S. HRG. 104–533

THE DEFENSE OF MARRIAGE ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1740

A BILL TO DEFINE AND PROTECT THE INSTITUTION OF MARRIAGE

JULY 11, 1996

Serial No. J–104–90

Printed for the use of the Committee on the Judiciary

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DATE DUE

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United States. Congress.
Senate. Committee on the
The Defense of Marriage Act

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THE DEFENSE OF MARRIAGE ACT

THURSDAY, JULY 11, 1996

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

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

Also present: Senators Grassley, Kennedy, Simon, Feinstein, and Feingold.

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

The CHAIRMAN. Today, the committee is convened to take testimony on the Defense of Marriage Act, which is sponsored by our colleague, Senator Nickles.

The Defense of Marriage Act would accomplish two goals: first, it would make clear that one State's definition of marriage need not be accepted by other States; second, the Defense of Marriage Act also would define the term "marriage" for purposes of Federal law as meaning only the legal union between one man and one woman as husband and wife. That definition would preclude any court from construing Federal law as treating same-sex unions as a "marriage."

In my view, this act is necessary, valuable, and it is a constitutional piece of legislation. This particular bill responds to several key questions.

First, is there a serious practical problem that Congress needs to address? The answer is yes. In 1993, the Supreme Court of Hawaii, by a 3-to-2 vote, held that a Hawaii State law ban on same-sex marriages may violate the equal protection clause of the Hawaii Constitution. The Hawaii Supreme Court remanded the case to the trial court for further proceedings before issuing a final decision on the matter. The trial court could issue a decision on remand later this year. The result is that the Hawaii Supreme Court could rule that Hawaii must recognize same-sex unions as marriages.

The effect of this ruling by the State of Hawaii would have ramifications throughout the United States. The full faith and credit clause, article IV, section 1, of the U.S. Constitution provides that:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Thus, it would not be surprising that persons who want to invoke the legitimacy of "marriage" for same-sex unions will travel to Hawaii to become "married." Then they will return to their home States where it would be expected that the State recognize as valid a Hawaii marriage certificate.

The second question before us today is whether the act will solve the problem before us; namely, whether three members of the Hawaii Supreme Court can force other States to accept the Hawaii Supreme Court decision, to alter radically the concept of marriage. The answer again is yes. The Defense of Marriage Act ensures that each State can define for itself the concept of marriage and not be bound by decisions made by other States. The Defense of Marriage Act also makes clear that no Federal law should be read to treat a same-sex union as a "marriage."

The last question is whether this act is a legitimate exercise of Congress' power. To me, the answer again is yes. But that is not just my view. The Clinton administration also believes that the Defense of Marriage Act is legitimate and lawful.

In that regard, I would like to place in the record a letter from Andrew Fois, Assistant Attorney General for the Office of Legislative Affairs. The letter states that the Clinton administration views this legislation as constitutional. The letter also addresses the House's identical version of this law, and the letter makes clear that the administration continues to believe that both H.R. 3396 and S. 1740 would be sustained as constitutional if challenged in court.

[The letter follows:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 9, 1996.

The Honorable ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of June 5, 1996, inviting a representative from the Department to testify at a hearing before the Committee on S. 1740, the Defense of Marriage Act. Should a representative be unavailable to testify at the hearing, you asked that we submit a written analysis of the Department's views regarding the constitutionality of S. 1740 for the hearing record.

S. 1740 is identical to H.R. 3396 which was recently reported out of the House Subcommittee on the Constitution. It contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that the Defense of Marriage Act would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that would make an appearance by a representative of the Department helpful to the Committee. As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer* v. *Evans* does not affect the Department's analysis (that the Defense of Marriage Act is constitutionally sustainable), and the President "would sign the bill if it was presented to him as currently written."

I respectfully request that this letter be submitted for the hearing record in lieu of oral testimony. Please feel free to contact this office if you have further questions.

Sincerely,

(Signed) Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

The CHAIRMAN. The full faith and credit clause vests in Congress the power to decide "the Effect" of the "Acts, Records, and Proceedings" that are law in each State. Congress can and, when necessary, must ensure that no one State can dictate how every other State must treat a subject. In sum, this act will solve each of the problems that confront us today. Senate bill 1740 is a necessary and reasonable exercise of the Constitution's express, textual grant of authority, and it is designed to achieve the legitimate purposes that I mentioned earlier.

So I do look forward to the testimony of our witnesses today, and it should be a very interesting hearing.

We will turn to Senator Kennedy for any comments he has.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much, Mr. Chairman.

I regret that the committee is spending time on this offensive, unnecessary, and divisive legislation. The bill before us is called the Defense of Marriage Act, but a more accurate title would be the Defense of Intolerance Act—or, even more accurately, the Defense of Endangered Republican Candidates Act.

Many of us believe that the final weeks of this Congress should be spent responding to the real needs of the American people on jobs, on health care, on education, campaign finance reform, immigration, and other pressing issues instead of trying to override State laws on marriage. I assume that Bob Dole's copy of the tenth amendment has a new hole in it.

It is no secret that I oppose this legislation. As I have said, I regard it as a thinly disguised example of intolerance. But regardless of anyone's views on same-sex marriage, this bill is a flatly unconstitutional exercise of congressional authority.

Harvard Professor Larry Tribe, for example, one of the most respected authorities in the Nation on the Constitution, has concluded that the bill is clearly unconstitutional because the full faith and credit clause does not empower the Congress to nullify the effect of a State court's laws in other States.

Proponents of this defective bill claim to be concerned about the possibility that the State of Hawaii will legalize same-sex marriage and that the other 49 States will be forced to recognize Hawaiian marriages.

That is not true. As Prof. Cass Sunstein will testify today, States are not required to recognize marriages in other States contrary to their own public policy. So this Federal bill is not only unconstitutional, it is wholly unnecessary. The Constitution entrusted this matter to the States. States have the authority to recognize or not recognize sister-State marriages, and it is a dangerous and unprecedented assertion of Federal authority for Congress to even attempt to negate State court judgments.

What is left of this bill is its real goal—it is a mean-spirited form of legislative gay-bashing designed to inflame the public 4 months before the November election.

It is designed to divide Americans, to drive a wedge between some citizens and others, solely for partisan advantage.

But some good can still come out of this bad bill. If our Republicans colleagues insist on bringing it up before the Senate, then Senator Jeffords, Senator Lieberman, I, and others intend to offer our Employment Non-Discrimination Act as an amendment to this bill in order to prohibit job discrimination based on sexual orientation.

As the Labor Committee learned in a 1994 hearing, large numbers of Americans are denied employment or suffer abuse on the job because of their sexual orientation. They deserve the same protection against discrimination on the job that all other Americans have—the opportunity to work, and to do so without fear of threats, violence, or other displays of bigotry. They deserve to be paid the same wages as their colleagues and promoted when a promotion is deserved. In other words, they should be treated fairly in the workplace.

Our Employment Non-Discrimination Act has broad public support and broad support across the political spectrum. It has the support of Coretta Scott King, of Senator Barry Goldwater, of Governor Christine Todd Whitman. It has the support of a broad-based religious coalition and businesses across the country. Similar anti-discrimination laws have already been enacted by nine States and 166 cities and counties to ensure that gay and lesbian Americans can bring their talents and skills to the workplace without fear of discrimination, and it is time to end that kind of prejudice in America once and for all.

I look forward to the testimony of the witnesses before us.

The CHAIRMAN. I appreciate those comments. I have to say that I don't agree with Senator Kennedy's assertion that both the President and Senator Dole are intolerant in supporting this bill. I think both are known for exceptional tolerance, and frankly, we can differ on the subject matter of the bill. But it is an important bill, and it is one that I believe to be constitutional.

Senator Nickles, we will turn to you.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Mr. Chairman, thank you very much, and Senators Kennedy and Simon. I appreciate the opportunity to be with you, and, Senator Kennedy, I am disappointed that you are not a cosponsor and I guess won't be cosponsoring this legislation, because this legislation does have bipartisan support. President Clinton has indicated that he would support it. I don't see him as mean-spirited or intolerant.

I happen to be a sponsor of this legislation, and I don't consider myself mean-spirited or intolerant. And I am somewhat offended by that language.

This bill is really very simple, and Senator Hatch explained it, and I will try not to be redundant. And I will ask, Mr. Chairman, that my statement be inserted in the record.

The CHAIRMAN. Without objection, we will put the full statement in the record.

Senator NICKLES. This bill is not intolerant when it says we define marriage as "a legal union between one man and one woman as husband and wife." I was raised to think that was common

knowledge. Some people want to change that. Maybe a court wants to change it; maybe some politicians want to change it. Maybe some activist groups want to change it. But to define marriage as "a legal union between one man and one woman as husband and wife" I don't think is mean-spirited, I don't think is intolerant.

The act also defines spouse as "a person of the opposite sex who is a husband or a wife." These definitions apply only to Federal law. We are not overriding any State law. We are not banning gay marriages. Anybody that puts that characterization on this legislation is wrong. What we are saying is that if a State passes recognition of gay marriages or same-sex marriages, that other States do not have to recognize that marriage. They are free to recognize that marriage if they so choose, but they don't have to.

Now, there is nothing intolerant about that. There is nothing mean-spirited about that whatsoever. It does say that if a court decision in Hawaii which is expected some time this fall, if there is a 3-2 decision that recognizes same-sex marriages, other States don't have to recognize such a marriage. They have the option to choose to recognize it, if they so desire, or not to recognize it. There is nothing mean-spirited about that in any way, shape, or form.

This act also deals with Federal benefits. We define "marriage" and "spouse." Those terms are mentioned numerous times throughout the Federal code but they are not defined in the Federal code. Well, they need to be defined, and they should be defined. We are talking about a lot of benefits. You are talking about survivors' benefits, whether you are talking about veterans or Social Security, disability, and so on. And so they should be defined.

Again, we define spouse as a person of the opposite sex. Most people think of spouse as a person of the opposite sex who happens to be a husband or wife. Again, I don't find this definition mean-spirited in any way, shape, or form.

I remember when we passed the family medical leave bill, we put in language, I might mention, which was adopted unanimously in the Senate. It was my language that defined, for the purposes of this bill, what a spouse would be. That turned out to be important language, we find out, because a lot of people tried to petition the Labor Department to expand the definition beyond the intent of Congress. Those petitions sought to have that term defined as a partner, not necessarily the same sex, but people wanted to have partners, unmarried partners, receive benefits under the Family Medical Leave Act. Well, under the bill we defined it as married partners of the opposite sex, and again, I think that was important.

So we do two things in this legislation: one, we define marriage and we define spouse for the purpose of Federal benefits, and then we say that States do not have to recognize marriages of the same sex recognized in other States. They are free to do so. They have the option to do so. So, Senator Kennedy, again, I take a little issue with the terminology that you use. I don't think that is helpful.

I think this is important legislation. Is it needed? Yes. There is going to be a court decision. Is it constitutional? Yes, it is. Senator Hatch, you mentioned one of the letters by the Assistant Attorney General. I have two by the Assistant Attorney General. I am not sure which one you entered in the record, but I have one dated

May 14 and one May 29, so I will ask that the other one be inserted in the record.

The CHAIRMAN. Without objection. In fact, why don't you put both of them in? This one is dated July 9.

Senator NICKLES. OK.

The CHAIRMAN. So we have plenty of Justice Department intolerance here as well, I guess.

Senator NICKLES. I will do that.

[The letters follow:]

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 14, 1996.

The Honorable HENRY J. HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, DC.

DEAR MR. CHAIRMAN: The Attorney General has referred your letter of May 9, 1996, to this office for a response. We appreciate your inviting the Department to send a representative to appear and testify on Wednesday, May 22, at a hearing before the Subcommittee on the Constitution concerning H.R. 3396, the Defense of Marriage Act. We understand that the date of the Hearing has now been moved forward to May 15.

H.R. 3396 contains two principal provisions. One would essentially provide that no state would be required to give legal effect to a decision by another state to treat as a marriage a relationship between persons of the same sex. The other section would essentially provide that for purposes of federal laws and regulations, the term "marriage" includes only unions between one man and one woman and that the term "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Department of Justice believes that H.R. 3396 would be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department.

Sincerely,

(Signed) Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 29, 1996.

The Honorable CHARLES T. CANADY,
Chairman, Subcommittee on the Constitution,
Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: I write in response to your letter of May 28, requesting updated information regarding the Administration's analysis of the constitutionality of H.R. 3396, the Defense of Marriage Act.

The Administration continues to believe that H.R. 3396 would be sustained as constitutional if challenged in court, and that it does not raise any legal issues that necessitate further comment by the Department. As stated by the President's spokesman Michael McCurry on Wednesday, May 22, the Supreme Court's ruling in *Romer* v. *Evans* does not affect the Department's analysis (that H.R. 3396 is constitutionally sustainable), and the President "would sign the bill if it was presented to him as currently written."

Please feel free to contact this office if you have further questions.

Sincerely,

(Signed) For Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

Senator NICKLES. There are other reasons I think it is constitutional. Senator Kennedy quoted Mr. Tribe saying he thought it wasn't. He is entitled to his opinion. But I think the Attorney Gen-

eral and the Constitution—I read the Constitution, and under article IV, clearly it is constitutional. I think it is important that we not allow an unelected judge to be setting policy not only for the Federal Government in determining benefits and throughout the Federal code, but also dictating to States that they would have to recognize same-sex marriages when that is not the desire of most States.

Mr. Chairman, again, I appreciate your entering my statement in the record and for having this hearing today. I believe we will have bipartisan support for this legislation. I believe it will pass the House of Representatives today. I believe we will pass it by an overwhelming margin in the Senate, and I hope and expect that the President will sign it.

The CHAIRMAN. Well, thank you, Senator Nickles. We appreciate having you here today, and we appreciate your comments.

Are there any questions?

Senator KENNEDY. Mr. Chairman, I am not suggesting that those that have a different view than mine with regard to same-sex marriages are intolerant. That is a position that is based upon strong religious and moral views, and I understand it. But the fact of the matter is the majority sets the agenda, Senator, and we all know what is going on around here—so do the American people—to be asked to deal with this issue just a few months before a national political campaign, when this will not go back to the courts until September, open to additional motions after that, and will be appealed up through the circuit courts and the Supreme Court of Hawaii.

We all know what is going on around here. The question is timing. Basically we are meeting over here. You are going to bring this up on the floor of the U.S. Senate. You are basically saying that this is an issue which is more burning, more important, and which appeals to the division in America, discrimination. It has been the heart and soul of this country to try and overcome it.

And there isn't anyone that doesn't understand that in America, and we only have to look at what has happened in this country in the period of recent weeks. And to drop this right out in terms of the national agenda and to say that this is somehow the most compelling issue that has to be done and to appeal to the darker side of human nature is intolerance. It is intolerance. And I don't step back one step from that.

Clearly I am not suggesting that those that support it and have a differing view from mine are intolerant. But the idea that we are bringing this up with 17, 18 days more to go, when we have judges that have not been approved by this committee that have been on the docket for months, when people are waiting to get the increase in the minimum wage, waiting to try and do something about campaign finance reform, waiting on all of these other kinds of matters, to say that we are going to drop this right out there in the American agenda and leave it out there for comments about it, I believe is intolerant.

I don't step back, retreat one step on that, Senator. We could have brought this up a number of months ago. This is being set as a matter of priority, as one of the final matters of hearings that

we are going to have on this committee, and I stand by the position.

The CHAIRMAN. Well, let me——

Senator KENNEDY. Let me, if I can, Senator—it is my time now.

The CHAIRMAN. Sure.

Senator KENNEDY. Let me ask you, do you support remedying the discrimination in the job place for those that are discriminated against solely on the basis of being gay or lesbian?

Senator NICKLES. I don't support your legislation. I have to find out——

Senator KENNEDY. Let me just ask you——

Senator NICKLES [continuing]. Do you think I am intolerant by pushing this legislation——

Senator KENNEDY. Let me just ask you——

The CHAIRMAN. Let him answer.

Senator NICKLES. Well, just a minute. You accused me of being intolerant——

Senator KENNEDY. I didn't.

Senator NICKLES [continuing]. And I am offended by that language. You accused Senator Dole of being intolerant, and I guess President Clinton of being intolerant, and that is offensive. And I would like to have that clarified before we get into your amendments which are intended to sidetrack or kill the legislation. You have that right to do so. But, first, I think it is a personal matter if the Senator accuses another Senator of being intolerant. I think we need to have that clarified very quickly.

Senator KENNEDY. I have said it, Senator, at the beginning, that there are strongly held religious, ethical, moral beliefs that are different from mine with regards to the issue of same-sex marriage which I respect and which are no indications of intolerance. I have said that, Senator. I respect those.

The CHAIRMAN. Let's assume that people are——

Senator KENNEDY. Just a minute, Senator. I am entitled——

The CHAIRMAN [continuing]. Let's assume people are——

Senator KENNEDY. Can I ask for regular order on this? The Senator asked me, and I am entitled, as a member of this body, to be able to have an exchange with a witness here. And I am not going to be interrupted on this issue.

The CHAIRMAN. We are——

Senator KENNEDY. I am not going to be interrupted on the issue. But what I am saying is the fact that we are calling this up now and putting this on the national agenda as a matter of priority by Republican leadership, everyone understands what is going on here. Everyone understands what is happening here. Everyone ought to have a good appreciation here on an issue that will be as divisive, as emotional, in terms of the American public on this. I think it appeals to the darker side, and I think that appeals to intolerance. I draw the distinction between individuals and the timing on this particular measure.

I would like to get an answer from you, whether you are going to support——

Senator NICKLES. No, I am not going to support your amendment.

Senator KENNEDY. So you are not going to support legislation to remedy discrimination against workers in the workplace whose only problem is being gay or lesbian and that are being discriminated against today, thousands are being thrown out of work today. Today it is happening, and you are not prepared to support any kind of amendment to try and deal with that form of discrimination in the workplace?

Senator NICKLES. No, Senator Kennedy, I don't want to support legislation that is going to tell the Boy Scouts that they have to change their——

Senator KENNEDY. I am not asking about the Boy Scouts. I am just talking about employment.

Senator NICKLES. No, I am talking about employment. Boy Scouts employ leaders, and right now they have a policy that they don't have gay advocates or leaders as employees. You want to change that. I don't want to change that. That would be the impact of your amendment. I am going to fight for the Boy Scouts. I am going to aggressively oppose your amendment. You have a right to offer your amendment. I have a right to oppose your amendment. That is not what we are having the hearing on today.

I do want to talk about timing just for a second. What was the genesis of considering this legislation during this Congress? Well, it wasn't advocated by Don Nickles or by the House leadership. It was advocated because the Supreme Court in Hawaii is getting ready to make a decision that could impact and change laws as far as recognition of same-sex marriages throughout the Nation. We need to clarify what the definition of marriage is and what the definition of spouse is. It is impacted when I see White House liaison Marsha Scott, who is Clinton's liaison to the homosexual activists, saying in Boston that she told a homosexual group we need to find ways to ensure that those of you in loving, long-term-committed relationships can enjoy all the benefits that heterosexual couples are entitled to under the law.

So there is a group, there is an activist group that wants to redefine marriage. Some of us want to protect marriage, defend marriage. That is the purpose for this.

I will mention one other thing as far as timing is concerned because this came out in the New York Times recently, on March 25. It talked about same-sex couples being recognized for marriage—the headline reads: "Virtual marriages for same-sex couples in San Francisco." I guess there were nearly 200 couples at a domestic partnership ceremony. Well, I hope that we don't have a decision in Hawaii this fall that requires other States to recognize same-sex marriages. That decision is going forward. I think it is important for us to move. We have the constitutional right. We have the support of the President. You have the right to try to add an amendment if you wish. That would be a killer amendment. That is your right to do that, certainly, and you can try to do it, and we will have to find out where the votes are. But I think it is important to move forward with this legislation.

I didn't instigate the Hawaii decision. I didn't file the petition before the court in Hawaii. I wasn't the President's liaison to the homosexual activists that is talking about gay marriages—or same-sex marriages. So the timing of this was really brought about by

the Hawaiian decision and by several activists that want to have same-sex marriages recognized throughout the country.

The CHAIRMAN. Well, any other questions?

Senator KENNEDY. Yes, just a final comment, and I will take just 30 seconds. As I understand the timing, so we all understand it, in May of 1993 the Hawaii Supreme Court ruled the denial of civil marriage licenses to same-sex couples presumptively violates State constitutional guarantees of equal protection. The court did not change the law or the licenses, but instead returned the case to the lower court to give State attorneys an opportunity either to show a compelling interest or to stop discriminating.

The trial court is now scheduled for September 1996. Following a trial of a few weeks, there will be further briefings, motions, and then the court will issue a ruling, probably the end of 1996. The lower court decision will then be appealed to the State Supreme Court. Briefing will begin all over again. Oral arguments will probably be scheduled for the fall of 1997 with a final decision expected in the spring of 1998, 2 years from now.

Now, if you have a different timing, I would hope you would put it in the record.

Senator NICKLES. Well, I think that——

Senator KENNEDY. Here we are 4 months before the Presidential election, and there isn't a person in this country that doesn't understand the difficulties that this Nation has had in terms of any forms of tolerance and bigotry and discrimination, and I do not believe that the timing in bringing this up at this particular time serves the interests of better debate and discussion on the major issues of the country.

The CHAIRMAN. Senator Simon?

STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Yes, just a few observations.

Number one, we are not dealing with an immediate problem. Senator Kennedy has just pointed out what the situation is——

Senator NICKLES. Could I interject something on timing? Because it was Senator Kennedy's last comment. I want to say I agreed with all the timing schedule history, 1993 through September. But in September there is going to be a court decision on this matter. If that court decides to legalize same-sex marriages, the other States may be obligated to do the same. Now, it may be contested and tied up in court for a year or more, but you may well have States and the Federal Government being coerced or forced by court decision to recognize same-sex marriages. This is because they have the practice of recognizing State marriage law. A State court decision in this matter will, at best, create ambiguity, but its effect could be immediate.

Senator SIMON. I want to add 2 minutes on to my time there since you were responding to Senator Kennedy's question.

The CHAIRMAN. Yes, start it over again.

Senator SIMON. I think the reality is——

The CHAIRMAN. And let's get through it.

Senator SIMON [continuing]. There is not an immediate problem. Just assuming even the schedule that Senator Kennedy mentioned

is followed, there are going to be appeals. This thing is going to drag out for a long time. Not a single State legislative body has passed any legislation along this line.

I do believe also that Senator Kennedy is correct when he calls this legislation divisive. I don't question motives of people, but I don't think there is any question we have a problem in our society today. Senator Hatch, to his credit, has sponsored, became the chief sponsor of extending the hate crimes statistics measure, which I introduced some years ago. The hate crime statistics that have been collected so far by the FBI show that numerically the single greatest violence against any group because of being a group is against African Americans. But numerically the greatest crimes proportionately are against people who are gay.

We have a problem. And does this legislation help us to bring this Nation together and understand problems? Or does it divide us? And I have to come to the conclusion I think it divides us.

When you say you have the Attorney General's opinion—and I am digressing for a moment here, but I have come to the conclusion—I am not going to have a voice in this because I will be leaving the Senate. I have come to the conclusion that we ought to appoint Attorneys General after a screening process for a period of 10 years, with careful bipartisan support, because you have police powers there, FBI, and other things, but also so that when we get an Attorney General's opinion it is, frankly, not a political opinion. It is very hard for me to read the Constitution when it says "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"—that is very clear, powerful language.

And then, finally, I would say to my friends in the gay community, we do use the English language, and the word "marriage" does, for the huge bulk of the population, mean men and women marrying. I think that some other name or phrase or word is needed. But we also have to be—and I know my friend from Oklahoma well enough to know that I believe he would not want to see people hurt who were born differently than you and I, who have a different genetic framework—when I was a boy, my father didn't say to me, Paul, you have to be interested in girls. He had to give me other kinds of warnings. But everyone was not born as I was born. Our genetic framework sometimes is different. And when people are partners, same-sex partners, and one of them is dying and the other one wants to visit that person in the hospital, I think we ought to be able to let that person be visited in the hospital. And then you get other, very practical questions that we have to face.

And so I think we have to approach this in a way that doesn't divide, that doesn't add more hate to a society that already has too much. Even with the antidiscriminative bill—assuming that Senator Kennedy's amendment is adopted—and I am a cosponsor of that legislation—even if that is adopted, I think this moves us in the wrong direction. And I recognize the President said he is going to sign it. I think this is not moving America where we ought to move. We ought to be reaching out. We ought to be understanding, including understanding people whose life styles are different than ours.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Feinstein?

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Mr. Chairman, I came here with an open mind to listen, and I must say I am hearing a number of different things.

First of all, I really have to question, along the lines Senator Kennedy just mentioned, why this is necessary. Fifteen States, to the best of my knowledge, have passed legislation that prohibits the recognition of out-of-State same-sex marriages and/or limits marriages to unions between men and women. These States include Alaska, Arizona, Georgia, Idaho, Illinois, Kansas, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah. California law currently contains the equivalent of section 3 of DOMA, which limits marriages to unions between men and women.

I have heard so much about returning power to the States and returning power to local government—and marriage is very clearly an area which has been left to the States—that it is hard for me to understand why this is being done now. I think it is something that the States can settle.

This morning I went to my fax, and my daughter had a little fax for me. I want to read it because it is kind of interesting. They call me "Ga-Ga."

Dear Ga-Ga: And, furthermore, if you are going to make marriage a Federal issue, what about looking at those States that allow 14-year-olds to marry versus States in which sex with a 14-year-old is a felony? Where would you stop? Should you prohibit the 19-year-old man from marrying the 75-year-old woman? Why not? They are not marrying for purposes of child-rearing. Doesn't the Federal Government have better things to do than attempt to regulate quasi-moral issues like marriage, when we have a horrible health care system, overcrowded jails and prisons, a lack of mental health services, and a decaying infrastructure? Let's be clear on our priorities here. Your loving daughter, Katherine.

[Laughter.]

I think she's got a point. And, you know, I have some gang legislation that I would sure like to get through this committee, some methamphetamine legislation I would sure like to get out. It is a real crisis. Senator Kyl and I just testified before Mr. Hyde in the House committee on our crimes victims constitutional rights amendment which we would like to move. And here we are.

I must say, Senator Nickles, Senator Kennedy asked you the question on employment, and you brought up the Boy Scouts. Prohibition against discrimination in employment on the basis of sexual orientation isn't really dealing with the Boy Scouts. It is dealing with an everyday ability to make a living. The same thing with housing. People are denied housing.

Let me ask you this question: Would you oppose legislation to provide an antidiscrimination provision on the basis of sexual orientation on housing?

Senator NICKLES. That is not the legislation we are here for. I would oppose it if—I guess I would have to rephrase the question, but if you are saying if a person had 10 apartment complexes and he or she had rented those out to—I'm going to say traditional families, and you had a couple of vacancies and you had two homosexual couples come in with T-shirts that said, "I'm gay and proud

of it. Let's make love," would I want that person to be able to deny renting those two units? Yes, I think they should have the right to do that without the Federal Government saying, "no, if you don't, you will be sued."

Senator FEINSTEIN. Well, you see, I guess that is what happens in this. I have heard this with respect to race. I have heard these same arguments. People have a right to rent a home. They have a right to hold a job, regardless of their race, creed, color, sex, or sexual orientation, I believe. And it seems to me that that is something that we ought to look at in terms of providing people, across the board, with the basic right to earn a living and to have a roof over their head, because this is denied to people.

I have a hard time, if 15 States have passed legislation and if family codes in various States like my own have already settled this question, I have a hard time understanding why it is necessary, particularly when you yourself believe States should have more authority. Why are we taking this—why is it necessary for us to do this?

Senator NICKLES. Let me answer that, because it is necessary. If you believe in States' rights, under our legislation no State would be compelled to recognize or not recognize same-sex marriages. But if you don't, you could have an unelected court by a conceivable 3-to-2 decision in Hawaii in September basically require or coerce every State in the Nation against their will to recognize same-sex marriages.

Now, if the State wants to, under our legislation they can. We don't make any decision whatsoever. And, Senator Simon, I need to answer your comment, because you quoted the Constitution. But you only quoted the first sentence of that. If you look at article IV, section 1, you read the first part correctly, the full faith and credit section. But the second part reads, "Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." That was put in for a purpose.

And so, Senator Feinstein, I am a very strong—I want to make sure, Senator Feinstein, I get your attention. Senator Feinstein? I want to get your attention. I am very strong advocate and supporter of the tenth amendment and all the other rights and powers that are reserved to the States and to the people. We are trying to protect States' rights. What we don't want to have is an unelected court dictate what the definition of marriage is nationwide. The States should have that right, and we are trying to protect that right. And by passing this legislation, the States will not have to recognize same-sex marriages unless they choose to. But they still have the right to choose to. That would be the State option. It wouldn't be dictated by an unelected court.

Senator FEINSTEIN. Let me just respond to what a constitutional lawyer has said on that just for a moment:

> As a matter of constitutional law, it is my professional opinion that it would not violate the full faith and credit clause of the Constitution for a second State to refuse to recognize a same-sex marriage legalized in Hawaii when the second State has a strong public policy against same-sex marriage and when the same-sex couple lives in or has some other significant contact with the second State. I believe that the constitutional history and case precedents overwhelmingly confirm that the sec-

ond State constitutionally could refuse to recognize the same-sex marriage if it chose to do so;

or it could recognize the same-sex marriage if it chose to do so. So——

Senator NICKLES. Well, under our legislation——

Senator FEINSTEIN [continuing]. Why is it necessary for us to do this?

Senator NICKLES. Well, we clarify it very easily in our legislation. We basically say no State has to recognize same-sex marriage. That is the essence of our legislation. If you believe in States' rights, you should support this legislation to allow the States to make that decision, and not rely on Laurence Tribe or anyone else—even though I have great respect for the professor and constitutional scholar. Instead, I rely on, one, the office of the Attorney General and its opinion on the legislation, and two, on the Constitution that says let's allow the States to be able to make that decision and not have it dictated to them. The full faith and credit is well established in the Constitution, and States do recognize other States' laws in dealing with marriage. So if one State—or in this case, Hawaii—even though the State legislature is opposed to same-sex marriage, the court, by a 3-to-2 decision, may come out and legalize same-sex marriage, we do not think that other States should have to recognize that such marriages. That is the purpose of this legislation. That is the timing of it, too.

Back to Senator Kennedy's questions, the court is going to be making the decision in September of this year, and you are going to have a lot of people, advocates and others, that are going to be saying, wait a minute, the court has decided this in Hawaii, therefore, other States, you must recognize it. Granted, those decisions will be appealed, but you are going to have a multitude of litigation in all 50 States.

Senator FEINSTEIN. Let me just respond——

The CHAIRMAN. Senator, your time is up.

Senator FEINSTEIN [continuing]. This quote was not Larry Tribe. This quote was from somebody who is going to testify before us today——

The CHAIRMAN. Well, then, let them testify.

Senator FEINSTEIN [continuing]. Lynn Wardle, professor of law at Brigham Young University. So we will have an opportunity to examine this witness and to discuss this further.

I thank the Chair.

The CHAIRMAN. Senator Feingold?

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

Senator FEINGOLD. Thank you, Mr. Chairman. I have to leave in a couple of moments. I am going to try to come back. But I am just going to use this opportunity to sort of summarize a couple of the comments that have been made by Senator Kennedy and Senator Feinstein.

The ultimate question in a situation like this is: Is this a good bill? And I have some serious doubts about whether or not it is a good bill. But there are a couple of preliminary questions that just haven't been answered to my satisfaction. The first one is: Should

the bill be here at all? Should this be handled at this level of government?

I go to every county in my State every year to hold a town meeting, and the reaction I get from people is—it has to do with a huge variety of issues, but there is an overwhelming feeling—that I thought this Congress was all about—that we shouldn't use the Federal Government as a hammer on people's personal lives unless we have to. And it just strikes me that of all the priorities we have, the notion that this Congress is going to get itself involved in this situation, obviously very prematurely, is very unfortunate. I have watched this carefully for the last 2 years, issue after issue. I thought this Congress was going to be about letting the States and, where possible, individuals make their own determination, to get the Federal Government off of people's backs. I really believe in that philosophy. Even though some people think Democrats don't believe in it, I do.

I really think we have got a problem with the Federal Government that sticks itself into too many areas, and the ultimate area would be the personal one. Sometimes we have to, but this issue seems so premature from the point of view of both the law and the existence of a problem.

I don't have my constituents begging me to deal with this issue. I listen to two or three thousand people a year. Maybe they will at some point.

And that leads to the second question, whether it should be brought up now in the context of this Congress as Senator Kennedy was talking about. People are very interested, when it comes to this committee, especially in issues of violent crime. They are interested in what is happening with drugs. They are terrified of things happening to them by people who are not law-abiding. However, this bill is directed, frankly, at people who are law-abiding. And this just isn't a priority for our country—certainly not at this stage of the game, as Senator Kennedy has said so well.

The reality is—of course, the majority can bring up any bill they want at any time. However, the reality is this does take away the ability to deal with those other issues because there is so little legislative time remaining. That is just a fact. Things that we could accomplish together, both parties together, to help save people's lives are being lost because of the need to bring this issue up at this time.

That really troubles me because I enjoy working on this committee a great deal. I think it is an excellent committee. And we have just got so much to do. This just doesn't rank up there, and it should be deferred to a later time.

I will have some questions later, I hope, if I get back, but I am very troubled by the notion that this will take precedence over things that we are trying to do on health care and jobs and crime and so many other issues.

The CHAIRMAN. Well, let me say this. I don't mean to cut you off, Senator Nickles, but one of the witnesses who will testify will talk about the breakdown of the family in our society. I happen to think it is a very priority issue. I happen to think that anything we can do to talk about how we solve these breakdown problems and how we start elevating the family to the level where it should be, how

we get husbands to live up to their obligations, how we stop the high divorce rate, how we resolve these problems that are social problems that are wrecking our country, these are all pretty important. I don't consider protecting traditional marriage and family values to be divisive.

Now, I agree that this is not part of Senator Kennedy's agenda; this bill is not part of Senator Kennedy's agenda. But be that as it may, it is coming up in the House, and frankly, this is an appropriate time to have this hearing. It is an important hearing. We have important witnesses on both sides of this issue, as we always do, I think in fairness. And I have to say this: I don't know of many issues that are more important. But I do kind of resent anybody saying that this committee is not doing its job. We have passed some of the most important legislation in history through this committee and through the floor. We have worked hard on the judges. I don't think anybody can deny that. Even the Washington Post admits that.

It is not the Republicans' fault that judges are not being approved on the floor. Since March of this year, I have tried to get people through, clearing both sides of the floor, and just 2 weeks ago, I tried to put through nine judges, some of which have bipartisan support, some of which have only Democrat support. Democrats raised objections to that. It is not hard for Republicans to say if they don't want their judges, why in the heck should we?

And, frankly, to have somebody come up here and say we are not doing our job on this committee I think is a little offensive.

Now, this is an important bill. It is worthy of consideration. These issues are some of the most important issues in our society, regardless of which side you come down on. I personally don't want discrimination in any form against anybody. And I know the distinguished Senator from Oklahoma feels very much the same. But there are some values that deserve consideration, deserve protection, and family values, in my opinion, rank at the highest level.

I think this is an important hearing, regardless of what anybody thinks. And as far as I am concerned, it isn't a political issue. It is a very important moral and family issue. And if society wants to go the way Senator Kennedy would have it go, I guess we will have to live with that. If our society feels as others feel, like Senator Nickles and myself and others, then I hope the other side will be willing to at least give some recognition to that point of view as well.

I hope we are not intolerant about others' points of view just because they differ with ours, on either side, and I sometimes think there is a great deal of intolerance from those who are always claiming they are tolerant.

Now, Senator Nickles, we appreciate your testifying——

Senator KENNEDY. Well, Mr. Chairman, since I have been referred to——

The CHAIRMAN. Well, I didn't refer to you. I just——

Senator KENNEDY [continuing]. Well, you said, as Senator Kennedy wants whatever society wants to go, if they—and I interpreted that as not to be a favorable comment. [Laughter.]

The CHAIRMAN. Well, then, I will give you some time.

Senator NICKLES. That scared a lot of people in Oklahoma.

Senator KENNEDY. Well, I know. We are used to—well, I don't want to say that. [Laughter.]

The CHAIRMAN. I think you have gone deep enough here today, Senator Kennedy.

Senator KENNEDY. I don't have to go back and defend what I have said earlier about the respect that I have for others that have differing views than I have on this extremely important issue. But I would hope, as you have just stated, that we are going to hear from these other witnesses about what the real threat to the family is and why this legislation is going to solve it. I dare say you do have the problems that are out there in terms of families staying together, and a lot of the fact is because they don't have a decent payment of a decent minimum wage and both parents working and they don't have time with their kids. It is because they fear that they don't get decent kind of health care, because they are scared they are living in communities with crimes and violence, and that they are troubled by the fact that their kids go to schools where there is too much violence.

I don't yield to anyone about my view about this society, and I don't yield to anyone about my concern about the family. So I hope that those witnesses are going to come up, if that is what the second panel is going to tell us, is going to tell us about how this legislation threatens American family life. I think it is important that we do focus on the questions of families and what the impacts are in terms of everyday life and the problems that they are facing also in terms of discrimination that is out there. But I am not going to let a comment go by and let someone suggest that they are necessarily more family oriented than other members of the committee.

The CHAIRMAN. I don't think anybody doubts your loyalty to your family. But I am saying this, that there is a lot of BS around here about what is good and what isn't good for families. I happen to think that morality happens to be good for families, as the father of 6 children, and now expecting 17 grandchildren. We have 15 now; 2 more are on the way. At least, that is all I know about who are on the way. [Laughter.]

So let's get with it, and let's recognize this as an important piece of constitutional legislation. There may be differing points of view, but it is important. And we are going to have good witnesses on both sides of this issue, and we are going to conduct this hearing fairly.

So, with that, Senator Nickles, thank you for coming.

Senator KENNEDY. I want to thank Senator Nickles. We have a difference, but we are always glad to hear from you, both in the committee and on the floor. Seriously, there is no disrespect intended, but these are views that ought to be exchanged. I thank you very much for coming.

Senator NICKLES. Thank you.

The CHAIRMAN. Thank you, Senator Nickles.

[The prepared statement of Senator Nickles follows:]

PREPARED STATEMENT OF SENATOR DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman and Members of the Committee: The Defense of Marriage Act, which I am pleased to have introduced, is a simple measure, limited in scope and

based on common sense. It shares broad bipartisan support, including the President's.

The bill does but two things: First, the bill restates the current and long-established understanding that "marriage" means "a legal union between one man and one woman as husband and wife." The act also defines "spouse" as "a person of the opposite sex who is a husband or a wife." These definitions apply only to Federal law.

Second, the bill says that no State shall be required to give effect to a second State's acts, records, or judgments "respecting a relationship between persons of the same sex that is treated as a marriage under the laws" of that second State.

There is nothing earth-shattering here. No breaking of new ground. No setting of new precedents. Indeed, these provisions simply reaffirm what is already known, what is already in place.

The definitions of S. 1740 are based on common understandings rooted in our nation's history, our statutes, and our case law. They merely reaffirm what Americans have meant for 200 years when using the words "marriage" and "spouse." The current United States Code does not contain a definition of marriage, presumably because most Americans know what it means and never imagined challenges such as those we are facing today.

As mentioned earlier, the Act's definitions apply to Federal law only. The Act does not intrude on the ability of the States to define marriage as they choose. To the contrary, this bill protects the right of States to define marriage for themselves. This way, each State will be able to decide for itself the type of marriage it will sanction.

The Defense of Marriage Act invokes Congress' constitutional authority, under Article IV, section 1, to "prescribe" "the effect" that shall be given to the public acts, records, and judicial proceedings of the various states with regard to the Full Faith and Credit Clause.

As the Committee knows, in May of 1993 the Hawaii Supreme Court rendered a preliminary ruling in favor of three same-sex couples who applied for marriage licenses. The court said the State's marriage law discriminated against the plaintiffs in violation of the equal-rights provision of the State Constitution. The case was remanded to the lower courts for a trial, to see if the State could show a "compelling state interest" to justify the marriage law. That trial is expected to start in the fall.

It has become clear that advocates of same-sex unions intend to win the lawsuit in Hawaii and then invoke the Full Faith and Credit Clause to force the other 49 states to accept same-sex unions.

Many States are justifiably concerned that Hawaii's recognition of same-sex unions will compromise their own laws prohibiting such marriages. Legislators in over 30 States have introduced bills to deny recognition to same-sex unions. Fourteen States already have approved such laws, and many other states are now grappling with the issue—including Hawaii, where legislative leaders are fighting to block their own courts from sanctioning such marriages. This bill would address this issue head-on, and it would allow each State to make the final determination for itself.

It seems to me, that the strategy of those advocating same-sex unions is profoundly undemocratic. I cannot envision a more appropriate time for invoking our constitutional authority to define the nature of the States' obligations to one another. As State Representative Terrance Tom from Hawaii testified before a House Subcommittee:

> If inaction by the Congress runs the risk that a single judge in Hawaii may re-define the scope of legislation throughout the other forty-nine states, [then] failure to act is a dereliction of the responsibilities [Congress was] invested with by the voters.

Another reason this bill is needed now concerns Federal benefits. The Federal Government extends benefits, rights, and privileges to persons who are married, and generally it accepts a State's definition of marriage. This bill will help the Federal Government defend the traditional and common-sense definitions of the American people. Otherwise, if Hawaii (or another State) gives new meaning to the words "marriage" and "spouse," the reverberations may be felt throughout the Federal code.

The provisions of Federal law do not, of course, regulate only the activities of the Federal Government. Federal law also regulates private persons. Consider the implication of the Family and Medical Leave Act of 1993.

Shortly before passage of that Act in the Senate, I attached an amendment that defined "spouse" as "a husband or wife, as the case may be." When the Secretary of Labor published his proposed regulations, a considerable number of comments

were received urging that the definition of "spouse" be broadened to include domestic partners in committed relationships, including same-sex relationships. However, when the Secretary issued the final rules he stated that the statutory definition of "spouse" and the legislative history of the Act precluded such a broadening of the definition. That small amendment, which was unanimously adopted, spared a great deal of costly and unnecessary litigation—and it spared Congress the shock it would have received from the American people if we had allowed the word "spouse" to mean something it had never meant before.

As the Committee knows, the White House has said that the President will sign the bill if "presented to him as currently written." The Committee also knows that the U.S. Department of Justice has said that it expects the bill will "be sustained as constitutional if challenged in court."

I urge the Committee to report the bill favorably so that the bill can be considered soon on the Senate floor.

Thank you.

The CHAIRMAN. We are going to call at this time Gary Bauer, who is president of the Family Research Council; David Zwiebel, who is general counsel for Agudath Israel of America, a national Orthodox Jewish movement; Prof. Lynn Wardle, a BYU law professor with extensive knowledge in family law and conflict law; Mitzi Henderson, president of Parents, Families and Friends of Lesbians and Gays; and Prof. Cass Sunstein, the Llewellyn Professor of Jurisprudence at the Chicago School of Law.

We welcome all of you. We are happy to have you here. We look forward to hearing your testimony. Gary Bauer, we will start with you first.

PANEL CONSISTING OF GARY L. BAUER, PRESIDENT, FAMILY RESEARCH COUNCIL, WASHINGTON, DC; LYNN D. WARDLE, PROFESSOR OF LAW, BRIGHAM YOUNG UNIVERSITY, PROVO, UT; CASS R. SUNSTEIN, KARL N. LLEWELLYN PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO, CHICAGO, IL; MITZI HENDERSON, NATIONAL PRESIDENT, PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS, MENLO PARK, CA; AND DAVID ZWIEBEL, GENERAL COUNSEL AND DIRECTOR OF GOVERNMENT AFFAIRS, AGUDATH ISRAEL OF AMERICA, NEW YORK, NY

STATEMENT OF GARY L. BAUER

Mr. BAUER. Thank you. Mr. Chairman, it is a real pleasure to be here this morning before this committee——

The CHAIRMAN. If I could wait just a second, let's go with you first, Gary, and then we will go across the board. And the reason I am starting with you first is because of your Family Research Council and some of the questions that have been raised. Maybe you can answer them.

Mr. BAUER. OK. Mr. Chairman, it is a pleasure to be here this morning with the committee and to discuss this profound issue. I have to admit to you, however, that I feel some mixed emotions. As good as it is to be here and to have a chance to interact with some old friends about something that really matters, it is also relatively depressing that in 1996 we actually have to have a hearing to discuss whether or not it is a good or bad idea for marriage to be redefined to mean that a man could marry a man and a woman marry a woman.

Mr. Chairman, we have had about 30 years now of a sexual revolution that has left quite a bit of destruction and damage in its

wake, and almost every place you turn, you can see the casualties of that sexual revolution. In 1996, here in Washington, DC, 75 percent of all the children born will be born out of wedlock. That is an incredible figure, but it is not unlike the figure——

The CHAIRMAN. What was that figure? I missed it.

Mr. BAUER. Seventy-five percent of all the children born in Washington, DC, this year will be born out of wedlock.

The CHAIRMAN. How does that compare to the national average?

Mr. BAUER. Nationally, one birth out of three is out of wedlock, and in almost all the major cities, the figures are comparable to the figures that I just mentioned to you.

The CHAIRMAN. I don't mean to interrupt you.

Mr. BAUER. That is OK.

The CHAIRMAN. But this is something I have been wondering about. What was that like, say, a few decades ago? Or you pick the period.

Mr. BAUER. This is really the amazing thing. I think there is a feeling today that it has always been this way. You only have to go back about 25 years to get figures that are extremely low. I think in Washington, DC, 25 years ago—I don't have the figures at my fingertips, but I believe it was more like 8 or 9 percent out of wedlock.

The CHAIRMAN. And today it is 75 percent. How about the rest of the country 25 years ago?

Mr. BAUER. Likewise, the rest of the country, out-of-wedlock births 25 or 30 years ago were an exceptional thing. The change in the last 30 years has been unbelievable. And it happened almost in slow motion, when no one was really paying much attention. But one of the effects of it is that Washington, DC, has probably guaranteed, as has the other major cities in the United States, has probably guaranteed its crime rate and its educational failure 15, 16 years down the road, because we are going to have hundreds of thousands, in fact, millions of young boys raised in our major cities with the influence of no adult male in the house. And we now know after study, one study after another, what the effects of all that are.

Mr. Chairman, it doesn't stop, obviously, just with the out-of-wedlock birth rate. We have got one divorce for every two marriages. We have sexually transmitted diseases now spread throughout the country that would have been unthinkable 25 or 30 years ago.

One of the most depressing things you can do is go into a sexually transmitted disease clinic in any city in America and see 11- and 12- and 13-year-olds sitting in that clinic with diseases that they may be afflicted with for the rest of their lives.

Well, you would think, after 30 years of a sexual revolution leaving this kind of wreckage, that those pushing radical social change and radical sexual change would be inclined to say let's call time out. Maybe there is only a couple of ways to get things right. Maybe there are a lot of ways to get things wrong. Maybe the sexual revolution is doing things to America that ought to give us pause. But no such luck. Those groups pushing radical social change after 30 years of this wreckage and this disaster are now arguing that we ought to take the basic institution of marriage and

redefine it to be the union of a man with another man or a woman with another woman. It is hard to imagine more radical change than something that would do that.

Now, Mr. Chairman, with your permission, I would like to submit my whole statement to the record.

The CHAIRMAN. Without objection, we will put all full statements in the record as though fully delivered.

Mr. BAUER. But let me just make a couple of additional points related to some of the questions that were asked by Senator Kennedy and others.

We are being asked not only to ignore the mounting evidence that the mother-and-father family is the foundation of civilization, but we are being asked to weaken marriage further by redefining it. We are being asked to pretend that marriage is no longer about bringing the two sexes together in a biological, social, economic, and spiritual union. We are being asked to restructure our entire sexual morality and social system to embrace a concept that has never, Mr. Chairman, never been accepted in the world by any major culture. We are being asked to do something that has never been done before.

I see my time is running out. Let me just make two more points.

No one is denied the right to marry. They just have to meet the requirements of marriage. The two sexes must be present for a marriage to occur. If that definition is radically altered based on the feelings of those in other relationships, then there is absolutely no logical reason why we should not recognize under the law three people getting married or any other type of unusual or bizarre arrangement that one could imagine.

Finally—and I am sorry that Senator Kennedy has stepped out; I hope he will return to continue this discussion. But I would particularly say to Senator Kennedy that we are here today because a few judges in Hawaii, against the express wishes of the Hawaiian people, are contemplating a radical social change. Ordinary people did not pick this fight. They are not the aggressors. They are merely defending the basic morality that has sustained the culture for a long, long time. Yet good men and women of varying beliefs have been subjected to a barrage of name calling and abuse simply for saying that marriage ought to be the union of a man and a woman, and that the laws should protect this vital social norm. It is not hatred to prefer normalcy. It is not bigotry to resist radical redefinition of marriage.

Mr. Chairman, along with you, I have consistently condemned gay-bashing and violence against homosexuals, and I would hope some of the other witnesses at the table would also condemn radical homosexual groups going into St. Patrick's Cathedral and disrupting worshiping services. This sort of event has happened all over the country.

A few days ago, we did a forum on Capitol Hill on the issue of marriage. It was an open discussion by men and women of good will. There were a lot of views presented. We had to turn off our 800 line that afternoon because of the hate-filled and abusive phone calls that poured into our offices because we had the audacity to say that marriage ought to be between a man and a woman.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bauer follows:]

PREPARED STATEMENT OF GARY L. BAUER, PRESIDENT, FAMILY RESEARCH COUNCIL

Ladies and Gentlemen, thank you for inviting me to testify.

As the head of an organization supported by 300,000 families, I am often asked to provide information on various issues that are important to family life, from tax credits to welfare reform. But in all my years of pro-family work, I cannot recall an issue that was so central to the very idea of family.

The Defense of Marriage Act would have seemed unnecessary and even unthinkable just a few years ago, even though marriage has been under siege for some time. No-fault divorce, a sex-saturated culture, and growing fiscal and social pressures have sundered many a marriage or, in some cases, discouraged them from happening, even with children in the picture. Many Americans are wrestling with the pain of broken families and are trying to rebuild their lives.

The decline of marriage has spawned America's most destructive social problems, as fatherless households have multiplied. You probably have heard the litany by now, but let me take a moment to mention some of the devastation caused by a lack of support for marriage: out-of-wedlock pregnancies, sexually-transmitted diseases, alcohol and drug abuse, educational failure, community decline, and last but not least, a frightening epidemic of crime that has changed the way we live.

A visitor from another land might well observe that we seem caught in a quickening downward spiral. As marriages fail, the pain spreads out through the next generation to the ones that follow.

The solution seems self-evident: If the collapse of marriage is the problem, why don't we move to strengthen this irreplaceable institution? Well, we could and should. Yet we are being asked by some groups with a radical agenda to do precisely the opposite.

We are being asked not only to ignore the mounting evidence that the mother-and-father family is the foundation of civilization, but to weaken marriage further by redefining it. We are being asked to pretend that marriage is no longer about bringing the two sexes together in a biological, social, economic, legal and spiritual union. We are being asked to restructure our entire sexual morality and social system to embrace a concept that has never been accepted anywhere in the world by any major culture. We are being asked to pretend that somehow two men could replace a mother in a child's life or that two women could take the place of a father and that it won't make any difference to children.

Often I am asked, what does it matter if two men or two women down the street want to call what they have "marriage?" Why does that hurt you or your marriage? Well it doesn't—unless they bring the law into it. Then the fiction is imposed on everyone and the counterfeit will do great harm to the special status that the genuine institution has earned. There are many relationships in which love is involved. But marriage is a unique bonding of the two sexes, with the probable expectation of procreation of children. It is the core of civilization and is universally honored.

Marriage is more than a union of two people who have strong feelings for one another. Marriage establishes bloodlines, kinship, the passage of family traditions and values through the generations, the passing on of family names and property and it is the most important source of social stability. If we all existed for only one generation, we would not have as strong a case for creating legal and cultural safeguards for marriage. But the protection of marriage is not only about social harmony. It is about creating a future for our children.

Nobody is denied the "right" to marry. They just have to meet the requirements. The two sexes must be present for it to be marriage. If that definition is radically altered based on the "feelings" of those in other relationships, then there is no logical reason for not letting several people marry, or for gutting other marital requirements, such as minimum age, blood relative status or even the limitation of the relationship to human beings.

Marriage is blessed by all major religions as the union of a man and a woman, so creating a counterfeit would be a slap in the face to millions of Americans. As George Washington observed, government is not eloquence or suggestion; government is force. If the government imposes a definition of marriage on all citizens that runs directly counter to the teachings of the great religions, it forces millions outside the civil law.

The state would be telling many, many people that their beliefs are no longer valid, and would turn the civil rights laws into a battering ram against them:

- Businessmen and women would be prosecuted if they failed to offer spousal health benefits to homosexual "spouses."

- Children would necessarily be taught in schools that homosexual relations represent the moral equivalent of marital love.
- Same-sex "marriage" would give a mighty tool to those pushing for adoption of children in homosexual households.
- Private organizations like the Boy Scouts of America would come under increased pressure to abandon their moral standards

We are here today because a few judges in Hawaii, against the expressed wishes of the Hawaiian people, are poised to strike down Hawaii's marriage law and legalize homosexual "marriages." Under the Full Faith and Credit Clause of the U.S. Constitution, it is likely that homosexuals from other states would fly to Hawaii, get a marriage license and then come home, demanding the exact same status as married couples in other states. This would create legal havoc and opportunities for further judicial mischief.

The Defense of Marriage Act merely puts the federal government on record as defining marriage as the union of a man and a woman as husband and wife, and it asserts Congress' constitutional prerogative of interpreting the Full Faith and Credit Clause so that the other 49 states will not be forced to submit to a handful of judges in Hawaii.

On May 20, in *Romer* v. *Evans,* the U.S. Supreme Court showed how little regard some powerful jurists have for the right of people to govern themselves in a democratic republic. Congress needs to act now to reassert the legislative branch's constitutional role as the voice of the people and the maker of the laws. It needs to send a message to the Supreme Court and other courts that they cannot be permitted to exchange morality for immorality in the nation's laws.

In his powerful and eloquent dissent, Justice Scalia warned that we are at a crossroads in which the very idea of a self-governing federal system is hanging in the balance. We cannot afford to let judges usurp any more power and tyrannize an already besieged moral code. The Defense of Marriage Act is a powerful antidote to the destructive trend that has gripped this country at the hands of some injudicious judges.

Finally, I would like to add that ordinary people did not pick this fight. They are not the aggressors. They are merely defending the basic morality that has sustained the culture for everyone. Yet good men and women of varying beliefs have been subjected to a barrage of name-calling and abuse simply for saying that marriage ought to be the union of a man and a woman and that the law should protect this vital social norm. It is not hatred to prefer normalcy. It is not bigotry to resist radical redefinition of marriage. It is not intolerance to believe in traditional morality.

The Defense of Marriage Act is a matter of common sense. It is sorely needed. I doubt that in all you do here, you will do anything more important. I urge you to give it swift approval so that the Congress can move to protect our society's irreplaceable institution.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Bauer.

We will go to you, Mr. Wardle, and then to you, Cass, and then across the table.

STATEMENT OF LYNN D. WARDLE

Mr. WARDLE. Thank you, Chairman Hatch.

Distinguished members of this committee, I am honored to give this testimony this morning regarding Senate bill 1740. I am going to summarize my written statement to just a few of the points which I know will be included in the record of this hearing. I want to emphasize that the opinions I express are my own professional views and not those of any institution with which I am associated.

The primary issue facing the committee today is whether Congress has the authority to enact S. 1740, or DOMA, as I will call it. I believe that it does. The regulation of domestic relations has long been regarded as a virtually exclusive province of the States, yet it is the open strategy of same-sex marriage advocates who use Federal law, the Federal full faith and credit provisions, as well as

interpretations of Federal statutes to force the States to recognize same-sex marriage. I believe that there is a serious threat to the authority of each State to regulate family relationships and to our Federal system. It is a very serious thing to propose to use Federal authority to force unwilling States to recognize same-sex marriage or to impose same-sex marriage on Federal law without the approval of Congress. I believe that that is a matter that merits the attention of this committee and of the Congress.

This is not a speculative concern. Same-sex marriage advocates and law review writers have been urging that interpretation of the full faith and credit clause as well as of Federal law very vigorously. The fact that 15 States have now enacted legislation, most of them this year, within the last few months, declaring that they do not wish to recognize and will not recognize same-sex marriages is, I think, some indication of the seriousness and immediacy of the concern.

DOMA has two operative sections. Section 2 provides that Federal full faith and credit rules neither prohibit nor compel any State to recognize same-sex marriages. Section 2 doesn't bar any State from legalizing same-sex marriage, nor does it prevent any State from recognizing same-sex marriages created in another State. It simply clarifies that the Federal rules of full faith and credit may not be used to force any State to recognize same-sex marriages legalized in some other State.

Thus, DOMA is a neutrality provision because it neither forbids nor requires any State to recognize full faith and credit. It leaves the matters to State decision. It protects the authority of each State to decide for itself whether or not to recognize same-sex marriage, thus protecting our federalism.

Section 3 prevents the back-door importation of same-sex marriage into Federal law without the approval of Congress. It eliminates an ambiguity that could breed costly and confusing and unnecessary litigation. Section 3 provides that for purposes of interpreting Federal law—and I emphasize Federal law only—the word "marriage" means only a legal union of one man and one woman as husband and wife. That definition is not imposed on any State. It is for use of Federal law only. And I think it accurately reflects congressional intent for when Congress has enacted legislation using the term "marriage," as it has literally hundreds of times, it has never intended that to encompass same-sex unions.

Both sections leave undisturbed the authority of each State and Congress to regulate, to legalize, or recognize same-sex marriage if they deem it appropriate. The question is whether Congress has the authority to enact legislation to prevent the misuse or misinterpretation of Federal law to force same-sex marriage onto States without their consent or upon Federal programs without the approval of this Congress. I believe that Congress has that authority.

Clearly, Congress has the constitutional powers to enact legislation like section 2 of DOMA defining the full faith and credit effect of acts, records, and judicial proceedings of other States—or one State in other States. The very language of the full faith and credit clause of the Constitution explicitly empowers Congress to do so, as we have heard this morning. Legal scholars have long argued that Congress can and should exercise that power to legislate, and

the Supreme Court has repeatedly acknowledged that Congress has the authority to so legislate.

Of course, that power is not absolute or unlimited. If S. 1740 were to discriminate, deny full faith and credit regarding Catholics or Jehovah's Witnesses or blacks, clearly it would violate the fourteenth amendment of the Constitution.

Does S. 1740 unconstitutionally discriminate on the basis of homosexuality? Does it violate *Romer* v. *Evans*? I think not. First, it focuses on marriage and the protection of the definition of marriage by the States. Marriage is a classic example of a preferred status. It is very important to distinguish between three categories of law—prohibiting, tolerating, and preferring. While *Romer* deals with prohibiting or tolerance, this statute directs with a matter of preference. You don't have to extend preference in order to tolerate something.

Second, the same day that the Supreme Court decided *Romer*, it also decided the *BMW* case in which it reiterated the importance of the principle of State sovereignty and the impermissibility of one State to impose its own policy choices on neighboring States. This bill is designed to prevent one State from dictating to all of the other States how marriage will be defined or whether they recognize same-sex marriage.

Is my time up, Mr. Chairman?

The CHAIRMAN. It is up, but if you wanted to finish—I always give a little leeway to witnesses, especially constitutional experts.

Mr. WARDLE. Thank you, Mr. Chairman. I will finish up in just one minute or less.

The *BMW* v. *Gore* case involved a mere matter of regulating auto sales, and the Supreme Court said that it had to protect against one State imposing or dictating to other States what their legal policy would be by penalizing acts in another State. I think if that is important in auto sales, it is even more important for Congress to protect the sovereignty of each State with respect to defining marriage.

In the case of judgments, full faith and credit requires more care and attention, and there has to be, I think, a very clear showing of a strong public policy. States cannot decline to recognize judgments willy-nilly. I don't think the difference between positive and negative language has any significance. The Supreme Court has often upheld—has looked for congressional intent, and when it finds an implied intent that Congress did not intend full faith and credit to be given, it has not given that effect.

I think I will defer the rest of my statement to the written statement. Thank you for your indulgence.

[The prepared statement of Mr. Wardle follows:]

PREPARED STATEMENT OF PROFESSOR LYNN D. WARDLE

I am honored to be invited to submit this written statement and to give testimony concerning S. 1740 to this Committee on the Judiciary of the United States Senate. I am a professor of law and I have taught courses in and relating to Family Law, Conflict of Law, and the Origins of the Constitution for many years.[1] S. 1740 hap-

[1] I am a Professor of Law at Brigham Young University. I also have taught family law and conflicts law or related subjects at Howard University School of Law (as Visiting Professor), at Sophia University Faculty of Law in Japan, (as Visiting Professor), and at the University of Ab-

Continued

pens to touch on all three of those fields. Thus, I have been asked to give my professional comment and analysis regarding S. 1740. Of course, the opinions I express are my own professional views; I do not speak for any of the institutions or organizations with which I am associated.

S. 1740 is titled "the Defense of Marriage Act" (hereinafter "the Act") but I would call it "the Protection of Federalism in Family Law Act." The bill contains two operative sections. Section 2 resolves a 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. It preserves the right of each state to choose for itself whether to recognize same-sex marriage. Section 3 eliminates a potentially serious 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. 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. Thus, S. 1740 protects the crucial balance of federalism in our constitutional system, preserving the right of each state and of Congress to settle the same-sex marriage question for itself.

The main questions that have been raised concerning S. 1740 and its counterpart in the House of Representatives, H.R. 3396, concern the *need* for the Act, the *authority* of Congress to enact the Defense of Marriage Act, and whether it is sufficiently *tolerant* under the recent Supreme Court decision in *Romer* v. *Evans*.[2] Those are the three main questions I address.[3] But first, it is important to explain exactly what S. 1740 would do if enacted. The astonishing inaccuracy of some newspaper descriptions of the Act, some the criticisms that have been made of it, reveal that there is substantial confusion about what the Act would do.

I. DOMA SIMPLY PROTECTS THE RIGHT OF EACH STATE AND OF THE FEDERAL GOVERNMENT TO DETERMINE FOR ITSELF WHETHER TO RECOGNIZE SAME-SEX MARRIAGE

a. Section 2 of S. 1740 clarifies that Federal full faith and credit principles permit but do not compel other States to recognize same-sex marriages

Section 2 of S. 1740 provides, in pertinent part, that:

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

The issue to which this Section is addressed is whether the federal government's full faith and credit power should be used to *force* one state's creation of a radical new form of "marriage" upon the other states. Section 2 answers, *"No."*

Section 2 clarifies the "effect" that federal full faith and credit rules require a state to give to public acts, records and judicial proceedings from another state that establish or recognize or give legal effect to a same-sex relationship as a marriage. Three details should be noted. First, *nothing* in Section 2 *prohibits* any state from recognizing same-sex marriage or recognizing other states' acts, records or judicial proceedings treating same-sex unions as marriages. Each state is still free to legalize same-sex marriage, or to give effect to another states' legalization of same-sex marriage, if it chooses to do so. A state may have or may create conflict of law rules

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erdeen in Scotland (as Visiting Research Fellow). Family Law is my primary area of scholarship. I have written or co-authored several books and several dozen law review articles or chapters in books about family law. Two of my most recent publications (published this year) are law review articles examining constitutional arguments for same-sex marriage, Lynn D. Wardle, "A Critical Analysis of Constitutional Claims for Same-Sex Marriage," 1996 B.Y.U.L. Rev. 1–101, and the rules and practices regarding international recognition of marriages, Lynn D. Wardle, "International Marriage and Divorce Regulation and Recognition: A Survey," Family Law Quarterly, vol. 29, pp. 497–517 (Fall 1995). Additionally, I have served as an officer or executive council member of the leading international scholarly organization in the field of family law, the International Society of Family Law, and I have served actively in the American Law Institute consultative group that is working on a "Family Law Project." I have received valuable input in preparing this testimony from my research assistants, Mr. Bill Duncan and Mr. Troy Smith.

[2] 116 S.Ct. 1620 (1996).

[3] Because of the very limited time provided to prepare this Statement in order to meet the tight legislative schedule, my review of all these points is necessarily brief. The subjects could and should be considered in much more comprehensive detail, with more fully-developed discussion of each of the points raised herein.

that would recognize same-sex marriages if legal in other states, and Section 2 does not interfere with that at all. Second, Section 2 only specifies that the federal full faith and credit rules do not *compel* other states to recognize or enforce same-sex marriages legalized or recognized in another state. Thus, S. 1740 takes a "neutral" position, that federal full faith and credit neither prohibits nor requires any state to recognize same-sex marriage acts, records and judgments from other states. Third, Section 2 applies not only to laws from others states (choice of law) but also to records and judgments. Thus, if a same-sex couple were married in a state (A) that had legalized same-sex marriage, another state (B) would not be forced to recognize that marriage, even if the same-sex couple got a declaratory judgment in the first state (A) recognizing their "marriage" as valid. Section 2 would allow, but not compel, others states to recognize (or to not recognize) that judgment. The Act would simply remove the potential federal compulsion one way or the other, and leave it up to the second state to decide for itself what effect to give such marriages of marriage judgments.

b. Section 3 of S. 1740 preserves the balance of federalism in family law

Section 3 of S. 1740 provides in pertinent part that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

This clarifies that the terms "marriage" and "spouse," when used in federal laws, do not include same-sex unions. It defines what those marriage terms mean when used in *federal* law only. That is a routine function of any legal system.

S. 1740 does not impose its definition of marriage upon any state or state law, nor does it bar any state from choosing to legalize same-sex marriage, if it chooses. Section 3 says only that if a state chooses to legalize same-sex marriage within its own jurisdiction, that will not force the federal government to use that radical definition of marriage in federal programs and laws. This is a straightforward application of federalism in action.

Section 3 is an accurate reflection of two hundred years of Congressional intent. The terms "marriage" and "spouse" are used many times in federal law. Some of the provisions are many decades, even centuries, old. Many of these federal laws were passed when homosexual relations were criminally prohibited by all the states, and punished in federal law as well. Even today, with homosexual relations still criminally prohibited in nearly half of the states and same-sex marriage allowed in no state (or nation—anywhere in the world), it is beyond question that Congress has never actually intended to include same-sex unions when it used the terms "marriage" and "spouses." Section 3 appears to embody quite accurately the actual historical intent and expectation of Congress and federal law generally that when these marriage terms are used in federal laws, same-sex couples were not intended to be included.[4]

Moreover, Section 3 of DOMA does not prevent Congress from later changing its mind and treating same-sex unions as marriages if it so desires. Indeed, for purposes of specific legislation (such as employment benefits regulation, housing, etc.) Congress may define the terms of "marriage" and "spouse" to include same-sex couples, if it chooses. Section 3 merely states the baseline, the default rule, that applies in the absence of countervailing specific intent.

Thus, DOMA is a neutrality Act, designed to prevent the misuse of federal law to force same-sex marriage upon the states without their own consent, or upon federal laws and programs without Congress' consent. DOMA protects our federalism, the structure of our liberties, from those who would manipulate federal laws to force same-sex marriage upon the people of the states and the people of the United States without their consent or approval.

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[4] Marriage terms are often used in federal law in a manner that suggests that Congress believed that the definition of "marriage" used in state law would be satisfactory for the federal law. Since no state allowed such radical reconstruction of marriage as same-sex marriage, the passive presumption of adoption of state law has worked quite well. However, if some state legalizes same-sex marriage, that would radically alter a basic premise upon which the presumption of adoption of state domestic relations law was based—namely, the essential fungibility of the concepts of "marriage" from one state to another. Section 3 clarifies the premise upon which two centuries of federal legislation using marriage terms has been predicated.

II. THE NEED FOR S. 1740—FEDERALISM AND FULL FAITH AND CREDIT: CONSTITUTIONAL PROTECTIONS FOR STATE AUTHORITY TO REGULATE FAMILY LAW

a. Federalism

The constitutional allocation of governmental authority between the national government and the governments of the states, called *federalism,* is one of the fundamental principles of the Constitution of the United States. It is the core concept in our system of shared sovereignty between states and the federal government, one of the essential "balances" of power-against-power that prevents the abuse of power by either repository of governmental power. Federalism defines the constitutional relationship of the states and federal government. The general demarcation between the authority of the national government and the authority of the state governments provided by the Constitution is the line between external and internal governmental concerns. In the Federalist Papers, James Madison put it this way:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those that remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. * * * The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State.[5]

Hamilton suggested in Federalist No. 17 that the national government would be concerned with matters of "[c]ommerce, finance, negotiation, and war" while the States governments would have priority in regulation "[t]he administration of private justice between citizens of the same State, the supervision of agriculture and of other concerns of a similar nature," and "regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake * * *."[6]

Since 1789 the broad authority of the states to regulate family relations, and the concomitant absence of virtually any authority of the federal government to directly regulate family relations, has been one of the clearest boundary lines of our federalism. The regulation of family relations historically has been, and as a matter of constitutional law still remains, primarily a matter of state law. Indeed, the Supreme Court of the United States has observed, not infrequently, that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states."[7] Thus, the enforcement of family law is left primarily to state courts, and the bulk of the governing rules are state, not federal, laws. For many years, even federal courts have declined to exercise diversity jurisdiction over suits directly involving certain core family relations issues,[8] and even in cases involving federal question jurisdiction some federal courts have hesitated to hear domestic disputes.[9] Behind these federalism practices are such strong policy values as respect for the value of and appreciation of the need to preserve what Alexander Hamilton described as "the constitutional equilibrium between the general and the State governments,"[10] desire to preserve and foster pluralism, belief that laws regulating families should reflect local values, respect for the expertise of state courts, and belief that the federal government has more than enough other important problems to address. S. 1740 appears to respect and protect these principles.

That does not mean, however, that the federal government is unable to exercise its constitutionally-delegated share of governmental authority whenever its action would indirectly affect family relations. Proper federal legislation and regulations dealing with matters clearly entrusted to the federal government such as commerce, defense, public health, taxes, immigration, social security, and many other federal programs, often have an indirect but very definite impact upon family relations.

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[5] The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). In the same paper, Madison also noted: "[T]he States will retain under the proposed Constitution a very extensive portion of active sovereignty." *Id.* at 290.

[6] The Federalist No. 17, *id.,* at 118–120 (Alexander Hamilton).

[7] *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1975); see also *Lehman* v. *Lycoming County Children's Services Agency,* 458 U.S. 502 (1982); *Moore* v. *Sims,* 442 U.S. 415 (1979); *Barber* v. *Barber,* 62 U.S. (21 How.) 582 (1859).

[8] *Ankenbrandt* v. *Richards,* 504 U.S. ____, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992).

[9] See Charles A. Wright, Arthur R. Miller and Edward H. Cooper, "Federal Practice and Procedure," par. 3609 (1984 and Supp. 1996); Martin Guggenheim, "State Intervention in the Family: Making a Federal Case Out of It," 45 Ohio St. L.J. 399 (1984); see also *Thompson* v. *Thompson,* 484 U.S. 174 (1988).

[10] The Federalist No. 31, at 197 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

Likewise, the definition and protection of individual liberties protected by the Constitution under the Fourteenth Amendment sometimes means that federal law profoundly affects state family law. For example, some state laws regulating family relations have been invalidated, and state domestic relations rules and statutes modified or enjoined by or because of the proper federal exercise of powers delegated by the Constitution to the federal government.[11]

Because family law in the United States has developed separately within each state, by its own local courts and local legislature, American family laws vary significantly in both substance and procedure.[12] Family law is a prime example of the "fifty different laboratories" idea of how federalism usually generates solutions to social problems much more quickly, how it preserves valuable cultural pluralism much more effectively, and how it fosters individual liberty much more fully than do centralized forms of governments.[13] Thus, federalism in family law is a structural principle required by the Constitution, and established by more than 200 years of precedents, that is essential to the proper equilibrium of our government, and critical to the well-being of families in our nation.

b. Full faith and credit

There is a second structural principle that operates to preserve the constitutional balance and preserve the role and responsibilities of the states. That is the Full Faith and Credit Clause. As the federalism principle polices the vertical relations of the national government and the states, the full faith and credit principle polices the horizontal relations of the states with each other. As the federalism principle protects the integrity of the states from possible overreaching by the national government, the Full Faith and Credit Clause protects the states from possible overreaching by each other. In a sense, federalism provides the longitudinal coordinate and full faith and credit provides the latitudinal coordinate defining the position of the states in the union under the compact of federation we call the Constitution. Both principles function together like a gyroscope to define the relational position of the states to each other and to the federal government, to protect and preserve the position of each individual states and the national government within the constitutional system that has functioned so successfully for so many generations in this great country.

If the federal government encroached upon the authority of the states to regulate family relations, that would distort the equilibrium along one axis, and if the states encroached upon the family laws of each other that would damage the alignment along the other dimension. If one state were to encroach upon the marriage law of another and do so in the name of federal authority, that would be doubly distorting and damaging. That threatening situation is developing right now. The situation concerns a proposed radical redefinition of marriage (same-sex marriage) which one state may adopt, and the attempt at mandatory imposition of that highly controversial and revolutionary deconstruction of marriage upon all other states in the name of the constitutionally-mandated marriage recognition principle of the Full Faith and Credit Clause. Closely related to that is the problem of the potential to impose same-sex marriage on federal law and programs by interpretation of ambiguous terms in federal laws as including same-sex marriage. These are the problems to which S. 1740 is addressed.

Congress need not pretend to be blind to the cunning tactics of same-sex marriage advocates who would destroy the delicate equilibrium of our federal system by using federal laws (federal full faith and credit law and the use of marriage terms in various federal programs) to force the states and various federal agencies to recognize and promote same-sex marriage. Congress has the authority to protect the states

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[11] See, e.g., *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Orr* v. *Orr*, 440 U.S. 268 (1979); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981); *Pickett* v. *Brown*, 462 U.S. 1 (1983); *Idaho* v. *Wright*, 497 U.S. 805 (1990). This is not to suggest that the federal courts have never improperly crossed the federalism line in this area and invalidated state family laws when the constitutional basis for federal authority is tenuous or lacking. Fortunately, perfection is not required of either the federal or state governments in order for the federal system to function generally well.

[12] Of course, persuasive sister-state judicial opinions, effective legislation enacted in other states, proposals for uniform legislation, federal programs providing support and incentives for states to take a particular policy position, federal constitutional standards, national media, national special interest influences, common cultural values, etc., have produced many multi-state and national trends in the family laws of the various states. Nevertheless, despite these homogenizing influences the family laws of the American states remain remarkably diverse in policy and practice.

[13] See generally Bruce C. Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests," 81 Mich. L. Rev. 463–476–484 (1983).

and federal programs from this impending abuse of federal law, and it should use its authority to protect the balance of our Constitution.

c. Congress' authority to protect State sovereignty from other States' intrusion

There is no doubt that the Constitution has a "special concern" for protecting "the autonomy of the individual States within their respective spheres."[14] This concern is especially acute when it concerns matters of state domestic relations law. S. 1740 is designed to protect the states' sovereign ability to determine for themselves whether to recognize same-sex marriages. It does this by closing two avenues of federal law that have been singled out by gay and lesbian strategists as means of imposing same-sex marriage on all states if any one state chooses to legalize same-sex marriage. DOMA prevents states that legalize same-sex marriage from forcing their policy on other states. It protects the fundamental constitutional notion that "[n]o state can legislate except with reference to its own jurisdiction."[15]

The Supreme Court of the United States has noted that Congress has a "substantial interest" in "balancing the interests" of the several states by "prevent[ing] [a state's] policy from dictating" what the legal policy of other states will be.[16] For example, in *United States* v. *Edge Broadcasting Co.*,[17] the Supreme Court upheld a federal restriction on speech—a statute forbidding broadcasters from carrying advertisements for lotteries if lotteries were forbidden in the state in which the broadcaster was located—in order to vindicate the sovereignty of each state to determine its own lottery rules. In *Edge* the broadcaster who challenged the law was located in North Carolina, which prohibited lotteries, but 90 percent of its listeners lived in Virginia, where the lottery was legal. Even though the overwhelming majority of the listeners resided in a state whose public policy would not be violated by allowing the lottery advertisements, the Court held that the "congressional policy of balancing the interests of lottery and nonlottery States" was a "substantial governmental interest" that justified even the prohibition of free speech in this instance.[18] The Court further endorsed the "substantial federal interest in supporting North Carolina's laws making lotteries illegal," and "prevent[ing] Virginia's lottery policy from dictating" what advertisements would be carried on stations located in another state.[19] The Court approved the enforcement of the federal law because it "advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States like Virginia."[20] The Court specifically approved congressional action "to accommodate non-lottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States."[21]

DOMA responds to the Court's explicit concern that:

> [t]o vest the power of determining the extraterritorial effect of a State's own laws and judgments in the [first] State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.[22]

It neutrally protects the balance of interests between the interested states.

Edge shows clearly how appropriate and important it is for Congress to enact S. 1740. We must acknowledge the "substantial federal interest in supporting [state] laws [prohibiting same-sex marriage]" and "prevent[ing] [one state's same-sex marriage] policy from dictating" what marriages are recognized in another state.[23] The Court should uphold DOMA because it "advances the governmental interest in enforcing the restriction in [non-same-sex-marriage] States, while not interfering with the policy of [same-sex marriage] States,"[24] and because the law is designed "to accommodate non-[same-sex marriage] States' interest in discouraging [same-sex mar-

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[14] *Healy* v. *Beer Institute*, 491 U.S. 324, 335–336 (footnote omitted); see also *BMW of North America, Inc.* v. *Gore*, 116 S.Ct. 1589, 1597 (1996).
[15] *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881).
[16] *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993).
[17] 509 U.S. 418 (1993).
[18] 509 U.S. at 428.
[19] 509 U.S. at 429.
[20] 509 U.S. at 430.
[21] 509 U.S. at 434.
[22] *Washington Gas Light Co.* v. *Thomas*, 448 U.S. 261, 272 (1980) (citing *Nevada* v. *Hall*, 440 U.S. 410, 424–425 (1979).
[23] 509 U.S. at 429.
[24] 509 U.S. at 430.

riage], even as they accommodate the countervailing interests of [same-sex marriage] States."[25]

a. The need for section 2

The question addressed by Section 2 is whether one state, by choosing to legalize same-sex marriage, can legislate for all other states. The strategy of same-sex marriage advocates to use federal full faith and credit rules to impose same-sex marriage recognition on all states is an open secret. This tactic threatens the very federal structure and unity of our Nation.

If one state legalizes same-sex marriage (for example, let us suppose that Hawaii were to legalize same-sex marriage), it is certain that many homosexual couples from many other states would go the Hawaii, get married in Hawaii, then return back to the states they came from and demand that those states recognize their "marriage" for purposes of the second state's laws (e.g., for purposes of marriage, divorce, adoption, custody, guardianship, visitation, health, education, alimony, property division, state taxes, probate, wills, trusts and estate law, etc.). Many same-sex couples living and married in Hawaii also, in time, would move to other states and demand recognition of their marriages by the other states. Lawsuits would be filed by same-sex marriage advocates demanding that the courts order the second state to recognize same-sex marriages from Hawaii even if the second state explicitly prohibited same-sex marriage. The gay or lesbian couples would argue that the full-faith and credit clause of the U.S. Constitution compels all states to recognize a same-sex marriage if such marriages are legal in the state of celebration. If the couple had obtained a judicial decree recognizing their relationship as a marriage or awarding legal rights arising out of a marital relationship, they would have an even stronger argument that existing federal full faith and credit principles compel all states to recognize their same-sex marriages, even if that violated the public policy of the second state.

In recent years, especially since 1990, quite a number of same-sex marriage advocates have written law review articles asserting that if Hawaii or any other state legalizes same-sex marriage, all other states would be required by the Full Faith and Credit Clause of the Constitution to recognize same-sex marriage. In other words, if any state were to legalize same-sex marriage, they would force all other states to recognize same-sex marriages through the federal Full Faith and Credit Clause. For example, in a recent law review article Deborah M. Henson argues that "the Supreme Court has allowed far too much laxity with the full faith and credit mandate."[26] She believes that Article IV, § 1 should and can be interpreted to compel other states to recognize same-sex marriage if Hawaii or some other state legalizes same-sex marriage.[27] Several other writers in law review and other publications have made similar arguments calling for "invigorating" the Full Faith and Credit Clause to require states to recognize same-sex marriages,[28] asserting compulsory recognition and enforcement in all states of "marital decrees" recognizing same-sex marriages,[29] or asserting that "[i]f Hawaii legalizes same-sex marriages, the effects will be felt across the country since other states must recognize gay marriages performed in Hawaii under the Full Faith and Credit Clause of the U.S. Constitution."[30] Likewise, one of the leading gay-rights advocates, Evan Wolfson, has written that "full faith and credit recognition [of same-sex marriages] is mandated by the plan meaning of the Full Faith and Credit Clause, and by basic federalist im-

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[25] 509 U.S. at 434.

[26] Deborah M. Henson, "Will Same Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitation on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriage Following Hawaii's *Baehr* v. *Levin*," 32 U. Louisville J. Fam. L. 551, 584 (1993–1994) (hereinafter "Henson").

[27] *Id.* at 584–590.

[28] Nancy Klingeman and Kenneth May, "For Better or For Worse, In Sickness and in Health, Until Death do Us Part: A Look at Same-Sex Marriage in Hawaii," 16 U. Haw. L. Rev. 447 (actual pg. # not on WL, but at West Law 16 UHILR 447, it is on pp. 40–45).

[29] Habib A. Balian, Note, "Til Death Do Us Part: Granting Full Faith and Credit to Marital Status," 68 S. Cal. L. Rev. 397, 401, 406–408 (1995).

[30] Anne M. Burton, Note, "Gay Marriage—A Modern Proposal: Applying *Baehr* v. *Lewin* to the International Covenant on Civil and Political Rights," 3 Ind. J. Global Legal Stud. 177, 195 (1995); but see *id.* n.22. See further Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Debate," 21 N.Y.U. Rev. L. & Soc. Change 567, 612 n. 196 (1994–95) (referring to another forthcoming article arguing that Full Faith and Credit mandates interstate recognition of same-sex marriage). Barbara J. Cox, "Same Sex Marriage and Choice of Law: If We Marry in Hawaii are We Still Married When We Return Home?", 1994 Wis. L. Rev. 1033, 1041 n.23 (1994). Similar claims are made in non-legal literature; but I confine myself herein to reviewing the law reviews.

peratives,"[31] and argued that "if you're married, you're married; this is one country, and you don't get a marriage visa when you cross a state border."[32]

This is not a speculative or trifling concern. It is a very serious matter to propose to use federal authority (the Full Faith and Credit Clause) to force unwilling states to recognize same-sex marriages. Yet that is precisely the tactic being pursued at the present time.

The gravity of this concern is evidenced by the fact that within the past year and a half, legislatures in *fifteen* states—nearly one-third of the states in the country—have enacted laws to prohibit same-sex marriage and to declare provisions that same-sex marriages will not be recognized in those states, even if entered into in a state where they are legal.[33] Most of these laws have been enacted during the past six months. Similar proposals are still pending in several state legislatures, and additional states are certain to consider like legislation next year.

Additionally, there is substantial concern that some states or courts will interpret the federal Full Faith and Credit rules one way, and others another way, creating enormous confusion in federal law. Moreover, there will undoubtedly be enormous resentment and backlash against Washington and the federal government if the radical interpretation (that federal Full Faith and Credit requires states to recognize same-sex marriage) proposed by some of the law review writers is accepted. Moreover, "the State of Hawaii is concerned that adoption of same-sex marriage in Hawaii would render not only same-sex marriages authorized in Hawaii under such law unenforceable in other States or elsewhere, but would render all Hawaii marriages unenforceable in one or more jurisdictions."[34] Thus, there clearly is a need for this legislation.

b. Need for section 3

Same-sex marriage advocates have already argued in several cases (such as immigration cases) for inclusion of same-sex marriages as "marriages" are defined in federal law. If a state legalizes same-sex marriage that pressure will only grow and intensify. It would be naive not to expect that some courts and agencies, given the opportunity, would interpret federal laws using the terms "marriage" and "spouse" to include same-sex couples who were married in a state that allowed such marriages. Congress needs to speak now and clearly.

For example, it is reasonable in the absence of any other indication to presume that Congress generally intended when it used a "marriage" term to include any type of marriage that the states allowed—to defer to and simply incorporate the state definition of marriage. When defining domestic relations terms for federal law, courts often apply a presumption that the federal law intended to adopt the state law definition of the domestic relations term. For example, in an oft-cited case, the Fifth Circuit had to find a definition of "widow," for purposes of the Federal Employees Group Life Insurance Act.[35] Forty years ago, in *De Sylva* v. *Ballentine,*[36] the Supreme Court suggested that federal courts should look to state law in defining terms describing familial relations, because "there is no federal law of domestic relations, which is primarily a matter of state concern."[37]

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[31] Evan Wolfson, Director of the Marriage Project (Lambda Legal Defense and Education Fund, Inc., "Winning and Keeping Equal Marriage Rights: What Will Follow Victory in *Baehr* v. *Lewin?* A Summary of Legal Issues" at 4 (March 20, 1996).

[32] Evan Wolfson, Director, The Marriage Project (Lambda Legal Defense and Education Fund, Inc., "Winning and Keeping the Freedom to Marry for Same-Sex Couples—What Lies Ahead After Hawaii, What Tasks Must We Begin Now?" at 2 (April 19, 1996).

[33] See 1996 Alaska Sess. Laws 21; 1996 Arizona Sess. Laws 348; 1995 Delaware House Bill 503 (Approved by the Governor June 21, 1996); Georgia Code Ann. § 19–3–3.1 (1996); Idaho Code § 32–209 (1996); 1996 Illinois Laws 459; 1995 Kansas S.B. 515 (Approved by Governor Apr. 10, 1996); 1995 Michigan House Bill 5662 (Approved by the Governor June 25, 1996) and 1995 Michigan Senate Bill 937 (Approved by the Governor June 25, 1996); Missouri S.B. 758 (enacted May 1996); 1995 North Carolina Sess. Laws 588; 1995 Oklahoma S.B. 73 (Approved by Governor Apr. 29, 1996); South Carolina House Bill 4502 (same-sex marriage against public policy of state); South Dakota Cod. Laws Ann. § 25–1–1 (1996); 1995 Tennessee Senate Bill 2305 (approved by Governor May 15, 1996); Utah Code Ann. 30–1–4 (1995). The Colorado legislature also passed a marriage nonrecognition bill, but the Governor vetoed it. 1996 Colorado House Bill 1291 (final amended version—12 Mar. 1996). Passed the House—28 Feb. 1996 (the vote was 33–31). Passed the Senate—12 Mar. 1996 (the vote was 20–14). Vetoed by Governor—25 Mar. 1996. *Lexis,* July 2, 1996.

[34] *Baehr* v. *Lewin,* Civil No. 91–1394–05, "Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories," 8 (Dec. 17, 1993).

[35] *Spearman* v. *Spearman,* 482 F.2d 1203 (1973). *Id.* at 1204. See also *Metropolitan Life Insur. Co.* v. *Jackson,* 896 F.Supp. 318 (S.D.N.Y. 1995).

[36] 351 U.S. 570 (1956).

[37] *Id.* at 580.

That presumption has its limits—the limits of what Congress reasonably had in mind when it used the generic marriage term. Thus, Supreme Court in *De Sylva* noted that federal law would not incorporate into federal the state law definition of a family relations term if a state defined the word "in a way entirely strange to those familiar with its ordinary usage * * *."[38] There is no question that the "ordinary usage" of the term "marriage" does not include same-sex unions. Moreover, as a matter of legislative intent, it is undisputable that when Congress has approved legislation using marriage terms, same-sex unions were never contemplated. The fact that the federal law was passed when such marriages were not only not allowed but in most cases when such marriages were not even seriously considered, plus the persisting strong policy in many states against such unions would provide ample evidence that it would not be consistent with Congressional intent to include same-sex unions within the meaning of those familial terms. "Aberrant" state definitions of domestic relations terms, such as defining marriage to include same-sex unions, "do not provide appropriate standards for federal law."[39]

Additionally, in many federal programs, uniformity in the definition of a critical term throughout the country is more important than accommodating diversity. As Justice Douglas observed in *De Sylva:* "Congress could of course give [a domestic relations term] the meaning it has under the laws of the several States. * * * But * * * the statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty-eight States."[40] Further, there is a danger that federal law and programs may be impaired if state law definitions of critical terms is always controlling.[41] For these reasons, the Supreme Court has observed: "We start * * * with the general assumption that in the absence of a plain indication to the contrary, * * * Congress when it enacts a statute is not making the application of the federal act dependent on state law."[42]

The reasonable presumption that when using marriage terms in federal legislation Congress generally intended to incorporate the relevant "ordinary" state definition of marriage underscores the need for Congress to clarify that it does not intend to include same-sex unions when it uses marriage terms in federal laws. In the absence of clear language like that contained in DOMA, courts could rule that same-sex unions valid in just one state must be deemed marriages for purposes of federal statutes, regulations, programs, and agencies. That could create a transportable marriage status, good wherever federal law applies in all 50 states.

Section 3 does not interfere with the ability of the states to define and regulate marriage for themselves. Nor does it deprive Congress of the ability to define marriage some other way in any particular legislation if Congress were to decide that for some particular program even same-sex unions should be included as marriages. Section 3 only sets the default definition, the general standard. Since the actual presumption of both history and of contemporary American society is that marriage does not entail same-sex couples, that presumption is the only reasonable presumption.

Allowing federal laws and programs to be construed to include same-sex unions as marriages would be extremely divisive. Transporting same-sex marriages from one state to another for purpose of federal laws (possibly as broad as social security, pension laws, tax laws, bankruptcy laws, commercial laws, public assistance programs, etc.). That would create conflict and resentment in states with strong policies in favor of heterosexual marriage only. It would have the effect of imposing same-sex marriage upon the states to the extent that state laws and programs are integrated with federal laws (for instance AFDC programs, medicaid and medicare programs, pension laws, etc.). Given the intense feelings that could be aroused by such a cram-down of same-sex marriage upon the states, that could weaken and severely undermine the cohesiveness of (if not begin the dismemberment of) the union.

Moreover, this is the kind of issue that is best resolved before the cases arise. Waiting until after some state legalizes same-sex marriage and a flood of cases are filed demanding that same-sex unions formed in such a state be treated as "marriages" for purposes of federal laws would be very unwise. It would invite a mul-

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[38] *Id.* at 581.

[39] *United States* v. *Little Lake Misere Land Company, Inc.,* 412 U.S. 580, 596 (1973).

[40] *Id.* at 583 (Douglas, J., concurring) (citing *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367; *National Metropolitan Bank* v. *United States,* 323 U.S. 454, 456; *Heiser* v. *Woodruff,* 327 U.S. 726, 732; *United States* v. *Standard Oil Co.,* 332 U.S. 301, 307).

[41] *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 43 (1989).

[42] *Id.* at 43 (citing *Jerome* v. *United States,* 318 U.S. 101, 104, 63 S.Ct. 483, 485, 87 L.Ed. 640 (1943); *NLRB* v. *Natural Gas Utility Dist. of Hawkins County,* 402 U.S. 600, 603, 91 S.Ct. 1746, 1749, 29 L.Ed.2d 206 (1971); *Dickerson* v. *New Banner Institute, Inc.,* 460 U.S. 103, 119, 103 S.Ct. 986, 995, 74 L.Ed.2d 845 (1983).

titude of unnecessary litigation, and create confusion, inconsistency, and unfairness. Different courts in different districts and circuits might reach contradictory conclusions adding to the uncertainty. It could put at risk a number of couples. For example, what would be the situation of a same-sex couple who marry where it is legal and begin to get a federal benefit based on the interpretation of the term "marriage" in the local law if that couple moved to another jurisdiction where the court had ruled that such unions are not "marriages" for purposes of federal law? Clearly, the wisest interpretative course to follow would be to decline to incorporate that radical redefinition of "marriage" into federal law. And equally clearly, it is best to clarify this in advance.

Section 3 clarifies the congressional intent that for the specific purposes of federal law, same-sex unions are not deemed "marriages," even if for purposes of some state's laws they are considered marriages. That is the most accurate historical definition, the most reasonable, and the most consistent with public understanding and expectations.

Section 3 eliminates what could be a lot of very messy and costly litigation for the federal government. It clarifies any ambiguity that would arise about the meaning of "marriage" in federal law should a state legalize same-sex marriage. To fail to make that clarification at this time would leave the federal laws and courts very vulnerable to a protracted same-sex marriage litigation campaign that can and should be avoided.

III. THE POWER OF CONGRESS TO ENACT S. 1740

a. Power of Congress to enact section 2 of DOMA

There is no serious doubt that Congress has the power to enact legislation defining the "effect" of other states' laws, records and judgments. Sentence two of the Full Faith and Credit Clause of the Constitution (Article IV, § 1) explicitly provides that "[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, *and the Effect thereof.*" The Congressional Research Service of the Library of Congress has stated: "Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States."[43] A host of scholarly authority for many decades concurs with this assessment.[44]

The power of Congress to enact such legislation was also recognized recently when the American Law Institute proposed that Congress enact federal statutory choice of law rules to govern complex litigation.[45] The Reporter noted that "Article IV, § 1, directly authorizes Congress to enact a statute specifying how to resolve conflicts between differing, but arguably applicable, laws from two or more states * * *."[46]

Supreme Court precedent supports the authority of Congress to enact S. 1740. In *Sun Oil Co.* v. *Wortman,*[47] for example, the Court noted: "that Congress [can] legislate to that effect under the second sentence of the Full Faith and Credit Clause * * *." Similarly in *Sherrer* v. *Sherrer,* Justice Frankfurter declared: "We cannot draw on the available power for social invention afforded by the Constitution for dealing adequately with the problem, because the power belongs to the Congress and not to the Court."[48] Also, in *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n.*[49] the Court observed:

> And in the case of statutes, the extrastate effect of which Congress has not prescribed, *as it may under the constitutional provision,* we think the conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

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[43] Congressional Research Service, "The Constitution of the United States of America, Analysis and Interpretation," 869–870 (1987).

[44] See, e.g., Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 Colum. L. Rev. 249, 301 (1992); Michael H. Gottesman, "Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes," 80 Geo. L.J. 1, 24–26 (1991); Walter Wheeler Cook, "The Powers of Congress Under the Full Faith and Credit Clause," 24 Yale L.J. 421 (1919); Brainerd Currie, "Full Faith and Credit Chiefly to Judgments: A Role for Congress," 1964 Sup. Ct. Rev. 89.

[45] American Law Institute, "Complex Litigation: Statutory Recommendations and Analysis," (1994).

[46] *Id.* at 311 (Chapter 6 Introductory Note, Reporter's Note to cmnt. b).

[47] 486 U.S. 717, 729 (1988).

[48] 334 U.S. 343, 366 (1947) (Frankfurter, J., dissenting).

[49] 306 U.S. 493, 502 (1939) (emphasis added).

More than one hundred eighty years ago, the Supreme Court in *Mills* v. *Duryee,*[50] noted: "It is manifest however that *the constitution contemplated a power in congress* to give a conclusive effect to such judgments." Thus, it is clear that Congress has the authority under the Constitution to declare the "effect" which the acts, records or judicial proceedings of states that legalize same-sex marriage must be given in other states, and that is precisely what Section 2 of S. 1740 would do.

Likewise, it is my professional opinion that it would not violate the Full Faith and Credit Clause (article IV, section 1) of the Constitution for a second state to refuse to recognize a same-sex marriage or declaratory judgment legalized in Hawaii or some other state when the second state has a strong public policy against same-sex marriage, at least when the same-sex couple lives in or has some other significant contact with the second state.[51] I believe that constitutional text, history, and case precedents, from the adoption of the Tenth Amendment in 1791 until now, support the right of the second state in such a case constitutionally to refuse to recognize the same-sex marriage, if it chose to do so, or to recognize the same-sex marriage, if it chose to do so. The Full Faith and Credit Clause would not force the state either way.

The basis for my general opinion is the text and history of the Full Faith and Credit Clause, and a long-established line of decisions by the Supreme Court of the United States establishing a permissible scope for nonrecognition.[52] For example, in

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[50] 11 U.S. (7 Cranch) 481, 485 (1813) (emphasis added).

[51] However, a significant contact between the second state and the case, parties, or matter in controversy is required and a significant public policy conflict in the second state is necessary before DOMA authorizes a state to decline to enforce an act, record of judgment of same-sex marriage from another state. It would be extremely rare for a case to arise in a second state (for it to have jurisdiction) and for it not to have a significant contact sufficient to justify application of its own strong policy against recognizing same-sex marriage. See generally *Healy,* 491 U.S. at 337, n.13 (jurisdiction and legislative standards similar). However, if such a rare case occurred, in which the second state was totally without any significant contacts or strong public policy, and the only interested state recognized same-sex marriage, full faith and credit might arguably preclude nonrecognition.

[52] See, e.g., *Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 285 (1980) ("We simply conclude that the substantial interests of the second State in these circumstances should not be overridden by another State through an unnecessarily aggressive application of the Full Faith and Credit Clause, as was implicitly recognized at the time of McCartin."); *Nevada* v. *Hall,* 440 U.S. 410, 421–422 (1979) ("But this Court's decision in *Pacific Insurance Co.* v. *Industrial Accident Comm'n,* 306 U.S. 493, clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."); *Carroll* v. *Lanza,* 349 U.S. 408, 412 (1955) ("The Court proceeded on the premise, repeated over and again in the cases, that the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." (citing *Pacific Ins. Co.* at 502)); *Hughes* v. *Fetter,* 341 U.S. 609, 611 (1951) ("We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved."); *Griffin* v. *McCoach,* 313 U.S. 498, 507 (1941) ("Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."); *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U.S. 498 (1941) ("The full faith and credit clause does not go so far as to compel Delaware to apply §480 if such application would interfere with its local policy."); *Alaska Packers Assn.* v. *Industrial Accident Comm'n. of California,* 294 U.S. 532, 546 (1935) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy."); *Bradford Electric Light Co.* v. *Clapper,* 286 U.S. 145, 159 (1932) ("It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies.") ("I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other.") (Stone, J., concurring at 164); *Pacific Insurance Co.* v. *Industrial Accident Comm'n,* 306 U.S. 493 (1939) (whole case). See also *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, 426 (1957) ("It is true that the commands of the Full Faith and Credit Clause are not inexorable in the sense that exceptional circumstances may relieve a State from giving full faith and credit to the judgment of a sister State because 'obnoxious' to an overriding policy of its own.") (Frankfurter, J., dissenting); *Morris* v. *Jones,* 329 U.S. 545, 558 (1946) ("But the Full Faith and Credit Clause does not imply that a judgment validly procured in one State is automatically enforceable in another, quite regardless of the consequences of such enforcement upon that State's policy in matters peculiarly within its control.") (Frankfurter, J., dissenting); *Williams* v. *North Carolina I,* 317 U.S. 287, 296 (1942) ("Nor is there any authority which lends support to the view that the full faith and credit clause compels the courts of one state to subordinate the local policy of that state, as respects its domiciliaries, to the statutes of any other state.") ("We have recognized an area of

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Allstate Insurance Co. v. *Hague,*[53] the Court approved the application of a forum state's law in a case in which another state clearly had the greater weight of contacts with the parties and incidents giving rise to the legal issue. The Court held that the forum state could apply its own law so long as it had "significant contact or a significant aggregation of contacts" with the parties and the occurrence or transaction to which it is applying its law.[54] That doctrine is reflected in many other Supreme Court decisions dating back many decades.[55] Moreover, it is worth noting that even the state of Hawaii, where the same-sex marriage controversy is centered in both the state courts and the state legislature, has officially taken the position in the pending *Baehr* litigation about same-sex marriage that "it may reasonably be expected that, at a minimum, other jurisdictions will not recognize Hawaii same-sex marriages as valid * * *."[56] From this perspective, Section 2 states the obvious and some could very reasonably ask why it is even necessary.

In the case of a judicial decree, the question is closer under existing case law, because there are added considerations finality and judicial efficiency. In that situation, the strong interest of the second state in applying its own public policy would have to be shown, and the public policy of the second state against same-sex marriage would have to be very clear, and very deeply-held. For example, to continue the earlier hypothetical, suppose a same-sex couple from Utah flew to Hawaii, got married, got a declaratory judgment of the validity of their marriage (or possibly some judicial declaration of a legal entitlement based on the status of marriage), then returned to Utah (which by statute prohibits same-sex marriage and explicitly prohibits recognition of same-sex marriage even if legal where performed) and demanded that Utah recognize their marriage or that incident of their marriage. In my opinion the interest of Utah in not recognizing that evasive marriage that would flaunt and undermine a strong public policy of Utah (which strongly favors and protects heterosexual marriage exclusively) would be sufficient to justify Utah's refusal to recognize the same-sex marriage. The Full Faith and Credit Clause of the Constitution "does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447, 448. 'To give it the force of a judgment in another state, it must be made a judgment there.' *McElmoyle* v. *Cohen,* 13 Pet. 312, 325."[57]

The argument recently asserted that because S. 1740 is phrased in negative (non-recognition) instead of positive (recognition) language is specious. The "effect" of acts, records and judgments from the states, which the Constitution gives Congress the power to define, can be stated either way. For example, in *Thompson* v. *Thompson,*[58] the Court approved the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738 A ("PKPA"), another "effects" clause enactment. The PKPA defines three jurisdictional bases upon which custody decrees will be entitled to full faith and credit. That means that states are free not to recognize (or to recognize, as they choose) custody decrees founded on other bases of jurisdiction. The fact that the PKPA clearly has that "negative" dimension has not impaired its constitutionality in the least.

The Supreme Court has repeatedly indicated that Congress has the power not only to determine when acts, records and judgments from the states are to be given full faith and credit (positive) but also to determine when they are *not* to be given full faith and credit (negative). For example, in several cases the Court has had to determine whether certain state proceedings resolving discrimination claims must be given full faith and credit so as to preclude later federal court litigation of civil rights claims. Invariably, the Court earnestly tries to determine what effect Congress intended—whether full faith and credit must be given.[59] Often, it finds that

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flexibility in the application of the Clause to preserve and protect state policies in matters of vital public concern.") (Murphy, J., dissenting at 309).

[53] 449 U.S. 302 (1981).

[54] *Id.* at 308.

[55] See, e.g., *Carroll* v. *Lanza,* 349 U.S. 409, 413–14 (1955); *Richards* v. *United States,* 362 U.S. 1, 15 (1962); *Nevada* v. *Hall,* 440 U.S. 410 (1979); *Griffin* v. *McCoach,* 313 U.S. 498, 506 (1941); *Pacific Employers Insurance Co.* v. *Industrial Accident Commission,* 306 U.S. 493 (1939).

[56] *Baehr* v. *Lewin,* Civil No. 91–1394–05, "Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories," 8, 9 (Dec. 17, 1993).

[57] *Williams* v. *North Carolina (II),* 325 U.S. 226, 229 (1945).

[58] 484 U.S. 174 (1988).

[59] *Negative congressional intent (no required effect): Astoria Federal Savings & Loan Association* v. *Solimino,* 504 U.S. 104, 109–111 (1991) (implied congressional intent of no preclusion for ADEA actions); *University of Tennessee* v. *Elliott,* 478 U.S. 788, 795 (1986) (implied congressional intent of no preclusion for Title VII actions). See also *Chandler* v. *Roudebush,* 425 U.S. 840 (1976) (Congress' implied intent not to bar trial de novo on his Title VII claim); *Brown* v.

intent implied, and it applies that implied Congressional intent, whether positive (to command full faith and credit) or negative (no full faith and credit, no preclusion).[60] If the role of Congress in determining what "effect" state court proceedings are to be given is so important that the Supreme Court laboriously searches for and follows mere implied congressional intent, whether positive or negative, it stands to reason that Congress has the power to *expressly* declare that certain state acts, records and judgments will not have compulsory effect.

The critics' assertion that only positive legislation is permitted would reduce the Full Faith and Credit clause to a mere rhetorical rule that signifies nothing because any rule, including the marriage recognition rule of S. 1740, may be state either in positive or negative terms. For example, Congress might achieve essentially the same result by declaring that marriages between a man and a woman that are valid in the state where performed must be recognized in other states, or all marriages valid where performed must be recognized unless they violate the strong public policy of the other state.

Finally, S. 1740 does not interfere with the Supreme Court's responsibility and authority to interpret the Constitution. While Article IV gives Congress substantial authority to set the standard for full faith and credit, if Congress were to "cut back on the measure of faith and credit required by a decision of [the] Court" an unresolved question about constitutionality might arise.[61] But no Supreme Court decision has ruled that states must recognize (absolutely, in all cases, regardless of competing public policy interests) marriages created in other states. Indeed, the critics of DOMA contradict themselves here, for they assert that DOMA is unnecessary because states are not constitutionally required to recognize same-sex marriage if they violate strong public policy of the other states.[62] Section 2 of the Act merely codifies and clarifies the existing constitutional rule, it does not repeal or contradict it.

b. Congressional authority to enact section 3

The power of Congress to adopt legislation like Section 3 of S. 1740 is also clear (although there are some exceptions that could cause confusion if care is not taken to remember the very narrow scope and application of the provision). The principle of federalism has two dimensions. Just as it defines and protects the role of the states within the hybrid state-federal system, it also defines and protects the role of the federal government within the same hybrid system. The states cannot dictate to the federal government how it must regulate behavior, define terms, what standards it will use to grant or restrict benefits in federal programs, agencies and laws.

For example, Congress has established a taxation system that gives particular benefits to "married" couples, and it is federal law (incorporating some state law as a matter of federal choice) that defines what "married" means for purposes of the federal tax system.[63] This is true even though the direct regulation of marriage is clearly outside of the scope of federal authority. While states have the sole and exclusive authority to regulate domestic relations within the state, the federal government has the sole and exclusive authority to regulate the federal tax system.[64] When the federal government uses the term "marriage" or "married" in federal tax law, it is not creating marriage or domestic relations law; it is creating tax law. It may define the term "marriage" however it chooses (within other constitutional limits) for purposes of the tax law, in light of the policies and objectives underlying the federal tax system.

Likewise, in Bankruptcy law, it is well-established that "what constitutes alimony, maintenance, or support will be determined under the [federal] bankruptcy

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Felsen, 442 U.S. 127, 136 (1979). *Positive congressional intent (required preclusive effect): Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 (1982) (Title VII); *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984); *Allen* v. *McCurry*, 449 U.S. 90 (1980) (1983 claims). See also *Matsushita Electric Industrial Co., Ltd.*, 116 S.Ct. 873 (1996).

[60] See cases cited *id.*

[61] *Washington Gas Light Co.* v. *Thomas*, 448 U.S. 261, 272 n.18 (1980) (plurality opinion).

[62] See Laurence H. Tribe, "Toward a Less Perfect Union," N.Y. Times, May 26, 1996, at *; 42 Cong. Rec. S5931–01, 1996 3024425 (Cong. Rec.), June 6, 1996 (letter from Professor Tribe to Sen. Edward Kennedy).

[63] For example, persons who are married under state law but are legally separated are not treated as "married" for purposes of federal income tax law. I.R.C. §§ 71 (b), 7703(a)(2), (b). Likewise, a couple who consistently obtains a divorce at the end of the year to obtain "single" status for tax filing, but remarries early the following year, will be considered "married" (regardless, apparently, of state law). Rev. Rul. 76–255, 1976–2 C.B. 40.

[64] Congress and federal court often incorporate state domestic relations law definitions of family law terminology used in federal laws and programs, but they do so *as a matter of federal law*. The federal law-maker can change the definition when it wishes and depart from state law when it wishes.

laws, not state law."[65] For another example, federal immigration law give certain valuable priorities and benefits to persons who are married to American citizens. Congress, however, intended only to give those benefits to persons who have a bona fide lifetime commitment marriage, not people who get married temporarily just to get the immigration advantage. In some states, however, persons who get married solely to get an immigration advantage, who do not intend to live together as husband and wife, may have a valid marriage under local marriage law. If that state definition of "marriage" were imported into the federal immigration laws, it would undermine the policy of the federal law and thwart the design of the federal immigration system. Thus, Congress has deliberately defined in the immigration laws the kinds of marriages to which it gives immigration benefits and that definition is much more narrow than any of the states define marriage.[66] That is not an improper regulation of marriage by Congress, because it is not really the regulation of domestic relations at all. Rather, it is the regulation of federal immigration policy, which is clearly within the constitutionally-delegated authority of the federal government.

In a related field dealing with divorce, a few years ago questions arose concerning whether state courts could include certain federal retirement and disability benefits when dividing marital or community property upon divorce. Division of property incidental to divorce is another area of domestic relations long understood to be under primary control of the states. When state courts in California went ahead and included those federal benefits in the division of the community property, however, the Supreme Court of the United States reversed those judgments holding that the control and division of federal pensions and employment benefits was governed by federal law, and finding that Congress had not intended those benefits to be treated as divisible community property.[67] A short time later, Congress amended several of the relevant federal laws to provide that railroad and military benefits may be divided upon divorce as community or marital property, and went much further to reform what should be done with federal employment benefits when the federal employee is divorced or dies.[68] That legislation *further* underscored that the regulation of federal benefits is a matter of federal law, even when it uses family terms or is incorporated into state family property law and dissolution procedures.

These are just a few of hundreds of examples in which Congress or federal agencies use marriage and other domestic relations terms in federal law and the meaning of those terms is ultimately determined as a matter of federal law.[69] The question is what did Congress intend. This is not a novel principle, it is as old as our Republic; it is well-established, settled doctrine.[70] It is settled by the Supremacy Clause of the Constitution.

Conceptually, there is a profound difference between the power of states to define and regulate the status of marriage and the extent to which state benefits, burdens, programs, and privileges will be offered incidental to such status, and the power of Congress to define and regulate whether and to what extent some or any federal benefits, programs, and privileges will be available to individuals, to married couples, to other couples, and to other groups. Section 3 of S. 1740 reaffirms and protects this federalist distinction.

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[65] H.R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 5785, 6319, cited in *Harrell* v. *Harrell,* 754 F.2d 902 (11th Cir. 1985); see also *Williams* v. *Williams,* 703 F.2d 1055, 1056 (8th Cir. 1983) ("whether a particular debt is a support obligation or part of a property settlement is a question of federal bankruptcy law, not state law."); *Shaver* v. *Shaver,* 736 F.2D. 1314, 1316 (1984) (Bankruptcy courts look to Federal law, not state law to determine whether an obligation is actually in the nature of alimony, maintenance or support).

[66] See, e.g., 8 U.S.C. §§1151(b), 1153–1155, 1186(a)(1), (b) (1988); *Azizi* v. *Thornburgh,* 908 F.2d 1130 (2d Cir. 1990); 1 Lynn D. Wardle, Christopher L. Blakesley, Jacqueline Y. Parker, Contemporary Family Law, §2:30 (1988).

[67] See *Hisquidero* v. *Hisquidero,* 439 U.S. 572 (1979); *McCarty* v. *McCarty,* 453 U.S. 210 (1981); *Mansell* v. *Mansell,* 490 U.S. 581 (1989).

[68] See, e.g., 45 U.S.C. §231 (1986); 10 U.S.C. §1408 (1983 and Supp. 1995) see further 5 U.S.C. §8345(j) (1986); 22 U.S.C. §§4054, 4069 (1986); Brett R. Turner, "Equitable Distribution of Property," §6.06 (2d ed. 1994).

[69] See generally *Southern Pacific Transportation Co.* v. *United States,* 462 F.Supp. 1193, 1208 (1978) (state laws that directly conflict with the purposes of the Federal Regulatory program are inappropriate for adoption, and a court faced with conflicting state laws would adopt a Federal Rule); *Burnett* v. *Gratton,* 468 U.S. 42, 56 (1984) (the court is presented with this task because Congress has seen fit not to prescribe a specific statute of limitations to govern actions under most of the Federal Civil rights statutes, instead directing courts to apply state law if "not inconsistent" with Federal Law).

[70] This preemption principle is true in other areas of federal law as well. See, e.g., *Schneidewind* v. *ANR Pipeline Co.,* 485 U.S. 293, 310 (1988) (natural gas regulation).

If Congress were attempting to impose the definition of "marriage" upon the states, to make them use that definition in their marriage and domestic relations laws, a serious constitutional issue would arise. In such cases, federal law supersedes state family law only upon a strict showing of deliberate preemption. As the Supreme Court noted in *Hisquierdo* v. *Hisquierdo:* "On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted."[71] In *McCarty* v. *McCarty,* the Court reiterated that "'[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.' * * *."[72] Moreover, "[a] mere conflict in words is not sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition."[73] Justice Rehnquist noted in his dissent in *McCarty* that he could find only five instances in which that kind of preemption (forcing federal standards upon state law) had occurred in the history of community property disposition.[74] But this is not such a case. S. 1740 does not impose federal law onto state law, but seeks to prevent the imposition of one specific possible state law definition of marriage upon federal programs, laws, and agencies.

IV. DOMA EMBODIES WISE AND TOLERANT POLICY

S. 1740 embodies wise and tolerant public policy. There are compelling reasons why every state in this country, and every nation in the world,[75] preserves the legal status of marriage for committed heterosexual relationships. And there are compelling reasons why Congress should protect the authority of each state to choose for itself whether to recognize same-sex marriage.

The committed union of male and female to each other that we call marriage contributes to society (and to the individuals) many benefits that are unmatched by any other relationships, including committed same-sex relationships. In terms of providing the safest and most beneficial environment for the expression of sexual intimacy, the best context for procreation, the most protective and most beneficial social arrangement for child-rearing, the most valuable relationship for encouraging fatherhood and motherhood, the most promising for enhancing the status of women, the most secure family economic unit, the most stable and secure basis for forging intimate human interdependency, the best relationship for developing the unique complimentary strengths of cross-gender union, and for many, many other reasons proved and reproved over millenia of multi-cultured human experience the committed, formal union of a man and a woman in marriage is unequalled in its value and contribution to society. Same-sex unions are not the same and do not make the same contribution to society. As the California Supreme Court has observed:

> Spouses receive special consideration from the state, for marriage is a civil contract "of so solemn and binding a nature * * * that the consent of the parties alone will not constitute marriage * * * the consent of the state is also required" [Citation.] *Marriage is accorded this degree of dignity in recognition that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."* [cites omitted.]
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> Our emphasis on the state's interest in promoting the marriage relationship is not based on anachronistic notions of morality. The policy favoring marriage is "rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." (*Laws* v. *Griep* (Iowa 1983)) 332 N.W.2d 339, 341. Formally married couples are granted significant rights and bear important re-

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[71] 439 U.S. 572, 581 (1979) citing *Wetmore* v. *Markoe,* 196 U.S. 68, 77 (1904).
[72] 453 U.S. 210, (1981) citing *Hisquierdo,* 439 U.S. at 581.
[73] *McCarty,* 453 U.S. at ____ (citing *Hisquierdo,* 439 U.S., at 581–583).
[74] 453 U.S. at 237.
[75] Four nations, Denmark, Norway, Sweden, and Iceland recognize same-sex domestic partnerships, but the legislatures in those countries very deliberately and clearly chose not to extend the special status of "marriage" to homosexual unions. No nation recognizes same-sex marriage.

sponsibilities toward one another which are not shared by those who cohabit without marriage.[76]

DOMA protects the ability of states to protect and preserve this critical social institution against competing intimate relationships that offer society much less, and offer the nations' children much less than they need and deserve.

Tolerance and S. 1740

Some have argued that the states and Congress should recognize same-sex marriage to show that they are tolerant of nontraditional, particularly homosexual, relationships. However, there is an important difference between "tolerance" and "preference." The law provides at least three different and distinct legal categories for personal relations and actions: "prohibited relations and conduct," "permitted relationships and behavior," and "preferred relationships and conduct." The boundary line between the first and second category is "tolerance." The boundary line between the second category and third category (preferred acts and relations) is the line of "preference." Historically, homosexual relations have been consistently placed in the prohibited category. Recently, there has been an apparent trend to move homosexual behavior across the "tolerance" barrier, from the "prohibited" to the "permitted" category. Thus, some homosexual relations have been decriminalized in more than half of the states. But *tolerating* same-sex relationships is quite a different thing from giving them *preferred* legal status.

Marriage is one of the oldest and most firmly-established types of preferred, specially-protected relations. Thus, the gay/lesbian demand that homosexual couples be allowed to marry is a demand for special preferred status for homosexual relations. There is widespread opposition to giving homosexual relations any special, preferred status, even among many groups that are very sympathetic to gay and lesbian legal status. For example, President Clinton's support for gay and lesbian legal stature is well-known, yet he has stated that he does not support same-sex marriage.

DOMA does not violate Romer *v.* Evans

S. 1740 is easily distinguished from Colorado's Amendment Two that the Supreme Court recently held unconstitutional in *Romer* v. *Evans*.[77] First, the Colorado amendment classified and discriminated in law on the basis of "homosexual, lesbian or bisexual orientation," and not solely on the basis of conduct, behavior or relationship. How someone feels or thinks or believes, including one's feelings or beliefs regarding sexual attraction, interest, or orientation, is not a permissible basis for legal discrimination; to legally classify persons on the basis of their "orientation" status is constitutionally forbidden.[78] By contrast, DOMA does not discriminate on the basis of any "orientation" but it is conduct (marriage) and action (actual same-sex relationships) that are the permissible basis for distinguishing heterosexual marriage from same-sex unions. Second, Colorado Amendment Two did not merely deny legal preference to persons with homosexual orientation, but it denied them basic equal protections of the law. The Supreme Court held that the Colorado amendment did not merely "put[] gays and lesbians in the same position as all other persons,"[79] but it arguably stripped them from even basic civil rights protections. The "sweeping and comprehensive" Colorado rule singled out gays and lesbians, and no others, for special non-protection status,[80] forbade specific protection of any kind for gays and lesbians,[81] and could be construed to "deprive[] gays and lesbians even of protection of general laws,"[82] There is a tremendous and constitutionally significant difference between depriving persons of potentially all protection of the laws, as Colorado Amendment Two was construed to do, and preserving the basic unit of our society by refusing to extend preferred legal status to homosexual couples. DOMA simply

[76] 46 Cal.3d 267, 274–275, 758 P.2d 582, 586, 250 Cal.Rptr. 254, 258–259 (1988) (emphasis added). See also *Marvin* v. *Marvin*, 18 Cal.3d 660, 684, 134 Cal.Rptr. 815, 557 P.2d 106 (1976); *Norman* v. *Unemployment Ins. Appeals Bd.*, 620 Cal.3d 1, 9, 192 Cal.Rptr. 134, 663 P.2d 904 (1983) (endorsing strong public policy favoring marriage, while noting no similar policy favored nonmarital relationships); *Beaty* v. *Truck Insurance Exchange*, 6 Cal.App.4th 1455, 8 Cal.Rptr.2d 593 (Third Dist. Ct. App.1992); *Lewis* v. *Hughes Helicopter*, 220 Cal.Rptr. 615 (Ct. App. 1985), modified 253 Cal.Rptr. 426, 764 P.2d 278 (Cal. 1988). *Hendrix* v. *General Motors Corp.*, 193 Cal.Rptr. 922, Cal.App.3d 296 (1983); *Nieto* v. *City of Los Angeles*, 138 Cal.App.3d 464, 470–471, 188 Cal.Rptr. 31 (1982).

[77] 116 S.Ct. 1620 (1996).

[78] *Id.* at 1623.

[79] *Id.* at 1624.

[80] *Id.* at 1625.

[81] *Id.* 1626.

[82] *Id.*

protects the right of the states to protect the institution of marriage. Nothing in *Romer* suggests any disapproval of laws that protect marriage and the family.

In fact, the same day the Supreme Court announced the *Romer* decision, it also rendered another decision that underscored how important it is to protect each state's ability to decide important legal policy issues for itself without having other states impose their policies extraterritorially upon co-equal sovereign states. In *BMW of North America, Inc.* v. *Gore,*[83] decided the same day as *Evans* v. *Romer,* the Court discussed whether Alabama courts could impose punitive damages upon a defendant for doing something in other states that was legal in those states but illegal in Alabama.[84] Justice Stevens wrote for the Court that under the Constitution it is impermissible for one state to "impose its own policy choice on neighboring States. See *Bonaparte* v. *Tax Court,* 104 U.S. 592, 594, 26 L.Ed. 845 (1881) ('No State can legislate except with reference to its own jurisdiction. * * * Each State is independent of all the others in this particular')."[85] A state's power to impose its legal policy, upon other states, even in matters of commerce, is "constrained by the need to respect the interests of other States * * *."[86] The Court emphasize the need to follow *"these principles of state sovereignty and comity"* which forbid one state giving its laws and legal policy extraterritorial effect that *"infring[es] on the policy choices of other States,"* because the Constitution requires each state "[t]o avoid such encroachment."[87] If such protection of state sovereignty is required for mere state economic regulations, it is even more important that one state not legislate a radical redefinition of marriage and then impose it on the other states. Since the very day the Court decided *Romer* it also validated the core principle upon which S. 1740 is based—the importance of protecting state sovereignty in setting its own legal policies from lateral extraterritorialism of other state's contradictory laws—and for the other reasons noted above, I do not believe that DOMA is inconsistent with *Romer.*

Conclusion

Section 2 of S. 1740 takes a neutral position about interstate recognition of same-sex marriage. It does not require or prohibit any state to recognize or give effect to same-sex marriage, but it does prevent federal full faith and credit principles from forcing states to take one position or the other. It establishes clearly a "hands-off" federal position—that federal authority will not be manipulated to compel states to take either a pro- or contra-same-sex marriage position. Thus, it leaves the matter to each state, individually, to determine for itself. It is a modest and prudent approach. It is generally consistent with the history of interstate recognition of marriage on difficult issues, and harmonious with the federalism principle that federal power ought not override the authority of each state to establish its own law of domestic relations. It is fair. And it is timely.

Section 3 protects Congress' authority to control federal laws, programs and agencies. It prevents the imposition of same-sex marriage upon federal law without the approval of Congress. That, too, protects our federalism.

I believe that S. 1740 is clearly within the power of Congress to enact. There is a need to act. Congress has a responsibility to protect the states' right to decide for themselves whether to recognize same-sex marriage. Congress also has a duty to protect federal programs and agencies from efforts to import same-sex marriage into federal laws and programs that operate in all states. Thus, based on my review and analysis to date, I recommend that DOMA be fine-tuned, and enacted.[88]

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[83] 116 S.Ct. 1589, 64 USLW 4335 (May 20, 1996).

[84] BMW had repainted parts of a new car that had suffered some paint damage while being transported from Germany to the United States, and then sold the car as a new car in Alabama without disclosing that it had been partially repainted at a cost of $601.37. That was lawful in other states, but a recent Alabama case made it improper there. The plaintiff introduced evidence that that lowered the resale price of the car about 10 percent and the jury awarded the buyer $4,000 in compensatory damages (10 percent of the car's price). BMW had sold about 1,000 such repainted cars in the United States, including 14 cars in Alabama. The jury mathematically awarded $4,000,000 in punitive damages, reduced on appeal to $2,000,000. The Supreme Court reversed and remanded, 5–4, noting that the award was so grossly excessive as to violate due process, in part because the award appeared to be based on out-of-state conduct that was lawful where it occurred and had no impact in Alabama.

[85] 116 S.Ct. at 1596–97.

[86] *Id.* at 1597 (citing *Healy* v. *Beer Institute,* 491 U.S. 324, 335–336 (1989); *Edgar* v. *MITE Corp.,* 457 U.S. 624, 643 (1982).

[87] *Id.* at 1597–98 (emphasis added).

[88] I have previously made wordcrafting suggestions for this bill. See Written Statement of Prof. Lynn D. Wardle Concerning Protecting Federalism in Family Law before the Subcommittee on the Constitution of the Judiciary Committee of the House of Representatives (May 15, 1996).

The CHAIRMAN. Thank you, Professor Wardle.
Mr. Sunstein?

STATEMENT OF CASS R. SUNSTEIN

Mr. SUNSTEIN. Thank you, Mr. Chairman. It is a pleasure to be here.

I am going to be talking also about the constitutional issues, the question of congressional power. I won't say a word about the policy questions or the underlying issues about the nature or definition of marriage.

The first point to note about this legislation is that it is remarkably unprecedented. In the Nation's entire history, now well over 200 years, Congress has never passed legislation whose purpose and effect was to negate the application of one State's judgment in other States. Congress has legislated under the full faith and credit clause. This negating or nullifying power has never been exercised once.

This legislation risks two dangers. One is it may well be pointless, and if it is not pointless, it raises very serious constitutional problems. If it is pointless, it is because States have grappled with this problem for a long time. This is an old problem, not a new one. It is familiar. And States that have significant geographical connections with people don't have to recognize marriages among people when those marriages violate the public policy of the State. In cases involving incest, polygamy, adultery, and more, States have grappled successfully with this problem without national intervention.

This particular issue, the issue of same-sex marriages, falls in a class of cases with which the Federal system has dealt successfully without national legislation.

If the statute isn't pointless, it is very problematic from the constitutional point of view. There is good reason to think that the full faith and credit clause gives Congress broad power to extend the application of judgments in one State. There is good reason to think that Congress has not been given the power to negate judgments by one State insofar as they are applied in other States. If Congress does have the power to do this under the full faith and credit clause, there is a big problem under the equal protection component of the due process clause, as construed just a few weeks ago by the U.S. Supreme Court in *Romer* v. *Evans*.

If Congress does this—it seems like a limited measure just involving same-sex marriage—there could be very large future consequences in areas involving product liability, punitive damages, marriage and divorce, where there are interest groups all over the Nation who would be extremely thrilled to see the possibility that Congress can nullify the extraterritorial application of one State's judgments.

Let me just say a few words now by way of elaboration. On pointlessness, as I say, this is not a new problem. It is an old one. In areas involving marriages among minors, incestuous or bigamous marriages, States have dealt with this very successfully and very frequently. There are volumes and volumes of cases. They don't involve congressional legislation. When a marriage violates a State's policy and when the State has a geographical connection with the

parties, the State is not obliged to recognize the marriage. That is the tradition. It is extremely well-settled law. It is in both restatements of the "Conflicts of Law." It suggests the very serious possibility that this legislation has no purpose.

If it does have a purpose, it is problematic from the constitutional point of view. There has been no serious suggestion that this is OK under the commerce clause. It would be an exotic understanding of the commerce clause to say that marriage falls within that domain.

The full faith and credit clause does, as you say, Senator Hatch, have the word "effects" in it, and Congress does have power to prescribe the effect of a judgment, and that might seem textually to give Congress power here. But I think there are some reasons to think that that is more word play or a verbal trick than an accurate understanding of the Constitution. The full faith and credit clause above all has a unifying purpose, not a disunifying purpose. It is part of the move from the articles of Confederation to the Constitution. If you look at the purpose of the clause, it is not to allow nullification; it is to allow extension of judgments, not to negate them.

If you look at the history of the clause back when the Framers were writing—Madison and the others—they spoke about congressional extension and enforcement of judgments. They spoke not at all about congressional nullification of judgments. There is a big dog that didn't bark in the Framers' night, and that is the bark of nullification.

If history and purpose aren't conclusive, let's look just at Congress' practice for now well over 200 years. Congress has never once nullified the extraterritorial application of a State judgment. Congress has acted under the full faith and credit clause a fair bit. It has always been in the interest of extension. The consequences of nullifying rather than extension could be very extreme. Californian divorces, Idaho punitive damage judgments, Illinois products liability judgments—all of them would henceforth be up for grabs. That is why from the standpoint of federalism this is a very large as well as a very new bit of legislation.

If for the first time in the country Congress is going to act to nullify a judgment in its extraterritorial applications, there is a problem under the equal protection clause. The Court said just a few weeks ago that Congress may not enact measures that have the peculiar property of imposing a broad disability on a single group. This is an invalid form of legislation. If Congress hasn't legislated for polygamous, incestuous marriages or marriages among minors, then it has raised a question of discrimination.

In conclusion, this legislation has never been—nothing like it has ever been done. It is unprecedented. It may well be pointless. This problem has been handled by the States for well over 200 years. If it has a point, it risks unconstitutionality. From the standpoint of federalism and constitutional law, it is ill advised.

[The prepared statement of Mr. Sunstein follows:]

PREPARED STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN PROFESSOR OF JURISPRUDENCE, UNIVERSITY OF CHICAGO

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to speak to you today on S. 1740, the proposed Defense of Marriage Act. I will not address the issues of policy that are raised by S. 1740. Instead I will be speaking only to the constitutional issues, which are novel, complex, and somewhat technical.[1] Because of the novelty and complexity of the issues, any judgments on the constitutional issues must be at least a bit tentative.

To summarize my view: S. 1740 is unprecedented in our nation's history; it is probably either pointless or unconstitutional; and while the constitutional issues are far from simple, it is safe to say that S. 1740 is a constitutionally ill-advised intrusion into a problem handled at the state level.

S. 1740 responds to an old problem, not a new one, and that problem—diverse state laws about marriage has been settled for a long time without national intervention. Thus there is a reasonable view that S. 1740 is pointless; it adds nothing to current law. If S. 1740 is not pointless—if states must give full faith and credit to the relevant marriages—S. 1740 may well be unconstitutional. In the nation's history, Congress has never declared that marriages in one state may not be recognized in another; it has not done this for polygamous marriages, marriages among minors, incestuous marriages, or bigamous marriages. It is unclear if Congress has the authority to enact such a bill under the commerce clause, the full faith and credit clause, or any other source of national authority. In addition, S. 1740 raises serious issues under the equal protection component of the due process clause in the aftermath of the Supreme Court's recent decision in *Romer* v. *Evans*.

I. BACKGROUND: FEDERALISM AND RECOGNITION OF OUT-OF-STATE MARRIAGES

The impetus for S. 1740 is easy to understand. If one state—Hawaii—recognizes same-sex marriage, is there not a danger that other states, whatever their views, will be forced to accept same-sex marriages as well? Perhaps people will fly to Hawaii, get married there, and effectively "bind" the rest of the union to Hawaii's rules, forcing all states to recognize marriages that violate their policies and judgments. A national solution seems necessary if one state's unusual rules threaten to unsettle the practices of forty-nine other states.

This scenario is, however, unlikely, for the full faith and credit clause has never been understood to bind the states in this way. For over two hundred years, states have worked out issues of this kind on their own. It is entirely to be expected that in a union of fifty diverse states, different states will have different rules governing marriage. American law has carefully worked out practical strategies for ensuring sensible results in these circumstances, as each state consults its own "public policy," and its own connection to the people involved, in deciding what to do with a marriage entered into elsewhere. In short: States have not been bound to recognize marriages if (a) they have a significant relation with the relevant people and (b) the marriage at issue violates a strongly held local policy.

Thus, for example, the first Restatement of Conflicts says than a marriage is usually valid everywhere if it was valid in the state in which the marriage occurred. But section 132 lists a number of exceptions, in which the law of "the domicile of either party" will govern: polygamous marriages, incestuous marriage, marriage of persons of different races, and marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state. The Second Restatement of Conflicts, via section 283, taken a somewhat different approach. It says that the validity of a marriage will be determined by the state that "has the most significant relationship to the spouses and the marriage." It also provides that a marriage is valid everywhere if valid where contracted unless it violates the "strong public policy" of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage. Thus a state might refuse to recognize incestuous marriages, polygamous marriages, or marriage of minors below a certain age.

The two Restatements show that it is a longstanding practice for interested states to deny validity to marriages that violate their own public policy. Many cases have reflected a general view of this kind. See, e.g., *In re Vetas's Estate,* 170 P.2d 183 (1946); *Maurer* v. *Maurer,* 60 A.2d 440 (1948); *Bucea* v. *State,* 43 N.J. Super 815 (1957); *In re Takahashi's Estate,* 113 Mont.490 (1942); *In re Duncan's Death,* 83

[1] I focus throughout on section 2. I do not believe that section 3 would be found unconstitutional, though it would be possible to raise questions under the equal protection clause, see *Romer* v. *Evans,* infra; see also W. Eskridge, "The Case for Same-Sex Marriage," (1996); Kuppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 NYU L. Rev. 197 (1994).

Idaho 254 (1961); *In re Mortenson's Estate,* 83 Ariz. 87 (1957). There is no Supreme Court ruling to the effect that this view violates the full faith and credit clause.

All this suggests that S. 1740 would respond to an old and familiar problem that has heretofore been settled through long-settled principles at the state level and without federal intervention. If some states do recognize same-sex marriage, the problem would be handled in the same way that countless similar problems have been handled, via "public policy" judgments by states having significant relationships with the parties. Different "public policies" will produce different results. This is consistent with longstanding practices and with the essential constitutional logic of the federal system. The greater irony is that the Hawaii legislature has recently made clear that a marriage is available only between a man and a woman, and hence there is no current problem that S. 1740 would address. I conclude that S. 1740 is constitutionally ill-advised because it intrudes, without current cause, into a traditional domain of the states.

If this traditional view is correct, S. 1740 is also pointless; it gives states no authority that they lack. But a lurking question remains: Why, exactly, does the full faith and credit clause not require states to recognize marriages celebrated elsewhere? The Supreme Court has not offered an explanation. Perhaps the answer lies in the fact that a marriage is in the nature of a contract, and hence it is not a "public Act, Record, [or] judicial Proceeding" within the meaning of the Clause. Perhaps the answer lies in the longstanding view that a state with a clear connection with the parties and strong local policies need not defer to another state's law. In either case there is no reason to enact S. 1740. But if the full faith and credit clause is interpreted to require states to respect certain marriages, and if S. 1740 negates that requirement, S. 1740 raises serious constitutional doubts.

II. CONGRESSIONAL AUTHORITY

Whether S. 1740 would be struck down as unconstitutional raised novel and complex issues. My conclusion is that no simple view is plausible, and that in view of the fact that this sort of issue has always been handled at the state level, S. 1740 makes little constitutional sense.

(a) Full faith and credit

The purpose of the full faith and credit clause was *unifying*—the clause was designed to help create a "United States" in which states would not compete against one another through a system in which judgments could be made part of interstate rivalry. The clause's historic function is to ensure that states will treat one another as equals rather than as competitors. In this way, the full faith and credit clause is akin to the commerce clause, operating against protectionism, in which one state uses its power over its persons and territories to punish outsiders. See Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1 (1945).

For reasons just stated, the full faith and credit clause has not been understood to mean that each state must recognize marriages celebrated in other states. But does the full faith and credit clause authorize S. 1740 if it is understood to give states permission to ignore judgments by which they would otherwise be bound? This is not clear. An affirmative answer might be supported by the following language: "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof." Perhaps Congress can say that some Acts, Records and Proceedings are of "no effect." Perhaps Congress' power over "the effect thereof" means that Congress can decide which Acts, Records and Proceedings have "effect." The question, then, is whether Congress may not only prescribe the manner of proof and also implement the clause by requiring "effect" upon certain proofs (what we might call the accepted "affirmative" power), but also say that certain Acts, Records, and Proceedings may be *without* effect when, in the absence of legislation, they would have effect (what we might call the "negative" power). Does the negative power exist, and how might it be limited? (Even if it does, Congress would have no power here if a marriage is not an Act, Record, or judicial Proceeding. I put that point to one side.)

This is a complex and difficult question, and no Supreme Court decision gives a clear ruling. A detailed historical study of the grant of power to Congress seems to suggest that the grant was designed to ensure that Congress could implement the full faith and credit clause by *expanding* the reach of state rules and judgments. That is because the clause has above all a *unifying* power. See Cook, The Powers of Congress Under the Full Faith and Credit Clause, 28 Yale LJ 421 (1919). In this view, the clause may well authorize Congress (for example) to make state judgments directly enforceable in other states, compel states to recognize rights create by legis-

lative acts in other states, and indeed enact uniform legislation for enforcement of judgments throughout the United States. This is very broad (and emphatically unifying power; but it need not include the power to say that certain judgments and acts are of "no" effect.

What about Congress' own practice? Congress has used its power under the full faith and credit clause relatively rarely, and when it has done so it has attempted to ensure, not to undermine, the application of one state's law to other states. Thus 28 USC 1738 prescribes rules for authentication and implements the clause by repeating its basic mandate. Thus 28 USC 1789 contains the rules for authentication of nonjudicial records. Thus 28 USC 1738A—the closest analogy to S. 1740—ensures that full faith and credit will be given to child custody determinations. And thus 28 USC 1788B requires full faith and credit for child support orders. Hence a leading commentator refers to "the power of Congress, under the 'effect' clause of Article IV, section 1, of the Constitution, to increase the requirements of full faith and credit to sister state decrees beyond what the Constitution alone would require." R. Weintraub, Commentary on the Conflict of Laws, 278 (3d ed. 1986).

We may thus conclude, without controversy, that the central purpose of the authorization to Congress is to allow the national legislature to provide a uniform system of proof, to regularize relevant proceedings, and to mandate or require sister states to recognize judgments that might otherwise not be recognized. See Currie, Full Faith and Credit, Chiefly to Judgments. A Role for Congress, 1964 Supreme Court Review 89. Does the clause extend further than that? Might Congress have the power to authorize states to ignore judgments by which they would otherwise be bound?

There are two possible extensions. FIRST: We might say that the clause allows Congress to sort out problems of federalism by designing careful rules to ensure that judgments in one state do not bind other states when those other have the most fundamental connection with the controversy. Thus it might be said that in a child custody dispute, Congress is entitled to "soften" judge-made rules for recognition of external judgments by ensuring that states having the closest or principal connections with the parties are entitled to implement their own policies. This "federalism" interpretation would create a negative component to congressional power, but only for purposes of implementing the basic goals of federalism. The child custody statute, 28 USC 1738A, is consistent with this interpretation; so too with the child support statute, 28 USC 1738B. Both statutes have mild "negative" dimensions insofar as they prescribe the requirements for full faith and credit. Currie, supra, strongly supports this view.

SECOND: A further extension would be to say that Congress can single out those state acts and judgments of which it disapproves and give them no effect in other states. Does this power exist? It is certainly not clear. The full faith and credit clause is a federalism provision, with a certain identifiable aim: the creation of a smoothly functioning federal system. When that aim is not involved, it is reasonable to think that the clause does not allow Congress to undo the effect of state judgments by saying that they are of "no effect." Thus the best reading of the text may well be that it gives Congress power to help ensure recognition of sister-state judgments and help ensure the smooth functioning of a federal system, but emphatically not that it authorizes Congress to pick and choose among the judgments that states should be required to recognize. There is no historical evidence that this latter power was something that the framers thought to grant to Congress.

If the text is ambiguous, we might resolve the ambiguity by asking about the effects of the interpretation urged by proponents of S. 1740. Suppose that the full faith and credit clause does allow Congress to say which state Acts, Records and Proceedings shall be of "no effect." If this interpretation were adapted, a good deal of the entire federal system could be undone, and the full faith and credit clause would give the national government extraordinary authority. Under the proponents' interpretation, Congress could simply say that any law that Congress dislikes is of "no effect" in other states, and in that way Congress could essentially confine the reach of any disfavored law to the enacting state itself. Congress could greatly disrupt commercial relations. In the areas of bankruptcy, contract law, and much more, it could confine state law and state judgments to a state's own borders. This would be an extraordinary power in light of the needs of a commercial republic. Nothing in the background of the full faith and credit clause suggests that this was anyone's understanding of the clause.

How does this bear on the constitutionality of S. 1740? It suggests that under the "federalism" reading of Congress' negative power, Congress could enact a law ensuring that states with significant connections to the parties are not bound by marriages celebrated in other states. Congress could, in short, do something like what has been done the first and Second Restatements of Conflicts. (At least this is so

if we assume that the Restatements do not themselves violate the clause and if we assume that a marriage qualifies as an Act, Record, or judicial Proceeding.) But S. 1740 is far broader than that. If it is not pointless, it is therefore of doubtful constitutionality.

(b) Commerce clause

If the full faith and credit clause does not support S. 1740, might Congress have some other source of authority? The usual source of congressional authority to regulate private behavior is the commerce clause. The proponents of S. 1740 have not relied on the commerce power, and so it is doubtful that the power is really at issue here. In any case it appears at first glance that there is little connection between the commerce power and S. 1740. The underlying conduct is not economic or commercial in character. There is no requirement of any "nexus" between any private behavior and commerce. Moreover, family law and domestic relations are frequently invoked as the paradigmatic areas in which States have reserved power, and this may bear on the constitutional issue. See *United States* v. *Lopez,* 115 S Ct 1624 (1995) (Kennedy, J., concurring).

Perhaps it could be argued that if a state allows same-sex marriage, people will travel via interstate commerce to that state, thus affecting interstate commerce in a dramatic way. The argument is not implausible. See *Heart of Atlanta Motel* v. *United States,* 379 US 241 (1964). But if Congress wants to support S. 1740 on this ground, it should investigate the underlying factual issues and make factual findings to this effect. Even with such findings, it is not clear that S. 1740 would be constitutional under the decision in *United States* v. *Lopez,* 115 S Ct 1624 (1995), in which the Court said that Congress could not ban guns in a school zone. In that case too it was plausible to say that violence in schools affect judgments about whether to travel from state to state. Nonetheless, the Court held that the commerce power did not extend so far.

III. EQUAL PROTECTION AND ROMER V. EVANS

Let us suppose that S. 1740 is not pointless and that the full faith and credit clause or the commerce clause allows Congress to free the states from an obligation they would otherwise have under the full faith and credit clause. Even if this is so, S. 1740 is not clearly constitutional. It may violate the equal protection component of the due process clause, since this would be the first time in the nation's history that the Court has freed a state from such an obligation, and Congress' selectivity—not freeing states from such an obligation in cases of polygamy, bigamy, incest, marriage to minors—may be impermissible discrimination.

In its very recent decision in *Romer* v. *Evens,* 116 S. Ct. 1620 (1996) the Supreme Court, by a 6-to-3 vote, struck down a Colorado constitutional amendment that said that homosexuals could not be treated as a "protected class" for purposes of any claim of discrimination. The Court said that this law violated the equal protection clause because it was "irrational," that is, it was unsupported by anything other than "animus" directed against homosexuals as a group. The Court emphasized in particular the unprecedented character of the Colorado law. Thus the Court said that the amendment "has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and * * * invalid form of legislation." Id. at 1627. The Court said that it "is not within our constitutional tradition to enact laws of this sort." Id. at 1628. And the Court said that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id. Thus the Court said that if "the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare * * * desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 1628 (citation omitted).

Romer v. *Evans* leaves open many questions, and it is not at all clear that S. 1740 is unconstitutional under that decision. But there are many parallels. As far as I have been able to determine, S. 1740 is unprecedented; I have not been able to find any other national legislation saying that states are permitted not to recognize a marriage or similar arrangement as determined by the states at hand. Indeed, it appears that this is the first time in the nation's history that Congress has expressly said that a state is permitted not to recognize a judgment of another state.[2] Like the Colorado amendment at issue in *Romer,* S. 1740 is an oddity in our constitutional tradition. And like the Colorado amendment, S. 1740 is drawn explicitly in terms of sexual orientation. S. 1740 makes a distinction between same-sex mar-

[2] The child custody and child support statutes do allow some escape hatches, but their general thrust is to ensure greater recognition of other states' judgments.

riages and all other marriages; it says nothing about incestuous marriages, bigamous marriages, marriages among minors, or polygamous marriages. Nor has Congress ever enacted a measure involving those kinds of marriages. Insofar as it draws the particular line it does, it risks running afoul of *Romer's* prohibition on laws based on "animus" against homosexuals. This argument does not mean that same-sex marriages must be recognized (just as *Romer* does not mean that a state must forbid discrimination against homosexuals). It means that a "unique disability" imposed on homosexuals raises serious questions, and S. 1740 is a unique disability insofar as Congress has enacted no similar measure about any other kind of socially disapproved "marriage."

CONCLUSION

S. 1740 intrudes on an area traditionally handled at the state level, under principles akin to those stated in both Restatements of Conflicts. It might well be pointless. It would be an unprecedented exercise of congressional authority under the full faith and credit clause, and Congress may well lack power to negate full faith and credit in these circumstances. If S. 1740 is not pointless, and if it enables states to ignore judgments by which they would otherwise be bound, it is unclear if S. 1740 is supported by legislative power under the full faith and credit or commerce clause. Finally, the Supreme Court's recent decision in *Romer* v. *Evans* casts this legislation into doubt under the equal protection component of the due process clause. S. 1740 is an odd departure from longstanding congressional practice. It is constitutionally ill-advised.

The CHAIRMAN. Thank you, Professor Sunstein.

Ms. Henderson?

STATEMENT OF MITZI HENDERSON

Ms. HENDERSON. Thank you, Mr. Chairman and members of the committee, for giving me this opportunity to address you this morning about the Defense of Marriage Act. My name is Mitzi Henderson, and I am here as the president of the national family organization Parents, Families and Friends of Lesbians and Gays. We profoundly oppose this legislation.

I agree that this bill is mean-spirited. It targets a specific group of people, our sons and daughters, and sets up a debate that misrepresents a community that is already under attack.

The bill is unnecessary. It is an attempt at a solution to a problem that does not yet exist. My marriage does not need to be defended. My husband and I do not need your help to continue to cherish one another and to respect our vows of more than 40 years. What my family needs is a more tolerant America.

We can recognize our differences about the right to marry for gay and lesbian persons and still oppose this legislation because we share a common commitment to tolerance. It is tolerance that will improve the lives of Americans and strengthen American families.

All across this country, we Americans are on a journey to understanding. Families, religious communities, and leaders are beginning to end the silence about homosexuality. Many people are still misinformed or uninformed about homosexuality, and the result is that there is understandably a sense of unease, of discomfort, and even of fear.

I understand the confusion and fear. Before my son came out to me 18 years ago, I had no information to help me to think positively about his future life as a gay man. I struggled as a parent and as a religious woman. But I never gave up on my faith and I never gave up on my family.

Today I am an Elder in the Presbyterian Church and the proud mother of four children and the grandmother of seven. As a mother

and a grandmother, I appreciate the honest attempts to strengthen the American family. But let's not cheapen those concerns by pretending that this bill will help heterosexual families.

In fact, with this legislation, you will add another worry to my job as a parent, because I am forced to worry about my gay son in a way that I am not forced to worry about my other children. Let me give you one simple illustration.

A little over 2 years ago, our son, Jamie, fell desperately ill and lost consciousness. His partner rushed him to the hospital. But there was a problem. Although they had been a couple that we recognized as a couple for the past 9 years, Ray was unable to give permission for treatment. By Federal and State law, Jamie and Ray are no more than strangers to each other. In health care, every moment counts. If Ray were legally married to my son, time, precious time, would not have been lost, time in which my son's condition worsened.

Health care concerns are just one reason why we have the institution of civil marriage. In my lifetime, we may never agree on how we understand God's love or understand human nature. But I hope that right now at a minimum we can agree that we need to practice tolerance for all families. To do any less is to sanction a hate that erodes the very family values that we are seeking to protect.

I fear for my son—not only because of who he is but because I know the price that is exacted by intolerance. One of those prices is violence. In 1994, more than 4,000 people were physically assaulted in nine cities simply because they were gay or lesbian. I live with that fear.

Job discrimination. In all but nine States, my son can be fired from his job simply because he is gay. I live with that fear. I wish I could have taken you with me for the last 18 years as I have grown and learned.

I can give more to my church, to my country, to my husband than I ever thought possible because I have grown and understood.

I will not let stereotypes destroy my family, and I will not let stereotypes continue to threaten my son's future.

You who know and work with gay and lesbian persons also know that these stereotypes are false. Most of you know that gay and lesbian persons are your constituents, your staffers, your family, and your friends. It is this community, your colleagues, your families, and your friends whose lives you are now considering. The voters are looking to you in Congress to resolve serious problems with the budget, with health care, with welfare, with all the important issues that only you at the Federal level can deal with. So we come to you today with a simple message: Do not engage in politics that divide the American family. You cannot defend marriage by attacking our gay sons and lesbian daughters.

Thank you.

[The prepared statement of Ms. Henderson follows:]

PREPARED STATEMENT OF MITZI HENDERSON, NATIONAL PRESIDENT, PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS

Thank you Mr. Chairman and members of the committee for the opportunity to address you this morning about the "Defense of Marriage Act." My name is Mitzi Henderson and I am here as the President of the national family organization Par-

ents, Families and Friends of Lesbians and Gays. I profoundly oppose this legislation.

The bill is unnecessary: it is an attempt at a solution to a problem that does not exist.

The bill is meanspirited: it targets a group of people for discrimination, and sets up a debate that misrepresents a community already under attack.

We can recognize our differences about the right to marry for gay and lesbian Americans and still agree that this bill is unnecessary. I am asking you to vote against this bill because there is nothing to gain—and much to lose. We cannot now, at this juncture, give up on our commitment to tolerance. We cannot now give up on a shared commitment to improving the lives of Americans, and strengthening American families.

All across this country, Americans are on a journey. Families, religious communities, and leaders are ending our silence about homosexuality. Many people are misinformed, or uninformed about homosexuality and so we are left, ultimately, with the task of educating each other. On this journey there is understandably a sense of dis-ease, discomfort, and even fear.

I understand your confusion and fear. Before my son came out to me 18 years ago, I had no information that would help me to think positively about his future life as a gay man. I struggled as a parent, and as a religious woman.

But I never gave up on my faith, and I never gave up on my family. Today I am an Elder in the Presbyterian Church, the proud mother of four and grandmother of six.

My family is better for our journey together. But my family was almost destroyed because at one time we believed the stereotypes about gay and lesbian people.

It is a challenge to be a parent today. I appreciate honest attempts to strengthen the American family, but lets not cheapen the concerns of American families by pretending that passing a bill that does nothing will actually help a single family.

In fact, with this legislation, you will add another challenge to my job as a parent. My marriage does not need to be defended. My husband and I do not need your help to continue to cherish one another, and to respect our vows of more than forty years. What my family needs is a more tolerant America.

My husband and I are not unique. As parents, we all worry about our children. Those of you who are parents are even right now thinking—at least a little bit—about your own children. Are they safe? Are they happy? When will you next have the chance to see them? As parents, we do everything we can to make sure that they are as safe as they can be from the everyday trials and tribulations of life. But we can not protect them from everything.

As a parent of a gay son, I face particular challenges. I am forced to worry about my gay son in a way that I do not worry about my other children. Some parents have lost their child to suicide, or to gay bashing. My family faced a medical emergency, complicated by legal barriers.

On the afternoon of January 3, 1994, our son, James Henderson, felt ill and came home from his office early. By evening, when his partner of nine years, Ray, arrived home he found Jamie delirious from pain, unable to reach the phone. Ray immediately rushed Jamie to the hospital. But there was a problem. Although they heave been a couple for nine years, Ray is not legally related to Jamie, so he was left outside in the waiting room—unable to get information about Jamie's condition, and unable to give permission for treatment.

In those moments my son's condition worsened. Had Ray been legally married to my son, he could have immediately signed the papers to authorize a life-saving operation. While the hospital commiserated with his predicament, without legal papers they could not move forward.

We were fortunate on that particular day. My son eventually received the operation that saved his life but his experience in the hospital drove home to me the precarious nature of his family. The ban on same-gender marriages in this instance quickly became a life-threatening situation for my family.

Let us be clear: despite the fact that my family recognizes the relationship of Jamie and his partner, by federal and state law they are no more than strangers to each other.

And so I fear for Jamie—not because of who he is, but because I know the price of intolerance. In 1994 more than 4,000 people were physically assaulted in nine cities because they are gay or lesbian. I live with that fear. In all but nine states, my son can be fired from his job simply because he is gay. I live with that fear.

My concern is not just about the contents of this bill, but the quality of our debate. Your words reach far beyond this piece of legislation. Your actions reach beyond the laws you pass. We all know that gay and lesbian people cannot get married in any state in this country. The Hawaii Supreme Court is not near a final deci-

sion on the matter, and the other states do not need your permission to outlaw same-gender marriage. Fourteen states have already done so.

In my lifetime we may never agree on how we understand God's love or human nature. I think that right now, we can agree that at a minimum, we need to practice tolerance for all of our families and communities. To do any less is to sanction a hate that erodes the very family values you seek to protect.

I wish I could have taken you with me for the last eighteen years as I grew and learned. I wish you could see how my family is stronger for our journey. I can give more to my church, to my family, and to my country than I ever thought possible because I dared to grow. I would not let stereotypes destroy my family. I will not let stereotypes threaten my son's life.

You who know and work with gay and lesbian persons also know that the stereotypes are false. I suspect that most of you know that gay and lesbian people are your constituents, your staffers, your family and your friends.

It is this community—your colleagues, families, and friends—whose lives you are now considering. A poll will not tell you what is right or fair. But your conscience and your experience can tell you.

The voters look to you in Congress to resolve serious problems with the budget, health care, welfare and the important issues that only you can deal with.

We come to you today with a simple message: do not engage in politics that divide the American family. We all need to strengthen the American family and marriage is an institution that allows us to recognize and strengthen family ties. But you can not defend marriage by attacking my son.

I urge you to resist the easy vote, and choose instead to support all families by defeating this bill.

* * * * *

PFLAG—PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS

Parents, Families and Friends of Lesbians and Gays (PFLAG) promotes the health and well-being of gay, lesbian, and bisexual persons, their families, and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. PFLAG provides opportunity for dialogue about sexual orientation, and acts to create a society that is healthy, and respectful of human diversity. Founded in 1981, PFLAG is now organized in 410 communities in every state, with 60,000 household members.

Mitzi Henderson has been president of PFLAG since 1992. Mitzi became involved with PFLAG in 1984, and founded the San Jose, CA Chapter. She served as PFLAG Mid-Pacific Regional Director in 1991 and 1992, coordinating programming and organizational development for 27 PFLAG chapters. She chaired the Nominating Committee of the PFLAG Board in 1990, and was the Secretary of the Board 1989–1991.

Mitzi is an elder in the Presbyterian Church, where she has worked on committees at all levels of the church, including chairing the Presbyterian More Light-Churches Network. She has also been a member of the League of Women Voters since 1971, serving as Treasurer and Vice President of the South San Mateo County League.

Mitzi holds a political science degree from Wellesley College, and has been married for 40 years to Thomas J. Henderson, retired corporate construction executive and current President of Pacific School of Religion. She has four children and six grandchildren.

The CHAIRMAN. Thank you, Ms. Henderson.

We will end with you, Mr. Zwiebel.

STATEMENT OF DAVID ZWIEBEL

Mr. ZWIEBEL. Thank you very much, Mr. Chairman and distinguished members of this committee. It is a privilege for me to be here and present Agudath Israel of America's perspective on this legislation to you, and it is also a privilege for me to share the panel with so many distinguished copanelists who are here today and who have spoken so eloquently and forcefully for their viewpoints.

Agudath Israel is a national Orthodox Jewish movement, and certainly we have an enormous stake in a tolerant society. Our community has for years historically and even here in the United States our community has suffered because in many respects we stand out and we are different, and we do have an enormous stake, as I say, in a society that is tolerant and respects diversity.

The dilemma, though, as Senator Kennedy indicated in an earlier statement—and I think he is absolutely right—the dilemma here is that there are perspectives among members of this society, whether they be based on religious or moral viewpoints, that there are differences between different types of conduct; that there are certain types of conduct which are inherently entitled to greater moral deference than others.

There are many legal questions that this bill presents, and we have heard from two constitutional experts. Indeed, as Professor Sunstein correctly points out, legislation of this nature probably is unprecedented in the history of this Congress. At the same time, as Mr. Bauer points out, the issue that this legislation is designed to address is also unprecedented, probably in the history of civilized society. Never before to my knowledge in any society has there been formal recognition of marital relationships between members of the same gender. And so if the proposed resolution of this issue or the proposed way Congress might address this issue is unprecedented, it is because the issue is unprecedented.

Frankly, there are two messages and two important, I think, points that this legislation would make which cause us in particular to support it at this time. Number one is the question of society's attitude toward marriage and what marriage means in this society. It has become tragically clear in recent years that the decline of marriage has engendered enormous social costs, and more specifically—and this is critical—that the failure to view marriage as the cornerstone of family life has had a devastating impact on children.

I was a member of a body appointed by Congress and the President of the United States, the National Commission on Children, and when we delivered our report to the American people in 1992, we said this: When parents divorce or fail to marry, children are often the victims. Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents. They also suffer more emotional, behavioral, and intellectual problems. They are at greater risk of dropping out of school, alcohol and drug abuse, adolescent pregnancy, childbearing, juvenile delinquency, mental illness and suicide.

It is an urgent objective of this Nation's public policy to strengthen the institution of marriage, but to do so in a manner that promotes a sense of responsibility to children. The historical genius of marriage is that it constitutes not only the legal union of man and woman, but that it furnishes the foundation of family. Sadly, we sometimes lose sight of that reality.

Legalizing same-sex marriages, which, by biological definition, can never have anything to do with procreation, would obscure further still the vital link between marriage and children. It would convey the message that childbearing and child-rearing are matters

entirely distinct from marriage. The message is subtle, but it is devastating.

There is one final point that I would make on this issue, and that concerns the attitude of society toward homosexuality, the practice of homosexuality. Again, I hesitate to say this because I don't mean to come across as intolerant, but I am a believer, as are millions of Americans, and we take Leviticus seriously. As many scholars have noted, when Government passes laws, the laws by which a society chooses to govern itself have, among other things, an educative function. When society confers its blessings upon same-sex unions by according them the legal status of marriage, that would convey an unmistakable imprimatur of social acceptability and legitimacy of the practice of homosexuality.

For better or for worse, millions of Americans reject the notion that homosexual conduct is merely an alternative life-style, no more objectionable, no less acceptable than the traditional heterosexual life-style. These Americans, pursuant to their faith, try to raise their children with those beliefs. Extending legal protection to same-sex unions is Government's way of telling those children that their parents are wrong, that their priests, ministers, rabbis are wrong, that civilized societies throughout the millennia have been wrong. Respectfully, Government has no business conveying that message.

Thank you very much.

[The prepared statement of Mr. Zwiebel follows:]

PREPARED STATEMENT OF DAVID ZWIEBEL, GENERAL COUNSEL AND DIRECTOR OF GOVERNMENT AFFAIRS, AGUDATH ISRAEL OF AMERICA

Honorable Members of the Senate Judiciary Committee:

I am David Zwiebel, general counsel and director of government affairs for Agudath Israel of America, a national Orthodox Jewish movement. Agudath Israel supports S. 1740; and I am grateful to you, Mr. Chairman, for inviting me here today to share our views with the members of this distinguished committee.

In the interest of full disclosure, I should mention right up front that Agudath Israel's perspective on homosexual conduct is informed by the biblical description of such conduct as *"to'eivah"*—an abomination. *(Leviticus 20:13.)* Our perspective on civil recognition of same-sex marriage is further informed by the talmudic dictum that the nations of the world have always faithfully adhered to three basic commitments they made to G-d, one of them being *"she'ein kosvin kesuba le'zecharim"*—that they do not recognize any formal marital relationship between males. *(Hulin 92.)* For those who would exclude religious groups from the arena of public policy debate on issues where their views are shaped by religious teachings, please be advised that for Agudath Israel and its constituency, this is one such issue—as it is, no doubt, for millions of Americans of all faiths.

Happily, though, our nation in recent years has come increasingly to the recognition that religiously-grounded viewpoints do have a place at the public policy table; that constitutionally mandated neutrality toward religion does not require hostility or indifference toward religious values; that our national dialogue on issues of profound social and moral import would be immeasurably impoverished were our churches, mosques and synagogues frozen out of the discussion. *Leviticus* is not irrelevant.

Neither is history. Marriage has existed since time immemorial, and it has always meant the sanctioned union of man and woman. Proponents of same-sex marriages seek to change not only statutory law, but also the very nature of a social institution that throughout the millennia has proven its worth as an agent of social stability and historical continuity. The title of the bill before you today, the "Defense of Marriage Act", may be dramatic—but it is apt.

The bill has two substantive components. Let me review each one briefly.

SECTION 2

Section 2 of S. 1740 would allow states not to "give effect to any public act, record, or judicial proceeding" of any sister jurisdiction concerning "a relationship between persons of the same sex that is treated as a marriage" by the sister jurisdiction.

This provision is designed to address a threat that looms on the immediate horizon. In *Baehr* v. *Lewin,* 852 P.2d 44 (1993), the Supreme Court of Hawaii ruled that the denial of marriage licenses to same-sex couples implicated the Hawaii state constitution's mandate that "[n]o person * * * be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of * * * sex". The court further ruled that such denial may be justified only if Hawaii can demonstrate that its anti-same-sex-marriage policy advances compelling state interests and is narrowly drawn to serve those interests. The case was remanded to the lower court for a determination on the issue of compelling state interest, and the trial of that issue is scheduled to begin shortly. Many legal observers anticipate that the eventual outcome of *Baehr* will be that same-sex marriages will be recognized in Hawaii. If so, the possibility looms large that same-sex couples from across the United States will journey to Hawaii to solemnize their "marital vows"; validate their marriage through a formal Hawaii state Proceeding; and then call upon their states of domicile to accord "full faith and credit" to the Hawaii proceeding.

To use the constitutional doctrine of full faith and credit to allow the courts of Hawaii, interpreting their own state constitution, effectively to determine that the 49 other states must also recognize the validity of same-sex marriages, would be to provoke a constitutional crisis of considerable magnitude. Section 2 is designed to head off such a crisis by allowing each state to decide the matter on its own.

It is often said, correctly, that the judiciary plays a vital role in protecting the minority against the tyranny of the majority. But tyranny is by no means within the exclusive domain of the majority. An empowered minority is capable of tyranny as well—as when, for example, a court radically redefines the institution of marriage by interpreting its state constitution in a manner that is at variance with the intent of the democratically elected representatives of the people, without the benefit of public debate, without the input of public hearings, without the legitimacy of public support. The tyranny of the minority is compounded 49 times over, however, if the powerful engine of the full faith and credit doctrine is then employed to convert one state court's radicalism into the de facto law of the entire land.

Section 2 is thus a particularly appropriate exercise of Congress' constitutional authority, pursuant to Article IV, Section I, to "prescribe * * * the Effect" of one state's legal judgments on the others. *See generally* Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law,* 92 Colum. L. Rev. 249, 301 (1992).

SECTION 3

As noted, section 2 of the bill takes no substantive position on the validity of same-sex marriages; it allows each state to decide for itself whether to recognize such marriages that have been performed with legal sanction in other states. Section 3, in contrast, takes an affirmative stance. It declares that for purposes of federal law, notwithstanding what any individual state—or for that matter, all the states—may choose to do, the terms "marriage" and "spouse" shall not encompass same-sex unions.

The need for this legislation is manifest. The general presumption is that "federal courts should look to state law in defining terms describing familial relations." *Spearman* v. *Spearman,* 482 F.2d 1203, 1204 (5th Cir. 1973). If, therefore, Hawaii or any other state accords recognition to same-sex marriages, a federal court might well conclude that the various benefits federal law assigns to married couples must be made available to the same-sex couples whose "marriages" have been validated pursuant to state law. Section 3 would preclude this result by clarifying that the intent of federal law is *not* to yield to any state definition of marriage that encompasses same-sex unions.

Congress' authority to issue this definitional clarification is a simple matter of federalism. It is the federal lawmaking body, not the state courts or legislatures, that has the power to decide the meaning of terms used in federal law. Section 3 is thus an unassailable expression of congressional authority in our federal system.

THE SOCIAL IMPORTANCE OF THIS LEGISLATION

The movement to confer the status of "marriage" upon same-sex unions is, in Agudath Israel's view, an extremely dangerous one for American society. I will focus on the two aspects of this movement that we believe should be cause for particular concern.

First, there is the question of society's attitude toward the institution of marriage itself. It has become manifestly and tragically clear in recent years that the decline of marriage has engendered enormous social costs—and, more specifically, that failure to view marriage as the cornerstone of family life has had devastating impact on children. In its 1992 report to the nation, *Beyond Rhetoric: A New American Agenda for Children and Families,* the National Commission on Children noted (at page 253) as follows:

> When parents divorce or fail to marry, children are often the victims. Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents. They also suffer more emotional, behavioral, and intellectual problems. They are at greater risk of dropping out of school, alcohol and drug use, adolescent pregnancy and childbearing, juvenile delinquency, mental illness, and suicide.

It is, or ought to be, an urgent objective of public policy not only to strengthen the institution of marriage, but to do so in a manner that promotes a sense of responsibility to children. The historical genius of marriage is not merely that it constitutes the legal union of man and woman, but that it furnishes the foundation of family. Sadly, we sometimes lose sight of that reality.

Legalizing same-sex marriages—which, by biological definition, can never have anything to do with procreation—would obscure further still the vital link between marriage and children. It would convey the message that childbearing, and childrearing, are matters entirely distinct from marriage. The message is subtle, but devastating.

Second, there is the question of society's attitude toward homosexuality. As many jurisprudential scholars have noted, and as many parents and teachers instinctively recognize, government is not a neutral actor in the field of moral values; the laws by which a society chooses to govern itself have (among other things) an educational function. Conferring society's blessing upon same-sex unions by according them the legal and social status of "marriage," as Hawaii appears about to do, would convey an unmistakable imprimatur of acceptability and legitimacy upon the practice of homosexuality.

Which brings us full circle. For better or for worse, millions of Americans, of all faiths, reject the notion that homosexual conduct is merely an "alternative lifestyle," no more objectionable and no less acceptable than the traditional heterosexual lifestyle. These Americans strive hard to raise their children to recognize that not all expressions of sexuality are morally equivalent. Extending legal recognition to same-sex unions is government's way of telling those children that their parents are wrong, that their priests, ministers and rabbis are wrong, that civilized societies throughout the millennia have been wrong. We respectfully submit that government has no business conveying that message.

Agudath Israel accordingly supports the Defense of Marriage Act. Thank you very much for your consideration of our views.

The CHAIRMAN. Thank you. I think this has been an excellent hearing. Each of you has presented a point of view that is very important to this committee.

I will put into the record at this point an editorial by Prof. Larry Tribe, Laurence Tribe, of the Harvard Law School, and a letter in response written by Prof. Michael McConnell of the University of Chicago Law School, without objection.

[The editorial of Mr. Tribe and a letter from Mr. McConnell follow:]

TOWARD A LESS PERFECT UNION

[By Laurence H. Tribe; Laurence H. Tribe is a professor of constitutional law at Harvard Law School.]

CAMBRIDGE, MA.—There is more than a little irony in the so-called Defense of Marriage Act, the proposed Federal law that would allow states to deny recognition to same-sex marriages that might be accorded full legal status in other states.

It is ironic, first, that such a measure should be defended in the name of states' rights. Our Constitution's principal means of protecting state sovereignty is to limit

the national Government to certain enumerated powers—but these powers do not include any authority to invite some states to disregard the official acts of others.

And it is ironic, second, that the first such invitation ever extended by Congress should deal with marital union. The Constitution's principal device for assuring a "more perfect union" is the Full Faith and Credit Clause, which requires that each state must fully credit "the public acts, records, and judicial proceedings of every other state." More than half a century ago, the Supreme Court described the clause as "a nationally unifying force" that transformed the individual states from "independent foreign sovereignties, each free to ignore rights and obligations" created by the others, into integral parts "of a single nation, in which rights * * * established in any [state] are given nationwide application."

The Defense of Marriage Act aims to counter the possibility that Hawaii's courts will legalize same-sex marriages, prompting gay couples to flock to the islands to be wed and return to their home states to claim the benefits of civil marriage. Defenders of this novel statute are fond of quoting the 10th Amendment: "The powers not delegated to the United States by the Constitution * * * are reserved to the states respectively, or to the people."

But that very principle condemns the proposed statute, for the Constitution delegates to the United States no power to create categorical exceptions to the Full Faith and Credit Clause. To be sure, the clause does empower Congress to enact "general laws" to "prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." But that is a far cry from power to decree that official state acts offensive to a majority in Congress need not even be recognized by states that happen to share Congress' view.

Some claim that a law inviting states to give no effect to certain acts of other states is a general law prescribing the "effect" of such acts. But that is a play on words, not a legal argument. The Full Faith and Credit Clause cannot be read as a fount of authority for Congress to set asunder the states that this clause so solemnly brought together.

Such a reading would mean, for example, that Congress could decree that any state was free to disregard any Hawaii marriage, any California divorce, any Kansas default judgment, any punitive damage award against a lawyer—or any of a potentially endless list of official acts that a Congressional majority might wish to denigrate. This would convert the Constitution's most vital unifying clause into a license for balkanization and disunity.

Defenders of the proposed law cite judicial decisions allowing one state to decline to enforce certain determinations of another on "public policy" grounds—marriages entered in one state, for example, to evade the bigamy laws of the state where the partners live. But states need no Congressional license to deny effect to whatever marriages (or other matters) may fall within this category. They can do so on their own.

The only authority the proposed statute could possibly add to the discretion states already possess would be authority to treat a sister state's binding acts as though they were the acts of a foreign nation—authority that Congress has no constitutional power to confer.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, IL, July 10, 1996.

The Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am writing in response to arguments that the proposed Defense of Marriage Act is beyond the powers of Congress under the Full Faith and Credit Clause, including an essay published by Professor Laurence Tribe in the New York Times on May 26, 1996. These arguments are, I believe, baseless.

The Full Faith and Credit Clause was intended by its framers to solidify the Union by requiring each state to respect the laws and legal judgments of sister States. But the Clause has never been understood to impose an absolute obligation; nor could it, given the nature of the subject matter. When two states have inconsistent laws on the same subject, it would literally be impossible for the each to be given effect throughout the country. This would defy the logical principle of noncontradiction. Rather, the Clause was written against the backdrop of choice-of-law principles, including those related to the enforcement of judgments. The effect of the Clause was to subject these principles to federal constitutional review, until and unless Congress has spoken on the subject, and to federal statutory law if Con-

gress so chooses, (Note the use of the permissive verb "may" in the last sentence of the provision.)

The prospect that one state may recognize same-sex unions as "marriages" raises precisely the kind of issue that is properly addressed by Congress under this Clause. Under our Constitution, marriage law is a question left to state law. No state has ever treated same-sex unions as marriages (indeed, no legal jurisdiction in the world has done so). Yet if the State of Hawaii performs marriages of persons of the same sex, these marriages might well be deemed public "Records," and declaratory judgments or other legal proceedings in Hawaii recognizing the validity of any such marriages would almost surely be "Judicial Proceedings," within the meaning of the Full Faith and Credit Clause. It is therefore not unlikely that other states would be compelled to recognize these unions as marriages within their own boundaries. Couples could journey to Hawaii, engage in a marriage ceremony under Hawaii law, and on return to their home states be entitled to legal treatment as a married couple, notwithstanding limitations of marriage in their own home state to persons of the opposite sex. Indeed, one of the briefs in the Hawaii case urges recognition of same-sex marriage precisely because of the bounteous tourist trade this would create.

I stress that while this scenario is not unlikely, it also is not certain. It is possible that states with laws against same-sex unions will be able to resist recognition of these marriages under the so-called "public policy" exception. (The answer to this probably hinges on whether marriages are embodied in a legal judgment, or not.) It is also possible that Hawaii will place reasonable domiciliary restrictions on the availability of same-sex marriage. The difficulty, however, is that these issues would not be resolved for many years, and if they are resolved adversely to the interests of the other states, it would likely be too late for Congress to act. The purpose of the proposed act, therefore, is to ensure that each state continues to be able to decide for itself whether to recognize same-sex marriage—to ensure that one state is not able to decide this question, as a practical matter, for the entire nation.

For those who believe in a prudent approach to social change, based on experience rather than abstract theorizing, the proposed statute has the advantage of allowing this rather dramatic departure from past practice to be tested before it is imposed everywhere. While powerful arguments have been made in support of same-sex marriage, the arguments on the other side are not inconsequential. Same-sex marriage has never been tried, and the effects on family, on children, on adoption, on divorce, on adultery rates, and on social mores in general are very difficult to predict. Whatever one's view on the merits of the social question, the advantages of using the "laboratories of democracy" provided by our decentralized, 50-state system, to test the results, before moving to a new national definition of marriage, should he apparent. Yet, if Congress does not act, there is a serious prospect that the Hawaiian definition of marriage will prevail throughout the nation, by virtue of application of the Full Faith and Credit Clause.

There is little doubt that Congress has authority to intervene. The Full Faith and Credit Clause explicitly empowers Congress to "prescribe * * * the Effect" that the "public Acts, Records, and Judicial Proceedings" of one state shall have in other states. Congress has rarely exercised this authority, and accordingly there is little precedent (either in the form of legislative interpretations or of judicial decisions) to illuminate it. But there is no reason to doubt that the Clause means precisely what it says: that Congress has plenary power to prescribe what effect the laws of one state will have on another.

The only express limitation on the power of Congress under the Effects Clause is that it must act by "general law." This means that it may not legislate with reference to particular cases. It could not, for example, pass a law specifying that Mr. John Doe's divorce must (or must not) be recognized throughout the Union. Congress should not judge individual cases. The "general law" limitation may also mean that the law must apply to all states. (The term "general" was typically used at the time in contradistinction to "local.") But the proposed Defense of Marriage Act is "general" in every sense of the word. It gives all states the power to enforce their own laws with respect to same-sex marriage.

I have heard it suggested that Congress' power is limited to effectuating or enforcing the acts, records, and judicial proceedings of the states, and that the Defense of Marriage Act does not fall within this category because it denies any effect to certain such acts. This interpretation has no support in the language, purpose, or history of the Clause. To "prescribe the effect" of something is to determine what effect it will have. In the absence of powerful evidence to the contrary, the natural meaning of these words is that Congress can prescribe that a particular class of acts will have no effect at all, or that their effect will be confined to their state of origin.

In this respect, it is useful to contrast the language of Section Five of the Fourteenth Amendment, which empowers Congress to "enforce, by appropriate legisla-

tion, the provisions of this article," or with Article I, §8, cl. 18, which empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." These provisions are, indeed, limited to statutes that would effectuate their respective purposes. But the Full Faith and Credit Clause is not worded that way. It does not give Congress power to make laws necessary and proper for the "enforcement" of state laws in other states, or for carrying those laws into "execution." Instead, Congress is given full power to "prescribe" their "effect."

There is good reason for this difference. The Full Faith and Credit Clause deals with the problem of inconsistencies in state laws. As noted above, not all state laws can be enforced everywhere, if the laws are in conflict. If Hawaii's law recognizing same-sex marriage is enforced in other states, the laws of those states will he stripped of their efficacy. The field called "choice of law" was developed to deal with these conflicts, and the Full Faith and Credit Clause empowers Congress as the ultimate umpire. But in exercising this power, it necessarily will be the case that Congress gives effect to some state laws and denies effect to others. Thus, an interpretation of the Clause that insists that Congress only has power to "give effect" to state laws and not to "deny effect" is logically impossible. The Defense of Marriage Act may "deny effect" to Hawaiian law under certain circumstances; but by the same token it "gives effect" to the law of the state in which the controversy takes place. The opposite result would "give effect" to Hawaiian law only by "denying effect" to the law of the place in which the conflict takes place.

Until this politically contentious context arose, no scholar studying the meaning of the Full Faith and Credit Clause had ever suggested that Congress' power to prescribe the effect of state laws was impliedly limited in this way. Edward C. Corwin, for example, wrote:

> Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union, and that no other kind shall. Or, to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of State legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

Edward S. Corwin, "The Constitution and What It Means Today," 255 (14th ed.). If Congress can "describe a certain type of divorce and say that it shall be granted recognition throughout the Union" it presumably may describe a certain type of marriage and say the same. See also Walter Wheeler Cook, "The Powers of Congress Under the Full Faith and Credit Clause," 28 Yale L.J. 421 (1919) (surveying history of the Full Faith and Credit Clause and concluding that it gives Congress full power to determine "the legal effects or consequences in other states of the 'public acts, records and judicial proceedings' of a state," including legislation as well as adjudications); Douglas Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law," 92 Colum. L. Rev. 249, 331 (1992) ("It is common ground that Congress can designate the authoritative state law under the Effects Clause, specifying which state's law gets any effect in that class of cases.") The proposed Act simply specifies that each state may give effect to its own law in this class of cases.

The argument that the proposed statute would violate the Equal Protection Clause requires little comment. As held in the recent case of *Romer* v. *Evans,* 116 S. Ct. 1620, 1627 (1996), laws that disadvantage individuals on the basis of sexual orientation will be upheld so long as they bear "a rational relation to some legitimate end." The provision struck down in *Romer,* the Court held, was not "directed to any identifiable legitimate purpose or discrete objective." *Id.* at 1629. By contrast, it is surely a legitimate legislative purpose to ensure that each state is able to make and enforce its own criteria for recognition of marriage.

Moving beyond the constitutional question, however, I question whether Congress really intends some of the results that could obtain under the proposed Act. For example, if a same-sex couple resident in Hawaii were involved in an automobile accident in Michigan, does it make any sense to treat them as "unmarried" for purposes of tort and insurance law? One way to handle this problem would be to declare that the legal right of two persons to be married to one another is determined by the state of common domicile from time to time, or if there is no common domicile, the state where the relationship is centered. This would leave in place ordinary choice of law rules for cases in which domiciliaries of one state were temporarily present in another state. That would be in keeping with longstanding principles regarding

the legal status of "sojourners"—principles that have been honored in the past even in the face of such divisive subjects as slavery.

Please be aware that I write as an individual, and not representing the views of the University of Chicago or of any other group or institution.

Very truly yours,

(Signed) Michael W. McConnell

(Typed) MICHAEL W. MCCONNELL,
William B. Graham Professor.

The CHAIRMAN. Mr. Bauer, let me start with you. How serious are the practical problems created by the Hawaiian Supreme Court's 1993 decision in *Baehr* v. *Lewin*?

Mr. BAUER. Well, it is very serious, Mr. Chairman. There is no State in the Union where any data can be found that shows public support for permitting same-sex marriages.

Senator Feinstein, in your State of California, the latest poll out just this week shows about 59 percent of Californians oppose same-sex marriage.

And yet if Hawaii acts, every State will find itself in the need of doing some affirmative action to prevent the State from having to recognize what these judges in Hawaii have done.

In a number of States where there has been an attempt to reflect the wishes of the population of that State, the bills have been bogged down with all kinds of delaying tactics, and there has been no vote in the legislatures this year. We just feel strongly that 49 other States should not be forced in a corner to have to affirmatively act in order to prevent being forced to embrace something that their populations overwhelmingly reject.

The CHAIRMAN. Thank you.

Mr. Zwiebel, the term and concept of marriage is not an invention of American culture, as you have said. Is it correct to say that our heritage defines a "marriage" as requiring a union of persons of opposite sexes?

Mr. ZWIEBEL. I believe it does. Again, as I noted and as Mr. Bauer noted, I believe that there has yet to exist a society in the history of the civilized world that has embraced a formal relationship. There has always been homosexuality, and there have been some societies that have been distinguished—I put the phrase within quotes—by homosexual practices that were fairly prevalent in those societies. But at the same time, never ever has any society attempted to translate those types of relationships into the formal legal recognition that marriage would imply. And so when we speak about a word as hallowed—and I use that phrase very, very decidedly—as hallowed as marriage, there is a tradition and history does have something to teach us about what that word means and what it ought to mean.

As I said earlier, there are sound reasons for that, because marriage is more than simply the union or the companionship of two people. It is the foundation of family.

The CHAIRMAN. Thank you.

Professor Wardle, Professor Sunstein in his testimony said that the Defense of Marriage Act, as I interpreted his testimony, may be unconstitutional. Has the Supreme Court ever held a law exercising Congress' power under the full faith and credit clause to be unconstitutional?

Mr. WARDLE. Not to my knowledge, Chairman Hatch. In fact, I believe the Supreme Court has repeatedly indicated that Congress has power to exercise, to legislate in this field, very broad power. I think the text is very broad.

I would respectfully disagree with my distinguished colleague's characterization. Mr. Sunstein described this as a bill that negates full faith and credit. I think that mischaracterizes, in fact, what the bill does. The bill is a neutral position, not a negating position. It says States—does not force States to refuse to recognize. It says, and only, that States are free to choose for themselves. It is a neutral position. They may recognize. It just says that Federal full faith and credit law cannot be used to force States to recognize same-sex marriage.

The CHAIRMAN. Professor Wardle, some critics of the Defense of Marriage Act say that Congress lacks power under the Constitution to legislate in this area. These critics say that under the tenth amendment only States have power to regulate marriage.

Does that criticism have any merit, in your view? Are there other instances where the Congress is engaged in what I would call lateral federalism?

Mr. WARDLE. Well, I don't believe that Congress has the authority to directly regulate marriage and domestic relations. I think that point is well taken. It is simply misplaced. That doesn't apply to this bill.

In fact, with regard to what you would call the lateral federalism, yes, Congress has acted. Section 1738(a) of the Parental Kidnapping Prevention Act is a full faith and credit measure that deals directly with child custody, a primary domestic relations issue. Likewise, section 1738(b) dealing with child support, again, full faith and credit, Congress' appropriate power. But it deals with the subject of domestic relations.

The CHAIRMAN. My time is up.

Senator Kennedy?

Senator KENNEDY. Thank you.

Ms. Henderson, I want to just thank you for being here and describing the reality of your family situation. I think all of us understand that it is never easy to talk about some of the challenges that families are facing. We all have a sense of wrapping ourselves around our families, whether there are health problems or other kinds of needs. So I must say we all thank you for being willing to share about what is happening out there among many other families, and I think you have shown great courage.

We never really give the kind of weight to the anxiety. Too often we know the costs of everything and the value of too little. You know, the first thing that we are always asked is what is the cost and what is the budget impact and all the rest. But I think what you talk about today is your genuine fear about your son and your family about whether he is able to hold a job or whether it is going to be exposed to violence in society, these others kinds of factors that other families worry about in terms of their kids, but there is no question that a person who is gay or lesbian faces this in much greater amount. So this is important. When we look at legislation to consider it in context, we appreciate that.

Mr. Sunstein, because I know that time is moving on, as I understand from your response—and I apologize to you and Mr. Bauer and the others for having to absent myself briefly because of another matter that came up, but as I understand, you believe that there is really little we can do here in the statute that is either going to enhance or diminish the constitutional authority of the power of the States. Is that correct? You can't by statute. And your understanding of various decisions that have been made by the States in terms of the recognitions of marriage, I mean in certain States people that are young can't get married or they have to be a certain age or the relationship between relatives, for example, is not recognized in my own State of Massachusetts, but that there is at least a code of holdings that at least could be interpreted as permitting the States to make judgments on these matters of, in this case, social policy?

Mr. SUNSTEIN. That is correct. Professor Wardle and I are agreed in suggesting, I think, that the proponents of this bill are panicked about a situation the Federal system has handled very well for a long, long time. If a State has a strong public policy and a territorial connection with a couple, and that couple has been married in, let's say, Hawaii and the State doesn't want to respect the marriage, that is by tradition OK. So this legislation on that count has no point.

Senator KENNEDY. Territorial, as I would translate it, means that if they just ran out there to a particular State and then came on back to another, they may make the judgment and decision that they wouldn't recognize it.

Mr. SUNSTEIN. Absolutely. The impetus for this bill is the fear that people will rush to Hawaii, get married, and then bind the 49 States. That has been stated a few times. But it is a fear without basis.

Senator KENNEDY. Let me in the time remaining, Mr. Bauer, just ask—you have a difference in terms of this legislation, and I respect your position on it. In preparation for the hearing, I am always reminded about sort of where this country has been on so many matters of bigotry and discrimination and how they have evolved in our society. In the Declaration of Independence, we say "all men are created equal." We dealt with the issues of gender—not as well as we should have. We inscribed slavery into the Constitution, and yet we fought a civil war to get over it.

One of the first pieces of legislation that I had the opportunity to floor manage was the immigration bill of 1965 that wrote in national origin quotas based upon where you were born, favoring some nations. We had the Asian Pacific triangle that discriminated against those of "yellow race"; 127 could come in under that time. My grandfather in Boston faced "no Irish need apply."

The Housing Act that we passed, the discrimination against elderly and against children, we had to pass a law because there were many apartment buildings that were discriminating against children and also the elderly.

We have had the Americans with Disabilities Act to try and do something about discrimination with disabilities. I am in a family that has a mentally retarded sister, and I can always remember the problems that she always faced as a person with mental retar-

dation. We have discrimination on mental illness today in our health care system, and we have discrimination against gays and lesbians. We have it out there in the job place.

Now, what is your position or do you have a position in terms of trying to do something about discrimination in the job place against gays and lesbians?

Mr. BAUER. Well, let me address specifically your idea, which is to add an amendment to this bill related to that issue. This may be the only time this year that President Clinton and I are in agreement. My advice would be to follow his advice and send him a clean bill so that he can sign it.

On the larger question of whether adding sexual preference to discrimination laws is a good or bad idea, I think it is a terrible idea. I think it is a terrible idea because it would necessarily require employers to inquire of employees what their sexual preferences are. When a woman walks into your office to interview for a job, there is no question that a woman has walked into your office to inquire about or apply for a job. But how would an employer even know if he is discriminating unless we are going to enshrine in the law the idea that we must know the sexual preferences and bedroom habits of every employee?

Senator KENNEDY. Well, there are ways of doing that. I won't get into an exchange on that because certainly the question is whether they are being discriminated against and fired from the job because of gay or lesbian activities. That is what I was addressing.

Let me ask you this: Do you think the laws that make homosexual conduct a crime ought to be enforced?

Mr. BAUER. I think that the States——

Senator KENNEDY. Can you answer that yes or no?

Mr. BAUER. Probably not to your satisfaction. It is going to take a couple sentences, Senator.

I think the States over the years did a wise thing in saying through those laws that they wanted to discourage homosexual behavior. Do I think it is a good use of law enforcement personnel and limited resources at a time when a crime wave is continuing to sweep the Nation to try to peer into bedroom doors? No, I don't.

Senator KENNEDY. So you don't believe that the laws that are on the statute books in localities and States with regard to gay and lesbian conduct should be enforced?

Mr. BAUER. I believe those laws are a good thing, but I also believe in prosecutorial discretion and that if I were a prosecutor, I would not use limited resources on that issue.

Senator KENNEDY. We all like it both ways, you know, on——

Mr. BAUER. Well, I noticed that, Senator, when I heard you making a federalism argument a little while ago, which was a real rarity. [Laughter.]

Senator KENNEDY. Well, we can—I think it is a sustainable position, and I am glad it has been by some of the distinguished constitutional authorities. But let me ask you, do you think gays and lesbians ought to be prohibited from living in a particular community?

Mr. BAUER. I think that—are you dealing with the rental issue or the question of whether——

Senator KENNEDY. Let's take both. Let's take the rental and then let's take just living in a community. Should a local housing community with a number of different homes be permitted to have some kind—those in these various subdivisions say that we will not permit gays and lesbians to own houses.

Mr. BAUER. I think that a healthy society will allow property owners to exercise moral judgment in who they rent their apartments out to.

Senator KENNEDY. So you——

Mr. BAUER. So if I have got an apartment unit for rent in my home and three transvestites come to rent it, I would like to have the right under the Constitution to say you are not the type of tenant I want in my home.

Senator KENNEDY. Well, we all have the Mrs. Murphy example from the civil rights position. What if they have a thousand units? As a matter of policy, would you say that you support a position in a 1,000-unit complex that there could not be the rental to gay or lesbian couples?

Mr. BAUER. Senator, I want to be as clear about this as I can. I believe that it is a gigantic mistake and ill advised to add sexual preference to any Federal civil rights law.

The CHAIRMAN. Senator, your time is long gone. I have permitted a lot of leeway here.

Senator KENNEDY. Well, I have just one final——

The CHAIRMAN. I will permit one more question, and then we will move on.

Senator KENNEDY. Fine. What about doing something—as Senator Simon pointed out, the incidence of violence against gays and lesbians is dramatic all across this country. Do you think we ought to do anything to try and protect their safety and their security with any Federal intervention? We have just passed legislation now with regards to arson and the burning, the hideous behavior of cowards in burning black churches. We know as well that the incidence of violence against gays and lesbians has been documented. Do you think we ought to try and provide additional Federal legislation to protect their safety, protect their security in local communities?

Mr. BAUER. Senator Kennedy, when you had to leave, I made a very clear statement condemning gay-bashing, physical attacks against people based on their sexual proclivities. I think that any assault on any individual for any reason ought to be prosecuted to the full extent of the law. And I look forward to the time when gay rights groups will also join in condemning the repeated incidents around the country where church services have been disrupted, St. Patrick's Cathedral just a few years ago, where condoms were thrown during the taking of Communion. There is a problem, I think, on both sides of the issue of unacceptable conduct, and it ought to be condemned by all men and women of good will.

Senator KENNEDY. Well, if I could just get an answer to the question. No one is justifying that kind of inappropriate behavior. No one is suggesting that. I am talking about the physical violence and incidents that cost people's lives.

Mr. BAUER. I am against it, Senator——

Senator KENNEDY. Are you in support of a Federal statute that would prosecute those individuals that are perpetrating those kinds of crimes?

Mr. BAUER. I guess where my hesitation is, is there some evidence that there is a State in the Union that does not prosecute to the full extent of the law——

Senator KENNEDY. Well, there are clear examples where that is happening, and it has escalated, and it has been documented with the hate crimes legislation. And the question I was asking was whether you are bothered by that sufficiently where you think that there ought to be a more vigorous prosecution of those particular activities. And I have to gather from your failure to respond that you don't.

The CHAIRMAN. I don't think——

Mr. BAUER. No, no.

The CHAIRMAN. I don't think that is fair, though. As the chairman, I am saying it is not fair. Go ahead and answer it, though.

Mr. BAUER. Senator, my hesitation is that federalism philosophy that you all were so enthused about a couple of hours ago but seem to have forgotten now, I generally don't support federalizing assault, et cetera. If someone can make the case to me that States are routinely ignoring physical assaults and robberies and other things against people because the victim is a homosexual, then it is something we ought to talk about.

The CHAIRMAN. All right. Senator——

Senator FEINSTEIN. Senator Kennedy, would you yield for just one moment on that point?

The CHAIRMAN. He doesn't have any time.

Senator Simon? In fact, he has used all of our time. We will go to Senator Simon.

Senator SIMON. Mr. Sunstein, you said this is a nonsolution here. But let's just say the State—you are familiar with the State of Hawaii situation, and as a member of the University of Chicago Law School faculty, you are an able lawyer. If you wanted to drag that out, that decision, as you look at it, how soon ultimately would a final decision be made?

Mr. SUNSTEIN. Two years.

Senator SIMON. So there is no necessity for our doing anything for the next 2 years even if you differ with your conclusion that this is a nonsolution?

Mr. SUNSTEIN. I think that in view of the fact that we won't have the problem, if it is a problem, for 2 years, in view of the fact that this is a problem, if it is a problem, that the Federal system has handled plenty well enough for well over 200 years, and in view of the fact that there are very serious constitutional problems with authorizing States to ignore other States' judgment, this is from the standpoint of federalism and constitutional law ill advised.

Senator SIMON. Ms. Henderson, your statement was eloquent. You mentioned about your son going into the hospital, and I want to ask Mr. Bauer and Mr. Zwiebel this: She talked about her son going into the hospital with his living partner, and his partner could not authorize medical action. If you were a State legislator and if you were faced with this kind of a situation, do you think there ought to be some way for people in this situation—don't call

it marriage, give it another name, but that people should be able to have a contractual relationship where someone's life can be saved in this way?

Mr. BAUER. Well, Senator Simon, help me, if you will. What is State law now if a live-in heterosexual couple who is not married, one of them falls ill, is the heterosexual live-in couple permitted to give permission at a hospital?

Senator SIMON. If someone was in a coma, I gather, was unconscious, yes, then the spouse can sign for——

Mr. BAUER. Well, a spouse can, but your opinion is that States routinely allow heterosexual couples that live together to exercise that legal authority?

Senator SIMON. I frankly don't know what the situation is in Illinois.

Mr. BAUER. I don't believe they do.

Senator SIMON. But let's just assume that it is a common-law marriage. I don't know.

Mr. BAUER. Right. I don't believe they do. I think that, for better or worse, we have not extended to other relationships the same rights and authority that we extend to married couples.

Now, I have heard similar stories that are perhaps not as dramatic about an individual not being able to visit a sick partner in the hospital because they don't have a marriage relationship or whatever, and I would advise hospitals to change regulations that would keep someone who loved Ms. Henderson's son out of his hospital room. But I would not recommend changing the definition of marriage to do so.

Senator SIMON. Mr. Zwiebel?

Mr. ZWIEBEL. Well, it is always nice to go second on a question like this, but I think that Mr. Bauer's point is very well taken. The law currently, as I understand it, in at least most of the States, is that where there is no formal relationship between people who live together, whether they be homosexual or heterosexual, that there are certain limitations that the law does impose or certain nonrecognitions that the law implies with respect to their ability to make decisions with respect to the health care or with respect to other matters that ordinarily a next of kin or a spouse might be able to make.

I think that there may be a strong basis for society to start thinking about whether that general understanding of who has the authority to make life-and-death decisions when a person is incapable of making them on his or her own behalf is in order. And that is a general issue that transcends the question of same-sex couples. It is an issue that extends way beyond that and deserves some careful consideration by society at large.

I think that the point that you are trying to make is well taken. The point, obviously, is that there needs to be some mechanism in our legal system which allows for circumstances where people, in fact, know one another's wishes are in a position to be knowledgeable of the desires of the incapacitated patient to be able to assume certain authorities. I don't believe, though, that the way we can accomplish—we can address that need is by changing the definition of marriage or, frankly, by recognizing—where we don't even need to recognize any formal familial relationship between the two peo-

ple. We can say that for purposes of X, Y, Z, whatever it may be, of medical decisionmaking, we may need to expand the group of people who can make those types of decisions.

Senator SIMON. My time has expired, but if I may just follow through, would you agree with Mr. Bauer that you would recommend to hospitals that they change their regulations?

Mr. ZWIEBEL. Obviously, the answer to that is that—in principle, yes. In practice, you would like to see the kind of language that would be developed, because when you have a legal relationship such as marriage, we understand that one partner is espoused to the other. Other relationships which have no formal legal recognition need to be very carefully defined, and ordinarily, the way the law has dealt with it all this time is by looking at those relationships that are defined—next of kin. To go beyond that will require some very, very careful draftsmanship and consideration by the broader society, but it is an issue.

Senator SIMON. I thank you all.

Mr. BAUER. Senator Simon, my able assistant, who is much brighter than I, has reminded me that under current law in the States, anyone can give the power of attorney to someone else to make decisions, financially and otherwise.

The CHAIRMAN. Did you want to say something, Ms. Henderson?

Ms. HENDERSON. Yes. Everybody here is talking about theory. I am talking about the reality that families face. The reality is that for my son and his partner there is no legal relationship possible. They have gone through all kinds of contortions and expenses to get legal documents that will allow one to inherit from another, but they still will not get Social Security survivor benefits, they will still not get all of the things that my other children who are married can get.

It is part of the—their relationship is a lifetime relationship. It has no legal status. For my other children who have a legal status, there is no question. But for my gay child, there are always questions—always questions about whether any agency, any health care facility will recognize their relationships, any other facility.

I also want to speak about—you talk about this as if families were not involved. You talk about children. You talk about their need for protection, their need for stable families. The organization that I represent has many, many families whose gay children are raising children. They are being raised in two-parent households where the parents are not allowed to marry. These are children who are growing up with gay and lesbian parents who are not allowed to marry, and yet they are being raised as families. This is a major issue for us. These are our grandchildren. The rights of custody as grandparents, who is able to care for those children, is very important to us.

The CHAIRMAN. Thank you.

Senator SIMON. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Simon.

Senator Feinstein, we will turn to you.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Just a point of interest to Mr. Bauer. In 1971, when I was president of the Board of Supervisors in San Francisco, I authored legislation to amend the antidiscrimination statutes for housing and

employment, adding the words "sex" and "sexual orientation"—not "preference," Mr. Bauer, but "orientation." And San Francisco is a large corporate financial headquarters city. To date, I have never had an employer or others tell me that there was any evidence of employer snooping because of that statute. Never, to my knowledge, has there been a problem with it from the point of view that you have raised. There have been instances where people have brought cases because they were really unjustly denied employment, and those cases were looked at. In some cases, the findings were for the plaintiff, and in some cases, they weren't.

I know of no instances of problems like you have just indicated, and it has had about 25 years now of active support. I would like, if I could——

Mr. BAUER. Senator Feinstein, I would be happy to give you for the record cases of many, many employers in your State who have been twisted into contortion of various shapes because of that law. We found out about a case just the other day——

Senator FEINSTEIN. This was not a State law. Let's get it right, Mr. Bauer. This is not a State law. This is a county law I am speaking of.

Mr. BAUER. Well, I assume you also support the State law——

Senator FEINSTEIN. It has nothing to do with the rest of the State.

Mr. BAUER. All right. So——

Senator FEINSTEIN. I am up here, and you are down there. I would appreciate the opportunity to ask the questions.

The CHAIRMAN. But let him answer if he—he wanted to give an answer so allow him to answer, and then proceed from there. So go ahead.

Mr. BAUER [continuing]. Not to put too fine a line on it, Senator, I assume you also support the State nondiscrimination law on sexual orientation.

Senator FEINSTEIN. I support—I basically believe that people have the right to a job and a right to housing. I don't support inappropriate behavior. Behavior and orientation are two different things. And one of the problems I find, Mr. Bauer, is that people often take instances of inappropriate behavior by some and apply them to the whole group. And that is a terrible injustice to do.

Mr. BAUER. It is, indeed. I have been on the receiving end of that approach myself.

Senator FEINSTEIN. In any event, if I might go on, I would appreciate it, since the chairman is very strict with the allocation of time. I appreciate the ability to make the point.

Professor Wardle, let me ask you this question. You state in your remarks,

> Suppose a same-sex couple from Utah flew to Hawaii, got married, got a declaratory judgment of the validity of their marriage, and then returned to Utah, which prohibits same-sex marriage and also prohibits the recognition of out-of-State same-sex marriages, and demanded that Utah recognize their marriage or the incident of their marriage.

You state,

> In my opinion, that marriage would flaunt and undermine a strong public policy of Utah and would be sufficient to justify Utah's refusal to recognize same-sex marriage.

If this is the case—and I believe it is, and I think you have eloquently made you argument—why, then, is this legislation necessary?

Mr. WARDLE. Senator Feinstein, if I were the judge or if I were all judges—if I were king judge for the day—that would be the case. But I am not. There are courts that will disagree. There are certainly respected scholars who have written and expressed disagreement, and there is—if the California Supreme Court were to face the issue, there is no certainty how they would rule.

How Utah rules, what Utah's policy is regarding recognition of same-sex marriages from other States is subordinate to Federal law, that is, the Federal full faith and credit statutes, as well as Federal. So Utah's position could be trumped by an interpretation of the Federal full faith and credit rules that said, sorry, Utah, regardless of how you interpret it, Federal law requires it to be interpreted a different way. And this legislation, section 2 of this legislation, is addressed to that threat—the threat that is very real, not speculative. Very real. It has been openly espoused that Federal full faith and credit rules should be interpreted and applied so as to prevent Utah from applying its marriage recognition rule, saying, sorry, Utah, you have to recognize, Federal law forces you to recognize same-sex marriages from abroad. That is the concern.

Senator FEINSTEIN. But Federal law doesn't demand it, any more than it does with bigamy or polygamy or age involving these relationships, as I understand it.

Mr. WARDLE. And that is what this statute should also clarify. This statute expressly makes that the rule. It is no longer a matter of speculation or debate. It is no longer a matter of curiosity. I agree that that is what the Federal rule should be, but I am not always in the majority in the academic world on this issue in particular. There has been a tremendous amount of writing on the other side.

Senator FEINSTEIN. Mr. Sunstein, would you like to respond?

Mr. SUNSTEIN. Yes. Maybe the simplest way to put it is that this bill is either unnecessary, if Professor Wardle's view, which is the traditional view, is right, or it is constitutionally troublesome. So there are two prongs of the dilemma. Either if the traditional view holds—and I think there is overwhelming authority to this effect—then this is a redundant and wasteful bill. If it is not redundant and wasteful, then it is the first time in the Nation's history that Congress has told States that they may ignore judgments that would otherwise be binding from other States. If that is the case, then we should think of this bill not as a bill about homosexuality and same-sex marriage, but a bill involving national permission to States to ignore other States' judgments.

Now, that is a very big deal. That is not about same-sex marriage and homosexuality. That is about punitive damages, default judgments, products liability—everything under the sun. From the constitutional point of view, this is no fundamentally a same-sex marriage act. It is fundamentally an act about national permission, and Professor Wardle and Senator Hatch are exactly right. This is permission, not requirement, but Federal permission to some States to ignore what other States have mandated. That is a very large step.

Senator FEINSTEIN. If I understand it, just to——

The CHAIRMAN. Senator, could Professor Wardle respond?

Senator FEINSTEIN. Yes, certainly.

Mr. WARDLE. I would just like to point out that I am not sure how something can either be pointless on the one hand or unconstitutional on the other, because if it is pointless or harmless, I don't think that it could be unconstitutional.

Mr. SUNSTEIN. Right, not pointless and unconstitutional. Pointless or unconstitutional.

Mr. WARDLE. But I don't think that if it is pointless, then it is harmless, and if it is harmless, I don't think that it raises to the level of an unconstitutional problem.

Mr. SUNSTEIN. I agree.

Senator FEINSTEIN. Could I ask you to respond to something that CRS says in their analysis? Let me read it to you.

The Defense of Marriage Act differs in one critical aspect from the legislative enactments passed by Congress under its full faith and credit power. The DOMA permits sister States to give no effect to the laws of other States. This is a novel approach to legislating under Congress' full faith and credit enforcement power. The constitutionality of this approach depends in large part upon the scope of Congress' enforcement power under the second sentence of the full faith and credit clause. The issue is whether the authority of Congress to proscribe the effect of marriage extends to this type of legislation.

Would you agree with that?

Mr. SUNSTEIN. Well, when you said CRS, I hesitated for a moment, because those are my initials, but I assume you mean the Congressional Research Service. [Laughter.]

Senator FEINSTEIN. Yes.

The CHAIRMAN. I didn't realize that. I have been putting too much credibility in CRS. [Laughter.]

Mr. SUNSTEIN. Maybe I should answer most simply by saying I agree with CRS.

Senator FEINSTEIN. Mr. Wardle, would you like to comment?

Mr. WARDLE. Well, I think that—what is the main point? What is the main criticism?

Senator FEINSTEIN. The main criticism, first of all, is that this would permit sister States to give no effect to the laws of other States. And then it makes the point that this is a novel approach to legislating under Congress' full faith and credit power. But it says the constitutionality of this approach depends on the scope of Congress' enforcement power under the second sentence of the full faith and credit clause. So the issue becomes whether Congress has the authority to proscribe the effect of marriage, whether it extends, whether that authority extends to this type of legislation.

Mr. WARDLE. With respect to that statement, I think that I would agree with that statement. I think that the difference between positive language and negative language is overstated. In fact, section 1738(a) of the Parental Kidnapping Prevention Act of title 28, which is a full faith and credit statute, says that States must recognize custody decrees when they are issued by a court that has exercised jurisdiction on certain bases—A, B, C. That also says that if they exercise jurisdiction based on D, E, or F grounds, they do not have to recognize.

So that section 1738(a) is an example of a statute that has both a positive and a neutral provision. I just don't think that the dif-

ference or the distinction has any constitutional significance, at least with respect to this legislation.

Senator FEINSTEIN. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Feinstein.

I want to thank each of the witnesses. Each of you has expressed yourself I think very, very well. This has been a terrific hearing, in my opinion, and I think it is a subject that deserves this type of consideration. I have to say that, you know, some of us believe that the law deserves to be clarified in this area even though it may not be earth-shaking or monumental, to borrow some of your logic, Professor Sunstein. But each of you has been important here today. We have had a variety of points of view, and I just want to thank each of you for being here. I think you have enlightened this committee. You have challenged us, and we will try to do what is right here.

Thank you very much. With that, we will recess until further notice.

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

APPENDIX

PROPOSED LEGISLATION

II

104TH CONGRESS
2D SESSION

S. 1740

To define and protect the institution of marriage.

IN THE SENATE OF THE UNITED STATES

MAY 8, 1996

Mr. NICKLES (for himself and Mr. DOLE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To define and proteet the institution of marriage.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. POWERS RESERVED TO THE STATES.

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

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

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

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

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

SEC. 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

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

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and

the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 1, United States Code, is amended by inserting after the item relating to section 6 the following new item:

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

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ADDITIONAL SUBMISSIONS FOR THE RECORD

AMERICAN CIVIL LIBERTIES UNION,
WASHINGTON NATIONAL OFFICE,
Washington, DC, July 10, 1996.

Senator ORRIN G. HATCH,
Chair, Senate Judiciary Committee,
U.S. Senate, Washington, DC.

DEAR SENATOR HATCH: The American Civil Liberties Union, Washington National Office and the Gay and Lesbian Rights Project, respectfully submits the enclosed testimony to be entered into the record of the Senate Judiciary Committee Hearings on the Defense of Marriage Act (S. 1740). Our testimony articulates our continued opposition to the bill. The ACLU has long advocated for the rights of lesbians and gay men. We believe the principle of equality requires that same-sex couples be allowed the right to marry.

We appreciate your inclusion of testimony from all sides of the issue. Should you or your office require additional information, please contact our offices.

Sincerely,

(Signed) Laura W. Murphy

(Typed) LAURA W. MURPHY,
Director.

(Signed) H. Alexander Robinson

(Typed) H. ALEXANDER ROBINSON,
Legislative Representative.

AMERICAN CIVIL LIBERTIES UNION,
WASHINGTON NATIONAL OFFICE,
Washington, DC, July 10, 1996.

Senator ORRIN G. HATCH,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR HATCH: The American Civil Liberties Union urges you to oppose the Defense of Marriage Act (DOMA). We believe this bill to be bad policy as well as unconstitutional. It is nothing but election-year grandstanding at the expense of gay and lesbian individuals, and at the expense of real, pressing issues overlooked by Congress. For your review, we have enclosed our testimony which has been submitted to the Senate Judiciary Committee.

The American Civil Liberties Union also urges your support for the Employment Non-Discrimination Act (ENDA) should it come up as an amendment to DOMA. While we continue to oppose the underlying bill, ENDA is a step in the right direction for Congress to take with regard to gay and lesbian issues.

ENDA strikes at the core of real, present day concerns of gays and lesbians, specifically employment discrimination based on sexual orientation. Furthermore, the American people believes employment discrimination of gays and lesbians to be a real problem that should be addressed. In a recent Newsweek poll, 84 percent of Americans supported equal rights for gay people and oppose job discrimination. In addition, ENDA enjoys the support of major corporations—such as AT&T, Eastman Kodak, Microsoft, Quaker Oats, RJR Nabisco, and Xerox—and the support of 30 Senate co-sponsors.

Lastly, we believe that a vote on ENDA is important at this time so that a broader discussion on gay and lesbian issues is facilitated. The civil liberties of gay and lesbian individuals are no less important to us than the civil liberties of other segments of our society. The sooner we have open debates on gay and lesbian issues, the sooner their grievances can be addressed.

Please show your opposition to unjust and unconstitutional discrimination against gays and lesbians—the Defense of Marriage Act. Show your support for a remedy which addresses real concerns—the Employment Non–Discrimination Act.

Sincerely,

(Signed) H. Alexander Robinson

(Typed) H. ALEXANDER ROBINSON,
Legislative Representative.

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION, SUBMITTED BY LAURA W. MURPHY, DIRECTOR, WASHINGTON OFFICE; MATTHEW COLES, DIRECTOR, GAY & LESBIAN RIGHTS PROJECT; AND H. ALEXANDER ROBINSON, LEGISLATIVE REPRESENTATIVE

A. Introduction

The American Civil Liberties Union (ACLU) appreciates the opportunity to provide this testimony. The ACLU is a private, nonprofit organization of more than 275,000 members, dedicated to the preservation of civil liberties enshrined in the Bill of Rights and the Constitution. The American Civil Liberties Union believes that S. 1740, the Defense of Marriage Act, is unconstitutional, and that it is bad public policy.

The ACLU supports legal recognition of lesbian and gay relationships, and it believes lesbians and gay men should have the right to marry. Nothing else would accord complete legal equality to lesbians, gay men and bisexuals.

Civil marriage is the way our society defines one's most intimate, committed relationships; it is the only vehicle our society has for recognizing the existence of primary relationships not defined by blood. That has powerful emotional consequences, and powerful practical consequences as well. Our society uses marriage to identify our partners for everything from retirement programs, to critical medical decisions, to the simple right to be together in crisis situations, like hospital emergency rooms.

While S. 1740 does not itself deny lesbians and gay men the right to marry, it would for the first time deny federal recognition to state licensed marriages. Clearly, this legislation is designed to be a preemptive strike to nullify the rights that may be conferred by Hawaii and other states to same sex couples.

S. 1740 would also for the first time make it federal policy that a state is free to disregard some marriages of some couples who were legally married in another state. This could have very unfair, and in some cases tragic consequences for couples who travel across the country, because their jobs are transferred to other states, or because of the desire to be near relatives, or for any number of legitimate reasons. Among the consequences of S. 1740 would be to deny federal recognition of a state sanctioned marriage and the rights to:

- take *bereavement or sick leave* to care for a partner or a partner's child;
- qualify for *pension or social security continuation* when a partner dies;
- keep a jointly owned home if a partner goes on *Medicaid*;
- file *joint tax returns* and quality for spousal exemptions on income and estate taxes;
- qualify for *veterans' discounts* on medical care, education and home loans based on a partner's service;
- apply for *immigration and residency* for partners from other countries.

We also believe that it is extremely unwise to proceed with this legislation without the benefit of additional hearings. This legislation raises complex legal questions that should be fully considered by Members of Congress before they are compelled to cast their vote.

B. Constitutional issues raised by S. 1740

1. FULL FAITH AND CREDIT—EQUAL PROTECTION

S. 1740 is unconstitutional because it constitutes discrimination against lesbians and gay men under the due process clause of the Fifth Amendment and because it violates Article IV section 1 of the Constitution (the "Full Faith and Credit clause").

a. Full faith and credit

First, S. 1740 violates the Article IV, Section 1 of the Constitution (the "Full Faith and Credit" clause). Article IV says:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2 of S. 1740 would allow state courts to ignore judgments from courts in other states "respecting" marriages between two persons of the same sex. Among the judgments which typically involve marriage are judgments of divorce, judgments awarding support or dividing property in connection with a divorce or separation, and judgments about obligations incurred because of marriage, like loan obligations, and obligations to vendors like hospitals, health care providers.

The United States Supreme Court has ruled again and again that the Full Faith and Credit clause obligates every state to respect the judgments of other state courts, including judgments of divorce. See, e.g., *Williams* v. *North Carolina,* 317 U.S. 287, 294 (1947); *Sherrer* v. *Sherrer,* 334 U.S. 343, 354–356 (1948).

The court has allowed two limited exceptions to that rule. First, a forum state does not have to respect the judgment of a sister state that purports to transfer title to real estate within the forum state. Second, a state does not have to respect "penal" judgments from other state courts. See, e.g., *Fall* v. *Eastin,* 215 U.S. 1 (1909) and *Huntington* v. *Attrill,* 146 U.S. 657 (1892). Neither of those exceptions could remotely be stretched to fit S. 1740. Moreover, there is no "policy" exception. States which disagree with the policy behind a law on which a judgment is based must enforce the judgment nonetheless. See, e.g., *Williams* v. *North Carolina, supra,* 317 U.S. at 294; *Sherrer* v. *Sherrer, supra,* 334 U.S. at 354–356; and see *Fauntleroy* v. *Lum,* 210 U.S. 230, 237 (1908).

While the Supreme Court has never decided what it means to say that one state must accord Full Faith and Credit to a state created "status" like a marriage outside the context of a judgment, it seems clear that at a minimum, states are not free to completely ignore them. The Commerce Clause and the right to travel from state to state, even without Article IV, would seem to prevent states from ignoring marriages in interstate commercial transactions, or when the people of one state travel to another. See, e.g., *Shapiro* v. *Thompson,* 394 U.S. 618, 629 (1969).

Moreover, while Article IV doubtless gives Congress the power to decide how the judgments and acts of one state are to be proven in another, that power does not extend to nullifying Article IV's basic requirement of Full Faith and Credit. Congress can not, under the guise of deciding what effect to give to judgments and acts which have been proven under a mechanism it has created, decide that no Faith and Credit need be given at all. See, e.g., *Powell* v. *McCormack,* 395 U.S. 486, 550 (1969) (Congress has the power to decide if its members have the qualifications set out in the Constitution, but it may not, in the guise of doing so, manufacture additional qualifications). See also, *Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 272 n. 18 (1980). That, however, is precisely what the bill purports to do.

Equal protection

Second, this entire bill violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment. The third section of the bill creates a definition of marriage for all federal purposes. The definition says that a marriage means "only a legal union between one man and one woman * * *." Just as the law struck down in *Loving* v. *Virginia,* 388 U.S. 1 (1967) discriminated on the basis of race because it made one's ability to marry depend on one's race, this bill discriminates on the basis of sex because it makes one's ability to marry depend on one's gender. It matters not that neither men nor women are unequally disadvantaged by the ban; whites and blacks were punished alike for violating the law in *Loving* as well. *Loving* v. *Virginia,* 388 U.S. at 11. The right to equality is a personal right, not a group right. See, *Regents of the University of California* v. *Bakke,* 438 U.S. 265, 289–290 (1978).

Classifications which discriminate on the basis of gender must be substantially related to some important government purpose. *Craig* v. *Boren,* 429 U.S. 190, 204 (1976). The only justification for the classification that appears from the proponents of the bill is that it would preserve what they regard as the "traditional" understanding of marriage. See, Senator Don Nickles "The Defense of Marriage Act." Quite apart from the fact that this ignores a 200 year tradition of allowing each state to define marriage, and using those definitions for federal purposes, tradition by itself is not an important government purpose. If it were, sex discrimination would be the quite permissible; discrimination against women has a pedigree in tra-

dition at least as long and time honored as that of discrimination against same sex couples in marriage. See, e.g., *Bradwell* v. *State,* 83 U.S. 130, 141 (1873) (Bradley, J., concurring); and see *Stanton* v. *Stanton,* 421 U.S. 7, 14–15 (1975).

Furthermore, to the extent that S. 1740 was intended to disadvantage lesbians and gay men it is constitutionally suspect for that reason as well. This bill disenfranchises lesbians and gay men in their efforts to gain recognition for their most intimate relationship. In our view, sexual orientation classifications should be treated as suspect, like race and, we believe, gender classifications. See *Watkins* v. *U.S. Army,* 837 F.2d 1428, affd. on other grounds, 875 F.2d 699 (9th Cir. 1989); *contra High Tech Gays* v. *D.I.S.C.O.,* 895 F.2d 563 (9th Cir. 1990). But regardless of whether Courts treat classifications which disadvantage lesbians and gay men as suspect, it is clear that like all other classifications, they must serve some legitimate governmental purpose. A mere desire to harm the group which is disadvantaged is not a legitimate purpose. *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528, 534 (1973); *Romer* v. *Evans,* ____ U.S. ___, 64 U.S.L.W. 4353, 4356–4357 (1996). Yet S. 1740 rests on nothing more. Saying that discrimination is nothing new and that one would like to keep it up does not come close to explaining what legitimate interest a classification serves.

As Justice Holmes put it:

> It is revolting to have no better reason for a rule of law than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O.W. Holmes, "Collected Legal Papers," (Boston, A. Harcourt, 1920), p. 187.

C. Public policy

Finally, the bill is very bad policy. We are a nation governed by one Constitution. We are not a collection of small nations with contiguous borders. It does not make sense to say to Americans that the existence of their marriages depends on which states they travel through on vacation, or which states their employer transfers them. Americans have a right to go from state to state, without having to surrender their most intimate relationship as a price of traveling or relocating. Moreover, this bill would create a complex set of legal and logistical problems which have not been fully examined. Since Congress has never sought to do anything of this kind questions about estates, taxes, securities and exchange laws, joint property and shared liability for debt have not been addressed by any of the relevant committees or sponsors of this bill.

As noted above, civil marriage is the way our society defines a person's committed relationships. If one can not marry his or her partner, the two can be legally ignored and discriminated against in ways, great and small, that would not be tolerated for a moment by the courts if they were married. For example, an unmarried partner can be excluded from the other partner's bedside when crucial medical decisions are made, and even at death. The lack of legal standing may preclude any authority to carry out the partners wishes.

Marriage is the device our society uses to identify partners for virtually every practical situation in which it is important to identity the person who is closest to you. To that end the Supreme Court has held that marriage is a fundamental right. See *Zablocki* v. *Redhail,* 434 U.S. 374 (1978) (holding that the freedom to marry is a fundamental liberty protected by the Due Process Clause).

The fact that a state allows same-sex couples to marry would not require any religious institution to recognize or perform such marriages. State marriage laws are entirely separate from religious practices in our country. The granting of civil marriage to same-sex couples would not impose any requirements on religious groups, but rather would ensure equal access to the complex structure of rights and responsibilities that *civil* marriage has become.

Marriage is not premised on procreation. See *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) (right of marital privacy prohibits government from interfering with efforts to actively avoid procreation). In any event, many different-sex couples do not choose or are unable to have children and many same-sex couples do have children.

While marriage has traditionally been defined as a union between people of different sexes, it was also traditionally defined as between people of the same race. As recently as 1967 state governments denied interracial couples the right to marry. *Loving* v. *Virginia,* 388 U.S. 1 (1967). Marriage was also traditionally understood to involve a man owning a woman as property. We've recognized that these traditions had to be abandoned because they were unfair.

We live in a society which attaches enormous civil, legal consequences to marriage. For example, a person's ability to keep the home she or he has shared with a partner for 20, 30 or more years will depend on their marriage status, especially if they are Medicaid recipients or die intestate. A person's ability to care for a sick or dying partner in most health care facilities depends on whether they are married. Most state laws treat partners who have not married as strangers. It is fundamentally unfair to say on the one hand that you must marry to be treated as next of kin, and then to tell an entire class of Americans who are next of kin in every real sense that they may not marry.

D. Summary

This bill is bad constitutional law and bad policy. For 200 years, Congress has left it to the states to decide who they will marry, and to courts to make sure they respect each other's decisions on that. That is a fine tradition, which ought to be respected. This bill throws it on the trash heap and belittles the relationships of lesbian and gay citizens. Apart from being an unmistakable violation of the Constitution, it is a deplorable act of hostility unworthy of the support.

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