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TALKING POINTS ON COLORADO CASE

The Supreme Court today invalidated the Colorado anti-gay provision. The vote was 6-3. Justice Kennedy wrote the majority opinion and was joined by Justices Stevens, O'Connor, Souter, Ginsberg and Bryer.

Statement:

The President is pleased by today's decision. The Colorado law denied a group of citizens the right to participate effectively in the political process and that is bad public policy. The President has urged states and localities to reject such provisions. Such provisions are both unconstitutional, as the court today held, and inconsistent with the common values and principles that make our nation strong.

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(Publication page references are not available for this document.)

**ROY ROMER, GOVERNOR OF
COLORADO, et al., PETITIONERS**

v.

RICHARD G. EVANS et al.

No. 94-1039

**SUPREME COURT OF THE UNITED
STATES**

Argued October 10, 1995

Decided May 20, 1996

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO****Syllabus [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

After various Colorado municipalities passed ordinances banning discrimination based on sexual orientation in housing, employment, education, public accommodations, health and welfare services, and other transactions and activities, Colorado voters adopted by statewide referendum "Amendment 2" to the State Constitution, which precludes all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Respondents, who include aggrieved homosexuals and municipalities, commenced this litigation in state court against petitioner state parties to declare Amendment 2 invalid and enjoin its enforcement. The trial court's grant of a preliminary injunction was sustained by the Colorado Supreme Court, which held that Amendment 2 was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. On remand, the trial court found that the Amendment failed to satisfy strict scrutiny. It

enjoined Amendment 2's enforcement, and the State Supreme Court affirmed.

Held: Amendment 2 violates the Equal Protection Clause. Pp. 4-14.

(a) The State's principal argument that Amendment 2 puts gays and lesbians in the same position as all other persons by denying them special rights is rejected as implausible. The extent of the change in legal status effected by this law is evident from the authoritative construction of Colorado's Supreme Court which establishes that the amendment's immediate effect is to repeal all existing statutes, regulations, ordinances, and policies of state and local entities barring discrimination based on sexual orientation, and that its ultimate effect is to prohibit any governmental entity from adopting similar, or more protective, measures in the future absent state constitutional amendment and from a review of the terms, structure, and operation of the ordinances that would be repealed and prohibited by Amendment 2. Even if, as the State contends, homosexuals can find protection in laws and policies of general application, Amendment 2 goes well beyond merely depriving them of special rights. It imposes a broad disability upon those persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination in a wide range of public and private transactions. Pp. 4-9.

(b) In order to reconcile the Fourteenth Amendment's promise that no person shall be denied equal protection with the practical reality that most legislation classifies for one purpose or another, the Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319-320. Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment is at once too narrow and too broad, identifying persons by a single trait and then denying them the possibility of protection across the board. This disqualification of a class of persons from the



right to obtain specific protection from the law is unprecedented and is itself a denial of equal protection in the most literal sense. Second, the sheer breadth of Amendment 2, which makes a general announcement that gays and lesbians shall not have any particular protections from the law, is so far removed from the reasons offered for it, i.e., respect for other citizens' freedom of association, particularly landlords or employers who have personal or religious objections to homosexuality, and the State's interest in conserving resources to fight discrimination against other groups, that the amendment cannot be explained by reference to those reasons; the Amendment raises the inevitable inference that it is born of animosity toward the class that it affects. Amendment 2 cannot be said to be directed to an identifiable legitimate purpose or discrete objective. It is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. Pp. 9-14.

882 P. 2d 1335, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

I

The enactment challenged in this case is an amendment to the Constitution of the State of

Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. Denver Rev. Municipal Code, Art. IV §§ 28-91 to 28-116 (1991); Aspen Municipal Code § 13-98 (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-11 (1987). What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code § 12-1-1 (defining "sexual orientation" as "the choice of sexual partners, i.e., bisexual, homosexual or heterosexual"); Denver Rev. Municipal Code, Art. IV § 28-92 (defining "sexual orientation" as "[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality"). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Colo. Const., Art. II, § 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

"No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall



constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing." *Ibid.*

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. Other plaintiffs (also respondents here) included the three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so. Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General and the State of Colorado.

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. *Evans v. Romer*, 854 P. 2d 1270 (Colo.1993) (*Evans I*). To reach this conclusion, the state court relied on our voting rights cases, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Williams v. Rhodes*, 393 U.S. 23 (1968), and on our precedents involving discriminatory restructuring of governmental decisionmaking, see, e.g., *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967);

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982); *Gordon v. Lance*, 403 U.S. 1 (1971). On remand, the State advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. *Evans v. Romer*, 882 P. 2d 1335 (Colo.1994) (*Evans II*). We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

II

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court. The state court, deeming it unnecessary to determine the full extent of the amendment's reach, found it invalid even on a modest reading of its implications. The critical discussion of the amendment, set out in *Evans I*, is as follows:

"The immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. See *Aspen, Colo., Mun. Code* § 13-98 (1977) (prohibiting discrimination in employment, housing and public accommodations on the basis of sexual orientation); *Boulder, Colo., Rev. Code* §§ 12-1-2 to -4 (1987) (same); *Denver, Colo., Rev. Mun. Code art. IV*, §§ 28-91 to -116 (1991) (same); *Executive Order No. D0035* (December 10, 1990) (prohibiting employment discrimination for 'all state employees, classified and exempt' on the basis of sexual orientation); *Colorado Insurance Code*, § 10-3-1104, 4A C.R.S. (1992 Supp.) (forbidding health insurance providers from determining insurability and premiums based on an applicant's, a beneficiary's, or an insured's



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sexual orientation); and various provisions prohibiting discrimination based on sexual orientation at state colleges.²⁶

"26. Metropolitan State College of Denver prohibits college sponsored social clubs from discriminating in membership on the basis of sexual orientation and Colorado State University has an antidiscrimination policy which encompasses sexual orientation.

"The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures." 854 P. 2d, at 1284-1285, and n. 26.

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far-reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. ___, ___ (1995) (slip op., at 13). The duty was a general one and did not specify protection for particular groups. The common law rules, however, proved insufficient in many instances, and it was settled early that the Fourteenth Amendment

did not give Congress a general power to prohibit discrimination in public accommodations, *Civil Rights Cases*, 109 U.S. 3, 25 (1883). In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes. See, e.g., S.D. Codified Laws §§ 20-13-10, 20-13-22, 20-13-23 (1995); Iowa Code §§ 216.6-216.8 (1994); Okla. Stat., Tit. 25, §§ 1302, 1402 (1987); 43 Pa. Cons. Stat. §§ 953, 955 (Supp. 1995); N.J. Stat. Ann. §§ 10:5-3, 10:5-4 (West Supp. 1995); N.H. Rev. Stat. Ann. § 354-A:7, 354-A:10, 354-A:17 (1995); Minn. Stat. § 363.03 (1991 and Supp. 1995).

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind." Boulder Rev. Code § 12-1-1(j) (1987). The Denver ordinance is of similar breadth, applying, for example, to hotels, restaurants, hospitals, dental clinics, theaters, banks, common carriers, travel and insurance agencies, and "shops and stores dealing with goods or services of any kind," Denver Rev. Municipal Code, Art. IV, § 28-92.

These statutes and ordinances also depart from the common law by enumerating the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply. In following this approach, Colorado's state and local governments have not limited anti-discrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. See, e.g., *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. ___, ___ (1994) (slip op., at 8) (sex); *Lalli v. Lalli*,



439 U.S. 259, 265 (1978) (illegitimacy); *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964) (race); *Oyama v. California*, 332 U.S. 633 (1948) (ancestry). Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates--and, in recent times, sexual orientation. Aspen Municipal Code § 13-98(a)(1) (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-4 (1987); Denver Rev. Municipal Code, Art. IV, §§ 28-92 to 28-119 (1991); Colo. Rev. Stat. §§ 24-34-401 to 24-34-707 (1988 and Supp. 1995).

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. See, e.g., Aspen Municipal Code §§ 13-98(b), (c) (1977); Boulder Rev. Code §§ 12-1-2, 12-1-3 (1987); Denver Rev. Municipal Code, Art. IV §§ 28-93 to 28-95, § 28-97 (1991).

Not confined to the private sphere, Amendment 2 also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government. The State Supreme Court cited two examples of protections in the governmental sphere that are now rescinded and may not be reintroduced. The first is Colorado Executive Order D0035 (1990), which forbids employment discrimination against "all state employees, classified and exempt on the basis of sexual orientation." 854 P. 2d, at 1284. Also repealed, and now forbidden, are "various provisions prohibiting discrimination based on sexual orientation at state colleges." *Id.*, at 1284, 1285. The repeal of these measures and the prohibition against their future reenactment demonstrates that Amendment 2 has the same force and effect in Colorado's governmental sector as it does elsewhere and that it applies to policies as

well as ordinary legislation.

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. See, e.g., Colo. Rev. Stat. § 24-4-106(7) (1988) (agency action subject to judicial review under arbitrary and capricious standard); § 18-8-405 (making it a criminal offense for a public servant knowingly, arbitrarily or capriciously to refrain from performing a duty imposed on him by law); § 10-3-1104(1)(f) (prohibiting "unfair discrimination" in insurance); 4 Colo. Code of Regulations 801-1, Policy 11-1 (1983) (prohibiting discrimination in state employment on grounds of specified traits or "other non-merit factor"). At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

If this consequence follows from Amendment 2, as its broad language suggests, it would compound the constitutional difficulties the law creates. The state court did not decide whether the amendment has this effect, however, and neither need we. In the course of rejecting the argument that Amendment 2 is intended to conserve resources to fight discrimination against suspect classes, the Colorado Supreme Court made the limited observation that the amendment is not intended to affect many anti-discrimination laws protecting non-suspect classes, *Romer II*, 882 P. 2d at 1346, n. 9. In our view that does not resolve the issue. In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special



rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

III

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-272 (1979); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., *Heller v. Doe*, 509 U.S. ___, ___ (1993) (slip op., at 6).

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See *New Orleans v. Dukes*, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain that there existed some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. See *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (STEVENS, J., concurring) ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.").

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across



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* the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928).

X It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws' is a pledge of the protection of equal laws." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

Davis v. Beason, 133 U.S. 333 (1890), not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In Davis, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it "simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the

commission of crimes forbidden by it." *Id.*, at 347. To the extent Davis held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); cf. *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Robel*, 389 U.S. 258 (1967). To the extent Davis held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See *Richardson v. Ramirez*, 418 U.S. 24 (1974).

A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988), and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the



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liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation ... [is] obnoxious to the prohibitions of the Fourteenth Amendment...." *Civil Rights Cases*, 109 U. S., at 24.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare ... desire to harm" homosexuals, ante, at 13, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, 478 U.S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality, ante, at 13, is evil. I vigorously dissent.

I

Let me first discuss Part II of the Court's opinion, its longest section, which is devoted to rejecting the State's arguments that Amendment 2 "puts gays and lesbians in the same position as all other persons," and "does no more than deny homosexuals special rights," ante, at 4. The Court concludes that this reading of Amendment 2's language is "implausible" under the "authoritative construction" given Amendment 2 by the Supreme Court of Colorado. *Ibid.*

In reaching this conclusion, the Court considers it unnecessary to decide the validity of the State's argument that Amendment 2 does not deprive homosexuals of the "protection [afforded by] general laws and policies that prohibit arbitrary discrimination in governmental and private settings." Ante, at 8. I agree that we need not resolve that dispute, because the Supreme Court of Colorado has resolved it for us. In *Evans v. Romer*, 882 P. 2d 1335 (1994), the Colorado court stated:

"[I]t is significant to note that Colorado law currently proscribes discrimination against



persons who are not suspect classes, including discrimination based on age, § 24-34-402(1)(a), 10A C.R.S. (1994 Supp.); marital or family status, § 24-34-502(1)(a), 10A C.R.S. (1994 Supp.); veterans' status, § 28-3-506, 11B C.R.S. (1989); and for any legal, off-duty conduct such as smoking tobacco, § 24-34-402.5, 10A C.R.S. (1994 Supp.). Of course Amendment 2 is not intended to have any effect on this legislation, but seeks only to prevent the adoption of anti-discrimination laws intended to protect gays, lesbians, and bisexuals." *Id.*, at 1346, n. 9 (emphasis added).

The Court utterly fails to distinguish this portion of the Colorado court's opinion. Colorado Rev. Stat. § 24-34-402.5 (Supp.1995), which this passage authoritatively declares not to be affected by Amendment 2, was respondents' primary example of a generally applicable law whose protections would be unavailable to homosexuals under Amendment 2. See Brief for Respondents Evans et al. 11-12. The clear import of the Colorado court's conclusion that it is not affected is that "general laws and policies that prohibit arbitrary discrimination" would continue to prohibit discrimination on the basis of homosexual conduct as well. This analysis, which is fully in accord with (indeed, follows inescapably from) the text of the constitutional provision, lays to rest such horrors, raised in the course of oral argument, as the prospect that assaults upon homosexuals could not be prosecuted. The amendment prohibits special treatment of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the "life partner" of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee. Or again, it does not affect the requirement of the State's general insurance laws that customers be afforded coverage without discrimination unrelated to anticipated risk. Thus, homosexuals could not be denied coverage, or

charged a greater premium, with respect to auto collision insurance; but neither the State nor any municipality could require that distinctive health insurance risks associated with homosexuality (if there are any) be ignored.

Despite all of its hand-wringing about the potential effect of Amendment 2 on general antidiscrimination laws, the Court's opinion ultimately does not dispute all this, but assumes it to be true. See ante, at 9. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court's opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. To take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only



persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard-of.

The Court might reply that the example I have given is not a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the substantive discrimination against relatives (i.e., the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the electoral-procedural discrimination against them (i.e., the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral-procedural discrimination" has not hitherto been heard of: a law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something special—something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

II

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment for the prohibition of special protection for homosexuals. [FN1] It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers v. Hardwick*, 478 U.S. 186 (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions. But in any event it is a given in the present case: Respondents' briefs did not urge overruling *Bowers*, and at oral

argument respondents' counsel expressly disavowed any intent to seek such overruling. Tr. of Oral Arg. 53. If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct. (As the Court of Appeals for the District of Columbia Circuit has aptly put it: "If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open ... to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula v. Webster*, 822 F. 2d 97, 103 (1987).) And a fortiori it is constitutionally permissible for a State to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. Respondents (who, unlike the Court, cannot afford the luxury of ignoring inconvenient precedent) counter *Bowers* with the argument that a greater-includes-the-lesser rationale cannot justify Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual "orientation." Some courts of appeals have concluded that, with respect to laws of this sort at least, that is a distinction without a difference. See *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F. 3d 261, 267 (CA6 1995) ("[F]or purposes of these proceedings, it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct"); *Steffan v. Perry*, 41 F. 3d 677, 689-690 (CA10 1994). The Supreme Court of Colorado itself appears to be of this view. See 882 P. 2d, at 1349-1350 ("Amendment 2 targets this class of persons based on four characteristics: sexual orientation; conduct; practices; and relationships. Each characteristic provides a potentially different way of identifying that class of persons who are gay, lesbian, or bisexual. These four characteristics are not truly severable from one another because each



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provides nothing more than a different way of identifying the same class of persons ") (emphasis added).

But assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, Bowers still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Just as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because some methadone users pose no threat to passenger safety, see *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), and just as a mandatory retirement age of 50 for police officers does not violate equal protection even though it prematurely ends the careers of many policemen over 50 who still have the capacity to do the job, see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam), Amendment 2 is not constitutionally invalid simply because it could have been drawn more precisely so as to withdraw special antidiscrimination protections only from those of homosexual "orientation" who actually engage in homosexual conduct. As JUSTICE KENNEDY wrote, when he was on the Court of Appeals, in a case involving discharge of homosexuals from the Navy: "Nearly any statute which classifies people may be irrational as applied in particular cases. Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational." *Beller v. Middendorf*, 632 F. 2d 788, 808-809, n. 20 (CA9 1980) (citation omitted). See also *Ben-Shalom v. Marsh*, 881 F. 2d 454, 464 (CA7

1989), cert. denied, 494 U.S. 1004 (1990).

Moreover, even if the provision regarding homosexual "orientation" were invalid, respondents' challenge to Amendment 2—which is a facial challenge—must fail. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It would not be enough for respondents to establish (if they could) that Amendment 2 is unconstitutional as applied to those of homosexual "orientation"; since, under *Bowers*, Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed. Some individuals of homosexual "orientation" who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person. See App. 4-5 (complaint describing each of the individual respondents as either "a gay man" or "a lesbian"). [FN2]

III

The foregoing suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable, with close, congressionally approved precedent in earlier constitutional practice.

First, as to its eminent reasonableness. The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as Unamerican. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could



exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*. The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct—that is, it prohibits favored status for homosexuality.

But though Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. See 1971 Colo. Sess. Laws, ch. 121, § 1. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. Cf. Brief for Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae in *Bowers v. Hardwick*, O.T. 1985, No. 85-140, p. 25, n. 21 (antisodomy statutes are "unenforceable by any but the most offensive snooping and wasteful allocation of law enforcement resources"); Kadish, *The Crisis of Overcriminalization*, 374 *The Annals of the American Academy of Political and Social Science* 157, 161 (1967) ("To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution").

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to

be retained. The Court cannot be unaware of that problem; it is evident in many cities of the country, and occasionally bubbles to the surface of the news, in heated political disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable "alternate life style." The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, see Record, Exh. MMM, have high disposable income, see *ibid.*; App. 254 (affidavit of Prof. James Hunter), and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. See, e.g., Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 *Neb. L. Rev.* 723, 724 (1993) ("[T]he task of gay rights proponents is to move the center of public discourse along a continuum from the rhetoric of disapprobation, to rhetoric of tolerance, and finally to affirmation").

By the time Coloradans were asked to vote on Amendment 2, their exposure to homosexuals' quest for social endorsement was not limited to newspaper accounts of happenings in places such as New York, Los Angeles, San Francisco, and Key West. Three Colorado cities—Aspen, Boulder, and Denver—had enacted ordinances that listed "sexual orientation" as an impermissible ground for discrimination, equating the moral disapproval of homosexual conduct with racial and religious bigotry. See Aspen Municipal Code § 13-98 (1977); Boulder Rev. Municipal Code §§ 12-1-1 to 12-1-11 (1987); Denver Rev. Municipal Code, Art. IV §§ 28-91 to 28-116 (1991). The phenomenon had even appeared statewide: the Governor of Colorado had signed an executive order pronouncing that "in the State of Colorado we recognize the diversity in our pluralistic society and strive to bring an end to discrimination in any



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form," and directing state agency-heads to "ensure non-discrimination" in hiring and promotion based on, among other things, "sexual orientation." Executive Order No. D0035 (Dec. 10, 1990). I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. Lacking any cases to establish that facially absurd proposition, it simply asserts that it must be unconstitutional, because it has never happened before.

"[Amendment 2] identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive....

"It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." Ante, at 11-12.

As I have noted above, this is proved false every time a state law prohibiting or disfavoring certain conduct is passed, because such a law prevents the adversely affected group—whether drug addicts, or smokers, or gun owners, or motorcyclists—from changing the policy thus established in "each of [the] parts" of the State. What the Court says is even demonstrably false at the constitutional level. The Eighteenth Amendment to the Federal Constitution, for example, deprived

those who drank alcohol not only of the power to alter the policy of prohibition locally or through state legislation, but even of the power to alter it through state constitutional amendment or federal legislation. The Establishment Clause of the First Amendment prevents theocrats from having their way by converting their fellow citizens at the local, state, or federal statutory level; as does the Republican Form of Government Clause prevent monarchists.

But there is a much closer analogy, one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah to this day contain provisions stating that polygamy is "forever prohibited." See Ariz. Const., Art. XX, par. 2; Idaho Const., Art. I, § 4; N.M. Const., Art. XXI, § 1; Okla. Const., Art. I, § 2; Utah Const., Art. III, § 1. Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

The United States Congress, by the way, required the inclusion of these antipolygamy provisions in the constitutions of Arizona, New Mexico, Oklahoma, and Utah, as a condition of their admission to statehood. See Arizona Enabling Act, 36 Stat. 569; New Mexico Enabling Act, 36 Stat. 558; Oklahoma Enabling Act, 34 Stat. 269; Utah Enabling Act, 28 Stat. 108. (For Arizona, New Mexico, and Utah, moreover, the Enabling Acts required that the antipolygamy provisions be "irrevocable without the consent of the United States and the people of said State"—so that not only were "each of [the] parts" of these States



not "open on impartial terms" to polygamists, but even the States as a whole were not; polygamists would have to persuade the whole country to their way of thinking.) Idaho adopted the constitutional provision on its own, but the 51st Congress, which admitted Idaho into the Union, found its constitution to be "republican in form and ... in conformity with the Constitution of the United States." Act of Admission of Idaho, 26 Stat. 215 (emphasis added). Thus, this "singling out" of the sexual practices of a single group for statewide, democratic vote-so utterly alien to our constitutional system, the Court would have us believe-has not only happened, but has received the explicit approval of the United States Congress.

I cannot say that this Court has explicitly approved any of these state constitutional provisions; but it has approved a territorial statutory provision that went even further, depriving polygamists of the ability even to achieve a constitutional amendment, by depriving them of the power to vote. In *Davis v. Beason*, 133 U.S. 333 (1890), Justice Field wrote for a unanimous Court:

"In our judgment, § 501 of the Revised Statutes of Idaho Territory, which provides that 'no person ... who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law ... is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory,' is not open to any constitutional or legal objection." *Id.*, at 346-347 (emphasis added).

To the extent, if any, that this opinion permits the imposition of adverse consequences upon mere abstract advocacy of polygamy, it has of course been overruled by later cases. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). But the proposition that polygamy can be criminalized, and those engaging in

that crime deprived of the vote, remains good law. See *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974). Beason rejected the argument that "such discrimination is a denial of the equal protection of the laws." Brief for Appellant in *Davis v. Beason*, O.T. 1889, No. 1261, p. 41. Among the Justices joining in that rejection were the two whose views in other cases the Court today treats as equal-protection lodestars-Justice Harlan, who was to proclaim in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion), that the Constitution "neither knows nor tolerates classes among citizens," quoted ante, at 1, and Justice Bradley, who had earlier declared that "class legislation ... [is] obnoxious to the prohibitions of the Fourteenth Amendment," *Civil Rights Cases*, 109 U.S. 3, 24 (1883), quoted ante, at 14. [FN3]

This Court cited Beason with approval as recently as 1993, in an opinion authored by the same Justice who writes for the Court today. That opinion said: "[A]dverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination... See, e.g., ... *Davis v. Beason*, 133 U.S. 333 (1890)." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993). It remains to be explained how § 501 of the Idaho Revised Statutes was not an "impermissible targeting" of polygamists, but (the much more mild) Amendment 2 is an "impermissible targeting" of homosexuals. Has the Court concluded that the perceived social harm of polygamy is a "legitimate concern of government," and the perceived social harm of homosexuality is not?

IV

I strongly suspect that the answer to the last question is yes, which leads me to the last point I wish to make: The Court today, announcing that Amendment 2 "defies ... conventional [constitutional] inquiry," ante, at 10, and "confounds [the] normal process of judicial review," ante, at 11, employs a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values.



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The Court's stern disapproval of "animosity" towards homosexuality might be compared with what an earlier Court (including the revered Justices Harlan and Bradley) said in *Murphy v. Ramsey*, 114 U.S. 15 (1885), rejecting a constitutional challenge to a United States statute that denied the franchise in federal territories to those who engaged in polygamous cohabitation:

"[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony: the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Id.*, at 45.

I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.

But the Court today has done so, not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes. To suggest, for example, that this constitutional amendment springs from nothing more than "a bare ... desire to harm a politically unpopular group," *ante*, at 13, quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), is nothing short of insulting. (It is also nothing short of preposterous to call "politically unpopular" a group which enjoys enormous influence in American media and politics, and which, as the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2, see App. to Pet. for Cert. C-18.)

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins and more specifically with

the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, see, e.g., Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments of 1975, H.R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990, see 42 U.S.C. § 12211(a) (1988 ed., Supp. V).

* * *

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate



means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

FN1. The Court evidently agrees that "rational basis"-the normal test for compliance with the Equal Protection Clause-is the governing standard. The trial court rejected respondents' argument that homosexuals constitute a "suspect" or "quasi-suspect" class, and respondents elected not to appeal that ruling to the Supreme Court of Colorado. See *Evans v. Romer*, 882 P. 2d 1335, 1341, n. 3 (1994). And the Court implicitly rejects the Supreme Court of Colorado's holding, see *Evans v. Romer*, 854 P. 2d 1270, 1282 (1993), that Amendment 2 infringes upon a "fundamental right" of "independently identifiable class[es]" to "participate equally in the political process." Ante, at 4.

FN2. The Supreme Court of Colorado stated: "We hold that the portions of Amendment 2 that would remain if only the provision concerning sexual orientation were stricken are not autonomous and thus, not severable," 882 P. 2d, at 1349. That statement was premised, however, on the proposition that "[the] four characteristics [described in the Amendment-sexual orientation, conduct, practices, and relationships] are not truly severable from one another because each provides nothing more than a different way of identifying the same class of persons." *Id.*, at 1349-1350 (emphasis added). As I have discussed above, if that premise is true-if the entire class affected by the Amendment takes part in homosexual conduct, practices and relationships-Bowers alone suffices to answer all constitutional objections. Separate consideration of persons of homosexual "orientation" is necessary only if one believes (as the Supreme Court of Colorado did not) that that is a distinct class.

FN3. The Court labors mightily to get around *Beason*, see ante, at 12-13, but cannot escape the central fact that this Court found the statute at issue-which went much further than Amendment 2, denying polygamists not merely special treatment but the right to vote-"not open to any constitutional or legal objection," rejecting the appellant's argument (much like the argument of respondents today) that the statute impermissibly "single[d] him out," Brief for Appellant in *Davis v. Beason*, O.T.

1889, No. 1261, p. 41. The Court adopts my conclusions that (a) insofar as *Beason* permits the imposition of adverse consequences based upon mere advocacy, it has been overruled by subsequent cases, and (b) insofar as *Beason* holds that convicted felons may be denied the right to vote, it remains good law. To these conclusions, it adds something new: the claim that "[t]o the extent [*Beason*] held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome." Ante, at 12-13. But if that is so, it is only because we have declared the right to vote to be a "fundamental political right," see, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), deprivation of which triggers strict scrutiny. Amendment 2, of course, does not deny the fundamental right to vote, and the Court rejects the Colorado court's view that there exists a fundamental right to participate in the political process. Strict scrutiny is thus not in play here. See ante, at 10. Finally, the Court's suggestion that § 501 of the Revised Statutes of Idaho, and Amendment 2, deny rights on account of "status" (rather than conduct) opens up a broader debate involving the significance of *Bowers* to this case, a debate which the Court is otherwise unwilling to join, see supra, at 6-9.

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FROM: Evan Wolfson
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RE: Constitutional and Legal Defects in H.R.
3396 and S. 1740, the Proposed Federal
Legislation on Marriage and the
Constitution

DATE: May 13, 1996

This is a preliminary memorandum on the possible legal ramifications of current proposals to have the federal government bar and subvert the recognition of selected lawful marriages, something never done before in U.S. history.²

SUMMARY

The proposed bills (H.R. 3396 and S.1740) have two key provisions: (1) exempting interstate recognition of selected lawful marriages from the constitutional command of full faith and credit, and (2) creating a federal definition of marriage so as to distinguish among lawful marriages. The attempt to circumvent the Constitution's provision for interstate full faith and credit, and the unprecedented federal intrusion into the law of marriage, get the role of the federal government wrong in both directions. If passed, the bills would create a "house divided" in which many Americans would not know from day to day, state to state, or agency to agency, whether they are legally married or not. The Constitution does not permit this violence to its federal-state balance, or the injury these bills would inflict upon real-life, lawfully married couples.

¹ Associate, Davis Polk & Wardwell.

² This memorandum should be read together with the Lambda Legal Defense & Education Fund "Summary of Legal Issues" (March 20, 1996) (available from Lambda).

I. THE ATTEMPT TO CIRCUMVENT FULL FAITH AND CREDIT IS UNPRECEDENTED, UNWISE, AND UNCONSTITUTIONAL.

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

- H.R. 3396

The Constitution contains several federalist provisions intended to make the United States one nation. One such provision is Article IV, section 1, the "full faith and credit" clause.³ The "very purpose" of the full faith and credit clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."⁴ As the Supreme Court has explained, it is a Constitution we are expounding -- a constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."⁵

The full faith and credit clause is intended to promote national unity, to assure that people (including lawfully married couples) can move throughout the country without being stripped of their legal rights, and to help Americans avoid repeated and burdensome litigation and relitigation of settled issues or established legal status.⁶ As Supreme Court Justice Robert Jackson stated in 1945, "the policy ultimately to be served in application of

³ Article IV, section 1 of the Constitution states that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

⁴ Williams v. North Carolina, 317 U.S. 287, 295 (1942), quoting Milwaukee County v. White Co., 296 U.S. 268, 276-277.

⁵ Williams, 317 U.S. at 302-303.

⁶ Sutton v. Lieb, 342 U.S. 402 (1952).

the clause is the federal policy of 'a more perfect union' of our legal systems."⁷

- A. Because Congress does not have the power to limit full faith and credit, the proposed statutes are unconstitutional.

The Constitution provides a role for Congress in assuring the full faith and credit to be granted by states to the acts, records and judicial proceedings of sister states.⁸ Although legal commentators and Supreme Court justices have occasionally mentioned this power in passing, Congress has rarely -- indeed, virtually never -- acted on its authority. In fact, the two principal pieces of implementing legislation date back to 1790 and 1804.

The first provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government.⁹ The second provides methods of authenticating non-judicial records.¹⁰ Each served a true "full faith and credit" purpose, i.e., promoting and facilitating uniformity.¹¹

⁷ Justice Robert Jackson, "Full Faith and Credit -- the Lawyer's Clause of the Constitution," 45 Columbia L. Rev. 1, 27 (1945).

⁸ "Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Art. IV, section 1.

⁹ 28 U.S.C.A. § 1738. Prior to a 1948 amendment, the statute addressed full faith and credit only as regards records and judicial proceedings.

¹⁰ 28 U.S.C.A. § 1739.

¹¹ Professor Lea Brilmayer explains that the proper analysis is not whether a bill in any respect limits "faith and credit," but whether the purpose is to promote faith and credit. In her words, if the result of an enactment would be to leave only a "proper subset" of acts, records, and judgments receiving full faith and credit (rather than having the effect of according faith and credit to X, while leaving out Y), then it is unconstitutional; such an enactment would not serve the purpose of giving effect to full faith and credit, but rather would be an attempt to erode full faith and credit without a net gain in uniformity. Such an enactment -- and the proposed statutes

Since 1804, Congress has passed only two pieces of implementing legislation: 28 U.S.C.A. § 1739A, the Parental Kidnapping Prevention Act of 1980 ("PKPA"), which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A. § 1738B, "Full Faith and Credit for Child Support Orders" (1994). Although Senator Nickles, the sponsor of S.1740, suggests that the PKPA gives a precedent for his bill, neither the 1980 and 1994 laws, nor the original enactments, purported to limit full faith and credit; to the contrary, each of these statutes reinforced or expanded the faith and credit given to state law.¹²

The plain meaning of the constitutional provision itself is that Congress can enact "supplementary and enforcing" legislation, but only where it has an actual and legitimate "full faith and credit" purpose as a whole.¹³ Congress has never before sought to abridge the mandate of the full faith and credit clause, and, in fact, lacks the power to do so. Congress can neither circumvent full faith and credit, nor attempt to make the second sentence of Article IV, section 1 swallow the clear and central mandate of the first sentence.¹⁴

are the perfect example -- would be an improper attempt by Congress to poach on another substantive area of law (i.e. domestic relations) in the guise of enforcing full faith and credit.

¹² Subsequent case law has established that the PKPA neither limits full faith and credit, nor establishes any kind of federal cause of action in child custody; rather, the PKPA facilitates parties' enforcement of judgments from state to state. Senator Nickles's ability to cite only the PKPA as a "precedent" for his proposed legislation thus in fact further underscores its unconstitutionality.

¹³ Corwin, "The Full Faith and Credit Clause," 81 U. Penn. L. Rev. 371, 373-74 (1933).

¹⁴ See Freund, "Chief Justice Stone and the Conflict of Laws," 59 Harv. L.Rev. 1210, 1229-30 (1946). See also Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980) ("while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.")).

Moreover, even under Brilmayer's more limited, less stringent formulation, it is clear that Congress lacks power to do what it is seeking to do here: arbitrarily abolish

Prior to the bills introduced last week, nearly all proposals for applying the powers authorized in the Constitution have focused on expanding or assuring faith and credit.¹⁵ The occasional political effort to introduce legislation that would have limited full faith and credit (arising, historically, most often during past controversy over civil divorce) have consistently failed.¹⁶

Because of this clear understanding throughout our history, and thanks to Congress's proper constitutional restraint (at least prior to the proposed bills), the Supreme Court has never had to scrutinize Congress's power under the clause.¹⁷ Called upon to review the constitutionality of legislation such as that proposed here, the Supreme Court would undoubtedly strike it down as inconsistent with the spirit, plain meaning, intent, and history of the Constitution.

In short, the proposed statute represents an attempt to subvert the requirements of the full faith and credit clause. Any such change in the meaning of the Constitution requires a constitutional amendment, not an abrupt election-year act of Congress.¹⁸

faith and credit for a subset of lawful acts, records, and judicial proceedings, without any legitimate federalist purpose of uniformity.

¹⁵ See, e.g., Cook, "Powers of Congress under the Full Faith and Credit Clause," 28 Yale L.J. 421 (1918-19). As outlined by Professor Cook, Congress has the potential power to provide (i) service in other states of state process in civil suits; (ii) the direct enforcement of state judgments in other states; (iii) for legislation compelling states to enforce judgments of other states by rendering new judgments; and (iv) compulsory recognition by the states of rights created by legislative acts of other states. *Id.* at 428-434.

¹⁶ See note 27, *infra*.

¹⁷ See, e.g., *Williams*, 317 U.S. at 303; *Scherrer v. Scherrer*, 334 U.S. 343 (1948).

¹⁸ The bills also run afoul of the requirement that Congress's enactments in furtherance of the full faith and credit command be in the form of "general" laws. The fact that the bills single out marriage, their facial discrimination based on sex, and their impact and purpose in creating a disadvantaged caste of lawfully-married people based on their sexual orientation all make them far from "general." An additional constitutional defect arises from

- B. Because the Supreme Court has already clarified that the mandate of full faith and credit extends beyond the scope of the proposed statutes, they are unconstitutional.

The full faith and credit clause is self-executing.¹⁹ Congress obviously may not rewrite the clause and its reach without a constitutional amendment, nor is its power exclusive; it is shared with the Supreme Court, and bounded by Court holdings.²⁰ Although the Supreme Court has not yet passed on the manner in which marriages per se are entitled to full faith and credit,²¹ the proposed

the the vagueness of the proposals, targeting any "act, record, or judicial proceeding ... respecting a relationship between persons of same sex that is treated as a marriage... or a right or claim arising from such relationship." Yet another defect lies in their potential interference with rights of Indian tribes and native Hawaiians established by treaty and customary law.

¹⁹ Justice Jackson, 45 Columbia L. Rev. at 11.

²⁰ See, e.g. Thomas, 448 U.S. at 272 n.18 ("it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation").

²¹ Lawfully-performed civil marriages qualify for recognition under each prong of the Full Faith and Credit Clause, partaking as they do of each of elements of the three enumerated categories (public acts, records, and judicial proceedings):

(1) The creation of a marriage is a "public Act" both because it occurs pursuant to a statutory scheme, and is performed in most states by a public or legally-designated official, and because the marriage is itself an act -- a res, a thing or status itself created by a state (which thus acts);

(2) The marriage certificate is the "Record" of that res, recording (with delineated legal effect) that a marriage has been validly contracted, that the spouses have met the qualifications of the applicable marriage statutes, that they have lawfully consented, and that they have duly become legally "married." (Along with marriage certificates, analogous public records of even lesser consequence, ranging from birth certificates to automobile titles, have been accorded full faith and credit); and

statutes would contradict standards set by a host of Supreme Court rulings on the reach of the full faith and credit clause.²²

For example, the bills subvert the Court's longstanding holdings on faith and credit for judgments, the most frequent context for issues of faith and credit in matrimonial relations. The Supreme Court first recognized full faith and credit for judgments in 1813, Mills v. Duryee, 7 Cranch 481 (U.S. 1813), and in the succeeding 183 years has regularly restated its position. States have virtually no discretion to deny full faith and credit to judgments. Restatement Second Conflict of Laws, § 103. Cases have established that even judgments arising from causes of action that could not be brought in the forum state must be recognized.²³ The Court has again and again clarified that the clause has this reach.

And yet, even in terms of judgments alone, the proposed statute would upset the rule of law, repeated in scores of decisions, that judgments are valid everywhere. The proposed statute, therefore, is unconstitutional because, in this case, the Congress is not simply seeking to reverse a Supreme Court interpretation of a statute, but rather the Supreme Court's long-settled interpretation of the Constitution itself, which can only be changed by amendment.

Furthermore, the Court has made clear that, when asked to recognize an unfulfilled or general right or duty

(3) Finally, celebrating a marriage is arguably a "judicial proceeding" in at least those sixteen states in which judges, court clerks, or justices of the peace officiate. Perhaps more important, marriage partakes of important elements of a "judgment," the state "act" or "judicial Proceeding" that has received with least question the greatest "full faith and credit" from the Supreme Court.

No court, including the Supreme Court, has held to the contrary; several courts have so held. For a fuller discussion and underlying authorities, see Lambda Legal Defense & Education Fund "Summary of Legal Issues" (March 20, 1996) (available from Lambda).

²² See, e.g., Thomas, 448 U.S. at 258 n. 18. See also Reynolds, "The Iron Law of Full Faith and Credit," 53 Maryland L.Rev. 412 (1994).

²³ See, e.g., Fauntleroy v. Lum, 210 U.S. 230, 237 (1908); Williams, 317 U.S. at 294; Scherrer, 334 U.S. at 354. See also Restatement Second Conflicts of Laws, § 117.

based on another state's statute or case law, states may weigh competing interests before deciding which rule of law to apply. But, when state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of specific parties, the other states must give those acts, records, or proceedings the same effect they would have at home. Once the status has been created, the judgment rendered, the record recorded, and rights established, the full faith and credit clause makes other state's legal regimes immaterial (because they are not at issue). What is then at stake is the protection of the partners, their expectations, their res, and the acts taken in reliance on state law by third parties.²⁴

Since a civil marriage -- whether as a certificate, an act, or a judgment-like res -- falls into the category of such adjudications or creations, there is no appropriate policy "balancing" regarding recognition. Full faith and credit must be granted under the clause itself, and Congress may not vitiate that central command, short of an amendment to the Constitution itself.²⁵

²⁴ See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 611 (1951). The issue in *Hughes* was whether Wisconsin could under its wrongful death statute deny a cause of action to the estate of an Illinois descendant, where Illinois law would have permitted the suit. The court noted that "if the same cause of action had previously been reduced to judgment, the full faith and credit clause would compel the courts of Wisconsin to entertain an action to enforce it" without balancing any policy interests. 341 U.S. at 612 n.4.

²⁵ Even were the Supreme Court ultimately to conclude that civil marriages do not constitute acts, records, or judicial proceedings, and are not otherwise subject to full faith and credit, it is clear that Congress cannot unilaterally attempt to usurp that determination by an end-run around the full faith and credit clause (especially not through a selective measure that on its face discriminates between lawful marriages).

Ironically, the religious-political extremist groups behind these bills are busily pushing anti-marriage-recognition legislation in state legislatures, presumably believing that they already have all the authority they need under current faith and credit law. See "Wedded to Intolerance: Extremists Lead Nationwide Assault on the Lives of Lesbian and Gay People," Human Rights Campaign, May 8, 1996 (documenting organized effort behind the anti-marriage backlash legislation proposed in Congress and the states).

- C. Because the proposed statutes would nationalize domestic relations, shattering historical precedent, they are unconstitutional.

Without exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic.²⁶ It is well established that "there is no federal law of domestic relations." De Sylva v. Ballentine, 351 U.S. 570, 580 (1956). See also In re Burrus, 136 U.S. 586 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."). See also Section II (1), infra.

As a result, Congress has never before passed legislation dealing purely with domestic relations issues, especially marriage. Federal courts maintain no jurisdiction over domestic relations issues. For example, despite similar political agitation and congressional grandstanding at other points in our nation's history, there is no federal divorce law. Nor, even with the PKPA cited by Senator Nickles as a "precedent" for his proposed bill, has there been any attempt to create federal jurisdiction over child custody.

In fact, prior to this election year, every attempt to nationalize domestic relations, whether through constitutional amendment or act of Congress, has been rebuffed as an unconstitutional or ill-advised intrusion of the federal government into an area left to the states.²⁷

To date, bills purporting to deny recognition to prospective lawful marriages of same-sex couples have been adopted in eight states, and rejected in seventeen, with several more still pending.

²⁶ Scherrer, 334 U.S. at 362, (Frankfurter, J., dissenting); Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992) (no subject matter jurisdiction in federal courts for domestic relations cases).

²⁷ As former Justice Frankfurter explained in his Scherrer dissent, 334 U.S. 343, the first constitutional amendment to allow Congress to have authority over domestic relations was proposed (and rejected) in 1884. Through 1948, seventy similar amendments were proposed, prompted by an analogous national controversy over whether to allow civil divorce. Supra, at note 16. All such proposals failed, and, after a period of needless (and untenable) uncertainty, in which Americans literally did not know from

In this area, the proper role of the federal government is simply to permit people and their families to travel, and businesses and others to function, throughout the country - with certainty and respect, and without discrimination.

The proposed statutes thus have radical implications far more vast even than stymieing interstate recognition of same-sex couples' lawful civil marriages. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government. Departing from the restraint it has shown since its last significant full faith and credit legislation in 1804, Congress would be setting a precedent; it could easily act again to disregard the interest of particular states by setting forth criteria for full faith and credit that would have implications in any number of areas -- e.g., divorce, child custody, adoption, gambling and abortion.

There is no guarantee that such future statutes would have effects that are either "conservative" or "liberal;" rather, they would be inherently political and would effectively transfer power from the states to Congress.²⁸ This unprecedented transfer of power to the federal government would be a dangerous, and especially ironic, legacy of the self-proclaimed "pro-local-control" 104th Congress.

- D. The proposed statutes would make existing law inconsistent and disorderly, creating an untenable legal and practical situation for lawfully-married couples and others.

The proposed statutes would clash with and contradict existing legislation. Although the existing statutes that implement full faith and credit do not refer directly to marriage, marriage and the incidents thereof are entitled to full faith and credit as acts, records or as a

state to state whether they were legally married (or divorced) or not, the U.S. Supreme Court clarified that lawful determinations as to marital status, through divorce, must be respected throughout the country. E.g., *Cook v. Cook*, 342 U.S. 126 (1951).

²⁸ Faith and credit is a two-way street. Where faith and credit is weak, states are not required to recognize the law of other states but at the same time find it difficult to have their own laws respected elsewhere. Where faith and credit is strong, states must recognize the law of other states but are also more likely to have their own law respected.

judgment-like res. For example, if Pat and Chris are married in Hawaii, they can be divorced in Hawaii, but also in any other state. Divorce is a judgment that is already granted full faith and credit.²⁹ Determinations on adoption, child custody and child support, all of which are as relevant to same-sex married couples as to other married couples, are also judgments that are already granted full faith in credit. Inheritance law adjudicates judgments. Authenticated birth certificates are considered public records to which full faith and credit must be given. The proposed statutes would call all of these into question.

The result of limiting full faith and credit pursuant to the proposed statutes would thus be a legal and practical nightmare, whereby at least some Americans would in effect have to get a "marriage visa" stamped when they cross a state border, or where they (or their parents) would be simultaneously married and unmarried in different reaches of the country. Such a situation is simply untenable, both in terms of federalism and the meaning and expectations around marriage, itself a fundamental right.

For example, imagine if married couples had to worry if their right to inherit from each other remained valid, or their right to make medical decisions for each other (or their children) would be respected, or their family health plan was in force -- merely because they chose to move to or visit another state. Imagine the difficulty for a bank in their home state that had loaned money based on a spousal guarantee that was enforceable in that state, only to learn it would not be enforced by a sister state. How could a company maintain coherent personnel policies if its offices were required by conflicting state laws to treat the same employee differently depending on the office in which he or she is working? How could a couple be sure their expectations for social security or veterans' benefits, child or spousal support, property and insurance rates would be honored? The full faith and credit clause, the constitutional right to interstate travel, and other federalist provisions prohibit a state from putting individuals (and their families, employers, and creditors) in such dilemmas.

Furthermore, not only are the proposed statutes inconsistent with both implementing acts of Congress passed nearly two centuries ago, they directly clash with the PKPA, which, as stated, seeks to assure enforcement of custody determinations and prevent "parental kidnapping" (protections which, presumably should apply to the children

²⁹ See, e.g., Williams, 317 U.S. 287; Scherrer, 334 U.S. 343; Dunham v. Dunham, 44 N.E. 841, 847-48 (Ill. 1896).

of same-sex couples, but which, under the proposed bills, would not). The result of this proposal, a slipshod, politically motivated congressional act, would be a mishmash of contradictory law giving rise to multiple, long, confusing, and costly lawsuits. Marriage, the legitimacy of children, the security of inheritance, the validity of wills, the guarantee of loans, the obligation of contracts - all would be up for grabs in every state.

As Justice Robert Jackson wrote during similar political controversy long ago, "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."³⁰ America is not a country where people can be legally married in one state, then forcibly unmarried when they cross into the "wrong" state.

E. The Proposed Statutes Run Afoul of Other Constitutional Protections, Including the Right to Marry and the Right to Travel.

By attempting to eliminate the constitutional means of assuring interstate recognition of lawful marriages, the proposed statutes would place a direct and tangible obstacle in the path of interstate travel, and thus severely burden people's right to marry, a fundamental constitutional right in itself. Licensing such a national "free for all" would also implicate other constitutional provisions relating to due process, the right to travel and move freely throughout the nation, equal protection (sex discrimination as well as sexual orientation discrimination), interstate commerce, the freedom of intimate association, the privileges and immunities clause, as well as the fundamental right to marry itself.

The rights to marry and to have that marriage recognized are of fundamental importance, both in and of themselves, and in part because marital status includes substantial economic and practical protections and benefits, upon which may depend the couple's ability to live as they want, raise children as they want, contract with others or even subsist.³¹ A couple lawfully married in Hawaii who

³⁰ Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) (emphasis added).

³¹ Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (unconstitutional to "unduly interfere with the right to 'migrate, resettle, find a new job, and start a new life'"); see also Edwards v. California 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. 35 (1867).

wished to travel in or to another state should not to choose between their marriage and their right to travel.

The Constitution should not be used as an election-year soapbox. The political effort to target gay and lesbian couples in fact would drive gaping holes through the Constitution, and radically alter the proper balance of federal-state relations. The proposed statutes are radical rather than conservative, seeking to trump 200 years of established precedent and history -- all to serve a transitory political (and extraordinarily discriminatory) agenda.

Whatever one's stand on equal marriage rights for all Americans, as former Justice Jackson said, "the [full faith and credit] clause would not seem to lend itself to sociological, ethical or economic ends or implications, other than certainty and order."³² All lawfully married couples are entitled to that certainty and order, and to protection of their lawful marriage throughout the country.

II. THE UNPRECEDENTED FEDERAL INTRUSION INTO DECISIONS ABOUT CIVIL MARRIAGE, TRADITIONALLY LEFT TO THE STATES AND TO INDIVIDUAL COUPLES, IS UNCONSTITUTIONAL, UNWISE, AND UNFAIR.

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

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- A. The Constitution and U.S. history place the definition and regulation of civil marriages with the states, not the federal government.

The Tenth Amendment, federalism, the absence of enumerated congressional power, and history all make clear that states, not the federal government, define and regulate civil marriage, subject only to U.S. constitutional constraints.³³ As the court stated in United Ass'n of

³² 45 Columbia L. Rev. at 25.

³³ Senator Dole, S.1740's original co-sponsor, often extols the Tenth Amendment while campaigning, and frequently reads it in full from a laminated palmcard: "The powers not

Journeyman Local 198 AFL-CIO Pension Plan v. Myers, 488 F. Supp. 704, 707 (M.D. Louis. 1980):

We start with the proposition that the delicate relationships of husband-wife, parent-child and family-property arrangements are traditionally matters of exclusive state concern. No provision of Article I of the Constitution confers power on the Congress to legislate in these sensitive state fields. Any general federal law attempting to regulate such relationships would be constitutionally infirm. (emphasis added)

"The power to regulate marriage is a sovereign function retained by the states; it has not been granted to the federal government." Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) (striking down a Nevada prison regulation denying inmates the ability to marry). Over a hundred years ago, the Supreme Court held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890).³⁴

More recently, in Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979), the Court reaffirmed that "[i]nsofar as marriage is within temporal control, the States lay on the guiding hand (emphasis added)." Direct regulation of the validity, formation, and dissolution of civil marriages is emphatically a matter of state, not federal, prerogative and jurisdiction.

Even a purported desire of the federal government to achieve its most legitimate concern in this area,

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X. And as the Courts have made clear, "[i]f the Tenth Amendment reserved any power to the states, it must be the power to legislate rules applicable to marriage, separation and divorce, community property and succession." United Ass'n of Journeymen, 488 F. Supp. at 707; see also Neustein v. Orbach, 130 F.R.D. 12, 14 (E.D.N.Y. 1990); In re Knabe, 8 B.R. 53, 56 (Bankr. S.D. Ind. 1980).

³⁴ See also Pennoyer v. Neff, 95 U.S. 714 (1877) ("The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930).

uniformity in the effect of federal legislation (a motivation clearly not present in these proposed statutes³⁵), cannot alter the status of preexisting rights. For example, in Ensminger v. Commissioner of Internal Revenue, 610 F.2d 189, 191 (4th Cir. 1979), the court held:

The regulation of marriage, family life and domestic affairs "has long been regarded as a virtually exclusive province of the States." In its application of the tax laws there has been a consistent deference by Congress to state laws in such matters.³⁶

Status and interests in domestic relations are determined by state law. Although federal law may (subject to other constitutional limitations) then decide how that lawfully-determined status or that state-created interest is treated, for example in taxation, it cannot create or destroy the underlying status itself. See Burnet v. Harmel, 287 U.S. 103, 110 (1932) ("state law creates legal interest but the federal statute determines when and how they shall be taxed."). As the Supreme Court explained in DeSylva, 351 U.S. 580:

The scope of a federal right is, of course, a federal question, but that does not mean its content is not to be determined by state, rather than federal law.... This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

This is particularly true of civil marriage -- an act that, once having occurred, creates a res, an actual ongoing status that remains unless abrogated by legal adjudication,

³⁵ The proposed statutes do not embody a federal promotion of uniformity; indeed, in an affirmative congressional act without precedent, they expressly license a "free-for-all" amongst the states. Similarly, with regard to federal status, they give new meaning to the phrase "house divided," literally making a couple sitting in their home, their children at their feet (and maybe their employers, or creditors, at the door) simultaneously married and "unmarried" depending on whether a state or federal agency is making the determination.

³⁶ Id. at 191 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)) (emphasis added); see also Boyer v. Commissioner of Internal Revenue, 732 F.2d 191, 194 (D.C. Cir. 1984).

i.e., divorce, by the proper legal authority (i.e., the states, not the federal government).

The proposed statutes would, for the first time in U.S. history, purport to declare that as a general matter (and not just for a particular purpose), Congress and every federal agency will not recognize a whole group of people's marriages -- marriages that are fully, equally, and lawfully valid under applicable state law. The proposed statutes in effect define marriage itself and thus unconstitutionally usurp state control of domestic relations, while placing couples and others in an untenable situation.

- B. Recognizing federalist imperatives, Congress has historically deferred questions of defining domestic relations to state law.

Even were Congress somehow to thread its way around these constitutional and historical boundaries, perhaps invoking its power over federal programs,³⁷ most federal statutes do not define domestic relations terms (especially terms such as "spouse", "husband," or "wife"), and courts generally found that Congress intended such terms to be defined by reference to state law (even with

³⁷ Although Congress indisputably has significant power to legislate within its own spheres of competence, when a law interferes with an area outside congressional power, it must in the first instance at least be "reasonably adapted" to a permitted end. *United States v. Darby*, 312 U.S. 100, 121 (1941). Here, for the first time ever, Congress would be sweepingly rejecting an entire group of marriages, not because of any specific, legitimate statutory purpose, but because it does not like the sexual orientation of the people marrying or the sex of the spouses they marry. Aside from being discriminatory, this is in essence an ultra vires regulation of marriage rather than treatment of a matter "reasonably adapted to a permitted end," and is therefore unconstitutional.

For instance, in *United States v. Parker*, 911 F.Supp. 830 (E.D. Pa. 1995), Judge Bechtel dismissed an indictment under the Child Support Recovery Act, holding that Congress has no power to regulate or govern payment of child support. Following the approach taken in *United States v. Lopez*, 115 S.Ct. 1624 (1995), the court held that the regulation of family relationships has insufficient connection to the regulation of enterprise permitted Congress under the Constitution's commerce clause. There are limits to what Congress can do, even in the exercise of its enumerated powers, powers it lacks in the area of marriage.

disparities from state to state).³⁸ This policy --

³⁸ See, e.g., *Ryan-Walsh Stevedoring Co, Inc. v. Trainer*, 601 F.2d 1306, 1313 (9th Cir. 1964) ("To determine whether a claimant is decedent's "wife," state law is dispositive because the [federal act] does not define this operative term"); *Yarbrough v. United States*, 341 F.2d 621, 623 (Ct. Cl. 1965) (in enacting the statute in question, Congress undoubtedly left the determination of whether or not an employee was married up to individual state law); *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 494-96 (1916) (in construing the Federal Employers' Liability Act, the words "next of kin" should take their meaning from applicable state law); *Lembecke v. United States*, 181 F.2d 703, 706 (2d. Cir 1950) (definition of "widow" for Federal employee life insurance statute determined by reference to state law); *Prudential Insurance Co. v. Dulek*, 504 F.Supp 1015 (D. Neb. 1980) (definition of "widow" for purposes of Federal statute governing serviceman's group life insurance policy determined by reference to state law); *Albina Engine & Machine Works v. O'Leary*, 328 F.2d 877, 878 (9th Cir. 1964) (definition of "surviving wife" for Longshoremen's and Harbor Workers Act determined by reference to state law); *Nott v. Folsom*, 161 F.Supp. 905, 907 (S.D.N.Y. 1958) (definition of "remarriage" for Social Security Act benefits determined by reference to state law); *Huff v. Director, United States Office of Personnel Management*, 40 F.3d 35, 36-7 (3rd Cir. 1994) (definition of "spouse" for federal survivor benefits determined by reference to state law); *Bell v. Tug Shrike*, 215 F. Supp. 377 (E.D. Va. 1963) (determination of valid legal status for merchant marine benefits is question of state law); *Davis V. College Suppliers Co.*, 813 F. Supp. 1234, 1237 (S.D. Miss. 1993) ("For purposes of ERISA, 'spouse' means the person to whom one is lawfully married").

These and other cases reflect the historical deference and restraint heretofore shown by Congress with regard to civil marriage, and thus do not themselves directly resolve whether Congress could under certain circumstances seek to impose a definition other than those legally established under state law; many, in fact, suggest that "when the Congress exercises the legislative powers vested in it by the Constitution, it may prescribe the rules which will apply." E.g., *United Ass'n of Journeyman*, 488 F. Supp. at 707.

The defect in the proposed statutes, however, lies in the degree to which Congress is exceeding its proper powers, transgressing Tenth Amendment and other federalist constraints, and violating other constitutional provisions such as the prohibition against discrimination. As such,

followed by Congress for more than two hundred years -- is not simply a result of deference, but rather is part of our system of federalism. As the Fourth Circuit wrote in Ensminger, 610 F.2d at 191, "Federal deference in matters within the state police power reflects more than a policy of comity. In fact, it represents a constitutionally derived recognition of the essential character of state government within our federal system."

Legislation in which Congress has, accordingly, left the definition of domestic relations to state law covers a vast range of topics and familial relationships.³⁹

even cases supporting congressional latitude cannot be relied on to support such a flagrantly ultra vires abuse.

³⁹ See note 37. One case bears additional discussion. In Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), an Australian man in a long-term committed relationship with an American man applied for American citizenship, claiming status as a "spouse" under the Immigration Act. The INS rejected his application with a letter that stated, "You have failed to establish a bona fide marital relationship can exist between two faggots." Bill Jordan, "Boulder Vows of Homosexuals Termed Invalid," Boulder Daily Camera, Dec. 4, 1975, p.1.

With linguistic alteration, the Ninth Circuit agreed, holding that "[s]o long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued." *Id.* at 1039-40. The court asserted that its decision was based "primarily on the [Immigration and Nationality] Act itself," *id.* at 1040, and was seemingly influenced by Congress's singularly "broad power over immigration and naturalization [in the exercise of which] Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* at 1042 (citations omitted). The court concluded that whatever the validity of the couple's marriage under state law, and despite the silence of the federal statute, Congress did not intend "spouse" to include a same-sex spouse.

This part of Adams is distinguishable today based on changes in both federal and state law. Whatever the "ordinary, contemporary, common meaning" that civil marriage or spouse may have seemed to have then, developments in Hawaii and other states make clear that "marriage" no longer automatically excludes same-sex couples. Moreover, claiming it should "strive to interpret language in one section of a statute consistently with the language of other sections," *id.* at 1040, the Adams court placed great weight on the

Despite disparities in state law regarding marriage, and historical periods of disagreement among the states, however, this consistent approach of congressional deference has served the states, the couples, and the nation well. It is ironic that the first such congressional proposal in decades to depart from this historic respect for federalism and states' power would come from this purportedly pro-"devolution" Congress. And it is telling that the proposal comes in an election year.

- C. Congress is bound by additional constitutional provisions that preclude its meddling with the definition of marriage, or interposing its own discriminatory selection among lawfully married couples.

Congress is bound not just by the Tenth Amendment and the federalist imperative of not encroaching upon the lawful domain of the states, but also by other constitutional constraints. These include the fundamental right to marry, equal protection, the right to intimate association, and the privileges and immunities clause.⁴⁰ The proposed statutes burden lawful marriages and discriminate among married people, and thus violate each of these constitutional guarantees.

To give just a few brief examples, consider the burden these anti-marriage bills impose on the fundamental right to marry itself. Marriage is not just a most important personal choice, but also a fundamental

infamous "homosexual exclusion" provision in the immigration statute, since repealed. Pub.L.No. 101-649, 194 Stat. 4978 (1990). According to the House Report for the Immigration Reform Act of 1990, the repeal demonstrated that "the United States does not view personal decisions about sexual orientation as a danger to other people in our society." H.R. Rep. No. 723, at 56.

Moreover, the bulk of the Adams opinion can fairly be regarded as dicta, since at the time, same-sex couples were unable to marry under Colorado law, and thus did not qualify for federal immigration protection. Indeed, the statute itself provided that for a marriage to be valid, it had to be "entered into in accordance with the laws of the place where the marriage took place." 8 U.S.C. Section 1186a(d)(1)(A)(i)(I).

⁴⁰ U.S. Const., art. IV § 2. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985); see also Evans v. Romer, 882 P.2d 1335, 1351 (Colo. 1994) (Scott, J., concurring).

constitutional right.⁴¹ Any laws that infringe upon a fundamental right, including a law that allows the federal government to exclude a class of people from the definition of marriage, are subject to strict scrutiny. Strict scrutiny is nearly always fatal to the law in question.

Courts will strike down federal regulations which burden the freedom to marry and marriage itself.⁴² Moreover, the Supreme Court has identified "the receipt of government benefits..., property rights, ... and other less tangible benefits," for which, as it noted "marital status is often a precondition," as one of the four defining and "important attributes of marriage."⁴³ Burdening such access across the board is literally one of the most massive burdens on marriage ever proposed.

Likewise, the proposed bills violate the constitutional guarantee of equal protection, as they would deny federal protections and entitlements to a discrete group of people, and authorize federal agencies across-the-board to pick and choose among lawfully married couples, discriminating against same-sex married couples for any and all purposes. The bills flagrantly discriminate on the basis of sex and sexual orientation, and violate the "fundamental rights" prong of the Equal Protection Clause.

⁴¹ Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 438 (1965); Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987). See also Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community Critique," 21 N.Y.U. Rev. of L. & Soc. Change 567, 568 n.2, 571-81 (1994).

⁴² See, e.g., O'Neill v. Dent, 364 F. Supp. 565, 569 (E.D.N.Y. 1973) (federal regulations of the U.S. Merchant Marine Academy prohibiting attendance by married cadets unduly restricts the fundamental right to marry guaranteed by the First, Fifth, Ninth and Fourteenth Amendments). The court noted, "[t]he Government does not deny that the power to regulate marriage is a sovereign function retained by the states, and not vested in Congress. Thus, subject to constitutional limitations, the ... States are authorized to regulate the qualifications of the contracting parties[.]" Id.

⁴³ Turner v. Safley, 482 U.S. 78, 95-96 (1987) (holding that even convicted murderers share important interests in exercising the freedom to marry, without arbitrary restriction).

While "fundamental rights" analysis requires strict scrutiny, and sex discrimination triggers at least heightened scrutiny, it is clear that the government "interest" in this extraordinary, across-the-board discrimination against selected married people cannot meet even the lowest level of scrutiny, so-called "rational basis" review. The only government "interest" is the sponsors's dislike of gay men and lesbians, and disapproval of women and men who fall in love with, choose to marry, and undertake the responsibilities and commitment of civil marriage with, a person of the "wrong" (that is, their same) sex. As former U.S. Solicitor General Rex E. Lee has written, despite his own personal disapproval, "[l]aws prohibiting homosexual marriages are the classic case of discrimination based on sex."⁴⁴

Moreover, since the proposed statutes would with one stroke alter the content of hundreds of federal laws addressing a myriad of purposes and contexts, it cannot be argued that the legislation is even rationally related to any legislative end, let alone all the ends reflected in the statutes affected. Whatever the stated intention, the result would be an irrational system of conflicting and incomplete rights, and indeterminate obligations.

For example, imagine a same-sex couple who are lawfully married in Hawaii, but where both spouses work for the federal government. The couple will be simultaneously married for state purposes, but not married for federal purposes. For state taxes, they would file as "married," but for federal they would have to file single returns. Benefits from state worker's compensation and disability insurance would accrue on the basis of their married status, but the federal taxation of those benefits would be determined on the basis of single status. Since state and federal statutes frequently intertwine, the couple would perpetually be in a paradoxical state of being married and not married at the same time in the same place. This hardly serves any "rational" end as to the couple, let alone to the states, the couple's children and dependents, their employers, creditors, or others, including the United States (of which we, too, are citizens).⁴⁵

⁴⁴ Rex E. Lee, A Lawyer Looks At the Equal Rights Amendment, p. 65 (Brigham Young University Press 1980).

⁴⁵ Similarly, the proposed statutes define marriage as solely a "legal union" between one man and one woman. Since it does not, and indeed cannot, define what a "legal union" is, courts will have to turn to the states for guidance. And, because the hundreds of federal statutes that would be covered deal with a variety of familial

Denying social security benefits to lesbians and gay men who retire after decades of marriage has nothing to do with the intent of the social security laws; preventing pension benefits of senior same-sex couples from vesting has nothing to do with the purposes of ERISA; preventing custodial parents from enforcing child custody decrees has nothing to do with the legislative intent of the Parental Kidnapping Prevention Act; preventing a lesbian or gay man to be at a same-sex spouse's hospital bedside furthers no legitimate Veterans Administration policy; nor do any such discriminatory exclusions and burdens fairly reflect the married couple's interest in equal participation in, or contribution to, society.

The proposed statutes's wholesale exclusion of lawfully married same-sex couples from literally every "Act of Congress, [and] any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States" would be perhaps the most sweeping and radical revision of federal law in history -- drawing a caste-line through each and every federal law or action that touches upon marriage.

- D. The proposed bills set a new low for Congress, an abdication of Congress's historic role in the federal system enforcing private rights.

The radical nature of the proposed statutes is underscored by recalling what Congress's role is supposed to be in the area of individual rights. Since the Civil War, Congress has, at its finest, used its powers to ensure that states and others do not infringe on the established rights of Americans, beginning especially with those protected by the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution. The Civil Rights Acts, the Religious Freedom Restoration Act, the Equal Access Act all are examples where Congress moved to ensure that Americans -- even minority Americans, even unpopular Americans -- are protected in their individual freedoms at least as much as, if not more than, is guaranteed by the Constitution.

relationships that are not defined (including "children," "survivor," "next-of-kin," "widow," "beneficiary" -- to name a few), courts would have to examine state law for those meanings as well. Thus, for instance, courts or agencies may find themselves compelled not to accept a Hawaii wife as a "wife" for "federal purposes," while acknowledging that woman's son as the couple's "child" for federal as well as state purposes. The result would be a legal and administrative mess, and a true stigma and hardship to the families involved.

Indeed, the Supreme Court has ruled that where Congress has constitutionally-based enforcement power it is to strengthen protection of individual rights. In Katzenbach v. Morgan, 384 U.S. 641, 651n.10 (1966), the Court considered the scope of congressional power in the context of its enforcement powers under the Fourteenth Amendment, and explained that:

Section 5 [of the Fourteenth Amendment] does not grant Congress the power to exercise discretion in the other direction and enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' (emphasis added)

By contrast, the proposed legislation harkens back to the shameful chapters of our history where the federal government targeted and took action against vulnerable minorities, reinforcing, or, in the worst cases, creating, their second-class citizenship. The legislation sets a new standard for federal discrimination, and overtly invites states to discriminate as well.

Moreover, the proposed statutes potentially set the federal government in direct opposition to many states, not just civil rights leaders such as Hawaii. For example, the demise of the "different-sex restriction" on marriage now being challenged in Hawaii will likely be based on the Hawaii state constitutional guarantee of freedom from discrimination on the basis of sex.⁴⁶ At least fifteen other state constitutions have such an explicit guarantee as well; all states have some requirement of equal protection. Over time, more and more states are likely to end sex discrimination in marriage.

And meanwhile, even apart from full faith and credit, at least eight states have signed the Uniform Marriage and Divorce Act, and numerous states have already enacted their own statutes governing the recognition of out-of-state marriages that would not have been performed in-state. For Congress to define civil marriage as excluding large numbers of individuals lawfully married in many states goes against Congress's historic role, and constitutional obligation, to help unify the country, provide for clarity and certainty as people travel, and assure the equal rights, privileges, and immunities of all Americans.

⁴⁶ Baehr v. Miike, 852 P.2d 44, 74-75 (Haw. 1993) (formerly "Baehr v. Lewin"). A final result is still at least two years away, as the case is just now heading toward trial in the lower court, currently scheduled for September 1996.

CONCLUSION

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

- Griswold v. Connecticut, 381 U.S. 479, 486 (1965)

Civil marriage -- with the responsibilities, privileges, protections, and commitment it entails -- is not a limited commodity. When same-sex couples finally partake of the same freedom to marry as other Americans, they will not "use up" or "harm" marriage, nor will they take anything away from non-gay married couples. Marriage and all its incidents will remain fully available for heterosexual couples.

Allowing lesbians and gay men to share in the commitment of civil marriage is not an attack on marriage; indeed, the instability, uncertainty, and radical discrimination introduced by this so-called "defense of marriage act" are themselves the real attack.

Whatever one's stand on equal marriage rights for same-sex couples, it should be clear that Congress would never even consider such a radical, unconstitutional, discriminatory, and impractical redefinition of marriage and the federal-state balance, were it not targeting a very vulnerable minority -- today, lesbian and gay Americans. If marriage needs "defense," it is not from same-sex couples in love; it is from politicians willing to subvert the Constitution to discriminatory or political ends, and from others unwilling to stand up for what is right.



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The “Defense of Marriage Act” does not advance the values inherent in marriage. The Act does undermine our country’s values of federalism.

Let’s Talk About Marriage:

- The values embodied in marriage are *good, moral values* -- the values of caring, commitment and love. Government plays an appropriate role in regulating and supporting, through state laws, this institution of marriage.
- The *federal government* plays *no role* in establishing the institution of marriage. This is how it should be. Marriage, and other domestic relations issues, are areas traditionally determined by the *States*.

Let’s Talk About Federalism:

- The federal government, under our Constitutional structure, has a very *defined role* in this country. Indeed, the current Supreme Court keeps Congress very conscious of *adhering* to that *appropriate, defined role*.
- The *United States* of America is held together by some important principles:
 - * The federal government will *not* tread unnecessarily on state sovereignty (read -- the Tenth Amendment); and
 - * The official acts and proceedings of each state *will* be recognized by sister States (read -- Full Faith and Credit clause).

Let’s Talk About The “Defense of Marriage Act”:

- The so-called “Defense of Marriage Act” does *nothing* to further the important, moral values of marriage. Nowhere in its text does it ever *prohibit* people of the same sex from marrying. It purports to advance moral views -- but actually ignores the morality of two people coming together in an act of love and commitment.
- But the “Defense of Marriage Act” *does* do a great deal of *harm* to the *federalism principles* on which our country is based. The bill expands the power of Congress,

in a radical and breathtaking manner, to *unilaterally*, without a Constitutional amendment, determine for states *which* of their official acts or proceedings will *no longer* be guaranteed recognition by other states.

The *Constitution* says *each state is guaranteed this right of recognition*. But *Congress* has now *usurped* for itself the role of *final arbiter* of such recognitions.

- Are the states ready to let *Congress* decide that certain types of *probate* decisions will no longer be granted recognition? Are the states ready to let *Congress* decide that remarriage for a *second* or *third* time, or a *childless* marriage, will no longer be recognized? Are the states ready to let *Congress* decide that a state custody order will no longer be recognized?

The *Constitution* says that in these *United* States of America, each state is *guaranteed* that right of recognition. But the "Defense of Marriage Act" says -- *Congress knows better*. The power to decide is the power to control.

Let's Be Real:

- Many people today do not support the right of people of the same sex to marry. That's a wrong position as a basic *moral* matter. The *moral* position is to validate the effort of two people to commit themselves to each other in a caring, loving, and responsible manner. That's why marriage is a good thing -- for *everybody*.

But one can be strongly against the right of two people of the same sex to marry -- and *still* be *strongly* against the so-called "Defense of Marriage Act." That's because the bill represents a *radical* attack on our most cherished principles of *federalism*.

Don't let Congress pull a Marbury v. Madison. Don't let them, in the guise of giving States more rights, *undermine* the *guarantees* to the States inherent in the Full Faith and Credit Clause. And don't let them, in the guise of States' rights, insert the federal government, for the first time, into the definition of marriage.

12:30pm
5/16

Text in BOLD is taken from previously released language, such as letters or speeches.

1. *In 1992, you said to gay people "I have a vision and you are part of it." What is that vision in 1996 and how do gays and lesbians figure into it?*

I have a vision of American in which every individual is valued and respected. As President, I have sought to promote inclusion and heighten public awareness in order to send a powerful message of equality and acceptance to people everywhere. Increased opportunity makes citizens more productive, building stronger communities and a stronger nation. I believe that we must continue to help people rise as far as their talents and determination can take them in order to make the most out of our great diversity. (letter).

2. *You have been praised by gays and lesbians as the most "pro-gay" president in history. Yet there is also a profound sense of disappointment in the gay community because the expectations you set in 1992 were so high. What do you say to those gay voters who invested so much emotionally to your candidacy but who have felt let down?*

We have truly accomplished a great deal during my Administration. We have also learned a lot about what we can do -- and how to get it done. My Administration has taken more steps than any previous in bringing the gay and lesbian communities to the table. (CG) I am proud of my record and it is a record to build on.

I remain dedicated to ending discrimination and to protecting the civil rights of every citizen in our society. I am proud that my Administration has more openly gay and lesbian individuals serving in appointed positions than in any previous Administration, and their impact, both in expertise and in efforts to advocate for the concerns of gay men and lesbians, is significant. We have increased AIDS funding, research, and educational outreach. I am the first President ever to endorse a gay and lesbian civil rights bill, the Employment Non-Discrimination Act. We have also opened the door for qualified gays and lesbians to receive top security clearances. I pledge to you that I will continue striving for greater education and compassion, working not simply to tolerate our differences, but to celebrate them. (POTUS message)

3. *What is your own personal comfort level with homosexuality? Is it one of tolerance or acceptance or something else?*

I believe all Americans should be judged on their merits, not on their orientation. I strive to do this in my personal life. It was one of the most fundamental lessons that my mother taught me from a very early age -- to make decisions about people based on who they are not what they are.

In public life, I have worked relentlessly to empower people who historically have been discriminated against based on race, class, gender, disability, or sexual orientation. I remain committed to achieving that goal. (POTUS letter 5-18-93)

Having grown up in a segregated society, I have always felt strongly that everyone who is willing to work hard and play by the rules should be allowed to participate in American life. My belief is that we don't have a person to waste. We should try to protect the rights of all our citizens to live up to the fullest of their capacities.

4. What gay or lesbian person has had the biggest impact on your life and why?

HOW TO INCLUDE BARNEY FRANK, ELIZABETH BIRCH, FRED HOCKBERG? (per Ann Lewis)

This is hard to answer because I know so many individuals, many of whom I brought into my Administration. Bruce Lehman, Roberta Achtenberg, Richard Socarides and Bob Hattoy, to name just a few, have all made valuable contributions. I've had a long friendship with David Mixner, whose advice has meant a great deal to me over the years. In 1978 I was Governor of Arkansas and I hired Dr. Mike Rankin to be the state's mental health director, and he has become a good friend of mine. Today he serves as an outstanding member of my advisory council on HIV/AIDS.

5. As a strong Baptist, do you have problems reconciling your religion's views on homosexuality with your personal beliefs?

I have been blessed by having people of strong faith in my life and this faith is a major sustaining force and motivation. It is through my religious beliefs that I have learned compassion, tolerance and inclusion. Through prayer and Bible study I have learned that God's love is extended to all people.

6. Jimmy Carter recently denounced how some religious and political leaders have embraced strong anti-gay views. And he said it must be made clear "that a platform of 'I hate gay men and women' is not a way to become president of the United States." Do you agree with Carter and do you intend to do anything to counter what he calls "obnoxious attitudes?"

Yes, I ^{believe that} ~~do agree with President Carter.~~ Those who promote discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. (POTUS letter) I will continue to move my Administration in the direction of compassion, acceptance and understanding.

The recent attempts by extremists in Congress to expel HIV positive servicemembers, regardless of their ability to serve, was a good example of what President Carter is saying. I'm very proud of the coalition my Administration built in our successful repeal effort. This provision was unconstitutional, served no military or public health policy and was just plain wrong. Once people understood this, we were able to have it repealed.

7. *Perhaps your biggest accomplishment in the area of gay rights has been with changes in the federal workplace. Federal departments have written non-discrimination policies. Gays and lesbians are no longer denied security clearances. What do you feel is the long-term impact of these changes?*

These changes are important because they represent another step forward in making sure that all Americans can contribute and that everyone has a seat at the table. It's particularly important to fully open up the civil service, to ensure that the most capable people are not denied the opportunity to serve. These men and women in our government, and their work, will outlast any President.

8. *People still debate what happened with the gays in the military issue. Given a second term, would you revisit this topic? Is there a chance you might issue the executive order you promised in 1992?*

Few issues in recent times have spurred the kind of debate that has occurred since I pledged to change our nation's policy toward homosexuals in the military. I know that this is a sensitive and emotional issue for many people.

many of
At this point these issues are being actively litigated in the federal courts, ~~and it is probably best to let those cases run their course.~~

9. *If you had the chance to start over, only this time knowing the extent of the opposition to opening the military's doors to gays and lesbians, how would you approach the issue? What lessons did you learn from the fight?*

It's fair to say that I have thought a lot about this and that there are some things I think I should have done differently. I now believe that we needed to build a broader consensus on this important issue before moving forward. Sometimes change comes best when it is achieved through incremental steps.

10. *Do you believe gays and lesbians face the same kind of obstacles that other minority groups have confronted?*

No two groups, just as no two people, face the same obstacles. Although some are quite similar, the gay and lesbian communities are themselves diverse and encompass members of all minority communities. We all want liberty and freedom. We want the embrace of family and community. We want to make the most of our own lives. (AA speech). That is why I've always said that our great diversity is a source of strength to unite -- not divide -- our country.

11. *You have endorsed the Employment Non-Discrimination Act. Why do you feel this legislation is appropriate and necessary. Given a second term, will you actively push the Congress to pass it?*

I don't think it's right for employers to discriminate based on sexual orientation. Men and

women in 42 states may now be fired from their jobs solely because of their sexual orientation, even though it has no bearing on their job performance. Those who face this kind of job discrimination have no legal recourse, in either our state or federal courts. This is wrong.

The Employment Non-Discrimination Act, for which I announced my support last fall, is designed to protect the rights of all Americans to participate in the job market without fear of unfair discrimination. (Kennedy letter 10/19/95)

12. *Why do you oppose same-sex marriage? Is there a chance you could reconsider?*

I am aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination. In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. I believe that these issues continue to be best resolved at this level of civil discourse.

13. *What about the slate of proposed laws to limit marriage between a man and a woman? Should Congress establish a national standard for marriage?*

~~As I have already stated, I am opposed to same sex marriage. I think these issues are best decided at the state level. If Congress decides otherwise, I will have to give it serious thought.~~ If Congress enacts legislation, I will review it in light of that position.

14. *Are there steps, such as changing the tax code or immigration laws or creating domestic partnership benefits for federal workers, that you believe the federal government should take to help gay couples?*

It is important that we all remember that for the most part, real and lasting social change occurs through incremental steps built upon consensus and by lengthy public discussion. We as a people are still struggling with these issues. So again, I think we have to look first to state and local governments as well as the private sector for guidance. And again I hope that these matters can be discussed at a level of discourse that will be civil and productive.

15. *An increasing number of gays and lesbians are having children, either biologically or through adoption. Is this trend acceptable to you? Is there anything government should do to encourage or discourage gay child rearing?*

The most important thing is that children find themselves in loving, healthy and safe environments. ~~It is the responsibility of State and local officials to ensure that the best interests of the child are being served. This should not be an issue for the federal government.~~

I am personally opposed to same-sex marriage. My position is long-standing. It is not being reviewed or reconsidered.

need to

16. *Some parents object to teaching anything positive about homosexuality in the public schools. At the same time, some troubled teens kill themselves because of confusion over their sexuality. How far should the nation's schools go in discussing homosexuality?*

Our nation's educators have made great strides in how to deal with issues which affect our children in these rapidly changing times. Decisions about what is said and what is taught must be left to teachers, local school districts, parents, and students.

I am deeply troubled by the numbers of teen suicides, especially among gay and lesbian youth and of the rise in violence among all youth. Secretary Shalala's conference on gay and lesbian teen suicide brought this discussion to a national level and my Administration is continuing to work to find solutions to these complex problems. I recently met with a large number of people from throughout the country to discuss the issues of drug use and violence among teenagers. These discussions are very important and will continue.

17. *You spoke out against the slate of anti-gay initiatives that were popular in past elections yet your administration decided to sit out of the Supreme Court fight on the issue. How can you justify speaking out in one instance and then staying silent later?*

I've never stayed silent on this issue. I have continually stated my belief that those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise. (POTUS letter)

18. *AIDS continues to be a crisis in America. How has AIDS affected you personally?*

My Administration has worked hard to respond aggressively to the this epidemic creates. I'm proud of the fact that despite the enormous pressures of a zero-growth budget we have increased spending for AIDS research, prevention and care by more than 40 percent. We have approved a whole new class of AIDS drugs in record time and made sure that people living with HIV would have the means to pay for them. We have also more than doubled the funding for the Ryan White CARE Act, which brings high-quality medical care to hundreds of thousands of people every year. And we have preserved the Medicaid program, which provides health coverage for almost half of those Americans living with AIDS.

Every case of AIDS affects each of us and the future of our country because we are losing part of the next generation of leaders for our nation. Like many Americans, I have lost close friends and colleagues to AIDS and I keep them in mind as a potent reminder of the task we all face in eradicating this disease.

19. *Some AIDS activists say in one breath that you've done more than either of the two most recent Presidents to fight the disease and then in the next breath they criticize you for not doing enough or speaking out enough. Are both critiques accurate?*

We have done more, but we will not have done enough until there are no more infections, no new cases and no more deaths. Our first priority must be to find a cure for those living with

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HIV and a vaccine for everyone else. We will continue to invest in research and keep our commitment to providing medical care to those living with HIV and AIDS. My Administration will continue to fight to preserve Medicare and Medicaid and to continue our investment in the Ryan White CARE Act. I have been frustrated by Congress' inability to approve the funds I have requested for the Centers for Disease Control and Prevention, and will continue to work to invest in prevention.

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21. Congress was stalled for many months on reauthorizing the Ryan White CARE Act. One reason was the debate over a proposal to test newborns for HIV. Is this a provision you can live with? What are your thoughts on mandatory HIV testing?

I was pleased to be able to sign a five-year reauthorization of the Ryan White CARE Act in May. Throughout those Congressional debates, I reminded the Speaker of the House and Senate Majority Leader of the importance of this program to people living with AIDS and HIV and their families. It was reassuring to see both houses reject the kind of divisive rhetoric adopted by Senator Helms.

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22. What will a second Clinton term do to fight the war on AIDS?

First and foremost, we must continue the search for a cure and a vaccine. At the same time, we will continue the search for better treatments for people living with AIDS. No President can guarantee success in science, but we must marshal all of our resources, public and

private, towards this effort. We will keep working on prevention efforts. And we must preserve the Medicaid program. I will continue to stand up to efforts to dismantle this program by the Republican majority in Congress. This program is a lifeline of support for millions of Americans, including many people living with AIDS.

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12:30pm
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1. *In 1992, you said to gay people "I have a vision and you are part of it." What is that vision in 1996 and how do gays and lesbians figure into it?*

I have a vision of American in which every individual is valued and respected. As President, I have sought to promote inclusion and heighten public awareness in order to send a powerful message of equality and acceptance to people everywhere. Increased opportunity makes citizens more productive, building stronger communities and a stronger nation. I believe that we must continue to help people rise as far as their talents and determination can take them in order to make the most out of our great diversity. (letter).

2. *You have been praised by gays and lesbians as the most "pro-gay" president in history. Yet there is also a profound sense of disappointment in the gay community because the expectations you set in 1992 were so high. What do you say to those gay voters who invested so much emotionally to your candidacy but who have felt let down?*

We have truly accomplished a great deal during my Administration. We have also learned a lot about what we can do -- and how to get it done. My Administration has taken more steps than any previous in bringing the gay and lesbian communities to the table. (CG) I am proud of my record and it is a record to build on.

I remain dedicated to ending discrimination and to protecting the civil rights of every citizen in our society. I am proud that my Administration has more openly gay and lesbian individuals serving in appointed positions than in any previous Administration, and their impact, both in expertise and in efforts to advocate for the concerns of gay men and lesbians, is significant. We have increased AIDS funding, research, and educational outreach. I am the first President ever to endorse a gay and lesbian civil rights bill, the Employment Non-Discrimination Act. We have also opened the door for qualified gays and lesbians to receive top security clearances. I pledge to you that I will continue striving for greater education and compassion, working not simply to tolerate our differences, but to celebrate them. (POTUS message)

3. *What is your own personal comfort level with homosexuality? Is it one of tolerance or acceptance or something else?*

I believe all Americans should be judged on their merits, not on their orientation. I strive to do this in my personal life. It was one of the most fundamental lessons that my mother taught me from a very early age -- to make decisions about people based on who they are not what they are.

In public life, I have worked relentlessly to empower people who historically have been discriminated against based on race, class, gender, disability, or sexual orientation. I remain committed to achieving that goal. (POTUS letter 5-18-93)

Having grown up in a segregated society, I have always felt strongly that everyone who is willing to work hard and play by the rules should be allowed to participate in American life. My belief is that we don't have a person to waste. We should try to protect the rights of all our citizens to live up to the fullest of their capacities.

4. What gay or lesbian person has had the biggest impact on your life and why?

HOW TO INCLUDE BARNEY FRANK, ELIZABETH BIRCH, FRED HOCKBERG? (per Ann Lewis)

This is hard to answer because I know so many individuals, many of whom I brought into my Administration. Bruce Lehman, Roberta Achtenberg, Richard Socarides and Bob Hattoy, to name just a few, have all made valuable contributions. I've had a long friendship with David Mixner, whose advice has meant a great deal to me over the years. In 1978 I was Governor of Arkansas and I hired Dr. Mike Rankin to be the state's mental health director, and he has become a good friend of mine. Today he serves as an outstanding member of my advisory council on HIV/AIDS.

5. As a strong Baptist, do you have problems reconciling your religion's views on homosexuality with your personal beliefs?

I have been blessed by having people of strong faith in my life and this faith is a major sustaining force and motivation. It is through my religious beliefs that I have learned compassion, tolerance and inclusion. Through prayer and Bible study I have learned that God's love is extended to all people.

6. Jimmy Carter recently denounced how some religious and political leaders have embraced strong anti-gay views. And he said it must be made clear "that a platform of 'I hate gay men and women' is not a way to become president of the United States." Do you agree with Carter and do you intend to do anything to counter what he calls "obnoxious attitudes?"

Yes, I ^{believe that} agree with President Carter. Those who promote discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. (POTUS letter) I will continue to move my Administration in the direction of compassion, acceptance and understanding.

The recent attempts by extremists in Congress to expel HIV positive servicemembers, regardless of their ability to serve, was a good example of what President Carter is saying. I'm very proud of the coalition my Administration built in our successful repeal effort. This provision was unconstitutional, served no military or public health policy and was just plain wrong. Once people understood this, we were able to have it repealed.

7. Perhaps your biggest accomplishment in the area of gay rights has been with changes in the federal workplace. Federal departments have written non-discrimination policies. Gays and lesbians are no longer denied security clearances. What do you feel is the long-term impact of these changes?

These changes are important because they represent another step forward in making sure that all Americans can contribute and that everyone has a seat at the table. It's particularly important to fully open up the civil service, to ensure that the most capable people are not denied the opportunity to serve. These men and women in our government, and their work, will outlast any President.

8. People still debate what happened with the gays in the military issue. Given a second term, would you revisit this topic? Is there a chance you might issue the executive order you promised in 1992?

And, as you know,

Few issues in recent times have spurred the kind of debate that has occurred since I pledged to change our nation's policy toward homosexuals in the military. I know that this is a sensitive and emotional issue for many people.

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9. If you had the chance to start over, only this time knowing the extent of the opposition to opening the military's doors to gays and lesbians, how would you approach the issue? What lessons did you learn from the fight?

It's fair to say that I have thought a lot about this and that there are some things I think I should have done differently. I now believe that we needed to build a broader consensus on this important issue before moving forward. Sometimes change comes best when it is achieved through incremental steps.

10. Do you believe gays and lesbians face the same kind of obstacles that other minority groups have confronted?

No two groups, just as no two people, face the same obstacles. Although some are quite similar, the gay and lesbian communities are themselves diverse and encompass members of all minority communities. We all want liberty and freedom. We want the embrace of family and community. We want to make the most of our own lives. (AA speech). That is why I've always said that our great diversity is a source of strength to unite -- not divide -- our country.

11. You have endorsed the Employment Non-Discrimination Act. Why do you feel this legislation is appropriate and necessary. Given a second term, will you actively push the Congress to pass it?

I don't think it's right for employers to discriminate based on sexual orientation. Men and

women in 42 states may now be fired from their jobs solely because of their sexual orientation, even though it has no bearing on their job performance. Those who face this kind of job discrimination have no legal recourse, in either our state or federal courts. This is wrong.

The Employment Non-Discrimination Act, for which I announced my support last fall, is designed to protect the rights of all Americans to participate in the job market without fear of unfair discrimination. (Kennedy letter 10/19/95)

12. Why do you oppose same-sex marriage? Is there a chance you could reconsider?

I am aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination. In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. I believe that these issues continue to be best resolved at this level of civil discourse.

13. What about the slate of proposed laws to limit marriage between a man and a woman? Should Congress establish a national standard for marriage?

~~As I have already stated, I am opposed to same sex marriage. I think these issues are best decided at the state level. If Congress decides otherwise, I will have to give it serious thought. If Congress enacts legislation, I will review it in light of that position.~~

14. Are there steps, such as changing the tax code or immigration laws or creating domestic partnership benefits for federal workers, that you believe the federal government should take to help gay couples?

~~It is important that we all remember that for the most part, real and lasting social change occurs through incremental steps built upon consensus and by lengthy public discussion. We as a people are still struggling with these issues. So again, I think we have to look first to state and local governments as well as the private sector for guidance. And again I hope that these matters can be discussed at a level of discourse that will be civil and productive.~~

15. An increasing number of gays and lesbians are having children, either biologically or through adoption. Is this trend acceptable to you? Is there anything government should do to encourage or discourage gay child rearing?

~~This question, with all due respect, misses the point. The most important thing is that children find themselves in loving, healthy and safe environments. It is the responsibility of state and local officials to ensure that the best interests of the child are being served. This should not be an issue for the federal government.~~

That's not the interest of the child, is it?

I am personally opposed to same-sex marriage. My position is long-standing. It is not being reviewed or reconsidered.

16. *Some parents object to teaching anything positive about homosexuality in the public schools. At the same time, some troubled teens kill themselves because of confusion over their sexuality. How far should the nation's schools go in discussing homosexuality?*

Our nation's educators have made great strides in how to deal with issues which affect our children in these rapidly changing times. Decisions about what is said and what is taught must be left to teachers, local school districts, parents, and students.

I am deeply troubled by the numbers of teen suicides, especially among gay and lesbian youth and of the rise in violence among all youth. Secretary Shalala's conference on gay and lesbian teen suicide brought this discussion to a national level and my Administration is continuing to work to find solutions to these complex problems. I recently met with a large number of people from throughout the country to discuss the issues of drug use and violence among teenagers. These discussions are very important and will continue.

17. *You spoke out against the slate of anti-gay initiatives that were popular in past elections yet your administration decided to sit out of the Supreme Court fight on the issue. How can you justify speaking out in one instance and then staying silent later?*

I've never stayed silent on this issue. I have continually stated my belief that those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise. (POTUS letter)

18. *AIDS continues to be a crisis in America. How has AIDS affected you personally?*

My Administration has worked hard to respond aggressively to the this epidemic creates. I'm proud of the fact that despite the enormous pressures of a zero-growth budget we have increased spending for AIDS research, prevention and care by more than 40 percent. We have approved a whole new class of AIDS drugs in record time and made sure that people living with HIV would have the means to pay for them. We have also more than doubled the funding for the Ryan White CARE Act, which brings high-quality medical care to hundreds of thousands of people every year. And we have preserved the Medicaid program, which provides health coverage for almost half of those Americans living with AIDS.

Every case of AIDS affects each of us and the future of our country because we are losing part of the next generation of leaders for our nation. Like many Americans, I have lost close friends and colleagues to AIDS and I keep them in mind as a potent reminder of the task we all face in eradicating this disease.

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1. *In 1992, you said to gay people "I have a vision and you are part of it." What is that vision in 1996 and how do gays and lesbians figure into it?*

I do have a clear vision, and all Americans figure into it. As President, I have sought to promote inclusion and heighten public awareness in order to send a powerful message of equality and acceptance to people everywhere. Increased opportunity makes citizens more productive, building stronger communities and a stronger nation. I believe that we must continue to help people rise as far as their talents and determination can take them -- regardless of their sexual orientation -- in order to make the most out of our great diversity. (letter).

2. *You have been praised by gays and lesbians as the most "pro-gay" president in history. Yet there is also a profound sense of disappointment in the gay community because the expectations you set in 1992 were so high. What do you say to those gay voters who invested so much emotionally to your candidacy but who have felt let down?*

We all had high expectations, and we've truly accomplished a lot during my Administration. We've also learned a lot about what we can do -- and how to get it done. Although some of my early efforts may not have been as effective as I had hoped, my Administration has taken more steps than any previous in welcoming the gay and lesbian communities to the table. (CG) I'm proud of my record, ~~but~~ it's a record to grow on, not to sit on.

I remain dedicated to ending discrimination and to protecting the civil rights of every citizen in our society. I am proud that my Administration has more openly gay and lesbian individuals serving in appointed positions than in any previous Administration, and their impact, both in expertise and in efforts to advocate for the concerns of gay men and lesbians, is significant. We have increased AIDS funding, research, and educational outreach. I am the first President ever to endorse a gay and lesbian civil rights bill, the Employment Non-Discrimination Act. We have also opened the door for qualified gays and lesbians to receive top security clearances. I pledge to you that I will continue striving for greater education and compassion, working not simply to tolerate our differences, but to celebrate them. (POTUS message)

3. *What is your own personal comfort level with homosexuality? Is it one of tolerance or acceptance or something else?*

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In Arkansas, I worked relentlessly to empower people who historically have been discriminated against based on race, class, gender, disability, or sexual orientation. I

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~~Yes, I do agree with President Carter.~~ ^{believe that} ~~Those who promote discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong.~~ (POTUS letter) I will continue to move my Administration in the direction of compassion, acceptance and understanding.

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Few issues in recent times have spurred the kind of debate that has occurred since I pledged to change our nation's policy toward homosexuals in the military. I know that this is a sensitive and emotional issue for many people.

This is still a topic of great concern to many people. At this point ^{many aspects of} these issues are being actively litigated in the federal courts. And at this point ~~it is probably best to let these cases run their course.~~

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My position on gay marriage is long-standing. It is not being reviewed or reconsidered.

The Employment Non-Discrimination Act, for which I announced my support last fall, is designed to protect the rights of all Americans to participate in the job market without fear of unfair discrimination. (Kennedy letter 10/19/95) I support it.

12. Why do you oppose same-sex marriage? Is there a chance you could reconsider?

The institutions of traditional marriage and family face tremendous pressures in today's society, and I think we must do everything we can to support and strengthen these institutions. I am aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination. In our country's history we have, for good reason, looked first to state and local governments, as well as private sector, to consider issues like these involving community values and matters of conscience. I believe that these issues continue to be best resolved at this level of civil discourse.

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It is important that we all remember that for the most part, real and lasting social change occurs through incremental steps built upon consensus and by lengthy public discussion. We as a people are still struggling with these issues. Thus again, I think we have to look first at state and local governments as well as the private sector for guidance. And again I hope that these matters can be discussed at a level of discourse that will be civil and productive.

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The most important thing, as far as I can tell, is that children find themselves in loving, caring, and nourishing environments. So long as state officials and adoption agencies need to determine that the best interests of the child are being served, there is no reason for the federal government to intervene.

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I am deeply troubled by the numbers of teen suicides, especially among gay and lesbian youth and of the rise in violence among all youth. Secretary Shalala's conference on gay and lesbian teen suicide brought this discussion to a national level and my administration is continuing to work to find solutions to these complex problems. I recently met with a large number of people from throughout the country to discuss the issues of drug use and violence among teenagers. These discussions are very important and will continue.

17. You spoke out against the slate of anti-gay initiatives that were popular in past elections yet your administration decided to sit out of the Supreme Court fight on the issue. How can you justify speaking out in one instance and then staying silent later?

I've never stayed silent on this issue. I have continually stated my belief that those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise. (POTUS letter)

23. Any final thoughts?

There are, without question, real differences in the life experience and backgrounds of people who make up America, but there is also a rich fabric of shared experience -- of common problems, common hopes and fears, common ground. It is a matter of the utmost importance for our nation that all citizens expand that common ground, focusing more on what unites us than on what divides us. Just as important, our public discourse must help guide us down the path toward greater unity. (POTUS letter) I want to lead a nation that is coming together, not coming apart.

THE WHITE HOUSE

WASHINGTON

May 10, 1996

MEMORANDUM FOR THE PRESIDENT

THROUGH: LEON PANETTA 
FROM: JACK QUINN
GEORGE STEPHANOPOULOS
MARSHA SCOTT
SUBJECT: GAY MARRIAGE LEGISLATION

This week, legislation on gay marriage was introduced by Bob Dole and Don Nickles in the Senate, and by Bob Barr (plus five other Republicans and two Democrats) in the House. We understand that there will be joint Senate-House hearings on the gay marriage bills as early as next Wednesday.

The proposed legislation has two parts. The first provides that states need not give "full faith and credit" to other states' recognition of gay marriage -- a provision that appears to anticipate legalization of gay marriage in Hawaii. This provision is of no real substantive significance, however, since the Constitution's "full faith and credit" clause already would permit each state to choose whether to recognize a gay marriage granted by another state.

The second part of the legislation would set forth that under any federal statute, rule or regulation, the terms "marriage" and "spouse" shall only refer to heterosexual marriage. This provision would mean that any federal funds, privileges or protections, including those administered by states, could not be made available to same sex married partners, even if same sex marriages are recognized by the state where they reside. This provision does have substantive significance and may be viewed by the gay and lesbian community as a form of overt discrimination. At least for now, however, it would not alter the status quo, since no state recognizes same sex marriages and neither does the federal government. There are, of course, many difficult issues facing our communities related to what benefits and rights can be associated with same sex partnerships outside the context of marriage. But those difficult issues are not addressed by this bill.

Given your stated and longstanding opposition to gay marriage, we believe there would not be a substantive basis for you not to sign the proposed legislation if it were to be adopted by Congress. **It is therefore our recommendation that you should sign this legislation if it is enacted.**

At the same time, we believe that your willingness to sign this legislation should not be announced until it is absolutely necessary to do so. While it is critical that your position be unambiguous and unwavering, there is a risk that too early an announcement of a willingness to sign the bill could cause Republicans to add even more draconian provisions.

For this reason, we recommend that in the first instance, the White House should state that you are opposed to gay marriage, but that there has not yet been an opportunity to review this legislation. The legislation has not yet even been marked up by committee, and thus it is premature for the White House to comment. If and when this approach is no longer viable, the White House would state that you would be prepared to sign this bill if enacted by Congress.

Assuming your approval of this approach, Marsha, George and others will be talking to key leaders in the gay and lesbian community to explain your position and why it is necessary for you to take this action. We can expect that many gays and lesbians will be hurt, if not offended, by this approach to the proposed legislation.

_____ AGREE

_____ DISAGREE

_____ DISCUSS



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 13, 1996

[DELLINGER DRAFT]

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building

Dear Mr. Chairman,

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

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

The Department of Justice believes that H.R. 3396 would ~~(clearly)~~ be sustained as constitutional, and that there are no legal issues raised by H.R. 3396 that necessitate an appearance by a representative of the Department. The President has previously stated his opposition to the legalization of marriage between persons of the same sex. ~~(We are informed that if H.R. 3396 were presented to the President, he would sign the measure into law.)~~

Sincerely,

[Walter Dellinger or Andrew Fois? I think Fois -- WD]

Rumors are circulating that the Supreme Court will soon -- perhaps as early as tomorrow -- announce its decision in the pending case on Colorado's statute precluding legal and other protections for gay people. After consultation with the Department of Justice and Marsha Scott, this office recommends that the White House's public response to any such ruling be short and take account of the Administration's determination last year not to submit a friend-of-the-Court brief in the case.

In the event the Court *upholds* the Colorado statute, we recommend that the White House limit its comments to a statement along the following lines:

The President condemns the Colorado statute and other similar laws. The President has urged states and localities to reject such ordinances. Those who would legalize such discrimination misunderstand the common values that make our nation strong.

In the event the Court *invalidates* the Colorado statute, we recommend that the White House make a statement along the following lines:

The President is pleased by today's decision, because he condemns the Colorado statute and other similar laws. The President has urged states and localities to reject such ordinances. Such discrimination is both unconstitutional, as the Court today held, and inconsistent with the common values and principles that make our nation strong.

MESSAGE CONFIRMATION

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THE PRESIDENT HAS SEEN

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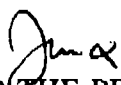
THE WHITE HOUSE

WASHINGTON

96 APR 8 P7:01

April 8, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN 
COUNSEL TO THE PRESIDENT

SUBJECT: GAY MARRIAGE

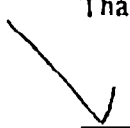
The White House has received numerous inquiries concerning your position on gay marriage. In addition, The Advocate, a widely-read gay and lesbian newspaper, is planning to publish a story on this issue and would like to include a statement of your position. The deadline for that story is *tomorrow -- Tuesday, April 9.*

With input from Marsha Scott, we have prepared the attached talking points. George Stephanopoulos has reviewed and approved them.

- The institutions of traditional marriage and family face tremendous pressures in today's society. We must do everything we can to support and strengthen these institutions. The President has previously said that he does not personally support same-sex marriages.
- The President is aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination.
- In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. The President believes that these issues continue to be best resolved at this level of civil discourse.

Recommendation

That you approve the talking points set forth above.

AGREEDISAGREEDISCUSS

To: Steve Newirth 61647
From: George R. Stephanopoulos (6-7128) FAX 6-6703
Re: Gay marriage talking points

POTUS approved

Gay Marriage Talking Points

---- The President has long opposed gay marriage based on his belief that the institution of marriage should be reserved for unions between one man and one woman.

---- The President strongly believes that gay and lesbian individuals should not be subject to unfair discrimination, which is why he has endorsed legislation outlawing discrimination against gays and lesbians in the workplace. But he does not believe that the federal government should promote gay marriages.

[If asked about domestic partnerships or providing federal benefits to partners in gay and lesbian partnerships---]

---- These decisions are best left to state and local governments and private institutions. But since the President does not believe that the federal government should recognize gay marriage, he does not believe it is appropriate for scarce federal resources to be devoted to providing spousal benefits to partners in gay and lesbian relationships.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 14, 1996

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

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

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

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

Sincerely,

Andrew Fois
Assistant Attorney General

cc: The Honorable Charles T. Canady
The Honorable John Conyers, Jr.
The Honorable Barney Frank

Jeff Powell

Randy Moss

Chris Schweden

Jevette Washington

What does it mean?

What are implications?

Court expressly says it is not proceeding on reasoning of Col. Sup Ct, re political participation
2 rationales:

① Amend 2 fails rational basis scrutiny, since the breath of amendment shows no connection to discrete objective; real objective to make gap unequal, and classification is for purpose of creating a classification.

↳ Clear distinction between this and gap in mil. policy, which has discrete objective of military cohesion, etc. - we have a legit. purpose, unlike the Colorado statute.

military morale,

Atmospheric impact, but not doctrinal change. Should not have material impact.

Maintain armed services under battlefield conditions.

③ A denial of equal protection in most literal sense - group cannot seek protection of laws when harmed in public or private sphere. Laws must be available to all who seek them. This problem rarely occurs Has only happened to African-Americans.

⌋

This does not cause doctrinal issue for gays in military policy.

⌋

No discussion of status of gays. It is only in other point, in rational basis section.

Gay marriage:

Def. of spouse and marriage still OK.
Cing leg. on its own spending power.

Q Mike, Speaker Gingrich has said that in the House in the next couple of weeks they'll take up a small business bill to give relief to small business owners and attach minimum wage to that. As far as you understand the provisions that he's talking about, would the President sign that bill?

MR. MCCURRY: Look, the President is clear, and I'll make it clear for the Speaker. If he needs to be -- just increase the minimum wage, do it cleanly, get it over with. He keeps moving slowly in the right direction, but he's not quite there yet. They're going to raise the minimum wage, they're going to do it sometime soon, and they shouldn't do it by attaching it to legislation the President finds less acceptable.

Q And would you take a look at this if it comes down?

MR. MCCURRY: We'll look at whatever Congress passes; we have an obligation to do that. But it's real simple what we need to do, which is to increase the minimum wage and get on with it, and they ought to do it now.

Q Why are you so confident they'll pass it?

MR. MCCURRY: Because they have indicated they will do it, and now they're just debating about what forum the final legislation will do. As you know, the Speaker indicated over the weekend it was likely that they would do it shortly.

Q Mike, does the President have a position on same-sex marriage, and if Congress passes a bill outlawing it, would he sign it?

MR. MCCURRY: The President's against same-sex marriage. We'll have to look carefully at the legislation that's under consideration in the Congress.

Q China --

MR. MCCURRY: China. I haven't had any report yet from the Deputy Trade Representative Mr. Sands, who is in Beijing now. His deliberations are critical to the schedule we now have, which calls for a trigger list to be published in the Federal Register on May 15th. There's no change in the status of that, and we await a report from our trade negotiator in Beijing.

Q You haven't had any report at all?

MR. MCCURRY: I haven't seen -- I think they were just beginning their meetings today in Beijing and we would get a report coming in at some point.

Q If I can just follow up on a previously asked question. You said the President is against same-sex marriage. Is

this a position he's espoused before? Because it seems to me when this has come up in the past, you've tried to kind of finesse it, and I've never heard this kind of -- that I remember, this kind of pronouncement.

MR. MCCURRY: It reflects his views that he's articulated in the past and it reflects his position on the issue.

MORE

#221-07/13

Q Why does he oppose same-sex marriages?

MR. MCCURRY: He believes this is a time when we need to do things to strengthen the American family, and that's the reason why he's taken this position.

Q He doesn't think that strengthens the --

Q To your knowledge has his position been enunciated before publicly?

MR. MCCURRY: Yes.

Q When?

MS. GLYNN: As early as 1992, but after that as well.

MR. MCCURRY: I think -- in 1992, Mary Ellen says.

Q How does he feel about legislation that would outlaw it?

MR. MCCURRY: Well, there is a piece of legislation that is under consideration on the Hill and we'll look at the legislation.

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MR. MCCURRY: I told the President what I had said and he didn't seem to be despondent about my characterization.
(Laughter.)

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THE PRESIDENT HAS SEEN

4/9/96

THE WHITE HOUSE

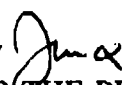
WASHINGTON

96 APR 8 P7:01

April 8, 1996

MEMORANDUM FOR THE PRESIDENT

FROM:

JACK QUINN 
COUNSEL TO THE PRESIDENT

SUBJECT:

GAY MARRIAGE

The White House has received numerous inquiries concerning your position on gay marriage. In addition, The Advocate, a widely-read gay and lesbian newspaper, is planning to publish a story on this issue and would like to include a statement of your position. The deadline for that story is *tomorrow -- Tuesday, April 9.*

With input from Marsha Scott, we have prepared the attached talking points. George Stephanopoulos has reviewed and approved them.

- The institutions of traditional marriage and family face tremendous pressures in today's society. We must do everything we can to support and strengthen these institutions. The President has previously said that he does not personally support same-sex marriages.
- The President is aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination.
- In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. The President believes that these issues continue to be best resolved at this level of civil discourse.

Recommendation

That you approve the talking points set forth above.



AGREE

DISAGREE

DISCUSS

TALKING POINTS ON SUPREME COURT COLORADO DECISION

What did the Court hold?

The Court invalidated a Colorado state constitutional amendment that rescinded and prohibited any state and local laws offering protection from discrimination on the basis of sexual orientation. The opinion of the Court -- written by Justice Kennedy and joined by Justices Stevens, O'Connor, Souter, Ginsberg and Breyer -- held that the Colorado provision violated the Equal Protection Clause of the Fourteenth Amendment.

What is the President's reaction to the decision?

The President believes the decision was appropriate. The Colorado law denied a group of citizens the right to participate effectively in the political process, and the President believes that it is bad public policy to deny rights categorically to any group of Americans. It is also inconsistent with the common values and principles that make our nation strong.

How does this decision affect the government's "Don't Ask, Don't Tell" policy for gays in the military?

We have been advised by the Department of Justice that the Court's decision should have no impact on litigation relating to that policy. In such litigation, the government has argued, and courts have held, that the existing policy bears a rational relationship to legitimate government interests, such as creating and maintaining unit cohesion in the armed forces. The Department believes that nothing in the Court's decision changes that.

What are the implications of the Court's decision with respect to the Defense of Marriage Act -- the gay marriage bill -- that has been introduced in Congress?

We have been advised today by the Department of Justice that the Court's decision does not affect the Department's conclusion that the proposed legislation would survive a constitutional challenge. As I have stated before, the President is opposed to gay marriage.

But didn't the court suggest that a classification -- like a classification of gay marriages envisioned by the Defense of Marriage bill -- is invalid?

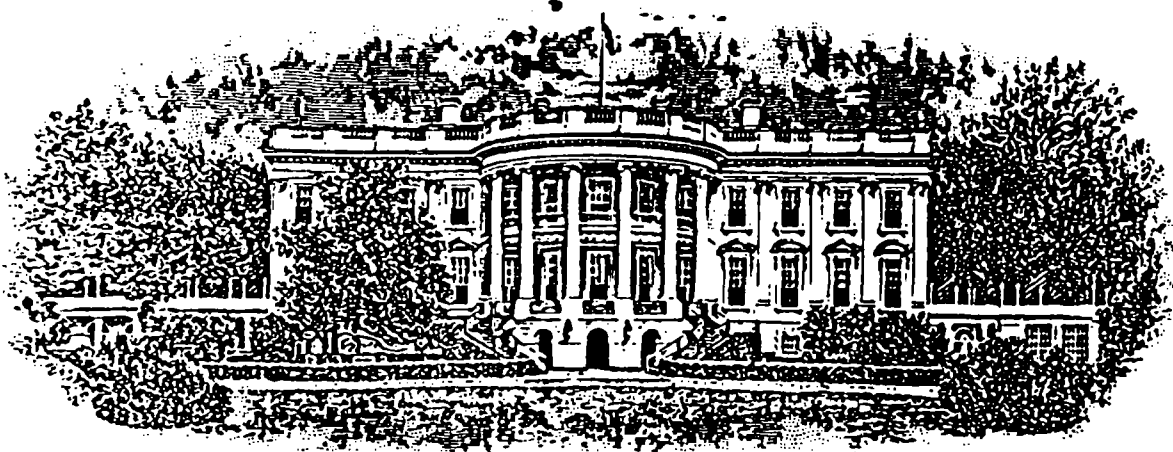
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Does the Court's decision mean that classifications based on sexual orientation will be subject to some heightened level of scrutiny, like that which applies in race cases?

No. The Court did not use that heightened scrutiny in this case, and instead applied the so-called "rational basis" test -- the lowest level of scrutiny applied in equal protection cases. And I understand that the Court did not change the way it applies the rational basis test -- that is, a classification is valid if it is a rational means of pursuing a legitimate government interest.

This is not to understate the significance of the Court's decision. The Court rarely invalidates a statute under "rational basis" scrutiny, but here found the Colorado provision could not be credibly related to any legitimate government interest.

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE:

5/21

TO:

JEFF POWELL, OLC

FACSIMILE NUMBER:

514 0539

TELEPHONE NUMBER:

FROM:

Steve Newirth

TELEPHONE NUMBER:

PAGES (WITH COVER):

3

COMMENTS:

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As I have stated before, the President is opposed to gay marriage.

But didn't the court suggest that a classification -- like a classification of gay marriages envisioned by the bill -- is invalid?

No. The Court did not address a bill like the Defense of Marriage Act in its decision. I, of course, can't predict how all of these issues will be decided in the future. But I have been advised that it is still the best judgment of the Justice Department that the Defense of Marriage Act would be upheld if challenged in court.

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This is not to understate the significance of the Court's decision. The Court rarely invalidates a statute under "rational basis" scrutiny, but here found the Colorado provision could not be credibly related to any legitimate government interest.

12:30pm
5/16

Text in BOLD is taken from previously released language, such as letters or speeches.

1. *In 1992, you said to gay people "I have a vision and you are part of it." What is that vision in 1996 and how do gays and lesbians figure into it?*

I have a vision of American in which every individual is valued and respected. As President, I have sought to promote inclusion and heighten public awareness in order to send a powerful message of equality and acceptance to people everywhere. Increased opportunity makes citizens more productive, building stronger communities and a stronger nation. I believe that we must continue to help people rise as far as their talents and determination can take them in order to make the most out of our great diversity. (letter).

2. *You have been praised by gays and lesbians as the most "pro-gay" president in history. Yet there is also a profound sense of disappointment in the gay community because the expectations you set in 1992 were so high. What do you say to those gay voters who invested so much emotionally to your candidacy but who have felt let down?*

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In public life, I have worked relentlessly to empower people who historically have been discriminated against based on race, class, gender, disability, or sexual orientation. I remain committed to achieving that goal. (POTUS letter 5-18-93)

Having grown up in a segregated society, I have always felt strongly that everyone who is willing to work hard and play by the rules should be allowed to participate in American life. My belief is that we don't have a person to waste. We should try to protect the rights of all our citizens to live up to the fullest of their capacities.

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women in 42 states may now be fired from their jobs solely because of their sexual orientation, even though it has no bearing on their job performance. Those who face this kind of job discrimination have no legal recourse, in either our state or federal courts. This is wrong.

The Employment Non-Discrimination Act, for which I announced my support last fall, is designed to protect the rights of all Americans to participate in the job market without fear of unfair discrimination. (Kennedy letter 10/19/95)

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The most important thing is that children find themselves in loving, healthy and safe environments. It is the responsibility of state and local officials to ensure that the best interests of the child are being served. This should not be an issue for the federal government. *That interest, not the interests of others, is what is paramount.*

This question, with all due respect, misses the point.

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I remain opposed to same sex marriage. I believe marriage is an institution for the union of a man and a woman. This has been my longstanding position and it is not being reviewed or reconsidered. I also strongly believe that issues relating to gays and lesbians should not be used to tear our communities apart. Even on the most difficult social issues we face, we must work together to find common ground. Every American deserves no less.

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I've never stayed silent on this issue. I have continually stated my belief that those who would legalize discrimination on the basis of sexual orientation or any other grounds are gravely mistaken about the values that make our nation strong. The essential right to equality must not be denied by a ballot initiative or otherwise. (POTUS letter)

18. AIDS continues to be a crisis in America. How has AIDS affected you personally?

My Administration has worked hard to respond aggressively to the this epidemic creates. I'm proud of the fact that despite the enormous pressures of a zero-growth budget we have increased spending for AIDS research, prevention and care by more than 40 percent. We have approved a whole new class of AIDS drugs in record time and made sure that people living with HIV would have the means to pay for them. We have also more than doubled the funding for the Ryan White CARE Act, which brings high-quality medical care to hundreds of thousands of people every year. And we have preserved the Medicaid program, which provides health coverage for almost half of those Americans living with AIDS.

Every case of AIDS affects each of us and the future of our country because we are losing part of the next generation of leaders for our nation. Like many Americans, I have lost close friends and colleagues to AIDS and I keep them in mind as a potent reminder of the task we all face in eradicating this disease.

19. Some AIDS activists say in one breath that you've done more than either of the two most recent Presidents to fight the disease and then in the next breath they criticize you for not doing enough or speaking out enough. Are both critiques accurate?

We have done more, but we will not have done enough until there are no more infections, no new cases and no more deaths. Our first priority must be to find a cure for those living with

HIV and a vaccine for everyone else. We will continue to invest in research and keep our commitment to providing medical care to those living with HIV and AIDS. My Administration will continue to fight to preserve Medicare and Medicaid and to continue our investment in the Ryan White CARE Act. I have been frustrated by Congress' inability to approve the funds I have requested for the Centers for Disease Control and Prevention and will continue to work to invest in prevention.

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Responsibility can help students protect themselves, while
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12:30pm
5/16

Text in BOLD is taken from previously released language, such as letters or speeches.

1. *In 1992, you said to gay people "I have a vision and you are part of it." What is that vision in 1996 and how do gays and lesbians figure into it?*

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GEORGETOWN UNIVERSITY LAW CENTER

Chai R. Feldblum
Associate Professor of Law

THE "DEFENSE OF MARRIAGE ACT"

to Stone Newirth

The Dole/Nickle "Defense of Marriage Act" has some *significant constitutional problems*.

The bill adds a section to the federal Full Faith and Credit statute (28 U.S.C. §1738) to allow states *not* to recognize the public acts of another State if they relate to that State's recognition of a same-sex marriage.

Senator Nickle asserts this provision is a constitutional "exercise of Congress' power" under the second sentence of the constitutional Full Faith and Credit Provision. Senator Nickles is way off the mark. **The bill's provision is *not* a constitutional exercise of Congress' power because the provision is directly *contrary* to the *first* sentence of the Full Faith and Credit clause.**

Here's what the United States *Constitution* says:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Sentence one of this clause is very clear: **every State is required to recognize the official public acts and judicial proceedings of other States.** While we tend to take the concept of a *United* States of America for granted these days, an early Supreme Court case set forth clearly the *reason* for the Full Faith and Credit clause:

The "very purpose" of the clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore the obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Williams v. North Carolina*, 317 U.S. 287, 295 (1942).

The second sentence of the Full Faith and Credit clause reads as follows:

“And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

There is *no* way this second sentence (which is what Senator Nickles is relying on) could be read to mean: States have to recognize the official acts of other States, *except* when **Congress** passes a statute to say they *don't* have to. That would effectively allow any Congressional statute to **amend** the Full Faith and Credit clause of Constitution -- without going through the bother of a constitutional amendment. That *cannot* be a correct reading of this sentence.

What the second sentence of the Full Faith and Credit clause does mean is actually pretty clear. It means Congress may pass **implementing** legislation to carry out, for practical purposes, the *logistics* of the constitutional mandate. Specifically, Congress may pass laws to establish the **manner** in which State acts or proceedings may be proved, and the specific **effects** in the States the recognition of such acts or proceedings will have as a practical matter.

Indeed, **every law Congress has passed in this area has been of this implementing type**. The early laws it passed in 1790 and 1804 were basic ones: the 1790 law provided for ways to authenticate acts and judicial proceedings, and the 1804 law provided methods for authenticating non-judicial records.

The recent laws cited by Senator Nickles simply reflect the more **modern** types of acts and proceedings our States do these day. They all share a **basic, common denominator: they all implement the Full Faith and Credit mandate -- they do not restrict it**.

For example:

* The Parental Kidnapping Prevention Act of 1990 provided that States must **enforce** *child custody determinations* made by other States;

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None of these Congressional statutes attempt to **restrict** States from recognizing the orders or proceedings of other States. Instead, they clarify the **types** of acts and proceedings the States **must** recognize. Those laws are **constitutional exercises** of Congress' power to **implement** the Full Faith and Credit mandate of the Constitution. **In contrast, the Dole/Nickles "Defense of Marriage Act" is an unconstitutional attempt by Congress to restrict and undermine the basic mandate of the Full Faith and Credit clause of the federal Constitution.**



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Chai R. Feldblum
Associate Professor of Law

The “Defense of Marriage Act” does not advance the values inherent in marriage. The Act does undermine our country’s values of federalism.

Let’s Talk About Marriage:

- The values embodied in marriage are *good, moral values* -- the values of caring, commitment and love. Government plays an appropriate role in regulating and supporting, through state laws, this institution of marriage.
- The *federal government* plays *no role* in establishing the institution of marriage. This is how it should be. Marriage, and other domestic relations issues, are areas traditionally determined by the *States*.

Let’s Talk About Federalism:

- The federal government, under our Constitutional structure, has a very *defined role* in this country. Indeed, the current Supreme Court keeps Congress very conscious of *adhering* to that *appropriate, defined role*.
- The *United States* of America is held together by some important principles:
 - * The federal government will *not* tread unnecessarily on state sovereignty (read -- the Tenth Amendment); and
 - * The official acts and proceedings of each state *will* be recognized by sister States (read -- Full Faith and Credit clause).

Let’s Talk About The “Defense of Marriage Act”:

- The so-called “Defense of Marriage Act” does *nothing* to further the important, moral values of marriage. Nowhere in its text does it ever *prohibit* people of the same sex from marrying. It purports to advance moral views -- but actually ignores the morality of two people coming together in an act of love and commitment.
- But the “Defense of Marriage Act” *does* do a great deal of *harm* to the *federalism principles* on which our country is based. The bill expands the power of Congress,

in a radical and breathtaking manner, to *unilaterally*, without a Constitutional amendment, determine for states *which* of their official acts or proceedings will *no longer* be guaranteed recognition by other states.

The *Constitution* says *each state is guaranteed this right of recognition*. But *Congress* has now *usurped* for itself the role of *final arbiter* of such recognitions.

- Are the states ready to let *Congress* decide that certain types of *probate* decisions will no longer be granted recognition? Are the states ready to let *Congress* decide that remarriage for a *second* or *third* time, or a *childless* marriage, will no longer be recognized? Are the states ready to let *Congress* decide that a state custody order will no longer be recognized?

The *Constitution* says that in these *United* States of America, each state is *guaranteed* that right of recognition. But the "Defense of Marriage Act" says -- *Congress knows better*. The power to decide is the power to control.

Let's Be Real:

- Many people today do not support the right of people of the same sex to marry. That's a wrong position as a basic *moral* matter. The *moral* position is to validate the effort of two people to commit themselves to each other in a caring, loving, and responsible manner. That's why marriage is a good thing -- for *everybody*.

But one can be strongly against the right of two people of the same sex to marry -- and *still* be *strongly* against the so-called "Defense of Marriage Act." That's because the bill represents a *radical* attack on our most cherished principles of *federalism*.

Don't let Congress pull a Marbury v. Madison. Don't let them, in the guise of giving States more rights, *undermine* the *guarantees* to the States inherent in the Full Faith and Credit Clause. And don't let them, in the guise of States' rights, insert the federal government, for the first time, into the definition of marriage.



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TO: Jack QuinnFAX NUMBER: 486-6279FROM: Chai Feldblum

COMMENT: _____

FAX FYE
to Walter, cc
Steve n -
"Any reaction
to this?"
JR



GEORGETOWN UNIVERSITY LAW CENTER

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THE "DEFENSE OF MARRIAGE ACT"

The Dole/Nickles "Defense of Marriage Act" has some *significant constitutional problems*.

The bill adds a section to the federal Full Faith and Credit statute (28 U.S.C. §1738) to allow states *not* to recognize the public acts of another State if they relate to that State's recognition of a same-sex marriage.

Senator Nickles asserts this provision is a constitutional "exercise of Congress' power" under the second sentence of the constitutional Full Faith and Credit Provision. Senator Nickles is way off the mark. **His provision is *not* a constitutional exercise of Congress' power because the provision is directly *contrary* to the *first* sentence of the Full Faith and Credit clause.**

Here's what the United States *Constitution* says:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Sentence one of this clause is very clear: every State is required to recognize the official public acts and judicial proceedings of other States. While we tend to take the concept of a *United* States of America for granted these days, an early Supreme Court case set forth clearly the *reason* for the Full Faith and Credit clause:

The "very purpose" of the clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore the obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Williams v. North Carolina*, 317 U.S. 287, 295 (1942).

The second sentence of the Full Faith and Credit clause reads as follows:

"And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

There is *no* way this second sentence (which is what Senator Nickles is relying on) could be read to mean: States have to recognize the official acts of other States, *except* when *Congress* passes a statute to say they *don't* have to. That would effectively allow any Congressional statute to **amend** the Full Faith and Credit clause of Constitution -- without going through the bother of a constitutional amendment. That *cannot* be a correct reading of this sentence.

What the second sentence of the Full Faith and Credit clause does mean is actually pretty clear. It means Congress may pass **implementing** legislation to carry out, for practical purposes, the *logistics* of the constitutional mandate. Specifically, Congress may pass laws to establish the *manner* in which the acts or proceedings of a State may be proved, and the specific *effects* in the States the recognition of such acts or proceedings will have as a practical matter.

Indeed, every law Congress has passed in this area has been of this **implementing type**. The early laws it passed in 1790 and 1804 were basic ones: the 1790 law provided for ways to authenticate acts and judicial proceedings, and the 1804 law provided methods for authenticating non-judicial records.

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