experienced temperature regulation problems, rapid breathing and hypoglycemia. Dahlia was recovering from general anesthesia and a major surgery. The pediatrician on staff refused to discuss Itamar's condition with me because I was not his "real mother." What is a "real mother" if not the person who would lay down her life for her child? I am a real mother to my children, and so is Dahlia. Fortunately, since then I have adopted Itamar through second-parent adoption, and Dahlia has adopted Aliana. Both children now have the benefit of a legal relationship with two parents.

On May 21, 2004, Dahlia and I were legally married in Massachusetts, where we had lived for eight years. It was a small ceremony because in our hearts, if not under law, we were already married.

In June 2004 we moved to Michigan, where I took a job as a pediatric endocrinologist at Wayne State University. My job lets me care for children with diabetes and other illnesses, particularly children living in underserved communities. I moved my family to Michigan so that I could take a job that would allow Dahlia to stay home with the kids. The domestic partner health benefits that Wayne State provided made this possible, particularly because

[1] Institutional affiliation is for identification purposes only.

Dahlia has a continuing medical condition that makes health insurance a necessity. I would not have taken the job without the domestic partnership benefits. The move also allowed me to be near my parents—our children's grandparents—who live eight houses down from us and who are here supporting us today.

Not long after we moved to Michigan, the state became embroiled in a campaign to pass Proposal 2, an amendment to the state constitution that would ban marriage rights for same-sex couples. When our daughter asked what it was all about, we told her that there were people who believed that we couldn't really be a family. We told her that we thought this was silly because, obviously, we are a family—we share love, children and a commitment to raising healthy, happy kids. When the results of the election came in, Aliana asked about the outcome. We told her that the amendment had passed. With tears in her eyes, she asked "does this mean our family has to split up?" Like children do, our four-year-old went straight to the heart of the issue. The voters had sent us a message that day: you are not a family.

We were dismayed and stunned by the results of the Michigan election and spent days wondering which of our neighbors and colleagues thought that our family should not have equal rights. We never wanted to get involved in a legal action, much less in national politics (no offense intended). But things got even worse shortly after the amendment passed. When anti-gay groups from outside our state tried to use the amendment to take away the health benefits insurance I obtain through my work, I could not sit idly by.

Throughout the campaign, supporters of the amendment insisted that the amendment had nothing to do with the health benefits that families like mine receive. In fact, their brochure even claimed that it was "only about marriage." But as soon as the amendment passed, it became a weapon to take away the health insurance upon which many families—including my own— rely.

In March, the Michigan Attorney General issued a non-binding opinion that the anti-marriage constitutional amendment prohibits state and local governments from providing domestic partnership benefits—including health insurance—to their employees. Two weeks ago, Dahlia and I joined with other families across Michigan to ask the Michigan state court for nothing more than a declaration that the state constitutional amendment will not take away our family's health care.

I am here today because I am concerned that the Federal Marriage Amendment, which is very similar to Michigan's amendment, will be used to deny equal benefits nationwide. The American people should not be fooled by the type of bait-and-switch tactic used by the supporters of the Michigan amendment, who sold the amendment as so-called protection of marriage, but then targeted my domestic partnership benefits for elimination.

My children have benefited enormously from their time with Dahlia at home. They are more relaxed, gentle, curious, and happy. Ironically, the same people who promoted this amendment favor policies that permit or encourage one parent to stay at home with children. But under the false pretense of protecting marriage, this law might force us either to move away from grandparents and family or to deprive our kids of precious time with their

parents. No one has been able to explain to me how even one marriage is protected by this unfair, discriminatory law.

I have also heard that the Michigan amendment – and the federal amendment that this body wisely rejected last year—is necessary to "protect" marriage as a sacred institution. As an observant Jew who believes that G-d blessed my marriage long before any state did so, I find this hard to understand. As an American with great respect for our Constitution, I don't understand why federal law should play a role in defining for the various religions which marriages are 'sacred.'" And given that this is the Constitution Subcommittee, you are all aware that no religious denomination can ever be forced to perform marriages that don't meet its standards. For instance, rabbis cannot be compelled to perform interfaith marriages even though the laws of every state allow them.

We are an observant Jewish family, and every day, we give thanks to G-d for the health of our children and the blessings we've been given. Our faith informs our beliefs on this issue. We teach our children that it is a miraculous thing to have so many people in the world, each different, each created by and loved by G-d. We teach our children that America was founded on this same ethic: the value of each person and the respect for different beliefs.

Finally, I have heard that marriage must be "protected" from families like mine for the good of children. As a pediatrician, I know that this is completely unsupported by any scientific fact. Every piece of creditable medical evidence I can find, every study, indicates that children with lesbian and gay parents do just as well as their peers. Every major medical, psychiatric and psychological association that has issued an opinion on the subject endorses increasing, not removing, legal protection of gay and lesbian families. Their endorsement is based on a commitment to protecting the health and welfare of children and their families. In short, the medical evidence, the research, and my clinical experience as a pediatrician observing what children and families need in their day-to-day lives and in times of crisis all indicate that it is of the utmost importance to extend, not to remove, legal protection to the children and to both parents in gay and lesbian families.

I will close with a Jewish folktale. A man went about saying hateful things about the Rabbi. One day, he saw the harm his words caused to the Rabbi's reputation. The man went to the Rabbi and begged forgiveness. The Rabbi said: "You must do two things. First, get a feather pillow, cut a hole in it, and throw the feathers off the side of a cliff. Then, return here." The man did as instructed. When he returned, the Rabbi said: "Now, you must go and gather each and every feather." The man said, "but that is impossible, Rabbi." The Rabbi replied, "Yes. It is just as impossible to take back the harm done by the words you have scattered around town."

I don't know what harm your words and actions as leaders advocating for a constitutional amendment might cause. I fear that families like mine, with young children, will lose health benefits; will be denied common decencies like hospital visitation when tragedy strikes; will lack the ability to provide support for one another in old-age. I fear that my loving, innocent children will face hatred and insults implicitly sanctioned by a law that brands their family as unequal. I know that these sweet children have already been shunned and excluded by people claiming to represent values of decency and compassion.

I also know what such an amendment will not do. It will not help couples who are struggling to stay married. It will not assist any impoverished families struggling to make ends meet or to obtain healthcare for sick children. It will not keep children with their parents when their parents see divorce as their only option. It will not help any single American citizen to live life with more decency, compassion or morality. In the coming months and debates, I urge you to consider both the medical evidence and the experiences of families like mine with an open heart and an open mind. Remember, the harm caused by actions and words can never be healed.

And I pray, and my family prays, that in dealing with our precious Constitution, you will follow the dictates of the oath that binds my profession: first, do no harm.

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

"Less Faith in Judicial Credit:
Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"

April 13, 2005

Written Testimony of Lynn D. Wardle
Professor of Law
Brigham Young University Law School

I am honored to have been invited to testify before this important Subcommittee of the U.S. Senate Judiciary Committee this morning about a subject of great importance. My name is Lynn D. Wardle; I am a professor of law and for nearly 27 years I have taught Family Law and other courses including Conflict of Laws and the Origins of the Constitution.[1] Both the Defense of Marriage Act (DOMA) and the proposed Federal Marriage Amendment concern all of those fields. Thus, I have been asked to give my professional analysis regarding the sufficiency of federal and state DOMAs, and need for a federal marriage amendment. Of course, the opinions I

[1]I am a Professor of Law at the J. Reuben Clark Law School at Brigham Young University. I also have taught family law and conflicts law or related subjects at Howard University School of Law in Washington, D.C., at Sophia University Faculty of Law in Japan, at the University of Aberdeen in Scotland, at the University of Queensland Faculty of Law, and lectured to law professors in special summer courses at the China University of Political Science and Law in Beijing, China, and the University of Nanjing Agricultural University in Nanjing, China. Family Law is my primary area of scholarship. I have written or co-authored several books and over 90 articles in law reviews, professional journals, and chapters in books, primarily about family law. Additionally, I am the immediate past president of the leading international scholarly organization in the field of family law, the International Society of Family Law, and I have served actively as a member of the American Law Institute. Of course, I do not speak today for any of these organizations, but only for myself.

express are my own professional views; I do not speak for any of the institutions or organizations with which I am associated.

In the summer of 1996, I was privileged to testify before a subcommittee of the Judiciary Committee of the U.S. House of Representatives in favor of the proposed Defense of Marriage Act. I entitled my remarks "Protecting Federalism in Family Law,"[2] because one of my major concerns with the effort to legalize same-sex marriage then was that it threatened a serious erosion of federalism in family law, as well as substantive flaws. Later that summer, I also was privileged to testify before the Senate Judiciary Committee in support of the proposed DOMA. I entitled my statement "A More Perfect Union - Federalism in American Marriage Law,"[3] again emphasizing the threat to structural federalism. I explained that if any state legalized same-sex marriage (as state courts in Hawaii were then threatening to do), gay and lesbian activists, and other supporters of same-sex marriage, would try to force other states to import and accept same-sex marriage under federal full faith and credit doctrines. I urged Congress to pass the Defense of Marriage Act to clarify and establish as a matter of congressional authority under the "Effects Clause" of the constitutional provision regarding Full Faith and Credit[4] that each state could determine for itself whether or not to treat same-sex unions as marriages. Congress saw the need, and passed the Defense of Marriage Act by overwhelming, bipartisan votes of 85-14 in the Senate, and by 342-67 in the House of Representatives, and DOMA was signed by President Clinton on September 22, 1996.[5] Congress was wise to anticipate the developments that have driven more that forty states to pass state DOMAs either by legislation, by constitutional amendment, or both (including 14 of 14 proposed state marriage amendments approved overwhelmingly by voters in the past year alone).

I remain a firm believer in the value and validity of the Defense of Marriage Act. It is a critical piece of legislation. As we approach the end of the first decade of DOMA, however, it appears that DOMA alone will no longer be sufficient to prevent the judicial federalization and

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[2] *Written Statement of Professor Lynn D. Wardle Concerning H.R. 3396 --Protecting Federalism in Family Law* in The Defense of Mariage Act, Hearing Before the Subcomm. on the Constitution of the Committee on the Judiciary, U.S. House of Representatives, 104 Cong., 2d Sess., on H.R. 3396, May 15, 1996 (Serial No. 69) at 158-180.

[3] *Written Statement of Professor Lynn D. Wardle Before the U.S. Senate Judiciary Committee Concerning S. 1740: A More Perfect Union - Federalism in American Marriage Law*, in the Defense of Marriage Act, Hearing Before the Committee on the Judiciary, United States Senate, 104 Cong., 2d Sess., on S. 1740, July 11, 1996, S. Hrg. 104-5530, at 23-42.

[4] U.S. Const., art. IV, §1, cl. 2.

[5] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C); *see also Clinton Draws Criticism from Gay Activists*, Chi. Tribune, Sept. 23, 1996, at 6; Bob Hohler, *Senate OK's Ban on Gay Marriages*, Boston Globe, Sept. 11, 1996, at A1; *House Passes Defense of Marriage Act*, Cong. Daily, July 12, 1996.

coerced imposition of same-sex unions on the states. That is why a Federal Marriage Amendment (FMA) is necessary. A Federal Marriage Amendment is necessary (1) to constitutionally protect and preserve DOMA, (2) prevent the broad federalization of family law, (3) to prevent judges from constitutionally mandating same-sex marriage or marriage-equivalent civil unions (herein called collectively "same-sex marriage"), and (4) to protect the substructure of the Constitution.

DOMA Is In Danger

DOMA is primarily a structural federalism law. DOMA prevents federal full faith and credit principles (constitutional, statutory or judicial) from being used to force states to recognize and accept same-sex marriages created or recognized in other states. It also prevents courts and others from mis-interpreting or stretching federal statutes or common law so as to import same-sex marriage into federal law. Thus, it preserves the policy power of the states and of Congress to decide this issue for themselves as against full faith and credit and statutory or common law interpretation claims. That was and is very important.

DOMA was intended to preserves the right of Congress and of each state to determine for itself whether same-sex marriage should be recognized, and to what extent. Section 2 of DOMA was enacted in response to the open strategy of many gay and lesbian activists asserting that if any one state allowed same-sex marriage, they would invoke federal full faith and credit principles to force all other states to accept and recognize them.[6] It resolves that potentially serious controversy concerning federal Full Faith and Credit marriage recognition rules by clarifying that if a state chooses to legalize same-sex marriage, it may not force that radical redefinition of marriage upon the other states.[7] It preserves the right of each state to choose for itself whether to recognize same-sex marriage. Section 3 eliminates a potentially serious

[6]*See* The Defense of Marriage Act, S. Hrg. 104-553, Hearing before the Comm. On the Jud., U.S. Sen., 104th Cong., 2d Sess., on S. 1740, Serial No. J-104-90 (July 11, 1996) at 1 (Statement of Sen. Orrin Hatch); *id.* at 18 (Prepared Statement of Sen. Don Nickles); *id.* at 28-31 (Prepared Statement of Prof. Lynn D. Wardle); Defense of Marriage Act, H. Rep. Report 104-664, 104th Cong., 2d Sess. (July 9, 1996) at 2-12 (need for DOMA); *id.* at 2-4 (campaign to legalize same-sex marriage).

[7]28 U.S.C.A. § 1738C (2004).

ambiguity in federal statutes, regulations, and programs regarding the meaning of "marriage" in federal law, preventing the back-door importation of same-sex marriage into federal law without the approval of Congress.[8] Both sections leave undisturbed the power of each state to define marriage for itself, and to control the incidents of marriage provided by state law.

[8] 1 U.S.C.A. § 7 (2004).

However, DOMA is only a statute, and "[m]any commentators argue that the second section of DOMA violates multiple provisions of the U.S. Constitution, including the Full Faith and Credit Clause, the equal protection component of the Due Process Clause, the Equal Protection Clause, the Bill of Attainder Clause, and the Privileges and Immunities Clause."[9] Appendix 1 to this statement lists 30 articles, comments and notes asserting that DOMA is unconstitutional which I found from reviewing a sample of 20% of 269 "hits" of law review and journal pieces.[10] Law professors and legal commentators are not the only ones making this assertion. Court decisions in New York and Iowa have recently called into question DOMA's constitutionality.[11] Moreover, in decisions that have serious implications for the federal Defense

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[9]Melissa A. Glidden, Recent Developments, *Federal Marriage Amendment*, 41 Harv. J. on Legis. 483, 491-92 (2004).

[10]Appendix 1: A Partial Listing of Some of the Law Review Publications Asserting that DOMA Is Unconstitutional.

[11]*See, e.g.,* Langan v. St. Vincent's Hospital of N.Y., 192 N.Y. Misc. 2d 442, 445 (N.Y. App. Div. 10th Dept. 2003) ("It is unclear by what authority the Congress may suspend or limit the full faith and credit clause of the Constitution, and the constitutionality of DOMA has been put in doubt."). *See also Alons v. Iowa District Court for Woodbury County*, Lambda Legal, http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203 (Seen March 19, 2005); *Iowa Supreme Court to Hear Oral Argument Friday in Lesbian Civil Union Dissolution Case*, Jan. 11, 2005, *id.*; *DOMA State Grants Lesbians Divorce*, 365gay.com, http://www.365gay.com/newscontent/120703iowaDivorce.htm (Dec. 7,

of Marriage Act, two state courts in Washington have ruled that a state DOMA is unconstitutional state constitutional doctrines,[12] and a federal court in Nebraska has ruled that that state's DOMA violates the prohibition against bills of attainder in the U.S. Constitution.[13] DOMA is clearly constitutional, but the motivation to promote and establish same-sex marriage has become so strong in certain segments of our society, including apparently in some courts, that the fair, honest, and consistent interpretation and application of precedents and doctrines can no longer be taken for granted.

Efforts to Legalize Same-Sex Marriage Seriously Threaten Federalism in Family Law

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2003).

[12]Andersen v. King County, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004) (invalidating state DOMA); Castle v. State, 2004 WL 1985215 at *3, *4, *10-*13, *16 (Wash. Super. 2004) (invalidating state DOMA).

[13]Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004, 1008-1011 (D. Neb. 2003) (finding likelihood that state DOMA violates Bill of Attainder clause).

Second, power centers have shifted, requiring federalists to adjust to the new threat to the principle of federalism in family law from judges who have gone further and quicker toward compelling legalization of same-sex marriage than anticipated. Less than two years ago, at an academic conference at the University of Oregon Law School in June, 2003, I presented a paper in which I criticized the proposed Federal Marriage Amendment because I wanted to protect and preserve the important principle of federalism in family law.[14] However, since then, many state and federal courts made radical rulings using various constitutional doctrines to force states to legalize same-sex marriages or unions. The lawyers seeking to legalize same-sex unions cited at least eight broad constitutional doctrines to support their claims,[15] and those courts relied upon

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[14]I also expressed similar criticism in a paper I presented at the International Society of Family Law North American Regional Conference at the University of Oregon School of Law in Eugene, Oregon, June 26-28, 2003 (copy in author's possession).

[15]The constitutional doctrines courts have invoked to force same-sex unions are *(1) equal protection* (*see, e.g.,* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Baehr v. Miicke, 196 WL 694235 (Haw. Cir. Ct. 1996); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 at 6 (Alaska. Super. Ct., Feb. 27, 1998); Tanner v. Oregon Health Sci=s Univ., 971 P.2d 435, 443 (Or. Ct. App. 1998); Baker v. State, 744 A.2d 864, 879, 882, 885 (Vt. 1999); Langan v. St. Vincent's Hosp. of N.Y., 765 N.Y.S.2d 411, 453-54 (N.Y. Sup. 2003); Goodridge v. Department of Public Health, 798 N.E.2d 941, 943, 959 (Mass. 2003); In re Opinion of the Justices to the Senate, 802 N.E.2d 565, 569-71 (Mass. 2004); Hernandez v. Robles, ___ N.Y.S.2d ___, 2005 WL 363778 (N.Y.Sup., Feb. 4, 2005); Coordination Proceeding, Special Title [Rule 1550 (c), Marriage Cases, Superior Ct, San Francisco County, Judicial Council Coordination Proceeding No. 4365 (Mar. 14, 2005); *see also* Li v. State, 2004 WL 1258167 (Or. Cir. 2004)), *(2) substantive due process* (privacy, right to marry, right of association) (*see, e.g., Brause,*1998 WL 88743 at 4; Goodridge, 798 N.E.2d at 959-61; Andersen v. King County, 2004 WL 1738447 *3,4,11 (Wash. Super. 2004); Hernandez v. Robles, ___ N.Y.S.2d ___, 2005 WL 363778 (N.Y.Sup., Feb. 4, 2005)), *(3) due process standards of arbitrariness or irrationality* (*see Goodridge*, 798 N.E.2d at 960; *Andersen*, 2004 WL 1738447 at *3, *4, *11-*12. *See further Baker*, 744 A.2d at 882, 884), *(4) privileges and immunities* (*see, e.g.*, *Tanner*, 971 P.2d at 447-48; Baker 744 A.2d at 867; Castle v. State, 2004 WL 1985215 at *3, *4, *10-*13, *16 (Wash. Super. 2004); *Andersen*, 2004 WL 1738447 at *3, *4; *Li*, 2004 WL 1258167 *1, 4-*7 (Or. Cir. 2004)), *(5) full faith and credit* (*see generally Alons v. Iowa District Court for Woodbury County*, Lambda Legal, http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=203 (Seen March 19, 2005); *Iowa Supreme Court to Hear Oral Argument Friday in Lesbian Civil Union Dissolution Case*, Jan. 11, 2005, *id.*; *DOMA State Grants Lesbians Divorce*, 365gay.com, http://www.365gay.com/newscontent/120703iowaDivorce.htm (Dec. 7, 2003) Angela Geralds, *Beaumont judge lifts mens' divorce decree,* Dallas Voice, April 4, 2003, in The Lesbian/Gay Rights Lobby of Texas, http://www.lgrl.org/news/article.php?newsID=25 (seen 18 March, 2005). *See also* Richard W. Millar, Jr., *Millar's Jurisdiction – A Boon to Divorce Lawyers: Marriage Is No Longer A Prerequisite,* 45-JUN Orange County Law. 8 (June 2003). *See also* Langan v. St. Vincents Hospital, 196 Misc. 2d at 449, 765 N.Y.S.2d at 418(Sup. Ct. Nassau Co.

N.Y., 2003); *but see* Goodridge, 798 N.E.2d 941 at __), and *(6)* the *bill of attainder clause* (Citizens for Equal Protection, Inc. v. Bruning, 290 F. Supp. 2d 1004, 1008-1011 (D. Neb. 2003)).

Additionally, proponents of same-sex marriage have long invoked two other constitutional doctrines: *(7) the free exercise of religion clause* (*see, e.g.,* Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. Ct. App. 1973) (rejecting the claim of same-sex marriage applicants who claimed marriage law violated their constitutional right of free exercise of religion); Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 Loy. U. Chi. L.J. 597, 598 (2002) ("arguing that Free Exercise guarantees preclude the state from maintaining a same-sex marriage ban without a showing of probable harm," and "suggesting that the fact that some religions recognize same-sex marriage provides yet another ground upon which to establish that states cannot meet their burden in justifying same-sex marriage bans."); *see also* Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 Sup. Ct. Econ. Rev. 75, 112 (2004) ("For its part, it is not clear how far *Lawrence* will go either. The question of whether its logic will carry over to samesex marriages is unclear and it is highly unlikely that this Supreme Court will go so far as to overrule Reynolds v. United States, and find that the free exercise of religion (and freedom of association) should govern there as well."), and *(8) the establishment of religion clause* (*see generally* James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 Mich. J. Gender & L. 335, 373 (1997) (arguing that DOMA is an establishment of religion because it is prompted by no secular purpose); Kevin Metz, Book Note, *Turning Religions Shield Into A Sword*, reviewing Religion in Politics: Constitutional and Moral Perspectives. By Michael J.Perry. New York and Oxford: Oxford University Press, 1997, 108 Yale L.J. 271, 273 n.8 (1997) ("Perry argues that abortion could be banned on secular grounds without violating the nonestablishment norm, but that prohibitions of legally recognized same-sex marriages cannot be."); David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage As An Expressive Resource,* 74 S. Cal. L. Rev. 925, 948 n. 117 (2001) (noting that lawmakers citations of the Bible "are at least a highly problematic basis for law in the United States under the Establishment Clause."); Gilbert A. Holmes, *The Conversations About the Intersecting Institutions of Marriage,* 4 Tex. Wesleyan L. Rev. 143, 146 (1998) ("Professor Eskridge argued that several constitutional doctrines are violated when the religious aspect of marriage dictates the legal policy of who has access to the marital institution. He suggested that First Amendment restrictions against the establishment of religion prohibit the use of religious beliefs as a justification for prohibiting same-sex marriages."); *see also* William Eskridge, Equality Practice 120 (2002) (noting anti-gay sentiment is strongest where "fundamentalist religions" are strongest); Emily Taylor, *Across the Board: The Dismantling of Marriage In Favor of Universal Civil Unions,* 28 Ohio N. U. L. Rev. 171, 171-73 (suggesting secular civil unions instead of marriage because marriage is tainted by religious origins and excludes same-sex couples); Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships,* 8 Cardozo Women's L.J. 207, 228 (2002) ("[A]ccording to the First Amendment of the U.S. Constitution, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Separation of church and state is fundamental to the Constitution. The

elastic interpretation of at least six expansive constitutional doctrines in ruling in favor of same-sex unions.[16] The use of such wide constitutional premises to define marriage as a matter of judicial interpretation of constitutional doctrine and to impose same-sex unions on the states makes a mockery of federalism in family law and would effectively destroy what is left of that important principle of federalism. Courts in eight states already have ruled in favor of same-sex marriage (though some have been overturned or are not final),[17] and cases are currently pending in eight states challenging marriage laws disallowing same-sex marriage.[18]

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civil, legal recognition of partnerships should be separate from religious definitions of 'morality' and 'marriage.'"); Vicki L. Armstrong, Note, *Welcome to the 21st Century and the Legalization of Same-Sex Unions,* 18 T.M. Cooley L. Rev 85, 106 (2001) (citing establishment clause in support of legalizing same-sex unions).

[16]*See supra* note 15, doctrines 1-6.

[17]These decisions have come in Hawaii, Alaska, Vermont, Massachusetts, Oregon, Washington, New York and California. Only the Vermont and Massachusetts decisions are final.

[18]The states are California, Connecticut, Florida, Maryland, Nebraska, New Jersey, New York, and Washington.

The threat to federalism of a narrow, focused federal marriage amendment is small indeed compared to the threat to federalism from the growing practice of judges giving expansive interpretation to already broad constitutional doctrines (such as equal protection, due process, privileges and immunities, and even such historically narrow ones as full faith and credit and bill of attainder) as a pretext for imposing their personal political preferences (such as for same-sex unions) upon the people. That is why I have changed my own view about a proposed Federal Marriage Amendment in the past two years, from opposition to strong support.[19] I still advocate federalism in family law, but it is now clear that the best (perhaps only) way to preserve and protect the heart and core of federalism in family law is to pass a Federal Marriage Amendment.

From a federalism perspective, it might be preferred if the issue of same-sex marriage were not constitutionalized at all. Regrettably, however, the same-sex marriage issue *has already been constitutionalized* by these court decisions under a variety of constitutional doctrines, and the pace and tempo of political judges ordering same-sex unions is increasing. It is too late to say that the issue should not be constitutionalized – it already has been constitutionalized by nearly a dozen court decisions.

While many of the state courts have acted under the state constitutions, the state constitutional doctrines they have applied have close federal counterparts, the tissue separating the state and federal versions of the constitutional doctrine is very thin and porous.[20] Thus, the

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[19]*See generally* Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, __ Univ. St. Thomas L.J. __ (in editing for publication), presented at the University of St. Thomas Law Journal Symposium on the Federal Marriage Amendment: Yes or No?, September 24, 2004, in Minneapolis, Minnesota; Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment,* the Symposium on Breaking with Tradition: New Frontiers for Same-Sex Marriage, held at the Yale Law School, March 4-5, 2005, reprinted by permission of the *Yale Journal of Law and Feminism*, Inc. from the *Yale Journal of Law and Feminism*, Vol. 17, Number 1, pp. __-__ (in editing for publication).

[20]Federal constitutional cases are cited in support of their decisions under state constitutional law. *See, e.g., Goodridge, Baehr*, etc.

use of state constitutional doctrines to mandate legalization of same-sex unions is only the first step of a simple two-step process leading to the interpretation of comparable *federal* constitutional doctrines to mandate legalization of same-sex marriage or unions.

Accordingly, it is now absolutely clear that the issue whether to legalize same-sex marriage or equivalent status and benefits is well on its way to being constitutionalized and federalized. The only questions are (1) *who* will decide what the constitutional rule will be – the courts, acting through constitutional interpretation, or the people, acting through constitutional amendments, and (2) *what* the controlling constitutional rule will be – preservation of the historic and unique legal status, rights, and benefits of the institution of conjugal marriage, or extension of all or most or some of the rights, status and benefits of marriage to same-sex relationships.[21] In these circumstances, advocates of federalism in family law must ask which method of deciding what the matter will be will best preserve and revitalize the principle of federalism in family law – if federal courts extend broad constitutional doctrines to mandate the legal creation of same-sex marriage, or if a narrow constitutional amendment addressing the specific issue of same-sex marriage is proposed, passed, and ratified. The judicial extension of broad constitutional doctrines (such as those noted above) to mandate legalization of same-sex unions would open the door to judicial determination of many other (virtually all) family law issues because the federal constitutional doctrines involved are broad and general. By comparison, the adoption of a narrow constitutional amendment establishing a definition of marriage as the union of one man and one woman would have relatively minimal spillover effect on other family law issues. Just as the Loving v. Virginia[22] decision imposing a constitutional standard on the definition of marriage did not undermine federalism in family law, so also adoption of a Federal Marriage Amendment to reject an extraneous definition of marriage that promotes "gay rights" will not undermine federalism in family law. Thus, from the perspective of protecting federalism in family law, the enactment of a federal marriage amendment is necessary and crucial.[23]

Judicial Rulings Attempt to Cram-Down Same-Sex Marriage By Creative Interpretation of Substantive Constitutional Provisions

Since DOMA it only a statute, it does not address or redress claims that substantive

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[21]These two questions are connected inasmuch as the "activist" judiciary leans toward the liberal positions of (2)(b) and the more radical (marriage-equivalent) forms of (2)(c), while the people tend to lean toward the conservative position of (2)(a) or some moderate (selected benefits only) form of 2(c).

[22]388 U.S. 1 (1967).

[23]The analysis in this subsection does not address what the content of that federal marriage amendment would be, and, arguably, even pro-same-sex-marriage federalists would prefer a constitutional amendment legalizing same-sex marriage to judicial expansion of general constitutional doctrines. However, as noted earlier, preservation of conjugal marriage is most consistent with the principles underlying federalism. *See supra* Parts II-IV.

constitutional provisions or doctrines – such as equal protection, due process, privileges and immunities, freedom of religion, establishment clause, or the bill of attainder clause – trump DOMA because they are constitutional doctrines and DOMA is merely a statute. In 1996 it was believed that a mere structural statute would be sufficient to preserve the issue of same-sex marriage for the people to decide. It seemed unlikely that courts would stretch and distort substantive constitutional doctrines so far as to force the American jurisdictions to legalize same-sex marriage. Sadly, in recent years, the situation has changed dramatically.

A mere structural statute is no longer sufficient. In less than a decade, the movement to legalize same-sex marriage has succeeded in constitutionalizing the substantive issue, and activist judges have turned a political position into a substantive constitutional requirement - by irresponsibly radical misconstruction of equal protection, substantive due process, privileges and immunities, and other doctrines. With arrogance and intellectual gymnastics not seen in decades, some courts today are ruling against the civil rights embodied in the institution of conjugal marriage, holding that laws restricting marriage to union man-woman are "irrational" and dumping loads of ad hominem pejorative rhetoric on the unique and millenia-old social institution of conjugal marriage.

The reason for this push to constitutionally mandate same-sex marriage is obvious. Marriage is the great prize. It is the primary mediating structure through which values are transmitted to society in general and to the rising generation, in particular. It is such a powerful social institution that political movements seek to capture marriage in order to mainstream and spread their political agendas. Marriage has always been an appealing target for social reform movements because the institution of marriage is so crucial to the organization of society and the transmission of social values. The effort to legalize same-sex marriage is just the latest political movement seeking to remake society by capturing (redefining) marriage. At least twice before extraneous ideological movements have succeeded in capturing marriage for the purpose promoting their ideologies, and those stains on our nations marriage laws were only finally repudiated in 1967 in *Loving*.[24] Just as the Constitution was used to protect the institution of marriage then, it is appropriate for the Constitution to protect the institution of marriage now from the latest campaign to "capture" marriage.

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[24]*See* Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment,* 17 Yale J. L. & Femin. __, *supra* note __.

Since the values and legal policy preferences of the people about such fundamental social institutions as marriage are not irrelevant in a democracy, it is important to emphasize that whenever the people of this country have been given the opportunity to express their position about legalizing same-sex marriage, they have unequivocally rejected it. The voters in Hawaii and Alaska in November, 1978 rejected same-sex marriage by 70%, and the voters in Kansas last week (April 5, 2005) also rejected same-sex marriage by 70%. In every state in which the people have been allowed to vote on a constitutional amendment to the state constitution to prohibit and reject same-sex marriage, they have ratified such amendments by overwhelming majorities, ranging from 57% in Oregon to 86% in Mississippi. Not a single one of the eighteen proposed state marriage amendments that have been taken to the people for a vote has failed to be ratified. State constitutional amendments protecting the institution of conjugal marriage are scheduled for popular vote in three additional states this year or next, and similar amendments are pending in the political process in thirteen (13) other states.[25] Additionally, 26 other states have some statutory protections for the institution of conjugal marriage; only six states lack any state constitutional or statutory protection for the institution of conjugal marriage.[26] Clearly, the people strongly favor *constitutional* protection for the institution of conjugal marriage as a matter of their civil rights.

Protecting the Substructure of the Constitution

Finally, the radical redefinition of marriage poses tremendous risks for not only the institution of conjugal marriage, which is the basic unit of society, but also for our constitutional system of protection for basic rights and liberties. A wise commentator nearly 170 years ago observed about the new American republic:

> I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . . No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.[27]

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[25]For a convenient summary, *see*

http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058&columns=true.

[26]Those 6 states are Connecticut, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island.

[27] FRANCIS J. GRUND, THE AMERICANS, IN THE MORAL. SOCIAL, AND POLITICAL RELATIONS 171 (1837).

Thus, enactment of a Federal Marriage Amendment is a prudent and necessary remedy to the dangers that threaten both the institution of conjugal marriage and the principle of federalism in family law. Marriage is the primary mediating structure through which values are transmitted to society in general and to the rising generation, in particular. As Grund perceived nearly 170 years ago, it is critical to protect that basic social unit in order to preserve our Constitutional system.

For these reasons, I urge the Senate Judiciary Committee to report to the Senate that there is a critical need for Congress to prudently consider and promptly propose a carefully-drafted federal marriage amendment.[28]

[28]For purposes of discussion, I propose that the amendment might specifically declare that (1) marriage is the union of a man and a woman, (2) the U.S. Constitution does not require or prohibit the people, legislature, and executive officers of any state, to create, recognize, extend or decline to extend marriage-equivalent domestic status or incidents to other sexual unions, and (3) the courts of the United States and any state shall not interpret the U.S. Constitution to require the creation, recognition, extension or non-extension of marriage-equivalent domestic status or legal incidents to other sexual unions.

Appendix 1: A Partial Listing of Some of the Law Review Publications Asserting that DOMA Is Unconstitutional

(A Westlaw search of the law journals and reviews database on April 5, 2005, identified 269 separate articles, essays, comments, notes, etc., published in American law reviews that use the term "unconstitutional" within 50 words of "DOMA" or "Defense of Marriage Act." The sample of 30 pieces here listed, found by reviewing the most recent 55 hits, supports the inference that a large portion of those 269 pieces assert that DOMA is or should be declared unconstitutional.)

Mark Strasser, *"Defending" Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jursiprudence: Why DOIMA Cannot Pass Muster After Lawrence,* Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA, 38 Creighton L. Rev. 421 (February, 2005).

Emily J. Sack, *The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause,* Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA, 38 Creighton L. Rev. 507 (February, 2005).

John Bash, Recent Development, *Abandoning Bedrock Principles?: The Musgrave Amendment and Federalism,* 27 Harv. J.L. & Pub. Pol'y 985 (Summer, 2004).

Emily J. Sack, Article, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders,* 98 Nw. U.L. Rev. 827, (Spring, 2004).

Kathy T. Graham, Article, *Same-Sex Unions and Conflicts of Law: When "I Do" May be Interpreted as "No, You Didn't!",* 3 Whittier J. Child & Fam. Advoc. 231 (Spring, 2004).

Bobbie L. Stratton, Comment, *A Prediction of the United States Supreme Courts Analysis of the Defense of Marriage Act, After Lawrence V. Texas,* South Texas Law Review, Texas Symposium Issue (Winter, 2004).

Edward Stein, *Introducing Lawrence V. Texas: Some Background and a Glimpse of the Future,* 10 Cardoza Women's L.J. 263 (Winter, 2004) Symposium: Privacy Rights in a Post Lawrence World: Responses to *Lawrence v. Texas.*

Thomas Prol & Daniel Weiss, *Lifting A Lamp Will New Jersey Create A Safe Harbor for Gay and Lesbian Immigration Rights?,* 227 N.J. Law. 22 (April, 2004).

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