FEDERAL MARRIAGE AMENDMENT (THE MUSGRAVE AMENDMENT)

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

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CONTENTS

MAY 13, 2004

OPENING STATEMENT

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FEDERAL MARRIAGE AMENDMENT (THE MUSGRAVE AMENDMENT)

THURSDAY, MAY 13, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 11 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot (Chair of the Subcommittee) Presiding.

Mr. CHABOT. The Committee will come to order. This is the Judiciary Subcommittee on the Constitution.

On May 21, 2003, Representative Marilyn Musgrave introduced a constitutional amendment, H.J. Res. 56, stating:

"Marriage in the United States shall consist only of the union of a man and 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 intent behind the amendment is to allow the States and Congress to enact civil unions but to reserve "marriage" as a legal concept applicable only to the union of man and a women.

To make that clear, Representative Musgrave announced in March that she supported deleting from the amendment the phrase "nor State or Federal law," such that the revised amendment would be, and I will quote that as well:

"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 shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

The intent of the rewording of the amendment is to make clear that State legislatures and Congress could, by statute, create same-sex civil unions, if they so chose.

At the House Constitution Subcommittee's previous oversight hearing on "Legal Threats to Traditional Marriage: Implications For Public Policy," we received testimony providing evidence for the following propositions:

Several judicial decisions over the past year threaten to undermine the age-old consensus of civilization that marriage is uniquely between a man and a woman.

That would be the first.

The second, the Massachusetts Supreme Judicial Court has held that "marriage" in that State must include same-sex "marriages."

While the Massachusetts legislature has passed a constitutional amendment barring same-sex "marriage", the earliest that amendment could go into effect is in the year 2006. Before that time, Massachusetts will be forced by the decision of the Massachusetts Supreme Judicial Court to issue same-sex "marriage" licenses beginning on Monday, May 17.

Third, we received testimony that it is, quote, "increasingly clear" that the Federal Defense of Marriage Act, the intent of which is to prevent one State from having to recognize a same-sex marriage license granted in another State, will be held unconstitutional under the legal rationales articulated by the Massachusetts Supreme Judicial Court, namely that the three reasons the State of Massachusetts gave for giving preferred status to heterosexual marriage—promoting procreation, encouraging the raising of children in two-parent biological families, and conserving limited State resources—have "no rational basis."

I might note that, although it says "increasingly clear", there was testimony to the contrary as well, that it might well be held constitutional.

Next, consequently, all States and the Federal Government will be required by courts to define "marriage" to include same-sex "marriages."

Fifth, we also received testimony that the effects of a court-imposed definition of "marriage" that includes same-sex "marriages will be felt throughout Federal law."

Six, finally, we received testimony that recent data from the Netherlands shows that legalizing same-sex marriage in the United States and thereby decoupling marriage from parenthood may contribute significantly to an increase in the out-of-wedlock birth rate for *heterosexual* couples, to the detriment of children.

Article IV, section 4, of the Constitution states that, "the United States shall guarantee to every State in this Union a republican form of government." This means a form of government under rules passed by the duly elected representatives of the people, not by judges who are not charged with reflecting the people's will.

James Madison, in *Federalist Paper* number 39, wrote:

"What, then, are the distinctive characters of the republican form of government? It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise, a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic."

Today, 44 States, so far, have enacted laws that provide that marriage shall consist only of the union of a man and a woman. These 44 States constitute 88 percent of the States—well more than the 75 percent required to approve a constitutional amendment—and they include 86 percent of the U.S. Population. This hearing will explore whether H.J. Res. 56 should be passed by Congress and sent to the States for ratification to help guarantee a republican form of government by preserving marriage policy as enacted by the people's duly elected representatives in the States.

I now recognize the gentleman from New York, Mr. Nadler, the Ranking Member of this Committee, for the purpose of making an opening statement.

Mr. NADLER. Thank you.

Before I read the opening statement that I prepared, I must comment on the rather extraordinary words of the Chairman. I hope the Chairman did not mean when he talked about guaranteeing a republican form of government that he believes that the Federal Government should start second-guessing the States as to what authority the States choose to grant to their court system in interpreting their own constitutions. Rather than guaranteeing a republican form of government, that would be about the most egregious form of States' rights violations that I could think of.

Mr. Chairman, today, the House Constitution Subcommittee is scheduled to hold its third in a series of five hearings on the subject of same-sex marriage. Evidently, this critical threat to our Nation's future requires the most extensive analysis of anything the Committee on the Judiciary has done in this Congress. By comparison, the proposed constitutional amendments dealing with the preservation of our democracy in the event of a catastrophic annihilation of the Congress by a terrorist attack have received no hearings whatsoever.

We will be making time after today's hearing to vote on a very important bill that would declare the oak tree as the national tree of the United States. So we deal with the time of this Committee.

What is the crisis? Could it be that the Republic cannot withstand the possibility that loving families could avail themselves of the protection of law even if they have the audacity to love someone of the same gender? Will the Nation be destroyed if the children of those families receive the same protections in law as the children of other families, or must we also punish little children because their parents are lesbian or gay?

I have trouble deciding what is worse, self-proclaimed defenders of marriage mobilizing to prevent people from getting married, or the hysterical assertion that, as we were told at our last hearing, that heterosexuals will no longer want to marry if lesbians and gays can also marry. So here is the Congress of the United States. Million of Americans cannot take their children to the doctor, millions of Americans are out of work, patriotic young Americans are being killed in Iraq, while it is clear that the President has not a clue as to what he is doing there, and the most important thing on the agenda is this anti-marriage amendment.

If equal protection of the laws has any meaning, it must be that all people, all families must be treated fairly and equally. That should include lesbian and gay families, whether or not anyone approves of them.

Most importantly for all Americans, it means that we must not become the first generation in our Nation's history to amend the Constitution to take away, rather than to enhance, liberty. It would indeed be another shameful legacy for this Congress.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

The Chair would ask that any other Members who would like to make opening statements would submit them for the record so we

can get right to the panel, if that is acceptable to the Members. We appreciate it.

I would ask unanimous consent that the Member from Wisconsin, Ms. Baldwin, be permitted to ask questions as any other Member of the Committee would be. She is not a Member of this Committee but is a Member of the full Committee on the Judiciary.

So, without objection, so ordered.

I will now introduce the panel.

We begin with our first witness, who is Representative Marilyn Musgrave. Mrs. Musgrave represents Colorado's Fourth District, and she is the lead House sponsor of the Federal Marriage Amendment. Serving her first term, Representative Musgrave sits on the House Agriculture, Small Business and Education and Workforce Committees.

Representative Musgrave was elected and served 4 years ago as a State representative during which time she was elected the Senate Republican Caucus Chairman. She also has taught school in eastern Colorado.

We welcome you here this morning, Marilyn.

Our second witness is Robert H. Bork. Judge Bork is a leading author and educator and former judge of the United States Court of Appeals for the District of Columbia Circuit. Judge Bork has been the Alexander M. Bickel Professor at Public Law at Yale Law School, a partner at the law firm of Kirkland and Ellis, and the author of several books, including *The Tempting of America* and *The Political Seduction of the Law.*

Judge Bork was nominated by President Reagan to serve as an Associate Justice on the United States Supreme Court, but his confirmation was denied by the United States Senate. Judge Bork is currently a Distinguished Fellow at the Hudson Institute.

We welcome you here, Judge Bork.

Our third witness is Representative Barney Frank, who represents the Massachusetts Fourth District. He is the Ranking Member on the House Financial Services Committee, and he is also a Member of the Select Committee on Homeland Security. Previously, he was a Massachusetts State Representative and an assistant to the Mayor of Boston; and we always welcome you here, Barney.

Our fourth and final witness is Jay Alan Sekulow, Chief Counsel for The American Center for Law and Justice, an international public interest law firm and educational organization. An accomplished and respected judicial advocate, Mr. Sekulow has presented oral arguments before the Supreme Court in numerous cases in defense of constitutional freedoms.

Founded in 1990, The American Center for Law and Justice specializes in constitutional law. The ACLJ under Mr. Sekulow's direction is involved in public interest and public policy issues that threaten people of faith and the American family.

The National Law Journal has twice named Mr. Sekulow one of the 100 most influential lawyers in the United States.

We welcome all four of the witnesses here this morning.

We will begin with Mrs. Musgrave; and, as I am sure most of you are aware, we have the 5-minute rule which will be in effect. When the yellow light comes on, you have a minute to wrap up. We will

give you a little leeway. But when the red light comes on, as all the witnesses know, we would appreciate it if you will wrap up your testimony by then.

Mrs. Musgrave, you are recognized.

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

Mrs. MUSGRAVE. Chairman Chabot, Ranking Member Nadler, and other distinguished Members of the Judiciary Committee, thank you very much for allowing me to come before you today.

Mr. Chairman, Members of the Committee, I bring before you House Joint Resolution 56, the FMA, or Federal Marriage Amendment, a proposal to amend the Constitution of the United States of America.

I assure you that I do not lightly propose to amend the Constitution, because I am persuaded that simple prudence dictates the Constitution should be amended only as a last resort. Indeed, I wish devoutly that the FMA were unnecessary and that we did not have to be here today to discuss it. I wish I could tell the American people that they have a choice about whether their Constitution will be amended.

Unfortunately, leaving the Constitution unaltered is not an option that is open to us. Let me say that again.

For better or ill, as we sit here today, the Constitution of the United States of America is on the verge of being amended; and the only choice we have in the matter is whether it will be amended *de jure* through the Democratic process for proposing and ratifying amendments set forth in article V of the Constitution itself or *de facto* by court ruling.

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

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

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

If this is the case, why is the FMA necessary? Sadly, the answer to that question lies in the fact that certain judges do not seem to

care about the text and structure of the Constitution or the unbroken history and traditions of our Nation. Instead, they seek to use their power to interpret the Constitution as a means of advancing a social revolution unsought and unwanted by the American people.

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

The FMA is a measured and a moderate response to the serious problem I outlined above. The proposed amendment is only 51 words long and states:

"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 first sentence is designed to ensure that no governmental entity—whether in the legislative, executive or judicial branch—at any level of government—Federal, State or local—shall have the power to alter the definition of marriage so that it is other than a union of one man and one woman.

The second sentence is designed to prevent any court from construing, one, the Federal Constitution, two, a State constitution, or, three, Federal or State statutory or common law of general applicability, to require any legislative body or executive agency to enact—or recognize under the Full Faith and Credit Clause—so-called civil unions or domestic partnership laws or any law that would confer a subset of the benefits, protections and responsibilities of marriage on unmarried persons.

Opponents of the FMA have attacked it as an attempt to constitutionalize discrimination against homosexuals and make them permanent second-class citizens. Nothing could be further from the truth. Gays are not excluded from the benefits of marriage by others. They are excluded by their own choices. Marriage is and for the entire history of mankind has always been a relationship between persons of the opposite sex, and the primary function of marriage has always been to provide a legal context for procreation and child rearing by fathers and mothers. Even the dictionary tells us that the very meaning of the word marriage necessarily contemplates a relationship between a man and a woman.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you, Ms. Musgrave.

[The prepared statement of Mrs. Musgrave follows:]

PREPARED STATEMENT OF THE HONORABLE MARILYN MUSGRAVE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

INTRODUCTION

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

Mr. Chairman, members of the committee, I bring before you House Joint Resolution 56 (the "FMA"), a proposal to amend the Constitution of the United States of America.

I assure you that I do not lightly propose to amend the Constitution, because I am persuaded that simple prudence dictates the Constitution should be amended

only as a last resort. Indeed, I wish devoutly that the FMA were unnecessary and that we did not have to be here today to discuss it. I wish I could tell the American people they have a choice about whether their Constitution will be amended.

Unfortunately, leaving the Constitution unaltered is not an option that is open to us. Let me say that again. For better or ill, as we sit here today, the Constitution of the United States of America is on the verge of being amended, and the only choice we have in the matter is whether it will be amended *de jure* through the democratic process for proposing and ratifying amendments set forth in Article V of the Constitution itself, or *de facto* by court ruling.

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

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

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

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

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

THE TEXT AND PURPOSE OF THE PROPOSED AMENDMENT

The FMA is a measured and moderate response to the serious problem I outlined above. The proposed amendment is only 51 words long and states:

> 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 first sentence is designed to ensure that no governmental entity (whether in the legislative, executive or judicial branch) at any level of government (federal, state or local) shall have power to alter the definition of marriage so that it is other than a union of one man and one woman.

The second sentence is designed to prevent any court from construing (1) the federal Constitution, (2) a state constitution, or (3) federal or state statutory or common law of general applicability, to require any legislative body or executive agency to enact (or recognize under the Full Faith and Credit Clause) so-called civil union or domestic partnership laws or any law that would confer a subset of the benefits, protections and responsibilities of marriage on unmarried persons.

Over the past few months some have misinterpreted the FMA, especially the words "nor state or federal law," and have argued that the text is more than a limitation on judicial activism and would constrain even legislatures from enacting civil union laws. Let me be very clear about this point. It is not now, nor has it ever been, my intention to impose any sort of constraint on legislatures with respect to passing civil union laws.

While I personally oppose such laws and would vote against any such proposal were I in the Colorado legislature, by no means am I seeking to establish this position in the Constitution. The FMA would establish a general rule against same-sex marriage while leaving the matter of civil unions, domestic partnerships and other nonmarital arrangements to the state legislatures to decide as they will. This has always been my intent, and I will support any amendment to the FMA necessary to make that intent clear.

In this regard, Senator Allard has introduced Senate Joint Resolution 30, the text of which is very similar to House Joint Resolution 56. For the record, I fully support the clarifying changes Senator Allard has made in that bill.

THE FMA DOES NOT NATIONALIZE MARRIAGE LAW

Some have questioned the FMA on the grounds that it will nationalize marriage law. Mr. Chairman, no one is a stronger supporter of the principles of federalism than I, and if I thought for a single moment the FMA would operate to nationalize marriage law I would not be here today.

Historically, the law of marriage has been a matter of state law, and the federal government has had little or no role in the area. For example, laws providing for the legal requirements for civil marriage; who has capacity to marry; types of marriages that are prohibited; and whether common law marriages are valid are all matters of state law. The FMA does not alter this state of affairs in any way except in the very narrow area of defining marriage as between a man and a woman. Indeed, far from depriving state legislatures of power the FMA is intended to empower legislatures against the advances of activist courts.

With respect to the limited area of marriage law that would be nationalized by the FMA (i.e., defining marriage as between a man and a woman), the nationalization of marriage law is precisely what the activists pressing for same-sex marriage are on the edge of achieving. In other words, this area of marriage law is about to be nationalized whether the FMA is ratified or not.

The activists expect that in the next few years same-sex marriage will be decreed by the Supreme Court, and recent Supreme Court rulings seem to make that expectation a reasonable one. As Justice Scalia explained in his dissent in *Lawrence* v. *Texas:*

> [T]he Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." . . . Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do" . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples[?]

Only five months later the Massachusetts Supreme Judicial Court answered Justice Scalia's poignant question. In *Goodridge* v. *Dept. of Public Health*, relying on the *Lawrence* ruling, the Massachusetts court decreed by judicial fiat that beginning next week—on Monday, May 17 to be exact—for the first time in the history of this nation a state will be required to issue marriage licenses to same-sex couples.

Goodridge was a 4 to 3 decision. The swing of a single vote among the seven members of the Massachusetts high court has resulted in a radical redefinition of marriage in Massachusetts that is wholly unsupported by the text, history or structure of that state's constitution or by the history and traditions of its people. Judicial hubris of this kind cannot be allowed to stand.

In addition, it is now clear that same-sex couples will travel to any state that allows them to marry or enter civil unions, and will then demand that their home states give "full faith and credit" to the judgment that recognizes their status. Many of the same-sex couples contracting civil unions in Vermont, for instance, do not live in Vermont, and just this week the media reported that a lesbian couple who entered into a Vermont civil union have filed for a divorce not in Vermont but in New York. The couple is seeking to have the New York courts recognize the Vermont civil union under the Full Faith and Credit Clause.

An additional declared strategy of the activists is to attack the constitutionality of the Federal Defense of Marriage Act, overwhelmingly adopted by Congress in 1996, and such challenges have already begun.

One way or another, therefore, the principles of federalism are bound to be compromised with respect to the recognition of same-sex unions. The only choice we have in the matter is whether the millennia-old tradition of defining marriage as a legally-recognized relationship between male and female will be compromised as well.

PRESERVING TRADITIONAL MARRIAGE IS NOT DISCRIMINATION

Opponents of the FMA have attacked it as an attempt to constitutionalize discrimination against homosexuals and make them permanent second class citizens. Nothing could be further from the truth.

Gays are not excluded from the benefits of marriage by others. They are excluded by their own choices. Marriage is and for the entire history of mankind has always been a relationship between persons of the opposite sex, and the primary function of marriage has always been to provide a legal context for procreation and child rearing by fathers and mothers. Even the dictionary tells us that the very meaning of the word "marriage" necessarily contemplates a relationship between a man and a woman. It is not discrimination for the state to recognize this fundamental biological reality.

A falcon might say he looks a lot like an eagle and can do many of the same things as an eagle and therefore it is discrimination to refuse to call him an eagle. But a falcon is not an eagle, and passing an "antidiscrimination" law requiring that henceforth all falcons shall be called eagles does not magically turn falcons into eagles. In the same way, calling a same-sex union a "marriage" does not mean that it is a marriage in any meaningful sense of that word.

We can understand homosexuals' yearning for public approval of their sexual choices. But same-sex marriage is not marriage. At most it is a pretending to be something like the relationship between husband and wife that is marriage. The reality is not changed, however, if the state collaborates in the pretense and calls it marriage. Conversely, refusing to call a same-sex union something that it is not and can never be is not discrimination.

THE AMERICAN PEOPLE OVERWHELMINGLY SUPPORT TRADITIONAL MARRIAGE

Finally, Mr. Chairman, polling date supports the common sense conclusion that the American people do not support any radical redefinition of marriage. In a CBS News/New York Times poll of 1,206 adults, conducted over March 10–14 59% of those polled reported that they favor an amendment to the United States Constitution that would allow marriage only between a man and a woman. Only 35% of those polled were opposed to the amendment and 6% did not know. The poll had a margin of error of 3%.

CONCLUSION

Mr. Chairman, I respect the Supreme Court and the role it plays in our constitutional republic. But there is a Latin phrase that captures perfectly the dilemma we find ourselves in when the court imposes its policy choices on the nation under the guise of interpreting the Constitution.

quis custodiet ipsos custodes

The phrase means, "Who guards the guardians?"

Can there be any doubt that in *Lawrence* the court overstepped its bounds? And I fear that, as Justice Scalia warned and the *Goodridge* ruling confirms, it may soon overstep its bounds by a much wider margin. Speaking of another case in which the Supreme Court overstepped its bounds—the court's infamous *Dred Scott* ruling—President Lincoln said:

> The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

President Lincoln was not willing to resign the government of the nation into the hands of the Supreme Court on the issue of slavery. And while he did not live to see his work finally accomplished, the *Dred Scott* decision was finally reversed when the 13th, 14th and 15th amendments were ratified in the wake of the civil war.

In our constitutional republic the answer to the question "Who guards the guardians?" is "we the people" do.

That is why I have introduced the FMA.

The Supreme Court is poised to take away from the people their right to declare how they will be governed with respect to the issue of same-sex unions. The purpose of the FMA is to give the people a voice, to allow them to tell the guardians of their liberties that they have erred.

Latin pronunciation guide:

quis custodiet ipsos custodes
KWis KUSTodiet IPsos KustoDEES

OFFICE OF U.S. REPRESENTATIVE MARILYN MUSGRAVE

MEMORANDUM REGARDING MEANING OF THE MUSGRAVE FEDERAL MARRIAGE AMENDMENT

United States House of Representatives
Judiciary Subcommittee on the Constitution

Thursday, May 13, 2004, 10:00 AM
2141 Rayburn House Office Building

The Text of the FMA

House Joint Resolution 56 (the "FMA") states.

> 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.

This memorandum will explain in detail the meaning of the language employed in the FMA.

The First Sentence

The first sentence of the FMA states: "Marriage in the United States shall consist only of the union of a man and a woman."

The word "marriage" means the legal status, condition, or relation of husband and wife united in law for life, or until divorced.[1] Historically, the law of marriage has been a matter of state law, and the federal government has had little or no role in this area. For example, laws providing for the legal requirements for civil marriage (e.g., issuance of marriage licenses, solemnization requirements); who has capacity to marry (i.e., age limitations), types of marriages that are prohibited (e.g., bigamous marriages, incestuous marriages) and whether a relationship that has not met the formal statutory requirements is nevertheless a marriage (i.e., common law marriage) are all matters of state law. The FMA is not intended to alter this state of affairs except in the very narrow area of defining marriage as between a man and a woman.

The word "marriage" does not refer to any legally recognized relationship other than marriage. Thus, the FMA is not intended to prevent the legislatures of the various states from enacting so-called "civil union" or "domestic partnership" laws that establish relationships that have the legal benefits of marriage. This is true even if the state enacts

[1] Black's Law Dictionary, pg. 876, (5th ed)

a law similar to the Vermont civil union law that is intended to give to partners in a relationship all of the benefits of marriage save the single exception of calling their relationship a "marriage." Some have argued that such statutes are "marriage in everything but name" and would therefore be prohibited by the first sentence of the FMA. This is not, however, the intention of the sponsor. The sponsor intends that the first sentence of the FMA should apply exclusively to legally-recognized relationships that are called "marriage" under the law of a state, and not to any other type of legally-recognized relationship.

The phrase "in the United States" is intended to include the broadest possible coverage of all areas over which the United States of America has sovereignty, including, but not limited to states, territories, districts, and possessions of the United States and Indian tribes.

The phrase "shall consist only" means "shall consist exclusively, solely and wholly without exception of any kind or nature whatsoever."

The phrase "the union of a man and a woman" means the legal union of one man and one woman.

As of this writing a number of jurisdictions have issued marriage licenses to same-sex couples (e.g., San Francisco, certain areas in Oregon, New Mexico and New York, etc.). In addition, pursuant to the Supreme Judicial Court of Massachusetts' ruling in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 94 (Mass. 2003), it is anticipated that the State of Massachusetts will begin issuing marriage licenses to same-sex couples on or about May 17, 2004. An issue may arise concerning whether the first sentence will apply retroactively to same-sex marriages entered into prior to the time the FMA is ratified.

On its face the first sentence of the FMA is an unambiguous absolute prohibition on the legal recognition of any marriage that is not between a man and a woman. Therefore, if the FMA is ratified, marriage in the United States shall at that time consist exclusively of "the union of a man and a woman." It shall not consist of the union of a man and a woman plus the union of any same sex couple that obtained a marriage license prior to the ratification of the FMA. Hence, if the FMA is ratified any marriage between persons of the same sex (whether or nor the marriage was entered into legally prior to the ratification of the FMA) shall be legally void.

In summary, the first sentence of the FMA is designed to ensure that no governmental entity (whether in the legislative, executive or judicial branch) at any level of government (federal, state or local) shall have power to alter the definition of marriage so that it is other than a union of one man and one woman.

The Second Sentence

The second sentence of the FMA states: "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 phrase "this Constitution" means the Constitution of the United States of America. The phrase "the constitution of any state" means the constitutions of the several states. The phrase "state or federal law" means statutory and common laws of general applicability not otherwise having to do with conferring the legal incidents of marriage on unmarried persons.

Some have misinterpreted the phrase "state or federal law" to mean that no state or federal law may be construed to confer any of the legal incidents of marriage on unmarried persons, and therefore the phrase would prohibit state legislatures from enacting civil union or domestic partnership laws. This is not what the phrase means. The flaw in this argument is that it ignores the important words "to require" that immediately follow the word "construed." The phrase is not intended to prevent legislatures from enacting civil union laws; the executive branch from enforcing such laws; or the judicial branch from applying such laws in a particular case. Instead, the phrase is intended to prohibit courts from construing laws that are *not* civil union laws to *require* that marital status or the legal incidents thereof be conferred upon unmarried persons.[2]

In other words, the phrase would prevent courts from construing laws of general applicability not otherwise having to do with conferring the legal incidents of marriage on unmarried persons from being interpreted to require such incidents of marriage to be conferred on unmarried persons. For example, if a state has a statute prohibiting discrimination on the basis of gender or sexual orientation, the law is a law of general applicability that does not specifically address whether the legal incidents of marriage should be conferred on same-sex unions. Thus, it would be a "state or federal law" that a court would be prohibited from construing to require that the legal incidents of marriage be conferred on same-sex unions.

The phrase "shall be construed to require" is intended to operate as a restraint on the courts. Commonly the roles of the three branches of government are described as follows: The legislative branch makes the laws; the executive branch enforces the laws; and the judicial branch interprets (i.e., "construes") the laws. Thus, this language is intended to prohibit the courts from interpreting the state and federal constitutions to require that marital status or the legal incidents of marriage be conferred upon unmarried persons. The language restrains the courts. Again, it does not constrain legislatures in any way.

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[2] Representative Musgrave supports the clarifying changes removing "state or federal law" as set forth in Senate Joint Resolution 30 introduced by Senator Allard.

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

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

It should be noted that nothing in the FMA would operate to invalidate the Vermont civil union statute. The Vermont legislature would be free to repeal the statute or leave it in place as it chooses.

The phrase "marital status" means the status of a person who is married. The phrase is not synonymous with "married" and therefore is not redundant with the first sentence of the FMA. In other words a person may have the status of a married person without in fact being married. For example, the above-quoted statute makes it is clear that the parties to a Vermont civil union have the identical status under Vermont law as spouses to a marriage. This phrase of the FMA is intended to prevent any court from *requiring* that unmarried persons be given the status of married persons as happened in Vermont. Again, however, it does not prevent a state legislature from conferring the status of married person on unmarried persons if it chooses to do so.

The phrase "legal incidents thereof" means the rights, benefits, protections, privileges and responsibilities of marital status that have been historically provided by law. There are hundreds of legal incidents of marriage, and it is impossible to set forth a definitive list. However, the following is a non-exclusive list of many of the legal incidents of marriage:

> 1. Rights and duties relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety;
>
> 2. Rights and duties relating to causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional

distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

3. Rights and duties under probate law and procedure, including nonprobate transfer;

4. Rights and duties under adoption law and procedure;

5. Rights and duties relating to group insurance for public and/or private employees;

6. Rights under a state spouse abuse program;

7. Rights relating to prohibitions against discrimination based upon marital status;

8. Rights relating to victim's compensation;

9. Rights relating to workers' compensation benefits;

10. Rights under laws relating to emergency and nonemergency medical care and treatment, and hospital visitation and notification;

11. Rights under "terminal care documents" and durable powers of attorney for health care execution and revocation;

12. Rights under family leave benefits laws;

13. The right to public assistance benefits under state and federal law;

14. Rights and duties laws relating to taxes imposed by the federal government, a state or a municipality such as the right to file a joint tax return;

15. Rights under laws relating to immunity from compelled testimony and the marital communication privilege;

16. The homestead rights of a surviving spouse;

17. Rights under laws relating to the making, revoking and objecting to anatomical gifts by others;

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

The phrase "conferred upon unmarried couples or groups" means that marital status or a subset of the benefits, protections and responsibilities historically associated with marital status is legally "conferred upon" (i.e., given to) unmarried persons by virtue of their relationship with another person or group of persons.[3] For example, under the Vermont civil union law marital status and the legal incidents of that status are "conferred upon" the parties to a Vermont civil union. As before, the FMA would not divest the Vermont legislature of the power to confer marital status or the legal incidents thereof on unmarried couples or groups. It merely prohibits courts from construing the federal or state constitutions or laws of general applicability to *require* the Vermont legislature to do so.

In summary, the second sentence of the FMA is designed to prevent a court from construing (1) the federal constitution, (2) any state constitution, or (3) federal or state statutory or common law of general applicability, to require any legislative body or executive agency to enact (or recognize under the Full Faith and Credit Clause) so-called civil union or domestic partnership laws or any law that would confer a subset of the benefits, protections and responsibilities of marriage on unmarried persons.

[3] Of course, in context the term "unmarried persons or groups" must be interpreted in terms of the first sentence, which defines marriage as exclusively a union of a man and a woman.

Mr. CHABOT. Before we go to Judge Bork, if I could make one point that I wanted to mention. We have a markup after this hearing for Members, if they could stay around, on H.R. 568 and 1775.

Mr. NADLER. Mr. Chairman, point of information, is that the oak tree bill?

Mr. CHABOT. One of them is.

Mr. NADLER. Yes, thank you.

Mr. Chairman, further points of information—seriously this time.

Mr. CHABOT. That was not serious?

Mr. NADLER. Not really.

Mr. Chairman, I am a little confused after Mrs. Musgrave's statement. I had thought that in the text of the resolution before us the words "nor State or Federal law" had been removed, and yet your testimony seems to indicate that those words are still there. Which is the case in the proposal?

Mr. CHABOT. If the gentlewoman would like to respond, although we are really not in the question part, but just as a point of order.

Mr. NADLER. As a point of information, does your proposal still have those words or have you removed those words?

Mrs. MUSGRAVE. Senator Allard made those changes in the Senate. It has not officially been changed here, but I am amenable to changes that make the intent very clear.

Mr. NADLER. But as of now it is still there. Thank you.

Mr. CHABOT. Judge Bork, you are recognized for 5 minutes.

STATEMENT OF JUDGE ROBERT BORK, McLEAN, VA

Judge BORK. Thank you, Mr. Chairman. I am pleased to be here at the invitation of the Subcommittee to discuss the wording of this Federal Marriage Amendment.

Mr. CHABOT. Would you pull the mike closer, Judge? Thank you.

Judge BORK. I think it is wise to say that of all the contested terrain in the culture war we are now engaged in, the subject of the homosexual rights is the most awkward to discuss. Because almost all of us know homosexuals who are decent, intelligent, compassionate people; and we have no desire to wound them. Yet this subject has been thrust upon us by the courts, and yet we unfortunately have to discuss it.

It is a problem created by the courts, and the objection is that part of the case for the Federal Marriage Amendment is to restore the branch of government which should be predominant in these matters, the legislature, to decide what the relationship should be, and to stop the process of courts ordering things that are nowhere to be found in any constitution.

The other problem is the substance of what the courts have done. Because I think, as you said, Mr. Chairman, there is evidence coming now from the Netherlands and there has been evidence from Sweden that the institution of gay marriage, same-sex marriage leads to——

In the first place, very few homosexuals apply for marriage licenses, because I do not think that is the point. Most of the point is gaining cultural approbation. They want an official statement that their life style is as normal as any other. But what does happen is a decline in the marriage rate among heterosexuals which among itself is problematical. But, in addition to that, that is followed by the dissolution of families so that you wind up increasingly with a lot of children being raised in one-parent families,

which is—as all we know, leads to social pathologies we do not care to see.

Now we have had three State courts hold that homosexual marriage is required. One of them offered the alternative of civil unions. I think most court watchers believe that within, say, two to three years the Supreme Court of the United States will hold that there is a Federal constitutional right to homosexual marriage; and that will come up either directly through the Federal courts as a challenge or it will come up when some State asserts the Defense of Marriage Act to prevent full faith and credit being given to a marriage they contracted in Massachusetts being imported into Texas. For that reason, this prospect of a Nationwide rule in favor of same-sex marriage is right now before us, and it is imminent.

There is some argument that we ought to leave the matter to the States. This matter will not be left to the States by the courts. We will have a Nationwide rule either allowing same-sex marriage or, because of this amendment, disallowing same-sex marriage.

Since I had something to do with the drafting of the version of the House amendment proposal, I think I am free to say that I am now not entirely happy with what we did. The first sentence is quite clear. The second sentence, however, which was intended to say that a court should not require civil unions as a matter of constitutional law, only legislatures could do that, some people said, well, the second sentence could be read to say that the legislatures could not do it either.

Now we are prepared to argue that point, but it is not a point worth arguing because we have no intention of trying to prevent any democratically enacted form of civil unions. So for that reason I agree with Congressman Musgrave that the Senate version is the one that should now be made, that the House version should be made congruent with the Senate version so that it is quite clear that marriage is between a man and a woman and that civil unions are up to the various legislatures in what they may decide. Thus, Vermont, which now has a civil union legislation enacted under coercion of the courts, would be free either to retain or to repeal that legislation.

The Senate language makes absolutely clear that was intended in the House version from the beginning; and I recommend that that version, the Senate version, be adopted by the House.

Thank you.

Mr. CHABOT. Thank you, Judge Bork.

[The prepared statement of Judge Bork follows:]

PREPARED STATEMENT OF ROBERT H. BORK

I am pleased to be here at the invitation of the Judiciary Subcommittee on the Constitution to discuss the wording of the proposed Federal Marriage Amendment embodied in House Joint Resolution 56.

Of all the contested terrain in the culture war, the subject of homosexual rights is the most awkward to discuss. Almost all of us know homosexuals who are decent, intelligent and compassionate people, and we have no inclination to wound them.

Yet "gay rights" have come to the fore and we must have a discussion, free of ad hominem accusations, about whether homosexual acts and relationships are to be regarded as on a par with the marital relationship of a man and a woman. The immediate problem is the homosexual activists' drive for same-sex marriage.

By no means all homosexuals want the right to marry, and in Sweden, where they have that right, very few exercise it. It seems clear that the drive for same-sex marriage is primarily about a constitutional ruling as the ultimate expression of moral approbation of homosexual behavior. The tactic of the activists is to seek judicial rulings because it is clear that a majority of the American public and their elected representatives do not want same-sex marriages. Judges, however, have pushed and continued to push our culture in ever more permissive directions and do not hesitate to strike down laws that for all of our history, for well over two centuries, have been regarded as legitimate defenses of the moral order. Homosexuals have already won significant victories in the courts and they see as the last obstacle to the complete normalization of homosexual behavior the ages-old understanding that marriage is the union of a man and a woman.

The activists won in Hawaii under the state constitution, but were then defeated by the Hawaiian electorates' amendment of that constitution to overturn the decision. The activists largely won in Vermont where the court, again acting in the name of the state constitution, told the legislature it must provide either a right to homosexual marriage or a right to civil unions. The Vermont constitution takes years to amend and so the legislature chose civil unions. The Supreme Judicial Court of Massachusetts, however, gave the activists what they wanted, an unambiguous right to homosexual marriage in a state where amending the constitution is an arduous process that can not be completed in time to meet the court's deadline.

Many court watchers believe that within one to three years the Supreme Court will hold either that there is a federal constitutional right to homosexual marriage or that all states are required to accept Massachusetts marriages as valid within their own borders. Either way there will be a nationwide rule. The matter will not be left to individual states to decide.

For that reason, Representative Marilyn Musgrave put forward a proposed Federal Marriage Amendment. Since I had something to do with the drafting of that proposal, I think I may be allowed to say that it was in some respects deficient. The amendment as introduced said:

> "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 first sentence clearly means that no branch of any government in the United States—executive, legislative, or judicial and whether the government is federal, state or local—may alter the definition of marriage as the union of a man and a woman. Moreover, no court or other branch of any such government may recognize a same-sex marriage contracted in another country. The purpose of this sentence is thus clearly to preserve the institution of marriage as it has been understood for millennia and as it has formed the basis for our society.

The second sentence, however, is directed to activists courts. They are not to construe language in constitutions or legislation to require the recognition of civil unions, unless, of course, legislatures make a deliberative choice to authorize such unions. The question of civil unions is thus left to democratic determination.

Objections to this second sentence have convinced me that it is poorly drafted and causes needless controversy. Critics say that, read literally, the sentence would forbid courts to implement legislatively-enacted civil unions. That was not the intent. It was hoped that this objection could be avoided by making the intention of the sentence clear in the debates that would surround the amendment in Congress and, if sent to the states, in the ratification debates. It was thought, moreover, that the word "construed" would indicate that the sentence was intended merely to restrain activists courts from requiring civil unions against the desires of the legislature involved.

There is no point in debating this matter when altering the language of the second sentence can make the point clear. For that reason, I recommend the version of the second sentence contained in Senate Joint Resolution 30: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." There is no doubt whatever, that this sentence leaves legislatures free to provide for civil unions if they wish. Thus, Vermont, which now has civil union legislation enacted under the coercion of its supreme court, would be free either to retain or repeal that legislation. The Senate language makes absolutely clear what was intended in the House version of the Federal Marriage Amendment.

Mr. CHABOT. The Honorable Barney Frank is recognized for 5 minutes.

STATEMENT OF THE HONORABLE BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. FRANK. Mr. Chairman and Members, I appreciate the way that Judge Bork began by saying he did not wish to give offense. So I want to reciprocate and, given the title to one of his books which was not mentioned, I am fighting my natural tendency to slouch. I am going to try to sit up very straight.

The amendment has been wildly underdescribed, although the gentlewoman from Colorado did accurately describe it at one point. This is not an amendment to prevent judges from making this decision. It is not an amendment to prevent the Full Faith and Credit Clause from going into effect. We may have a referendum in Massachusetts. We will have one if our legislature wants to have one.

So if the democratically elected legislature of Massachusetts decides under our constitution to put an amendment on the ballot by a simple majority of next year's legislature and if the voters of Massachusetts allow same-sex marriage to stand, this constitutional amendment knocks it out. So let us not talk about this as a way to stop the judges from doing something or to stop the Full Faith and Credit Clause or the U.S. Supreme Court. If that is what proponents want to do, I do not agree with it, but they know how to do it.

Indeed, as Judge Bork pointed out, this amendment differentiates. It says nobody, no legislature, no referendum, no combination of democratic procedures in a State, can enact same-sex marriage, even if we were to confine that to that State.

He then says, let us have a second section, reword it to say courts cannot require civil unions, legislatures can. In other words, they know how to differentiate.

So let us be clear. This is a conscious decision not to prevent judges from deciding and not to interfere with that, to amend the effect of Full Faith and Credit, but to prevent any State by democratic procedures from going forward with this.

Now why do people say that? I think there are two groups of people who oppose same-sex marriage. There is a group that, frankly, does not like those of us who are gay and lesbian individually and, not liking us individually, they are geometrically more unhappy at the notion of a couple of us hanging out.

I will pass up on the question of our physical capability that the gentlewoman from Colorado raised.

There is a broader group, however, I believe, which represents the most important group numerically. Those are people who are not themselves in any way inclined to make the lives of gay and lesbian people less than others. They do not dislike us. They are prepared to work with us. They are prepared to share their lives with us in a lot of ways. But people whom they respect, religious leaders, political leaders and others, have told them that if same-sex marriage is allowed this will be very disarranging to society.

Now I have been working on anti-discrimination measures for more than 30 years as a legislator. Every time we deal with dis-

crimination based on race or gender or religion, which is a choice by the way, purely a choice, or disability or age or sexual orientation, we hear predictions that chaos will ensue. The world will be greatly disarranged. None of those are ever true.

We had in Massachusetts a bill passed to ban discrimination based on sexual orientation 15 years ago. It has been very well enforced by Republican governors ever since. It has not caused any problem.

I believe we are now hearing, and I think the critical element here, are people—not those who are opposed to us in principle getting married, not people who believe that marriage should always be between people of opposite sex—and I was impressed that the gentlewoman of Colorado did not repeat the formula that marriage has always been between one man and one woman, because, clearly, it has not. It has often been between one man and at least one woman. Figures such as Joshua or Abraham in the Bible, for instance, are in that situation.

But the question then is, what will happen if we allow a State—now let us take this amendment at its fullest. Suppose the State of Massachusetts votes in a referendum that it is okay for men and men or women and women to get married. Well, let us lay our predictions out. Let me make my predictions.

One, there will be no polygamy. Two, the divorce rate will not go up compared to what it has been. Three, children will not be abused. Four, there will not be an erosion of family stability in any particular minority community.

Now we have heard references to a prediction that somehow this is going to lead heterosexuals to stop getting married. Indeed, if it has any effect—and this may be already happening—it may put some pressure on heterosexuals to get married, not that I want to dictate to their lives any more than I want them to dictate to mine. But there are now in various institutions in the private sector and in some governments domestic partnership benefits, and some people have extended the domestic partnership benefits to people of the opposite sex as well as the same sex.

I think it is very plausible to say that once people of the same sex can get married, they have to do that, and they do not have the option of domestic partnership benefits. Some have already begun to say that. So the result of same-sex marriage in Massachusetts will be a diminution of opposite-sex domestic partnerships. So some heterosexuals will decide that they are going to have to get married.

I do not think most people make those calculations based on economics. But I really do think it is important for the Committee—let us lay out our predictions. I have laid out mine. I guess what people seem to sometimes forget is same-sex marriage will be entirely optional, even in Massachusetts, and it will have an effect on those people who choose to get married, and it will have no effect on people who choose not to.

Civil unions were referenced. I will close with this.

We had this debate a few years ago in Vermont. Vermont was one of the courts to which Judge Bork alluded, and they ordered something, and they got civil unions. Virtually all of the arguments about the socially disorganizing effects of marriage were made

about civil unions in Vermont 4 years ago. Today, civil unions in Vermont are boring to all the people who are not in them and, given human nature, to a few of the people who are, but they have had no negative social impacts whatsoever.

So let us lay out our predictions. Massachusetts will go ahead and have marriage. A year from now, I hope you will convene this hearing again and we can see whose predictions are right.

I say no polygamy. There will not be a Full Faith and Credit Clause. The Supreme Court of the United States will not require this. There will not be an increase in the divorce rate. There will be thousands of thousands of people married in Massachusetts. Most of them will live happily ever after, some of them will not, and that will be it.

Mr. CHABOT. Thank you.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF THE HONORABLE BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman and Members of the Committee,

During my years in elected office, I have been involved in a number of debates involving measures that deal with discrimination. I have supported legislation to prohibit inappropriately unequal treatment of individuals based on their race, their religion, their gender, their sexual orientation, their age and whether or not they are disabled. In every case, opponents of the legislation have made predictions that social chaos will ensue. In no case of which I am aware have these predictions turned out to be accurate. That is, in every case of which I am aware, enactment of legislation prohibiting unfair treatment of people based on various personal characteristics has had some beneficial effects for those in the category being protected against mistreatment, and no negative effects on society at large.

Unfortunately, while the predictions of social chaos are often widely discussed in legislative bodies, the media, and elsewhere before enactments, they are rarely examined afterwards. This is unfortunate, because were we to make a regular practice of going back to these debates after various anti-discriminatory laws were enacted to check on the validity of the predictions made by their opponents, we would see a very clear pattern: vivid forecasts of social upheaval, moral decay, interference with the legitimate rights of the majority of people to go about their business, the destruction of important social institutions, and other negative effects; then, after adoption of the cause of all this worry , none of the above.

This has been particularly clear in the area of legislation dealing with discrimination based on sexual orientation and gender identification. In Massachusetts, the legislature passed and the Governor signed a law in 1989 banning discrimination based on sexual orientation and employment. It was passed under Democratic Governor Michael Dukakis and it has been administered by a series of Republican Governors since, all of whom have supported the continuation of the law, and in none of whose administrations have any negative consequence resulted.

Similarly, in Vermont, in the years leading up to the adoption of civil unions, the state was riven by controversy, with opponents of civil unions predicting that the implementation of the policy in the state would have terribly negative consequences on the institution of marriage, and morality in general. Indeed, the election of Vermont in 2000 was dominated by this.

Since that time, this has become essentially a non-issue in Vermont. Indeed, my impression is that if someone not interested in a civil union with someone not of his or her own sex were to move from another state to Vermont today, and that individual was not a student of recent history nor particularly interested in the ins and outs of domestic law, he or she would probably go for a long time without knowing that there was such a thing as civil unions, unless he or she met a couple involved in one. And then it would be a matter of perhaps some interest, but of no impact on that individual's life.

I believe we would do public policy debates in this country a service by beginning now a new procedure: let's have both sides in this current debate make very explicit in these days just before Massachusetts begins actually performing same-sex marriage our predictions of what the consequences will be.

Mine are very simple: several thousand people in Massachusetts of the same sex will marry each other. They will then live married lives very similar to the married lives of other people. Most, we hope, will be happy. Some will not be. The effects of either sort of marriage will be primarily on those engaged in the marriage, with some impact on those of their friends and relatives who choose to associate with them. There will be no serious effort to extend the right to marry to people interested in polygamy, because while some differences are hard to maintain, the difference between two people and three people is a fairly clear-cut one. There will be no diminution whatsoever, in the number of heterosexual marriages that happen, everything else being equal. That is, the ratio of heterosexual marriages among eligible people in Massachusetts to those that take place elsewhere in the country will not be altered by this. Indeed, since some private employers have announced that they will no longer honor domestic partnership benefits between people who are unmarried, now that everyone in the Commonwealth will have the right to get married, there may in fact an incentive for some people to enter into heterosexual marriages, who have not previously done so, because they might otherwise lose some benefits. But I think this will be at most an incidental effect.

There will be no negative impact whatsoever of this on marriage within any particular community in Massachusetts, including racial and ethnic minorities. Nor will there be any increased incidence in the number of people who discover that they are gay, lesbian or bisexual, and there will be no negative effect whatsoever on the raising of children.

In this context, the most important thing to note about same-sex marriage is one that debates seem to me sometimes to overlook: it is optional. This means that it will have an impact almost exclusively on those who decide to take advantage of the option. It will not affect the behavior of gay and lesbian people who decide not pursue this option, and it will clearly have no effect whatsoever on heterosexual people who are completely uninterested in marrying people of their own sex. I urge the Committee in its questioning to ask those who are opponents to be equally explicit about their predictions, and I further urge the Committee one year from now to come back and have a hearing in which the various predictions that those of us make about this can be scrutinized in the light of experience.

Mr. CHABOT. Our final witness this morning will be Mr. Sekulow.

STATEMENT OF JAY SEKULOW, THE AMERICAN CENTER FOR LAW AND JUSTICE, INC.

Mr. SEKULOW. Thank you, Mr. Chairman and Ranking Member Nadler and Members of the Judiciary Subcommittee. Thank you for inviting me to participate in a hearing that I think is important.

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

In calling for a constitutional amendment here to uphold marriage as a union between a man and a woman, the proposal reflects the reality that a rush of push-the-envelope activist judges, four unelected appointed-for-life judges in Massachusetts have initiated a process that has, in reality, completely thwarted the legislative deliberative process; and that is because those four justices in the majority in the *Goodrich* case demanded that the State legislature redraft the laws concerning marriage and insert the phrase that marriage shall be defined now as one spouse to the exclusion of all others.

This was a mandate. The entire legislative deliberative process in Massachusetts was thwarted through this because, in reality, it is now an after-the-fact response, as Congressman Frank alluded to, regarding the constitutional amendment.

There will also be—and this is one of those rare occasions, I believe, where there is the convergence of legal confusion, a thwarting of the legislative process, and ultimately litigation that will probably ensue rather quickly in all 50 States.

With reference to where this is going to go in the predictions, I will give one prediction. I will not be as bold as Congressman Frank in predicting this, but I will give you this prediction. That by this time next year litigation will be ensued in most of the States challenging the constitutionality of the Defense of Marriage Act. In fact, today in Florida a Federal lawsuit was filed challenging DOMA, despite the fact that no State yet has legally issued a marriage license. I think the inevitable and the resulting conflict in the courts is going to be quite significant on the Defense of Marriage Act.

We saw that, emboldened by the four judges' decision in Massachusetts, the bare majority, that officials in San Francisco issued thousands of marriage licenses to same-sex couples, even though that was intentionally contrary to California's Defense of Marriage Act which was passed by an overwhelming majority just a few years ago.

By the way, California also passed as a legislative enactment, protection against discrimination based on sexual orientation, but they also have a prohibition on same-sex marriage.

Public officials in States like Oregon, of course, New York, New Jersey, New Mexico have also attempted similar legal experiments, despite legislation to the contrary. In fact, I think it is fair to say that the Mayor in San Francisco literally took the law into his own hands, because there was not yet a determination by any court with regard to the constitutionality of same-sex marriage. The only legislation that was in place specifically prohibited that activity. Yet he issued licenses. That currently, of course, is now before the California Supreme Court.

The effect of these decisions and the intent of the litigation strategy behind them is unmistakable, and that is to establish same-sex marriage as a civil right, not through the legislative process but rather, through the courts. Because, in reality, the legislative process thus far has not been responsive to the claims made and the positions advocated by the legal strategy of the same-sex advocates.

To reach the outcome that was desired, it took a majority in this particular case in Massachusetts, of four judges to change the law in Massachusetts. And, as I said, the prediction that I will make is that by this time next year there will be litigation in a host of States, probably a majority of the States. Because individuals in Massachusetts that are duly authorized residents of Massachusetts that will seek a marriage license, obtain that marriage license, they may get transferred in their jobs, they may decide to move under their own volition, they are going to want recognition under the Full Faith and Credit Clause.

I will tell you that my prediction on that, and I will limit these to just a few, will be that the Supreme Court of the United States—I personally would not want to rest the institution of marriage on the United States Supreme Court at this point.

We think that this resolution as modified by the Senate's version—I think the modifications are important to clarify exactly what is at issue—should be put into effect. We have heard from, in just a few weeks, over 230,000 of our members from around the

country.[1] There are two concerns, and I think these are the two fundamental concerns in this issue.

That is, number one, the deliberative process has been completely eviscerated by the decision of the four judges in Massachusetts; and, number two, the very institution of marriage as it has traditionally been understood, at least in the United States since colonial times, is also subject to significant change and redirection.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you, Mr. Sekulow.

[The prepared statement of Mr. Sekulow follows:]

PREPARED STATEMENT OF JAY ALAN SEKULOW

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, H.J. Res. 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 H.J. Res. 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.

[1] See May 17, 2004 letter from ACLJ to Chairman Chabot in the Appendix. The referenced petition was submitted to the Constitution Subcommittee and can be found in the official heaing docket.

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* [1] that denying marriage licenses to same-sex couples "may violate the Hawaii Constitution's ban on sex discrimination." [2] 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.[3] 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.[4]

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

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." [5] 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." [6] 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.[7] 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.[8] 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." [9] 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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[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.

[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.

[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.[10] In November 1998, Measure 2 appeared on ballots in Alaska.[11] This measure provided, "Each marriage contract in this State may be entered into only by one man and one woman."[12] Alaskans overwhelmingly approved this measure, 68% for to 32% against.[13] The passage of this amendment made the same-sex couple's request for a marriage license moot, and their case was dismissed.[14] 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*[15] that the State was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[16] 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.[17] In 2000, the Vermont legislature passed a law that created "civil unions" for same-sex couples.[18] This law gives "these couples all the rights and benefits of marriage under Vermont law but not marriage licenses."[19] 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.[20] Lambda Legal Defense and Education Fund filed the lawsuit on behalf of these couples. A state judge ruled against the plaintiffs in November 2003.[21] The case is currently on appeal. Lambda Legal expects this case to ultimately be decided by the New Jersey Supreme Court.[22]

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.[23] 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 marriage licenses to same-sex couples in the state."[24] 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.[25] San Francisco started issuing licenses on February 12, 2004, and has currently issued more than 4,000 licenses.[26] On March

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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.
[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
[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.*

12, 2004, the California Supreme Court "ordered an immediate halt . . . to same-sex weddings in San Francisco." [27] 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." [28] Several lawsuits have been filed in California challenging the constitutionality of California's Defense of Marriage Act.[29]

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.[30] 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." [31] 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.[32]

7. Oregon

Two County Boards in Oregon, Benton and Multnomah, voted to issue marriage licences to same-sex couples in March 2004.[33] 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.[34] Multnomah County has not stopped issuing licenses, and currently has granted licenses to over 2,400 same-sex couples.[35] 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.[36]

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.[37] West's renegade conduct ceased when the local district attorney charged him with 19 criminal counts.[38] 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." [39] And on March 2, 2004, the mayor

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[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&Cont entID=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.

[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.

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

[36] Letter from Oregon Attorney General Hardy Myers to Oregon Governor Ted Kolongoski, (March 12, 2004), *available at* 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.*

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."[40]

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.[41] The General's opinion also stated, however, that same-sex marriages entered into outside the State "should be recognized in New York."[42]

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."[43]

9. New Mexico

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

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.[46] In Florida, a homosexual couple has filed a lawsuit in Broward County challenging the state's marriage laws.[47] In Nebraska, a lawsuit has been filed in federal court challenging the state's ban on same-sex marriage.[48] The same situations exist in Arizona, Indiana, and North Carolina.[49]

11. Massachusetts

The key state in the same-sex marriage controversy right now, of course, is Massachusetts. In *Goodridge* v. *Department of Pubic Health,*[50] 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."[51] The Court stated that the State has failed to "identify any constitutionally adequate reason for denying civil marriage to same-sex couples."[52] The Court has ordered that same-sex marriage licenses begin to be issued starting May 17, 2004.[53] 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.[54] 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

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

[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.

[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.

[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.

[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.

[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/.

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, 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.[55] 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.

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. . . ."[56]

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

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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.

[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.

to Article V, Congress holds the power to choose between the two alternative means of ratification.[57]

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

> 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 H.J. Res. 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.

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[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.

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 indefeasible.

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.[58] 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 rearrangement of marriage.

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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 (3rd Cir. 2000) (applying Lincoln's aphorism); *First Liberty Investment Group* v. *Nicholsberg,* 145 F.3d 647, 652 n.3 (3rd Cir. 1998) (same); *Eirhart* v. *Libbey-Owens-Ford Co.,* 996 F.2d 837, 841 n.5 (7th Cir. 1993) (same).

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 States 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.

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.[59]

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 *Trammell* 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.[60] 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.

One long-standing privilege relates to the legal presumption regarding offspring or issue of the marriage.[61] Although this presumption may be changing with the

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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).

[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).

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,*[62] 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. 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.[63]

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."[64] Indeed, "[t]he U.N. is now issuing urgent warnings about European depopulation."[65] 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."[66] 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.[67]

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

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[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+.

[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.*

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.[68] And the known research indicates that the offspring of traditional marital relations also trend toward greater health and more developed social skills.[69]

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 principal difference between married couples that would procreate and same-sex couples seeking to do likewise. 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.[70]

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.

Mr. CHABOT. We have now reached the point where Members of the Committee will have five minutes each to ask questions. I yield myself five minutes at this time to ask questions.

First of all, the thing that brings us here today, obviously, is the fact that many of us believe—in fact, the overwhelming majority, I believe, in this country believes that marriage has always been a cornerstone of our society. It is an institution that is important, obviously, for raising children; and it has always been recognized as a man and a woman.

If we are going to change something that has been as essential to our society as the institution of marriage is, it ought to be done by the will of the people; and that is expressed through their elected representatives either here in Congress, at the Federal level, or in the State legislatures at the State level.

Many are concerned that, even though we passed DOMA back in '97 by an overwhelming vote here in the House and by something like 85 to 14 in the Senate, that DOMA may well be at risk be-

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

[69] *See id.*

[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 flows 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.

cause of Full Faith and Credit which is the Constitution; and, of course, the Constitution trumps a statute any time.

So dealing with DOMA itself, Mr. Sekulow, I would like to start with you, if I could, and you have already commented on this somewhat. Could you comment on what you believe relative to DOMA and the likelihood of it withstanding a constitutional challenge ultimately?

Mr. SEKULOW. I think that DOMA, in light of *Lawrence* v. *Texas*, will be difficult to maintain its constitutionality. Because in reading—and I think what Justice Scalia said in his dissent is correct. The *Lawrence* decision is a significant shift in the way the law has developed with regard to, in that particular case, the practice of sodomy. It overturned specifically *Bowers.*

I think we have to realize there will be some courts that will find DOMA constitutional. There will be others that find that it is not. Ultimately, that means it goes to the Supreme Court of the United States. If that case was this year or next, depending on the makeup of the court, I would suspect—and I am pretty confident of this—that in light of *Lawrence* v. *Texas* and some other decisions of the court recently, that it would be probable that that statute would be struck as unconstitutional, violating Full Faith and Credit.

Mr. CHABOT. Barney.

Mr. FRANK. First, I know you are not supposed to say I told you so. You are supposed to pretend you do not like to. But I find it is one of the few pleasures that improves with age. So I will say I voted against DOMA in '96, not '97—not coincidentally, it was a presidential election year—and I am interested to see that those who voted for it now have retroactively decided it was unconstitutional. But I voted against it because I think it is constitutionally irrelevant.

I think when the Supreme Court comes—as to the first section, when the Supreme Court comes to dealing with whether or not Full Faith and Credit applies, I do not think that is a subject into which they will invite congressional input in any serious way. I believe the Court will decide this on its own.

Let us make this prediction: I believe the Supreme Court will not find that Full Faith and Credit covered—that has not been the case. We have the case of *Loving* in Virginia in which is the Supreme Court knocked down racial laws. If in fact Full Faith and Credit fully applied, there would not have been a need for that case, because whites and blacks married in another State could have gone to Virginia and be covered. I think the history has been that, by and large, States have been allowed to set their own policies.

We have this interesting phenomenon where people are now predicting something which, if it were to come up, they would then yell against it and try to stop it. So I do not think Full Faith and Credit will be found.

Mr. CHABOT. Thank you.

Judge Bork, would you like to weigh in.

Judge BORK. Yes. I think, contrary to what has just been said, unless the Court steps back because it feels that public outrage will break out on a decision that homosexual marriage is a constitu-

tional right, unless the Court shies away for that reason, I think DOMA is absolutely a dead letter constitutionally, not because it would be under the original Constitution but because it is under the way this Court is behaving. I suspect the vote against DOMA would be six to three. I do not see any prospect of sustaining it.

Mr. CHABOT. Thank you.

Marilyn, have you had a chance to consider this?

Mrs. MUSGRAVE. I was going to say that even in a State like Nebraska that has passed DOMA by 70 percent constitutional amendment in the State of Nebraska, the Attorney General there does not expect that to stand. I believe that this is an evolving process, and since 1996 we see all of the challenges in various ways to DOMA, and I believe it is very likely that Federal DOMA will not stand.

Mr. CHABOT. Thank you.

My next question I was going to get into civil unions and its relationship here, but my time has just run out, but I am sure other Members will probably get into that area.

I want to thank the witnesses, and I yield now to the gentleman from New York. Mr. Nadler is recognized for 5 minutes.

Mr. NADLER. Thank you. I have a number of questions, so I hope the answers will be brief. The questions will be brief and to the point.

Judge Bork, when was the last time the Constitution of the United States was amended to sustain an existing law on the assumption that the Supreme Court might decide that existing law was unconstitutional?

Judge BORK. Offhand, I do not recall.

Mr. NADLER. So, in other words, we have never done that.

Judge BORK. I did not say that. I said, offhand, I do not recall.

Mr. NADLER. I have been unable to find anybody who can answer that question in the affirmative.

What you are really proposing is that we should—that the Supreme Court will declare something unconstitutional and amend the constitution in advance of that.

Judge BORK. We know that that is happening. We know that is coming.

Mr. NADLER. We know the question is coming. We do not know how the Court is going to rule. We can make assumptions on that.

Let me ask you a different question, Judge Bork. Should unelected judges ever have the power to overrule a legislative enactment on constitutional grounds or should we dispense with *Marbury* v. *Madison*?

Judge BORK. No, Mr. Nadler.

Mr. NADLER. That is the question you raised,

Judge BORK. I know. I was thinking that that was a very odd way to put it. Nobody wants to dispense with *Marbury* v. *Madison*, and of course judges will have the power to override legislation that is unconstitutional. The problem arises when judges begin to depart from the Constitution and make up their own idea of the Constitution, and that is precisely what has been happening in this area. That is what happened in *Lawrence* v. *Texas.*

Mr. NADLER. Let me ask you the next question.

There are a number of rights recognized by the Supreme Court that are not explicitly in the Constitution, for example, the right

to marry, the right of parents to control the upbringing of their children. Do you think the Court was wrong to discover these rights or was it acting extraconstitutionally, as you are saying the Court is doing in other cases?

Judge BORK. I think it was extraconstitutional. There are a lot of activist court decisions back in the—prior to 1937 that I, as a political matter, like. As a judicial matter, they were none of the business of the courts; and the court should not have done it.

Mr. NADLER. Mr. Sekulow, let me ask you the same question. The rights the Supreme Court discovered in the Constitution—the right to marry, the right of parents to control the upbringing of their children—do you think this is the Supreme Court inventing constitutional rights that do not exist in the Constitution?

Mr. SEKULOW. The Court has consistently through its history adopted, through its liberty interests that it has asserted, most recently in the last 40 or 50 years, and they have discovered rights, some of which you might agree with, some of which you might not. The difficulty, of course, specifically in the Massachusetts situation was there the Court did not just hold the statute was unconstitutional as was the case in Vermont, but, rather, in Massachusetts the Court not only held the statute unconstitutional, but told the legislature this is the only way you can fix it and did not provide for even the alternative, as was available in Vermont, of a civil union. So the Court there really overstepped its bounds not just in determining something unconstitutional but, rather, employing the remedy, specifically drafting legislation.

Mr. NADLER. So you would, by the same logic, say that the remedies ordered by the courts in the progeny cases after *Brown* v. *Board of Education* were also wrong.

Mr. SEKULOW. No, the Court in *Brown* v. *Board of Education*—the subsequent cases held that decisions of the lower courts had to be consistent with the individual decision of the—in that particular case, the Federal court.

Mr. NADLER. But the lower courts and the Supreme Court upheld very specific remedies when legislatures and town governments and city governments refused to remedy the situation.

Mr. SEKULOW. Congressman Nadler, what the Supreme Court did in *Brown* v. *Board of Education* and its progeny was have the lower courts issue opinions and orders consistent with the Supreme Court opinion. They did not draft the individual order.

Mr. NADLER. The lower courts drafted the specific orders.

Mr. SEKULOW. That is right. Those were orders to enforce a judicially recognized situation. In Massachusetts, the——

Mr. NADLER. I fail to see the difference.

Mr. SEKULOW. There is a difference between State and Federal court.

Mr. NADLER. Judge Bork, you talk about unelected judges and Mrs. Musgrave and everyone talks about unelected judges making these terrible decisions, or impositions, I should say, on the democratic legislation. If the legislature of Massachusetts or of some other State were to pass a law recognizing gay marriage and allowing gay marriage within the State of Massachusetts, do you think that the Federal Constitution should prohibit the legislature of

Massachusetts from doing that, or of any other State from doing that?

Judge BORK. I do. There are some institutions and some basic things about our Government, about our society that the Constitution ought to protect. I think that the——

Mr. NADLER. So, in other words, all the rhetoric about the unelected judges is out the window. What you are really saying is that the superior wisdom of the people drafting this Constitution or presumably the Congress, et cetera, should amend the Constitution to prohibit the people of any State or local government through their elected representatives from doing this thing which you think is terrible.

Judge BORK. Mr. Nadler, every constitutional provision prevents people from doing things through their legislatures. The Bill of Rights is nothing but a list of things that legislatures may not do.

Mr. CHABOT. The gentleman's time has expired.

Mr. NADLER. Can I have an additional minute?

Mr. CHABOT. The gentleman, by unanimous consent, has 1 additional minute.

Mr. NADLER. Barney, would you comment on that?

Mr. FRANK. I thank you for making that point.

If they really were only looking at unelected judges—of course, some judges are elected in some State courts. But if they are only looking at judges, what they would do is get rid of the first sentence and deal with it the way they do it in the second sentence. That is, they now, after working this out among themselves, those who are supporting this say it does not stop legislatures and electorates from having civil unions. It only stops courts from ordering it.

I would not be for that amendment, but they could do that. So it is clear. I think your questioning has made this clear. This is not based on the decision that judges should not say this. It is a substantive decision.

We, the Federal Government, will say that no State by whatever means, no matter how democratic, will allow two people of the same sex to get married, and that is what it says. They have the ability to do less than that. They have the ability to also deal with Full Faith and Credit. So it does seem to me that people ought to be called upon to defend what it is they are trying to do.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Mr. Chairman, first, I want to thank the panel. It is a very esteemed panel here.

Judge Bork, I am pleased to see you here in front of us, along with our distinguished panel members.

I want to make a couple of comments along the way.

Marilyn Musgrave, the presentation that you made in that opening 5 minutes was as complete and concise and succinct as anything I have heard delivered on this subject; and I will be getting a draft copy of that to preserve for my reference.

As I listen to the testimony across the panel, there are a couple of things that come to mind. Massachusetts has got to be a fascinating place, and I need to spend more time there so I can begin

to better understand the politics that flows from Massachusetts. There is no question about your ability, Mr. Frank.

As I look at it this way, lay out our predictions, and I am willing to do that. In fact, I would illustrate the prediction that there will not be an issue of Full Faith and Credit and that in Vermont civil unions have become boring. Maybe they are boring in Vermont, but when they manifest themselves through an interpretation of Full Faith and Credit in Iowa, it is not boring.

It is not boring when I have a Judge Neery in Sioux City, Iowa, that grants a dissolution of marriage for a Vermont civil union in my back yard and I end up before the State Supreme Court to try to resolve that issue. That is not boring.

And it is continuing, as Mr. Sekulow said. We are going to see this flow across this Nation in multiple ways, ways we cannot begin to comprehend, because of the confusion that is driven into this thing by the courts. And I certainly hand this over to the legislative process and in our States and in our Nation, but I think we need to preserve marriage in all those ways.

So I will make my prediction, and it will sound a little bit like the Santorum prediction, and that is that if we do not draw the line, then what comes along the way? What do you allow a court to make a decision on?

If they are going to base their decision on a rule of law, then where do you draw it? If it is not between marriage by the pure definition of marriage, and then marriage can be distorted in its meaning to include between a man and a man or a woman and a woman, then how do you draw the line between group marriage, bigamy, polygamy, and all the living arrangements there are? How do you slow this race toward a pure socialistic society where group marriages can be arranged for the purposes of benefits that come by the incentive out there by just being able to claim those kind of living arrangements?

I think Rick Santorum was right, and I think he is right on the line. I pose this question to Mr. Frank, and that is that if we do not draw the line here, if we do not protect this here—and in spite of your predictions, mine are different, and I am consistent with Justice Scalia, *Lawrence* v. *Texas*, do believe it. It does directly effect marriage. Certainly Scalia was right in his prediction and that found its way into the Massachusetts Supreme Court.

But if we do not draw the line here at this point with a constitutional amendment, then where and how and under what legal circumstances could a line be drawn? Someplace between homosexual marriage and bigamy, polygamy, group marriage and the other things on the Santorum list? Should it be drawn?

Mr. FRANK. Yes, a couple of points. Some lines are very hard to draw in public policy. The line between two people and three people in my experience has always been fairly clear. That is, I think it is perfectly reasonable for society to say, as a matter of public policy, we believe having two people legally as well as emotionally committed to each other promotes stability.

There was reference to children. This argument that this is bad for children does not go nearly far enough, if that is what your concern is. Remember, gay people can now have children. Lesbians can now have children. Single people can have children. In fact, what

this does is it makes it more likely that the children of any such operation will have two parents on whom they can make legal claim.

Mr. KING. But should not the line be drawn and under what legal circumstances?

Mr. FRANK. Yes, well, I am trying to get to the point. I cannot simplify it any more.

What I am saying is we can say it is better for two people to be raising the children. It is better for two people to be involved. That is socially stabilizing.

When you get into three way and other relationships—and, by the way, I do not know why you thought it was socialistic. The views on homosexuality that prevailed in those self-described socialist societies that we have had are much closer to yours than to mine, in China or Russia or North Korea. I do not believe socialism has been practiced——

Mr. KING. I can make that case, but I will save it for another time.

Mr. FRANK. What I am saying is you say two consenting adults committing themselves to each other legally is socially stabilizing, whereas having someone who cannot consent or is not of the legal age or having three or four people, that that is socially destabilizing, and that is the way you draw the line.

You do say that, yes, two consenting adults, that can be an element of social stability, but if you get into three and four and five, no, that has inherent difficulties. It is not the way, which children are they, etc.

Mr. KING. So you would draw the line at two people, not three.

Mr. FRANK. Yes.

I would make one other prediction. I am struck by the number of people here who are now purporting to believe—and I use those words quite deliberately—that *Lawrence* v. *Kansas* requires the U.S. Supreme Court to allow same-sex marriage. I will predict that if any such case comes up, one, I do not think the Supreme Court will say that; and, two, those who are now claiming to believe that *Lawrence* v. *Kansas* compels it will be taking the opposite position when in fact that case gets argued

Mr. KING. Mr. Chairman, I would point out that the second half of this question, which is under what legal circumstance——

Mr. FRANK. The Judge correctly——

Mr. KING.—I do not have an answer to. But I would yield time back to the Chair and hope we have a second round of questions.

Mr. CHABOT. The gentleman's time is expired.

The gentleman from Virginia, Mr. Scott, is recognized for five minutes.

I might mention that we generally have not gone to a second round in this Committee except under extraordinary circumstances.

Mr. FRANK. I have all morning.

Mr. CHABOT. But we have a markup on two bills after this.

The gentleman from Virginia is recognized.

Mr. SCOTT. Mr. Chairman, on a previous Committee I think we accomplished that this amendment would have no legal effect on traditional marriages, but, Judge Bork, did I understand your testi-

mony to say that if same-sex marriages were allowed, opposite-sex couples might be less likely to get married?

Judge BORK. That is the evidence that particularly Stanley Kurtz, who I believe has testified before this Subcommittee, that is the evidence one gathers from Sweden and from the Netherlands and perhaps from Norway.

Mr. SCOTT. Thank you.

Let me ask another question, Judge Bork. The whole subject of domestic relations belongs to the laws of States and not to the laws of the United States. That was language from *France* v. *United States*, a D.C. Circuit case in 1983. The case goes on to say, family law continues to be regarded as almost entirely a State matter, and so strong has this tradition been that it was simply a given that Federal power could not touch this area of life.

Do you agree with that language?

Judge BORK. Well, no, I do not agree. Because what is happening now is Federal power is reaching that area of life and is doing so through the courts.

Mr. SCOTT. Well, this is a Federal constitutional—let me get back. You do not agree with the language.

Judge BORK. I agree with the language in the—in the context of that case, it probably was correct. But if you say that the Federal power will never be able to reach family law, that simply is not true. Federal power reaches family law all the time, and now it is reaching it through constitutional rulings from Federal courts.

Mr. SCOTT. As we read the proposed constitutional amendment, you have to read the whole thing not just the first sentence. The first sentence, as has been pointed out, is fairly clear, but—the second sentence makes it apparent that civil unions may not be required, but they appear to be permitted; is that correct?

Judge BORK. That is correct. Permitted by the legislature.

Mr. SCOTT. Under this amendment, could you have a civil union that is substantively equivalent to a marriage, that is, all the rights, privileges and responsibilities of a marriage but not called a marriage? Would that be permissible for a State to do that under this constitutional amendment?

Judge BORK. I think it probably would be.

Mr. SCOTT. Just so we don't call it a marriage?

Judge BORK. The symbolism is crucial in cultural matters. And the symbolism of marriage is one of the most basic symbols in our society.

Mr. SCOTT. I want to get the substance. Substantively, you could have a legal entity absolutely precisely identical to a marriage?

Judge BORK. I would have to go through the list of all the things we are talking about to know whether it would be identical, but it certainly would be very close.

Mr. SCOTT. That would be possible.

Let me follow through and follow up on one of the questions that was asked about Full Faith and Credit. How is the Full Faith and Credit question affected by the passage or not passage—failure to pass of this amendment; and that is to say, does Virginia have to recognize a Vermont civil union now or a Massachusetts marriage now? And will it have to recognize a marriage or a civil union if this thing were to be adopted?

Judge BORK. Well, without the amendment, let me start that way, people get married—same-sex couples get married in Massachusetts; for some reason, they wind up in Virginia and claim the benefits of marriage. Let us suppose that Virginia says no. That is contrary to our public policy and furthermore, it is contrary to State DOMA if we have a State DOMA. And furthermore, it is contrary to the Federal Defense of Marriage Act. That couple will then go into Federal Court and challenge the constitutionality of Virginia's public policy and Virginia's DOMA and the Federal DOMA. And it is my firm belief that that couple will succeed in constitutional litigation.

Mr. SCOTT. Today?

Judge BORK. Today.

Mr. SCOTT. If this amendment were to pass, it doesn't say anything about Full Faith and Credit. Would you have the same result?

Judge BORK. No, because the Massachusetts marriage would no longer be something that was valid.

Mr. SCOTT. What about the Vermont civil union?

Judge BORK. Civil unions might be. There would be an argument about that.

I don't predict what the outcome would be under a Full Faith and Credit argument there, but certainly marriage would be, and the various public policies and citations of various Federal and State DOMAs would not prevail.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from Alabama, Mr. Bachus, is recognized for 5 minutes.

Mr. BACHUS. Thank the Chairman.

I would say this to the panel: Next to nothing has been said about the effects of civil unions or same-sex marriages on the Federal Treasury or the State treasuries. I know that GAO has asked to take a look at this, and they identified 1,138 Federal benefit programs in which the determining factor in receiving benefits was marital status.

Judge Bork and Congresswoman Musgrave, have you all made any estimates on the cost of this and the cost of Social Security, food stamps, disability payments, welfare, unemployment benefits, Medicare, Medicaid? Won't this just break the bank?

Canada was considering this, and this is what stopped it in Canada. They found the retroactive Social Security benefits, if this thing went through—alone, that they couldn't afford that, just the one program.

Mrs. MUSGRAVE. Well, I certainly do not have any estimates of how much it would cost, but I think this gives evidence to the argument that when you are contemplating in the public policy arena something like same-sex marriage and the benefits that go along with it, it should be done in this deliberative legislative arena in the States, not done by judges.

In fact, there is no State in the Union that has recognized gay marriage. In fact, States that have recognized civil unions go out of their way to say that this is not marriage. So these things, Mr. Bachus, you bring up, they are very pertinent to the debate, but we haven't been allowed to have that debate.

Mr. BACHUS. Not only that, but the news media and the press in this country, in covering this—and I have watched it for 3 months, and I have spoken about the cost in billions of dollars to Social Security, the cost in billions of dollars to Medicare and billions of dollars to Medicaid, billions of dollars to unemployment benefits, they have not covered that. It is something that has not been highlighted.

And let me say this. When I talk about the cost of money, I am not implying that there is not a heavy cost morally or socially to this country in undermining our traditional institution of marriage. That will always be in my mind; the greatest cost will be the devastation there. And I—but I believe that the one thing that proponents of this—these unions, if they just want to be recognized—I just want to be publicly recognized, I want the same benefits; what they are not saying to the American people is, I want Social Security, I want retirement benefits, I want these billions of dollars worth of coverage.

And I know one person, I think, that has been honest about that is Representative Frank, because he proposed this domestic partnership benefit for Federal employees, and he actually did request from the Congressional Budget Office what the cost of that would be. And just part of that was 41.4 billion, and that is just for a certain number of Federal employees, a certain benefit for them.

But I mean—and I would like to introduce that for the record if I could. And this is just one benefit for one Federal employee that CBO scored.

Mr. CHABOT. Without objection, it will be included in the record.

Mr. BACHUS. I would like to introduce the GAO record, which estimates that this could impact 1,138 Federal statutory provisions in the U.S. Code in which marital status is the factor in determining receiving benefits, rights and privileges. This would not simply be a recognition of these people and a blessing of it; it would be asking those constituents that I represent, that you represent and that all of us represent to pay millions of dollars more. And I wonder where the AARP and other senior citizens and other veterans groups are in this debate and why they are not sitting out there in the audience.

Mr. CHABOT. Without objection, it will be included in the record.

[The information referred to follows in the Appendix]

Mr. CHABOT. Congressman Frank.

Mr. FRANK. I will plead guilty to the same thing, to say that gay people should be fully eligible for Social Security. As to everybody else, I would say two things.

Judge Bork did say, and he would not agree with you because he said he thought very few gay and lesbian couples would get married. Obviously, then it isn't going to cost very much money. I would note what the gentlewoman from Colorado said. Well, we should have a debate.

That is the point. The amendment prevents the debate. The amendment says there can be no marriage, so the amendment prevents the debate.

With regard to civil unions in Vermont, they couldn't confer Federal benefits; they conferred Vermont benefits. It was not very costly.

In effect, domestic partnership benefits, in general, that have been granted by various private entities, the leading corporations in America—Microsoft, IBM, et cetera—none of them have found this to be a financial burden.

Mr. BACHUS. Let me say this——

Mr. CHABOT. The gentleman is granted an additional minute.

Mr. BACHUS. If I was in the legislature of Massachusetts and there was an additional cost to the people of Massachusetts, then I would take it out of the budget of the supreme court of Massachusetts. They have passed a tax increase on the people of Massachusetts. And it just shows us the judicial activism in this country. This ought to be another wake-up call, as if we hadn't had enough.

Mr. CHABOT. The gentleman has a witness that is chomping at the bit.

Mr. SEKULOW. Two points quickly: In Hawaii, the issue of the economic cost analysis was actually part of the factor in the legislative process. Again, they were able to utilize the deliberative process in their domestic partnership program as they tailored the benefits to specific items because of the cost concerns and the insurance companies' concerns over the general cost of this. But it does point out, as the Congressman said—and I think it is the most significant aspect of this—that regardless of where you fall on the issue, the debate has stopped. And it wasn't stopped because of the legislature in Massachusetts, it was not stopped because of this constitutional amendment, if it were to pass, because it still would have to be ratified by the States; it stopped because four unelected judges decided it would stop.

Mr. CHABOT. The gentleman's time has expired.

The gentlelady from Wisconsin is recognized for 5 minutes.

Ms. BALDWIN. Thank you, Mr. Chairman.

I can't resist responding to the comments about costs, because I look at it oftentimes from the other side. I think of partners in Vermont raising a young child, a son named Trevor. One chose to stay home to raise Trevor, the other worked for wages. And the working mom, who is not the legally recognized mother, was struck and killed in a car accident. What is the cost of Trevor that he can't collect Social Security benefits for a lost parent?

There are so many examples like that. We have to weigh those costs, too.

But I want to get to the substance that is before the Committee this morning, Mr. Sekulow, and ask you—if you could answer this briefly, because I don't want to spend a lot of time—as an attorney and Federal marriage proponent, what do you believe the meaning of the phrase "legal incidents thereof" are in the second sentence of the proposed amendment? Real brief.

Mr. SEKULOW. We looked at that both from what I understand the legislation to be and what the courts have said about that, and it is usually associated with the benefits that obtain to or would be included within the context of marriage, everything from economic benefits to spousal privilege in cross-examination of witnesses.

Ms. BALDWIN. Do you believe the Federal Marriage Amendment could be interpreted by the courts to invalidate laws such as civil

unions and domestic partnership legislation, or laws, as they currently exist or might be enacted in the future?

Mr. SEKULOW. It is hard to say what a court would do or wouldn't do. I don't think it would be because of the language of the amendment, especially as modified by the Senate version, which clearly leaves the issue of civil unions to the States to determine. The question would be in the context of, as Congressman Scott mentioned, if Virginia would not have a civil unions program, but Vermont did, and individuals from Vermont then came to Virginia, would Virginia be forced to recognize the civil union?

I would suspect the arguments would be made that they should. I have a better chance of winning that case, though, if Virginia did not want to recognize the Full Faith and Credit aspect.

Ms. BALDWIN. Mr. Frank.

Mr. FRANK. I am pleased to see again this distinction between marriage and civil union. Once again it proves, if the proponents wanted to leave this up to the political process and not the courts, they knew how to do that.

But, secondly, I have to stress, I wish people would go back and look at the debates that happened in Vermont about civil unions. Now we are being told that civil unions are a much less harmful form. All of the arguments being made against marriage were made against civil unions. And the total absence of any of those predicted negative consequences in Vermont, I think is a pretty good model for what is going to happen once we have marriages in Massachusetts.

Ms. BALDWIN. Mr. Sekulow, you and the American Center for Law and Justice were involved in a challenge to a San Francisco local ordinance requiring companies that do business with the city to provide domestic partnership coverage benefits?

Mr. SEKULOW. That is correct.

Ms. BALDWIN. At the time you said, and I quote, "This is a critical issue that focuses on a cultural shift under way in corporate America that is designed to legitimize same-sex relations. We are vigorously challenging an ordinance that we believe undermines the institution of marriage and conflicts with the moral values of most Americans," end quote.

Is it your view that laws creating civil unions and domestic partnerships that give legal recognition to the relationships of same-sex couples undermine the institution of marriage?

Mr. SEKULOW. I think civil unions can certainly undermine the institution of marriage. And in the particular case that you mentioned in San Francisco, the litigation there was because the ordinances involved actually required domestic partnership benefits and civil unions to not be given just to employees in California, but to the employees that were located in their home office in Minnesota.

Ms. BALDWIN. If they wanted to do business.

Mr. SEKULOW. If they wanted to do any business.

Ms. BALDWIN. As you know, California recently enacted assembly bill 205, which gives registered domestic partners in California many, if not most, of the rights given married heterosexual couples. It is being challenged by the Alliance Defense Fund.

Are you familiar with the lawsuit?

Mr. SEKULOW. Yes.

Ms. BALDWIN. The principal basis of the Alliance Defense Fund's challenge is its claim that a California law that provides only marriage between a man and a woman is valid, means that the State legislature cannot enact a domestic partnership statute.

Do you agree with the Alliance Defense Fund that California's Defense of Marriage Act should be interpreted to invalidate AB 205?

Mr. SEKULOW. That is not the legal position I would advocate. In California, while they have a specific prohibition on same-sex marriage, as I mentioned in my testimony, they also have a specific reference to sexual orientation as part of their protected class under their civil rights. So I don't think that that would be the approach I would take.

The question is, does the State Defense of Marriage Act reach a civil union situation, and it probably was not the legislative intent.

Mr. CHABOT. The gentlelady's time has expired.

The gentleman from Indiana, Mr. Hostettler, is recognized for 5 minutes.

Mr. HOSTETTLER. Congressman Frank, as you brought the discussion of the historical basis for polygamy, you suggested a couple of cases, namely Abraham and I believe it was Joshua. If I can somehow set the record straight with regard to the marital status of Abraham. I believe he had one wife and one concubine that was suggested in the Scripture as not a wife.

Mr. FRANK. Is that better or worse? In a role model is that better or worse? I am taking your Biblical guidance.

Mr. HOSTETTLER. It was not an issue of marriage; it is not a role model for me.

And with regard to Joshua, I am not sure of a Scriptural connotation to his marital status, but if we can turn to a relative of Abraham and that is we are talking about the societal impact of the marriage status and the societal imprimatur on homosexual relationships, you will admit there is Biblical precedent for Abraham's nephew, Lot, and an adverse impact on society in the case of Sodom.

Mr. FRANK. Not just homosexuality, but of people trying to force themselves on other people. That is an abusive situation in which visitors to the town were being threatened with forcible sexual activity.

Mr. HOSTETTLER. Which is the etymology for the term "sodomy" that we recognize in our laws today.

Mr. NADLER. Would the gentleman yield for clarification? I do not believe Scripture actually specifies the sins of the people in Sodom and Gomorrah.

Mr. HOSTETTLER. If I could set the record straight: that the visitors that the gentleman speaks about were men, and Lot recommended daughters—that people, explicitly the men of the Old Testament, denied and would rather be given the men.

Mr. FRANK. Would it have been better if they tried to do this to women? I don't think so.

Mr. HOSTETTLER. I think this is a hearing——

Mr. FRANK. Why did you bring it up then?

Mr. HOSTETTLER. Because you were historically inaccurate in your basis.

And so, that being said, we have talked a little bit about *Marbury* v. *Madison* here, and the basis for the need of a constitutional amendment. In his paper, Louis Fisher, senior specialist in separation of powers, puts *Marbury* v. *Madison* in the proper political context when he says, quote, "It is evident that Marshall did not think he was powerful enough in 1803 to give orders to Congress and the President. He realized he could not uphold the constitutionality of section 13 of the Judiciary Act of 1789 and direct Secretary of State James Madison to deliver the commissions to the disappointed would-be judges. President Thomas Jefferson and Madison would have ignored such an order. Everyone knew that, including Marshall. As Chief Justice, Warren Burger"—and he quotes Burger here—quote, "The Court could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter had Marshall issued a mandamus that the Jefferson administration ignore," end quote.

And so we are talking with regard to what the—as opposed to what is going to happen inside the courtroom, what is going to happen in society should the Court, for example, strike down DOMA, if the Court should opine or decide that DOMA is not constitutional. But, in fact, as Louis Fisher points out, that will have to be a political decision. It is a political decision that was made by the Court at that time to say that we know that Jefferson and Madison will not uphold this mandamus.

And so, today, we know that ultimately—if DOMA is struck down, it will ultimately take an executive enforcement action to make, for example, the State of Indiana recognize a marriage license from the State of Massachusetts.

In *Lawrence* v. *Texas*, the Court carries on the political nature of their decisions. In the discussion of *Lawrence* v. *Texas*, they bring up an issue that is not relevant to the case and that is the issue of marriage. When Justice Kennedy alludes to it in his majority opinion, quote, it "does not involve—the case does not involve the Government, whether the Government must give formal recognition to any relationship that homosexuals seek to enter," obviously a reference to marriage. And Justice O'Connor is a little more straightforward when she says, quote, "Texas cannot assert any legitimate State interest here," and that is in precluding homosexual sodomy, "such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations, the asserted State interests in this case, other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."

Mr. CHABOT. The gentleman's time has expired.

Mr. BACHUS. Unanimous consent, an additional minute.

Mr. HOSTETTLER. In *Lawrence* v. *Texas*, the Court continues its recognition of the political nature of the decisions it hands down. Just as in *Marbury* v. *Madison Chief Justice Marshall* knew that Jefferson was not going to uphold a mandamus to seat Marbury and his associates, the Court recognizes in *Lawrence* v. *Texas* that if they step on the issue of traditional marriage by placing their imprimatur on marriage, there will be wholesale revolt by the peo-

ple of the United States through their elected representatives or through the executive branch, which, like Jefferson, it is hoped will not uphold a writ to grant same-sex marriage in the State of Indiana to couples that have gotten that in the State of Massachusetts.

And so I believe that the Court has signaled itself that it is not willing to enter this debate. However, I think that we should enter that debate and that we should continue to preserve the institution of marriage as it has been known for centuries in this country and that is a sacred union between one man and one woman.

Mr. FRANK. May I make one word correction of something I said? I should have said Jacob and not Joshua. It was Jacob I was alluding to and not Joshua.

Mr. CHABOT. The gentlelady from Pennsylvania, Ms. Hart, is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman. I am going to try to ask a different question, and some of you may or may not be familiar with some of the testimony from prior hearings, from Stanley Kurtz, who is a research fellow. He testified before the Subcommittee on recent data from the Netherlands that showed that legalizing same-sex marriage, in his opinion, thereby decoupling marriage from parenthood, may have contributed to an increase in the out-of-wedlock birthrate for heterosexual couples to the detriment of children which—most of us agree that people are better off with two parents.

Do any of you, and especially Representative Frank, have any evidence for any theory that would otherwise explain the uniquely large reduction in heterosexual marriages in the Netherlands following that country's legalization of same-sex marriages; and from—I understand similar statistics have also come to light in Sweden and Norway, which have done the same kind of thing.

And I will start with Representative Frank.

Mr. FRANK. I have not seen that fully, but I wonder why you would look to foreign societies when we have some here.

Ms. HART. We don't have any here.

Mr. FRANK. We have Vermont.

Ms. HART. I am not talking about civil unions.

Mr. FRANK. I am because you would have been talking about same-sex marriage. All the arguments made against same-sex marriage were made against civil unions, as the gentlewoman from Wisconsin's arguments made clear.

Ms. HART. I am not following that line of questioning. My reasoning is different, and I think Mr. Kurtz's was as well.

Mr. FRANK. I think you are wrong about that. I think the argument has been allowing these same-sex relationships—of course, we have seen nothing negative in Vermont. With regard to that data, it is not very well thought out.

Ms. HART. Have you any suggestions for why it is occurring outside of that suggestion that Professor Kurtz has made?

Mr. FRANK. As a continuation of trends that have been going on in those societies, I would say this. We are talking about three foreign countries about which none of us are particularly expert in terms of analyzing their social consequences. I can see no logical connection here.

The notion—and this is the argument—that because same-sex couples can get married, opposite sex couples stop getting married, imputes to the opposite sex couples a degree of irrationality which needs a much heavier burden of proof.

I don't think Kurtz's analysis is a very good one. His statistics aren't good. I notice, by the way, that you said he suggested that it may have caused it; I don't think he proves it.

Ms. HART. No. I am not suggesting that he did; I am suggesting——

Mr. FRANK. We have Vermont, which you don't want to talk about. It contradicts your thesis. People have made the same argument about Vermont and it has had no negative effect after 4 years in an American jurisdiction, no negative effect whatsoever on marriage.

Ms. HART. I got what you said. I happen to think they are different, and I understand you are not interested in answering the question that I have posed.

Mr. SEKULOW. Here is what the law is within the context of the European Union and the experience in Europe. We have an office in Strasbourg, the European Center for Law and Justice, and they have examined these issues both in the Netherlands and other countries where this has been explored.

And the reason that the evidence seems to indicate, at this point, because there a difference between a civil union recognition and its impact and the actual granting of marriage licenses, the uniqueness of the relationship as viewed by the state changes. Therefore, those entering into it view the uniqueness as no longer important; and that is why you are seeing an increase in out-of-wedlock births and you are seeing a decrease in the amount of marriages.

It is the uniqueness of it and the special categories on which it was based, and the protections given have been removed and that is not a trend of something for 4 years; that has been a trend in the context of Europe for 15.

Mr. FRANK. They haven't had same-sex marriages for 15 years in these countries you are mentioning. I think that is the point. They have not had same-sex marriages for 15 years in Norway and Denmark.

Ms. HART. I think I am asking the questions here.

Mr. CHABOT. Could we have order?

Ms. HART. I would like answers to the questions that I have to ask and not someone else using up my time, thanks.

And I would like to ask Representative Musgrave, maybe you have more information on this. I would like to hear your comments on this particular issue of decoupling.

Mrs. MUSGRAVE. I think in his testimony Judge Bork cited the research. He is more familiar with it than I am. But it is interesting to me that in the *Lawrence* decision that justices cited European and Canadian court decisions.

So I mean, on one hand, Congressman Frank doesn't want us to look at those situations in the Netherlands or in other countries. However, the Court's decision, when they looked to other countries when they made decision, that is okay.

I think that common sense tells all of us that when you are cavalier about the institution of marriage—and I would be the first to

admit, and we all know, that heterosexuals in this country are cavalier about marriage; but when you redefine marriage, you, in effect, make it meaningless.

I was interested in what Congressman King said in regard to the line, when Congressman Frank responded, "Well, we will move the line, but we will draw it between two and three." Well, if you are using a moral judgment to draw the line, you can draw the line anywhere your morals take you; and that is why it is imperative that we do not allow four judges against the vehement opposition of three judges in the State of Massachusetts to redefine marriage, because for children, a union between a man and a woman, committed, married, is the best environment.

Mr. CHABOT. The gentlelady's time has expired and the gentleman from Florida is recognized for 5 minutes.

Mr. FEENEY. I want to thank and welcome all the witnesses. We appreciate all of you being advocates for your respective positions.

To the extent it wasn't done in the original hearing, I would ask unanimous consent that the Kurtz research be submitted as part of the record.

Mr. NADLER. I object to that travesty—I withdraw my objection. It was just a motion.

Mr. FEENEY. That piece of research was based on studies in Sweden and Norway and——

Mr. CHABOT. Without objection, it is admitted in the record. I believe it was admitted in the previous hearing.

[The information referred to follows in the Appendix]

Mr. FEENEY. And, again, I appreciate all of our witnesses.

Mr. NADLER. I am reserving my right to object. Would the gentleman yield?

Mr. FEENEY. If I could have an extension of time, I would be happy to yield for a moment.

Mr. CHABOT. So ordered.

Mr. NADLER. As I understand, you want this study of foreign conditions entered into the record?

Mr. FEENEY. I believe it is appropriate for us too, as legislators, not as judges imposing laws.

Mr. NADLER. I think you are anticipating my question. And you are going to be offering your resolution against ever citing foreign decisions?

Mr. FEENEY. We would be delighted to have people interested in *Lawrence* v. *Texas* back for that markup.

Mr. NADLER. Let me just say before withdrawing my objection, I think the last hearing showed pretty conclusively that—as a matter of social research, that Mr. Kurtz's work is a piece of garbage, frankly.

Mr. CHABOT. The time belongs to the gentleman from Florida.

Ms. BALDWIN. Unanimous consent motion.

Mr. CHABOT. Make your motion.

Ms. BALDWIN. I would just ask that the article that I referred to at the last hearing labeling his research as "crack research," that was published in last week's *New Republic*, also be admitted for the record.

Mr. CHABOT. Without objection. They can both be admitted.

We make access to many different studies and sources of information, and ultimately, the decision is made by the votes that are taken in this Committee and other Committees in Congress.

[The information referred to follows in the Appendix]

Mr. FEENEY. If I could start my 5 minutes, I would be grateful now that we have cleared up the introduction of studies.

Mr. CHABOT. The gentleman is recognized for the balance of his time, which we put on hold before.

Mr. FEENEY. I believe that no amount of erudite argument between my friend, Mr. Frank, and I, based on Biblical history or philosophy or research, is going to resolve the issue about whether or not we are better off with or without the clear sanction of marriage between a man and a woman. But I think it is appropriate that we do look at the appropriate role Congress has here because, after all, we had this issue dumped in our lap by a number of cases.

Judge Bork, you were asked earlier by the gentleman from New York whether you were aware, where a constitutional amendment was based on anticipating breaches of law in general and courts in specific. Most, if not all, of the Bill of Rights actually anticipates abuses that had not necessarily occurred, but were being headed off by the amendments themselves.

Judge BORK. The entire Bill of Rights, in that sense, is heading off anticipated problems.

Mr. FEENEY. The first amendment passed by the United States of America after the Bill of Rights was article XI, which prohibited the judiciary from certain anticipatory abuses.

Judge BORK. The judiciary had already done it and this was to correct what they had done.

Mr. FEENEY. Thank you very much, but anticipating abuses is one of the things we do with constitutional amendments.

Congresswoman Musgrave, like Congressman King, I was impressed by your testimony, both oral and written. It is erudite and it is very compelling. But I do think there was a fair question suggested, that I didn't get an answer to, that maybe you or Judge Bork would answer; and that is, we are anticipating here that some Goodrich type abuse by the United States Supreme Court, like the Massachusetts abuse—the court abused its legitimate judicial authority by lawmaking, after 220 years or so of a Massachusetts constitution, in creating some new right out of thin air; we are anticipating a potential abuse here just by our U.S. Supreme Court.

Where do we end the line, because they are making law on a fairly regular basis? Can we anticipate all of their abuses which—I suppose the answer to it is certainly no. Where do we draw the line in terms of which potential abuses we ought to deal with here through the constitutional mandatory process, and why don't we wait to see what they do before we try to react?

Mrs. MUSGRAVE. I think marriage is something that the American people understand. You know—I mean, the frustration with the courts is ubiquitous. Citizens are frustrated with the Court. Legislators are frustrated with the Court. And there are various constitutional amendments that have been proposed here.

But this amendment deals with something that is at the very core of our culture: marriage between a man and a woman. So this is the one that I am focusing on.

You know, as you said, we didn't ask for this struggle. It was forced upon us. Judges legislating from the bench, State judges, supreme courts in one State forcing their public policy decisions—attempting to force it on other States.

Mr. FEENEY. I want to get in one last question. In fairness—I think Congresswoman Frank can take the last question, and I will be finished.

Number one, I want to commend you with respect to your public position on what was happening in San Francisco because it shows no matter how important the end is to you that there is a certain respect for the rule of law, which is something we can agree on even though we can't agree on where that rule of law starts and finishes.

I am concerned about judge-made law in this instance and other instances. Plato suggested that government by philosopher, kings, might be an appropriate thing, but it is not our form of Government. And assuming arguendo, there is a gray area here that we may not be able to agree on here in terms of the *Lawrence* decision, the *Goodrich* decision in Massachusetts, let us take a black-and-white case; and I would like you to tell me what Congress' remedy is.

For example, article I, section 1, first substantive clause in the Constitution, invests all legislative power in the Congress. Supposing tomorrow from the bench five members of the U.S. Supreme Court declare that they had legislative power and went on to legislate.

What would be the appropriate remedy in your view?

Mr. FRANK. In the case of a blatantly unconstitutional decision which violated that, the only one is impeachment, and there are cases when that would be appropriate. But I would say this: The amendment today, that is not what we are talking about. This is an amendment today that says if there is a referendum in Massachusetts that allows same-sex marriage, it is canceled out.

The issue you raised is a good one. There is a whole line of decisions by this current Supreme Court, mostly 5-4, that basically says that citizens cannot sue their own States for violation of Federal discrimination laws that I think is against the plain text of the 11th amendment and is a very serious interference with congressional rights for disability. I would—I have quarrels with that.

But this amendment is not a judicial restraint amendment; it is a specific subject amendment that says, no one, no referendum or State legislature can allow same-sex marriage.

I would be glad to have a debate on this, on how do you respond to a blatantly erroneous constitutional decision by the U.S. Supreme Court. This amendment is not primarily about that and goes much beyond that and, in fact, deals with the rights of States through the political process to make decisions that people here don't like.

Mr. CHABOT. The gentleman's time has expired.

Judge BORK. When I agreed to come, I was told that the starting time was 10 o'clock. I informed whoever that I had a doctor's appointment at 1:30.

Mr. CHABOT. That was our last questioner here.

I want to thank the panel. Without objection, all Members will have 5 legislative days to submit additional materials for the record.

There was also—there had been a request for a second round. We generally have refrained from that in the 3 years I chaired this Committee, and we would like to do that. However, if the panel will submit, we would like to have any Members that would like to submit questions in writing, if we could have those submitted to you.

Mr. CHABOT. Panel members will have the opportunity to do that.

I want to personally thank all four witnesses for their very helpful testimony here this afternoon.

This Committee——

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that a copy of the resolution, that is being considered on the floor as this Committee was conducted, honoring *Brown* v. *Board of Education* be inserted into this hearing record so that people will recognize that all of us are not offended by judge-made law nor are we required to have a cost-benefit analysis on civil rights.

Mr. CHABOT. Gentleman, without objection, that will be so ordered.

Mr. CHABOT. We are going to move into a markup at this time. Those who are aren't interested, if you could make your way out into the hallway.

I want to thank the panel. We are going to shift at this point from this hearing into a markup.

[Whereupon, at 12:40 p.m., the Subcommittee proceeded to other business.]

APPENDIX

Material Submitted for the Hearing Record

Stanley Kurtz
NRO Contributing Editor

May 04, 2004, 8:41 a.m.

The Marriage Mentality

A reply to my critics.

By Stanley Kurtz

Now that I have had a chance to present my case that gay marriage is undermining marriage in Europe to the Constitution Subcommittee of the House Judiciary Committee, a chorus of critics has risen to challenge my argument. The hearing featured strenuous efforts by Jerrold Nadler (D., N.Y.) and other Democrats to discredit my claims. Congresswoman Tammy Baldwin (D., Wis.) staged a bit of an ambush — cross-examining me using an (at the time) unpublished article from *The New Republic* that attacks my work on Scandinavian marriage. As far as I'm concerned, the Democrats failed to shake or rebut my case. But you can judge for yourself by viewing the webcast. (There's a sound problem toward the end.) You can also consider my testimony, which previews my upcoming work on gay marriage in the Netherlands. That work is important because Holland now has formal gay marriage, and because in the Netherlands it's particularly easy to isolate the causal effects of gay marriage.

Meantime, Andrew Sullivan has posted entries here and here attempting to rebut my Scandinavia argument. Sullivan draws on the work of Darren Spedale, a lawyer who studied gay marriage in Denmark on a Fulbright scholarship. Nathaniel Frank, who wrote the critique of my work for *The New Republic*, is an expert on sexual minorities in the military. Here's my response to the critics.

MUTUAL REINFORCEMENT

The critics say I show only correlation — not a causal connection — between Scandinavian registered partnerships and marital decline. Supposedly, I confuse cause and effect. But it's the folks who say gay marriage could be *only* an effect of marital decline — without also being a cause — who are confused.

Gay marriage, and other contributors to marital decline, are *mutually reinforcing*. I've never said de facto gay marriage is the only cause — or even the main cause — of marital decline in Scandinavia. But I do say it's an important contributing cause. While it's true that contraception, abortion, women in the workforce, secularism, individualism, and the welfare state have weakened the institution of marriage, gay marriage (de facto and formal) has now been added to that list.

If I think registered partnerships destroyed Scandinavian marriage, asks Frank, then how do I explain the rise of cohabitation in the United States? After all,

America doesn't have gay marriage, so how did American marriage decline? This supposedly devastating question completely misses my point. I've never said that marriage has been undermined by gay marriage alone. But I do say that marriage in Scandinavia is in much more radical trouble than it is in America. That has plenty to do with gay marriage.

The critics ignore my core claims about how gay marriage undermines marriage. I show that registered partnerships are not understood in a "conservative" light by the public. Instead of treating de facto gay marriage as an affirmation of the importance of marriage, the public sees this change as proof that traditional marriage is no better than any other family form. And this culturally radical interpretation of gay marriage is as prevalent in the Netherlands (where we now have formal gay marriage) as in Scandinavia. Since the public sees gay marriage as powerful proof that all family forms are equal, gay marriage reinforces marital decline.

A NEW STAGE OF MARITAL DECLINE

The critics ignore another key aspect of my causal argument. Gay marriage is part and parcel of a whole new stage of marital decline — a stage still relatively unfamiliar in the United States. In this new stage of marital decline, couples don't just cohabit before they become parents. Couples cohabit even after they become parents. Because gay marriage helps to break apart the ideas of marriage and parenthood, it is closely associated with this advanced stage of marital decline.

There are three core elements in this new and more radical stage of marital decline: parental cohabitation, the legal equalization of marriage and cohabitation, and gay marriage. My claim is that these three factors are mutually reinforcing. When any of these three factors emerges, the others tend to follow. And they draw out the initial factors still further.

In Sweden, marriage and cohabitation were almost completely equalized, and parental cohabitation was widespread, before gay marriage emerged. So in Sweden, gay marriage was more "effect" than "cause." Nevertheless, gay marriage has played a key role in Swedish marital decline.

Yet in Norway the effect of gay marriage was greater. Gay marriage arrived in Norway before parental cohabitation had reached Swedish levels, and before cohabitation and marriage were legally equalized. Norwegian radicals were able to use gay marriage to suppress traditionalists and to argue for a still more liberalized cohabitation regime. So in Norway, the causal role of gay marriage was greater. And in the Netherlands, the causal impact of gay marriage on marital decline has been decisive.

CONTRADICTORY CLAIMS

Not only do Sullivan, Spedale, and Frank completely ignore this aspect of my causal framework, the three of them take utterly contradictory positions on a supposedly fatal flaw in my case. Writing in *The New Republic*, Frank says that since Scandinavia has only "registered partnerships," the Scandinavian case "has literally nothing to do with same-sex marriage." Trouble is, Sullivan himself, writing in the same magazine in 2001, touted Spedale's work on "de

facto gay marriage" in Denmark as proof that gay marriage is harmless. The first sentence of Spedale's current reply to me reads, "Since 1989, gay marriage has been a reality in Scandinavia."

When he thought Scandinavian marriage was in good shape, Sullivan was perfectly happy to treat "registered partnerships" as "de facto gay marriage." After I showed that Scandinavian marriage was in a state of collapse, Sullivan flipped and denied that registered partnerships had any relevance to the gay marriage debate. Now that he thinks Spedale has rebutted me, Sullivan is back to treating registered partnerships as gay-marriage equivalents.

This whole fuss is based on the erroneous notion that registered partnerships are "marriage lite," while formal gay marriage would be received by the public as an affirmation of the traditional ethos of marriage. My work on the reception of formal gay marriage in the Netherlands disproves that claim.

The remarkable thing about Darren Spedale's reply to my work is that, without realizing it, he actually makes my causal case. Overtly, Spedale denies that Scandinavian gay marriage has had any negative impact on "the sanctity of marriage." If anything, says Spedale, gay marriage has actually strengthened Scandinavian marriage. Trouble is, Spedale's work is a celebration of the decline of Scandinavian marriage. Spedale doesn't deny that Scandinavian parents have stopped getting married. His real point is that parental cohabitation is just great.

CLUES IN COHABITATION

Spedale's flat wrong about that. Amazingly, he denies what scholars, journalists, and advocates across the cultural-political spectrum acknowledge: that unmarried parents in Scandinavia break up at two to three times the rate of married parents. Consider this article on parental cohabitation from Norway's (not at all conservative) newspaper, *Aftenposten*. The piece quotes a couple of family experts lamenting the higher dissolution rate of families with unmarried parents. Or look at this excellent treatment of Scandinavian marital decline by Carol Williams of the *Los Angeles Times*. Williams's piece emphasizes the higher breakup rate of unmarried parents. Her realistic portrait of the Scandinavian system belies Spedale's cheery denials of trouble. Scholarly affirmations of the higher breakup rate among unmarried Scandinavian parents are legion (see especially David Popenoe and Mai Heide Ottosen).

Spedale says I make Scandinavia's parental cohabitation look worse than it is by comparing it to American single mothering. Actually, I'm careful to note that most Scandinavian out-of-wedlock births are to cohabiting parents. Like most everyone except Spedale, I stress that such families dissolve at very high rates. Also note that the export of the Scandinavian system to America would have serious consequences. There's no underclass in Scandinavia. In America, Scandinavian-style cohabitation among the middle classes would encourage more out-of-wedlock births among poor single mothers. It's already happened as the Scandinavian system of parental cohabitation has spread to Britain, which has a substantial urban underclass.

To my detailed rebuttal of his use of marriage and divorce statistics, Spedale

offers no arguments. He simply repeats his claims.

THE MENTALITY OF MARITAL DECLINE

But the truly remarkable thing about Spedale's "rebuttal" is that it actually makes my causal argument. According to Spedale, Scandinavian gay marriage is a product of "increasing respect for diverse family structures." Sure. But doesn't gay marriage then breed further acceptance of "diverse family structures" — like the parental cohabitation of which Spedale is so enamored? Apparently so, since Spedale himself keeps saying that the approval of gay marriage has garnered ever increasing public support for the idea of family change.

Spedale argues that Scandinavian gay marriage has made society take marriage more seriously. Gay couples marry very late, says Spedale. With social pressure for marriage gone, gays only marry when they are absolutely sure they've found their life partners. That stance, says Spedale, has probably increased respect for marriage in Scandinavia.

But what Spedale is really describing is reinforcement of the mentality at the root of marital decline. The problem with Scandinavian marriage is that parents aren't pressured to marry. Instead, parents wait until long after their children are born to decide if they've found their permanent life partners (and often break up before then). Despite his denials, Spedale is actually saying that gay marriage both flows from — and contributes to — this ethos of weakened marriage. And that is exactly my causal point.

Actually, I don't think the example of particular gay couples has much effect. There are way too few gays getting married for that. Sullivan mistakenly takes this to be my point when he talks about how few gays got married in Nordland county, where marriage itself is disappearing. The real point is that the public arguments for gay marriage detach marriage from parenthood. The debate over gay marriage, and the ongoing social symbolism of the change, turn marriage into a pure celebration of the love of two adults, rather than something intrinsically tied to parenthood. Nordland's churches were convulsed by a battle over the rainbow flag because the meaning of marriage for everyone was at stake. It wasn't necessary for many gays in Nordland to actually be married for the flag dispute to rivet the attention of the nation — and transform the meaning of marriage.

WHAT ABOUT THE CHILDREN?

It's extraordinary that Sullivan is now touting Spedale. Spedale's naive praise for parental cohabitation is the antithesis of Sullivan's "conservative case" for gay marriage. And Sullivan is now approvingly posting readers' letters that say Norwegian parental cohabitation is fine. Between his flip-flops on the relevance of "registered partnerships" to gay marriage, and his embrace of marriage radicals like Spedale, Sullivan's argument has dissolved in a welter of contradictions.

We'll go to Sweden for a final look at how gay marriage is undermining marriage. While advocates like Sullivan argue that marriage isn't about children, Nathaniel Frank takes the opposite approach. Since some gays have

children, says Frank, formal gay marriage would unite — not separate — the ideas of marriage and parenthood.

That misses the point. Ideally, biological parents ought to be married to *each other*. Since no gay couple can get a child without the intervention of a third party, gay marriage cannot help but undermine the idea that parents ought to marry each other.

You can see the process playing out now in Sweden, which is on the verge of turning its system of registered partnerships into formal gay marriage. The big step on that road came in 2002, when Sweden removed that last real difference between registered partnerships and marriage by allowing gay partners to adopt. Has that move brought the ideas of marriage and parenthood closer together?

Not at all. The National Swedish Social Insurance Board recently convened a panel in which two legal experts recommended changes in Swedish family law. One invoked same-sex parenting to argue for legal recognition of three- and even four-parent families. According to this scholar, the antiquated two-parent standard virtually forces lesbian couples to find anonymous sperm donors, rather than form a more complex family with, say, gay sperm donors to whom they feel close.

The polyamory movement has reached Sweden, and there are now Swedes who would seize on triple or quadruple parenting to usher in legalized polyamory. By the way, this conference invoked the well-known fact (the one Spedale denies) that families with unmarried parents dissolve at higher rates. Yet here the figures on rising family dissolution were used to justify the rejection of traditional dual parenthood. With so many dissolved cohabitors and gay parents, why not do away with the two-parent standard altogether? So as Sweden combines formal gay marriage with adoption rights for same-sex couples, the dawn of quadruple parenting and polyamory looms. So much for Frank's claim that formal gay marriage will reinforce the link between marriage and parenthood.

Even in Sweden, where gay marriage came along well after cohabitation and marriage were equalized, and well after parental cohabitation was widespread, gay marriage is reinforcing the movement away from the traditional family. As I told the subcommittee, the effect in the Netherlands has been more dramatic still. Let's not turn America into the next unfortunate experiment.

CONGRESSIONAL BUDGET OFFICE
COST ESTIMATE

August 4, 2003

H.R. 2426

Domestic Partnership Benefits and Obligations Act of 2003

As introduced in the House of Representatives on June 11, 2003, with a modification requested by the sponsor

SUMMARY

H.R. 2426 would provide fringe benefits to domestic partners of federal employees. Same-sex and opposite-sex domestic partners of federal employees would be entitled to the same benefits available to spouses of federal employees. Those benefits would include survivor annuities, health insurance, life insurance, and compensation for work-related injuries. Additionally, H.R. 2426 would amend the Internal Revenue Code by exempting domestic partner benefits from federal income taxes.

CBO estimates that enacting the bill would increase direct spending by $137 million over the 2004-2008 period and by $242 million over the next 10 years. Discretionary spending under the bill would increase by $525 million over the 2004-2008 period and by about $1.3 billion over the next 10 years, assuming appropriation of the necessary funds. The bill would also affect federal revenues; those effects would have to be estimated by the Joint Committee on Taxation (JCT).

H.R. 2426, as introduced, would extend benefits to domestic partners of active federal employees and of current and prospective retirees. At the request of the sponsor, this estimate excludes the costs of extending such benefits to domestic partners of *currently* retired federal employees. (Including benefits for the domestic partners of currently retired federal employees would increase direct spending by an additional $448 million over the 2004-2008 period and $1.4 billion over the 2004-2013 period; it would not result in additional discretionary costs.)

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 2426 is shown in the following table. The costs of this legislation fall within budget functions 550 (health) and 600 (income security).

	Outlays in Millions of Dollars, By Fiscal Year									
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Changes in Direct Spending										
Increase in FEHBP Benefits (future retirees)	4	9	14	19	25	32	40	49	58	69
Net Increase in FECA Outlays [a]	2	2	*	*	*	*	*	*	*	*
Postal Service FEHBP and FECA Costs (off-budget)	54	59	0	0	0	0	0	0	0	0
Reduction in Survivor Annuity Payments	-3	-7	-10	-13	-17	-21	-25	-29	-32	-36
Total, Direct Spending	57	63	3	5	8	11	16	20	26	32
Changes in Discretionary Spending										
Agency Costs for FEHBP Benefits (active employees)	91	96	102	109	117	125	134	143	152	162
Agency Costs for FECA	1	1	3	3	3	3	3	3	3	3
Total, Discretionary Spending	92	97	105	112	120	128	137	146	155	165

NOTES: FEHBP = Federal Employees Health Benefits Program. FECA = Federal Employees Compensation Act. Components may not sum to totals because of rounding. This estimate assumes that the bill will be enacted by October 2003. The estimate does not reflect changes to the Internal Revenue Code; those effects would have to be estimated by JCT.

* = Less than $500,000.

a. The outlays shown are net of receipts from federal agencies.

BASIS OF ESTIMATE

For this estimate, CBO assumes that H.R. 2426 will be enacted by the end of fiscal year 2003 and that domestic partners would be eligible to begin receiving benefits in

November 2003. CBO estimates that about 2 percent of federal employees would elect to provide health care and retirement benefits for a domestic partner if given the opportunity. Approximately 83 percent of the costs would come from partners in opposite-sex partnerships and approximately 17 percent of costs derive from partners in same-sex partnerships. These figures are based on information from state and local governments as well as corporations that have adopted similar policies. In addition, domestic partners of workers who retire after the bill goes into effect would be eligible to opt for survivor annuity coverage, as well as retiree health care benefits.

Direct Spending

Federal Employees Health Benefits Program (FEHBP) for Future Retirees. H.R. 2426 would extend eligibility for health benefits to the domestic partners of retiring federal employees. An employee who retires after enactment of the bill would be allowed to maintain family coverage for his or her domestic partner. Unlike premiums for current workers, the government's share of health care premiums for retirees is classified as direct spending. For each year of the 2004-2013 period, CBO projects that approximately 1,000 additional family coverage policies would be added to the FEHBP by retiring non-Postal Service workers choosing to cover domestic partners. As a result, direct spending would increase by $71 million over the next five years and by $319 million over the next 10 years. The costs associated with providing benefits to the domestic partners of both active and retiring Postal Service workers are discussed below.

Federal Employees' Compensation Act (FECA) Benefits. FECA provides compensation to federal civilian employees for disability due to personal injury sustained while in the performance of duty. Married workers currently receive slightly higher FECA benefits for wage replacement than do single workers. Additionally, if an employee dies of an employment-related injury or disease, his or her spouse receives monthly compensation equal to 50 percent of the deceased employee's salary. CBO projects that H.R. 2426, if enacted, would provide FECA benefits to approximately 1,200 domestic partners of non-postal federal employees each year. Additional costs would total $35 million; agencies would have to cover those costs over time from appropriated funds (see below). Because increases in agency contributions would lag behind the increased costs, there would be a net increase in direct spending of $4 million over the 2004-2013 period.

Postal Service Employees. Postal Service employees would also be eligible for domestic partner coverage under H.R. 2426. CBO estimates that providing health benefits to the domestic partners of active postal workers would result in about 11,000 postal employees moving from individual to family coverage plans. Additionally, CBO anticipates that

approximately 500 of the postal workers who would retire each year would maintain FEHB coverage for their partners. Together, these benefits would cost $311 million over the 2004-2008 period and $814 million over the 2004-2013 period. Additionally, extending FECA benefits to Postal Service employees would cost $15 million over the next five years and $30 million over the next 10 years.

The operations of the Postal Service are classified as off-budget (like Social Security), although the total federal budget records the agency's net spending (outlays less offsetting collections). The Postal Service's mandate requires it to set postage rates to cover its operating expenses, and thus it would be expected to cover 100 percent of the increased costs associated with H.R. 2426 from postage receipts. However, the Postal Service Retirement System Funding Reform Act of 2003 (Public Law 108-18) effectively froze postage rate increases until 2006. Therefore, for the 2004-2005 period, the increased costs resulting from H.R. 2426 would not be offset by higher postal receipts. Beginning in 2006, the Postal Service would be able to raise postage rates to account for its increased costs. As a result, CBO estimates that extending FEHBP and FECA benefits to the domestic partners of Postal Service workers would increase off-budget direct spending by $113 million over the 2004-2005 period and would have no net effect after that.

Survivor Annuities. Under current law, a federal employee who is eligible to receive retirement benefits may elect to provide his or her spouse with a survivor annuity by reducing the value of the employee's annuity. Participants in the Civil Service Retirement System (CSRS) face different reductions and survivor annuity benefit levels than participants in the Federal Employees' Retirement System (FERS). Under both plans, those who elect survivor benefits face a reduction in their current annuity of between 5 percent and 10 percent.

Under H.R. 2426, federal employees who retire would be able to choose to reduce the value of their own annuities in order to provide survivor annuities for their domestic partners. CBO estimates that 85 percent of federal employees with domestic partners would elect survivor benefits if given the opportunity. On that basis, CBO projects that approximately 2,000 newly retired federal employees each year would add survivor annuities for their domestic partners and thus collect smaller annuities. However, some of these individuals would die and their partners would begin collecting survivor benefits. Over the next 10 years, the savings from the reduction in retirees' annuities would outweigh the additional costs for survivors' annuities. CBO estimates that direct spending would decrease by $51 million over the 2004-2008 period and by $194 million over the 2004-2013 period.

Coverage of Current Retirees. H.R. 2426, as introduced, would extend domestic partner benefits to all current federal retirees, as well as active workers. However, the sponsor

indicated to CBO that this was not the intent of H.R. 2426 and requested that CBO estimate the costs of the bill under the assumption that it would be changed to include only active workers and those who retire after the bill's enactment. The above estimate reflects that assumed change. If all current retirees were to receive the same benefits that new retirees would receive under H.R. 2426, the cost of the bill would increase by an additional $448 million over the 2004-2008 period and $1.4 billion over the 2004-2013 period.

Discretionary Spending

Health Benefits for Active Employees. H.R. 2426 would allow federal employees to add domestic partners to their health insurance policies. CBO estimates that about 80 percent of employees who add a domestic partner would switch from individual coverage to family coverage. Federal agencies pay about 72 percent of health-care premiums for active employees; thus, as premiums rise, so do agency contributions. In 2004 family coverage policies for active employees are projected to cost the federal government approximately $3,800 more than individual coverage policies. CBO estimates that providing additional family coverage policies to about 24,000 non-postal employees who would elect domestic partner coverage would increase spending subject to appropriation by $515 million over the 2004-2008 period and by $1.2 billion over the 2004-2013 period.

Federal Employees' Compensation Act Benefits. As discussed under the direct spending section, this bill would result in increased spending for federal workers' compensation. The reimbursement of FECA expenses paid by the Department of Labor comes from discretionary salary and expense accounts of federal agencies. Because these expenses are ultimately borne by the employing agency, CBO estimates discretionary spending would increase by $11 million over the 2004-2008 period and by $26 million over the 2004-2013 period to pay for these benefits.

Federal Employees' Group Life Insurance (FEGLI) Benefits. Under current law, the federal government pays one-third of basic life insurance premiums and employees pay two-thirds. Optional coverage that provides benefits above the basic level is paid for entirely by the employee. H.R. 2426 would allow federal employees to purchase Option C coverage, which would insure a domestic partner for up to $25,000. The premium for this option is actuarially sound; over time, premiums paid in to the account equal the payouts from the account. While the cash flow in any given year could be positive or negative, the overall impact on the federal budget would be negligible.

Tax Changes

H.R. 2426 contains provisions that would amend the Internal Revenue Code of 1986. Those changes would likely have tax implications that CBO does not estimate. The Joint Committee on Taxation normally supplies the estimate of the tax effects of legislation.

ESTIMATE PREPARED BY:

Van Swearingen and Geoff Gerhardt

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

GAO
Accountability • Integrity • Reliability
United States General Accounting Office
Washington, DC 20548

January 23, 2004

The Honorable Bill Frist
Majority Leader
United States Senate

Subject: *Defense of Marriage Act: Update to Prior Report*

Dear Senator Frist:

The Defense of Marriage Act (DOMA) provides definitions of "marriage" and "spouse" that are to be used in construing the meaning of a federal law and, thus, affect the interpretation of a wide variety of federal laws in which marital status is a factor.[1] In 1997, we issued a report identifying 1,049 federal statutory provisions classified to the United States Code in which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor.[2] In preparing the 1997 report, we limited our search to laws enacted prior to September 21, 1996, the date DOMA was signed into law. Recently, you asked us to update our 1997 compilation.

We have identified 120 statutory provisions involving marital status that were enacted between September 21, 1996, and December 31, 2003. During the same period, 31 statutory provisions involving marital status were repealed or amended in such a way as to eliminate marital status as a factor. Consequently, as of December 31, 2003, our research identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.

To prepare the updated list, we used the same research methods and legal databases that we employed in 1997. Accordingly, the same caveats concerning the completeness of our

[1] The Defense of Marriage Act defines "marriage" as "a legal union between one man and one woman as husband and wife"; it defines "spouse" as referring "only to a person of the opposite sex who is a husband or a wife." The Act requires that these definitions apply "[i]n 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." 1 U.S.C. § 7.

[2] U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C.: January 31, 1997).

collection of laws apply to this updated compilation, as explained more fully in our prior report. For example, because of the inherent limitations of any global electronic search and

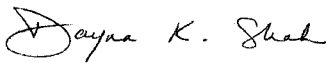
the many ways in which the laws of the United States Code may deal with marital status, we cannot guarantee that we have captured every individual law in the United States Code in which marital status figures. However, we believe that the probability is high that the updated list identifies federal programs in the United States Code in which marital status is a factor.

We have organized our research using the same 13 subject categories as the 1997 report. As agreed with your staff, in addition to providing you with a primary table of new statutory provisions involving marital status, we have prepared a second table identifying those provisions in our prior report that subsequently have been repealed or amended in a manner that eliminates marital status as a factor. Finally, in a third table, we have listed those provisions identified in our 1997 report that have since been relocated to a different section of the United States Code. We have also attached a brief summary of the 13 research categories; a full description of each category is set forth in the 1997 report.

We plan no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies of this letter to interested congressional committees. The letter will also be available on GAO's home page at http://www.gao.gov.

If you have any questions, please contact me at (202) 512-8208 or by E-mail at shahd@gao.gov. Behn Miller Kelly and Richard Burkard made key contributions to this project.

Sincerely yours,



Dayna K. Shah
Associate General Counsel

APPENDIX 1

Table of Statutory Provisions Involving Marital Status Added to the United States Code Between September 21, 1996, and December 31, 2003, by Category

CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS

Title 42 – The Public Health and Welfare	
Chapter 6A—Public Health Service	
Subchapter II	
Part D—Primary Health Care	
Subpart I—Health Centers	
§ 254d	National Health Service Corps
Subchapter IV—Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services	
Part B—Child and Family Services	
Subpart 2—Promoting Safe and Stable Families	
§ 629a	Definitions
Subchapter XI—General Provisions, Peer Review, and Administrative Simplification	
Part A—General Provisions	
§ 1320a-7	Exclusion of certain individuals and entities from participation in Medicare and state health care programs
§ 1320b-17	Recovery of SSI overpayments from other benefits
Part C—Medicare + Choice Program	
§ 1395w-22	Benefits and beneficiary protections
§ 1395w-23	Payments to Medicare + Choice organizations
§ 1395w-27	Contracts with Medicare + Choice organizations
Part D—Miscellaneous Provisions	
§ 1395x	Definitions
§ 1395ff	Determinations; appeals
Chapter 35—Programs for Older Americans	
Subchapter III—Grants for States and Community Programs on Aging	
Part C—Nutrition Services	
Subpart III—General Provisions	
§ 3030g-21	General provisions—nutrition
§ 3030s	Definitions
Chapter 46—Justice System Improvement	
Subchapter XII—F—Public Safety Officers' Death Benefits	
Part A—Death Benefits	
§ 3796d	Purposes
§ 3796d-1	Basic eligibility
Subchapter XII—H—Grants to Combat Violent Crimes against Women	
§ 3796gg-1	State grants
Chapter 84—Department of Energy	
Part A—Establishment of Compensation Program and Compensation Fund	
Subchapter XVI—Energy Employees Occupational Illness Compensation Program	
§ 7384s	Compensation and benefits to be provided
§ 7384u	Separate treatment of certain uranium employees
Part C—Treatment, Coordination, and Forfeiture of Compensation and Benefits	
§ 7385c	Exclusivity of remedy against the United States and against contractors and subcontractors
Chapter 110—Family Violence Prevention and Services	
§ 10410	Grants for state domestic violence coalitions
§ 10421	Definitions

Chapter 129—National and Community Service	
Subchapter I—National and Community Service State Grant Program	
Division F—Administrative Provisions	
§ 12639	Evaluation
Chapter 130—National Affordable Housing	
Subchapter I—General Provisions and Policies	
§ 12704	Definitions
§ 12713	Eligibility under first-time home-buyer programs
Chapter 136—Violent Crime Control and Law Enforcement	
Subchapter III—Violence against Women	
Part C—Civil Rights for Women	
§ 13981	Civil rights
§ 13992	Training provided by grants
Chapter 143—Intercountry Adoptions	
Subchapter V—General Provisions	
§ 14952	Special rules for certain cases

CATEGORY 2—VETERANS' BENEFITS

Title 38—Veterans' Benefits	
Part II—General Benefits	
Chapter 17—Hospital, Nursing Home, Domiciliary, and Medical Care	
Subchapter II—Hospital, Nursing Home, Or Domiciliary Care and Medical Treatment	
§ 1710B	Extended care services
Subchapter VIII—Health Care of Persons other than Veterans	
§ 1781	Medical care for survivors and dependents of certain veterans
Chapter 18—Benefits for Children of Vietnam Veterans	
Subchapter III—General Provisions	
§ 1821	Definitions
Chapter 19—Insurance	
Subchapter III—Servicemembers' Group Life Insurance	
§ 1967	Person insured; amount
§ 1969	Deductions; payment; investment; expenses
Chapter 23—Burial Benefits	
§ 2306	Headstones, markers, and burial receptacles
Part III—Readjustment and Related Benefits	
Chapter 30—All-Volunteer Force Educational Assistance Program	
Subchapter II—Basic Educational Assistance	
§ 3020	Transfer of entitlement to basic educational assistance: members of the Armed Forces with critical military skills
Chapter 42—Employment and Reemployment Rights of Members of the Uniformed Services	
§ 4215	Priority of service for veterans in Department of Labor job training programs
Part IV—General Administrative Provisions	
Chapter 53—Special Provisions Relating to Benefits	
§ 5302	Waiver of recovery of claims by the United States
§ 5313B	Prohibition on providing certain benefits with respect to persons who are fugitive felons
Part V—Boards, Administrations, and Services	
Chapter 77—Veterans Benefits Administration	
Subchapter II—Veterans Outreach Services Program	
§ 7721	Purpose; definitions

CATEGORY 3—TAXATION

Title 26—Internal Revenue Code	
Subtitle A—Income Taxes	
Chapter 1—Normal Taxes and Surtaxes	
Subchapter A—Determination of Tax Liability	
Part IV—Credits Against Tax	
Subpart A—Nonrefundable Personal Credits	
§ 24	Child tax credit
§25A	Hope and lifetime learning credits
§ 25B	Tax imposed on individuals
Subchapter B—Computation of Taxable Income	
Part III—Items Specifically Excluded from Gross Income	
§ 101	Certain death benefits
Part VII—Additional Itemized Deductions for Individuals	
§ 138	Medicare + Choice MSA
§ 221	Interest on education loans
Subchapter D—Deferred Compensation, Etc.	
Part I—Pension, Profit-Sharing, Stock Bonus Plans, Etc.	
Subpart A—General Rule	
§ 408A	Roth IRAs
Subchapter F—Exempt Organizations	
Part VIII—Higher Education Savings Entities	
§ 529	Qualified tuition programs
§ 530	Coverdell education savings accounts
Subchapter K—Partners and Partnerships	
Part IV—Special Rules for Electing Large Partnerships	
§ 774	Other modifications
§ 775	Electing large partnership defined
Subchapter O—Gain or Loss on Disposition of Property	
Part II—Basis Rules of General Application	
§ 1022	Treatment of property acquired by decedent dying after December 31, 2009
Subchapter W—District of Columbia Enterprise Zone	
§ 1400C	First-time home-buyer credit for District of Columbia
Subtitle B—Estate and Gift Taxes	
Chapter 11—Estate Tax	
Subchapter A—Estates Of Citizens Or Residents	
Part IV—Taxable Estate	
§ 2057	Family-owned business interests
Subchapter C—Miscellaneous	
§ 2210	Termination
Chapter 12—Gift Tax	
Subchapter B—Transfers	
§ 2511	Transfers in general
Chapter 13—Tax on Generation-Skipping Transfers	
Subchapter D—GST Exemption	
§ 2632	Special rules for allocation of GST exemption
Subtitle F—Procedure and Administration	
Chapter 61—Information and Returns	
Subchapter A—Returns and Records	
Part II—Tax Returns or Statements	
Subpart B—Income Tax Returns	
§ 6015	Relief from joint and several liability on joint return
Part III—Information Returns	
Subpart B—Information Concerning Transactions with Other Persons	
§ 6045	Returns of brokers

Chapter 62—Time and Place for Paying Tax	
Subchapter A—Place and Due Date for Payment of Tax	
§ 6159	Agreements for payment of tax liability in installments
Chapter 63—Assessment	
Subchapter C—Tax Treatment of Partnership Items	
§ 6230	Additional administrative provisions
Chapter 66—Limitations	
Subchapter B—Limitations on Credit or Refund	
§ 6511	Limitations on credit or refund

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

Title 5—Government Organization and Employees	
Part III—Employees	
Subpart A—General Provisions	
Chapter 23—Merit system principles	
§ 2301	Merit system principles
§ 2302	Prohibited personnel practices
Subpart B—Employment and Retention	
Chapter 33—Examination, Selection, and Placement	
Subchapter I—Examination, Certification and Appointment	
§ 3301	Civil service; generally
Subpart D—Pay and Allowances	
Chapter 57—Travel, Transportation, And Subsistence	
Subchapter II—Travel And Transportation Expenses; New Appointees, Student Trainees, And Transferred Employees	
§ 5737	Relocation expenses of an employee who is performing an extended assignment
Chapter 59—Allowances	
Subchapter III—Overseas Differentials And Allowances	
§ 5922	General provisions
Subpart G—Insurance and Annuities	
Chapter 90—Long-term Care Insurance	
§ 9001	Definitions
§ 9002	Availability of insurance
§ 9003	Contracting authority
Title 6—Domestic Security	
Chapter 1—Homeland Security Organization	
§ 331	Treatment of charitable trusts for members of the armed services and other governmental organizations
Title 10—Armed Forces	
Subtitle A—General Military Law	
Part I—Organization and General Military Powers	
Chapter 2—Department of Defense	
§ 118a	Quadrennial quality of life review
Part II—Personnel	
Chapter 55—Medical and Dental Care	
§ 1108	Health care coverage through federal employees' health benefits program: demonstration project
Chapter 73—Annuities based on Retired or Retainer Pay	
Subchapter II—Survivor Benefit Plan	
§ 1448a	Election to discontinue participation: one-year opportunity after second anniversary of commencement of payment of retired pay
Chapter 88—Military Family Care Programs and Military Child Care	
Subchapter II—Military Child Care	

§ 1798	Child care services and youth program services for dependents: financial assistance for providers
Title 37—Pay and Allowances of The Uniformed Services	
Chapter 7—Allowances	
§ 403	Basic allowance for housing
§ 407	Travel and transportation allowances: dislocation allowance
§ 411f	Travel and transportation allowances: transportation for survivors of deceased member to attend the member's burial ceremonies
§ 427	Family separation allowance

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED STATUTORY PROVISIONS

Title 29—Labor	
Chapter 30—Workforce Investment Systems	
Subchapter I—Workforce Investment Definitions	
§ 2801	Definitions
Subchapter IV—National Programs	
§ 2918	National emergency grants
Title 30—Mineral Lands and Mining	
Chapter 25—Surface Mining Control and Reclamation	
Subchapter VII—Administrative and Miscellaneous Provisions	
§ 1304	Surface owner protection
Title 42—The Public Health and Welfare	
Chapter 46—Justice System Improvement	
Subchapter XII—Public Safety Officers' Death Benefits	
Part B—Educational Assistance to Dependents of Civilian Federal Law Enforcement Officers Killed or Disabled in the Line of Duty	
§ 3796d	Purposes
§ 3796d-1	Basic eligibility
Chapter 84—Department of Energy	
Subchapter XVI—Energy Employees Occupational Illness Compensation Program	
§ 7384s	Compensation and benefits to be provided
§ 7384u	Separate treatment of certain uranium employees
§ 7385c	Exclusivity of remedy against the United States and against contractors and subcontractors

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

Title 8—Aliens and Nationality	
Chapter 12—Immigration and Nationality	
Subchapter II—Immigration	
Part II—Admission Qualifications fFor Aliens; Travel Control of Citizens And Aliens	
§ 1183a	Requirements for sponsor's affidavit of support
Part IV—Inspection, Apprehension, Examination, Exclusion, and Removal	
§ 1227	General classes of deportable aliens
§ 1229a	Removal proceedings
§ 1229b	Cancellation of removal; adjustment of status
§ 1229c	Voluntary departure
Part IX—Miscellaneous	
§ 1367	Penalties for disclosure of information
§ 1375	Mail-order bride business

Chapter 14—Restricting Welfare and Public Benefits for Aliens	
Subchapter IV—General Provisions	
§ 1641	Definitions
Chapter 15—Enhanced Border Security and Visa Entry Reform	
Subchapter V—Foreign Students and Exchange Visitors	
§ 1761	Foreign student monitoring program
Title 19—Customs Duties	
Chapter 24—Bipartisan Trade Promotion	
§ 3805*note*	United States—Chile Free Trade Agreement Implementation Act

CATEGORY 7--INDIANS

Title 25—Indians	
Chapter 18—Indian Health Care	
Subchapter II—Health Services	
§ 1621h	Mental health services
Chapter 24—Indian Land Consolidation	
§ 2206	Descent and distribution
§ 2216	Trust and restricted land transactions
Chapter 43—Native American Housing Assistance and Self-Determination	
§ 4103	Definitions
Subchapter VIII—Housing Assistance for Native Hawaiians	
§ 4221	Definitions

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

Title 12—Banks and Banking	
Chapter 13—National Housing	
§ 1701q	Supportive housing for the elderly
	Subchapter II—Mortgage Insurance
§ 1707	Definitions
§ 1713	Rental housing insurance
§ 1715e	Cooperative housing insurance
Chapter 17—Bank Holding Companies	
§ 1841	Definitions
Chapter 31—National Consumer Cooperative Bank	
Subchapter I—Establishment and Operation	
§ 3015	Eligibility of cooperatives
Chapter 32—Foreign Bank Participation in Domestic Markets	
§ 3106a	Compliance with state and federal laws
Title 15—Commerce and Trade	
Chapter 14A—Aid to Small Business	
§ 632	Small business concern
Chapter 14B—Small Business Investment Program	
Subchapter V—Loans to State and Local Development Companies	
§ 696	Loans for plant acquisition, construction, conversion, and expansion
Chapter 41—Consumer Credit Protection	
Subchapter IV—Equal Credit Opportunity	
§ 1691	Scope of prohibition

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

Title 7—Agriculture	
Chapter 50—Agricultural Credit	
Subchapter VI—Delta Regional Authority	
§ 2009aa-1	Delta Regional Authority
Subchapter VII—Northern Great Plains Regional Authority	
§ 2009bb-1	Northern Great Plains Regional Authority
Subchapter IX—Rural Strategic Investment Program	
§ 2009dd-3	National Board on rural America

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

Title 18—Crimes and Criminal Procedure	
Part I—Crimes	
Chapter 46—Forfeiture	
§ 983	General rules for civil forfeiture proceedings
Chapter 110A—Domestic Violence	
§ 2261A	Interstate stalking
Title 20	
Chapter 28—Higher Education Resources and Student Assistance	
Subchapter VIII—Miscellaneous	
§ 1152	Grants to combat violent crimes against women on campuses
Title 28—Judiciary and Judicial Procedure	
Part V—Procedure	
Chapter 115—Evidence; Documentary	
§ 1738C	Certain acts, records, and proceedings and the effect thereof
Title 42—The Public Health And Welfare	
Chapter 135—Violent Crime Control and Law Enforcement	
Subchapter III—Violence against Women	
Subpart 3—Rural Domestic Violence and Child Abuse Enforcement	
Part C—Civil Rights for Women	
§ 13981	Civil rights
Part D—Equal Justice for Women in the Courts Act	
Subpart 1—Education and Training for Judges and Court Personnel in State Courts	
§ 13992	Training provided by grants

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

No new provisions in this category of statutes.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED STATUTORY PROVISIONS

No new provisions in this category of statutes.

CATEGORY 13—MISCELLANEOUS STATUTORY PROVISIONS

Title 20—Education	
Chapter 70—Strengthening and Improvement of Elementary and Secondary Schools	
Subchapter II—Preparing, Training, and Recruiting High Quality Teachers and Principals	
Part C—Innovation for Teacher Quality	
Subpart 1—Transition to Teaching	
§ 6674	Participation agreement and financial assistance
Subchapter VII—Bilingual Education, Language Enhancement, and Language Acquisition Programs	
Part B—Native Hawaiian Education	
§ 7512	Findings
Title 22—Foreign Relations and Intercourse	
Chapter 75—Chemical Weapons Convention Implementation	
Subchapter I—General Provisions	
§ 6713	Civil liability of the United States

APPENDIX 2

Tables of Statutory Provisions Identified in 1997 Report as Involving Marital Status That Have Been Repealed or Amended to Remove Reference to Marital Status

Category 1—Social Security and Related Programs, Housing, and Food Stamps

Subject	1997 Statutory Citation	Status
Regulations pertaining to garnishments	42 U.S.C. §§661-662	Repealed by Pub. L. No. 104-193, § 362(b)(1), effective February 22, 1997, 110 Stat. 2246.

Category 3—Taxation

Subject	1997 Statutory Citation	Status
Collapsible corporations	26 U.S.C. § 341	Repealed by Pub. L. No. 108-27, § 302(e), May 28, 2003, 117 Stat. 763.
Rollover of gain on sale of principal residence	26 U.S.C. § 1034	Repealed by Pub. L. No. 105-34, § 312(b), Aug. 5, 1997, 111 Stat. 839.
Tax on excess distribution from qualified retirement plans	26 U.S.C. § 4980A	Repealed by Pub. L. No. 105-34, § 1073(a), Aug. 7, 1997, 111 Stat. 948.

Category 4—Federal Civilian and Military Service Benefits

Subject	1997 Statutory Citation	Status
Employment of retired members of the uniformed services; reduction in retired or retainer pay	5 U.S.C. § 5532	Repealed by Pub. L. No. 106-65, § 651(a)(1), Oct. 1, 1999, 113 Stat. 664.
Assistance to separated members to obtain certification and employment as teachers or employment as teachers' aides	10 U.S.C. § 1151	Repealed by Pub. L. No. 106-655, § 1707(a)(1), Oct. 5, 1999, 113 Stat. 823.
Military child care employees	10 U.S.C. § 1792	Amended by Pub. L. No. 105-261, § 1106, Oct. 17, 1998, 112 Stat. 2142; reference to marital status removed.
Job training partnership, application of federal law	29 U.S.C. § 1706	Repealed by Pub. L. No. 105-220, § 199(b) (2), effective July 1, 2000, 112 Stat. 1059.
Rights, benefits, privileges, and immunities; exercise of authority of Secretary of Commerce or designee (National Ocean Survey employees)	33 U.S.C. § 857a	Repealed by Pub. L. No. 107-372, § 271(2), Dec. 19, 2002, 116 Stat. 3094 and replaced with similar provisions that omit any reference to marital status. See 33 U.S.C. 3071 (National Oceanic and Atmospheric Administration Commissioned Officer Corps - Rights and benefits).

Category 5—Employment Benefits and Related Statutory Provisions

Subject	1997 Statutory Citation	Status
Youth training program for the disadvantaged	29 U.S.C. § 1644	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.
Job Corps—Allowances and support	29 U.S.C. § 1699	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.
Labor market information	29 U.S.C. § 1752	Repealed by Pub. L. No. 105-220, § 199(b)(2), effective July 1, 2000, 112 Stat. 1059.

Category 6—Immigration, Naturalization, and Aliens

Subject	1997 Statutory Citation	Status
Suspension of deportation of aliens	8 U.S.C. § 1251	Repealed by Pub. L. No. 104-208, § 308(b)(7), Sep. 30, 1996, 110 Stat. 3009-615.

Category 9—Financial Disclosure and Conflict of Interest

Subject	1997 Statutory Citation	Status
Alternative Agricultural Research and Commercialization Corporation—Board of Directors, Employees, and Facilities	7 U.S.C. § 5903	Repealed by Pub. L. No. 107-171, § 6201(a), May 13, 2002, 116 Stat. 418.

Category 10—Crimes and Family Violence

Subject	1997 Statutory Citation	Status
Interstate violation of a protection order	18 U.S.C. § 2262	Amended by Pub. L. 106-386, § 1107, Oct. 28, 2000, 114 Stat. 1464; reference to marital status removed.
Narcotic addict rehabilitation—definitions	42 U.S.C. § 3411	Repealed by Pub. L. No. 106-310, § 3405(b), Oct. 17, 2000, 114 Stat. 1221.
Model state leadership grants for domestic violence intervention	42 U.S.C. § 10415	Repealed by Pub. L. No. 108-36, § 410, June 25, 2003, 117 Stat. 827.

Category 11—Loans, Guarantees, and Payments in Agriculture

Subject	1997 Statutory Citation	Status
Paul Douglas Teaching Scholarships—exceptions to repayment provisions	20 U.S.C. § 1104g	Amended by Pub. L. No. 105-244, § 501, October 7, 1998, 112 Stat. 1581; reference to marital status removed.
Faculty Development Fellowship Program—exceptions to repayment provisions	20 U.S.C. § 1134r-5	Repealed by Pub. L. No. 105-244, § 701, October 7, 1998,112 Stat. 1581.

Category 13—Miscellaneous Statutory Provisions

Subject	1997 Statutory Citation	Status
Vocational education state plans	20 U.S.C. § 2323	Amended by Pub. L. No. 105-332, § 1(b), October 31, 1998,112 Stat. 3076; reference to marital status removed.
Vocational education definitions	20 U.S.C. § 2471	Amended by Pub. L. No. 105-332, § 1(b), October 31, 1998, 112 Stat. 3076; reference to marital status removed.
Agricultural Hall of Fame	36 U.S.C. § 977	Amended by Pub. L. No. 105-354, § 1, Aug. 12, 1998, 112 Stat. 3238; reference to marital status removed.
Audits of Federally Chartered Corporations	36 U.S.C. § 1101	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1253; reference to marital status removed.
Gold Star Wives of America	36 U.S.C. § 1602	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1253; replaced provision's reference to "gold wives" with "corporation". (The name of the organization continues to be the Gold Star Wives of America.)
Navy Wives Clubs of America	36 U.S.C. § 2802	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1436; replaced provision's reference to "Navy Wives" with "corporation". (The name of the organization continues to be the Navy Wives Clubs of America.)
Aviation Hall of Fame	36 U.S.C. § 4307 and § 4309	Amended by Pub. L. No. 105-225, § 1, Aug. 12, 1998, 112 Stat. 1312. These provisions' references to "survivors" were deleted.
Membership of Martin Luther King, Jr., Federal Holiday Commission	36 U.S.C. § 169j-3	Repealed by Pub. L. No. 105-225, § 6, Aug. 12, 1998, 112 Stat. 1253.
Testing and other early intervention services for state prisoners	42 U.S.C. § 300ff-48	Repealed by Pub. L. No. 106-345, § 301(a), Oct. 20, 2000, 114 Stat. 1345.
Programs for older Americans—Demonstration projects	42 U.S.C. § 3035a	Provision was omitted by Pub. L. No. 106-501, Nov. 13, 2001, 114 Stat. 2257.

APPENDIX 3

Tables of Statutory Provisions Identified in 1997 Report as Involving Marital Status That Have Been Relocated in the United States Code

Category 1—Social Security and Related Programs, Housing, and Food Stamps

Subject	1997 Statutory Citation	Status
Alien's eligibility for benefits	42 U.S.C. § 615	Relocated to 42 U.S.C. § 608(f)

Category 2—Veterans' Benefits

Subject	1997 Statutory Citation	Status
Medical care for survivors and dependents of certain veterans	38 U.S.C. § 1713	Relocated to 38 U.S.C. § 1781

Category 4—Federal Civilian and Military Service Benefits

Subject	1997 Statutory Citation	Status
House of Representatives Child Care Center	40 U.S.C. § 184g	Relocated to 2 U.S.C. § 2062
National Oceanic and Atmospheric Administration commissary privileges	33 U.S.C. § 857-4	Relocated to 33 U.S.C. § 3074
Gratuities for survivors of deceased House employees; computation	40 U.S.C. § 166b-4	Relocated to 2 U.S.C. § 125
Senate employee child care benefits	40 U.S.C. § 214d	Relocated to 2 U.S.C. § 2063

Category 5—Employment Benefits and Related Statutory Provisions

Subject	1997 Statutory Citation	Status
Job training partnership—definitions	29 U.S.C. § 1503	Relocated to 29 U.S.C. § 2801

Category 6—Immigration, Naturalization, and Aliens

Subject	1997 Statutory Citation	Status
Deportable aliens	8 U.S.C. § 1251	Relocated to 8 U.S.C. § 1227

Category 7—Indians

Subject	1997 Statutory Citation	Status
Indian land consolidation—Descent and distribution	25 U.S.C. § 2205	Relocated to 25 U.S.C. § 2206

Category 9—Financial Disclosure and Conflict of Interest

Subject	1997 Statutory Citation	Status
Appalachian Regional Commission—personal financial interests	40 U.S.C. § 108	Relocated to 40 U.S.C. § 14309

Category 10—Crimes and Family Violence

Subject	1997 Statutory Citation	Status
Family violence prevention and Services—definitions	40 U.S.C. § 10408	Relocated to 40 U.S.C. § 10421

Category 13—Miscellaneous Statutory Provisions

Subject	1997 Statutory Citation	Status
Marine Corps League	36 U.S.C. § 57a	Relocated to chapter 2301 § 140102
Veterans of Foreign Wars of the United States	36 U.S.C. § 113	Relocated to chapter 2301 § 230102
Legion of Valor of the United States of America	36 U.S.C. § 633	Relocated to chapter 1303 § 130302
Veterans of World War I of the United States of America	36 U.S.C. § 763	Relocated to chapter 2303 § 230302
The Congressional Medal of Honor Society of the United States	36 U.S.C. § 793 and § 799	Relocated to chapter 405 § 40502 and § 40506
Blinded Veterans Association	36 U.S.C. § 859	Relocated to chapter 303 § 30307
National Woman's Relief Corps, Auxiliary to the Grand Army of the Republic	36 U.S.C. § 1005	Relocated to chapter 1537 § 153703
Gold Star Wives of America	36 U.S.C. § 1601	Relocated to chapter 805 § 80502
American Ex-Prisoners of War	36 U.S.C. § 2103	Relocated to chapter 209 § 20903
Catholic War Veterans of the United States of America, Inc.	36 U.S.C. § 2603	Relocated to chapter 401 § 40103
Navy Wives Clubs of America	36 U.S.C. §2801 and § 2803	Relocated to chapter 1545, § 154502 and §154503.
Army and Navy Union of the United States	36 U.S.C. § 3903	Relocated to chapter 229 § 22903
Non-Commissioned Officers Association of the United States	36 U.S.C. § 4003	Relocated to chapter 1547 § 4003
Retired Enlisted Association, Incorporated	36 U.S.C. § 5103	Relocated to chapter 1903 § 190303
National Fallen Firefighters Foundation	36 U.S.C. § 5201	Relocated to Chapter 1513 § 151302
Public Health Service grants for services of substance abusers	42 U.S.C. § 280d	Relocated to 42 U.S.C. § 290bb-25
Programs for older Americans—state plans	42 U.S.C. § 3035	Relocated to 42 U.S.C. § 3027

APPENDIX 4
CATEGORIES OF STATUTORY PROVISIONS

CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS

This category includes the major federal health and welfare programs, particularly those considered entitlements, such as Social Security retirement and disability benefits, food stamps, welfare, and Medicare and Medicaid. Most of these provisions are found in Title 42 of the United States Code, Public Health and Welfare; food stamp legislation is in Title 7, Agriculture.

CATEGORY 2—VETERANS' BENEFITS

Veterans' benefits, which are codified in Title 38 of the United States Code, include pensions, indemnity compensation for service-connected deaths, medical care, nursing home care, right to burial in veterans' cemeteries, educational assistance, and housing. Husbands or wives of veterans have many rights and privileges by virtue of the marital relationship.

CATEGORY 3—TAXATION

While the distinction between married and unmarried status is pervasive in federal tax law, terms such as "husband," "wife," or "married" are not defined. However, marital status figures in federal tax law in provisions as basic as those giving married taxpayers the option to file joint or separate income tax returns. It is also seen in the related provisions prescribing different tax consequences, depending on whether a taxpayer is married filing jointly, married filing separately, unmarried but the head of a household, or unmarried and not the head of a household.

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

This category includes statutory provisions dealing with current and retired federal officers and employees, members of the Armed Forces, elected officials, and judges, in which marital status is a factor. Typically these provisions address the various health, leave, retirement, survivor, and insurance benefits provided by the United States to those in federal service and their families.

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED PROVISIONS

Marital status comes into play in many different ways in federal laws relating to employment in the private sector. Most provisions appear in Title 29 of the United States Code, Labor.

However, others are in Title 30, Mineral Lands and Mining; Title 33, Navigation and Navigable Waters; and Title 45, Railroads. This category includes laws that address the rights of employees under employer-sponsored employee benefit plans; that provide for continuation of employer-sponsored health benefits after events like the death or divorce of the employee; and that give employees the right to unpaid leave in order to care for a seriously ill spouse. In addition, Congress has extended special benefits in connection with certain occupations, like mining and public safety.

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

This category includes federal statutory provisions governing the conditions under which noncitizens may enter and remain in the United States, be deported, or become citizens. Most are found in Title 8, Aliens and Nationality. The law gives special consideration to spouses of immigrant and nonimmigrant aliens in a wide variety of circumstances. Under immigration law, aliens may receive special status by virtue of their employment, and that treatment may extend to their spouses. Also, spouses of aliens granted asylum can be given the same status if they accompany or join their spouses.

CATEGORY 7—INDIANS

The indigenous peoples of the United States have long had a special legal relationship with the federal government through treaties and laws that are classified to Title 25, Indians. Various laws set out the rights to tribal property of "white" men marrying "Indian" women, or of "Indian" women marrying "white" men. The law also outlines the descent and distribution rights for Indians' property. In addition, there are laws pertaining to health care eligibility for Indians and spouses and reimbursement of travel expenses of spouses and candidates seeking positions in the Indian Health Service.

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

This category includes provisions concerning foreign or domestic business and commerce, in the following titles of the United States Code: Bankruptcy, Title 11; Banks and Banking, Title
12; Commerce and Trade, Title 15; Copyrights, Title 17; and Customs Duties, Title 19. This category also includes the National Housing Act (rights of mortgage borrowers); the Consumer Credit Protection Act (governs wage garnishment); and the Copyright Act (spousal copyright renewal and termination rights).

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

Federal law imposes obligations on members of Congress, employees or officers of the federal government, and members of the boards of directors of some government-related or government chartered entities, to prevent actual or apparent conflicts of interest. These individuals are required to disclose publicly certain gifts, interests, and transactions. Many of

these requirements, which are found in 16 different titles of the United States Code, apply also to the individual's spouse.

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

This category includes laws that implicate marriage in connection with criminal justice or family violence. The nature of these provisions varies greatly. Some deal with spouses as victims of crimes, others with spouses as perpetrators. These laws are found primarily in Title 18, Crimes and Criminal Procedure, but some statutory provisions, dealing with crime prevention and family violence, are in Title 42, Public Health and Welfare.

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

Under many federal loan programs, a spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the program. In other instances, marital status is a factor in determining the amount of federal assistance to which a person is entitled or the repayment schedule. This category includes education loan programs, housing loan programs for veterans, and provisions governing agricultural price supports and loan programs that are affected by the spousal relationship.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED PROVISIONS

Federal law gives special rights to spouses in connection with a variety of transactions involving federal lands and other federal property. These transactions include purchase and sale of land by the federal government and lease by the government of water and mineral rights.

CATEGORY 13—MISCELLANEOUS PROVISIONS

This category comprises federal statutory provisions that do not fit readily in any of the other 12 categories. Federal provisions that prohibit discrimination on the basis of marital status are included in this category. This category also includes various patriotic societies chartered in federal law, such as the Veterans of Foreign Wars or the Gold Star Wives of America.

PREPARED STATEMENT OF STANLEY KURTZ

My name is Stanley Kurtz. I have a Ph.D. in Social Anthropology from Harvard University (1990). My scholarly work has long focused on the intersection of culture and family life. My book, *All the Mothers Are One* (Columbia University Press, 1992), is about the cultural significance of the Hindu joint-family. I have published in scholarly journals on the subject of the family and psychology in cross-cultural perspective.

I have been a Research Associate of the Committee on Human Development of the University of Chicago, a program that specializes in the interdisciplinary study of the family and psychology. I have also been a postdoctoral trainee with the Culture and Mental Health Behavioral Training Grant (NIMH), administered by the University of Chicago's Committee on Human Development. For two years, I was Assistant Director of the Center for Culture and Mental Health, and Program Coor-

dinator of the Culture and Mental Health Training Grant (NIMH), at the University of Chicago's Committee on Human Development. There I helped train graduate students and postdoctoral fellows. I taught in the "Mind" sequence of the University of Chicago's core curriculum, and also taught a graduate seminar on cultural psychology in the Committee on Human Development. I was also awarded a Dewey Prize Lectureship in the Department of Psychology at the University of Chicago.

For several years, I was also a Lecturer in the Committee on Degrees in Social Studies of Harvard University. Harvard's Committee on Degrees in Social Studies is an interdisciplinary undergraduate major in the social sciences.

I am currently a research fellow at Stanford University's Hoover Institution, a contributor to print journals including *Policy Review* and *The Weekly Standard*, and a Contributing Editor at National Review Online. The views I put forward in this testimony are my own, and do not represent the views of either the Hoover Institution, or of the venues in which I publish.

In a recently published article, "The End of Marriage in Scandinavia" (*The Weekly Standard*, February 2, 2004), I show how the system of marriage-like same-sex registered partnerships established in the late eighties and early nineties in Scandinavia has contributed significantly to the ongoing decline of marriage in that region. My research on Scandinavia is based on my reading of the demographic and sociological literature on Scandinavian marriage. I have also consulted with Scandinavian scholars, and with American scholars with expertise on Scandinavia.

Shortly, I will be publishing the results of my research on the condition of marriage in yet another country, the Netherlands. That research is based on my reading of the demographic and sociological literature on marriage in the Netherlands, as well as on consultation with scholars and experts on that country. In my forthcoming publications on the Netherlands, I will show that same-sex marriage has contributed significantly to the decline of marriage in that nation.

The research discussed below is drawn from demographic information provided by European statistical agencies, and from scholarly monographs and journal articles by demographers and sociologists expert on the state of the family in Europe. After summarizing the results of my published research on Scandinavian marriage, I shall summarize the results of my soon to be published research on marriage in the Netherlands.

SCANDINAVIA

Marriage in Scandinavia is in serious decline. A majority of children in Sweden and Norway are now born out-of-wedlock, as are sixty percent of first born children in Denmark. In some of the more socially liberal districts of Scandinavia, marriage itself has virtually ceased to exist.

When Scandinavia's system of marriage-like same-sex registered partnerships was enacted in the late 1980's and early 1990's, the rate at which Scandinavian parents married was already in decline. Although many Scandinavians were having children out-of-wedlock, it was still typical for parents to marry sometime before the birth of the second child.

While a number of these out-of-wedlock births were to single parents, most were to cohabiting, yet unmarried, couples. The drawback of this practice is that cohabiting parents break up at two to three times the rate of married parents. A high breakup rate for unmarried parents is found in Scandinavia, and throughout the West. For this reason, rising rates of out-of-wedlock birth—even when such births are to cohabiting, rather than single, parents—mean rising rates of family dissolution.

Since demographers and sociologists take rising out-of-wedlock birthrates as a proxy for rising rates of family dissolution, we know that the family dissolution rate in Scandinavia has been growing. We also have studies that confirm for Scandinavia what we already know for the United States—that children of intact families are significantly better off than children in families that experience parental breakup.

Out-of-wedlock birthrates were already rising in Scandinavia prior to the enactment of same-sex registered partnerships. Those rates have continued to rise since the enactment of same-sex partnerships. While the out-of-wedlock birthrate rose swiftly during the 1970's and 1980's, those rapidly rising rates reflected the "easy" part of the shift toward a system of unmarried parenthood. That is, the common practice in Scandinavia through the 1980's was to have the first child out of wedlock. Prior to the nineties in Norway, for example, a majority of parents—even in the most socially liberal districts—got married prior to the birth of a second child.

During the nineties, however—following the debate on, and adoption of, same-sex registered partnerships—the out-of-wedlock birthrate began to move through the toughest areas of cultural resistance. At the beginning of the nineties, for example,

traditionally religious and socially conservative districts of Norway had relatively low out-of-wedlock birthrates. Now those rates have risen substantially, for both first and second-and-above births. In socially liberal districts of Norway, where it was already common to have the first child outside of marriage by the early nineties, a majority of even second-and-above born children are now born out-of-wedlock.

Marital decline in Scandinavia is the product of a confluence of factors: contraception, abortion, women in the workforce, cultural individualism, secularism, and the welfare state. Scandinavia is extremely secular, and its welfare state unusually large. Scandinavian law tends to treat marriage and cohabitation alike. Yet the factors driving marital decline in Scandinavia are present in all Western countries. Scholars have long taken Scandinavian family change as a bellwether for family change throughout the West. Scholars agree that the Scandinavian pattern of births to unmarried, cohabiting parents is sweeping across Europe. Northern and middle European countries are most affected by the trend, while the southern European countries are least affected. Scholarly debate among comparative students of marriage now centers on the question of whether, and how quickly, the Scandinavian family pattern is likely to spread through Europe and North America.

There is good reason to believe that same-sex marriage, and marriage-like same-sex registered partnerships, are both an effect and a reinforcing cause of this Scandinavian trend toward unmarried parenthood. The increasing cultural separation between the ideas of marriage and parenthood makes same-sex marriage more conceivable. Once marriage is separated from the idea of parenthood, there seems little reason to deny marriage, or marriage-like partnerships, to same-sex couples. By the same token, once marriage (or a status close to marriage) has been redefined to include same-sex couples, the symbolic separation between marriage and parenthood is confirmed, locked-in, and reinforced.

Same-sex partnerships in Scandinavia have furthered the cultural separation of marriage and parenthood in at least two ways. First, the debate over same-sex partnerships has split the Norwegian church. The church is the strongest cultural check on out-of-wedlock birth in Norway, since traditional clergy preach against unmarried parenthood. Yet differences within Norway's Lutheran church on the same-sex marriage issue have weakened the position of traditionalist clergy, and strengthened the position of socially liberal clergy who effectively accept both same-sex partnerships and the practice of unmarried parenthood.

This pattern has been operative since the establishment of same-sex registered partnerships early in the nineties. The phenomenon has lately been most evident in the socially liberal Norwegian county of Nordland, where many churches now fly rainbow flags. Those flags welcome clergy in same-sex registered partnerships, and signal that clergy who preach against homosexual behavior are banned.

When scholars draw conclusions about the causal effects on marriage of various beliefs and practices, they do so by combining statistical correlations with a cultural analysis. For example, we know that out-of-wedlock birthrates are unusually low in traditionally religious districts of Norway, where clergy actively preach against the practice of unmarried parenthood. Scholars reasonably conclude that the low out-of-wedlock birthrates in such districts are causally related to the preaching of these traditionalist clergy.

The judgement that same-sex marriage has contributed to rising out-of-wedlock birthrates in Norway is of exactly the same order as the aforementioned scholarly conclusion. If traditionalist preachers in socially conservative districts of Norway help to keep out-of-wedlock birthrates low, it follows that a ban on conservative preachers in socially liberal districts of Norway removes a critical barrier to an increase in those rates. Since the division within the Norwegian church caused by the debate over same-sex unions has led to a banning of traditionalist clergy (the same clergy who preach against unmarried parenthood), it follows that the controversy over same-sex partnerships has helped to raise the out-of-wedlock birthrate.

In concluding that same-sex registered partnerships have contributed to higher out-of-wedlock birthrates, we do not simply rely on the experience of the Norwegian church. The cultural meaning of marriage-like same-sex partnerships in Scandinavia tends to heighten the separation of marriage and parenthood in secular, as well as religious, contexts. As the influence of the clergy has declined in Scandinavia, secular social scientists have taken on a role as cultural arbiters. These secular social scientists have touted same-sex registered partnerships as proof that traditional marriage is outdated. Instead of arguing that de facto marriage by same-sex couples ought to encourage marriage among heterosexual parents, secular opinion leaders have drawn a different lesson. Those opinion leaders have pointed to same-sex partnerships to argue that marriage itself is outdated, and that single motherhood and unmarried parental cohabitation are just as acceptable as parenthood within marriage.

This socially radical cultural reading of same-sex partnerships was revealed in 2002, when Sweden added the right of adoption to same-sex registered partnerships. During that debate, advocates of the reform associated same-sex adoption with single parenthood. Same-sex adoption was not used to heighten the cultural connection between marriage and parenthood. On the contrary, same-sex adoption was taken to prove that the traditional family was outdated, and that novel social forms—like single parenthood, were now fully acceptable.

The socially liberal districts where Norway's secular intellectuals "preach" this view of the family experience significantly higher out of wedlock birthrates than more traditional and religious districts. Therefore, in the same way that scholars conclude that traditionalist clergy keep out-of-wedlock birthrates low in religious districts, we can conclude that the advocacy of culturally radical public intellectuals has helped to spread the practice of unmarried parenthood in socially liberal districts. These secular intellectuals have consistently pointed to same-sex registered partnerships as evidence that marriage is outdated, and unmarried parenthood as acceptable as any other family form. In this way, we can isolate the causal effect of same-sex registered partnerships as one among several causes contributing to the decline of marriage in Scandinavia.

In the socially liberal Norwegian county of Nordland, where rainbow flags fly on churches as signs that same-sex registered partnerships are fully accepted, the out-of-wedlock birthrate in 2002 was 67.29 percent—markedly higher than the rate for Norway as a whole. The out-of-wedlock birthrate for first born children in Nordland county in 2002 was 82.27 percent. More significantly, the out-of-wedlock birthrate for second-and-above born children in Nordland county in 2002 was 58.61 percent. In the early nineties, when the debate on same-sex partnerships began, most Nordlanders already bore their first child out-of-wedlock. Yet in 1990, 60.26 percent of Nordland's parents still married before the birth of the second-or-above born child. By 2002, the situation had reversed. Just under sixty percent of Nordlanders now bear even second-and-above born children out-of-wedlock.

That nearly twenty point shift in the out-of-wedlock birthrate for second-and-above born children since 1990 signals that marriage itself is now a rarity in Nordland county. What began as a practice of experimenting with the relationship through the birth of the first child has now turned into a general repudiation of marriage itself.

The figures are similar in the socially liberal county of Nord-Troendelag, which borders on the university town of Trondheim, home to some of the prominent public intellectuals who point to same-sex registered partnerships as proof that marriage itself is outdated and unnecessary. In 2002, 83.27 percent of first born children in Nord-Troendelag were born out-of-wedlock. More significantly, in 2002, 57.74 percent of second-and-above born children were born out-of-wedlock. That compares to 38.12 percent of second-and-above born children born out of wedlock in 1990, just before the debate over marriage-like same-sex partnerships began.

With a clear majority of even second-and-above born children now born out-of-wedlock, it is evident that marriage has nearly disappeared in some socially liberal counties of Norway. In the parts of Norway where de facto gay marriage finds its highest degree of acceptance, marriage itself has virtually ceased to exist. This fact ought to give pause.

THE NETHERLANDS

The situation in the Netherlands confirms and strengthens the argument for a causal contribution of same-sex marriage to the decline of marriage. This is so for two reasons. In the Netherlands, a system of marriage-like registered partnerships open to both same-sex and opposite-sex couples was authorized by parliament in 1996, and took effect in 1998. More recently, in 2000, parliament adopted full and formal same-sex marriage, which took effect in 2001. The experience of the Netherlands shows that not only marriage-like registered partnerships open to same-sex couples, but also full and formal same-sex marriage, contribute to the decline of marriage. The particular cultural situation of marriage in the Netherlands, moreover, makes it easier to isolate the causal effect of same-sex marriage from other contributors to marital decline. In effect, the Netherlands shows how same-sex marriage draws down the "cultural capital" on which the system of married parenthood depends.

Marriage in the Netherlands has long been liberalized in a legal sense. Nearly a decade before the adoption of registered partnerships in the nineties, the Netherlands began to legally equalize marriage and cohabitation. The practice of premarital cohabitation is very widespread in the Netherlands, and in a European con-

text, high rates of premarital cohabitation are generally associated with high out-of-wedlock birthrates.

Yet scholars note that the practice of cohabiting parenthood in the Netherlands has been surprisingly rare, despite the early legal equalization of marriage and cohabitation, and despite the frequency of premarital cohabitation. Most scholars attribute the unexpectedly low out-of-wedlock birthrates in the Netherlands to the strength of conservative cultural tradition in the Netherlands.

Yet the striking fact of the matter is that, ever since Dutch parliamentary proposals for formal gay marriage and/or registered partnerships were first introduced and debated in 1996, and continuing through and beyond the authorization of full and formal same-sex marriage in 2000, the out-of-wedlock birthrate in the Netherlands has been increasing at double its previous speed. The movement for same-sex marriage in the Netherlands began in earnest in 1989. After several attempts to legalize gay marriage through the courts failed in 1990, a campaign of cultural-political activism was launched. This campaign involved the establishment of symbolic marriage registries—and ceremonies—in sympathetic municipalities (although these marriages had no legal force), and favorable treatment of same-sex marriage in the largely sympathetic mainstream news and entertainment media.

The movement for same-sex marriage picked up steam after the election of a socially liberal government in 1994—a government that for the first time included no representatives of the socially conservative Christian Democratic party. At that point, the movement for same-sex marriage went into high gear, with a series of parliamentary debates and public campaigns running from 1996 through the adoption of full gay marriage in 2000.

In 1996, just as the campaign for gay marriage went into high gear, the unusually low Dutch out-of-wedlock birthrate began to rise at a rate of two percent per year, in contrast to it's earlier average rise of only one percent per year. Dutch demographers are at a loss to explain this doubling of the rate of increase by reference to legal changes, or changes in welfare policy.

Some might argue that the "marriage lite" of registered partnerships—open to both same-sex and opposite-sex couples—can account for the rapid increase in the out-of-wedlock birthrate in the mid-nineties. After all, since the Netherlands allows even heterosexual couples to enter registered partnerships, any children they might have would by definition be born outside of marriage. So it could be argued that had the Netherlands established full and formal gay marriage in the mid-nineties, instead of a system of registered partnerships open to same-sex and opposite-sex couples, out-of-wedlock birthrates would have remained low.

It is important to note, however, that the open aim of the gay marriage movement in the Netherlands was always full and formal marriage. Even at the moment when registered partnerships were authorized in 1996, a majority in the Dutch parliament also called for full and formal gay marriage. The Dutch cabinet demurred at that time, for political reasons. Yet the ultimate goal of full and formal same-sex marriage was affirmed by majority sentiment in parliament—and by the gay marriage movement itself—all along. Moreover, even during the years of registered partnership, the Dutch media continued to treat same-sex unions as marriages. So the symbolic core of the gay marriage movement in the Netherlands was the quest for full and formal marriage—not "marriage lite."

Moreover, Dutch demographers discount the "marriage lite" effect on the out-of-wedlock birthrate. The number of heterosexual couples entering into registered partnerships in the nineties was simply too small to account for the two-fold increase in growth of the out of wedlock birthrate during this period. By the same token, the out-of-wedlock birthrate has continued to climb at a very fast two percent per year since the vote for full and formal gay marriage in 2000. **[See the graph attached to this testimony for an illustration of this process.]** It must be emphasized that it is relatively rare for a country to sustain a two percent per year increase in the out-of-wedlock birthrate for seven consecutive years. As a rule, this only happens when a country is on the way to a Scandinavian style system of non-marital parental cohabitation.

In light of all this, it is reasonable to conclude that the traditionalist "cultural capital" that scholars agree kept the Dutch out-of-wedlock birthrate artificially low (despite the legal equalization of marriage and cohabitation in the eighties) has been displaced and depleted by the long public campaign for same-sex marriage. Same-sex marriage has increased the cultural separation of marriage from parenthood in the Netherlands, just as it has in Scandinavia.

This history enables us to isolate the causal mechanism in question. Since legal and structural factors affecting marriage had failed to produce high out-of-wedlock birthrates in the Netherlands through the mid-nineties, the scholarly consensus was that cultural factors—and only cultural factors—were keeping the out-of-wedlock

birthrates low. It took a new cultural outlook on the connection between marriage and parenthood to eliminate the traditional cultural barriers to unmarried parental cohabitation. Same-sex marriage, along with marriage-like registered partnerships open to same-sex couples, provided that outlook. Now, with the 2003 Dutch out-of-wedlock birthrate at 31 percent, and the practice of cohabiting parenthood on the rise, the Netherlands appears to be well along the Scandinavian path.

AMERICA'S PROSPECTS

The experience of Scandinavia and the Netherlands make it clear that same-sex marriage could widen the separation between marriage and parenthood here in the United States. America is already the world leader in divorce. Our high divorce rates have significantly weakened the institution of marriage in this country. For all that, however, Americans differ from Europeans in that they commonly assume that couples ought to marry prior to having children. Although the association of marriage and parenthood is relatively weak among the urban poor, it is still remarkably strong in the rest of American society. Scandinavia, in contrast, has no large concentrations of urban poor. The practice of unmarried parenthood is widespread in Scandinavia's middle and upper-middle classes, because the cultural association between marriage and parenthood has been lost in much of Europe.

Yet, the first signs of European-style parental cohabitation are now evident in America. And the prestigious American Law Institute recently proposed a series of legal reforms that would tend to equalize marriage and cohabitation ("The Principles of the Law of Family Dissolution," 2000). As of yet, these harbingers of the Scandinavian family pattern have had a limited effect on the United States. The danger is that same-sex marriage could introduce the sharp cultural separation of marriage and parenthood in America that is now familiar in Scandinavia. That, in turn, could draw out the budding American trends toward unmarried but cohabiting parenthood, and the associated legal equalization of marriage and cohabitation.

Same-sex marriage has every prospect of being even more influential in America than it has already been in Europe. That's because, in Scandinavia, same-sex partnerships came at the tail end of a process of marital decline that centered around unmarried parental cohabitation. In the United States, same-sex marriage would be the leading edge, rather than the tail end, of the Scandinavian cultural pattern. And a combination of the Scandinavian cultural pattern with America's already high divorce rate would likely mean a radical weakening of marriage—perhaps even the end of marriage itself. After all, we are witnessing no less than the end of marriage itself in Scandinavia.

America's concentrations of urban poor compound the potential dangers of importing a Scandinavian-style separation between marriage and parenthood. Scandinavia has no substantial concentrations of urban poverty. America does. A weakening of the ethos of marriage in the middle and upper-middle classes would likely undo the progress made since welfare reform in stemming the tide of single parenthood among the urban poor. This is foreshadowed in Great Britain, where the Scandinavian pattern of unmarried but cohabiting parenthood is rapidly spreading. Britain, like the United States, does have substantial pockets of urban poverty. Since the spread of the Scandinavian family pattern to Britain's middle classes, the rate of births to single teenaged parents among Britain's urban poor has risen significantly.

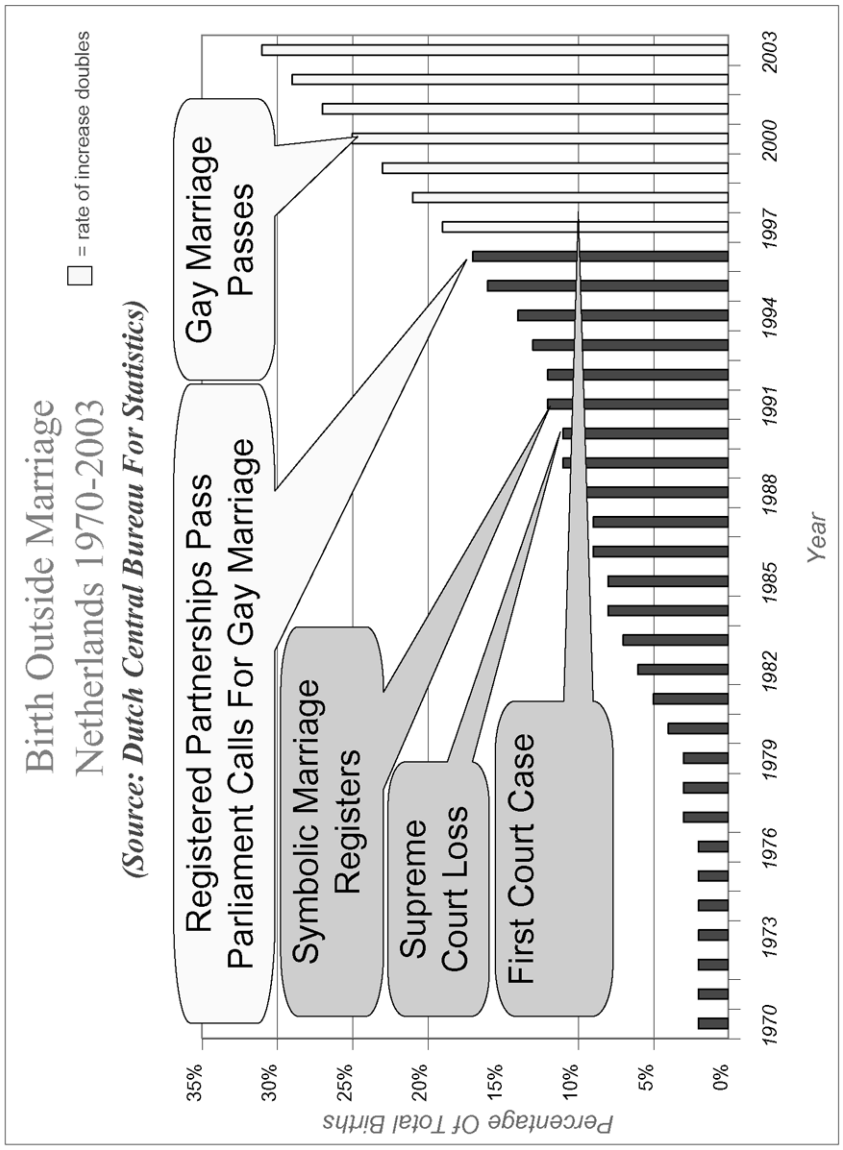
In Scandinavia, a massive welfare state largely substitutes for the family. Should the Scandinavian cultural pattern take root in the United States, with its accompanying effects on the urban poor, we shall be forced to choose between significant social disruption and a substantial increase in our own welfare state. The fate of marriage therefore impacts the broadest questions of governance.

Note also that scholars of marriage widely discuss the likelihood that the Scandinavian family pattern will spread throughout the West—including the United States. And in effect, the spread of the movement for same-sex marriage from Scandinavia to Europe and North America is further evidence that what happens in Scandinavia can and does have every prospect of spreading to the United States. Unless we take steps to block same-sex marriage and prevent the legal equalization of marriage and cohabitation, it is entirely likely that America will experience marital decline of the type now familiar in Scandinavia—and rapidly on the rise in the Netherlands.

In effect, the adoption of same-sex marriage in the Netherlands has prefigured this entire process. The socially conservative Netherlands equalized marriage and cohabitation, then adopted same-sex marriage. The effects of liberalized cohabitation were minimal, at first. After same-sex marriage was added to the mix, however, the traditional connection between marriage and parenthood eroded. In a classic case of "depleted cultural capital," the Netherlands' relative cultural conservatism in the

matter of marriage was drawn down. That country is now firmly on the path to the Scandinavian system of unmarried, cohabiting parenthood. And in the Netherlands, same-sex marriage was on the leading edge, rather than the tail end, of marital decline.

In short, since the adoption of same-sex registered partnerships—and of full, formal same-sex marriage—marriage has declined substantially in both Scandinavia and the Netherlands. In the districts of Scandinavia most accepting of same-sex marriage, marriage itself has almost entirely disappeared. I have shown that same-sex marriage contributed significantly to this pattern of marital decline. The social harm in all this is the damage to children. Children will suffer greatly if the Scandinavian pattern takes hold, because the concomitant of the Scandinavian pattern is a rising tide of family dissolution. And a further decline of marriage and family is sure to bring calls for a major expansion of the welfare state. For all these reasons, steps to block same-sex marriage should be taken.


Birth Outside Marriage
Netherlands 1970-2003
(Source: Dutch Central Bureau For Statistics)
= rate of increase doubles
Registered Partnerships Pass Parliament Calls For Gay Marriage
Gay Marriage Passes
Symbolic Marriage Registers
Supreme Court Loss
First Court Case
Percentage Of Total Births
35%
30%
25%
20%
15%
10%
5%
0%
1970
1973
1976
1979
1982
1985
1988
1991
1994
1997
2000
2003
Year

ATTACHMENT

the weekly Standard

The End of Marriage in Scandinavia
The "conservative case" for same-sex marriage collapses.
by Stanley Kurtz
02/02/2004, Volume 009, Issue 20

MARRIAGE IS SLOWLY DYING IN SCANDINAVIA. A majority of children in Sweden and Norway are born out of wedlock. Sixty percent of first-born children in Denmark have unmarried parents. Not coincidentally, these countries have had something close to full gay marriage for a decade or more. Same-sex marriage has locked in and reinforced an existing Scandinavian trend toward the separation of marriage and parenthood. The Nordic family pattern--including gay marriage--is spreading across Europe. And by looking closely at it we can answer the key empirical question underlying the gay marriage debate. Will same-sex marriage undermine the institution of marriage? It already has.

More precisely, it has *further* undermined the institution. The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher. Instead of encouraging a society-wide return to marriage, Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.

This is not how the situation has been portrayed by prominent gay marriage advocates journalist Andrew Sullivan and Yale law professor William Eskridge Jr. Sullivan and Eskridge have made much of an unpublished study of Danish same-sex registered partnerships by Darren Spedale, an independent researcher with an undergraduate degree who visited Denmark in 1996 on a Fulbright scholarship. In 1989, Denmark had legalized de facto gay marriage (Norway followed in 1993 and Sweden in 1994). Drawing on Spedale, Sullivan and Eskridge cite evidence that since then, marriage has strengthened. Spedale reported that in the six years following the establishment of registered partnerships in Denmark (1990-1996), heterosexual marriage rates climbed by 10 percent, while heterosexual divorce rates declined by 12 percent. Writing in the McGeorge Law Review, Eskridge claimed that Spedale's study had exposed the "hysteria and irresponsibility" of those who predicted gay marriage would undermine marriage. Andrew Sullivan's Spedale-inspired piece was subtitled, "The case against same-sex marriage crumbles."

Yet the half-page statistical analysis of heterosexual marriage in Darren Spedale's unpublished paper doesn't begin to get at the truth about the decline of marriage in Scandinavia during the nineties. Scandinavian marriage is now so weak that statistics on marriage and divorce no longer mean what they used to.

Take divorce. It's true that in Denmark, as elsewhere in Scandinavia, divorce numbers looked better in the nineties. But that's because the pool of married people has been shrinking for some time. You can't divorce without first getting married. Moreover, a closer look at Danish divorce in the post-gay marriage decade reveals disturbing trends. Many Danes have stopped holding off divorce until their kids are grown. And Denmark in the nineties saw a 25 percent increase in cohabiting couples with children. With fewer parents marrying, what used to show up in statistical tables as early divorce is now the unrecorded breakup of a cohabiting couple with children.

What about Spedale's report that the Danish marriage rate increased 10 percent from 1990 to 1996? Again, the news only appears to be good. First, there is no trend. Eurostat's just-released marriage rates for 2001 show declines in Sweden and Denmark (Norway hasn't reported). Second, marriage statistics in societies with very low rates (Sweden registered the lowest marriage rate in recorded history in 1997) must be carefully parsed. In his study of the Norwegian family in the nineties, for example, Christer Hyggen shows that a small increase in Norway's marriage rate over the past decade has more to do with the institution's decline than with any renaissance. Much of the increase in Norway's marriage rate is driven by older couples "catching up." These couples belong to the first generation that accepts rearing the first born child out of wedlock. As they bear second children, some finally get married. (And even this tendency to marry at the birth of a second child is weakening.) As for the rest of the increase in the Norwegian marriage rate, it is largely attributable to remarriage among the large number of divorced.

Spedale's report of lower divorce rates and higher marriage rates in post-gay marriage Denmark is thus misleading. Marriage is now so weak in Scandinavia that shifts in these rates no longer mean what they would in America. In Scandinavian demography, what counts is the out-of-wedlock birthrate, and the family dissolution rate.

The family dissolution rate is different from the divorce rate. Because so many Scandinavians now rear children outside of marriage, divorce rates are unreliable measures of family weakness. Instead, we need to know the rate at which parents (married or not) split up. Precise statistics on family dissolution are unfortunately rare. Yet the studies that have been done show that throughout Scandinavia (and the West) cohabiting couples with children break up at two to three times the rate of married parents. So rising rates of cohabitation and out-of-wedlock birth stand as proxy for rising rates of family dissolution.

By that measure, Scandinavian family dissolution has only been worsening. Between 1990 and 2000, Norway's out-of-wedlock birthrate rose from 39 to 50 percent, while Sweden's rose from 47 to 55 percent. In Denmark out-of-wedlock births stayed level during the nineties (beginning at 46 percent and ending at 45 percent). But the leveling off seems to be a function of a slight increase in fertility among older couples, who marry only after multiple births (if they don't break up first). That shift masks the 25 percent increase during the nineties in cohabitation and unmarried parenthood among Danish couples (many of them young). About 60 percent of first born children in Denmark now have unmarried parents. The rise of fragile families based on cohabitation and out-of-wedlock childbearing means that during the nineties, the total rate of family dissolution in Scandinavia significantly increased.

Scandinavia's out-of-wedlock birthrates may have risen more rapidly in the seventies, when marriage began its slide. But the push of that rate past the 50 percent mark during the nineties was in many ways more disturbing. Growth in the out-of-wedlock birthrate is limited by the

tendency of parents to marry after a couple of births, and also by the persistence of relatively conservative and religious districts. So as out-of-wedlock childbearing pushes beyond 50 percent, it is reaching the toughest areas of cultural resistance. The most important trend of the post-gay marriage decade may be the erosion of the tendency to marry at the birth of a second child. Once even that marker disappears, the path to the complete disappearance of marriage is open.

And now that married parenthood has become a minority phenomenon, it has lost the critical mass required to have socially normative force. As Danish sociologists Wehner, Kambskard, and Abrahamson describe it, in the wake of the changes of the nineties, "Marriage is no longer a precondition for settling a family--neither legally nor normatively. . . . What defines and makes the foundation of the Danish family can be said to have moved from marriage to parenthood."

So the highly touted half-page of analysis from an unpublished paper that supposedly helps validate the "conservative case" for gay marriage--i.e., that it will encourage stable marriage for heterosexuals and homosexuals alike--does no such thing. Marriage in Scandinavia is in deep decline, with children shouldering the burden of rising rates of family dissolution. And the mainspring of the decline--an increasingly sharp separation between marriage and parenthood--can be linked to gay marriage. To see this, we need to understand why marriage is in trouble in Scandinavia to begin with.

SCANDINAVIA has long been a bellwether of family change. Scholars take the Swedish experience as a prototype for family developments that will, or could, spread throughout the world. So let's have a look at the decline of Swedish marriage.

In Sweden, as elsewhere, the sixties brought contraception, abortion, and growing individualism. Sex was separated from procreation, reducing the need for "shotgun weddings." These changes, along with the movement of women into the workforce, enabled and encouraged people to marry at later ages. With married couples putting off parenthood, early divorce had fewer consequences for children. That weakened the taboo against divorce. Since young couples were putting off children, the next step was to dispense with marriage and cohabit until children were desired. Americans have lived through this transformation. The Swedes have simply drawn the final conclusion: If we've come so far without marriage, why marry at all? Our love is what matters, not a piece of paper. Why should children change that?

Two things prompted the Swedes to take this extra step--the welfare state and cultural attitudes. No Western economy has a higher percentage of public employees, public expenditures--or higher tax rates--than Sweden. The massive Swedish welfare state has largely displaced the family as provider. By guaranteeing jobs and income to every citizen (even children), the welfare state renders each individual independent. It's easier to divorce your spouse when the state will support you instead.

The taxes necessary to support the welfare state have had an enormous impact on the family. With taxes so high, women must work. This reduces the time available for child rearing, thus encouraging the expansion of a day-care system that takes a large part in raising nearly all Swedish children over age one. Here is at least a partial realization of Simone de Beauvoir's dream of an enforced androgyny that pushes women from the home by turning children over to the state.

Yet the Swedish welfare state may encourage traditionalism in one respect. The lone teen pregnancies common in the British and American underclass are rare in Sweden, which has no underclass to speak of. Even when Swedish couples bear a child out of wedlock, they tend to reside together when the child is born. Strong state enforcement of child support is another factor discouraging single motherhood by teens. Whatever the causes, the discouragement of lone motherhood is a short-term effect. Ultimately, mothers and fathers can get along financially alone. So children born out of wedlock are raised, initially, by two cohabiting parents, many of whom later break up.

There are also cultural-ideological causes of Swedish family decline. Even more than in the United States, radical feminist and socialist ideas pervade the universities and the media. Many Scandinavian social scientists see marriage as a barrier to full equality between the sexes, and would not be sorry to see marriage replaced by unmarried cohabitation. A related cultural-ideological agent of marital decline is secularism. Sweden is probably the most secular country in the world. Secular social scientists (most of them quite radical) have largely replaced clerics as arbiters of public morality. Swedes themselves link the decline of marriage to secularism. And many studies confirm that, throughout the West, religiosity is associated with institutionally strong marriage, while heightened secularism is correlated with a weakening of marriage. Scholars have long suggested that the relatively thin Christianization of the Nordic countries explains a lot about why the decline of marriage in Scandinavia is a decade ahead of the rest of the West.

Are Scandinavians concerned about rising out-of-wedlock births, the decline of marriage, and ever-rising rates of family dissolution? No, and yes. For over 15 years, an American outsider, Rutgers University sociologist David Popenoe, has played Cassandra on these issues. Popenoe's 1988 book, "Disturbing the Nest," is still the definitive treatment of Scandinavian family change and its meaning for the Western world. Popenoe is no toe-the-line conservative. He has praise for the Swedish welfare state, and criticizes American opposition to some child welfare programs. Yet Popenoe has documented the slow motion collapse of the Swedish family, and emphasized the link between Swedish family decline and welfare policy.

For years, Popenoe's was a lone voice. Yet by the end of the nineties, the problem was too obvious to ignore. In 2000, Danish sociologist Mai Heide Ottosen published a study, "Samboskab, Aegteskab og Foraeldrebrud" ("Cohabitation, Marriage and Parental Breakup"), which confirmed the increased risk of family dissolution to children of unmarried parents, and gently chided Scandinavian social scientists for ignoring the "quiet revolution" of out-of-wedlock parenting.

Despite the reluctance of Scandinavian social scientists to study the consequences of family dissolution for children, we do have an excellent study that followed the life experiences of *all* children born in Stockholm in 1953. (Not coincidentally, the research was conducted by a British scholar, Duncan W.G. Timms.) That study found that regardless of income or social status, parental breakup had negative effects on children's mental health. Boys living with single, separated, or divorced mothers had particularly high rates of impairment in adolescence. An important 2003 study by Gunilla Ringbäck Weitoft, et al. found that children of single parents in Sweden have more than double the rates of mortality, severe morbidity, and injury of children in two parent households. This held true after controlling for a wide range of demographic and socioeconomic circumstances.

THE DECLINE OF MARRIAGE and the rise of unstable cohabitation and out-of-wedlock

childbirth are not confined to Scandinavia. The Scandinavian welfare state aggravates these problems. Yet none of the forces weakening marriage there are unique to the region. Contraception, abortion, women in the workforce, spreading secularism, ascendant individualism, and a substantial welfare state are found in every Western country. That is why the Nordic pattern is spreading.

Yet the pattern is spreading unevenly. And scholars agree that cultural tradition plays a central role in determining whether a given country moves toward the Nordic family system. Religion is a key variable. A 2002 study by the Max Planck Institute, for example, concluded that countries with the lowest rates of family dissolution and out-of-wedlock births are "strongly dominated by the Catholic confession." The same study found that in countries with high levels of family dissolution, religion in general, and Catholicism in particular, had little influence.

British demographer Kathleen Kiernan, the acknowledged authority on the spread of cohabitation and out-of-wedlock births across Europe, divides the continent into three zones. The Nordic countries are the leaders in cohabitation and out-of-wedlock births. They are followed by a middle group that includes the Netherlands, Belgium, Great Britain, and Germany. Until recently, France was a member of this middle group, but France's rising out-of-wedlock birthrate has moved it into the Nordic category. North American rates of cohabitation and out-of-wedlock birth put the United States and Canada into this middle group. Most resistant to cohabitation, family dissolution, and out-of-wedlock births are the southern European countries of Spain, Portugal, Italy, and Greece, and, until recently, Switzerland and Ireland. (Ireland's rising out-of-wedlock birthrate has just pushed it into the middle group.)

These three groupings closely track the movement for gay marriage. In the early nineties, gay marriage came to the Nordic countries, where the out-of-wedlock birthrate was already high. Ten years later, out-of-wedlock birth rates have risen significantly in the middle group of nations. Not coincidentally, nearly every country in that middle group has recently either legalized some form of gay marriage, or is seriously considering doing so. Only in the group with low out-of-wedlock birthrates has the gay marriage movement achieved relatively little success.

This suggests that gay marriage is both an effect and a cause of the increasing separation between marriage and parenthood. As rising out-of-wedlock birthrates disassociate heterosexual marriage from parenting, gay marriage becomes conceivable. If marriage is only about a relationship between two people, and is not intrinsically connected to parenthood, why shouldn't same-sex couples be allowed to marry? It follows that once marriage is redefined to accommodate same-sex couples, that change cannot help but lock in and reinforce the very cultural separation between marriage and parenthood that makes gay marriage conceivable to begin with.

We see this process at work in the radical separation of marriage and parenthood that swept across Scandinavia in the nineties. If Scandinavian out-of-wedlock birthrates had not already been high in the late eighties, gay marriage would have been far more difficult to imagine. More than a decade into post-gay marriage Scandinavia, out-of-wedlock birthrates have passed 50 percent, and the effective end of marriage as a protective shield for children has become thinkable. Gay marriage hasn't blocked the separation of marriage and parenthood; it has advanced it.

WE SEE THIS most clearly in Norway. In 1989, a couple of years after Sweden broke ground by offering gay couples the first domestic partnership package in Europe, Denmark legalized de facto gay marriage. This kicked off a debate in Norway (traditionally more conservative than either Sweden or Denmark), which legalized de facto gay marriage in 1993. (Sweden expanded its benefits packages into de facto gay marriage in 1994.) In liberal Denmark, where out-of-wedlock birthrates were already very high, the public favored same-sex marriage. But in Norway, where the out-of-wedlock birthrate was lower--and religion traditionally stronger--gay marriage was imposed, against the public will, by the political elite.

Norway's gay marriage debate, which ran most intensely from 1991 through 1993, was a culture-shifting event. And once enacted, gay marriage had a decidedly unconservative impact on Norway's cultural contests, weakening marriage's defenders, and placing a weapon in the hands of those who sought to replace marriage with cohabitation. Since its adoption, gay marriage has brought division and decline to Norway's Lutheran Church. Meanwhile, Norway's fast-rising out-of-wedlock birthrate has shot past Denmark's. Particularly in Norway--once relatively conservative--gay marriage has undermined marriage's institutional standing for everyone.

Norway's Lutheran state church has been riven by conflict in the decade since the approval of de facto gay marriage, with the ordination of registered partners the most divisive issue. The church's agonies have been intensively covered in the Norwegian media, which have taken every opportunity to paint the church as hidebound and divided. The nineties began with conservative churchmen in control. By the end of the decade, liberals had seized the reins.

While the most public disputes of the nineties were over homosexuality, Norway's Lutheran church was also divided over the question of heterosexual cohabitation. Asked directly, liberal and conservative clerics alike voice a preference for marriage over cohabitation--especially for couples with children. In practice, however, conservative churchmen speak out against the trend toward unmarried cohabitation and childbirth, while liberals acquiesce.

This division over heterosexual cohabitation broke into the open in 2000, at the height of the church's split over gay partnerships, when Prince Haakon, heir to Norway's throne, began to live with his lover, a single mother. From the start of the prince's controversial relationship to its eventual culmination in marriage, the future head of the Norwegian state church received tokens of public support or understanding from the very same bishops who were leading the fight to permit the ordination of homosexual partners.

So rather than strengthening Norwegian marriage against the rise of cohabitation and out-of-wedlock birth, same-sex marriage had the opposite effect. Gay marriage lessened the church's authority by splitting it into warring factions and providing the secular media with occasions to mock and expose divisions. Gay marriage also elevated the church's openly rebellious minority liberal faction to national visibility, allowing Norwegians to feel that their proclivity for unmarried parenthood, if not fully approved by the church, was at least not strongly condemned. If the "conservative case" for gay marriage had been valid, clergy who were supportive of gay marriage would have taken a strong public stand against unmarried heterosexual parenthood. This didn't happen. It was the conservative clergy who criticized the prince, while the liberal supporters of gay marriage tolerated his decisions. The message was not lost on ordinary Norwegians, who continued their flight to unmarried parenthood.

Gay marriage is both an effect and a reinforcing cause of the separation of marriage and

parenthood. In states like Sweden and Denmark, where out-of-wedlock birthrates were already very high, and the public favored gay marriage, gay unions were an effect of earlier changes. Once in place, gay marriage symbolically ratified the separation of marriage and parenthood. And once established, gay marriage became one of several factors contributing to further increases in cohabitation and out-of-wedlock birthrates, as well as to early divorce. But in Norway, where out-of-wedlock birthrates were lower, religion stronger, and the public opposed same-sex unions, gay marriage had an even greater role in precipitating marital decline.

SWEDEN'S POSITION as the world leader in family decline is associated with a weak clergy, and the prominence of secular and left-leaning social scientists. In the post-gay marriage nineties, as Norway's once relatively low out-of-wedlock birthrate was climbing to unprecedented heights, and as the gay marriage controversy weakened and split the once respected Lutheran state church, secular social scientists took center stage.

Kari Moxnes, a feminist sociologist specializing in divorce, is one of the most prominent of Norway's newly emerging group of public social scientists. As a scholar who sees both marriage and at-home motherhood as inherently oppressive to women, Moxnes is a proponent of nonmarital cohabitation and parenthood. In 1993, as the Norwegian legislature was debating gay marriage, Moxnes published an article, "Det tomme ekteskap" ("Empty Marriage"), in the influential liberal paper Dagbladet. She argued that Norwegian gay marriage was a sign of marriage's growing emptiness, not its strength. Although Moxnes spoke in favor of gay marriage, she treated its creation as a (welcome) death knell for marriage itself. Moxnes identified homosexuals--with their experience in forging relationships unencumbered by children--as social pioneers in the separation of marriage from parenthood. In recognizing homosexual relationships, Moxnes said, society was ratifying the division of marriage from parenthood that had spurred the rise of out-of-wedlock births to begin with.

A frequent public presence, Moxnes enjoyed her big moment in 1999, when she was embroiled in a dispute with Valgerd Svarstad Haugland, minister of children and family affairs in Norway's Christian Democrat government. Moxnes had criticized Christian marriage classes for teaching children the importance of wedding vows. This brought a sharp public rebuke from Haugland. Responding to Haugland's criticisms, Moxnes invoked homosexual families as proof that "relationships" were now more important than institutional marriage.

This is not what proponents of the conservative case for gay marriage had in mind. In Norway, gay marriage has given ammunition to those who wish to put an end to marriage. And the steady rise of Norway's out-of-wedlock birthrate during the nineties proves that the opponents of marriage are succeeding. Nor is Kari Moxnes an isolated case.

Months before Moxnes clashed with Haugland, social historian Kari Melby had a very public quarrel with a leader of the Christian Democratic party over the conduct of Norway's energy minister, Marit Arnstad. Arnstad had gotten pregnant in office and had declined to name the father. Melby defended Arnstad, and publicly challenged the claim that children do best with both a mother and a father. In making her case, Melby praised gay parenting, along with voluntary single motherhood, as equally worthy alternatives to the traditional family. So instead of noting that an expectant mother might want to follow the example of marriage that even gays were now setting, Melby invoked homosexual families as proof that a child can do as well with one parent as two.

Finally, consider a case that made even more news in Norway, that of handball star Mia Hundvin (yes, handball prowess makes for celebrity in Norway). Hundvin had been in a registered gay partnership with fellow handballer Camilla Andersen. These days, however, having publicly announced her bisexuality, Hundvin is linked with Norwegian snowboarder Terje Haakonsen. Inspired by her time with Haakonsen's son, Hundvin decided to have a child. The father of Hundvin's child may well be Haakonsen, but neither Hundvin nor Haakonsen is saying.

Did Hundvin divorce her registered partner before deciding to become a single mother by (probably) her new boyfriend? The story in Norway's premiere paper, Aftenposten, doesn't bother to mention. After noting that Hundvin and Andersen were registered partners, the paper simply says that the two women are no longer "romantically involved." Hundvin has only been with Haakonsen about a year. She obviously decided to become a single mother without bothering to see whether she and Haakonsen might someday marry. Nor has Hundvin appeared to consider that her affection for Haakonsen's child (also apparently born out of wedlock) might better be expressed by marrying Haakonsen and becoming his son's new mother.

Certainly, you can chalk up more than a little of this saga to celebrity culture. But celebrity culture is both a product and influencer of the larger culture that gives rise to it. Clearly, the idea of parenthood here has been radically individualized, and utterly detached from marriage. Registered partnerships have reinforced existing trends. The press treats gay partnerships more as relationships than as marriages. The symbolic message of registered partnerships--for social scientists, handball players, and bishops alike--has been that most any nontraditional family is just fine. Gay marriage has served to validate the belief that individual choice trumps family form.

The Scandinavian experience rebuts the so-called conservative case for gay marriage in more than one way. Noteworthy, too, is the lack of a movement toward marriage and monogamy among gays. Take-up rates on gay marriage are exceedingly small. Yale's William Eskridge acknowledged this when he reported in 2000 that 2,372 couples had registered after nine years of the Danish law, 674 after four years of the Norwegian law, and 749 after four years of the Swedish law.

Danish social theorist Henning Bech and Norwegian sociologist Rune Halvorsen offer excellent accounts of the gay marriage debates in Denmark and Norway. Despite the regnant social liberalism in these countries, proposals to recognize gay unions generated tremendous controversy, and have reshaped the meaning of marriage in the years since. Both Bech and Halvorsen stress that the conservative case for gay marriage, while put forward by a few, was rejected by many in the gay community. Bech, perhaps Scandinavia's most prominent gay thinker, dismisses as an "implausible" claim the idea that gay marriage promotes monogamy. He treats the "conservative case" as something that served chiefly tactical purposes during a difficult political debate. According to Halvorsen, many of Norway's gays imposed self-censorship during the marriage debate, so as to hide their opposition to marriage itself. The goal of the gay marriage movements in both Norway and Denmark, say Halvorsen and Bech, was not marriage but social approval for homosexuality. Halvorsen suggests that the low numbers of registered gay couples may be understood as a collective protest against the expectations (presumably, monogamy) embodied in marriage.

SINCE LIBERALIZING DIVORCE in the first decades of the twentieth century, the Nordic countries have been the leading edge of marital change. Drawing on the Swedish experience,

Kathleen Kiernan, the British demographer, uses a four-stage model by which to gauge a country's movement toward Swedish levels of out-of-wedlock births.

In stage one, cohabitation is seen as a deviant or avant-garde practice, and the vast majority of the population produces children within marriage. Italy is at this first stage. In the second stage, cohabitation serves as a testing period before marriage, and is generally a childless phase. Bracketing the problem of underclass single parenthood, America is largely at this second stage. In stage three, cohabitation becomes increasingly acceptable, and parenting is no longer automatically associated with marriage. Norway was at this third stage, but with recent demographic and legal changes has entered stage four. In the fourth stage (Sweden and Denmark), marriage and cohabitation become practically indistinguishable, with many, perhaps even most, children born and raised outside of marriage. According to Kiernan, these stages may vary in duration, yet once a country has reached a stage, return to an earlier phase is unlikely. (She offers no examples of stage reversal.) Yet once a stage has been reached, earlier phases coexist.

The forces pushing nations toward the Nordic model are almost universal. True, by preserving legal distinctions between marriage and cohabitation, reining in the welfare state, and preserving at least some traditional values, a given country might forestall or prevent the normalization of nonmarital parenthood. Yet every Western country is susceptible to the pull of the Nordic model. Nor does Catholicism guarantee immunity. Ireland, perhaps because of its geographic, linguistic, and cultural proximity to England, is now suffering from out-of-wedlock birthrates far in excess of the rest of Catholic Europe. Without deeming a shift inevitable, Kiernan openly wonders how long America can resist the pull of stages three and four.

Although Sweden leads the world in family decline, the United States is runner-up. Swedes marry less, and bear more children out of wedlock, than any other industrialized nation. But Americans lead the world in single parenthood and divorce. If we bracket the crisis of single parenthood among African-Americans, the picture is somewhat different. Yet even among non-Hispanic whites, the American divorce rate is extremely high by world standards.

The American mix of family traditionalism and family instability is unusual. In comparison to Europe, Americans are more religious and more likely to turn to the family than the state for a wide array of needs--from child care, to financial support, to care for the elderly. Yet America's individualism cuts two ways. Our cultural libertarianism protects the family as a bulwark against the state, yet it also breaks individuals loose from the family. The danger we face is a combination of America's divorce rate with unstable, Scandinavian-style out-of-wedlock parenthood. With a growing tendency for cohabiting couples to have children outside of marriage, America is headed in that direction.

Young Americans are more likely to favor gay marriage than their elders. That oft-noted fact is directly related to another. Less than half of America's twentysomethings consider it wrong to bear children outside marriage. There is a growing tendency for even middle class cohabiting couples to have children without marrying.

Nonetheless, although cohabiting parenthood is growing in America, levels here are still far short of those in Europe. America's situation is not unlike Norway's in the early nineties, with religiosity relatively strong, the out-of-wedlock birthrate still relatively low (yet rising), and the public opposed to gay marriage. If, as in Norway, gay marriage were imposed here by a

socially liberal cultural elite, it would likely speed us on the way toward the classic Nordic pattern of less frequent marriage, more frequent out-of-wedlock birth, and skyrocketing family dissolution.

In the American context, this would be a disaster. Beyond raising rates of middle class family dissolution, a further separation of marriage from parenthood would reverse the healthy turn away from single-parenting that we have begun to see since welfare reform. And cross-class family decline would bring intense pressure for a new expansion of the American welfare state.

All this is happening in Britain. With the Nordic pattern's spread across Europe, Britain's out-of-wedlock birthrate has risen to 40 percent. Most of that increase is among cohabiting couples. Yet a significant number of out-of-wedlock births in Britain are to lone teenage mothers. This a function of Britain's class divisions. Remember that although the Scandinavian welfare state encourages family dissolution in the long term, in the short term, Scandinavian parents giving birth out of wedlock tend to stay together. But given the presence of a substantial underclass in Britain, the spread of Nordic cohabitation there has sent lone teen parenting rates way up. As Britain's rates of single parenting and family dissolution have grown, so has pressure to expand the welfare state to compensate for economic help that families can no longer provide. But of course, an expansion of the welfare state would only lock the weakening of Britain's family system into place.

If America is to avoid being forced into a similar choice, we'll have to resist the separation of marriage from parenthood. Yet even now we are being pushed in the Scandinavian direction. Stimulated by rising rates of unmarried parenthood, the influential American Law Institute (ALI) has proposed a series of legal reforms ("Principles of Family Dissolution") designed to equalize marriage and cohabitation. Adoption of the ALI principles would be a giant step toward the Scandinavian system.

AMERICANS take it for granted that, despite its recent troubles, marriage will always exist. This is a mistake. Marriage is disappearing in Scandinavia, and the forces undermining it there are active throughout the West. Perhaps the most disturbing sign for the future is the collapse of the Scandinavian tendency to marry after the second child. At the start of the nineties, 60 percent of unmarried Norwegian parents who lived together had only one child. By 2001, 56 percent of unmarried, cohabiting parents in Norway had two or more children. This suggests that someday, Scandinavian parents might simply stop getting married altogether, no matter how many children they have.

The death of marriage is not inevitable. In a given country, public policy decisions and cultural values could slow, and perhaps halt, the process of marital decline. Nor are we faced with an all-or-nothing choice between the marital system of, say, the 1950s and marriage's disappearance. Kiernan's model posits stopping points. So repealing no-fault divorce, or even eliminating premarital cohabitation, are not what's at issue. With no-fault divorce, Americans traded away some of the marital stability that protects children to gain more freedom for adults. Yet we can accept that trade-off, while still drawing a line against descent into a Nordic-style system. And cohabitation as a premarital testing phase is not the same as unmarried parenting. Potentially, a line between the two can hold.

Developments in the last half-century have surely weakened the links between American marriage and parenthood. Yet to a remarkable degree, Americans still take it for granted that

parents should marry. Scandinavia shocks us. Still, who can deny that gay marriage will accustom us to a more Scandinavian-style separation of marriage and parenthood? And with our underclass, the social pathologies this produces in America are bound to be more severe than they already are in wealthy and socially homogeneous Scandinavia.

All of these considerations suggest that the gay marriage debate in America is too important to duck. Kiernan maintains that as societies progressively detach marriage from parenthood, stage reversal is impossible. That makes sense. The association between marriage and parenthood is partly a mystique. Disenchanted mystiques cannot be restored on demand.

What about a patchwork in which some American states have gay marriage while others do not? A state-by-state patchwork would practically guarantee a shift toward the Nordic family system. Movies and television, which do not respect state borders, would embrace gay marriage. The cultural effects would be national.

What about Vermont-style civil unions? Would that be a workable compromise? Clearly not. Scandinavian registered partnerships *are* Vermont-style civil unions. They are not called marriage, yet resemble marriage in almost every other respect. The key differences are that registered partnerships do not permit adoption or artificial insemination, and cannot be celebrated in state-affiliated churches. These limitations are gradually being repealed. The lesson of the Scandinavian experience is that even de facto same-sex marriage undermines marriage.

The Scandinavian example also proves that gay marriage is not interracial marriage in a new guise. The miscegenation analogy was never convincing. There are plenty of reasons to think that, in contrast to race, sexual orientation will have profound effects on marriage. But with Scandinavia, we are well beyond the realm of even educated speculation. The post-gay marriage changes in the Scandinavian family are significant. This is not like the fantasy about interracial birth defects. There is a serious scholarly debate about the spread of the Nordic family pattern. Since gay marriage is a part of that pattern, it needs to be part of that debate.

Conservative advocates of gay marriage want to test it in a few states. The implication is that, should the experiment go bad, we can call it off. Yet the effects, even in a few American states, will be neither containable nor revocable. It took about 15 years after the change hit Sweden and Denmark for Norway's out-of-wedlock birthrate to begin to move from "European" to "Nordic" levels. It took another 15 years (and the advent of gay marriage) for Norway's out-of-wedlock birthrate to shoot past even Denmark's. By the time we see the effects of gay marriage in America, it will be too late to do anything about it. Yet we needn't wait that long. In effect, Scandinavia has run our experiment for us. The results are in.

Stanley Kurtz is a research fellow at the Hoover Institution. His "Beyond Gay Marriage" appeared in our August 4, 2003, issue.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR.

So we're finally in the middle of our five-part series of hearings on whether we should pass an amendment enshrining discrimination into the Constitution. This is not only unlikely but unneeded and inflammatory.

No one seriously believes this amendment could garner the two-thirds vote it needs to pass the House. That begs the question of why we are even discussing it. To most Americans, the answer is clear: the Republican leadership wants to score political points with its right-wing base in an election year.

Motives aside, the amendment is unneeded. Each state has the right to establish its own policy on this issue. President Bush tried to galvanize conservatives by saying there is a grave risk "that every state would be forced to recognize any relation-

ship that judges in Boston . . . choose to call a marriage." This statement is totally false, and the President knows that.

Any first-year law student can tell you that the full faith and credit clause does not force one state to recognize a marriage from another state that conflicts with the first state's public policy. In fact, perhaps we should have a first-year law student testify at these hearings.

In any event, the President misunderstands Massachusetts law. The law voids any marriage performed in Massachusetts if the couple is not eligible to be married in their home state. Even advisers to Governor Mitt Romney (R-MA) have said that out-of-state residents cannot use a Massachusetts same sex marriage to circumvent their home state laws. It is clear that a constitutional amendment is not required to accomplish the discriminatory goals of the right-wing.

The President is also wrong to argue that Congress has been forced into this position by "activist judges." Anyone who has followed this knows that those in San Francisco, Portland, and New York who have pressed this issue are elected officials, not judges. As a matter of fact, it is judges in California who have stopped the licenses from being issued.

It goes without saying that this amendment is beyond inflammatory. This Subcommittee has done nothing about preventing hate crimes, preserving the right to vote in a presidential election year, or ensuring women have the right to health care. Instead, we are wasting five days on trying to take a basic right away from committed couples.

In closing, this amendment would, for the first time in our nation's history, write intolerance into our Constitution. We have debated civil rights issues before, but those issues were about ending slavery, liberating women, safeguarding freedom of religion, and protecting the disabled. As you can see, those were all efforts to eradicate discrimination. Leave it to the Bush Administration to buck the trend and actually try to legalize discrimination.

Colby M. May
Director, Washington Office

Admitted in District of Columbia and Virginia

ACLJ
American Center
for Law & Justice

May 17, 2004

The Honorable Steve Chabot, Chairman
U.S. House Committee on the Judiciary
Constitution Subcommittee
2138 Rayburn House Office Building
Washington, DC 20515

BY HAND

RE: *Federal Marriage Amendment*, H.J. Res. 56

Dear Chairman Chabot:

During the Subcommittee's hearing on the *Federal Marriage Amendment* (H.J. Res. 56), Jay Sekulow, Chief Counsel of the American Center for Law and Justice, made reference to a recent petition signed by 233,000 Americans, representing each state, supporting the *Federal Marriage Amendment*. That report is attached and it is respectfully requested that it be included in the Subcommittee's hearing record on this matter.

If there are any questions or additional information is needed, please contact the undersigned.

Respectfully Submitted,

Colby M. May

CMM:fd
Enclosure

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REP. MARILYN MUSGRAVE'S ANSWERS TO REP. HOSTETTLER QUESTIONS/ANSWERS

JUNE 22, 2004

1. It seems to me that there is very little substantive difference between civil unions, domestic partnerships, and marriage. If there is no real difference, why would we leave states free to enact civil unions, which would be in fact marriage by another name?

I believe preserving the institution of marriage is a worthy goal, both in substance and in symbolism. As Judge Bork noted in his testimony before the committee, symbols are vitally important to a culture. Indeed, symbols are a culture's life's blood, and the importance of the symbolism of the marriage institution cannot be overstated.

If activist courts continue to undermine marriage, the devastating impact on the country's families will be incalculable. The centuries-old tradition of marriage as a sacred mystical union between one man and one woman will be sullied at best and perhaps damaged irreparably. Conversely, if the amendment were to become part of the Constitution, this sacred institution would be preserved in the highest law of the land, and this nation would have expressed in its fundamental law that marriage between a man and a woman is the true form and that civil unions are derivative and subsidiary. Thus, preserving the sanctity of the institution of marriage could be this generation's legacy to posterity.

Yes, it is true that civil unions would still be possible. But importantly the amendment removes activists judges from the equation, and while I do not trust activist courts, I do trust our democratically elected legislatures.

In summary, part of the amendment is substantive in that seeks to prevent courts from imposing homosexual marriage and/or civil unions on the nation. Another part of the amendment seeks to make a statement about the institution of marriage and its symbolism. Symbols are vitally important to a culture. Thus, properly understood, the amendment's effort to preserve the symbol of marriage is not a weakness of the proposed amendment, but one of it main strengths.

2. If Senator Allard's amendment language is adopted—striking the prohibition on a judge construing a state or federal law (leaving only a prohibition on a judge construing a federal or state constitution)—do we leave open the door for a judge to give the incidents of marriage to same-sex couples when they construe simple state law, such as a state tax statute? It seems like this new language leaves open the possibility of much judicial mischief.

Answer:

The importance of the second sentence is that it removes the courts' constitutional "trump card" and gives democratically-elected legislatures complete latitude when dealing with this matter. It is true that a court could still erroneously construe a state law such as a state tax statute. Importantly, however, any such mischief would be subject to a legislative check. In other words, if a court were to erroneously construe a state law as requiring a benefit to be conferred on a same-sex couple, the legislature would be free to overturn the court's ruling by simply amending the statute. Under present law the activist courts purport to be construing constitutional provisions, and this leaves no avenue for any legislative remedy to their mischief.

REP. MARILYN MUSGRAVE'S ANSWERS TO REP. NADLER'S QUESTIONS/ANSWERS

JUNE 22, 2004

1. With your prepared testimony for last Thursday's hearing, you included a "Memorandum Regarding Meaning of the Musgrave Federal Marriage Amendment," ("Memo") which sets forth your position on the meaning of the FMA's terms. In discussing the meaning of the FMA's "legal incidence thereof" language, you include a non-exhaustive list of 17 "incidents of marriage." Included among these are the right to hospital visitation, the right to adopt children, the right to inherit under probate law, as well as the rights and responsibilities under terminal care documents or medical powers of attorney. [p. 4–5] Your Memo then goes on to state that your intention is to prevent courts from construing laws to require these rights for gay and lesbian couples, not to prevent state legislatures from conferring such rights if they so wish. Your argument on this point presents the following questions:

- Your Memo presumes that gay and lesbian couples would enjoy none of these "incidents of marriage," even those based on private contracts, unless a legislature affirmatively and specifically grants these rights to gay and lesbian couples. Does this mean that the FMA would strip gay couples of these rights as they presently exist—including hospital visitation rights and the right to adopt children—pending further action by their respective state legislatures?

Answer: The FMA makes no changes whatsoever in contract law. Whatever rights a person presently has under state contract law, he would continue to have if the FMA is ratified.

- The FMA states that "no[] state or federal law[] shall be construed to require that marital status or the legal incidents be conferred upon unmarried couples . . ." Your Memo argues that the phrase "to require" following the word "construed" is meant to act as a restraint on courts, but would not prevent state legislatures from conferring any or all of your proffered "incidents of marriage" upon gay and lesbian couples. [p. 3] However, "construe" means to "discover and apply the meaning and intention of with reference to a particular state of affairs." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 489 (3d ed. 1993). Further, "require" means to "direct, order, demand, instruct, command . . . [or] compel." BLACK'S LAW DICTIONARY 1304 (6th ed. 1990). Considering these terms together, the FMA would expressly prevent any court from granting effect to any state law granting any "incidence of marriage" rights to same sex couples. For instance, if a person was denied hospital visitation to their partner in violation of a state law, and went to court to enforce that right, the only way the court could sustain the visitation right would be to "apply the meaning" of the statute at issue with reference to the facts of that case, or "with reference to a particular state of affairs," then direct or order, in other words "require," the hospital to comply with the law. In short, the court would be forced to construe a state law to require that a visitation right, which you term an incident of marriage, be granted. Such on outcome is expressly prohibited by the FMA. Would not the FMA, by its express terms, prevent courts from granting effect to any law conferring any of the "incidents of marriage" included in your Memo, as that would require construing the law in question to confer the legal incidents of marriage upon unmarried couples?

Answer. As explained in the memo, the purpose of the language you quote is to prevent courts from construing laws of general applicability not otherwise having to do with conferring the legal incidents of marriage on unmarried persons from being interpreted to require such incidents of marriage to be conferred on unmarried persons.

As I stated in my testimony, however, to the extent this language has caused confusion or has been misconstrued, I support the changes Senator Allard has made to clarify this matter.

- Continuing with this point, your Memo also lists the right to group insurance for public and private employees as an incident of marriage. [p. 5] As you know, many private employers grant the partners of gay and lesbian employees the right to participate in the employers' group health plan, and the right to participate in such group insurance plans is often

included in private employment contracts. Would not the FMA nullify this aspect of any private employment contract by making the contract right to group health insurance unenforceable in court as a legal incident of marriage?

Answer. No, as explained above, it would not.

2. You testified that you introduced the FMA "to stop judicial activism and preserve the right of self-determination for the American people" with respect to defining marriage. [Statement, p. 2.] Yet, you also acknowledge that the first sentence of the FMA ensures that "no governmental entity (whether in the legislative, executive or judicial branch) . . . shall have power to alter the definition of marriage." [Statement, p. 2.] If you purport to be taking aim at "judicial activism," why does your amendment tie the hands of other branches of government, as well? Why are you denying legislatures the right to define marriage as their constituents demand?

Answer. As Judge Bork has written, the democratic integrity of law depends entirely upon the degree to which its processes are legitimate. In a democratic society the people make the law and courts interpret it. This is the very essence of the democratic rule of law. It is illegitimate, therefore, for a willful court to use its power to interpret the constitution to impose its policy choices on the American people. It is not illegitimate, however, for a people to set forth in their fundamental law an understanding of marriage that until very recently was taken for granted by all people in all places at all times. This is especially true now that that understanding has come under attack by activist courts bent on a reshaping the institution of marriage in a way that is wholly unsupported by the text, history or structure of the constitution or by the history and traditions of this nation.

3. You have stated that the second sentence only prevents courts from construing laws of "general applicability" to require that the incidents of marriage be conferred upon unmarried persons. [Memo, p. 3.] However, the amendment does not contain the term "general applicability," and you have not defined it in your statements thus far. How do you define "general applicability"? Who is to determine whether or not a statute is one of "general applicability" if not the courts?

Answer. As with any constitutional provision, the courts will construe the meaning of the FMA if it is ratified. As explained in the memo, the purpose of the language you quote is to prevent courts from construing laws of general applicability not otherwise having to do with conferring the legal incidents of marriage on unmarried persons from being interpreted to require such incidents of marriage to be conferred on unmarried persons. As I stated in my testimony, however, to the extent this language has caused confusion or has been misconstrued, I support the changes Senator Allard has made to clarify this matter.

4. You concede that "it is impossible to set forth a definitive list" identifying the legal incidents of marriage. [Memo, p. 4.] How are the courts supposed to identify the limits on their authority if this term is undefined? Who is to construe this language if not the courts?

Answer: Most terms in the constitution are undefined. Therefore, as with any provision of the constitution, the courts will interpret the terms used in the FMA using various sources, including, but not limited to, the legislative history of the amendment.

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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May 24, 2004

Judge Robert Bork,
Distinguished Fellow
Hudson Institute
6520 Ridge Street
McLean, Virginia 22101

Dear Judge Bork:

Thank you for your recent appearance before the Subcommittee and your testimony on H.J. Res. 56, the "Federal Marriage Amendment" (the Musgrave Amendment). Following is an additional question from Rep. John Hostettler for your written response which will be made a part of the hearing record. Due to the current mail situation, please fax your responses to the attention of Catherine Graham of the Constitution Subcommittee at (202) 225-3746 or email catherine.graham@mail.house.gov no later than June 7, 2004.

It seems to me that there is very little substantive difference between civil unions, domestic partnerships, and marriage. If there is no real difference, why would we leave states free to enact civil unions, which would be in fact marriage by another name?

Sincerely,

Steve Chabot
Chairman
Subcommittee on the Constitution

SC/pt/cg

JUDGE ROBERT BORK'S RESPONSES TO REP. JOHN HOSTETTLER'S QUESTIONS

JUNE 5, 2004

Marriage and civil unions are treated alike by the proposed amendment in that both are placed beyond the reach of activist courts. Overreaching courts are the main, almost the only, danger in this area.

Marriage and civil unions are treated differently in that legislatures could not change the fundamental nature of marriage but could permit civil unions. There are several reasons for making that distinction. The pragmatic reason is that the American people make a distinction; they are against homosexual marriage but inclined to support civil unions or at least some aspects, such as the right to hospital visits. We have been told by leading members of Congress that attempting to ban civil unions would greatly harm the prospects of getting the marriage amendment out of Congress and then ratified by the states.

There is an historical parallel to our present situation. After the Supreme Court's outrageous rewriting of the Constitution in Roe v. Wade, there was a chance for a constitutional amendment that would have overturned Roe and returned the issue of abortion to state legislatures. Anti-abortion absolutists, however, insisted on an amendment that would ban all abortions in all states. The result was that they got nothing, and the situation today is far worse than would have been the case with the more moderate version of the amendment.

Second, marriage carries an emotional symbolism that civil unions do not. That is why homosexual activists will not settle for civil unions. They want marriage, not so much for the benefits it may confer, but as a public approval of homosexuality as in no way different from heterosexuality. They want moral approbation that only the symbolism of marriage can confer. It is important for the remaining vitality of traditional marriage and for the benefit of impressionable and uncertain young people that complete moral approbation not be given.

It will be much easier to oppose in political forums civil unions that are the equivalent of marriage if marriage has been defined as the union of a man and a woman.

There may be others, but these seem to me the primary reasons for not attempting to prohibit publicly supported forms of civil unions by constitutional amendment.

Sincerely,

Robert H. Bork

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May 24, 2004

The Honorable Barney Frank
2252 Rayburn House Office Building
Washington, D.C. 20515

Dear Barney:

Thank you for your recent appearance before the Subcommittee and your testimony on H.J. Res. 56, the "Federal Marriage Amendment" (the Musgrave Amendment). Following are additional questions from Rep. John Hostettler and Rep. Steve King for your written response which will be made a part of the hearing record. Due to the current mail situation, please fax your responses to the attention of Catherine Graham of the Constitution Subcommittee at (202) 225-3746 or email catherine.graham@mail.house.gov no later than June 7, 2004.

Sincerely,

Steve Chabot
Chairman
Subcommittee on the Constitution

SC/pt/cg

Enclosure

Rep. Hostettler's Question:

It seems to me that there is very little substantive difference between civil unions, domestic partnerships, and marriage. If there is no real difference, why would we leave states free to enact civil unions, which would be in fact marriage by another name?

Rep. King's Questions and Commentary:

In your testimony before the Constitution subcommittee on May 13th, you indicated that you would support a policy that would limit marriage to "the voluntary union of two persons as spouses, to the exclusion of all others."

Q. Would you support a federal Constitutional amendment stating this policy? Would you oppose allowing marriage and "the incidents thereof" for bigamy, polygamy, polyandry, or incestual marriage?

Q. Would you withdraw your support for marriages anywhere between traditional marriage and multiple group marriage? If so, where would you draw the line? How would you suggest stopping those marriages?

Q. If the Supreme Court were to rule that any relationship that you oppose is a Constitutional right, how then would you recommend that we prohibit that relationship?

You also stated that you do not believe the United States Supreme Court will invoke the Full Faith and Credit clause to force other states to recognize homosexual marriages performed in Massachusetts.

Q. If the Court does force other states to recognize Massachusetts-sanctioned homosexual marriages by applying the Full Faith and Credit clause, will you acknowledge that four judges in Massachusetts imposed judge-made law, not just on Massachusetts, but on the entire United States of America?

During the hearing, Representative Nadler repeatedly referred to the fact that the proposed Federal Marriage Amendment is an attempt to amend the Constitution in anticipation of the Supreme Court's negative ruling on state and/or federal Defense of Marriage Acts.

Q. If no congressional action is taken until the Court actually does sanction homosexual marriage, can you envision any scenario by which we could possibly undo the damage and return to marriage only between a man and a woman? If so, how?

Finally, Congressman Frank, you predicted that homosexual marriage would have no adverse impact on our country, and asked the members of the Judiciary Committee for their predictions.

Then, in one year, you suggest we review all the predictions made now. I will gladly restate mine for the record:

As I write this on May 18, 2004, seemingly endless lines of homosexual couples, most certainly not all Massachusetts residents, are streaming into city clerks' offices in Massachusetts. Setting aside those couples from Massachusetts for the moment, those who are not Massachusetts residents will return to their home states, where they will seek recognition and the benefits associated with marriage. When these marriages are not recognized, some of the homosexual couples will file lawsuits, pleading with courts to follow in the footsteps of the Massachusetts Supreme Judicial Court and force their states to recognize homosexual marriage under the same standards as traditional, heterosexual marriage by virtue of the Full Faith and Credit Clause of our Constitution. Considering the influx of judicial activists in our court system today, some courts are certain to uphold these requests. This debate will undoubtedly reach the United States Supreme Court. Based on the Court's recent opinion in Lawrence v. Texas, it should surprise no one if the Court finds, in error, that the Full Faith and Credit clause requires states to recognize the homosexual marriages granted by other states. A one-justice majority of a state court would thus have set national policy on one of the most important issues of our time.

I highly doubt this issue will be settled within the next year. I do not predict that polygamy or incestual marriages will become the norm within this short period. However, any time our social mores change to accept non-traditional marriage, we slide further down the values slope. I recommend that, in addition to the one-year review of marriage in our society, we also schedule ten- and twenty-year reviews; Thomas Jefferson once stated that a generation is nineteen years. It is within the next generation that we will truly see the effects the one-justice state-court majority has had on the state of traditional values in our nation.

The menu of life I predict will be available to the next generation, should we continue down this path you wish for us, will include marriage, civil unions, homosexual marriage, bigamy, polygamy, incest, group marriage, and multiple interconnecting marriages-all driven by bogus civil rights arguments and all designed, at least in part, to access multiple benefits. If we do nothing to stop this downward spiral, I predict that none of us will recognize marriage at this next-generation review.

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Congress of the United States
House of Representatives
Washington, DC

June 1, 2004

Judiciary Committee
Constitution Subcommittee
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Washington, DC 20515

Representative Frank's answers to Representative Hostettler's question:

1. The gentleman's questions should be addressed not to me but to the sponsors of the pending amendment, since it is they who would embody a distinction between marriage on the one hand and civil unions or domestic partnerships on the other into the United States Constitution. Since I oppose the amendment on a variety of grounds, I am not the best one to explain why we should make this part of the Constitution. The amendment would make it impossible for any state to recognize same-sex marriages, even if this occurred as a result of a popular referendum, while it would allow either a referendum or an act of the state legislature to provide for other forms of same-sex relationships.

   There is one potentially very important legal distinction between the two forms of recognition of relationships between loving couples of the same sex who are prepared to be legally as well as morally and emotionally committed to each other. Federal law confers a variety of benefits and imposes some responsibilities on people who are married to each other. It is true that under the current version of federal law, neither of these is extended to people in a same-sex relationship – as a result of the so-called Defense of Marriage Act of 1996. But the fact that marriage is recognized in federal law and none of the alternative forms are is an indication that the difference is a real one, not simply symbolically, but in a way that has potentially real impact on participants.

   Currently, same-sex couples united in civil union in Vermont are not able to go to federal court and make a claim that they are being denied equal protection of the laws by this clause which recognizes some marriages sanctioned by states and not others. But couples who have been married in Massachusetts since May 17 will at some point be able to make such a claim. The argument that recognizing some state-sanctioned marriages and not others is a denial of equal protection to those denied the law is a far easier claim to assert than the claim that a state decision not to allow same-sex marriages itself violates the equal protection law. In the latter case, a federal court denying the claim would at least be giving sanction to a state decision. But a federal court which denied federal marriage benefits and responsibilities to same-sex couples in Massachusetts would be in

opposition not simply to the claims of those couples, but to a decision made through its due Constitutional processes by the Commonwealth of Massachusetts.

It is also the case that there was in 1996 and almost certainly is today more Congressional support for federal recognition of state decisions with regard to same-sex marriages than there is for the principle that the decision of any one state must be followed by all of the other states. The vote in favor of the Defense of Marriage Act in the House was 342 to 67. An amendment which I offered to strike the section denying recognition to state decisions to allow same-sex marriages failed, but received a significantly larger number of votes – the vote on this amendment was 103 to 311. From the perspective of state legislators acting on this, this means that there is a smaller hurdle to overcome in seeking ultimate federal recognition at either the Judicial or Congressional level of any state decision to recognize same-sex marriages than there would be to getting the federal government to grant appropriate benefits and impose appropriate responsibilities on a whole new class of relationships, namely civil unions or domestic partnerships.

There is one other important implication of Congressman Hostletter's question, however, which should be noted. I agree, as I said, with part of the thrust of his question, namely that any impact that legally recognizing same-sex relationships will have on the vast majority who choose not to enter into them will be essentially similar, whether these are recognized as marriages or civil unions. This makes the experience that we have seen in Vermont since civil unions were enacted four years ago very relevant to the predictions that recognizing same-sex relationships will undermine the institution of marriage. Not surprisingly, and as many of us predicted, allowing people, who are in love and prepared to commit to each other legally in Vermont to enter into civil unions, has had zero negative effects on anyone else in Vermont. In other words, the far- fetched and intellectually flawed efforts to argue from the experience in various European societies that recognition of same-sex relationships will be deleterious to society as a whole, have much less validity as predictors of what will happen in the United States than does the experience in Vermont – which is after all part of the United States. As I note in my additional answer to the question from the gentleman from Virginia, Mr. Scott, I believe the arguments put forward by Stanley Kurtz are of virtually no intellectual worth, and simply reflect a desperate effort to provide empirical evidence for a personal objection to same-sex marriages. But to those who are tempted to take comfort from Mr. Kurtz's overblown assertions, the very fact that he has ignored, to my knowledge, the Vermont experience is a very high hurdle to overcome in asserting their probity for the American experience. And I believe that this is particularly true to those who agree with Mr. Hostettler's premise.

Next, I submit my answers to the questions proposed by the gentleman from Iowa, Mr. King:

1. As a citizen of Massachusetts, I agree that marriage should be limited to "the voluntary union of two persons as spouses, to the exclusion of all others," as his question proposes, and I would also exclude from marriage people under 18. But I see no need for a federal Constitutional amendment, which would impose this on all of the states. I think the general principle that we should amend the Constitution only when there is a clear and

demonstrated need is an important one, and I am aware of no state in which a proposal to legalize polygamy, incest, or marriage between or among juveniles has even received serious discussion, much less any significant support in any official body. There are a number of things, which I do not think states ought to do, but in the absence of any showing whatsoever that they are contemplating such actions, I do not favor cluttering up the Constitution with a series of amendments prohibiting things which there is no likelihood will happen.

Additionally, in the specific formulation of his question, Mr. King asks if I would support a Constitutional amendment which opposed among other things "incestual marriage." I believe it is entirely proper for states to decide what degree of relationship they will allow before a marriage goes forward, and marriages between parents or siblings clearly ought to be prohibited. But it is my understanding that the states differ on the degree of more remote relationships which they will allow and Mr. King's formulation would appear to impinge on that. Indeed, I am not clear what degree of relationship would be covered by his prohibition on "incestual marriages" and I do not think that at the federal level we have to decide whether or not second cousins, whether or not removed, should marry.

2. The second question appears to be simply a reformulation of the first question – I support, as a citizen of Massachusetts, allowing people of the same sex to marry, on the same terms that people of opposite sex may marry. Obviously this means I draw the line against allowing three or more people to be married. I believe there is a very rational basis on which to make that distinction. It is entirely legitimate for a society to decide that recognizing the loving relationship of two people with various legal rights and responsibilities promotes stability, provides a better setting in which children can be raised, and minimizes the likelihood that the courts will be drawn into disputes among multiple participants in a marriage. Rivalries, jealousies and disputes among multiple participants, especially when there are children of various of the members of a multiple marriage contesting for rights and privileges, clearly presents a much more complex set of issues than arise when there are only two equal partners in a marriage, and I believe the universal decision in the United States to give legal sanction only to two-way partnerships is an entirely justified one on that ground.

3. As to the question as to how I would stop these marriages, I repeat that I do not believe we should resort to the enormously grave action of amending our Constitution to stop something which no one seriously thinks is at all likely to happen anywhere in the U.S.

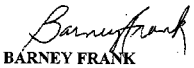
In beginning my responses to the questions involving the application of the Full Faith and Credit clause, I want to repeat that I am bemused by the spectacle of many of my colleagues who voted for a Congressional statute, declaring that the Full Faith and Credit clause would have no relevance with regard to same-sex marriages now proclaiming that the act they supported has no Constitutional validity. My own view at the time was that the act in this regard was irrelevant – unlike the section which bans legal recognition of same-sex marriages, which has a great deal of force, of a negative sort. I did not think then and do not think now that the Supreme Court will be inclined to defer to a Congressional interpretation of the Full Faith and Credit clause, and that view has been

strengthened by recent Supreme Court decisions. While I am myself convinced that the Supreme Court will not overturn two hundred years of a tradition of essentially leaving the question of the definition of marriage to the states, and allowing states to deny recognition of marriages in other states when these counter the public policy of the state in question, I do not favor a Constitutional amendment because I believe that in our system, this question should continue to be left to the courts.

If an amendment denying Full Faith and Credit recognition were to be put forward – and I note that no one has put such an amendment forward, although the arguments given for the pending amendment sometimes seek to conceal its real impact by essentially describing it as if that was all it did – I believe there would be great difficulties in phrasing such an amendment. I certainly do not support a general statement that no Full Faith and Credit shall extend at all regarding marriages. Allowing the states to ignore the question of whether or not marriages that occurred or were dissolved in general would introduce chaos into an area of the law, which has been refined by more than two hundred years of court decisions. As with the polygamy red herring, I believe that this is a suggestion to amend the Constitution unnecessarily, and I continue to believe – as I must tell you I think most of the people supporting the amendment believe – that the Supreme Court will not compel other states to follow the Massachusetts example with regard to same-sex marriages.

4. To answer the question as to what would happen if the Supreme Court were to rule that the Full Faith and Credit clause requires all states to recognize same-sex marriages performed in Massachusetts, the answer is that the remedy of a Constitutional amendment will be as available then as it is now, although for the reasons I said above, I believe such an amendment would be very difficult to draft without a number of adverse, unintended consequences.

5. I disagree with much of the statement that Mr. King appends to his question. But to respond to his specific proposal, I am all in favor of reviewing this issue not just one year from now, but ten years from now, twenty years from now, and beyond that, although I should say that I do not myself expect to be participating in the reviews twenty years and more from now as a Member. But I am confident that those who will be serving in Congress at the time will be able to recognize marriage, despite Mr. King's fears.



BARNEY FRANK

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

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June 3, 2004

The Honorable Barney Frank
2252 Rayburn House Office Building
Washington, D.C. 20515

Dear Hon. Frank, Barney

Thank you for your recent appearance before the Subcommittee and your testimony on H.J. Res. 56, the "Federal Marriage Amendment" (the Musgrave Amendment). Following are additional questions and commentary from Rep. Jerrold Nadler for your written response which will be made a part of the hearing record. Due to the current mail situation, please fax your responses to the attention of Catherine Graham of the Constitution Subcommittee at (202) 225-3746 or email catherine.graham@mail.house.gov no later than June 17, 2004.

At the hearing, you were asked to explain Mr. Kurtz's conclusion that legalizing same sex marriage has been followed by a decline in heterosexual marriage in Scandinavia and the Netherlands. The question required that you assume, for the purposes of your answer, that this sequence of events had occurred.

Do you agree with Mr. Kurtz's interpretation of the data?

What relevance, if any, do you believe Mr. Kurtz's research has to the debate on same sex marriage in the United States?

Sincerely,

Steve

Steve Chabot
Chairman
Subcommittee on the Constitution

SC/pt/cg

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Congress of the United States
House of Representatives
Washington, DC

June 8, 2004

The Honorable Steve Chabot
Chairman
Subcommittee on the Constitution
Judiciary Committee
H 2362 Ford House Office Building
Washington, D.C. 20515

Attn: Catherine Graham

Dear Mr. Chairman,

These are my answers to the supplemental questions posed to me by Congressman Nadler, pursuant to the hearing on H.J. Res. 56, the Federal Marriage Amendment.

As to Mr. Kurtz, at the hearing, Congresswoman Hart asked me a question based on the work of Stanley Kurtz. Ms Hart asked me to accept that Mr. Kurtz had demonstrated that recognition of same-sex marriage had been followed by a significant decline in heterosexual marriage, and asked if I could advance any alternative explanation of this sequence which would not lead to the conclusion that same-sex marriage had contributed to the decline of heterosexual marriage.

I have now read Mr. Kurtz's analysis. Even with his clear intent to discredit same-sex marriage, he fails to make the case Ms. Hart wanted him to make.

First, Mr. Kurtz does not claim that the decline in heterosexual marriage came largely after recognition of same-sex relationships. Most of his work deals with Norway, Denmark and Sweden. In his article in the Weekly Standard for February 2, 2004, Mr. Kurtz says that "In states like Sweden and Denmark, where out-of-wedlock births were already very high, and the public favored gay marriage, gay unions were an effect of earlier changes. (emphasis added) Once in place, gay marriage symbolically ratified the separation of marriage and parenthood. And once established, gay marriage became one of several factors contributing to further increases in cohabitation and out-of-wedlock birthrates, as well as to early divorce. But in Norway, where out of wedlock birthrates were lower, religion stronger, and the public opposed same-sex unions, gay marriage had an even greater role in precipitating marital decline."

That is, Mr. Kurtz himself does not argue that recognition of same-sex marriage preceded the significant decline in heterosexual marriage in two of the three affected countries, and he asserts that same-sex marriage was basically an effect of the same causes that led to a reduction in heterosexual marriage.

He lists these in his testimony before this committee earlier this year: "Marital decline in Scandinavia," Mr. Kurtz asserts, "is the product of a confluence of factors: contraception, abortion, women in the workforce, cultural individualism, secularism, and the welfare state. Scandinavia is extremely secular and its welfare state unusually large." So to answer Ms. Hart's question, and to respond to the supplemental

question posed by Mr. Nadler, Mr. Kurtz himself does not argue that recognition of same-sex marriage preceded the bulk of the drop in heterosexual marriage in two of the three countries he focuses on, and he essentially concedes that both phenomena are the result of these other factors. (I should note that while I know that there is opposition on the part of many of my colleagues to the legalization of abortion, and some anti-welfare sentiment, I would be surprised if there was widespread agreement that we should be returning to a state when contraception was illegal, and I know of virtually none of my colleagues who profess opposition to women in the workforce or cultural individualism. And secularism is constitutionally protected as a viewpoint. So it appears that we are condemned in the U.S. to live with most – probably all – of the factors to which Mr. Kurtz assigns primary responsibility for the decline of heterosexual marriage.)

It is true that with regard to Norway, Mr. Kurtz does assign some causality to same-sex marriage in the decline of heterosexual marriage. But the basis on which he does so makes it entirely irrelevant to the United States. In his testimony before this Committee, Mr. Kurtz says that "same-sex partnerships in Scandinavia have furthered the cultural separation of marriage and parenthood in at least two ways." I must confess that having read this testimony several times – I am prepared to make sacrifices in pursuit of our work – I have not been able to identify two such ways, much less three or more. The sentence after the sentence I have just quoted does begin with the phrase " First, the debate over same-sex partnerships…" But I have been unable to find anywhere in the subsequent pages any relevant sentence beginning with – or even including – "second."

The first – and only clearly identified – causal factor is that "differences within Norway's Lutheran Church on the same-sex marriage issue have weakened the position of traditionalist clergy, and strengthened the position of socially liberal clergy who effectively accept both same-sex partnerships and the practice of unmarried parenthood." In other words, the one causal factor that Mr. Kurtz notes is in Norway – the only country of the three where he finds the factual sequence Ms. Hart assumes. In Norway, he argues, liberal factions have taken over the Lutheran Church in some parts of the country and have prohibited clergy who are opposed to same-sex marriage from preaching or in other ways propagating their views through the Church. This he says diminishes the number of authoritative voices speaking for heterosexual marriage because it is those who are opposed to same-sex marriage who most strongly argue for heterosexual marriage.

I confess that this seems to me a bit strained, but strained or not, it clearly has no relevance to the United States. Most organized religions in the United States oppose same-sex marriage. Only a small number of religious entities recognize them. And in only a tiny percentage – if at all – are clerical opponents of same-sex marriage cast out of their churches or silenced within them. So the argument that same-sex marriage hurts heterosexual marriage because opponents of same-sex marriage are denied access to pulpits – this, remember, is Mr. Kurtz's causal argument for Norway – is wholly inapplicable in the U.S.

The closest I can come to finding a second causal argument in Mr. Kurtz's testimony comes when he says that "as the influence of the clergy has declined in Scandinavia, secular social scientists have taken on a role as cultural arbiters. These secular social scientists have touted same-sex registered partnerships as proof that traditional marriage is outdated." I am not an expert on what is going on in Norway, Sweden or Denmark. But I am very aware of what is going on in the United States, and once again Mr. Kurtz is pointing to a phenomenon which has no relevance to U.S. experience. Contrary to his implicit assumption that the leading advocates of same-sex marriage in the United States are arguing that marriage is outdated, some of the most ardent defenders of marriage as an institution in our country today are people who are arguing for same-sex marriage. Mr. Kurtz notes that in Scandinavia, "instead of arguing that de facto marriage by same-sex couples ought to encourage marriage among heterosexual parents,

secular opinion leaders have drawn a different lesson. Those opinion leaders have pointed to same-sex partnerships to argue that marriage itself is outdated, and that single motherhood and unmarried parental cohabitation are just as acceptable as parenthood within marriage." I defy members of this Committee or any others who oppose same-sex marriage to find those leading advocates of allowing same-sex marriage who hold this position. And Mr. Kurtz's effort to blame same-sex relationships in Norway for a decline in heterosexual marriage, even for those who accept it, is wholly inapplicable to the U.S.

What is relevant to the U.S. is experience in the U.S. In my testimony, I pointed to the total absence of any negative effects from the existence of civil unions in Vermont. Some on the Committee and among my fellow witnesses disparaged this on two grounds. First, that Vermont allows civil unions and not marriage; second that the Vermont experience has not been long enough. But Mr. Kurtz himself uses examples which would be excluded if either of those two points were consistently applied.

First, he makes explicit that he does not distinguish in his analysis between formal legal marriage and various other binding legal recognitions of same-sex relationships. Indeed, it is not the case that same-sex marriage in the sense that it exists in Massachusetts existed in the three Scandinavian countries that are his primary examples during the period of his analysis. Furthermore, he adds in his testimony a section on the Netherlands – where same-sex marriage has been in existence since 2000. But the Vermont Supreme Court decision demanding that the Legislature create either full marriage or its close legal equivalent is of almost exactly the same vintage – December, 1999. In other words, we have had about the same length of experience with civil unions in Vermont as in the Netherlands. So the argument that we have not had enough time to draw conclusions from the Vermont experience is undercut by those who would rely on Mr. Kurtz's inferences drawn from the Netherlands experience.

Given the great differences that exist between Scandinavia and the United States, particularly the scant likelihood that anti-same-sex marriage clergy will be marginalized and deprived of a chance to preach from their own pulpits as Mr. Kurtz reports has happened in Norway, the experience in Vermont is clearly the most relevant. And since no one argues that there has been any negative consequence on heterosexual marriage from the existence for 41/2 years of civil unions in Vermont, the argument that the United States must make a drastic change in Constitutional history and pass an amendment prohibiting the people of Massachusetts from making their own decision with regard to same-sex marriage has no relevant empirical support.

BARNEY FRANK

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Congress of the United States

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May 24, 2004

Mr. Jay Sekulow
c/o Mr. Colby M. May, Esq.
American Center for Law and Justice
201 Maryland Avenue N.E.
Washington, D.C. 20002-5703

Dear Mr. Sekulow:

Thank you for your recent appearance before the Subcommittee and your testimony on H.J. Res. 56, the "Federal Marriage Amendment" (the Musgrave Amendment). Following is an additional question from Rep. John Hostettler for your written response which will be made a part of the hearing record. Due to the current mail situation, please fax your responses to the attention of Catherine Graham of the Constitution Subcommittee at (202) 225-3746 or email catherine.graham@mail.house.gov no later than June 7, 2004.

It seems to me that there is very little substantive difference between civil unions, domestic partnerships, and marriage. If there is no real difference, why would we leave states free to enact civil unions, which would be in fact marriage by another name?

Sincerely,

Steve Chabot
Chairman
Subcommittee on the Constitution

SC/pt/cg

June 15, 2004

Honorable John N. Hostettler
c/o Constitution Subcommittee
U.S. House Committee on the Judiciary
362 Ford House Office Building
Washington, D.C. 20515

Re: Response to Follow-up Question From the May 13, 2004 Hearing on the Federal Marriage Amendment (H.J. Res. 56)

Dear Representative Hostettler:

Following the May 13, 2004, hearing on the Federal Marriage Amendment ("FMA") you have asked me whether Congress should "also deny the state the power to allow civil unions." Certainly the current language of the FMA would allow states the right to make what ever judgment they might regarding civil unions. This is consistent with our system of law, where the powers of government are divided between the federal and state governments.

When judges circumvent the lawmaking process and assume the powers of legislating, the democratic process is usurped. It is troubling to observe the ease with which the Massachusetts' judges are willing to discard clear laws and legislative intent because it fails their perception of rationality. Constitutional government is threatened when judges alter the definition of things and reinterpret duly approved laws in order to achieve their own policy preferences. This is also why there is great uncertainty in relying upon enforcement of the Defense of Marriage Act ("DOMA"). Judges could simply hold DOMA unconstitutional, and that full faith and credit requires all other states to recognize and comply with what the Massachusetts court has done

The Framers rightly left marriage policy with the states. Unlike any other relationship, marriage is the quintessential building block of society. It is not, however, a matter for state-by-state experimentation. Society isn't harmed when states experiment with different tax rates. The market adjusts to the inconsistency. Not so with marriage. A highly integrated society such as ours -- with questions of property ownership, tax and economic liability, and inheritance and child custody crossing state lines -- requires a uniform definition of marriage. But beyond that, these same important factors may allow for state experimentation with civil unions, which the FMA currently allows.

Certainly, in a free society, important fundamental questions must be addressed and settled for the good of that society. States cannot impair the obligation of contracts, coin their own money,

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or experiment with forms of non-republican government. Certainly the nation could not endure half slave and half free.

If marriage is a fundamental social institution, which I believe it is, then it's fundamental for all of society. As such, it is not only reasonable, but obligatory that it be preferred and defended in the law, and protected in the U. S. Constitution. This doesn't mean that marriage must be completely nationalized or should become the regulatory responsibility of the federal government. Policy decisions concerning questions such as degrees of consanguinity, the age of consent and the rules of divorce should remain with the states. This is also the case for civil unions, however any individual state may define it.

A constitutional amendment that defines marriage is really the only thing that would actually protect the states' capacity to regulate marriage by sustaining it as an institution. In order to guard the states' liberty to determine marriage policy in accord with the principles of federalism, society as a whole must prevent the institution itself from being redefined out of existence or abolished. Beyond that, even though I may not like it, federalism would allow near-marriage experiments.

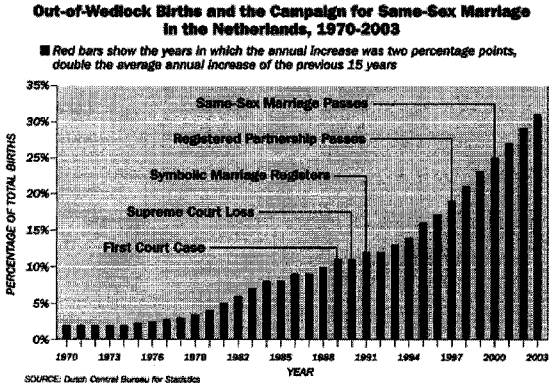
If you have any additional questions, please feel free to let me know.

Very Truly Yours,

Jay D. Sekulow,
Chief Counsel

the weekly
Standard

Going Dutch?
From the May 31, 2004 issue: Lessons of the same-sex marriage debate in the Netherlands.
by Stanley Kurtz
05/31/2004, Volume 009, Issue 36



ONLY A FEW YEARS AGO, two prominent demographers hailed the Dutch family as a model for Europe. Somehow the Dutch had managed to combine liberal family law and a robust welfare state with a surprisingly traditional attitude toward marriage. Even as a new pattern of highly unstable parental cohabitation was sweeping out of Scandinavia and across northern Europe, the Dutch were unswayed. To be sure, premarital cohabitation was widespread, but when Dutch couples decided to have children, they got married. At least they used to.

Today, marriage is in trouble in the Netherlands. In the mid-1990s, out-of-wedlock births, already rising, began a steeper increase, nearly doubling to 31 percent of births in 2003. These were the very years when the debate over the legal recognition of gay relationships came to the fore in the Netherlands, culminating in the legalization of full same-sex marriage in 2000. The conjunction is no coincidence.

A careful look at the decade-long campaign for same-sex marriage in the Netherlands shows that one of its principal themes was the effort to dislodge the conviction that parenthood and marriage are intrinsically linked. Even as proponents of gay marriage argued vigorously--and ultimately successfully--that marriage should be just one of many relationship options, fewer Dutch parents were choosing marriage over cohabitation. No longer a marked exception on the European scene, the Dutch are now traveling down the Scandinavian path.

Call it the end of the Dutch paradox, the distinctive combination of liberal social policies and traditional behavior. On euthanasia, prostitution, drug use, and now gay marriage, Dutch law is the cutting edge of Western liberalism. Yet among Dutch people, drug use and sexual license are far from rampant. Many have asked whether this balance of tolerance and tradition, with its deep roots in Dutch culture and history, is sustainable over the long term. At least for marriage, the answer appears to be no.

THE ORIGINS of Dutch tolerance lie in the mercantile pragmatism of Holland's Golden Age, under the republic of the 17th and 18th centuries. Back then, the Dutch had their own Puritans, who, as American gradeschoolers used to learn, harbored the English religious dissenters for more than a decade before they set sail on the voyage that would take them to Plymouth Rock. More recently, Holland's blend of tolerance and tradition found expression in the late 19th- and early 20th-century policy of "pillarization." Dutch society was divided into three "pillars." Calvinists, Catholics, and socialists lived in self-contained worlds, each with its own universities, newspapers, football leagues, and eventually radio and television stations. Working together, the elites of the three pillars kept conflict at bay by setting principle aside and adopting an attitude of pragmatic toleration.

Today, the ghost of pillarization survives in the Dutch tendency to cede a large degree of cultural liberty to others, while behaving traditionally themselves. When a new social movement presents itself to a Dutchman, he typically says, in effect: Do as you please, but I'll go on as before. This tolerance for what is culturally alien is a legacy from a world built on religion. Not obvious is what happens when tolerance remains and religion disappears.

No Western society has secularized more radically or rapidly than Holland. The cultural revolution of the 1960s weakened the churches. Once faith became too fragile to sustain the social order, the pillars collapsed. The Netherlands changed from one of the most religious countries in Europe to one of the most secular. Today, nearly three-quarters of the Dutch under 35 claim no religious affiliation. The very speed of the collapse virtually guaranteed that some traditional patterns of behavior would linger at first. Sooner or later, though, would Dutch society fray, as one social experiment after another drew down the cultural capital of the past?

This question has come into sharp focus around the family. Even as premarital cohabitation became nearly universal, and as cohabitation acquired virtually equal status with marriage under Dutch law in the 1980s, scholars attributed Holland's continuing attachment to parental marriage to the persistence of the Calvinist and Catholic moral codes.

Not everyone applauded this. Many of Europe's social scientists and public intellectuals are cultural radicals who hope to see marriage replaced by cohabitation and an expanded welfare state. But in 2002, British demographer David Coleman coauthored an article with one of Holland's premier demographers, Joop Garssen, that held up the Netherlands as an alternative to the Swedish model. Noting Sweden's falling fertility rate, unsustainable welfare system, and burdened children reared in fragile cohabiting families, Coleman and Garssen proposed

Holland's combination of liberal laws, liberal social welfare policies, and relatively traditional marriage as a better pattern to sustain the European family.

Coleman and Garssen, who focused on the years through 1998, noted the beginning of what would turn out to be an unusual annual increase of two percentage points in Dutch out-of-wedlock births. It would continue for seven consecutive years (and counting), as parental cohabitation spread and Holland's vaunted marriage traditionalism waned. What happened?

One thing that happened was the push for same-sex marriage. It began in earnest in the Netherlands in 1989. After several attempts to legalize gay marriage through the courts failed in 1990, advocates launched a campaign of cultural-political activism. They set up symbolic marriage registries in sympathetic cities and towns (although the marriages had no legal force), and the largely sympathetic news and entertainment media chimed in.

The movement picked up steam after the election of a socially liberal government in 1994--the first government since 1913 to include no representatives of the socially conservative Christian Democratic party. A series of parliamentary debates and public appeals began that would run through the end of the decade.

In 1996, the lower house of parliament passed a motion calling for gay marriage, and the government began to plan for full-fledged same-sex marriage. The following year, parliament legalized registered partnerships. Same-sex couples appeared on a honeymoon television show and the like. Finally, same-sex marriage was approved in late 2000. By then, large majorities in parliament had come around: The lower house passed gay marriage 109-33, the upper house 49-26. The law became effective on April 1, 2001.

Before meeting this defeat, the defenders of traditional marriage, needless to say, fought back. With one voice, they swore that procreation and parenthood were the essence of marriage. In the first serious national debate on the issue, in 1996, Christian Democratic party chairman Hans Helgers made this case. And in 2000, Kars Veling, speaking for three of the smaller religious parties, repeatedly highlighted what he called the unique and universal procreative structure of marriage.

The most sustained and acute presentation of the argument from procreation probably came from Cees van der Staaij, a member of parliament from one of the small religious parties, the SGP. Van der Staaij argued in 2000 that the principle of equality cannot by itself resolve the issue of same-sex marriage. The equality principle applies only to those who are similarly situated. If procreation is essentially related to marriage, and even the possibility of procreation is "structurally missing" in same-sex couples, then heterosexual and homosexual couples are differently situated, and the equality principle does not apply.

Van der Staaij pointed out a critical problem in the government's proposal for same-sex marriage. Would the law recognize the usual ties of descent between children and married couples? Would, say, the female spouse of a mother who conceived a child automatically become the parent of the biologically unrelated child? If so, the implication was, might such a child have three simultaneous legal parents? And if so, would this not set off a cascade of legal pressures to repudiate the two-parent standard (a process that is playing itself out right now in Sweden)?

The government opted to avoid the issue by denying automatic parental rights to same-sex

spouses. But, as Van der Staaij noted, that decision opened up a dangerous gap between the traditionally conjoined notions of marriage and parenthood. The dilemma itself stood as stark proof that in a matter heretofore central to marriage, homosexual and heterosexual couples are indeed differently situated.

THE PROPONENTS of gay marriage never bought this. In 1996, in the pages of their flagship publication, *De Gay Krant* (The Gay News), columnist Cees van der Pluijm sharply rejected the notion that marriage ought to be defined by the possibility of having children. True, Van der Pluijm himself opposed marriage, favoring instead a morally neutral system of relationship regulation. Marriage, he said, is essentially a fairy tale of permanent monogamy that deserves to be repudiated by all. Nonetheless, Van der Pluijm affirmed that, on the principle of equality, if heterosexuals can marry, homosexuals ought to be allowed to do so as well. From his radical perspective, that could only change the meaning of marriage and relationship for the better, since gays, Van der Pluijm affirmed, are the symbol of an alternative morality, of sex separated from procreation, of freedom, and of modern life.

Four years later, during the final parliamentary debate on gay marriage, Otto Vos--a spokesman for the centrist-liberal VVD party, at the other end of the pro-gay-marriage coalition--made much the same radical argument. Embracing a definition of marriage as separate from parenthood, he argued that the real basis of marriage is the love between two partners. Actually, Vos said something more remarkable than that.

What he said was, "Proceeding on the basis of the notion that love between two partners forms the most important driving force in selecting one of the forms of relationship, there is absolutely no reason, objectively, to distinguish between heterosexual love and homosexual love." Vos, in other words, joined in the call for treating marriage as just one choice on a menu of relationship options.

Gay marriage opponent Van der Staaij had warned of exactly that. If marriage is decoupled from procreation, asked Van der Staaij, how can other radical innovations be avoided? He cited a 1984 article from *Nederlands Juristenblad* (The Journal of Dutch Law) that called for the total removal of marriage from the sphere of the state. Superficially, said Van der Staaij, legalizing same-sex marriage seems to be the opposite of abolishing marriage. Yet by stretching the notion of marriage to embrace a complex array of alternative forms, one would accomplish the legal abolition of marriage by other means.

NOTHING ILLUMINATES the cultural shift in the Dutch understanding of marriage so clearly as the contrast between the conservative Van der Staaij and the centrist-liberal Vos during the final gay marriage debate in 2000. Vos, like many in his party, had opposed gay marriage only two years before. Once Vos and his party moved firmly into the gay marriage camp, the parliamentary battle was over.

It is noteworthy that when Vos switched sides, he did not adopt a moderate defense of same-sex marriage. He never argued that gay marriage would strengthen marriage for all. Instead, Vos flipped from traditionalism to a view of relationships barely distinguishable from that of radicals like Van der Pluijm.

It wasn't necessary for Van der Staaij to wait years to see his warnings about the slippery slope from gay marriage to de facto abolition of the institution borne out. Indeed, Vos himself approvingly cited the very article from *Nederlands Juristenblad* that Van der Staaij had

brandished as a warning. Yes, said Vos, the government ought to get out of the marriage business altogether. The state has no business encouraging citizens to choose marriage over other relationships.

Startled by Vos's radical shift, leaders of the other parties pressed him to explain his change of heart. Tellingly, Vos attributed his own earlier opposition to gay marriage to sheer inertial traditionalism.

So the juxtaposition of Van der Staaij the steadfast traditionalist and Vos the new radical encapsulates the shift in the Dutch understanding of marriage precipitated by the decade-long debate over same-sex unions. Van der Staaij speaks for those increasingly marginalized Dutch who continue to view marriage in largely traditional terms. Vos represents the secular center, once content to ride the rails of tradition, now radicalized by the same-sex marriage debate.

THESE TWO EMBLEMATIC LEADERS' radical view of gay marriage is widely held. The leaders of *De Gay Krant*--the sparkplugs of the movement for gay marriage--always sought full social recognition for homosexuality, not the reinforcement of the position of marriage in society. *De Gay Krant*'s history of the gay marriage movement makes no mention of what in America is called the "conservative case" for same-sex marriage--the argument that gay marriage will encourage gay monogamy and strengthen the unique appeal and status of marriage for all.

The Dutch movement for gay marriage got a major boost when the main Dutch gay rights organization, the COC, finally joined *De Gay Krant* in the fight. For the first five years of the battle, COC had refused to support the cause, on the grounds that marriage was an oppressive and outdated institution. The COC never changed its mind on that score. When it finally joined hands with *De Gay Krant* in 1995, COC openly declared that this was a tactical shift that did not signify acceptance of marriage as an institution.

The Dutch left was similarly frank about its radical understanding of gay marriage. During the 2000 parliamentary debates, Green party spokesman Femke Halsema said it was only when considered superficially that the drive for same-sex marriage appeared to contradict the feminist quest for the abolition of marriage. In reality, said Halsema, conservative opponents were largely right to claim that gay marriage would be tantamount to the abolition of marriage--which was exactly why gay marriage was a good thing. Halsema added that the logical consequence of her position was that registered partnerships ought to be protected and encouraged as a nontraditional alternative to marriage.

The Greens had recognized the radical significance of gay marriage as early as 1996. At the time, Dutch lesbian intellectual Xandra Schutte argued in *De Groene Amsterdammer* (The Green Amsterdammer) that providing gay marriage as one of a menu of relationship options was the equivalent of the abolition of marriage. Necessarily, Schutte emphasized, gays would be trendsetters in removing the connection between marriage and parenthood, thereby pushing society toward a more flexible conception of relationships (which, she said, could include three- and foursomes).

A comparable position was implicit in the stance of the governing coalition. During the 2000 debate, Boris Dittrich, spokesman for the liberal D66 party, a member of the governing coalition and floor manager of the gay marriage bill, suggested that changes could be made to registered partnerships that would establish them more securely as a "light" alternative to

marriage. So the main government sponsor of the gay marriage bill was still another who saw same-sex marriage as an invitation to further experimentation with the relationship system.

And that is exactly what has developed in the years since gay marriage was enacted. The revised parental leave act passed by parliament in 2001 extends the rights of married couples and registered partners to unregistered cohabitors. The 2001 revision of the tax code also extends rights to unregistered as well as registered partners. These legal changes--which came five years into the upsurge of Dutch parental cohabitation--confirm that the legalization of gay marriage in the Netherlands is associated not with renewed emphasis on the privileged status of marriage but with the opposite.

Dutch opponents of gay marriage don't seem to have spent any time rebutting the "conservative case" for gay marriage. Why should they? All participants in the debate--the gay community as well as the political left, center, and right--took gay marriage to signify the replacement of marriage by a flexible and morally neutral range of relationship options.

To appreciate gay marriage's role in encouraging the recent upsurge of Dutch parental cohabitation, we need only take seriously what participants in the Dutch debate said. Spend a decade telling people that marriage is not about parenthood and they just might begin to believe you. Make relationship equality a rallying cry, and people might decide that all forms of relationship are equal--especially young people, of family-forming age, most of whom have left religion behind. Dutch conservatives made a valiant stand for procreation and parenting as of the essence of marriage, and they were soundly beaten. Having duly considered and rejected the essential tie between marriage and parenthood, the Dutch started to abandon their inertial traditionalism and began to experiment with parental cohabitation in record numbers.

Again and again, voices from across the political spectrum argued that gay marriage signifies the demotion or abolition of marriage as the socially preferred setting for parenthood. It should come as no surprise when Dutch parents act accordingly.

Stanley Kurtz is a research fellow at the Hoover Institution.

Stanley Kurtz
NRO Contributing Editor

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June 03, 2004, 9:10 a.m.

No Explanation

Gay Marriage has sent the Netherlands the way of Scandinavia.

Dutch marriage is in trouble. Once noted for their low out-of-wedlock birthrates, and touted by scholars as an alternative to the Scandinavian family model, the Dutch are now experiencing a striking rupture in the relationship between marriage and childbearing, practicing Scandinavian-style parental cohabitation in increasing numbers. The bulk of the change has come in the past seven years — just as Holland adopted registered partnerships, and then full and formal same-sex marriage.

Coincidence? Advocates of same-sex marriage would like us to believe so. But a serious look at the evidence suggests otherwise. In "Going Dutch," I point out how the decade-long campaign for same-sex marriage in the Netherlands helped break apart the relationship between marriage and parenthood. Advocacy of same-sex marriage encouraged erstwhile Dutch traditionalists to reconsider the idea that marriage has anything intrinsic to do with raising children. Not surprisingly, this "family diversity" ideal took hold. Dutch parents have begun to cohabit in ever-increasing numbers, leading to a dramatic rise in out-of-wedlock births. Since cohabiting parents break up at two to three times the rate of married parents, we can expect a significant increase in children living with solo mothers in fatherless homes.

For the past several decades, Dutch society has successfully combined liberal laws and a secular outlook with attitudes lingering from Holland's strongly religious past. Legally, the Dutch largely equalized marriage and cohabitation in the 1980's. And premarital cohabitation has been widespread in the Netherlands for some time. Yet Dutch out-of-wedlock birthrates remained significantly lower than expected in a country with liberal laws and near-universal premarital cohabitation. For all the changes in the Dutch family since the sixties, the Dutch still believed that couples ought to marry before having children.

In the past seven years, however, the Dutch out-of-wedlock birthrate has been moving up at the strikingly high rate of two-percentage points per year. It needs to be emphasized that it is comparatively rare (although not unheard of) for a Western country's out-of-wedlock birthrate to sustain a 2-percentage-point-per-year increase for seven consecutive years. Every year the Dutch out-of-wedlock birthrate continues to rise at a two-percent rate is a surprise. In the '90s, only two European countries — Finland and Ireland — even approached such a rise (without achieving it). The rapid shift in Holland's out-of-wedlock birthrate is therefore a significant turning point, and requires explanation.

In "Going Dutch," I make the case that gay marriage had an important role in this shift. Of course, social-science evidence is almost always provisional and complex. There could be lots of other contributing factors. But if the widespread campaign to persuade the Dutch people that marriage has no special relationship to parenting is not the explanation for the dramatic increase in out-of-wedlock births, what is?

NO EXPLANATION

Many explanations for increases in cohabiting couples with children have been proposed over the years, including contraception, abortion, women in the workforce, individualism, secularism, and the welfare state. How well do these alternative explanations account for the Dutch experience? Not very well, as we can see by looking at these hypotheses, one by one.

CONTRACEPTION

As everyone from religious traditionalists to cultural radicals has long understood, contraception is probably the single most important cause of modern marital decline. The pill helped detach sex from reproduction, setting in motion a chain of events that distanced marriage from parenthood. The pill allowed married couples to delay childbirth, which reduced the stigma on divorce, and encouraged premarital cohabitation.

Yet if the pill seriously weakened the connection between marriage and parenthood, the link was hardly eliminated. Modern contraception has long been available in both America and Sweden. Yet Americans take it for granted that parents ought to be married, while Swedes do not. Something beside contraception has to account for this difference.

If any country has assimilated the effects of contraception on marriage, it's the Netherlands. A decade ago, demographers famously dubbed the Dutch "an almost perfect contraceptive population." The pill has been available to all, free of charge, since the 1970s, and the moral legitimacy of contraception is taken for granted.

In part because of the widespread availability of the pill, the birthrate for single Dutch teens has historically been among the lowest in Europe. (Holland's family traditionalism also keeps teen pregnancy rates low.) The Dutch teen birthrate has risen a bit since the mid-'90s, but this cannot be explained by any change in the availability of contraception. Instead the rise in teen out-of-wedlock births seems partially attributable to an increase in the number of poor urban immigrants, and is partly an effect of changing marital mores in the adult world. In any case, the post-1997 surge in Holland's out-of-wedlock births is largely due to the spread of Swedish-style adult parental cohabitation, not to unplanned teen pregnancies.

ABORTION

The wide availability of abortion in the post-1960s West has also helped separate sex from reproduction (and marriage from parenthood). Yet as with contraception, abortion has been freely accessible and politically uncontroversial in the Netherlands for decades. The fundamental effect of abortion on Dutch marriage was registered long ago.

Attitudes toward abortion exemplify the Dutch cultural paradox. While the secular Dutch do not see abortion as categorically immoral, they do view it as an unfortunate last resort. The Dutch have long had one of the lowest abortion rates in the world. Distaste for abortion helps explain the vigorous public advocacy of contraception. The slight increase since the mid-'90s in the still very low Dutch abortion rate is chiefly due to non-Western immigrants. Yet there has been no real change in the availability of abortion, such as might explain the last seven years of marital decline.

WORKING WOMEN

The movement of women into the workforce is another major cause of the decline of marriage. This is especially true in Scandinavia, where housewives have largely vanished from the scene — replaced by full-time working mothers and a vast government-sponsored day-care system. Women's independence has encouraged delayed marriage, higher rates of divorce, and ultimately, parental cohabitation.

Yet what's striking about the Netherlands is how greatly the situation of Dutch women departs from the Scandinavian pattern. Dutch female labor-force participation did increase during the '90s. In 1992, 55.7 percent of families with young children had full-time working fathers and stay-at-home mothers. By 2001, that figure had decreased to 37 percent. Yet nearly all of the growth in female labor-force participation during the '90s was in part-time work.

In Holland, if nowhere else, the "mommy track" has triumphed. Although many mothers work part-time, full-time working motherhood is widely condemned. Dutch feminists grouse about the prevailing "motherhood ideology," and the seemingly endless stream of government white papers on the need for independent female incomes is largely ignored.

While Dutch day-care services have grown in response to increased female part-time labor, the childcare sector is still relatively small, and largely private. Even Dutch Social Democrats want the government out of childcare. Judged by feminist standards of equality in work, care, and income, the Netherlands finishes dead last when compared to other EU countries: another example of Dutch traditionalism. So despite the movement of some Dutch mothers into part-time labor, nothing significant enough to account for the recent rise of parental cohabitation has occurred. If anything, it's remarkable that Swedish-style parental cohabitation has spread to a country where social circumstances for women differ so dramatically from Scandinavia.

SECULARIZATION

Another potential culprit, Dutch secularization, has somewhat dented Dutch marriage. With each passing year, the first Dutch generation with a broadly secular upbringing takes a larger role in society. Yet, in an important sense, Dutch secularism has transformed Holland's family mores by way of gay marriage. For example, the election of the first Dutch cabinet in memory with no representation from the Christian Democrats was a pivotal moment for the Dutch gay-marriage movement.

The secularism issue also begs the central cultural question: How much staying

power does Dutch traditionalism have, in the absence of its original religious context? Although the Dutch have dropped their principled religious objections to abortion, residual cultural distaste for abortion remains strong. That's why Holland still has one of the lowest abortion rates in the world. So secularism has not significantly undermined the traditional Dutch aversion to abortion. Yet the tendency of Dutch parents to marry is fading fast. Something beyond secularism must have intervened to account for that change.

Finally, growth in the number of self-described Dutch secularists actually leveled off in the mid- to late-'90s, exactly as the Dutch out-of-wedlock birthrate took off. So we need to look elsewhere for our explanation.

INDIVIDUALISM

Individualism has certainly contributed to the rise of Dutch parental cohabitation. Yet the gay-marriage movement itself embodies this cultural force. Gay marriage encourages parental cohabitation because the public sees both changes in a radically libertarian light. Contrary to the claims of prominent American advocates of the "conservative case" for gay marriage, same-sex marriage is not taken as evidence that marriage is a superior family form. Instead, gay marriage is taken as proof that no family form is preferable to any other. Same-sex marriage teaches that individuals ought to be able to craft whatever sort of family they like, and the state should give no special support or encouragement to any one form. If a man wants to marry a man, that's fine. If a man and woman want to have a child without getting married, that's fine too. Family is whatever an individual wants it to be, and the state has no business expressing a preference. So gay marriage encourages parental cohabitation by way of radical individualism.

THE WELFARE STATE

Scandinavia's massive welfare state has played a central role in the rise of Swedish-style parental cohabitation. With cohabitation and marriage treated equally under the law, with generous support for single parents, and with a vast government-run day-care sector, the Scandinavian family has in many respects been replaced by the state. Yet the Netherlands in the '90s saw no fundamental changes along these lines.

The Netherlands has pension, unemployment, and health benefits that rival Scandinavia's. Yet when it comes to the family, the Dutch welfare system departs sharply from Scandinavia's. While the Swedish system treats even married taxpayers as individuals, Dutch tax law still assumes a single breadwinner. The breadwinner provisions were reaffirmed, with slight changes, in the new Dutch tax code of 2001. Combine this with special provisions for part-time labor (overwhelmingly used by mothers), and the Dutch government's limited (and decreasing) involvement in day care, and it's clear that Holland's welfare state has not been pushing Dutch parents into Swedish-style parental cohabitation.

While no reform of law or welfare regulations over the past decade can account for the rapid rise of Dutch parental cohabitation, legal changes in the 1970s and 1980s did lay groundwork for Dutch marriage's current troubles. Especially during the 1980s, cohabiting couples gained tax concessions and many of the

pension and social-security benefits enjoyed by married couples. That really does take a leaf from the Scandinavian book.

Yet despite the long-standing legal equalization of marriage and cohabitation, Dutch parents just kept on getting married from the 1970s to the mid-'90s. That's why observers pointed to Holland's inherited "cultural capital" to explain its paradoxical mixture of marriage traditionalism and liberal law. Something beside liberal cohabitation laws had to intervene in order to break Holland's marriage traditionalism and to set off the upsurge in parental cohabitation. That something was gay marriage.

SCHOLARS STUMPED

We've considered the alternative explanations for rising rates of parental cohabitation and found them incomplete or wanting. Scholars face the same dilemma. I contacted senior Dutch demographer, Joop Garssen, to find out if sociologists and demographers had been able to account for Holland's rising rates of out-of-wedlock birth. In various publications, Garssen has argued persuasively that historically low out-of-wedlock birthrates in the Netherlands are rooted in traditionalism. Together with British demographer David Coleman, Garssen has suggested that continued low out-of-wedlock births in the Netherlands could mark out the Dutch system as a moderately traditionalist alternative to the Swedish model. Yet the record of the past seven years calls that into serious question. So how do Garssen and his colleagues explain the recent surge in parental cohabitation? They don't: Garssen has canvassed the experts, and they're stumped. None of the conventional explanations for increased births outside of marriage works.

And Garssen explicitly rejects an explanation that might be offered by gay-marriage advocates. In 1996 the Dutch parliament approved a system of "registered partnerships," open to both homosexual and heterosexual couples. Registered partnerships went into effect in 1998, and formal same-sex marriage followed in 2000. So perhaps the recent surge in out-of-wedlock births was caused when registered partnerships drew heterosexual parents into non-marital unions. Yet Garssen notes that the number of registered heterosexual partnerships is too small to explain the surge in the out-of-wedlock birthrate. (The number of heterosexual parents in registered partnerships is inflated, since many couples convert to easily dissolved registered partnership as a way of ending their marriages without a formal divorce hearing.)

But note that Garssen and his colleagues recognize that something needs to be explained. The sharp, seven-year rise in the Dutch out-of-wedlock birthrate is not something that Dutch demographers expected or predicted. They consider it a break from the past, and not a mere continuation of earlier trends.

CAUSATION

As we've seen, the upswing in the Dutch out-of-wedlock birthrate coincides with the enactment of registered partnerships and gay marriage. A diligent search for alternative explanations, such as access to contraception and women in the workforce, yields nothing that correlates well with the rise of out-of-wedlock birthrates in the Netherlands. Both opponents and supporters of gay marriage linked the willingness to embrace same-sex marriage with increasing

social and legal acceptance of cohabitation rather than marriage for couples with children. Although pinpointing cause and effect raises particular challenges when studying the intricacies of human social life, there are now at least strong indications that Dutch gay marriage has contributed significantly to the decline of Dutch marriage.

Perhaps there is an alternative explanation. But it is up to those who wish to argue that gay marriage has *not* undermined marriage in the Netherlands to provide a more plausible reason for the last seven years of Dutch marital decline.

Of course, social-science evidence is seldom definitive. We can and should call for more research, and I hope other family scholars take up the question in a serious way. But at a minimum, we ought to be able to achieve a consensus on what has not happened in the Netherlands: There is no evidence to support the Rauch-Sullivan hypothesis — namely, that gay marriage will help strengthen marriage as a social institution.

The "conservative case" for gay marriage appears just plain wrong. In Scandinavia and in the Netherlands, marriage has substantially weakened in the years since registered partnerships and formal gay marriage have been debated and enacted. Whether or not you agree that gay marriage has helped to cause this decline, it is already evident that gay marriage has done nothing to strengthen marriage as a whole.

Who has the burden of proof here? I would argue that the burden lies with the advocates of radical change to the existing definition of marriage, one that no society we know of has embraced, to show that this kind of social experiment will do no harm.

Given the fact that marriage in both Scandinavia and the Netherlands is in dramatic decline, it is now up to the advocates of same-sex marriage to show why we should believe them when they say that same-sex marriage won't deeply weaken marriage as a social institution, block efforts to strengthen the connection between marriage and parenting, and commit law and government to the idea that many kinds of alternative family structures deserve the same legal protections as mothers and fathers united in marriage.

Stanley Kurtz
NRO Contributing Editor

May 04, 2004, 8:41 a.m.

The Marriage Mentality

A reply to my critics.

By Stanley Kurtz

Now that I have had a chance to present my case that gay marriage is undermining marriage in Europe to the Constitution Subcommittee of the House Judiciary Committee, a chorus of critics has risen to challenge my argument. The hearing featured strenuous efforts by Jerrold Nadler (D., N.Y.) and other Democrats to discredit my claims. Congresswoman Tammy Baldwin (D., Wis.) staged a bit of an ambush — cross-examining me using an (at the time) unpublished article from *The New Republic* that attacks my work on Scandinavian marriage. As far as I'm concerned, the Democrats failed to shake or rebut my case. But you can judge for yourself by viewing the webcast. (There's a sound problem toward the end.) You can also consider my testimony, which previews my upcoming work on gay marriage in the Netherlands. That work is important because Holland now has formal gay marriage, and because in the Netherlands it's particularly easy to isolate the causal effects of gay marriage.

Meantime, Andrew Sullivan has posted entries here and here attempting to rebut my Scandinavia argument. Sullivan draws on the work of Darren Spedale, a lawyer who studied gay marriage in Denmark on a Fulbright scholarship. Nathaniel Frank, who wrote the critique of my work for *The New Republic*, is an expert on sexual minorities in the military. Here's my response to the critics.

MUTUAL REINFORCEMENT

The critics say I show only correlation — not a causal connection — between Scandinavian registered partnerships and marital decline. Supposedly, I confuse cause and effect. But it's the folks who say gay marriage could be *only* an effect of marital decline — without also being a cause — who are confused.

Gay marriage, and other contributors to marital decline, are *mutually reinforcing*. I've never said de facto gay marriage is the only cause — or even the main cause — of marital decline in Scandinavia. But I do say it's an important contributing cause. While it's true that contraception, abortion, women in the workforce, secularism, individualism, and the welfare state have weakened the institution of marriage, gay marriage (de facto and formal) has now been added to that list.

If I think registered partnerships destroyed Scandinavian marriage, asks Frank, then how do I explain the rise of cohabitation in the United States? After all,

America doesn't have gay marriage, so how did American marriage decline? This supposedly devastating question completely misses my point. I've never said that marriage has been undermined by gay marriage alone. But I do say that marriage in Scandinavia is in much more radical trouble than it is in America. That has plenty to do with gay marriage.

The critics ignore my core claims about how gay marriage undermines marriage. I show that registered partnerships are not understood in a "conservative" light by the public. Instead of treating de facto gay marriage as an affirmation of the importance of marriage, the public sees this change as proof that traditional marriage is no better than any other family form. And this culturally radical interpretation of gay marriage is as prevalent in the Netherlands (where we now have formal gay marriage) as in Scandinavia. Since the public sees gay marriage as powerful proof that all family forms are equal, gay marriage reinforces marital decline.

A NEW STAGE OF MARITAL DECLINE

The critics ignore another key aspect of my causal argument. Gay marriage is part and parcel of a whole new stage of marital decline — a stage still relatively unfamiliar in the United States. In this new stage of marital decline, couples don't just cohabit before they become parents. Couples cohabit even after they become parents. Because gay marriage helps to break apart the ideas of marriage and parenthood, it is closely associated with this advanced stage of marital decline.

There are three core elements in this new and more radical stage of marital decline: parental cohabitation, the legal equalization of marriage and cohabitation, and gay marriage. My claim is that these three factors are mutually reinforcing. When any of these three factors emerges, the others tend to follow. And they draw out the initial factors still further.

In Sweden, marriage and cohabitation were almost completely equalized, and parental cohabitation was widespread, before gay marriage emerged. So in Sweden, gay marriage was more "effect" than "cause." Nevertheless, gay marriage has played a key role in Swedish marital decline.

Yet in Norway the effect of gay marriage was greater. Gay marriage arrived in Norway before parental cohabitation had reached Swedish levels, and before cohabitation and marriage were legally equalized. Norwegian radicals were able to use gay marriage to suppress traditionalists and to argue for a still more liberalized cohabitation regime. So in Norway, the causal role of gay marriage was greater. And in the Netherlands, the causal impact of gay marriage on marital decline has been decisive.

CONTRADICTORY CLAIMS

Not only do Sullivan, Spedale, and Frank completely ignore this aspect of my causal framework, the three of them take utterly contradictory positions on a supposedly fatal flaw in my case. Writing in *The New Republic*, Frank says that since Scandinavia has only "registered partnerships," the Scandinavian case "has literally nothing to do with same-sex marriage." Trouble is, Sullivan himself, writing in the same magazine in 2001, touted Spedale's work on "de

facto gay marriage" in Denmark as proof that gay marriage is harmless. The first sentence of Spedale's current reply to me reads, "Since 1989, gay marriage has been a reality in Scandinavia."

When he thought Scandinavian marriage was in good shape, Sullivan was perfectly happy to treat "registered partnerships" as "de facto gay marriage." After I showed that Scandinavian marriage was in a state of collapse, Sullivan flipped and denied that registered partnerships had any relevance to the gay marriage debate. Now that he thinks Spedale has rebutted me, Sullivan is back to treating registered partnerships as gay-marriage equivalents.

This whole fuss is based on the erroneous notion that registered partnerships are "marriage lite," while formal gay marriage would be received by the public as an affirmation of the traditional ethos of marriage. My work on the reception of formal gay marriage in the Netherlands disproves that claim.

The remarkable thing about Darren Spedale's reply to my work is that, without realizing it, he actually makes my causal case. Overtly, Spedale denies that Scandinavian gay marriage has had any negative impact on "the sanctity of marriage." If anything, says Spedale, gay marriage has actually strengthened Scandinavian marriage. Trouble is, Spedale's work is a celebration of the decline of Scandinavian marriage. Spedale doesn't deny that Scandinavian parents have stopped getting married. His real point is that parental cohabitation is just great.

CLUES IN COHABITATION

Spedale's flat wrong about that. Amazingly, he denies what scholars, journalists, and advocates across the cultural-political spectrum acknowledge: that unmarried parents in Scandinavia break up at two to three times the rate of married parents. Consider this article on parental cohabitation from Norway's (not at all conservative) newspaper, *Aftenposten*. The piece quotes a couple of family experts lamenting the higher dissolution rate of families with unmarried parents. Or look at this excellent treatment of Scandinavian marital decline by Carol Williams of the *Los Angeles Times*. Williams's piece emphasizes the higher breakup rate of unmarried parents. Her realistic portrait of the Scandinavian system belies Spedale's cheery denials of trouble. Scholarly affirmations of the higher breakup rate among unmarried Scandinavian parents are legion (see especially David Popenoe and Mai Heide Ottosen).

Spedale says I make Scandinavia's parental cohabitation look worse than it is by comparing it to American single mothering. Actually, I'm careful to note that most Scandinavian out-of-wedlock births are to cohabiting parents. Like most everyone except Spedale, I stress that such families dissolve at very high rates. Also note that the export of the Scandinavian system to America would have serious consequences. There's no underclass in Scandinavia. In America, Scandinavian-style cohabitation among the middle classes would encourage more out-of-wedlock births among poor single mothers. It's already happened as the Scandinavian system of parental cohabitation has spread to Britain, which has a substantial urban underclass.

To my detailed rebuttal of his use of marriage and divorce statistics, Spedale

offers no arguments. He simply repeats his claims.

THE MENTALITY OF MARITAL DECLINE

But the truly remarkable thing about Spedale's "rebuttal" is that it actually makes my causal argument. According to Spedale, Scandinavian gay marriage is a product of "increasing respect for diverse family structures." Sure. But doesn't gay marriage then breed further acceptance of "diverse family structures" — like the parental cohabitation of which Spedale is so enamored? Apparently so, since Spedale himself keeps saying that the approval of gay marriage has garnered ever increasing public support for the idea of family change.

Spedale argues that Scandinavian gay marriage has made society take marriage more seriously. Gay couples marry very late, says Spedale. With social pressure for marriage gone, gays only marry when they are absolutely sure they've found their life partners. That stance, says Spedale, has probably increased respect for marriage in Scandinavia.

But what Spedale is really describing is reinforcement of the mentality at the root of marital decline. The problem with Scandinavian marriage is that parents aren't pressured to marry. Instead, parents wait until long after their children are born to decide if they've found their permanent life partners (and often break up before then). Despite his denials, Spedale is actually saying that gay marriage both flows from — and contributes to — this ethos of weakened marriage. And that is exactly my causal point.

Actually, I don't think the example of particular gay couples has much effect. There are way too few gays getting married for that. Sullivan mistakenly takes this to be my point when he talks about how few gays got married in Nordland county, where marriage itself is disappearing. The real point is that the public arguments for gay marriage detach marriage from parenthood. The debate over gay marriage, and the ongoing social symbolism of the change, turn marriage into a pure celebration of the love of two adults, rather than something intrinsically tied to parenthood. Nordland's churches were convulsed by a battle over the rainbow flag because the meaning of marriage for everyone was at stake. It wasn't necessary for many gays in Nordland to actually be married for the flag dispute to rivet the attention of the nation — and transform the meaning of marriage.

WHAT ABOUT THE CHILDREN?

It's extraordinary that Sullivan is now touting Spedale. Spedale's naive praise for parental cohabitation is the antithesis of Sullivan's "conservative case" for gay marriage. And Sullivan is now approvingly posting readers' letters that say Norwegian parental cohabitation is fine. Between his flip-flops on the relevance of "registered partnerships" to gay marriage, and his embrace of marriage radicals like Spedale, Sullivan's argument has dissolved in a welter of contradictions.

We'll go to Sweden for a final look at how gay marriage is undermining marriage. While advocates like Sullivan argue that marriage isn't about children, Nathaniel Frank takes the opposite approach. Since some gays have

children, says Frank, formal gay marriage would unite — not separate — the ideas of marriage and parenthood.

That misses the point. Ideally, biological parents ought to be married to *each other*. Since no gay couple can get a child without the intervention of a third party, gay marriage cannot help but undermine the idea that parents ought to marry each other.

You can see the process playing out now in Sweden, which is on the verge of turning its system of registered partnerships into formal gay marriage. The big step on that road came in 2002, when Sweden removed that last real difference between registered partnerships and marriage by allowing gay partners to adopt. Has that move brought the ideas of marriage and parenthood closer together?

Not at all. The National Swedish Social Insurance Board recently convened a panel in which two legal experts recommended changes in Swedish family law. One invoked same-sex parenting to argue for legal recognition of three- and even four-parent families. According to this scholar, the antiquated two-parent standard virtually forces lesbian couples to find anonymous sperm donors, rather than form a more complex family with, say, gay sperm donors to whom they feel close.

The polyamory movement has reached Sweden, and there are now Swedes who would seize on triple or quadruple parenting to usher in legalized polyamory. By the way, this conference invoked the well-known fact (the one Spedale denies) that families with unmarried parents dissolve at higher rates. Yet here the figures on rising family dissolution were used to justify the rejection of traditional dual parenthood. With so many dissolved cohabitors and gay parents, why not do away with the two-parent standard altogether? So as Sweden combines formal gay marriage with adoption rights for same-sex couples, the dawn of quadruple parenting and polyamory looms. So much for Frank's claim that formal gay marriage will reinforce the link between marriage and parenthood.

Even in Sweden, where gay marriage came along well after cohabitation and marriage were equalized, and well after parental cohabitation was widespread, gay marriage is reinforcing the movement away from the traditional family. As I told the subcommittee, the effect in the Netherlands has been more dramatic still. Let's not turn America into the next unfortunate experiment.

Stanley Kurtz
NRO Contributing Editor

May 25, 2004, 9:27 a.m.

Unhealthy Half Truths

Scandinavia marriage *is* dying.

M. V. Lee Badgett, professor of economics and gay and lesbian studies at the University of Massachusetts at Amherst, has a *Slate* piece that purports to refute my work on same-sex unions and marriage in Scandinavia. It doesn't. Badgett's case is built on statistical sleight of hand. And his claim that "heterosexual marriage looks pretty healthy in Scandinavia" flies in the face of a broad scholarly consensus.

The idea that Scandinavian marriage is dying is not my invention. Have a look at this 2000 piece from the *Los Angeles Times*. Scandinavians, the *Times* reports, "have all but given up on marriage as a framework for family living, preferring cohabitation even after their children are born." According to the *Times*, "the 1990's witnessed a resolute rejection of marriage, even among couples having children." Whether they praise or blame the Scandinavian family system, scholars agree.

Badgett's odd claim that Scandinavian marriage is doing just fine is built on a statistical trick. According to Badgett, roughly four out of five couples with children in Denmark and Norway are married. That's true, but it's also incomplete and deeply misleading. What Badgett doesn't tell you is that her "couples with children" figure includes only couples who are living together. Children who live with single parents or step families are omitted from Badgett's report.

In Norway, those children of broken families are put in a huge category called "other type of family." That category includes single adults as well as single parents and step-families. Separating out the subcategories, Norwegian demographer Christer Hyggen reports that by January 2002, only 62 percent of Norwegian children were living with married parents — far lower than Badgett's 80 percent.

Badgett's figures conveniently sidestep the central point. Cohabiting parents are 2-3 times more likely to break up than married parents. That's why parental cohabitation is a problem. Since cohabiting couples break up at a high rate, many of their children end up with single parents or in step families. By leaving those children out, Badgett disregards the true cost of the Scandinavian system.

And the problem is getting worse. In Norway, cohabiting families are the fastest-growing family type, while married couples with children are the fastest shrinking family type. The proportion of Norwegian children living with

married parents dropped 16 percent from 1989 to 2002 (from 78 percent to 62 percent).

Badgett's figures are deeply misleading. But break even those down by region, and the results are revealing. Even restricting ourselves to parents who are living together, in Norway's religious and socially conservative southwest, only one child in ten lives with cohabiting parents. But in the socially liberal north (where the idea of gay marriage has been most completely accepted) fully four children in ten are living with unmarried parents (who still reside together). Add the children of single parents and step families, and we are surely at over 50 percent of children living with unmarried parents in Norway's liberal north. If that sounds high, consider that in 2002, 83 percent of first-born children in the northern Norwegian county of Nord-Troendelag were born out of wedlock, as were 58 percent of subsequent children.

You can read more in this summary from Statistics Norway. Notice what Norway's own national statisticians take to be the big story in the numbers — the rise of cohabitation and the decline of married couples with children. That's a far cry from Badgett's claim that "heterosexual marriage looks pretty healthy in Scandinavia."

Badgett's statistical cherrypicking also distorts her claim about the Netherlands, as blogger Justin Katz has already noticed. Badgett says that in 2003, 90 percent of Dutch couples with kids were married. What she doesn't tell you is that there were almost twice as many single-parent households in the Netherlands as cohabiting-parent households in 2003. So in reality, married couples now make up only about 75 percent of the families with children, not 90 percent. And that 75 percent figure represents a drop of about seven percent since the campaign for gay marriage kicked into high gear in the Netherlands.

Even these numbers don't tell the real story. The important point is that registered partnerships and gay marriage have brought sharply higher rates of parental cohabitation to the Netherlands in just the last few years. (For more on this, see my new piece, "Going Dutch?") Since the surge in Dutch unmarried cohabitation is only seven years old, it will take some time before the higher breakup rate for cohabiting couples has its full effect on the single parenting statistics. But Dutch marriage is waning, and the fast-rising rate of unmarried parenthood sets kids up for even more trouble in the future. So Badgett's claim that heterosexual marriage "looks pretty healthy" is built on statistical half-truths.

Badgett ignores key points from my work on Scandinavia. I've shown in detail why higher marriage rates do not mean a marital renaissance in Scandinavia. Badgett quotes the usual statistics, while saying nothing in reply to my arguments.

Badgett also ignores another one of my key points — that there is an important difference between out-of-wedlock births to first-born's, and to subsequent children. In the early stages of parental cohabitation, the first child is treated as a test of the relationship. Many couples break up shortly after the first child is born, but many also marry. Yet as parental cohabitation grows more popular,

people lose the impulse to marry at all. They have two and even three children without marrying, and many stop marrying altogether. This second stage spells the end of marriage itself. That's why it has to work against deeper cultural resistance than "experimental" first-child out-of-wedlock births.

What's happened in Scandinavia since gay marriage is that couples have moved from the first to the second stage. They've started to shift from treating the first child as the test of a possible marriage, to giving up on marriage altogether. In the liberal northern counties of Norway, prior to the enactment of registered partnerships, most first children were born outside of marriage. Yet most subsequent children were born to married couples. Since registered partnerships have been established, even most second and third children are now born out-of-wedlock in these districts. The Norway's liberal north, marriage is literally disappearing. The other key change since registered partnerships is that parental cohabitation is growing, even in the once traditional and religious districts of Norway's southwest.

So to compare the quick early rise of the Norwegian out-of-wedlock birthrate in the 1980s to the rate of increase in the last decade or so is like comparing apples and oranges. As I've said from the start, out-of-wedlock birthrates may have risen more sharply in Scandinavia prior to registered partnerships, but now they're moving through the toughest parts of cultural resistance.

If I'm right that out-of-wedlock birthrates necessarily rise more slowly when they get to very high levels, then introducing gay marriage to a country with low out-of-wedlock births could kick off a much more rapid rise in the rate. That is exactly what has happened in the Netherlands. Until recently, Holland was vastly more traditional about marriage than Scandinavia. The Dutch had very low rates of parental cohabitation, and very low rates of out-of-wedlock birth. But since registered partnerships and formal gay marriage were introduced in the Netherlands, parental cohabitation has spread widely, and the out-of-wedlock birthrate has been moving up at a fast pace.

This is exactly what Badgett says needs to happen in order to prove that registered partnerships and gay marriage really do encourage parental cohabitation. The Netherlands does in fact meet the causal test Badgett sets. Gay marriage came in, and the out-of-wedlock birthrate shot up.

When Badgett points out that countries with registered partnerships or gay marriage had just as much of a rise in their out-of-wedlock birthrates as countries without gay unions, she is again confusing two different stages of parental cohabitation. Those two groups of countries were at two very different points in the process. The countries with registered partnerships are already nearly maxed out on "experimental" first births out-of-wedlock. They've moved rapidly through the "easy" part of the rise in out-of-wedlock births and are now moving more slowly through the tough final stages of the destruction of marriage. It's like the difference between slicing through the meat on a drumstick and trying to cut the drumstick off of the turkey.

I've explained how I think the larger causal process works, but Badgett has ignored what I've said. I do not argue that gay marriage is the sole cause, or

even the main cause, of parental cohabitation. It is one of several causes. Gay marriage is one part of a new stage of marital decline that contains three basic elements: parental cohabitation, legal equalization of marriage and cohabitation, and gay marriage. My claim is that these three factors are mutually reinforcing. When any of these three factors emerges, the others tend to follow. And they draw out the initial factors still further.

In Sweden, parental cohabitation came first, followed quickly by legal equalization of marriage and cohabitation, and later by gay marriage. In the Netherlands, cohabitation and marriage were legally equalized in the 1980's, yet Dutch parents still got married. It wasn't till gay marriage was added to the mix that parental cohabitation became popular in the Netherlands. So Badgett is right to say that parental cohabitation often comes first, and itself causes gay marriage. I've said as much myself. But gay marriage reinforces and intensifies parental cohabitation. And in a case like the Netherlands, gay marriage actually preceded parental cohabitation, and had a key role in encouraging the practice. I've shown this in "Going Dutch?" and I will shortly be publishing a piece that isolates the causal effect of gay marriage in the Dutch case even more clearly.

Badgett makes much of the various legal and economic incentives that encourage Americans to marry, but all that is now in danger. The influential American Law Institute has already proposed legal reforms that would equalize marriage and cohabitation. And we've seen at least the beginnings of European-style parental cohabitation here in the United States. If the cultural changes stimulated by gay marriage draws these trends out, then the legal and economic incentives to marry in America will fall away.

Badgett points out that there are no moves by conservative governments in France or the Netherlands to repeal registered partnerships or gay marriage. That's true. Yet the conservative government in France is strongly opposing formal gay marriage right now. The more important point is that it does indeed become difficult to repeal these changes once made. The truth about the decline of Dutch marriage is only beginning to come out. Yet as the real effects of gay marriage on the Netherlands emerge, it will be next to impossible politically to do anything about it. The power of "possession" changes things. If we legalize gay marriage here in the United States, we'll meet the same fate.

the weekly Standard

The End of Marriage in Scandinavia

The "conservative case" for same-sex marriage collapses.

by Stanley Kurtz

02/02/2004, Volume 009, Issue 20

MARRIAGE IS SLOWLY DYING IN SCANDINAVIA. A majority of children in Sweden and Norway are born out of wedlock. Sixty percent of first-born children in Denmark have unmarried parents. Not coincidentally, these countries have had something close to full gay marriage for a decade or more. Same-sex marriage has locked in and reinforced an existing Scandinavian trend toward the separation of marriage and parenthood. The Nordic family pattern--including gay marriage--is spreading across Europe. And by looking closely at it we can answer the key empirical question underlying the gay marriage debate. Will same-sex marriage undermine the institution of marriage? It already has.

More precisely, it has *further* undermined the institution. The separation of marriage from parenthood was increasing; gay marriage has widened the separation. Out-of-wedlock birthrates were rising; gay marriage has added to the factors pushing those rates higher. Instead of encouraging a society-wide return to marriage, Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.

This is not how the situation has been portrayed by prominent gay marriage advocates journalist Andrew Sullivan and Yale law professor William Eskridge Jr. Sullivan and Eskridge have made much of an unpublished study of Danish same-sex registered partnerships by Darren Spedale, an independent researcher with an undergraduate degree who visited Denmark in 1996 on a Fulbright scholarship. In 1989, Denmark had legalized de facto gay marriage (Norway followed in 1993 and Sweden in 1994). Drawing on Spedale, Sullivan and Eskridge cite evidence that since then, marriage has strengthened. Spedale reported that in the six years following the establishment of registered partnerships in Denmark (1990-1996), heterosexual marriage rates climbed by 10 percent, while heterosexual divorce rates declined by 12 percent. Writing in the McGeorge Law Review, Eskridge claimed that Spedale's study had exposed the "hysteria and irresponsibility" of those who predicted gay marriage would undermine marriage. Andrew Sullivan's Spedale-inspired piece was subtitled, "The case against same-sex marriage crumbles."

Yet the half-page statistical analysis of heterosexual marriage in Darren Spedale's unpublished paper doesn't begin to get at the truth about the decline of marriage in Scandinavia during the nineties. Scandinavian marriage is now so weak that statistics on marriage and divorce no longer mean what they used to.

Take divorce. It's true that in Denmark, as elsewhere in Scandinavia, divorce numbers looked better in the nineties. But that's because the pool of married people has been shrinking for some time. You can't divorce without first getting married. Moreover, a closer look at Danish divorce in the post-gay marriage decade reveals disturbing trends. Many Danes have stopped holding off divorce until their kids are grown. And Denmark in the nineties saw a 25 percent increase in cohabiting couples with children. With fewer parents marrying, what used to show up in statistical tables as early divorce is now the unrecorded breakup of a cohabiting couple with children.

What about Spedale's report that the Danish marriage rate increased 10 percent from 1990 to 1996? Again, the news only appears to be good. First, there is no trend. Eurostat's just-released marriage rates for 2001 show declines in Sweden and Denmark (Norway hasn't reported). Second, marriage statistics in societies with very low rates (Sweden registered the lowest marriage rate in recorded history in 1997) must be carefully parsed. In his study of the Norwegian family in the nineties, for example, Christer Hyggen shows that a small increase in Norway's marriage rate over the past decade has more to do with the institution's decline than with any renaissance. Much of the increase in Norway's marriage rate is driven by older couples "catching up." These couples belong to the first generation that accepts rearing the first born child out of wedlock. As they bear second children, some finally get married. (And even this tendency to marry at the birth of a second child is weakening.) As for the rest of the increase in the Norwegian marriage rate, it is largely attributable to remarriage among the large number of divorced.

Spedale's report of lower divorce rates and higher marriage rates in post-gay marriage Denmark is thus misleading. Marriage is now so weak in Scandinavia that shifts in these rates no longer mean what they would in America. In Scandinavian demography, what counts is the out-of-wedlock birthrate, and the family dissolution rate.

The family dissolution rate is different from the divorce rate. Because so many Scandinavians now rear children outside of marriage, divorce rates are unreliable measures of family weakness. Instead, we need to know the rate at which parents (married or not) split up. Precise statistics on family dissolution are unfortunately rare. Yet the studies that have been done show that throughout Scandinavia (and the West) cohabiting couples with children break up at two to three times the rate of married parents. So rising rates of cohabitation and out-of-wedlock birth stand as proxy for rising rates of family dissolution.

By that measure, Scandinavian family dissolution has only been worsening. Between 1990 and 2000, Norway's out-of-wedlock birthrate rose from 39 to 50 percent, while Sweden's rose from 47 to 55 percent. In Denmark out-of-wedlock births stayed level during the nineties (beginning at 46 percent and ending at 45 percent). But the leveling off seems to be a function of a slight increase in fertility among older couples, who marry only after multiple births (if they don't break up first). That shift masks the 25 percent increase during the nineties in cohabitation and unmarried parenthood among Danish couples (many of them young). About 60 percent of first born children in Denmark now have unmarried parents. The rise of fragile families based on cohabitation and out-of-wedlock childbearing means that during the nineties, the total rate of family dissolution in Scandinavia significantly increased.

Scandinavia's out-of-wedlock birthrates may have risen more rapidly in the seventies, when marriage began its slide. But the push of that rate past the 50 percent mark during the nineties was in many ways more disturbing. Growth in the out-of-wedlock birthrate is limited by the

tendency of parents to marry after a couple of births, and also by the persistence of relatively conservative and religious districts. So as out-of-wedlock childbearing pushes beyond 50 percent, it is reaching the toughest areas of cultural resistance. The most important trend of the post-gay marriage decade may be the erosion of the tendency to marry at the birth of a second child. Once even that marker disappears, the path to the complete disappearance of marriage is open.

And now that married parenthood has become a minority phenomenon, it has lost the critical mass required to have socially normative force. As Danish sociologists Wehner, Kambskard, and Abrahamson describe it, in the wake of the changes of the nineties, "Marriage is no longer a precondition for settling a family--neither legally nor normatively. . . . What defines and makes the foundation of the Danish family can be said to have moved from marriage to parenthood."

So the highly touted half-page of analysis from an unpublished paper that supposedly helps validate the "conservative case" for gay marriage--i.e., that it will encourage stable marriage for heterosexuals and homosexuals alike--does no such thing. Marriage in Scandinavia is in deep decline, with children shouldering the burden of rising rates of family dissolution. And the mainspring of the decline--an increasingly sharp separation between marriage and parenthood--can be linked to gay marriage. To see this, we need to understand why marriage is in trouble in Scandinavia to begin with.

SCANDINAVIA has long been a bellwether of family change. Scholars take the Swedish experience as a prototype for family developments that will, or could, spread throughout the world. So let's have a look at the decline of Swedish marriage.

In Sweden, as elsewhere, the sixties brought contraception, abortion, and growing individualism. Sex was separated from procreation, reducing the need for "shotgun weddings." These changes, along with the movement of women into the workforce, enabled and encouraged people to marry at later ages. With married couples putting off parenthood, early divorce had fewer consequences for children. That weakened the taboo against divorce. Since young couples were putting off children, the next step was to dispense with marriage and cohabit until children were desired. Americans have lived through this transformation. The Swedes have simply drawn the final conclusion: If we've come so far without marriage, why marry at all? Our love is what matters, not a piece of paper. Why should children change that?

Two things prompted the Swedes to take this extra step--the welfare state and cultural attitudes. No Western economy has a higher percentage of public employees, public expenditures--or higher tax rates--than Sweden. The massive Swedish welfare state has largely displaced the family as provider. By guaranteeing jobs and income to every citizen (even children), the welfare state renders each individual independent. It's easier to divorce your spouse when the state will support you instead.

The taxes necessary to support the welfare state have had an enormous impact on the family. With taxes so high, women must work. This reduces the time available for child rearing, thus encouraging the expansion of a day-care system that takes a large part in raising nearly all Swedish children over age one. Here is at least a partial realization of Simone de Beauvoir's dream of an enforced androgyny that pushes women from the home by turning children over to the state.

Yet the Swedish welfare state may encourage traditionalism in one respect. The lone teen pregnancies common in the British and American underclass are rare in Sweden, which has no underclass to speak of. Even when Swedish couples bear a child out of wedlock, they tend to reside together when the child is born. Strong state enforcement of child support is another factor discouraging single motherhood by teens. Whatever the causes, the discouragement of lone motherhood is a short-term effect. Ultimately, mothers and fathers can get along financially alone. So children born out of wedlock are raised, initially, by two cohabiting parents, many of whom later break up.

There are also cultural-ideological causes of Swedish family decline. Even more than in the United States, radical feminist and socialist ideas pervade the universities and the media. Many Scandinavian social scientists see marriage as a barrier to full equality between the sexes, and would not be sorry to see marriage replaced by unmarried cohabitation. A related cultural-ideological agent of marital decline is secularism. Sweden is probably the most secular country in the world. Secular social scientists (most of them quite radical) have largely replaced clerics as arbiters of public morality. Swedes themselves link the decline of marriage to secularism. And many studies confirm that, throughout the West, religiosity is associated with institutionally strong marriage, while heightened secularism is correlated with a weakening of marriage. Scholars have long suggested that the relatively thin Christianization of the Nordic countries explains a lot about why the decline of marriage in Scandinavia is a decade ahead of the rest of the West.

Are Scandinavians concerned about rising out-of-wedlock births, the decline of marriage, and ever-rising rates of family dissolution? No, and yes. For over 15 years, an American outsider, Rutgers University sociologist David Popenoe, has played Cassandra on these issues. Popenoe's 1988 book, "Disturbing the Nest," is still the definitive treatment of Scandinavian family change and its meaning for the Western world. Popenoe is no toe-the-line conservative. He has praise for the Swedish welfare state, and criticizes American opposition to some child welfare programs. Yet Popenoe has documented the slow motion collapse of the Swedish family, and emphasized the link between Swedish family decline and welfare policy.

For years, Popenoe's was a lone voice. Yet by the end of the nineties, the problem was too obvious to ignore. In 2000, Danish sociologist Mai Heide Ottosen published a study, "Samboskab, Aegteskab og Foraeldrebrud" ("Cohabitation, Marriage and Parental Breakup"), which confirmed the increased risk of family dissolution to children of unmarried parents, and gently chided Scandinavian social scientists for ignoring the "quiet revolution" of out-of-wedlock parenting.

Despite the reluctance of Scandinavian social scientists to study the consequences of family dissolution for children, we do have an excellent study that followed the life experiences of *all* children born in Stockholm in 1953. (Not coincidentally, the research was conducted by a British scholar, Duncan W.G. Timms.) That study found that regardless of income or social status, parental breakup had negative effects on children's mental health. Boys living with single, separated, or divorced mothers had particularly high rates of impairment in adolescence. An important 2003 study by Gunilla Ringbäck Weitoft, et al. found that children of single parents in Sweden have more than double the rates of mortality, severe morbidity, and injury of children in two parent households. This held true after controlling for a wide range of demographic and socioeconomic circumstances.

THE DECLINE OF MARRIAGE and the rise of unstable cohabitation and out-of-wedlock

childbirth are not confined to Scandinavia. The Scandinavian welfare state aggravates these problems. Yet none of the forces weakening marriage there are unique to the region. Contraception, abortion, women in the workforce, spreading secularism, ascendant individualism, and a substantial welfare state are found in every Western country. That is why the Nordic pattern is spreading.

Yet the pattern is spreading unevenly. And scholars agree that cultural tradition plays a central role in determining whether a given country moves toward the Nordic family system. Religion is a key variable. A 2002 study by the Max Planck Institute, for example, concluded that countries with the lowest rates of family dissolution and out-of-wedlock births are "strongly dominated by the Catholic confession." The same study found that in countries with high levels of family dissolution, religion in general, and Catholicism in particular, had little influence.

British demographer Kathleen Kiernan, the acknowledged authority on the spread of cohabitation and out-of-wedlock births across Europe, divides the continent into three zones. The Nordic countries are the leaders in cohabitation and out-of-wedlock births. They are followed by a middle group that includes the Netherlands, Belgium, Great Britain, and Germany. Until recently, France was a member of this middle group, but France's rising out-of-wedlock birthrate has moved it into the Nordic category. North American rates of cohabitation and out-of-wedlock birth put the United States and Canada into this middle group. Most resistant to cohabitation, family dissolution, and out-of-wedlock births are the southern European countries of Spain, Portugal, Italy, and Greece, and, until recently, Switzerland and Ireland. (Ireland's rising out-of-wedlock birthrate has just pushed it into the middle group.)

These three groupings closely track the movement for gay marriage. In the early nineties, gay marriage came to the Nordic countries, where the out-of-wedlock birthrate was already high. Ten years later, out-of-wedlock birth rates have risen significantly in the middle group of nations. Not coincidentally, nearly every country in that middle group has recently either legalized some form of gay marriage, or is seriously considering doing so. Only in the group with low out-of-wedlock birthrates has the gay marriage movement achieved relatively little success.

This suggests that gay marriage is both an effect and a cause of the increasing separation between marriage and parenthood. As rising out-of-wedlock birthrates disassociate heterosexual marriage from parenting, gay marriage becomes conceivable. If marriage is only about a relationship between two people, and is not intrinsically connected to parenthood, why shouldn't same-sex couples be allowed to marry? It follows that once marriage is redefined to accommodate same-sex couples, that change cannot help but lock in and reinforce the very cultural separation between marriage and parenthood that makes gay marriage conceivable to begin with.

We see this process at work in the radical separation of marriage and parenthood that swept across Scandinavia in the nineties. If Scandinavian out-of-wedlock birthrates had not already been high in the late eighties, gay marriage would have been far more difficult to imagine. More than a decade into post-gay marriage Scandinavia, out-of-wedlock birthrates have passed 50 percent, and the effective end of marriage as a protective shield for children has become thinkable. Gay marriage hasn't blocked the separation of marriage and parenthood; it has advanced it.

WE SEE THIS most clearly in Norway. In 1989, a couple of years after Sweden broke ground by offering gay couples the first domestic partnership package in Europe, Denmark legalized de facto gay marriage. This kicked off a debate in Norway (traditionally more conservative than either Sweden or Denmark), which legalized de facto gay marriage in 1993. (Sweden expanded its benefits packages into de facto gay marriage in 1994.) In liberal Denmark, where out-of-wedlock birthrates were already very high, the public favored same-sex marriage. But in Norway, where the out-of-wedlock birthrate was lower--and religion traditionally stronger--gay marriage was imposed, against the public will, by the political elite.

Norway's gay marriage debate, which ran most intensely from 1991 through 1993, was a culture-shifting event. And once enacted, gay marriage had a decidedly unconservative impact on Norway's cultural contests, weakening marriage's defenders, and placing a weapon in the hands of those who sought to replace marriage with cohabitation. Since its adoption, gay marriage has brought division and decline to Norway's Lutheran Church. Meanwhile, Norway's fast-rising out-of-wedlock birthrate has shot past Denmark's. Particularly in Norway--once relatively conservative--gay marriage has undermined marriage's institutional standing for everyone.

Norway's Lutheran state church has been riven by conflict in the decade since the approval of de facto gay marriage, with the ordination of registered partners the most divisive issue. The church's agonies have been intensively covered in the Norwegian media, which have taken every opportunity to paint the church as hidebound and divided. The nineties began with conservative churchmen in control. By the end of the decade, liberals had seized the reins.

While the most public disputes of the nineties were over homosexuality, Norway's Lutheran church was also divided over the question of heterosexual cohabitation. Asked directly, liberal and conservative clerics alike voice a preference for marriage over cohabitation--especially for couples with children. In practice, however, conservative churchmen speak out against the trend toward unmarried cohabitation and childbirth, while liberals acquiesce.

This division over heterosexual cohabitation broke into the open in 2000, at the height of the church's split over gay partnerships, when Prince Haakon, heir to Norway's throne, began to live with his lover, a single mother. From the start of the prince's controversial relationship to its eventual culmination in marriage, the future head of the Norwegian state church received tokens of public support or understanding from the very same bishops who were leading the fight to permit the ordination of homosexual partners.

So rather than strengthening Norwegian marriage against the rise of cohabitation and out-of-wedlock birth, same-sex marriage had the opposite effect. Gay marriage lessened the church's authority by splitting it into warring factions and providing the secular media with occasions to mock and expose divisions. Gay marriage also elevated the church's openly rebellious minority liberal faction to national visibility, allowing Norwegians to feel that their proclivity for unmarried parenthood, if not fully approved by the church, was at least not strongly condemned. If the "conservative case" for gay marriage had been valid, clergy who were supportive of gay marriage would have taken a strong public stand against unmarried heterosexual parenthood. This didn't happen. It was the conservative clergy who criticized the prince, while the liberal supporters of gay marriage tolerated his decisions. The message was not lost on ordinary Norwegians, who continued their flight to unmarried parenthood.

Gay marriage is both an effect and a reinforcing cause of the separation of marriage and

parenthood. In states like Sweden and Denmark, where out-of-wedlock birthrates were already very high, and the public favored gay marriage, gay unions were an effect of earlier changes. Once in place, gay marriage symbolically ratified the separation of marriage and parenthood. And once established, gay marriage became one of several factors contributing to further increases in cohabitation and out-of-wedlock birthrates, as well as to early divorce. But in Norway, where out-of-wedlock birthrates were lower, religion stronger, and the public opposed same-sex unions, gay marriage had an even greater role in precipitating marital decline.

SWEDEN'S POSITION as the world leader in family decline is associated with a weak clergy, and the prominence of secular and left-leaning social scientists. In the post-gay marriage nineties, as Norway's once relatively low out-of-wedlock birthrate was climbing to unprecedented heights, and as the gay marriage controversy weakened and split the once respected Lutheran state church, secular social scientists took center stage.

Kari Moxnes, a feminist sociologist specializing in divorce, is one of the most prominent of Norway's newly emerging group of public social scientists. As a scholar who sees both marriage and at-home motherhood as inherently oppressive to women, Moxnes is a proponent of nonmarital cohabitation and parenthood. In 1993, as the Norwegian legislature was debating gay marriage, Moxnes published an article, "Det tomme ekteskap" ("Empty Marriage"), in the influential liberal paper Dagbladet. She argued that Norwegian gay marriage was a sign of marriage's growing emptiness, not its strength. Although Moxnes spoke in favor of gay marriage, she treated its creation as a (welcome) death knell for marriage itself. Moxnes identified homosexuals--with their experience in forging relationships unencumbered by children--as social pioneers in the separation of marriage from parenthood. In recognizing homosexual relationships, Moxnes said, society was ratifying the division of marriage from parenthood that had spurred the rise of out-of-wedlock births to begin with.

A frequent public presence, Moxnes enjoyed her big moment in 1999, when she was embroiled in a dispute with Valgerd Svarstad Haugland, minister of children and family affairs in Norway's Christian Democrat government. Moxnes had criticized Christian marriage classes for teaching children the importance of wedding vows. This brought a sharp public rebuke from Haugland. Responding to Haugland's criticisms, Moxnes invoked homosexual families as proof that "relationships" were now more important than institutional marriage.

This is not what proponents of the conservative case for gay marriage had in mind. In Norway, gay marriage has given ammunition to those who wish to put an end to marriage. And the steady rise of Norway's out-of-wedlock birthrate during the nineties proves that the opponents of marriage are succeeding. Nor is Kari Moxnes an isolated case.

Months before Moxnes clashed with Haugland, social historian Kari Melby had a very public quarrel with a leader of the Christian Democratic party over the conduct of Norway's energy minister, Marit Arnstad. Arnstad had gotten pregnant in office and had declined to name the father. Melby defended Arnstad, and publicly challenged the claim that children do best with both a mother and a father. In making her case, Melby praised gay parenting, along with voluntary single motherhood, as equally worthy alternatives to the traditional family. So instead of noting that an expectant mother might want to follow the example of marriage that even gays were now setting, Melby invoked homosexual families as proof that a child can do as well with one parent as two.

Finally, consider a case that made even more news in Norway, that of handball star Mia Hundvin (yes, handball prowess makes for celebrity in Norway). Hundvin had been in a registered gay partnership with fellow handballer Camilla Andersen. These days, however, having publicly announced her bisexuality, Hundvin is linked with Norwegian snowboarder Terje Haakonsen. Inspired by her time with Haakonsen's son, Hundvin decided to have a child. The father of Hundvin's child may well be Haakonsen, but neither Hundvin nor Haakonsen is saying.

Did Hundvin divorce her registered partner before deciding to become a single mother by (probably) her new boyfriend? The story in Norway's premiere paper, Aftenposten, doesn't bother to mention. After noting that Hundvin and Andersen were registered partners, the paper simply says that the two women are no longer "romantically involved." Hundvin has only been with Haakonsen about a year. She obviously decided to become a single mother without bothering to see whether she and Haakonsen might someday marry. Nor has Hundvin appeared to consider that her affection for Haakonsen's child (also apparently born out of wedlock) might better be expressed by marrying Haakonsen and becoming his son's new mother.

Certainly, you can chalk up more than a little of this saga to celebrity culture. But celebrity culture is both a product and influencer of the larger culture that gives rise to it. Clearly, the idea of parenthood here has been radically individualized, and utterly detached from marriage. Registered partnerships have reinforced existing trends. The press treats gay partnerships more as relationships than as marriages. The symbolic message of registered partnerships--for social scientists, handball players, and bishops alike--has been that most any nontraditional family is just fine. Gay marriage has served to validate the belief that individual choice trumps family form.

The Scandinavian experience rebuts the so-called conservative case for gay marriage in more than one way. Noteworthy, too, is the lack of a movement toward marriage and monogamy among gays. Take-up rates on gay marriage are exceedingly small. Yale's William Eskridge acknowledged this when he reported in 2000 that 2,372 couples had registered after nine years of the Danish law, 674 after four years of the Norwegian law, and 749 after four years of the Swedish law.

Danish social theorist Henning Bech and Norwegian sociologist Rune Halvorsen offer excellent accounts of the gay marriage debates in Denmark and Norway. Despite the regnant social liberalism in these countries, proposals to recognize gay unions generated tremendous controversy, and have reshaped the meaning of marriage in the years since. Both Bech and Halvorsen stress that the conservative case for gay marriage, while put forward by a few, was rejected by many in the gay community. Bech, perhaps Scandinavia's most prominent gay thinker, dismisses as an "implausible" claim the idea that gay marriage promotes monogamy. He treats the "conservative case" as something that served chiefly tactical purposes during a difficult political debate. According to Halvorsen, many of Norway's gays imposed self-censorship during the marriage debate, so as to hide their opposition to marriage itself. The goal of the gay marriage movements in both Norway and Denmark, say Halvorsen and Bech, was not marriage but social approval for homosexuality. Halvorsen suggests that the low numbers of registered gay couples may be understood as a collective protest against the expectations (presumably, monogamy) embodied in marriage.

SINCE LIBERALIZING DIVORCE in the first decades of the twentieth century, the Nordic countries have been the leading edge of marital change. Drawing on the Swedish experience,

Kathleen Kiernan, the British demographer, uses a four-stage model by which to gauge a country's movement toward Swedish levels of out-of-wedlock births.

In stage one, cohabitation is seen as a deviant or avant-garde practice, and the vast majority of the population produces children within marriage. Italy is at this first stage. In the second stage, cohabitation serves as a testing period before marriage, and is generally a childless phase. Bracketing the problem of underclass single parenthood, America is largely at this second stage. In stage three, cohabitation becomes increasingly acceptable, and parenting is no longer automatically associated with marriage. Norway was at this third stage, but with recent demographic and legal changes has entered stage four. In the fourth stage (Sweden and Denmark), marriage and cohabitation become practically indistinguishable, with many, perhaps even most, children born and raised outside of marriage. According to Kiernan, these stages may vary in duration, yet once a country has reached a stage, return to an earlier phase is unlikely. (She offers no examples of stage reversal.) Yet once a stage has been reached, earlier phases coexist.

The forces pushing nations toward the Nordic model are almost universal. True, by preserving legal distinctions between marriage and cohabitation, reining in the welfare state, and preserving at least some traditional values, a given country might forestall or prevent the normalization of nonmarital parenthood. Yet every Western country is susceptible to the pull of the Nordic model. Nor does Catholicism guarantee immunity. Ireland, perhaps because of its geographic, linguistic, and cultural proximity to England, is now suffering from out-of-wedlock birthrates far in excess of the rest of Catholic Europe. Without deeming a shift inevitable, Kiernan openly wonders how long America can resist the pull of stages three and four.

Although Sweden leads the world in family decline, the United States is runner-up. Swedes marry less, and bear more children out of wedlock, than any other industrialized nation. But Americans lead the world in single parenthood and divorce. If we bracket the crisis of single parenthood among African-Americans, the picture is somewhat different. Yet even among non-Hispanic whites, the American divorce rate is extremely high by world standards.

The American mix of family traditionalism and family instability is unusual. In comparison to Europe, Americans are more religious and more likely to turn to the family than the state for a wide array of needs--from child care, to financial support, to care for the elderly. Yet America's individualism cuts two ways. Our cultural libertarianism protects the family as a bulwark against the state, yet it also breaks individuals loose from the family. The danger we face is a combination of America's divorce rate with unstable, Scandinavian-style out-of-wedlock parenthood. With a growing tendency for cohabiting couples to have children outside of marriage, America is headed in that direction.

Young Americans are more likely to favor gay marriage than their elders. That oft-noted fact is directly related to another. Less than half of America's twentysomethings consider it wrong to bear children outside marriage. There is a growing tendency for even middle class cohabiting couples to have children without marrying.

Nonetheless, although cohabiting parenthood is growing in America, levels here are still far short of those in Europe. America's situation is not unlike Norway's in the early nineties, with religiosity relatively strong, the out-of-wedlock birthrate still relatively low (yet rising), and the public opposed to gay marriage. If, as in Norway, gay marriage were imposed here by a

socially liberal cultural elite, it would likely speed us on the way toward the classic Nordic pattern of less frequent marriage, more frequent out-of-wedlock birth, and skyrocketing family dissolution.

In the American context, this would be a disaster. Beyond raising rates of middle class family dissolution, a further separation of marriage from parenthood would reverse the healthy turn away from single-parenting that we have begun to see since welfare reform. And cross-class family decline would bring intense pressure for a new expansion of the American welfare state.

All this is happening in Britain. With the Nordic pattern's spread across Europe, Britain's out-of-wedlock birthrate has risen to 40 percent. Most of that increase is among cohabiting couples. Yet a significant number of out-of-wedlock births in Britain are to lone teenage mothers. This a function of Britain's class divisions. Remember that although the Scandinavian welfare state encourages family dissolution in the long term, in the short term, Scandinavian parents giving birth out of wedlock tend to stay together. But given the presence of a substantial underclass in Britain, the spread of Nordic cohabitation there has sent lone teen parenting rates way up. As Britain's rates of single parenting and family dissolution have grown, so has pressure to expand the welfare state to compensate for economic help that families can no longer provide. But of course, an expansion of the welfare state would only lock the weakening of Britain's family system into place.

If America is to avoid being forced into a similar choice, we'll have to resist the separation of marriage from parenthood. Yet even now we are being pushed in the Scandinavian direction. Stimulated by rising rates of unmarried parenthood, the influential American Law Institute (ALI) has proposed a series of legal reforms ("Principles of Family Dissolution") designed to equalize marriage and cohabitation. Adoption of the ALI principles would be a giant step toward the Scandinavian system.

AMERICANS take it for granted that, despite its recent troubles, marriage will always exist. This is a mistake. Marriage is disappearing in Scandinavia, and the forces undermining it there are active throughout the West. Perhaps the most disturbing sign for the future is the collapse of the Scandinavian tendency to marry after the second child. At the start of the nineties, 60 percent of unmarried Norwegian parents who lived together had only one child. By 2001, 56 percent of unmarried, cohabiting parents in Norway had two or more children. This suggests that someday, Scandinavian parents might simply stop getting married altogether, no matter how many children they have.

The death of marriage is not inevitable. In a given country, public policy decisions and cultural values could slow, and perhaps halt, the process of marital decline. Nor are we faced with an all-or-nothing choice between the marital system of, say, the 1950s and marriage's disappearance. Kiernan's model posits stopping points. So repealing no-fault divorce, or even eliminating premarital cohabitation, are not what's at issue. With no-fault divorce, Americans traded away some of the marital stability that protects children to gain more freedom for adults. Yet we can accept that trade-off, while still drawing a line against descent into a Nordic-style system. And cohabitation as a premarital testing phase is not the same as unmarried parenting. Potentially, a line between the two can hold.

Developments in the last half-century have surely weakened the links between American marriage and parenthood. Yet to a remarkable degree, Americans still take it for granted that

parents should marry. Scandinavia shocks us. Still, who can deny that gay marriage will accustom us to a more Scandinavian-style separation of marriage and parenthood? And with our underclass, the social pathologies this produces in America are bound to be more severe than they already are in wealthy and socially homogeneous Scandinavia.

All of these considerations suggest that the gay marriage debate in America is too important to duck. Kiernan maintains that as societies progressively detach marriage from parenthood, stage reversal is impossible. That makes sense. The association between marriage and parenthood is partly a mystique. Disenchanted mystiques cannot be restored on demand.

What about a patchwork in which some American states have gay marriage while others do not? A state-by-state patchwork would practically guarantee a shift toward the Nordic family system. Movies and television, which do not respect state borders, would embrace gay marriage. The cultural effects would be national.

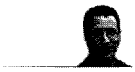
What about Vermont-style civil unions? Would that be a workable compromise? Clearly not. Scandinavian registered partnerships *are* Vermont-style civil unions. They are not called marriage, yet resemble marriage in almost every other respect. The key differences are that registered partnerships do not permit adoption or artificial insemination, and cannot be celebrated in state-affiliated churches. These limitations are gradually being repealed. The lesson of the Scandinavian experience is that even de facto same-sex marriage undermines marriage.

The Scandinavian example also proves that gay marriage is not interracial marriage in a new guise. The miscegenation analogy was never convincing. There are plenty of reasons to think that, in contrast to race, sexual orientation will have profound effects on marriage. But with Scandinavia, we are well beyond the realm of even educated speculation. The post-gay marriage changes in the Scandinavian family are significant. This is not like the fantasy about interracial birth defects. There is a serious scholarly debate about the spread of the Nordic family pattern. Since gay marriage is a part of that pattern, it needs to be part of that debate.

Conservative advocates of gay marriage want to test it in a few states. The implication is that, should the experiment go bad, we can call it off. Yet the effects, even in a few American states, will be neither containable nor revocable. It took about 15 years after the change hit Sweden and Denmark for Norway's out-of-wedlock birthrate to begin to move from "European" to "Nordic" levels. It took another 15 years (and the advent of gay marriage) for Norway's out-of-wedlock birthrate to shoot past even Denmark's. By the time we see the effects of gay marriage in America, it will be too late to do anything about it. Yet we needn't wait that long. In effect, Scandinavia has run our experiment for us. The results are in.

Stanley Kurtz is a research fellow at the Hoover Institution. His "Beyond Gay Marriage" appeared in our August 4, 2003, issue.

Stanley Kurtz
NRO Contributing Editor



February 02, 2004, 9:17 a.m.

Slipping Toward Scandinavia

Contra Andrew Sullivan.

In "The End of Marriage in Scandinavia," I show that gay marriage has helped hasten the decline of marriage. Andrew Sullivan dismisses my argument, claiming I fail to show causality, and draw impermissible inferences about gay marriage from Scandinavian registered partnerships. Trouble is, when Sullivan thought he could prove that marriage is *not* undermined by registered partnerships, he was happy to argue causality, and eager to equate registered partnerships with gay marriage. Now that we see that Scandinavian marriage is in a state of collapse, Sullivan pretends that Scandinavia has no relevance to the gay-marriage debate. In the meantime, Sullivan ignores one of the key points of my piece — that Scandinavian gays themselves have rejected the "conservative case" for gay marriage. To see why Sullivan is wrong, let's take a look at marriage in Norway.

Consider "Church flies gay flag," a story from the English-language edition of *Aftenposten*, Norway's premiere newspaper. Two parish councils in northern Norway recently voted to fly rainbow flags on their churches. The flags signal that no one in these churches — priests included — may speak or preach against homosexual behavior. The flags also welcome gay clergy, including those who live in "registered partnerships" (i.e. de facto gay marriage).

Obviously, in the county of Nordland, where these two parishes are located, gay marriage has achieved a high degree of acceptance. After all, the Lutheran church has long led the opposition to gay marriage in Norway. One of the few things distinguishing same-sex registered partnerships from marriage is that they cannot be celebrated in the Norwegian state church. And the ordination of clergy in registered gay partnerships is the most divisive question in the church. So when two parishes in the same county fly the rainbow flag to welcome partnered gay clergy, gay marriage has obviously achieved an extraordinary degree of popular acceptance.

That acceptance isn't total. Many are unhappy with the flags — and the silencing of conservative congregants and priests that the flags symbolize. And as the original news accounts make clear, these parish councils are acting in defiance of their bishop. Clearly, though, Nordland is a socially liberal county in which gay marriage has achieved a high degree of acceptance. So what's the state of marriage in Nordland?

Marriage in Nordland is in severe decline. In 2002, an extraordinary 82.27 percent of first-born children in Nordland were born out-of-wedlock. A "mere" 67.29 percent of all children born in Nordland in 2002 were born out-of-

wedlock. As I explained in "The End of Marriage in Scandinavia," many of these births are to unmarried, but cohabiting, couples. Yet cohabiting couples in Scandinavia break up at two to three times the rate of married couples. Since the Norwegian tendency to marry after the second child is gradually giving way, it is likely that the 67-percent figure for all out-of-wedlock births will someday catch up to the 82-percent figure for first-born out-of-wedlock births. At that point, marriage in Nordland will be effectively dead.

Now consider the county of Nord-Troendelag, which is bordered by NTNU (Norwegian University of Science and Technology). NTNU is where Kari Moxnes and Kari Melby teach — two radical pro-gay marriage social scientists. Nord-Troendelag is like Massachusetts — a socially liberal state influenced by left-leaning institutions of higher learning. In Nord-Troendelag in 2002, the out-of-wedlock birthrate for first-born children was 83.27 percent. The out-of-wedlock birthrate for all children was 66.85 percent. These rates are far higher than the rates for Norway as a whole.

When we look at Nordland and Nord-Troendelag — the Vermont and Massachusetts of Norway — we are peering as far as we can into the future of marriage in a world where gay marriage is almost totally accepted. What we see is a place where marriage itself has almost totally disappeared.

The story of the rainbow flag in Nordland embodies one of the causal mechanisms I outlined in "The End of Marriage in Scandinavia." There I showed that gay marriage had split the Norwegian church and weakened the position of those clergy most likely to speak out against the trend toward unmarried parenthood among heterosexuals. In Norway, the clergy most accepting of gay marriage are the clergy least likely to criticize unmarried parenthood. With priests who see homosexuality as sinful effectively banned from churches, their criticisms of out-of-wedlock parenthood will be lost as well. Since traditional religion is one of the strongest barriers to out-of-wedlock births (conservative religious districts in Norway have by far the lowest rates), it's obvious that the flag movement will help remove a key counterforce to the decline of marriage. And it is very unlikely that conservative priests would have been so thoroughly and effectively banned if the issue were only unmarried heterosexual parenthood. It took the question of homosexuality to produce what amounts to a near total purge of conservative clergy from Nordland's churches.

The deeper point is that, contrary to the "conservative case," those who favor gay marriage tend to favor or condone unmarried parenthood. The connection between gay marriage and unmarried parenthood extends to all sectors of Scandinavian society — religious or not. So when professors from NTNU use the example of gay marriage to argue that marriage is unnecessary for parenthood — they have just as much effect on their secular "congregations" as Lutheran clergy have on theirs.

Although Andrew Sullivan has challenged my causal analysis, the causal mechanisms I've described here are of the same type social scientists use to explain trends in marriage. Scholars agree that, when it comes to the out-of-wedlock birthrate, ideas and values are key variables. They establish causal

links by noting broad correlations (like the low rate of out-of-wedlock births in religiously conservative districts of Norway), and then connecting those correlations to a cultural analysis. If religious districts have low out-of-wedlock birthrates, and if clergy preach against unmarried parenthood, it's reasonable to conclude that religion contributes to low out-of-wedlock birthrates.

The causal mechanisms I've outlined are of just this sort. One district bans clergy who oppose gay marriage (and these same clergy are the ones who criticize unmarried parenthood). Another district lionizes leftist professors who cite gay unions to prove that marriage has no intrinsic connection to parenthood. If both districts have high out-of-wedlock birthrates, it's reasonable to conclude that gay marriage contributes to those rates. Andrew Sullivan can reject that sort of analysis if he likes, but why does he accept the idea that secularism has an influence on marriage? The causal mechanism in the case of secularism is no different in kind than the mechanism I use in my own analysis. The truth is, Sullivan doesn't object to the causal analysis. He objects to what I've found.

Sullivan says there are too many independent variables to separate out gay marriage as a cause of marital decline. I've just explained how gay marriage can be separated out as a cause. But think about what Sullivan is saying. Sullivan is really saying he'll never accept any claim that gay marriage harms marriage. If the mere existence of prior causes of marital decline makes it impossible to isolate new factors, then the offer of state-by-state "experiments" in gay marriage is bogus. No matter how bad things get — and no matter how clearly we show a cultural connection between attitudes toward gay marriage and marital decline — Sullivan will deny that gay marriage makes any contribution to the problem.

Of course, when Sullivan thought he had statistical proof that heterosexual marriage was doing well in post-gay marriage Scandinavia, he was eager to play social scientist. Take a look at "Unveiled," the piece where Sullivan relies on an unpublished study by a kid barely out of college to prove his "conservative case" for gay marriage. When Sullivan thought he had proof that heterosexual marriage was not undermined by gay marriage, he was more than happy to tout the Scandinavian example. If it's really impossible to disentangle the gay-marriage variable, why did Sullivan introduce data in the first place?

But now, after I've exploded his use of the Spedale study, Sullivan claims that Scandinavian registered partnerships "have no relevance" to the gay marriage debate. Sullivan sure thought registered partnerships had relevance to gay marriage in 2001. But after having seen the collapse of marriage in Scandinavia, Sullivan says registered partnerships "have no relevance" to marriage.

As for Sullivan's complaint about my use of the terms "de facto gay marriage" or "gay marriage" for Scandinavian registered partnerships, I've simply adopted Sullivan's own language. In "Unveiled," Sullivan himself calls registered partnerships "de facto gay marriage" and "gay marriage." And by the way, in "Unveiled," Sullivan used data on Vermont's civil unions to draw conclusions about "gay marriage." Yet now Sullivan is attacking me for doing exactly what

he did three years ago.

Sullivan is wrong to say that Scandinavian registered partnerships are open to heterosexuals. They're not. Sullivan wants to claim that registered partnerships are a "marriage lite" that attracts large numbers of heterosexuals and thus weaken conventional marriage. This is how Sullivan wants to explain the decline of Scandinavian marriage. But Scandinavian heterosexuals do not enter into registered partnerships, so Sullivan's way of explaining the decline of marriage in Scandinavia is wrong. (I see Sullivan has now corrected his error. But he's avoided acknowledging that his mistake sinks his explanation for the link between gay marriage and the decline of marriage in Scandinavia.)

While we're at it, where is Sullivan's causal warrant for the "conservative case" for gay marriage? How can Sullivan proclaim with such confidence that gay marriage will strengthen marriage when (according to his new position, anyway) formal gay marriage has existed only for a couple of years in the Netherlands, and no other evidence has any bearing on the question? If Sullivan is such an empiricist, why doesn't he express more uncertainty about the effects of gay marriage? Given the fact that marriage is fast disappearing in the very places most hospitable to gay marriage, you'd think Sullivan might at least consider the possibility that his totally ungrounded predictions about the future are wrong.

And note that "The End of Marriage in Scandinavia" refutes the "conservative case" for gay marriage on several matters that have nothing to do with the causal question. Scandinavian gays have not taken to monogamous marriage, and they openly reject the "conservative case" for gay marriage. Sullivan says nothing in response to these points.

The mechanism by which gay marriage undermines marriage is easy to grasp. We see it at work in Sullivan's own writings — including his reply to me. Sullivan claims that "coupling — not procreation — is what civil marriage now is." That is false. Just because we can find cases in which infertile couples marry, Sullivan thinks he's proven that marriage has nothing to do with parenthood. But marriage and parenthood are still deeply linked. That is why Scandinavia's practice of unmarried parenthood shocks us.

Scholars treat the connection between marriage and parenthood as something that erodes gradually. That is why Sullivan is mistaken to say that American marriage is about coupling, not procreation. The connection between American marriage and parenting may have diminished, but it is far from gone — as is quickly revealed by the European comparison.

But every time Andrew Sullivan claims that marriage is about coupling, not procreation, he helps weaken the connection between marriage and parenting in America. The gay-marriage debate is eroding the cultural connection between marriage and parenthood. Despite all the changes in marriage since the Sixties, Americans have a long way to go before marriage and parenthood are decoupled to the degree that they are now in Nordland and Nord-Troendelag. There is more than enough scope for a new factor to intervene and heighten that separation. This is exactly what gay marriage has done in Scandinavia —

and is doing right now in America, especially through the work of Andrew Sullivan.

I don't mean to deny Sullivan the right to advocate for gay marriage. He has every right. But the fact is, Andrew Sullivan himself is the causal mechanism by which gay marriage undermines marriage. His persistent belittling of the connection between marriage and parenthood and his attempts to elevate infertile exceptions into the rule for a transformed understanding of marriage are laying the cultural groundwork for a Scandinavian-style disappearance of marriage in the United States.

I end with three questions for Andrew Sullivan. 1) Is it mere coincidence that in districts of Norway where de facto gay marriage (your phrase) is most accepted, marriage itself is virtually dead? 2) If this is not pure coincidence, how would you explain the connection? (Remember, your marriage-lite theory doesn't work.) 3) Would it be possible for gay marriage to be an effect of the decline of marriage, without also becoming a contributing cause?

Stanley Kurtz
NRO Contributing Editor

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Deathblow to Marriage

Gay marriage has real implications.

On Wednesday, the Massachusetts Supreme Judicial Court unambiguously mandated the granting of marriage licenses to same-sex couples. The decision will take effect in about three and a half months. The time will come to debate the tactics of the gay-marriage battle. Right now is a moment for sober reflection on what is at stake.

At issue in the gay-marriage controversy is nothing less than the existence of marriage itself. This point is vehemently denied by the proponents of gay marriage, who speak endlessly of marriage's adaptability and "resilience." But if there is one thing I think I've established in my recent writing on Scandinavia, it is that marriage can die — and is in fact dying — somewhere in the world. In fact, marriage is dying in the very the same place that first recognized gay marriage.

In setting up the institution of marriage, society offers special support and encouragement to the men and women who together make children. Because marriage is deeply implicated in the interests of children, it is a matter of public concern. Children are helpless. They depend upon adults. Over and above their parents, children depend upon society to create institutions that keep them from chaos. Children cannot articulate their needs. Children cannot vote. Yet children *are* society. They are us, and they are our future. That is why society has the right to give special support and encouragement to an institution that is necessary to the well being of children — even if that means special benefits for some, and not for others. The dependence intrinsic to human childhood is why unadulterated libertarianism can never work.

The "discrimination" inherent in the legal institution of marriage is relatively minor. Single people are "discriminated against" by the benefits granted to married couples. Those who prefer to live with multiple lovers are also "discriminated against" by the institution of marriage. So, too, are same-sex couples "discriminated against" by marriage. Each of these groups is now demanding redress from this "discrimination." Such redress will spell the end of marriage.

The difficulties and challenges of gays are special precisely because they do *not* derive from the "discrimination" of marriage. The real source of the challenges of gay life is the problem of sexual difference. It is terribly difficult to grow up with a different sort of sexuality than most of the world around you. Marriage does not cause this problem, and it cannot solve it.

Yet, out of understandable compassion for the sorrows and difficulties of gays, many Americans want to offer marriage as a kind of consolation or remedy for the challenges inherent in the gay situation. The increased social tolerance for gays in America is largely a good thing, as far as I'm concerned. But using marriage to accomplish a purpose for which it was not intended — and which it cannot fulfill — will not fundamentally alter the situation of gays. It will, however, spell the end of marriage, and of the protection marriage offers to vulnerable children who cannot vote or articulate their interests. The number of children potentially endangered by the collapse of marriage is far larger than the number of gays or "polyamorists." The number of single people who will never marry is substantial and growing, yet society is right to "discriminate" against these single people in ways that are relatively modest — but which sustain an institution that protects children.

THE ROOT CAUSE

I believe I have established that marriage in Scandinavia is dying. No one has disputed this. Instead it is objected that gay marriage is not a cause of this demise, but only an effect. I would like someone to explain how gay marriage could be *only* an effect of the decline of marriage, without also being a reinforcing cause. How can a change that becomes imaginable only after marriage has been separated from parenthood fail to lock in and reinforce that very separation?

In Sweden, where marriage was already radically separated from parenthood, and largely equalized with cohabitation in legal-financial terms, gay marriage was more effect than cause. But in Norway, where the decline of marriage was only partial, gay marriage had a greater role as a facilitator of marital decline than it did in Sweden. In the United States, the effect of gay marriage would be massive.

As of now (and in substantial contrast to Scandinavia), the legal distinction between marriage and cohabitation in America is strong. Yet important proposals from the American Law Institute would put us on the Scandinavian path. In America, gay marriage would be the leading edge of the Scandinavian system — not the tail-end, as it was in Sweden. Gay marriage would accustom us to think about marriage in Scandinavian terms — to think of marriage as substantially unrelated to parenthood. And that would lead us to adopt legal reforms that already loom — reforms that would lock us in to the Scandinavian pattern of marital decline.

Everywhere, gay marriage is both an effect and a cause of marital decline. But in America, gay marriage would have even more causal impact than it did in Norway — and far more than in Sweden.

Having touched on the larger issues. Let me now take up my debate with Andrew Sullivan on the meaning of Scandinavian gay marriage. Because I see the Scandinavian example as the empirical key to the gay-marriage controversy, this issue has got to be hashed out.

Andrew Sullivan has responded to my "Slipping Toward Scandinavia." I'm struck by what Sullivan does not say. He does not meet my points about causal arguments. He continues to withhold comment on the failure of Scandinavian

gays to embrace the "conservative case" for gay marriage. And Sullivan has no response to the three questions with which I ended my piece. Sullivan has no real answer to my point that he himself has used Scandinavian registered partnership and Vermont's civil unions to draw conclusions about gay marriage's effect on heterosexual marriage. (While we're at it, Sullivan has never offered anything close to a serious response to my earlier piece, "Beyond Gay Marriage.")

Instead of meeting my points in "Slipping Toward Scandinavia," Sullivan focuses on early reports that Scandinavian registered partnerships showed lower divorce rates than heterosexual marriages. Even if true, that would not meet my central point about the effect of gay marriage on heterosexual marriage. But it turns out that the divorce rate among same-sex registered partners in Sweden is substantially higher than the rate among heterosexuals. European demographers Gunnar Andersson and Turid Noack report that male same-sex partnerships in Sweden have a 50-percent higher divorce rate than heterosexual marriages. Perhaps surprisingly, female same-sex partnerships in Sweden have a 170-percent higher divorce risk than heterosexual marriages. What Andersson and Noack call this "super risk of divorce" holds true even when controlling for various demographic variables.

Nonetheless, this information on high divorce risk for same-sex couples may be less significant than the fact that we are dealing with a strikingly small population — too small to draw clear conclusions. In Norway, same-sex registered partnerships form only .68 percent as often as heterosexual marriages. In Sweden, registered partnerships form only .55 percent as often as heterosexual marriages (i.e. about one half of 1 percent as often). The symbolic effect of registered partnerships on the meaning of Scandinavian marriage has been great — stimulating major national debates that continue to drag on (over issues like gay adoption, and rainbow flags on churches). But the actual number of Scandinavian registered partners is exceedingly small — even taking into account that gays represent only a few percent of the population.

In addition to some preliminary indications that same-sex registered partnerships may not be as stable as heterosexual marriages, it's of interest that a much higher proportion of same-sex spouses tend to be over 40 years of age. In Sweden, for example, half of all male partnerships are entered into by at least one spouse over 40. In contrast, only 14 percent of opposite-sex marriages involved such senior spouses. This suggests that even when same-sex couples do marry, the effect on sexual behavior is minimal. That's because they wait until their later years to wed. True, some of this age discrepancy may be due to same-sex couples who might have married at younger ages "catching up" after legalization. Even so, the age discrepancy is striking, and may have more general significance.

In short, current data on same-sex registered partnerships in Scandinavia suggest that the effect of marriage on gay monogamy will be minimal. Exceedingly few couples marry. Those few who do marry are significantly older. And in Sweden at least, same-sex couples divorce at a significantly higher rate. But the biggest imponderable here is Sullivan's assumption that marriage does in fact indicate monogamous behavior — or even monogamy as

an ideal — among same-sex couples. In my earlier piece, "Beyond Gay Marriage," I showed that this can by no means be assumed. So in Scandinavia, exceedingly few gays marry at all. And we don't even know if those very few who do marry practice or strive for monogamy.

TEXAS VS. MASSACHUSETTS

In response to my pointing out that marriage has virtually disappeared in the most gay-marriage friendly districts of Norway, Sullivan offers a comparison between marriage and divorce rates in "pro-gay" Massachusetts and "anti-gay" Texas. It turns out that more people marry and fewer divorce in Massachusetts than in Texas. So, says Sullivan, by "Kurtz's Norwegian logic," we all ought to imitate socially liberal Massachusetts.

Actually, the Massachusetts/Texas contrast has a lot to do with differences in relative levels of education and wealth. Other factors play in as well, like relative stability of residence in Massachusetts, and relative residential transiency in Texas. But probably the most interesting and important factor at play in the Massachusetts/Texas contrast is the strong presence of Roman Catholics in Massachusetts. Catholics tend to divorce at significantly lower rates than other religious groups. The public in Massachusetts is split on gay marriage, and the large Catholic population generally opposes it. So Sullivan is actually holding up the marital behavior of Catholic opponents of gay marriage as a model.

In comparison to the polyglot populations of large American states, Norwegian counties like Nordland and Nord-Troendelag are socially homogeneous. The social liberalism of these Norwegian counties can be linked to their high out-of-wedlock birthrates far more reliably than low divorce rates can be linked to social liberalism in Massachusetts.

Finally, Sullivan claims that however desirable it may be to connect marriage and parenthood, the empirical reality of marriage in America is that most married couples have no children. This is a deeply misleading statistical trick. Sullivan tries to deflect criticism here by conceding that at least some cases of married couples without children at home may simply be older couples whose children are now in school. But Sullivan's statistics disguise just how profoundly marriage and child bearing are still are still connected in American culture.

Justin Katz nicely dissipates Sullivan's statistical fog. Katz shows that it is clearly the norm for married American women of child-bearing age to have children. Most people who get married are planning to have children. The fact that older couples have kids off in college does nothing to change that fact. The striking thing about Americans — and it's evident immediately on comparison with Scandinavia — is just how closely we continue to associate marriage with parenthood. Every time Andrew Sullivan makes his case that marriage and parenthood are not connected, he is harming marriage. I know this is far from Sullivan's intention (and I respect his intentions). But the harm to marriage is real nonetheless.

The debate will go on. I believe the coming weeks and months will show that

we are just beginning to learn what is really at stake in the gay-marriage controversy. The Massachusetts Supreme Judicial Court has acted precipitously, and without due regard to the immensity and complexity of the institution they are tampering with. The mere fact that the real situation of marriage in Scandinavia — and Europe as a whole — is almost entirely unknown in the United States should be enough to give us pause. Unfortunately, we are now obliged to do battle against judges who haven't the foggiest notion of the real implications of their actions (much less respect for the democratic process).

Some say this battle is lost. I don't think it is. The coming year or two will tell the tale. There are surprises yet to come, and moments when those of us who see gay marriage as a mistake will have a chance to rally and turn the tide. The stakes are nothing less than the survival of marriage itself.

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http://www.nationalreview.com/kurtz/kurtz200402050842.asp

Stanley Kurtz
NRO Contributing Editor

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Strange Bedfellows

Looking at marriage as all or nothing.

Has Andrew Sullivan abandoned his "conservative case" for gay marriage? Apparently so. I've already shown that the Scandinavian experience empirically refutes Sullivan's "conservative case." Yet now, instead of arguing that gay marriage will strengthen marriage itself, Sullivan claims that gay marriage cannot harm an institution that is already effectively dead. Sullivan seizes on a piece by "Christian traditionalist" Donald Sensing to make this point.

Sensing argues that, by allowing sex without consequences, the birth-control pill has already killed marriage. Having severed the connection between marriage and childbearing, the pill, says Sensing, ushered in an era of cohabitation, thereby putting an end to the social regulation of sex and procreation. Sensing argues that gay marriage is merely an outgrowth of these earlier trends — a final stage in the unraveling of an institution that has already lost its central function.

It's true that the pill and its consequences have substantially weakened marriage, yet Sensing is wrong to say that nothing remains of marriage that can or should be saved. Sensing's traditionalism blinds him to the enormous remaining strengths of contemporary American marriage. How odd and interesting that Andrew Sullivan, for all his many swipes at Christian traditionalists, should ally himself with this all-or-nothing view of marriage.

PARENTING MEANS MARRYING

Here is what Sensing misses: In America, parenthood still means marriage. Despite the problems of the underclass, and despite the prevalence of *premarital* cohabitation, the vast majority of Americans believe that parents ought to be married. True, divorce has seriously disrupted the connection between marriage and parenthood. Yet a comparison to Scandinavia and the rest of Europe immediately reveals that Americans who wish to become parents marry.

It's easy for a traditionalist like Sensing to overlook the enormous remaining strength of the connection between marriage and parenthood in America — because traditionalists compare the present to the model of marriage that prevailed in the '50s. But compare the America of today to what is happening in Scandinavia — or to the utopian visions of the anti-marriage radicals — and the recalcitrant influence of tradition on the present shines clear. For all the hits that marriage has taken, the connection between marriage and parenthood in America is still surprisingly robust.

Let's turn our gaze from a despairing traditionalist like Sensing to a despairing radical, like American University law professor Nancy Polikoff. (Polikoff is one of the family-law radicals I wrote about in "Beyond Gay Marriage.") Polikoff would like to see legal marriage abolished. For Polikoff, gay marriage is only acceptable if it serves as a means to that end.

In a 2000 piece in the *American University Journal of Gender, Social Policy & the Law*, Polikoff looks back with nostalgia to the '60s, and is openly despondent over the tendency of contemporary American mothers to marry:

> While rejecting an institution they believed incapable of transformation, for a brief historical moment heterosexual feminists chose not to marry but rather to live with their male partners, and raise children. That moment passed at least twenty years ago. Today, although premarital cohabitation is common, long-term voluntary, non-marital cohabitation, especially if it includes children, is not truly a choice. ... I have yet to find one woman who believed she could exercise a choice not to marry. One student ... swore she would not marry out of solidarity with lesbians and gay men who could not. A few years after graduation, a colleague of mine received an invitation to her wedding.

DRAWING THE LINE

Polikoff would like nothing more than for American marriage to be replaced by the system of parental cohabitation that now dominates Scandinavia. Her very embrace of that goal shows that, in her mind's eye, Polikoff understands — in a way Sensing does not — just how strong the relationship between American marriage and parenthood remains.

Sensing is right that the pill has weakened American marriage, but is wrong to treat the link between marriage and parenthood as an all-or-nothing connection that is gone for good. That is why Sensing is wrong about the causal significance of gay marriage: While it's true that the movement for gay marriage is an effect of the pill — and of the other forces weakening traditional marriage — it is also true that gay marriage would immensely further marital decline, by breaking the remaining (and remarkably powerful) connection between marriage and parenthood. Gay marriage — part and parcel of the radical separation of marriage and parenthood that dominates in Scandinavia — would move us toward that system of parental cohabitation, favored by radicals like Polikoff, yet still thankfully alien to the vast majority of Americans.

This is why Sullivan is mistaken to imply that opposition to gay marriage must be motivated by a hatred of homosexuals. Sullivan says he's "morally troubled" that gay-marriage opponents accept so much of marriage's weakened state, yet "draw the line" at homosexual unions. It's true that I see a complete restoration of the family system of the '50s as neither possible nor desirable. It's also true that gay marriage is one place at which I "draw the line" against further change. Yet Sullivan is mistaken to imply that I — and other opponents of homosexual unions — "draw the line" only at gay marriage, and not also at a series of other reforms that apply to heterosexuals.

THE DIVORCE QUESTION

I believe that the greatest current threat to American marriage is the worldwide spread of the Scandinavian system, because its expansion would put an end to the remaining and surprisingly healthy connection between American marriage

and parenthood. In fact, the American Law Institute has proposed an equalization of cohabitation and marriage along Scandinavian lines, and, as I have said repeatedly, I oppose it. So it is simply wrong to imply that I am only concerned about changes in marriage that apply only to homosexuals: The ALI proposals affect heterosexuals.

But what about divorce? Gay-marriage advocates often bring it up. Shouldn't someone who wants to strengthen marriage favor a constitutional amendment that would ban divorce? Well, I am not a religious traditionalist in the mold of Donald Sensing. I am very concerned about the implications of divorce for children, but I do not believe that it is either possible or desirable to repeal no-fault divorce. (Nor do I believe that we ought to return to the '50s view of homosexuality. I long supported the repeal of sodomy laws for that reason.)

Sensing may overlook the existing strengths of American marriage, but he is correct to imply that the traditional system is scarcely workable in the wake of the pill. The real question is whether we can preserve, and perhaps even strengthen, the remaining connection between marriage and parenthood, even if a total return to the '50s is untenable.

SCORCHED-EARTH MARRIAGE REFORM?

The best way to achieve this middle point (between the '50s and the '60s) is to pass an amendment defining marriage as the union of a man and a woman — *and* to block the equalization of marriage and cohabitation proposed by the American Law Institute. Once that's achieved, we can concentrate on feasible divorce reform. As I've said before, I think a waiting period for divorce for couples with children is the way to go. That "draws the line" where it needs to be drawn — at the connection between marriage and parenthood.

There is something deeply damaging to marriage in the all-or-nothing approaches of both Sensing and Sullivan. I certainly respect the efforts — especially their intellectual consistency — of religious traditionalists to work toward a full restoration of the family system of the '50s, even if I don't happen to share that policy. In truth, American marriage would be long gone if not for the efforts of Christian traditionalists, and for that we are all in their debt. Yet the all-or-nothing position can also slip into despair and defeatism in the wake of the innovations Sensing describes. That is the weakness of the traditionalists.

And the all-or-nothing polemic of gay-marriage advocates plays all too easily on the ambivalence of those Americans in the moderate middle ground on family issues. Increasingly, gay-marriage advocates are trying to set up an equation by which acceptance of contraception, no-fault divorce, and premarital cohabitation must inevitably entail acceptance of gay marriage. Logically, that does not follow: We can, and should, draw a line between them.

NOT THE SAME THING

The marriage debate is oddly similar to our divisions over the war on terror. For some Americans, to accept the president's tough policy on terror would be to repudiate their own earlier dovishness. Can you support the war in Iraq if you opposed the war in Vietnam? Would that mean you had betrayed your

earlier pacifism, or would it mean that Vietnam and Iraq are entirely different matters? Likewise, can you oppose gay marriage if you've been divorced — or even if you simply don't want to repeal no-fault divorce? Would protecting traditional marriage be an admission that divorce is unacceptable, or would it be an acknowledgment of the fact that the two issues are not the same?

What Andrew Sullivan's odd alliance with a (despairing) Christian traditionalist misses is that those middle-ground Americans who oppose gay marriage, yet also oppose a return to the '50s, are the same Americans who have repudiated traditional attitudes toward homosexuality. Sullivan would have us make a radical choice. According to him, we must either all be Christian traditionalists, or "we must all be sodomites now." But those are not the only alternatives.

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the weekly Standard

Beyond Gay Marriage
From the August 4 / August 11, 2003 issue: The road to polyamory.
by Stanley Kurtz
08/04/2003, Volume 008, Issue 45

AFTER GAY MARRIAGE, what will become of marriage itself? Will same-sex matrimony extend marriage's stabilizing effects to homosexuals? Will gay marriage undermine family life? A lot is riding on the answers to these questions. But the media's reflexive labeling of doubts about gay marriage as homophobia has made it almost impossible to debate the social effects of this reform. Now with the Supreme Court's ringing affirmation of sexual liberty in Lawrence v. Texas, that debate is unavoidable.

Among the likeliest effects of gay marriage is to take us down a slippery slope to legalized polygamy and "polyamory" (group marriage). Marriage will be transformed into a variety of relationship contracts, linking two, three, or more individuals (however weakly and temporarily) in every conceivable combination of male and female. A scare scenario? Hardly. The bottom of this slope is visible from where we stand. Advocacy of legalized polygamy is growing. A network of grass-roots organizations seeking legal recognition for group marriage already exists. The cause of legalized group marriage is championed by a powerful faction of family law specialists. Influential legal bodies in both the United States and Canada have presented radical programs of marital reform. Some of these quasi-governmental proposals go so far as to suggest the abolition of marriage. The ideas behind this movement have already achieved surprising influence with a prominent American politician.

None of this is well known. Both the media and public spokesmen for the gay marriage movement treat the issue as an unproblematic advance for civil rights. True, a small number of relatively conservative gay spokesmen do consider the social effects of gay matrimony, insisting that they will be beneficent, that homosexual unions will become more stable. Yet another faction of gay rights advocates actually favors gay marriage as a step toward the abolition of marriage itself. This group agrees that there is a slippery slope, and wants to hasten the slide down.

To consider what comes after gay marriage is not to say that gay marriage itself poses no danger to the institution of marriage. Quite apart from the likelihood that it will usher in legalized polygamy and polyamory, gay marriage will almost certainly weaken the belief that monogamy lies at the heart of marriage. But to see why this is so, we will first need to reconnoiter the slippery slope.

Promoting polygamy

DURING THE 1996 congressional debate on the Defense of Marriage Act, which affirmed the ability of the states and the federal government to withhold recognition from same-sex marriages, gay marriage advocates were put on the defensive by the polygamy question. If gays had a right to marry, why not polygamists? Andrew Sullivan, one of gay marriage's most intelligent defenders, labeled the question fear-mongering--akin to the discredited belief that interracial marriage would lead to birth defects. "To the best of my knowledge," said Sullivan, "there is no polygamists' rights organization poised to exploit same-sex marriage and return the republic to polygamous abandon." Actually, there are now many such organizations. And their strategy--even their existence--owes much to the movement for gay marriage.

Scoffing at the polygamy prospect as ludicrous has been the strategy of choice for gay marriage advocates. In 2000, following Vermont's enactment of civil unions, Matt Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project, said, "I think the idea that there is some kind of slippery slope [to polygamy or group marriage] is silly." As proof, Coles said that America had legalized interracial marriage, while also forcing Utah to ban polygamy before admission to the union. That dichotomy, said Coles, shows that Americans are capable of distinguishing between better and worse proposals for reforming marriage.

Are we? When Tom Green was put on trial in Utah for polygamy in 2001, it played like a dress rehearsal for the coming movement to legalize polygamy. True, Green was convicted for violating what he called Utah's "don't ask, don't tell" policy on polygamy. Pointedly refusing to "hide in the closet," he touted polygamy on the Sally Jessy Raphael, Queen Latifah, Geraldo Rivera, and Jerry Springer shows, and on "Dateline NBC" and "48 Hours." But the Green trial was not just a cable spectacle. It brought out a surprising number of mainstream defenses of polygamy. And most of the defenders went to bat for polygamy by drawing direct comparisons to gay marriage.

Writing in the Village Voice, gay leftist Richard Goldstein equated the drive for state-sanctioned polygamy with the movement for gay marriage. The political reluctance of gays to embrace polygamists was understandable, said Goldstein, "but our fates are entwined in fundamental ways." Libertarian Jacob Sullum defended polygamy, along with all other consensual domestic arrangements, in the Washington Times. Syndicated liberal columnist Ellen Goodman took up the cause of polygamy with a direct comparison to gay marriage. Steve Chapman, a member of the Chicago Tribune editorial board, defended polygamy in the Tribune and in Slate. The New York Times published a Week in Review article juxtaposing photos of Tom Green's family with sociobiological arguments about the naturalness of polygamy and promiscuity.

The ACLU's Matt Coles may have derided the idea of a slippery slope from gay marriage to polygamy, but the ACLU itself stepped in to help Tom Green during his trial and declared its support for the repeal of all "laws prohibiting or penalizing the practice of plural marriage." There is of course a difference between repealing such laws and formal state recognition of polygamous marriages. Neither the ACLU nor, say, Ellen Goodman has directly advocated formal state recognition. Yet they give us no reason to suppose that, when the time is ripe, they will not do so. Stephen Clark, the legal director of the Utah ACLU, has said, "Talking to Utah's polygamists is like talking to gays and lesbians who really want the right to live their lives."

All this was in 2001, well before the prospect that legal gay marriage might create the cultural

conditions for state-sanctioned polygamy. Can anyone doubt that greater public support will be forthcoming once gay marriage has become a reality? Surely the ACLU will lead the charge.

Why is state-sanctioned polygamy a problem? The deep reason is that it erodes the ethos of monogamous marriage. Despite the divorce revolution, Americans still take it for granted that marriage means monogamy. The ideal of fidelity may be breached in practice, yet adultery is clearly understood as a transgression against marriage. Legal polygamy would jeopardize that understanding, and that is why polygamy has historically been treated in the West as an offense against society itself.

In most non-Western cultures, marriage is not a union of freely choosing individuals, but an alliance of family groups. The emotional relationship between husband and wife is attenuated and subordinated to the economic and political interests of extended kin. But in our world of freely choosing individuals, extended families fall away, and love and companionship are the only surviving principles on which families can be built. From Thomas Aquinas through Richard Posner, almost every serious observer has granted the incompatibility between polygamy and Western companionate marriage.

Where polygamy works, it does so because the husband and his wives are emotionally distant. Even then, jealousy is a constant danger, averted only by strict rules of seniority or parity in the husband's economic support of his wives. Polygamy is more about those resources than about sex.

Yet in many polygamous societies, even though only 10 or 15 percent of men may actually have multiple wives, there is a widely held belief that men need multiple women. The result is that polygamists are often promiscuous--just not with their own wives. Anthropologist Philip Kilbride reports a Nigerian survey in which, among urban male polygamists, 44 percent said their most recent sexual partners were women other than their wives. For monogamous, married Nigerian men in urban areas, that figure rose to 67 percent. Even though polygamous marriage is less about sex than security, societies that permit polygamy tend to reject the idea of marital fidelity--for everyone, polygamists included.

Mormon polygamy has always been a complicated and evolving combination of Western mores and classic polygamous patterns. Like Western companionate marriage, Mormon polygamy condemns extramarital sex. Yet historically, like its non-Western counterparts, it de-emphasized romantic love. Even so, jealousy was always a problem. One study puts the rate of 19th-century polygamous divorce at triple the rate for monogamous families. Unlike their forebears, contemporary Mormon polygamists try to combine polygamy with companionate marriage--and have a very tough time of it. We have no definitive figures, but divorce is frequent. Irwin Altman and Joseph Ginat, who've written the most detailed account of today's breakaway Mormon polygamist sects, highlight the special stresses put on families trying to combine modern notions of romantic love with polygamy. Strict religious rules of parity among wives make the effort to create a hybrid traditionalist/modern version of Mormon polygamy at least plausible, if very stressful. But polygamy let loose in modern secular America would destroy our understanding of marital fidelity, while putting nothing viable in its place. And postmodern polygamy is a lot closer than you think.

Polyamory

AMERICA'S NEW, souped-up version of polygamy is called "polyamory." Polyamorists trace

their descent from the anti-monogamy movements of the sixties and seventies--everything from hippie communes, to the support groups that grew up around Robert Rimmer's 1966 novel "The Harrad Experiment," to the cult of Bhagwan Shree Rajneesh. Polyamorists proselytize for "responsible non-monogamy"--open, loving, and stable sexual relationships among more than two people. The modern polyamory movement took off in the mid-nineties--partly because of the growth of the Internet (with its confidentiality), but also in parallel to, and inspired by, the rising gay marriage movement.

Unlike classic polygamy, which features one man and several women, polyamory comprises a bewildering variety of sexual combinations. There are triads of one woman and two men; heterosexual group marriages; groups in which some or all members are bisexual; lesbian groups, and so forth. (For details, see Deborah Anapol's "Polyamory: The New Love Without Limits," one of the movement's authoritative guides, or Google the word polyamory.)

Supposedly, polyamory is not a synonym for promiscuity. In practice, though, there is a continuum between polyamory and "swinging." Swinging couples dally with multiple sexual partners while intentionally avoiding emotional entanglements. Polyamorists, in contrast, try to establish stable emotional ties among a sexually connected group. Although the subcultures of swinging and polyamory are recognizably different, many individuals move freely between them. And since polyamorous group marriages can be sexually closed or open, it's often tough to draw a line between polyamory and swinging. Here, then, is the modern American version of Nigeria's extramarital polygamous promiscuity. Once the principles of monogamous companionate marriage are breached, even for supposedly stable and committed sexual groups, the slide toward full-fledged promiscuity is difficult to halt.

Polyamorists are enthusiastic proponents of same-sex marriage. Obviously, any attempt to restrict marriage to a single man and woman would prevent the legalization of polyamory. After passage of the Defense of Marriage Act in 1996, an article appeared in Loving More, the flagship magazine of the polyamory movement, calling for the creation of a polyamorist rights movement modeled on the movement for gay rights. The piece was published under the pen name Joy Singer, identified as the graduate of a "top ten law school" and a political organizer and public official in California for the previous two decades.

Taking a leaf from the gay marriage movement, Singer suggested starting small. A campaign for hospital visitation rights for polyamorous spouses would be the way to begin. Full marriage and adoption rights would come later. Again using the gay marriage movement as a model, Singer called for careful selection of acceptable public spokesmen (i.e., people from longstanding poly families with children). Singer even published a speech by Iowa state legislator Ed Fallon on behalf of gay marriage, arguing that the goal would be to get a congressman to give exactly the same speech as Fallon, but substituting the word "poly" for "gay" throughout. Try telling polyamorists that the link between gay marriage and group marriage is a mirage.

The flexible, egalitarian, and altogether postmodern polyamorists are more likely to influence the larger society than Mormon polygamists. The polyamorists go after monogamy in a way that resonates with America's secular, post-sixties culture. Yet the fundamental drawback is the same for Mormons and polyamorists alike. Polyamory websites are filled with chatter about jealousy, the problem that will not go away. Inevitably, group marriages based on modern principles of companionate love, without religious rules and restraints, are unstable. Like the short-lived hippie communes, group marriages will be broken on the contradiction between

Colby M. May
Director, Washington Office

Admitted in District of Columbia and Virginia

ACLJ
American Center
for Law & Justice

June 16, 2004

Honorable Steve Chabot, Chairman
Constitution Subcommittee
U.S. House Committee on the Judiciary
362 Ford House Office Building
Washington, D.C. 20515

Re: Request to Accept Supplemental Material for the Record Developed on H.J. Res. 56, The Federal Marriage Amendment, at the Subcommittee's May 13, 2004 Hearing

Dear Chairman Chabot:

The American Center for Law and Justice ("ACLJ") hereby submits the following information regarding the trend in Europe over the last 15 years to remove the unique protection given to marriage (one man and one woman). It is respectfully requested that this submission be added to the back of the record developed at the Subcommittee's May 13, 2004 hearing on H.J. Res. 56, The Federal Marriage Amendment.

Specifically, in a line of questioning by Congresswoman Hart to the ACLJ's Chief Counsel, Jay A. Sekulow, it was noted that there "has been a trend in the context of Europe for 15" years of removing "the protections given" to marriage (Sekulow Transcript, p. 69). This engendered collogue between the witnesses, and Congressman Frank commented that "[Europe hadn't] had same sex marriage for 15 years in these countries you are mentioning . . . Norway and Denmark" (Sekulow Transcript pp. 69-70). To confirm the point Mr. Sekulow made regarding Europe's trend toward removing the "protection" given marriage, a copy of Denmark's original civil union law, implemented 15 years ago in 1989, is attached..[1]

The Danish law allows for same sex couples to form a registered partnership. These partnerships are governed by most of the same laws that govern marriage and these partnerships "shall have the same legal effects as the contracting of marriage."[2] Also, most of the law that governs the formation and dissolution of marriage similarly governs the formation and dissolution of registered partnerships. The act apparently does not allow for adoption of children

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1 Danish Registered Partnership act, D/341 H-ML No. 372 (June 1, 1989). English translation available at http://www.france.qrd.org/texts/partnership/dk/denmark-act.html.

2 *Id.*

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by a partner, as it provides that "[t]he provisions of the Danish Adoption Act regarding spouses shall not apply."[3] This law marked the first in a series that granted to same sex couples almost the complete litany of rights that had formerly only been granted to heterosexual marriages, and marked a significant shift in the European mind-set towards marriage.

Four years after Denmark enacted its law, Norway enacted a similar law in 1993 creating the institution of registered partnerships.[4] This law also makes most of the laws governing marriage applicable to partnerships, and grants to partnerships the same benefits and responsibilities as those placed on marriage. The act further provides that one who is already part of a registered partnership or marriage cannot enter into another partnership, and attaches criminal penalties for violation. The act similarly does not allow Norway's spousal adoption laws to apply to registered partnerships. Also, it restricts registration of partnerships to those where at least one party is domiciled in Norway and is of Norwegian nationality.

Sweden quickly followed suit in 1994, by enacting its own version of a registered partnership act.[5] Sweden's law is similar to the others in Europe and applies marriage law to partnerships, gives all the benefits of marriage to partnerships except for adoption, and restricts granting of partnerships to domiciled Swedish citizens. There are, however, some differences. First, the act applies incest rules to registered partnerships, preventing partnerships between full-blooded brothers or between full-blooded sisters. It also provides that permission must be obtained from the government for half-brothers and half-sisters to declare a partnership. Second, it even makes the procedure for declaring a partnership similar to that for marrying, providing that "Each [partner] separately shall, in response to a question put to them by the person conducting the registration, make it known that they consent to the registration."

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3 *Id.* at section 4(1).

4 Norwegian Bill on Registered Partnership, Act No. 40 (Apr. 30, 1993); see The Ministry of Children and Family Affairs, Oslo, Norway, The Norwegian Act on Registered Partnerships for Homosexual Couples (Apr. 1993), English translation available at http://www.france.qrd.org/texts/partnership/no/norway-en.html.

5 Swedish Law No. 1117 Regarding Registered Partnership (June 23, 1994), English translation available at http://www.france.qrd.org/texts/partnership/se/sweden-act.html.

In 1996, Iceland passed its "recognized partnership" bill.[6] This bill is the same as the others in Europe, applying marriage law to partnerships, restricting partnerships to domiciled citizens, and granting all benefits of marriage to a partnership except for adoption. Nothing else about the bill seems to be particularly noteworthy.

The Netherlands became enacted its civil union law in 1997.[7] This law, however, has become obsolete as the Dutch have since passed a law in 2001 allowing same-sex couples to marry and those with civil unions to "upgrade" them to a marriage certificate (though the Dutch are still permitted to enter into civil unions).[8] The law treats same-sex marriages and heterosexual marriages in the same way. It even seems to go so far as to allow same-sex spousal adoption, and there are no exceptions similar to what the other European countries have. This law also has provisions against incest even among same-sex couples. The act further indicates that it is a five year experiment, as the Dutch Parliament is to review the consequences of the act in 2006.

This information both supplements the Subcommittee's record, and confirms Mr. Sekulow's point that the protections afforded to marriage have been gradually eroding in Europe over the past fifteen years and that the consequences of this can be traced back over that period. This can be0. seen most clearly in that, even the first civil union law in Denmark, and all the ones passed in other countries since then, have granted almost all the same benefits to civil unions that have been in the past only given to traditional marriages, and removed the historic uniqueness of traditional marriage.

Respectfully Submitted,

AMERICAN CENTER FOR LAW AND JUSTICE

Colby M. May

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6 Icelandic Law on Approved Cohabitation, arts. 1-9 (June 12, 1996), English translation available at http://www.france.qrd.org/texts/partnership/is/iceland-bill.html.

7 Act of July 5, 1997, [1997] Stb. 324; Act of Dec. 17, 1997, [1997] Stb. 660.

8 Wet van 21 December 2000, Stb. 2001, 9. For an English translation of the text of the law, *see* the summary translation by Kees Waaldijk, http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html.

FULL TEXT OF RELEVANT LAWS:

THE DENMARK REGISTERED PARTNERSHIP ACT

D/341- H- ML Act No. 372 of June 1, 1989

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, do make known that:-

The Danish Folketing has passed the following Act which has received the Royal Assent:

1.- Two persons of the same sex may have their partnership registered.

Registration

2.- (1) Part I, sections 12 and 13(1) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnerships, cf. subsection 2 of this section.
(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.
(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

Legal Effects

3.- (1) Subject to the exceptions of section ^4, the registration of a partnership shall have the same legal effects as the contracting of marriage.
(2) The provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners.
4.- (1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.
(2) Clause 3 of section 13 and section 15(3) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.
(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.
(4) Provisions of international treaties shall not apply to registered partnership unless the other contracting parties agree to such application.

Dissolution

5.- **(1)** Parts 3, 4 and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership, cf. subsections 2 and 3 of this section.
(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.
(3) Irrespective of section 448 c of the Danish Administration of Justice Act a registered partnership may always be dissolved in this country.

Commencement etc.

6.- This Act shall come into force on October 1, 1989.

7.- This Act shall not apply to the Faroe Islands nor to Greenland but may be made applicable by Royal order to these parts of the country with such modifications as are required by the special Faroese and Greenlandic conditions.
Given at Christiansborg Castle, this seventh day of June, 1989
Under Our Royal Hand and Seal
MARGRETHE R.

NORWEGIAN BILL ON REGISTERED PARTNERSHIPS

Section 1

Two persons of the same sex may register their partnership, with the legal consequences which follow from this Act.

Section 2

Chapter 1 of the Marriage Act, concerning the conditions for contracting a marriage, shall have corresponding application to the registration of partnerships. No person may contract a partnership if a previously registered partnership or marriage exists.
Chapter 2 of the Marriage Act, on verification of compliance with conditions for marriage, and chapter 3 of the Marriage Act, on contraction of a marriage and solemnization of a marriage, do not apply to the registration of a partnership.
A partnership may only be registered if one or both of the parties is domiciled in the realm and at least one of them has Norwegian nationality.
Verification of compliance with the conditions and the procedure for the registration of partnerships shall take place according to rules laid down by the Ministry.

Section 3

Registration of partnerships has the same legal consequences as entering into marriage, with the exceptions mentioned in section 4.
The provisions in Norwegian legislation dealing with marriage and spouses shall be applied correspondingly to registered partnerships and registered partners.

Section 4

The provisions of the Adoption Act concerning spouses shall not apply to registered partnerships.

Section 5

Irrespective of the provision in section 419a of the Civil Procedure Act, actions concerning the dissolution of registered partnerships that have been entered in this country may always be brought before a Norwegian court.

Section 6

The Act shall enter into force on a date to be decided by the King.

Section 7

From the date on which the Act enters into force, the following amendments to other Acts shall come into force:
1. The Penal Code, No. 10, of 22 May 1902 is amended as follows: Section 220 shall read:

> Any person who enters into a marriage that is invalid pursuant to 3 or 4 of the Marriage Act, or who enters into a partnership that is invalid pursuant to 2, first paragraph, of the Partnership Act, cf. 3 of the Marriage Act, or 2, first paragraph, second sentence of the Partnership Act, shall be liable to imprisonment for a term not exceeding 4 years. If the spouse or partner was not aware that the marriage or partnership had been entered into contrary to the above-mentioned provisions, he

or she shall be liable to imprisonment for a term not exceeding 6 years. Complicity shall be penalized in the same way.

Any person who causes or is accessory to causing a marriage or registered partnership that is invalid because of the forms used, to be entered into with any person who is not aware of its invalidity shall be liable to imprisonment for a term not exceeding 4 years.

Section 338 shall read:

Any person who enters into a marriage or partnership pursuant to the Act relating to registered partnership in such a way as to set aside the provisions in force concerning the requirements for a valid marriage or the requirements concerning the registration of a valid partnership, dispensation or other statutory conditions, or is accessory thereto, shall be liable to fines.

2. The Marriage Act, No. 47, of 4 July 1991 is amended as follows: Section 4 shall read:

No person may contract a marriage if a previous marriage or registered partnership exists.

Section 7, first paragraph, litra e shall read:

e. Each of the parties to the marriage shall solemnly declare in writing whether he or she has previously contracted a marriage or a registered partnership. If so, proof shall be presented that the earlier marriage or registered partnership has been terminated by death or divorce, or has been dissolved pursuant to section 24.

Proof that the former spouse or registered partner is dead is, as a rule, presented in the form of a certificate issued by a domestic or foreign public authority. If such a certificate cannot be obtained, the parties may submit their information and evidence to the appropriate probate judge, cf. section 8, second cf. first paragraph, of the Probate Act. If administration of the estate does not come under the jurisdiction of a Norwegian probate court, the issue may be brought before the probate judge at the place where the fulfillment of the conditions for marriage is verified. The probate court will by order decide whether the evidence shall be accepted. An interlocutory appeal against the order may be made by the party against whom the decision is made. If the evidence is accepted, the probate court shall notify the County Governor, who may make an interlocutory appeal against the order.

Proof that the marriage or registered partnership has ended in divorce or been dissolved pursuant to section 24 may be given by presenting the license or judgment duly certified to be final. The question whether a marriage may be contracted in Norway on the basis of a foreign divorce shall be decided by the Ministry pursuant to the provisions of section 4 of Act No. 38 of 2 June 1978.

Section 7, first paragraph, litra j, first paragraph shall read:

j. Each of the parties to the marriage shall provide a sponsor who shall solemnly

declare that he or she knows the said party, and shall state whether the said party has previously contracted a marriage or registered partnership and whether the parties to the marriage are related to each other as mentioned in section 3.

Section 8, first, second and third paragraphs shall read:

Any person who has previously been married or has been a partner in a registered partnership must produce proof that the estate of the parties to the previous marriage or registered partnership has been submitted to the probate court for administration, or produce a declaration from the former spouse or former partner or heirs stating that the estate is being divided out of court.

This does not apply if a declaration is presented from the previous spouse or partner stating that there were no assets in the marriage or registered partnership to be divided, or from the heirs of the deceased spouse or partner stating that they consent to the survivor remaining in possession of the undivided estate.

If the previous marriage or registered partnership was dissolved in a way other than by death, and if more than two years have elapsed since it was dissolved, it is sufficient that the person who wishes to contract a new marriage states that the estate was divided, or that there was nothing to divide between the spouses or partners.

"The Norwegian Act on Registered Partnerships for Homosexual Couples", The Ministry of Children and Family Affairs, Oslo, Norway, April 1993.

THE SWEDISH REGISTERED PARTNERSHIP ACT

Issued on 23 June 1994

In accordance with the decision of the Parliament the following is enacted:

Chapter 1
Registration of partnership

Section 1

Two persons of the same sex may request the registration of their partnership.

Section 2

Registration may only take place if at least one of the partners is a Swedish citizen, domiciled in Sweden.

Section 3

Registration may not take place in the case of a person who is under the age of 18 years or of persons who are related to one another in the direct ascending or descending line or who are sisters or brothers of the whole blood.
Neither may registration take place in the case of sisters or brothers of the half blood without the permission of the Government or such authority as is stipulated by the Government.
Registration may not take place in the case of a person who is married or already registered as a partner.
The right to register a partnership shall be determined according to Swedish law.

Section 4

Before registration takes place, inquiry shall be made as to whether there is any impediment to registration.

Section 5

The provisions of Chapter 3 and Chapter 15 of the Marriage Code applicable to the procedure for inquiries into impediments to marriage shall apply correspondingly to this inquiry.

Section 6

Registration shall take place in the presence of witnesses.

Section 7

At the registration both partners shall be present at the same time. Each of them separately shall, in response to a question put to them by the person conducting the registration, make it known that they consent to the registration. The person conducting the registration shall thereafter declare that they are registered partners.
A registration is invalid if it has not taken place as indicated in the first paragraph or if the person conducting the registration was not authorized to perform the registration.
A registration which is invalid under the second paragraph may be approved by the Government if there are extraordinary reasons for such approval. The matter may only be considered on the application of one of the partners or, if either of them has died, of the heirs of the deceased.

Section 8

Registration may be conducted by a legally qualified judge of a district court or a person appointed by a county administrative board.

Section 9

In other respects the provisions of Chapter 4, Sections 5, 7 and 8, of the Marriage Code and regulations issued by the Government apply to registration.
Decisions concerning registration may be appealed against in accordance with the provisions of Chapter 15 Sections 3 and 4 of the Marriage Code.
Chapter 1, Sections 4-9, of the Act concerning certain International Legal Relationships relating to Marriage and Guardianship (1904:26 p. 1) apply to international circumstances relating to registration.

Chapter 2
Dissolution of registered partnership

Section 1

A registered partnership is dissolved by the death of one of the partners or by a court decision.

Section 2

The provisions of Chapter 5 of the Marriage Code apply correspondingly to issues concerning the dissolution of a registered partnership.

Section 3

Cases concerning the dissolution of registered partnerships and cases involving proceedings to determine whether or not a registered partnership subsists are partnership cases. Provisions stipulated by statute or other legislation relating to matrimonial cases also apply to issues concerning partnership cases.

Section 4

Partnership cases may always be considered by a Swedish court if registration has taken place under this Act.

Chapter 3
Legal effects of registered partnership

Section 1

Registered partnership has the same legal effects as marriage, except as provided by Sections 2-4.
Provisions of a statute or other legislation related to marriage and spouses shall be applied in a corresponding manner to registered partnerships and registered partners unless otherwise provided by the rules concerning exceptions contained in Sections 2-4.

Section 2

Registered partners may neither jointly nor individually adopt children under Chapter 4 of the Code on Parents, Children and Guardians. Nor may registered partners be appointed to jointly exercise custody of a minor in the capacity of specially appointed guardians under Chapter 13,

Section 8 of the Code on Parents, Children and Guardians.
The Insemination Act (1984:1140) and the Fertilization outside the Body Act (1988:711) do not apply to registered partners.

Section 3

Provisions applicable to spouses, the application of which involves special treatment of one spouse solely by reason of that spouse's sex, do not apply to registered partners.

Section 4

The provisions of the Ordinance concerning Certain International Legal Relationships relating to Marriage, Adoption and Guardianship (1931:429) do not apply to registered partnerships.
This Act enters into force on 1 January 1995.
On behalf of the Government
CARL BILDT
GUN HELLSVIK, Ministry of Justice

ICELAND: 564TH BILL
ON THE RECOGNIZED PARTNERSHIP

1

Two persons of the same sex can contract a recognized partnership.

2

What is provided in the Part II of the Marriage Act on the legal prerequisites of marriage shall apply to this Act, as well. However, see subsection 2. A recognized partnership can only be contracted if at least one of the parties is a citizen of Iceland and is domiciled in Iceland.

3

Before a partnership is officially recognized, both parties are to certify that the prerequisites of such a partnership are fulfilled. Part III of the Marriage Act regulates the certification. The Minister of Justice shall issue more precise instructions on the certification.

4

The contracting of such partnerships are to be carried out by heads of a police district or their representatives with a juridical education. Paragraphs 21 - 26 of the Marriage Acts regulate how certificates are to be issued.

5

Persons living in a recognized partnership are to enjoy the same rights as those in a marriage with the exception of what is said in subsection 6. What is said on marriage and legally married spouses in the legislation in force applies to the parties of a partnership, too.

6

The subsections on adoption in the Marriage Act shall not apply to the parties of a partnership. Regulations on who are entitled to artificial conception shall not apply to the recognized partnership. What the law says on the sex of a legally wedded spouse shall not apply to the recognized partnership. What is provided in the international agreements, signed by the Republic of Iceland, shall not apply to the recognized partnership unless all parties to the agreement approve of it.

7

A recognized partnership is deemed having ended at the death of one of the partners, in the case of cancellation or divorce.

8

The regulations on cancellation, divorce and division of property in the Marriage Act shall apply to the recognized partnership, however, with regard to subsections 2 and 3. Otherwise, what is regulated upon the end of a marriage and its legal entailments shall apply to the partnership, too. Despite what is said in subsection 1 of Section 114, it is always possible to proceed with a charge in an Icelandic court on the basis of Section 113, if the partnership has been recognized in Iceland. Despite what is said in Subsection 1 of Section 123 of the Marriage Act, an Icelandic court is always entitled to solve issues pertaining to partnerships recognized in this country.

9

These Acts are enacted on 1 July 1996.

[redacted]

Translation from Finnish to English is made by Mr. Mika Vepsalainen. This translation is made from the Finnish text, translated from Icelandic by Steinunn Gudmundsdottir.
The original wording of the Act is using expression "confirmed living together", where "recognized partnership" is used in this translation.

Text of Dutch law on the opening up of marriage for same-sex partners (plus explanatory memorandum)

summary-translation by Kees Waaldijk (**home page**)

Universiteit Leiden, The Netherlands, **c.waaldijk@law.leidenuniv.nl**

version of 2 May 2001

This is an unofficial translation and I am not a professional translator. Please consult me before publishing this text elsewhere. All explanations and comments between square brackets have been added by me. Square brackets are also used to indicate omitted or summarized passages. All copyrights are mine (W).

For some background information on the lengthy process leading up to this bill, see: **Latest news about same-sex marriage in the Netherlands** and **www.coc.nl/index.html?file=marriage** .

See also: **Text of Dutch law on adoption by persons of the same sex. Summary-translation by Kees Waaldijk** (October 2000).

The new Dutch text of Book 1 of the Civil Code can be found at: **Boek 1 Burgerlijk Wetboek, zoals dat luidt na openstelling van huwelijk en adoptie per 1 April 2001**

Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January) (Official Journal of the Kingdom of the Netherlands)

For the original version in Dutch, see: (**http://www.eerstekamer.nl/9202266/d/w26672st.pdf**).

Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage)

[This Act results from proposal nr. 26 672, introduced by the Government on 8 July 1999, amended by the Government on 3 May 2000 and 4 August 2000, adopted by the Lower House of the States-General on 12 September 2000 and by the Upper House of the States-General on 19 December 2000, and signed into law on 21 December 2000. As a result of the Royal Decree of 20 March 2001 (*Staatsblad* 2001, nr. 145) it has entered into force on 1 April 2001.]

We Beatrix [...];

[*preamble*:]

considering that it is desirable to open up marriage for persons of the same sex and to amend Book 1 of the Civil Code accordingly;

Article I

A, B and C

[amendments to articles 16a, 20 and 20a, concerning administrative duties of the registrar]

D

[amendment of article 28, concerning the change of sex in the birth certificates of transsexuals: Being not-married shall no longer be a condition for such change.]

E

Article 30 shall read as follows:

Article 30

1. A marriage can be contracted by two persons of different sex or of the same sex.

2. The law only considers marriage in its civil relations.

[Until now, article 30 only consists of the text of the second paragraph.]

F

Article 33 shall read as follows:

Article 33

A person can at the same time only be linked through marriage with one person.

[Until now, the text of article 33 only outlaws heterosexual polygamy.]

G

[Insertion of the words „brothers" and „sisters" in article 41, which will now read as follows:

Article 41

1. A marriage cannot be contracted between those who are, by nature or by law, descendant and ascendant, brothers, sisters or brother and sister.

2. Our Minister of Justice can, for weighty reasons, grant exemption from this prohibition to those who are brothers, sisters or brother and sister through adoption.]

H

A new article 77a shall be inserted:

Article 77a

1. When two persons indicate to the registrar that they would like their marriage to be converted into a registered partnership, the registrar of the domicile of one of them can make a record of conversion to that effect. If the spouses are domiciled outside the Netherlands and want to convert their marriage into a registered partnership in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

2. Articles 65 and 66 apply correspondingly.

3. A conversion terminates the marriage and starts the registered partnership on the moment the record of conversion is registered in the register of registered partnerships. The conversion does not affect the paternity over children born before the conversion.

I
[consequential amendment to article 78, concerning proof of marriage]
J
[amendments to article 80a, concerning registered partnership. The minimum age for marriage and registered partnership is 18, but for marriage it is reduced to 16, if the woman is pregnant or has given birth; this exception shall now also apply to registered partnership. Furthermore, annulment of an underage marriage is not possible after the female spouse has become pregnant; the same shall now apply to an underage registered partnership.]
K
[consequential amendment to article 80c]
L
A new article 80f shall be inserted:

Article 80f

1. When two persons indicate to the registrar that they would like their registered partnership to be converted into a marriage, the registrar of the domicile of one of them can make a record of conversion to that effect. If the registered partners are domiciled outside the Netherlands and want to convert their registered partnership into a marriage in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

2. The articles 65 and 66 apply correspondingly.

3. A conversion terminates the registered partnership and starts the marriage on the moment the record of conversion is registered in the register of marriages. The conversion does not affect the paternity over children born before the conversion.

M
[consequential amendment to article 149]
N
Article 395 shall read as follows:

Article 395
Without prejudice to article 395a, a stepparent is obliged to provide the costs of living for the minor children of his spouse or registered partner, but only during his marriage or registered partnership and only if they belong to his nuclear family.
[Until now this article only applies to marriage, not to registered partnership.]
O
Article 395a, second paragraph, shall read as follows:
2. A stepparent is obliged to provide [the costs of living and of studying] for the adult children of his spouse or registered partner, but only during his marriage or registered partnership and only if they belong to his nuclear family and are under the age of 21.
[Until now this article only applies to marriage, not to registered partnership.]

Article II
[technical amendments concerning registered partnership]

Article III
Within five years after the entering into force of this Act, Our Minister of Justice shall send Parliament a report on the effects of this Act in practice, with special reference to the relation to registered partnership.

Article IV
This Act shall enter into force on a date to be determined by royal decree.
[This Act entered into force on 1 April 2001, as a result of the Royal Decree of 20 March 2001, *Staatsblad* 2001, nr. 145.]

Article V
This Act shall be cited as: Act on the Opening up of Marriage.

[...] Given in The Hague, 21 December 2000: ***Beatrix***
The State-Secretary for Justice: ***M.J. Cohen***
Published on 11 January 2001 (The Minister for Justice: ***A.H. Korthals***)

Lower House of the States-General, session 1998/1999
Parliamentary paper 26672, nr. 3 (8 July 1999)
Amendment of Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage)

EXPLANATORY MEMORANDUM
[The explanatory memorandum which accompanied the original Bill of 8 July 1999, is a lengthy text. Therefore only some brief passages have been translated.]
[...]

Amendments – where necessary – in other books of the Civil Code and in other legislation will be proposed in a separate bill. [introduced on 22 August 2000, Parliamentary Papers II 1999/2000, 27256, nr.2] [...]

1. *History*

[...]

From the government's manifesto of 1998 (Parliamentary Papers II, 1997/1998, 26024, nr. 9, p. 68) it appears that the principle of equal treatment of homosexual and heterosexual couples has been decisive in the debate about the opening up of marriage for persons of the same sex.

2. *Equalities and differences between marriage for persons of different sex and marriage for persons of the same sex.*

[...]

As to the conditions for the contracting of a marriage no difference is made between heterosexuals and homosexuals [...].

[For example, only one of the persons wishing to marry needs to have either his or her domicile in the Netherlands or Dutch nationality.]

The differences between marriage for persons of different sex and marriage for persons of the same sex only lie in the consequences of marriage. They concern two aspects: firstly the relation to children and secondly the international aspect. [...]

[According to article 199 the husband of the woman who gives birth during marriage is presumed to be the father of the child.] It would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching reality. The distance between reality and law would become too great. Therefore this bill does not adjust chapter 11 of Book 1 of the Civil Code, which bases the law of descent on a man-woman relationship. Nevertheless, the relationship of a child with the two women or the two men who are caring for it and who are bringing it up, deserves to be protected, also in law. This protection has partly been realized through the possibility of joint authority for a parent and his or her partner (articles 253t ff.) and will be completed with a proposal for the introduction of adoption by same-sex partners [introduced 8 July 1999, Parliamentary Papers II 1998/1999, 26673; this proposal became law on 21 December 2000, see my **Summary-translation**], with a proposal for automatic joint authority over children born in a marriage or registered partnership of two women [introduced 15 March 2000, Parliamentary Papers II 1999/2000, 27047], and with a proposal to attach more consequences [such as inheritance] to joint authority [not yet introduced]. [...]

As far as the law of the European Union is concerned, the Kortmann-committee [advising the government about the opening up of marriage in 1997] concluded that it is certainly not unthinkable that the rules of free movement of persons relating to spouses will not be considered applicable to registered partners or married spouses of the same sex (report, p. 20). A recent judgment of the Court of Justice in Luxembourg strengthens this conclusion (see Court of Justice of the EC 17 February 1998, *Grant v South-West Trains*, case C-249/96). [...]

Treaties relating to marriage are almost all dealing with private international law. [...] An interpretation of these treaties based on a gender-neutral marriage seems improbable. Just because of this it will be necessary, when opening up marriage for persons of the same sex in the Netherlands, to design our own rules of private international law. The Royal Commission on private international law will be asked to advise on this, as soon as this bill will have been approved by the Lower House of Parliament.

3. *Relation to registered partnership; evaluation.*

Registered partnership was introduced in the Netherlands on 1 January 1998. In 1998 4556 couples (including 1550 different-sex couples) have used the possibility of contracting a registered partnership [...]. Compared to other countries with registered partnership legislation the interest in registered partnership in the Netherlands is relatively high [...].

The relatively high number of different-sex couples that contracted a registered partnership in 1998 and the results of a quick scan evaluation research [Yvonne Scherf, *Registered Partnership in the Netherlands. A quick scan* (Amsterdam: Van Dijk, Van Someren en Partners, 1999); that is the English translation of the original report] make it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage.

Therefore the government wants to keep the institution of registered partnership in place, for the time being. After five years the development of same-sex marriage and of registered partnership will be evaluated. Then [...] it will be possible to assess whether registered partnership should be abolished. [...]

4. *International aspects*

[...]

As the Kortmann-committee has stated (p. 18) the question relating to the completely new legal phenomenon of marriage between persons of the same sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about homosexuality. The outcome of a survey by the said committee among member-

states of the Council of Europe was that recognition can only be expected in very few countries. This is not surprising. [...]

Apart from the recognition of marriage as such, it is relevant whether or not in other countries legal consequences will be attached to the marriage of persons of the same-sex. [...]

As a result of this spouses of the same sex may encounter various practical and legal problems abroad. This is something the future spouses of the same sex will have to take into account. [...] However, this problem of "limping legal relations" also exists for registered partners, as well as for cohabiting same-sex partners who have not contracted a registered partnership or marriage.

5. *Conversion of marriage into registered partnership and of registered partnership into marriage*

[...]

6. *Adaptation of computerized systems*

[...]

7. *Explanation per article*

[...]
Article I – D
[...] The principle of gender-neutrality of marriage is expressed by [the new article 30, paragraph 1].
[...]

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summary, translation and comments by Kees Waaldijk

June 21, 2004

Dear Mr. Chairman,

I am grateful to the Constitution Subcommittee for the opportunity to respond to Congressman Frank's critique of my work on same-sex marriage in Europe.

What I find most striking in Congressman Frank's discussion of my testimony is his near total omission of any reference to my treatment of the Netherlands. My work on the Netherlands was the focus of my written testimony, and the focus of my answers to questions at the hearing.

This is important because Congressman Frank says, "Mr. Kurtz does not claim that the decline in heterosexual marriage came largely after recognition of same-sex relationships." That is not true. I do in fact claim that the decline of heterosexual marriage *in Holland* came largely after recognition of same-sex relationships, and I made that case before the subcommittee. So by omitting any discussion of my testimony on the Netherlands, Congressman Frank has failed to meet my core point.

As Congressman Frank points out, I do indeed say that many factors contribute to marital decline, and that these factors had already prompted considerable decline in Scandinavian marriage prior to the passage of registered partnerships. This is entirely unsurprising. It is widely understood that marriage has been substantially weakened throughout the West, for a variety of reasons. No one is arguing–or should be expected to argue–that recognition of same-sex relationships is the one and only cause of martial decline. The key question is whether same-sex marriage would add yet another important factor to those that have already weakened marriage. I believe the Scandinavia case confirms that same-sex marriage is another such weakening factor.

We all know that marriage has taken many "hits" in the last few decades. You don't have to favor the repeal of every innovation that has weakened marriage to believe that yet another blow would be a bad idea. Many people hesitate to approve of same-sex marriage because they worry that another big hit could push an already severely weakened institution into a final tailspin. We see such a tailspin in Scandinavia–where marriage is literally dying–and registered partnerships are very much a part of the picture. That is why the Scandinavian example stands as such an important warning.

While I believe that the weakening effect of registered partnerships on marriage has been substantial throughout Scandinavia, the effect has been strongest in Norway. Although Congressman Frank argues that Norway's experience with gay marriage has no relevance to the United States, I believe its relevance is substantial.

In Norway, gay marriage split the Lutheran church and greatly weakened the position of

marriage traditionalists. The same clergy who opposed registered partnerships opposed the spreading Norwegian practice of parental cohabitation. So when opponents of registered partnerships lost influence, their power to battle parental cohabitation also decreased.

As in Scandinavia, religion in America is a major bulwark of marriage's institutional strength. The issue of same-sex marriage has already opened fissures in major American religious denominations, and talk of formal schism has been heard. Legal recognition for same-sex marriage would greatly weaken the position of marriage traditionalists within their own churches.

During the recent debates over a state constitutional amendment dealing with same-sex marriage in Massachusetts, a group of legal experts that included Mary Ann Glendon, Harvard Law School; Dwight G. Duncan, Southern New England School of Law; Scott FitzGibbon, Boston College Law School; Thomas Kohler, Boston College Law School; Gerard Bradley, University of Notre Dame Law School; and Robert Destro, Columbus School of Law, Catholic University, argued that granting state constitutional status to civil unions could endanger religious liberty.

According to this group of scholars, granting state constitutional status to marriage-like same-sex civil unions would give:

> ...wide-ranging licenses to judges to enforce a new social norm on organizations touched by the law–which, as a practical matter, includes almost all organizations of any significance. Most significantly, churches and other religious organizations that fail to embrace civil unions as indistinct from marriage may be forced to retreat from their practices, or else face enormous legal pressure to change their views....[R]eligious institutions could even be at risk of losing tax-exempt status, academic accreditation, and media licenses, and could face charges of violating human rights or hate speech laws.

While these scholars were referring here to civil unions, full and formal gay marriage would pose similar problems for religious and marriage traditionalists. These problems would clearly tend to weaken the position of traditional churches, and would substantially weaken the position of marriage traditionalists in intra-church disputes. So just as in Scandinavia, same-sex marriage in the United States would likely place marriage traditionalists on the defensive, and weaken their position within society.

Although Congressman Frank argues that there are no American figures of any significance who support same-sex marriage while also favoring practices such as parental cohabitation, that is simply not true. As I show in "Beyond Gay Marriage" (*The Weekly Standard*, August 4/August 11, 2003), many who favor same-sex marriage also favor the replacement of marriage by legally recognized forms of cohabitation. The most powerful faction

within the discipline of family law takes precisely this position, as do advocacy groups supported by such specialists (eg. the "Alternatives to Marriage Project). And we know that the cutting edge positions found among legal scholars often become codified in law some years down the road.

Even the highly influential, and entirely mainstream, American Law Institute, whose proposals often work their way into law, has floated a program for the legal equalization of marriage and cohabitation. This would take us down the Scandinavian path. And as I show in "Beyond Gay Marriage," even one-time Democratic presidential nominee Al Gore has shown sympathy with radical legal theories that could easily be used move us in the direction of Scandinavian parental cohabitation.

Congressman Frank notes that some American advocates of gay marriage are strong defenders of marriage itself. There are several problems with this observation. First, even the staunchest advocates of the "conservative case" for same-sex marriage deny and deride the intrinsic connection between marriage and parenthood. Yet it is the loss of that connection that encourages European-style parental cohabitation. Second, despite the place of a few advocates of the "conservative case" for same-sex marriage in public debate, most advocacy of same-sex marriage is conducted on grounds of the analogy from civil rights. Among the general public, adherence to the "conservative case" for gay marriage is slight.

Here, the Scandinavian experience is an excellent guide. As I show in "The End of Marriage in Scandinavia" (*The Weekly Standard*, February 2, 2004), gay scholars in Scandinavia treat the "conservative case" for same-sex marriage as a political tactic useful in public debate, but with no real constituency among gays themselves.

Finally, in his only reference to my work on the Netherlands, Congressman Frank argues that, given the quick relationship I posit between same-sex partnership recognition in Holland and the decline of marriage there, we must conclude that any problems with gay marriage in America would already have manifested themselves in Vermont.

This overlooks profound differences between the situations in the Netherlands and Vermont. In the Netherlands, the courts pointedly refused to impose same-sex marriage. It was the Dutch courts' refusal to get involved in what they saw as a legislative issue that set off a full-blown national campaign for gay marriage. That campaign played out in the Dutch national media, and gradually yielded major changes in Dutch public opinion. When gay marriage was finally approved in Holland, strong majorities of the public favored it, and it was adopted legislatively, with strong majorities in parliament.

In Vermont, on the other hand, civil unions have been imposed by the courts, against strong public opposition. In fact, in the election that followed the judicial imposition of civil

unions, many of the legislators who went along with the court order lost their seats. And unlike Dutch television viewers, who can turn on a popular honeymoon show and watch same-sex couples participate, television viewers in Vermont do not see the American national media taking gay marriage's existence for granted. On the contrary, the people of Vermont understand very well that civil unions have been imposed by the courts, and are by no means recognized–legally or culturally–in the rest of the country.

Dutch parents did not typically cohabit, even after marriage and cohabitation were largely equalized in Dutch law in the 1980's. Yet the fact that the Dutch had already equalized marriage and cohabitation in law made it easier for same-sex marriage to push them in the direction of Scandinavian-style parental cohabitation in the nineties. In the United States, as of yet we have only proposals to equalize marriage and cohabitation from the American Law Institute. Gay marriage will help to make those proposals more acceptable to the public. But it will take longer to make the change here than it did in Holland, where such laws were already on the books.

The core point in all this is that gay marriage is part of a whole new level of marital decline. Same-sex marriage radically separates the idea of marriage from the idea of parenthood. That is why it is strongly associated with Scandinavian-style parental cohabitation. If marriage has nothing intrinsic to do with parenthood, but is simply the expression of the love of two adults, then parents might as well marry after their children have been born as before.

So gay marriage and parental cohabitation are *mutually reinforcing*. Where we see one, the other follows. Gay marriage and parental cohabitation can emerge in different order, but the two practices are closely linked. In Scandinavia, parental cohabitation came first. That helped bring about registered partnerships, which in turn helped encourage still more parental cohabitation. In the Netherlands, gay marriage came first, and that helped to make the idea of parental cohabitation acceptable.

In the U.S., where parental cohabitation is only in the early stages, and the American Law Institute's proposals to equalize marriage and cohabitation are not yet law, gay marriage would have even more impact on marriage than it's already substantial effect on Scandinavia and the Netherlands. Gay marriage would get Americans used to an idea which is new to them–that marriage has little to do with parenthood. And that will eventually bring us around to the Scandinavian way. It will take longer here than it did in Europe. That's because gay marriage is being imposed more quickly in America, and against the public will. But that very fact will make gay marriage's ultimate weakening of our marriage culture more profound.

Sincerely,

Stanley Kurtz

Perverted: Quack gay marriage science

By Nathaniel Frank
The New Republic (SECTION: Pg. 20)
Post date 04.27.04 | Issue date 05.03.04

On one level, there was nothing especially surprising about the radio ad campaign launched in March by the group Your Catholic Voice to denounce gay marriage. Following a three-month period in which the Massachusetts Supreme Judicial Court deemed the state's ban on gay marriage unconstitutional, and local officials from California to New York began handing out marriage licenses to gay couples, it would have been far more surprising had social conservatives *not* taken to the airwaves and news pages to express their opposition. But there was at least one surprising feature of the Your Catholic Voice campaign: The lay Catholic organization claimed its opposition was rooted in evidence from Scandinavia, where, according to the ad, "marriage has almost totally disappeared."

After years of being derided as bigoted or crackpot, it appears the right has discovered a new weapon in its fight against gay marriage: seemingly legitimate social science. Over the last several months, anti-gay-marriage activists have increasingly invoked work by a handful of scholars claiming that gay marriage is bad for children and that it undermines the institution of marriage altogether. In January, the conservative Christian group Focus on the Family placed a newspaper ad featuring a prominent scholar's claim that "we should disavow the notion that `mommies can make good daddies'" and asserting that its opposition to gay marriage was rooted in "conclusive social science data." The website of Concerned Women for America currently cites the "vast body of social science research" that militates against allowing same-sex couples to marry and raise children. In February, Pennsylvania Senator Rick Santorum, a fierce opponent of gay rights, cited the Scandinavian example to argue that same-sex unions undermine traditional marriage.

In a debate that has been dominated in recent years by either dogma or raw emotion, this newfound interest in analytical rigor should be refreshing. And it would be, except for one small hitch: The social scientific evidence that scholars are feeding conservatives has literally nothing to do with same-sex marriage.

Perhaps the most prominent scholarly argument against same-sex marriage comes courtesy of Stanley Kurtz, a research fellow at the Hoover Institution. Since February, Kurtz has taken to the pages of The Weekly Standard, National Review Online, San Francisco Chronicle, and The Boston Globe to argue that evidence from Scandinavia shows that recognizing same-sex unions has nearly destroyed the institution of marriage there. The "evidence is in," Kurtz concludes. "Marriage is dying in Scandinavia," where "de facto same-sex marriage" has existed for over a decade.

Kurtz offers statistics showing that rising proportions of children in Sweden, Norway, and Denmark are now born out of wedlock. Although he concedes that many factors have contributed to this development, he insists that the creation of "same-sex registered partnerships" has "locked

in and reinforced the separation between the ideas of marriage and parenthood, thereby accelerating marital decline" by weakening the cultural imperative to wed before giving birth. Kurtz's argument is not that gay marriages would prompt existing straight couples to end their marriages, just that the symbolic damage done to the institution by letting gays join it would deter younger couples from bothering to wed: "By getting Americans used to a strong separation between marriage and parenthood, gay marriage would draw out these trends and put us firmly on the path to the Scandinavian system."

Alas, Kurtz's conclusions are suspect on their face--for the simple reason that Scandinavia does not have gay marriage, merely a marriage alternative available only to gays. (Kurtz clearly knows this, because at times he correctly calls them "registered partnerships." But, then, inexplicably and inaccurately, he slips into calling them gay marriages.) That complication aside, he offers zero evidence suggesting that gay partnerships have driven down marriage rates among heterosexuals in Scandinavia. At best, Kurtz struggles to show a correlation, much less a causative effect, between gay partnerships and the "disappearance" of marriage. Co-habitation and out-of-wedlock births, we are told, "closely track the movement for [what Kurtz calls] gay marriage." In one liberal county in Norway where "gay marriage has achieved a high degree of acceptance" (never mind that it remains illegal), marriage rates are in decline.

But to suggest these correlations prove that recognizing gay unions has hurt marriage is simply shoddy social science. If gays are to blame for Scandinavia's marital decline, how do we explain another trend closer to home: In the United States, the number of unmarried, co-habiting couples increased tenfold from 1960 to 2000. And all of this with no gay marriage, no registered partnerships, not even civil unions, which only came into existence in a handful of states after the 40 years of data in question. If anything, the emergence in the West of both registered partnerships for gays and the possibility of gay marriage itself are more likely a result, not a cause, of liberalizing attitudes toward marriage, themselves a product of evolving views toward women, divorce, and contraception, along with a host of social issues (including a vibrant social safety net) that have made being single a more attractive option. But, however you feel about that proposition, Kurtz's claim that he can now "answer the key empirical question underlying the gay marriage debate" is utter nonsense.

Worse, Kurtz's conflation of gay partnerships and gay marriages is hardly a trivial mistake. Kurtz begins from the premise that co-habitation undermines marriage by offering an alternative arrangement for child-rearing, thus removing the social stigma of out-of-wedlock birth and severing the link between marriage and parenthood. He then argues that "gay marriage" further erodes the link between marriage and parenthood, making a bad situation even worse: "Scandinavian gay marriage," we are told, has sent the message that "virtually any family form, including out-of-wedlock parenthood, is acceptable."

But, once again, there is no gay marriage in Scandinavia, only registered partnerships. And these arrangements by definition sever the link between marriage and parenthood, not because gays don't have children--they do--but because they are denied the right to marry and are thus consigned to co-habitation. If they have kids, this means they're sentenced to unmarried parenthood. By contrast, if gays could marry, many of the children living with out-ofwedlock gay parents would instead be living in married households, and the link between marriage and

parenthood would be restored. The only thing Kurtz's data really show is that formalizing a new arrangement of co-habitation is correlated with increased co-habitation rates.

Kurtz is not the only scholar who relies on dubious social science to make the case against gay marriage. Others point to the potential harm inflicted upon children, arguing that a household involving a married mother and father is the optimal child-rearing environment and that gays should not be allowed to wed since they can't provide it. This is the line favored, for example, by Douglas Kmiec, a professor of constitutional law at Pepperdine University, who in a Los Angeles Times op-ed last month cited research suggesting that children who grow up in gay households "are more likely to be confused sexually" and to "face a heightened chance of being the victim of sexual abuse." Maggie Gallagher, president of the Institute for Marriage and Public Policy, sounded still louder alarms in a December 2003 Weekly Standard article, pointing to "a consensus across ideological lines, based on 20 years' worth of social science research" that children do better with a married mother and father. And though David Blankenhorn, the founder and president of the Institute for American Values, has stopped short of opposing same-sex marriage, he nevertheless insisted, according to a February Washington Post article, that "children deserve, as a sort of birthright, mothers and fathers-- preferably the mothers and fathers who brought them into this world."

But there's a huge flaw in the claims of all three scholars: They rely on divorce and father-absence studies, which compare two-parent with single-parent homes, not heterosexual parents with homosexual parents. The whole basis of Gallagher's 20-year "consensus across ideological lines" is that two parents are better than one, not that both parents must be different genders. Kmiec concedes the dubiousness of this leap when he writes that "scientific attempts to study homosexual parenting are incomplete and conflicting." Nevertheless, he concludes, "It would seem logical to expect that children with same-sex couples would face a similarly increased chance of behavioral difficulty or lesser achievement in school."

No, it wouldn't. One of the most commonly cited studies actually assessing the effect on children was published in 2001 by University of Southern California Professors Judith Stacey and Timothy Biblarz, who favor same-sex marriage but nonetheless set out to critique studies suggesting there were no differences between children raised in gay and straight families. Their research concluded that children of gay couples did exhibit moderate differences from children of heterosexual parents in that they appeared "less traditionally gender-typed and more likely to be open to homoerotic relationships."

In the hands of conservative scholars like Kmiec, who begin with the assumption that homosexuality is pathological, this turns into children being "confused sexually." But Stacey and Biblarz's conclusions decisively rebut the idea that growing up with gay parents is harmful: Such children "display no differences from heterosexual counterparts in psychological well-being or cognitive functioning," they write. In addition, Stacey and Biblarz find that gay parenting "has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment." This, as it happens, was also the determination of the American Psychological Association (APA) after an extensive 1995 review of the literature on gay families. Children raised by gay parents, the APA concluded, are not "disadvantaged in any significant respect relative to the children of heterosexual parents." The American Academy of Child and

Adolescent Psychiatry echoed this finding in its 1999 statement opposing discrimination against gay parents. Ditto the American Academy of Pediatrics in a 2002 policy statement, saying children of gay parents have "the same advantages and the same expectations for health, adjustment, and development" as those of heterosexual parents. Indeed, not a single reputable study shows any harm whatsoever to children living in same-sex-headed households.

But the research that is least disputed in the budding marriage movement is that married people are happier, healthier, wealthier, and in a better position to raise kids. They are less likely to commit suicide, to have fatal accidents, or to suffer from alcoholism and depression, and they earn more money and report better sex lives than singles. And, not only are married people happier individuals, they are more productive citizens. All the data, in other words, point toward extending the benefits of marriage to as many people as can fulfill its social function. If the United States leads, perhaps Scandinavia will one day follow.

Nathaniel Frank teaches history at New York University and New School University.

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