

TESTIMONY OF JAY ALAN SEKULOW

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BEFORE

THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

MAY 13, 2004

ON

**H.J. RES. 56, THE FEDERAL MARRIAGE AMENDMENT**

Chairman Chabot, Ranking Member Nadler, and members of the Judiciary Subcommittee on the Constitution, thank you for extending the invitation to appear before the Subcommittee to testify in support of House Joint Resolution 56, the “Federal Marriage Amendment (The Musgrave Amendment).

I respectfully request that the entirety of my personal statement be made a part of the record of today’s hearing.

### **OPENING REMARKS**

Like marriage itself, amending the Constitution is not something to be entered into lightly.

In calling for a constitutional amendment to uphold marriage as a union between a man and a woman, HJR-56 reflects the reality that a rush of push-the-envelope activism by some state courts and local officials has left no other option available to resolve the debate over the unique nature, purpose and legal status of marriage. There is no doubt that how the issue is settled will shape the future of our society and the course of constitutional government in the United States.

Beginning with a trial court in Hawaii in 1993, followed by the Alaska Superior Court in 1998, and a Vermont Supreme Court ruling in 1999, state courts have determined that marriage as it has always been in this country, from Colonial times to the present, discriminates based on gender preference. Then, in November 2003, the Massachusetts Supreme Judicial Court declared that traditional marriage upholds persistent prejudices and that same-sex couples have a fundamental right to marry.

Emboldened by such activism, San Francisco officials issued thousands of “marriage licenses” to same-sex couples, even though intentionally contrary to California’s Defense of Marriage Act, passed by an overwhelming majority just a few years ago. Public officials in other states, like Oregon, New York, New Jersey, and New Mexico, have also attempted similar legal experiments, all under the claim that limiting traditional marriage to one man and one woman is discriminatory, and unconstitutional.

The effect of these decisions, and the intent of the litigation strategy behind them, is unmistakable: to establish same-sex marriage as a civil right, a right that the federal government would be constitutionally obligated to secure nationwide. Advocates of same-sex marriage demand, and will accept, nothing less. To reach this outcome, activist judges have simply ignored the custom and experience of recorded Western history, flouting the laws of our country, and condescending to every major religious tradition in the world.

The startling holding by the Massachusetts Supreme Judicial Court, a legal preference for traditional marriage is "irrational," chillingly illustrates the need to resolve this matter now.

The shock of these startling attempts to change marriage by judicial edict is all the more troubling because they skirt the democratic process. This shreds the rule of law, excludes the people from this fundamental debate and decision, and emboldens local officials to determine for themselves which laws they will and will not enforce.

This is why HJR 56 is so essential. Its passage will allow, once and for all, the states to decide through the democratic process whether marriage will remain the union of one man and one woman. No other process will accomplish this imperative.

Social science, and human experience over hundreds of years, tells us that marriage is best for the family, and especially for children. Children are hurt when either the father or the mother is absent. Given its purpose and function in society, there can be no doubt marriage is *sui generis* and our most vital institution. The question must therefore be settled: is the marriage of one man and one woman, and the hope of children it provides, the cornerstone of our welfare, of our liberties and of our responsibilities as a free people; and if so, it must be protected?

I look forward to this discussion, and to any questions Members of the Subcommittee may have.

## I. OVERVIEW AND HISTORY

For many years now, lawyers for same-sex marriage proponents have been trying to extend the institution of marriage to embrace same-sex relationships. Having been unsuccessful in swaying the public opinion in favor of recognizing same-sex marriage through the legislative process, proponents have turned to the courts.

### A. Litigation in the states

#### 1. Hawaii

The same-sex marriage legal situation began in earnest in 1993 in the State of Hawaii. In that year, the Hawaii State Supreme Court ruled in *Baehr v. Lewin*<sup>1</sup> that denying marriage licenses to same-sex couples “may violate the Hawaii Constitution’s ban on sex discrimination.”<sup>2</sup> The Court found that the denial of marriage licenses to same-sex couples constituted sex-based discrimination in violation of the Equal Protection Clause of the Hawaii Constitution.<sup>3</sup> In light of this conclusion, the Court remanded the case to the circuit court with the following, ominous instructions:

On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the State] to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.<sup>4</sup>

When a Court requires a statute to pass “strict scrutiny,” the law in question has little chance of surviving.

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1. *Baehr v. Lewin*, 74 Haw. 530; 852 P.2d 44 (1993).

2. *Marriage Equality for Same-Sex Couples - A History*, Oct. 1, 2002, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1067>.

3. *Baehr*, 74 Haw. at 561; 852 P.2d at 59.

4. *Id.* at 583, 852 P.2d at 68.

In 1996, the Hawaii Circuit Court ruled that the state did not have a compelling reason to restrict marriage only to couples of the opposite sex, and held that the same-sex couples “should therefore be allowed to marry.”<sup>5</sup> The case went back to the Hawaii Supreme Court, but before it could issue an order requiring the issuance of marriage licenses to same-sex couples, the people of Hawaii approved a constitutional amendment “restricting marriage to men and women only.”<sup>6</sup> The amendment passed by an overwhelming seventy percent vote in favor with only thirty percent opposed.

## 2. Alaska

In 1994, a gay couple in Alaska filed for a marriage license.<sup>7</sup> Their request was denied. The couple brought a lawsuit, asking that Alaska’s Marriage Code be found unconstitutional because it restricted marriage to heterosexual couples.<sup>8</sup> In 1998, an Alaska Superior Court judge acquiesced, ruling that “marriage, i.e., the recognition of one's choice of a life partner, is a fundamental right. The state must therefore have a compelling interest that supports its decision to refuse to recognize the exercise of this fundamental right by those who choose same-sex partners rather than opposite-sex partners.”<sup>9</sup> Similar to the situation in Hawaii, the Alaska Court system forced the state to support its marriage laws under the difficult-to-satisfy strict scrutiny standard.

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5. *Marriage Equality for Same-Sex Couples - A History*, *supra* note 2.

6. *Id.*

7. B.A. Robinson, *Homosexual (Same-Sex) Marriages in Alaska*, Jan. 20, 2004, *available at* [http://www.religioustolerance.org/hom\\_mar9.htm](http://www.religioustolerance.org/hom_mar9.htm).

8. *Id.*

9. *Id.*; *see also Brause v. Bureau of Vital Statistics*, 1998 WL 88743 at 1 (Alaska Super. Ct. 1998).

During the pendency of the couple's lawsuit, concerned Alaskans were working to get a constitutional amendment regarding marriage on the ballot.<sup>10</sup> In November 1998, Measure 2 appeared on ballots in Alaska.<sup>11</sup> This measure provided, "Each marriage contract in this State may be entered into only by one man and one woman."<sup>12</sup> Alaskans overwhelmingly approved this measure, 68% for to 32% against.<sup>13</sup> The passage of this amendment made the same-sex couple's request for a marriage license moot, and their case was dismissed.<sup>14</sup> As in Hawaii, but for the passage of this constitutional amendment, same-sex marriage would likely be a reality in Alaska today.

### 3. Vermont

In 1999 the Vermont Supreme Court ruled in *Baker v. Vermont*<sup>15</sup> that the State was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."<sup>16</sup> The Court instructed the Vermont legislature that it must adopt one of two alternatives to fulfill this requirement: 1) issue marriage licenses to homosexual couples, or 2) enact a domestic partnership or similar system that provides homosexual couples with all the rights and privileges married couples enjoy.<sup>17</sup> In 2000, the Vermont legislature passed a law that created "civil unions" for

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10. Robinson, *supra* note 7.

11. *Id.*

12. *Id.*; *see also* Alaska CONST. Art. I, § 25 (2004).

13. Robinson, *supra* note 7.

14. *Id.*

15. *Baker v. Vermont*, 170 Vt. 194, 226 (1999).

16. *Id.* at 226.

17. *Id.* at 197-98.

same-sex couples.<sup>18</sup> This law gives “these couples all the rights and benefits of marriage under Vermont law but not marriage licenses.”<sup>19</sup> In Vermont, then, the same-sex marriage movement is just one step away from realizing their ultimate goal.

#### 4. New Jersey

In June 2002, seven homosexual couples filed a lawsuit, captioned *Lewis et. al. v. Harris et. al.*, requesting the recognition of same-sex marriage in New Jersey.<sup>20</sup> Lambda Legal Defense and Education Fund filed the lawsuit on behalf of these couples. A state judge ruled against the plaintiffs in November 2003.<sup>21</sup> The case is currently on appeal. Lambda Legal expects this case to ultimately be decided by the New Jersey Supreme Court.<sup>22</sup>

More recently, the City of Asbury Park, N.J., following the lead of San Francisco Mayor Gavin Newsom, started issuing marriage licenses to same-sex couples.<sup>23</sup> The city commenced this practice on March 8, 2004. New Jersey’s Attorney General “said he would seek an injunction to halt the issuance of

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18. *Marriage Equality for Same-Sex Couples - A History*, *supra* note 2.

19. *Id.*

20. News Release, Lambda Legal Defense and Education Fund, *Sweeping Gay Marriage Lawsuit in New Jersey Aims for U.S. History* (June 26, 2002), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1074>.

21. News Release, Lambda Legal Defense and Education Fund, *Lower-Court Loss in Lawsuit Seeking Marriage for Same-Sex Couples in New Jersey ‘Propels Us Forward’ To Higher Courts Where Case Will Be Decided*, *Lambda Legal Says*, Nov. 5, 2003, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1345>.

22. *Id.*

23. “*Marriage in New Jersey*,” available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17267&TEMPLATE=/ContentManagement/ContentDisplay.cfm>

marriage licenses to same-sex couples in the state.”<sup>24</sup> The American Center for Law and Justice filed a state court action against the City of Asbury Park concerning the issuance of same-sex marriage licenses.

## 5. California

In contravention of a California initiative passed just a few years ago by an overwhelming majority of California voters that limited marriage to heterosexual couples, San Francisco mayor Gavin Newsom directed city officials to begin issuing marriage licenses to same-sex couples.<sup>25</sup> San Francisco started issuing licenses on February 12, 2004, and has currently issued more than 4,000 licenses.<sup>26</sup> On March 12, 2004, the California Supreme Court “ordered an immediate halt . . . to same-sex weddings in San Francisco.”<sup>27</sup> The Court will not address whether the state law limiting marriage to heterosexuals is unconstitutional, but instead will decide the narrower issue of whether “Newsom can ignore the state law if he considers it unconstitutional.”<sup>28</sup> Several lawsuits have been filed in California challenging the constitutionality of California’s Defense of Marriage Act.<sup>29</sup>

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24. *Id.* (not a direct quote from AG, but rather a quote from the AP’s summary on the web site).

25. “*Marriage in San Francisco*,” available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=16860&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

26. *Id.*

27. Bob Egelko, *Court Halts Gay Vows*, San Francisco Chronicle, Mar. 12, 2004, available at <http://www.hrc.org/Template.cfm?Section=Center&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17392>.

28. *Id.*

29. Alliance Alert, Alliance Defense Fund, Status Report: California Same Sex Marriage Litigation (Apr. 12, 2004), available at <http://www.alliancealert.org/index.php?ID=171>.

## 6. Washington

On March 8, 2004, Lambda Legal filed a lawsuit in a Washington state court on behalf of six same-sex couples seeking the right to marry.<sup>30</sup> Jamie Pedersen, Co-Chair of Lambda Legal's Board of Directors, said of the lawsuit, "As long as gay couples cannot marry, they are not treated equally under the law. This case seeks full marriage for lesbian and gay couples in Washington - nothing more and nothing less."<sup>31</sup> Complicating the same-sex marriage issue in Washington, Seattle Mayor Greg Nickels recently announced that "the city would begin recognizing same-sex marriages from other jurisdictions," despite Washington's Defense of Marriage Act that limits marriage to opposite-sex couples.<sup>32</sup>

## 7. Oregon

Two County Boards in Oregon, Benton and Multnomah, voted to issue marriage licences to same-sex couples in March 2004.<sup>33</sup> Benton County has ceased issuing licenses to any couples, gay or straight, in response to Oregon Attorney General Hardy Myers's threat to sue the County and his promise to accelerate a constitutional challenge to Multnomah's decision to issue licenses to gay couples.<sup>34</sup> Multnomah

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30. News Release, Lambda Legal Defense and Education Fund, *Lambda Legal and Northwest Women's Law Center File Lawsuit Seeking Full Marriage for Lesbian and Gay Couples in Washington State* (March 8, 2004), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1464>.

31. *Id.*

32. Gene Johnson, *Gay Couples Sue for Right to Marry*, The Associated Press, March 9, 2004, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17205&TEMPLATE=/ContentManagement/ContentDisplay.cfm>; see also Rev. Code Wash. (ARCW) § 26.04.010 (2004).

33. *Marriage in Oregon*, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17512&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

34. Theresa Hogue, *In Benton, the Wedding's Off: County to Halt All Marriage Licenses*, Corvallis Gazette-Times, March 23, 2004, available at <http://www.hrc.org/Template.cfm?Section=Center&Template=/ContentDisplay.cfm&ContentID=17659>.

County has not stopped issuing licenses, and currently has granted licenses to over 2,400 same-sex couples.<sup>35</sup> In a legal memorandum written to Oregon Governor Ted Kulongoski, General Myers predicted that the Oregon Supreme Court would likely “conclude that withholding from same-sex couples the legal rights, benefits and obligations that . . . are automatically granted to married couples of the opposite sex violates” Oregon’s constitutional provision guaranteeing equal protection of the laws.<sup>36</sup>

## 8. New York

In New York three issues are in play. First, mayors of three New York towns have taken actions favorable to the recognition of same-sex marriages. On February 27, 2004, the mayor of New Paltz, New York, Jason West, started marrying same-sex couples without issuing them licenses.<sup>37</sup> West’s renegade conduct ceased when the local district attorney charged him with 19 criminal counts.<sup>38</sup> On February 28, 2004, John Shields, mayor of Nyack, promised to “lead a group of same-sex couples to the clerk’s office to apply for marriage licences.”<sup>39</sup> And on March 2, 2004, the mayor of Ithaca, Carolyn Peterson, said the city “will accept applications [for same-sex marriage licenses] and forward them to the state’s health department for individual determinations.”<sup>40</sup>

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35. *Marriage in Oregon, supra* note 33.

36. Letter from Oregon Attorney General Hardy Myers to Oregon Governor Ted Kulongoski, (March 12, 2004), available at [http://www.doj.state.or.us/pdfs/AG\\_samesexopinion.pdf](http://www.doj.state.or.us/pdfs/AG_samesexopinion.pdf).

37. Lyle Denniston, *Oregon Judge Upholds Rights for Gay Couples*, *Boston Globe*, April 21, 2004.

38. *Marriage in New York*, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17083&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

39. *Id.*

40. *Id.* (direct quote from the article, not the person).

Second, on March 3, 2004, New York Attorney General Elliot Spitzer issued an opinion on the state of same-sex marriages in New York. The opinion instructed state officials that New York law prohibits the issuance of marriage licenses to same-sex couples.<sup>41</sup> The General's opinion also stated, however, that same-sex marriages entered into outside the State "should be recognized in New York."<sup>42</sup>

Third, on March 5, 2004, Lambda Legal filed a lawsuit in New York, as it has in several other states, seeking the recognition of same-sex marriage. Kevin Cathcart, Executive Director of Lambda Legal, said, "This is the whole enchilada. We seek, and intend to win, full marriage for lesbian and gay couples across New York."<sup>43</sup>

## 9. New Mexico

On February 20, 2004, Sandoval County Clerk Victoria Dunlap started issuing marriage licenses to same-sex couples.<sup>44</sup> Dunlap issued 66 licenses before a judge issued a temporary restraining order prohibiting the further issuance of licenses to same-sex couples.<sup>45</sup> The status of same-sex marriage in New Mexico is now, as elsewhere, in the hands of the courts.

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41. *Id.* (direct quote from the article, not the person).

42. Press Release, Office of New York State Attorney General Elliot Spitzer, *Attorney General Issues Opinion on Same Sex Marriage* (Mar. 3, 2004), available at [http://www.oag.state.ny.us/press/2004/mar/mar03a\\_04.html](http://www.oag.state.ny.us/press/2004/mar/mar03a_04.html).

43. *Id.*

44. News Release, Lambda Legal Defense and Education Fund, *Lambda Legal Files Historic Lawsuit Seeking Full Marriage for Gay Couples in New York* (Mar. 5, 2004), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1462>.

45. *Judge Quits N.M. Gay Marriage Case*, The Associated Press, Mar. 30, 2004, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=17834&TEMPLATE=/ContentManagement/ContentDisplay.cfm>.

## 10. Other States with Pending Same-Sex Marriage Lawsuits

Individuals in several other states have filed lawsuits challenging the constitutionality of denying same-sex couples the right to marry. In Alabama, two male prison inmates have sued for the right to marry each other.<sup>46</sup> In Florida, a homosexual couple has filed a lawsuit in Broward County challenging the state's marriage laws.<sup>47</sup> In Nebraska, a lawsuit has been filed in federal court challenging the state's ban on same-sex marriage.<sup>48</sup> The same situations exist in Arizona, Indiana, and North Carolina.<sup>49</sup>

## 11. Massachusetts

The key state in the same-sex marriage controversy right now, of course, is Massachusetts. In *Goodridge v. Department of Pubic Health*,<sup>50</sup> the Supreme Judicial Court of Massachusetts ruled that the State “may [not] deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry.”<sup>51</sup> The Court stated that the State has failed to “identify any constitutionally adequate reason for denying civil *marriage* to same-sex couples.”<sup>52</sup> The Court has ordered

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46. *Id.*

47. Jessica Walker, *Agency Looks to Block Inmates Marriage*, *The Montgomery Advertiser*, Apr. 15, 2004.

48. Alliance Alert, Alliance Defense Fund, Same Sex Marriage Pending and Recent Litigation Summary (Apr. 13, 2004), available at [http://www.alliancealert.org/aa2004/2004\\_04\\_13.htm](http://www.alliancealert.org/aa2004/2004_04_13.htm).

49. *Judge: Same-Sex Marriage Lawsuit Can Proceed*, CNN Law Center, Nov. 11, 2003, available at <http://www.cnn.com/2003/LAW/11/11/samesex.lawsuit.ap>.

50. *Id.*

51. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309 (2003).

52. *Id.* at 312.

that same-sex marriage licenses begin to be issued starting May 17, 2004.<sup>53</sup> As it currently stands, for the first time in our nation’s history, same-sex couples will be able to legally marry in just a few short days.

**B. At the federal level – the *Defense of Marriage Act***

In 1996, the Congress passed, and President Clinton signed into law, the Defense of Marriage Act.<sup>54</sup> The enactment of DOMA was a welcome moment in the longer-term struggle to support the ongoing stability of society’s bedrock unit: the family. At the time of its consideration and adoption, DOMA was a measured response to an orchestrated plan to change the law of the fifty States on the question of marriage without the democratic support of the People of the States. That revolution would have occurred had persons joined in licensed, same-sex marriages from a single jurisdiction, Hawaii, began traveling to other jurisdictions and then demanding legal recognition of their relationships, or of judgments reflecting legitimacy on their same-sex unions. The plotted intention was *to force* States to bend their will and abdicate their important public policy interests by weight of the Full Faith and Credit Clause of the United States Constitution.

Exercising its clear authority under the Full Faith and Credit Clause, Congress defined precisely the respect that sister States were bound to give to “judgments” of sister States that two persons of the same sex were married. In crafting DOMA, Congress showed its profound respect for the cooperative federalism that is the hallmark of our Republic. In that instance, recognizing the indisputably primary role of the States in defining the estate of marriage, and providing for its creation, maintenance, and dissolution,

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53. *Id.* (emphasis added)

54. *Massachusetts Approves Gay Marriage Ban, Legalizes Civil Unions*, CNN Law Center, Mar. 30, 2004, available at <http://www.cnn.com/2004/LAW/03/29/gay.marriage.ap/>.

Congress deferred to the judgment of each State the question of whether any union other than that between one man and one woman could be accorded legal status as a marriage under state law. At the same time, the Congress properly took account of federal dimensions of marital relationships (under, for example, the Internal Revenue Code).

As far as DOMA goes, it is justified as an exercise of clear Congressional authority under the Constitution, and is substantially relied upon by the States.<sup>55</sup> Of course, that DOMA suffices for these purposes does not mean that the work of the Congress in this area is complete. This is especially so in the wake of *Goodridge* and the penchant of many courts to replace the democratic process with judicial fiat.

## II. THE FEDERAL MARRIAGE AMENDMENT

The United States Constitution provides for its own amendment as needed to meet the needs of the Nation over time. Article V provides the process for amending the Constitution. It states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

United States Const. Art. V.

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55. Thirty-eight States, relying on DOMA, have enacted statutory or constitutional provisions limiting marriage to the union of opposite sex couples. See <http://www.marriagewatch.org/states/doma.htm>. In doing so, this super majority of the States have expressly announced the strong public policy preference for limiting marriage to opposite sex unions.

Article V proposes two means for initiating the amendment process and two means for ratifying propounded amendments. The first means is essentially federal in nature and origin and occurs “whenever two thirds of both Houses shall deem it necessary,” such that the Congress “shall propose Amendments to this Constitution . . . .” The second means is the product of the States, when, “on the Application of the Legislatures of two thirds of the several States,” Congress calls “a Convention for proposing Amendments . . . .”<sup>56</sup>

Whichever of the two means initiates the amendment process, an amendment propounded to the States becomes valid when ratified. Article V provides that an amendment is “valid to all Intents and Purposes, as Part of this Constitution,” in either of two cases: first, when a propounded amendment is “ratified by the Legislatures of three fourths of the several States”; or, second, when a propounded amendment is ratified by “Conventions in three fourths” of the several States. Pursuant to Article V, Congress holds the power to choose between the two alternative means of ratification.<sup>57</sup>

House Joint Resolution 56 proposes an amendment to the United States Constitution:

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56. James Madison explained these alternatives as reflecting the opportunity for either the States or the general government to seek amendment when the experiences of the one or the other suggested the propriety of doing so. *See* THE FEDERALIST NO. 43 at 278 (Rossiter ed.) (amendment process “equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other”). Thus, where need was apparent to the one, but not the other, amendment was still, at least, a possibility.

57. Congress has, with one exception, always preferred to subject the question of ratification to approval by the Legislatures of the several States. The twenty-first amendment was the exception to the practice, and resulted in the rapid ratification of the twenty-first amendment (repealing, in turn, the eighteenth amendment). *See* <http://www.usconstitution.net/constamnotes.html#Am21>.

## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to marriage .

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:*

`Article –

`SECTION 1. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.'.

The provisions of House Joint Resolution 56 fall within two broad categories: substantive and procedural. These are treated in turn below.

### **A. The Substantive Provisions of the Proposed Amendment**

The Federal Marriage Amendment proposed by HJR 56 accomplishes two tasks.

*First*, if ratified, the FMA authoritatively defines the term “marriage” for purposes of federal and state law throughout the United States.

*Second*, if ratified, the FMA expressly bars any construction of constitutions or laws, whether federal or state, in a way that requires either that marital status be conferred on those who are unmarried or that the legal incidents of marriage be conferred on such unmarried couples or groups. Great hue and cry can be anticipated from opponents of the amendment. Despite that, the FMA does not, in fact,

work a surprising, unpredictable, or sudden change in the status of law in the United States. Rather, the FMA serves to resolve the uncertainties that have been artificially interjected into what would otherwise be fairly described as an entirely and clearly settled question of law.

**1. The FMA Uniformly Confirms the Established, Long-standing and Broadly Accepted Definition of Marriage**

On this point, the FMA is definitive and clear:

“Marriage in the United States shall consist only of the union of a man and a woman.”

Not two men. Not two women. Not a man and two or more women. Not a woman and two or more men. Not a commune. This ineffable nature of marriage as a union between a man and a woman was long established before it was noted by William Blackstone:

By statute 32 Hen. VIII. c. 38. it is declared, that all persons may lawfully marry, *but such as are prohibited by God's law*; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble

Blackstone, Commentaries on the Laws of England, Book 1, Ch. 15 (emphasis added).

Within a century of its birth, our nation tested the meaning of that common law tradition, found that it served the common good, and made it the principle by which marriage would be governed in Territories of the United States. The effect of that determination was the ban on polygamous marriage, a ban that had particular impact in the Utah Territory, where the Mormon Church had settled.

The leading case considering the constitutionality of the federal ban on polygamy was *Reynolds v. United States*, 98 U.S. 145 (1878). Chief Justice Waite wrote the opinion for the Court in *Reynolds*, affirming a criminal conviction for polygamy, over a claim that the prohibition violated the right to free

exercise of religion. After disposing of the free exercise defense, the Court addressed the underlying interest in monogamous marriage sought to be preserved by the statute in question in *Reynolds*:

[I]t is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation [limiting marriage to one man and one woman] in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor, Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Chancellor Kent observes that this remark is equally striking and profound . . . . An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

98 U.S. at 165-66.

None of the several States has ever, by constitutional provision or by legislative enactment, altered the estate of marriage so to admit to it any relationship other than that of one man and one woman. No objection to the contrary of this fact can be made. Marriage as sanctioned by the States has ever been only that which the FMA now makes express and infeasible.

## **2. The FMA Finally Resolves and Places Beyond Judicial Adventure the Uniformly Established, Long-standing and Broadly Accepted Definition of Marriage**

Abraham Lincoln famously questioned, if one called a dog's tail a leg, how many legs the dog would have? Veterinary mathematicians could be counted on to reply, "why, five, of course." And that sought after response would draw the laugh of the great man, along with his rebuff that, no matter what you

called a tail, it was never going to be a leg.<sup>58</sup> And, no matter what you call the union of any grouping of persons other than one man and one woman, it will never be a marriage. Nonetheless, judges in a number of States have been busy counting five legged dogs and creating judicial mandates for marital constellations no less bizarre.

For centuries of American legal history and a millennium of common law, marriage has been only one thing: the union of *one* man and *one* woman. Call three men and a baby a marriage, if you must, but Lincoln would as surely chuckle as if you had counted five legs on his hound. Nonetheless, the ongoing struggle of our States to preserve to themselves the power to define the institution of marriage is suffering blow after blow from judges that have never counted fewer than five legs on Lincoln's dog. We have indicated above some of the instances of the judicial re-arrangement of marriage.

Plainly, it is within the power of the States to put any question, any issue, beyond the reach of special interest groups and judges that have usurped the power of the people and the role of the legislature. There is no constitutional offense committed against the sovereignty of the States when, for their mutual aid and care, the State compact together in the manner proposed by the FMA. The donation of a small portion of sovereignty, over the definition of marriage and the judicially compelled disposition of its benefits, if it occurs, will be by the vote of the States. The voluntary act of free and independent States is the crown of liberty not the source of injury.

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58. Over time, the traditional attribution of this story to Abraham Lincoln has been questioned. Nonetheless, the story serves well to illustrate fallacious logic. Moreover, that Lincoln cannot be shown by original sources to have used this story has not stopped the Judicial Branch from employing the story for its economic effectiveness. *See, e.g., Bellas v. CBS, Inc.* 221 F.3d 517, 540 (3<sup>rd</sup> Cir. 2000) (applying Lincoln's aphorism); *First Liberty Investment Group v. Nicholsberg*, 145 F.3d 647, 652 n.3 (3<sup>rd</sup> Cir. 1998) (same); *Eirhart v. Libbey-Owens-Ford Co.*, 996 F.2d 837, 841 n.5 (7<sup>th</sup> Cir. 1993) (same).

**3. The FMA Leaves to the States the Power to Decide What Shall Be the Legal Incidents of Marriage, Only Preventing Constructions of Constitutions and Laws, whether Federal or State, in a Manner that Requires That Marital Status or the Legal Incidents of Marital Status Be Conferred on Unmarried Couples or Groups.**

The FMA ultimately defines marriage for purposes of law in the United States. It does not stop there. Rather, the FMA addresses the root of the present dispute over the nature of marriage and the right to adjust the definition of marriage to fit relational groupings other than those of one man and one woman. That root, as we explained above, is in the judicial perturbations arising from disputes over allegations that limiting legal marriage to the union of one man and one woman violates either a fundamental right or a duty under the Constitution of government actors not to discriminate. The FMA responds to those perturbations by placing beyond the reach of those whose duties include construction of federal and state laws and constitutions the ability to use their positions to effect a construction of law that would require the expansion of marriage to groupings other than the union of one man and one woman, or the allocation of the legal incidents of marriage to such other groupings.

Here we consider the provision of the FMA regarding the legal incidents of marriage. These, we think, are determined by the law of the jurisdictions to which a marital union is subject. For example, a married couple is entitled, under federal law, to file their federal income tax returns and pay any liabilities thereon under the unique formulation of “married filing jointly.” To no other grouping of individuals is such a special categorization allowed. Thus, under federal law, an incident of marriage is the right to file tax returns using that categorization.

Similarly, States may provide such a legal incident to marriage in their system of income or other taxation. In addition, States may create special capacities of relation between such married couples and

property. A good example of this latter approach is the property holding category of “tenancy by the entireties.” While others than a married couple may hold property as tenants in common, “tenancy by the entireties” grants to each spouse the right to survivorship, meaning that upon the death of the other, the surviving spouse takes title to the property as though it was always in their name alone.

Still other legal incidents of marriage have existed and may yet be created.

One such incident arises in the judicial setting. That legal incident is the spousal privilege protecting marital communications from compelled disclosure. The grant of the privilege serves what the Supreme Court has recognized to be an important governmental interest in preserving marital harmony.<sup>59</sup>

The application of the spousal testimony rule well illustrates the sovereignty retained by the States in this regard. Many States follow the federal approach as explained in the *Trammel* decision. Others choose to formulate the spousal privileges in other ways. Kansas, for example, has rejected *Trammel* and allows a defendant spouse to assert the testimonial privilege even against a willing spouse.<sup>60</sup> Under the FMA, States would be free to refine and reconsider such privileges. All that the FMA does in this regard is to prevent the States from being compelled to enlarge the spousal testimonial privilege so that it becomes akin to the “lovers privilege,” the “really good friends for a long time privilege,” or the “we want it because we want it” privilege.

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59. See *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (“the important public interest in marital harmony”) (discussing *Trammel v. United States*, 445 U.S. 40 (1980) (affirming federal spousal privilege, limiting ability to assert privilege to the testifying spouse)).

60. See KSA § 60-423(b) (testimonial privilege in criminal cases); KSA § 60-248 (more limited spousal privilege in civil litigation).

One long-standing privilege relates to the legal presumption regarding offspring or issue of the marriage.<sup>61</sup> Although this presumption may be changing with the times and with changes in society, the States have had the power in law to craft such a presumption and to give legal effect to it.

Still other legal incidents of marriage may be defined, discovered or recognized. We do not pretend to exhaust the definitional exercise of identifying those incidents. Whatever they may be in any given State of the Union, those legal incidents are given a kind of insulation by the FMA. The FMA leaves to the States the power to decide what legal incidents belong to marriage. At the same time, the FMA bars judges, mayors, town clerks, and others from using the guise of statutory construction as the means to extend outside of the marital union the availability of any such incidents as may be recognized by State law.

**B. The *Federal Marriage Amendment* Properly Recognizes Opposite Sex Marriage as the Key to Stable and Healthy Societies**

Europe's experience with same-sex marriage is instructive to us on why we must clearly define marriage as the union of one man and one woman, and accept nothing less. In *The Fall of France: What Gay Marriage Does to Marriage*,<sup>62</sup> David Frum commented on the relevance of France's experience to the same-sex marriage debate in the United States:

The argument over gay marriage is only incidentally and secondarily an argument over gays. What it is first and fundamentally is an argument over marriage. . . . [G]ay marriage will turn out in practice to mean the creation of an alternative form of legal coupling that will be available to homosexuals and heterosexuals alike. Gay marriage, as the French are vividly demonstrating, does not extend marital rights; it abolishes marriage and puts a new, flimsier institution in its place.

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61. See, e.g., *Freedman v. McCandless*, 539 Pa. 584, 654 A.2d 529 (1995); but see 701 A.2d 176 (Pa. 1996) (noting limitations on the presumption of paternity resulting from changing patterns of family life and changes in legal status of children born out of wedlock).

62. David Frum, *The Fall of France: What Gay Marriage Does to Marriage*, National Review, Nov. 8, 1999, available at [http://www.findarticles.com/cf\\_dls/m1282/21\\_51/56899757/p2/article.jhtml?term=](http://www.findarticles.com/cf_dls/m1282/21_51/56899757/p2/article.jhtml?term=).

Proponents of gay marriage freely borrow analogies from the civil-rights movement. But we are not talking here about throwing open the country club to people of all races; we are talking about bulldozing the country club and building something entirely different in its place.<sup>63</sup>

Social commentator Maggie Gallagher concurs. “A look at Europe,” she says, demonstrates that “if marriage and children” become “just one of many lifestyle choices, people stop getting married and they stop having children in numbers large enough to replace the population.”<sup>64</sup> Indeed, “[t]he U.N. is now issuing urgent warnings about European depopulation.”<sup>65</sup> Thus the legal recognition of *any* relationship on the same level as traditional marriage will wreak irreversible harm on American society, as it has on European society.

Marriage has taken a serious hit in our culture in the last 40 years. Its weakening has led to “a gigantic expansion of state power and a vast increase in social disorder and human suffering.”<sup>66</sup> As Gallagher observes,

The results of the marriage retreat are not merely personal or religious. When men and women fail to form stable marriages, the first result is a vast expansion of government attempts to cope with the terrible social needs that result. There is scarcely a dollar that state and federal government spends on social programs that is not driven in large part by family fragmentation: crime, poverty, drug abuse, teen pregnancy, school failure, mental and physical health problems. Even Medicare spending is inflated, as elderly singles spend more of their years in nursing homes.<sup>67</sup>

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63. *Id.*

64. Maggie Gallagher, *The Stakes: Why We Need Marriage*, National Review, July 14, 2003, available at <http://www.nationalreview.com/comment/comment-gallagher071403.asp>.

65. *Id.*

66. *Id.*

67. *Id.*

Same-sex marriage will not simply undermine traditional marriage, it will transform our society and the nature and reach of government. That transformation will lead to more, not less, government growth and social chaos. The *Federal Marriage Amendment* will insure such a profound and elemental change does not occur without the opportunity of the people and society to exercise the democratic model and vote through their elected state houses.

It is not surprising that virtually ever society has expressed, by statutes, laws, and regulations, a strong preference for marriage. At a minimum, the larger society has depended on the conjoining of men and women in fruitful unions to secure society's continued existence. Traditional marriages, in which one man and one woman create a lasting community, transmit the values and contributions of the past to establish the promise of the future.

Nor do the benefits of traditional marriage flow only *from* the couple *to* the society made stable by the creation of enduring marriages. The valued role of marriage in increasing the level of health, happiness and wealth of spouses, compared to unmarried partners, is established.<sup>68</sup> And the known research indicates that the offspring of traditional marital relations also trend toward greater health and more developed social skills.<sup>69</sup>

In contrast, sexual identicality, not difference, is the hallmark of same-sex relationships. Thus, to admit that same-sex relationships can be valid marriages requires a concession that sexual distinctions are meaningless. That conclusion is not sensible or empirically supported. Consider, for example, the principle difference between married couples that would procreate and same-sex couples seeking to do likewise.

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68. See "New Study Outlines Benefits of Marriage," *The Washington Times*, Oct. 17, 2000.

69. See *id.*

Children can never be conceived as the fruit of a union between couples of the same sex, perforce requiring the intervention of a third person, the donating participant with the same-sex couple. If the identity of this donor is secret, then it is guaranteed that the child of such same-sex unions will be deprived of an intimate relationship with their biological parent. If the donor is included into the relationship, the transmogrified same-sex union is changed again into a tri-unity. While the math of these problems may be easy to follow, claims that raising children as the children of a homosexual union appear to be based entirely on a game of “hide the ball” that serves to leave no doubt that such placements are consistent with the best interests of the child, even though, in fact, every major study reaching that conclusion is impeached by flawed constructions and conclusions.<sup>70</sup>

Traditional marriage makes such significant contributions to society that it is simply a sound policy judgment to prefer such marriages over lesser relationships in kind (such as co-habitation) or entirely different in character (same-sex relationships). The unique nature of marriage justifies the endorsement of marriage and the omission of endorsements for same-sex marriage.

For all of these reasons, Congress should pass H.J. Res. 56, and allow the states the opportunity to resolve the matter through the democratic process of a Constitutional amendment.

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70. There are at least two recent and thorough declamations of the argument that children in the homes of same-sex couples suffer from no diminution of socially relevant factors. One of those objections takes the form of affidavit testimony in the Canadian same-sex marriage case. See <http://www.marriagewatch.org/issues/parenting/htm> (linking Affidavit of University of Virginia Professor Steven Lowell Nock filed in *Halpern et al. v. The Attorney General of Canada*, Docket No. 684/0 (Ontario Court of Justice, Quebec)) (critiquing studies addressing the question of same-sex parenting. Professor Nock found that all the reviewed studies contained fatal flaws in design or execution, and that each study failed to accord with “general accepted standards of scientific research”). The other document is a monograph available from the same webpage. That monograph, Lerner and Nagai, “No Basis” (2001), examines 49 studies of same-sex parenting and concludes that the studies are fatally flawed and do not provide a sound scientific basis for policy or law-making.