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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Jul-1996 12:11pm

TO: Cheryl L Sweitzer

FROM: Stephen R. Neuwirth
 Office of the Counsel

SUBJECT: Could you please show Jack the attached e-mails.

I assume he is comfortable with the revised version of the SAP on the Defense of Marriage Act. Thanks.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Jul-1996 11:33am

TO: Richard Socarides
TO: Stephen R. Neuwirth
TO: Jeremy D. Benami

FROM: Ingrid M. Schroeder
 Office of Mgmt and Budget, LRD

CC: Alice E. Shuffield
CC: Lisa Kountoupes

SUBJECT: Hilley change to the HR 3396 SAP -

Attached is a John Hilley change to the HR 3396 - Defense of Marriage SAP. If you have any problems with the change please let me know ASAP - by 2pm today at the latest.

Thanks

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Jul-1996 10:50am

TO: Laura Capps

FROM: Ingrid M. Schroeder
 Office of Mgmt and Budget, LRD

CC: Peter Jacoby

SUBJECT: Revised Defense of Marriage SAP - HR 3396

Below is the revised SAP on HR 3396. The only change from the previous version is that the order of the two paragraphs were switched (per John Hilley's request). Please let me know ASAP if the change is OK. Peter Jacoby (WHLA) would like to get the SAP up to the Hill today (Rules Committee is scheduled to consider HR 3396 tomorrow - with floor action scheduled for Friday).

H.R. 3396 - Defense of Marriage Act
(Barr (R) Georgia and 108 cosponsors)

The President has long opposed same sex marriage. Therefore, if H.R. 3396 were presented to the President as ordered reported from the House Judiciary Committee, the President would sign the legislation.

The President, however, strongly opposes discrimination against any group of Americans, including gay and lesbian individuals, and he supports legislation to outlaw such discrimination in the workplace.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Jul-1996 01:49pm

TO: Cheryl L Sweitzer

FROM: Stephen R. Neuwirth
 Office of the Counsel

SUBJECT: Here is some additional info on SAP for Def. of Marriage Act

6/24
MAY 24/96

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Jul-1996 12:27pm

TO: Ingrid M. Schroeder

FROM: Richard Socarides
Office of the Chief of Staff

CC: Stephen R. Neuwirth

CC: Jeremy D. Benami

CC: Alice E. Shuffield

CC: Lisa Kountoupes

SUBJECT: RE: Hilley change to the HR 3396 SAP -

I feel strongly that it was softer the other way -- with the anti-discrimination provision up front. The only people who will focus on what we say here are the DC based g/l rights groups to whom this is important.

I agree
Richard
with



U. S. Department of Justice

Office of Legal Counsel

Washington, D. C. 20530

DATE: May 31, 1996

FACSIMILE TRANSMISSION SHEET

FROM: Walter Dellinger

OFFICE (202) 514-2051
PHONE:TO: Jack Quinn
Kathleen WallmanOFFICE (202) 456-2632
PHONE:NUMBER OF PAGES: 9 PLUS COVER SHEET

FAX NUMBER: (202) 456-6279

REMARKS:

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563
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U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

May 31, 1996

**NOTE FOR JACK QUINN
COUNSEL TO THE PRESIDENT**

From: Randolph D. Moss *RD*
Deputy Assistant Attorney General
Office of Legal Counsel

Re: Section 2 of the "Defense of Marriage Act"

Walter asked that I send you and Kathy copies of the attached memorandum, which we have prepared principally for internal OLC use. We do not currently anticipate any broader circulation of the memorandum. Please feel free to call if we can answer any questions raised by the memorandum.

cc: Kathleen Wallman
Deputy Counsel to the President

GW
MARRIAGE
FILE



U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

May 31, 1996

**MEMORANDUM FOR WALTER DELLINGER
ASSISTANT ATTORNEY GENERAL**

From: Randolph D. Moss *ROM*
Deputy Assistant Attorney General

H. Jefferson Powell *JP*
Deputy Assistant Attorney General

Re: Section 2 of the "Defense of Marriage Act"

As you know, the President has stated that he intends to sign the Defense of Marriage Act (the "Act"), if and when it is presented to him. Although we have previously indicated that we believe that the Act, if challenged, will withstand judicial scrutiny, a recent short article in the New York Times by Professor Laurence H. Tribe appears to take issue with that conclusion. See Laurence H. Tribe, Toward a Less Perfect Union, N.Y. Times, May 26, 1996 at E11 ("N.Y. Times"). We have studied the article and have reviewed our prior analysis, and we remain convinced that the courts will uphold the Act against constitutional challenge. Professor Tribe's article reaches a contrary conclusion only by reading the Act -- inappropriately, we believe -- to permit a state to decline to recognize same sex marriages even where the state has not manifested a strong public policy against same sex marriage.

I.

The Defense of Marriage Act would add a new section to the portion of the United States Code that implements the Full Faith and Credit Clause of the Constitution, see U.S. Const. art. IV, § 1. That section would, in relevant part, provide:

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, sec. 2(a); S. 1740, sec. 2(a).¹

Professor Tribe argues that Congress lacks authority, under the Full Faith and Credit Clause or otherwise, to enact such a provision. Although he concedes that a state may "decline to enforce certain determinations of another on 'public policy' grounds," such as declining to recognize a bigamous marriage entered in another state, the states may do so, as Professor Tribe notes, without any special "Congressional license." See N.Y. Times at E11. The Act, in Professor Tribe's view, must thus be construed to do more than this, and to permit a state to refuse to give effect to same sex marriages entered in another state, even where the forum state lacks a sufficient public policy ground for doing so. In short, Professor Tribe construes the Act to grant states "authority to treat a sister state's binding acts as though they were the acts of a foreign nation -- authority that Congress has no constitutional power to confer." Supra.

Without reaching the question whether Congress has authority to set full faith and credit standards that might fall short of those that would apply without an act of Congress, we conclude that Professor Tribe's analysis is flawed. In our view, section 2 of the Act is properly construed simply to permit states that have a strong public policy opposed to same sex marriage, as manifested, for example by a statute declaring such a policy, to decline to recognize such marriages entered in other states. Under this construction, the provision raises no serious constitutional issue, but simply implements the long-settled rule that the Full Faith and Credit Clause makes the conflict of law rules enforceable as a matter of constitutional law. This approach, moreover, properly construes the Act so as to avoid a serious constitutional issue, and does not, as Professor Tribe suggests, render the Act meaningless.

II.

Article IV, section 1 of the Constitution contains two separate clauses.² The first, which we will refer to herein as the "Full Faith and Credit Clause," states:

¹ The Act would also amend title 1 of the United States Code to provide that, for the purpose of interpreting "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." H.R. 3396, sec. 3; S. 1740, sec. 3. We believe that, if challenged, the courts would also uphold this provision, which establishes a uniform definition of marriage for purposes of federal law. Because the Tribe article does not take issue with the constitutionality of this provision, we do not address it herein.

² Although all of section 1 of Article IV is sometimes referred to as the "Full Faith and Credit Clause," for purposes of clarity, we will refer to the two sentences separately.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

The second sentence, which we will refer to as the "Effects Clause," adds:

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

It is clear that the first sentence of Article IV, section 1 cannot be construed literally. As the Supreme Court observed in Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532, 547 (1935), "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." See also Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 295-96 (1992). It has long been recognized that the Full Faith and Credit Clause does not require such an absurdity, but rather makes "conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity." Sun Oil Co. v. Wortman, 486 U.S. 717, 723 n.1 (1988).

The Supreme Court, moreover, has repeatedly held that the governing conflict of laws rules -- and thus the Full Faith and Credit Clause -- do "not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979); see also Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939); Alaska Packers Ass'n, 294 U.S. at 546; Hood v. McGehee, 237 U.S. 611 (1915); Olmsted v. Olmsted, 216 U.S. 386 (1910). Although the Supreme Court has never had occasion to decide whether the public policy exception provides a constitutionally adequate basis for a state to decline to recognize a marriage validly entered in a sister state,³ numerous state courts have applied the exception in this context. These courts have concluded that a marriage valid in the state where it was entered need not be given effect in the forum state, if to do so would contravene a strong public policy of that state.⁴ Indeed, as far as we are aware, no judicial

³ Cf. Loughran v. Loughran, 292 U.S. 216, 223 (1934) ("Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction").

⁴ See, e.g., Smith v. Goldsmith, 134 So. 651 (Ala. 1931); State v. Graves, 307 S.W.2d 545 (Ark. 1957); Colbert v. Colbert, 169 P.2d 633 (Cal. 1946); Spenser v. People, 292 P.2d 971 (Colo. 1956); Catalano v. Catalano, 170 A.2d 726 (Conn. 1961); Godt v. Godt, C.A. 90C-JA-5Z, 1990 WL 123047 (Del. Super. Ct. Aug. 7, 1990); Goldman v. Dithrich, 179 So. 715 (Fla. 1938); Christopher v. Christopher, 31 S.E.2d 818 (Ga. 1944); Stevens v. Stevens, 136 N.E. 785 (Ill. 1922); In the Matter of the Estate of Owen C. Loughmiller, 629 P.2d 156 (Kan. 1981); Mangrum v. Mangrum, 220 S.W.2d 406 (Ky. 1949); Succession of Gabisso, 44 So. 438 (La. 1907); Henderson v. Henderson, 87 A.2d 403 (Md. 1952); Green v. Kelley, 118 N.E. 235 (Mass. 1918); People v. Steere, 151 N.W. 617 (Mich. 1915); Laikola v. Engineered Concrete, 277

decision -- state or federal -- has reached a contrary conclusion. States have declined to recognize on public policy grounds bigamous and polygamous marriages, incestuous marriages, and for some period of time, interracial marriages.⁵

We note that the Act does not provide the forum state with authority to invalidate a marriage entered in a sister state, but rather provides only that the forum state is not "required to give effect to" a same sex marriage entered in another state. This distinction is an important one under the controlling conflict of laws rules. In general, a forum state may only declare a marriage entered in another state invalid if the forum state "had the most significant relationship to the spouses and the marriage at the time of the marriage." Restatement (Second) of Conflict of Laws § 283(2). In contrast, regardless of whether the forum state had significant contacts with the individuals or marriage at the time of the marriage, "[a] state [need] not give a particular incident to a foreign marriage when to do so would be contrary to its strong local policy." Id. at 284, cmt. c (emphasis added). Examples of the "incidents" of marriage include the rights lawfully to cohabit, to share in marital property, and to obtain an intestate share of the estate of a deceased spouse. See id. at cmt. a.

We are left with little doubt that the courts would not construe the Full Faith and Credit Clause to require a state, in contravention of its own strong public policy, to give effect to a same sex marriage entered in another state. See Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same Sex Marriages, 53 Md. L. Rev. 450, 481-93 (1994); Barbara J. Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 Wis. L. Rev. 1033, 1082-98.

III.

Professor Tribe does not take issue with this conclusion, and, indeed, appears to concede that the case law under the Full Faith and Credit Clause permits a state to decline, on the basis of a strong public policy, to recognize a marriage recognized in another state. Rather, he seems to argue that the Act must be construed to do more than this. We disagree.

N.W.2d 653 (Minn. 1979); In re Matter of May's Estate, 114 N.E.2d 4 (N.Y. 1953); Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958); Sturgis v. Sturgis, 93 P. 696 (Or. 1908); Commonwealth v. Case, 189 A.2d 756 (Pa. 1963); Johns v. Johns, 420 S.E.2d 856 (S.C. 1992); Rhodes v. McAfee, 457 S.W.2d 522 (Tenn. 1970); In re Vetas' Estate, 170 P.2d 183 (Utah 1946); Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939); Johnson v. Johnson, 106 P. 500 (Wash. 1910); Spradlin v. State Compensation Commissioner, 113 S.E.2d 832 (W.Va. 1960).

⁵ The Supreme Court has held that the Fourteenth Amendment prohibits states from refusing to recognize interracial marriages. See Loving v. Virginia, 388 U.S. 1 (1967). The Court's holding in Loving, however, is premised, inter alia, on the strict scrutiny given to racial classifications in equal protection analysis. The Supreme Court has not afforded classifications based on sexual preference this heightened level of scrutiny. Cf. Romer v. Evans, No. 94-1039, 1996 WL 262293 (U.S. May 20, 1996) (applying rational basis scrutiny to a classification based on sexual orientation).

The Defense of Marriage Act neither validates nor invalidates same sex marriages. Instead, the Act simply provides the "[n]o State . . . shall be required to give effect to" same sex marriages. H.R. 3396, sec. 2(a); S. 1740, sec. 2(a). The word "required" suggests that Congress sought to make clear that states may not be forced, against their own public policy, to recognize same sex marriages. The question is whether the Act is properly construed to allow a state to decline to recognize a same sex marriage under any circumstances or whether the state must, as a prerequisite for doing so, have a strong public policy against same sex marriages. In our view, courts will almost certainly adopt the latter construction. Significantly, the broader reading of the statute would do little more than address a difficult, hypothetical scenario that is unlikely ever to arise. Moreover, as discussed in greater detail below, this construction of the Act is not only consistent with, but is compelled by, traditional rules of statutory construction.

A.

At base, Professor Tribe seems to argue that the Act is unconstitutional because it cannot reasonably be construed simply to repeat what the Full Faith and Credit Clause already requires and because to do more would exceed Congress' power. This argument, however, is inconsistent with the apparent views of the First Congress.

On May 26, 1790, the First Congress enacted what is now 28 U.S.C. § 1738. The Act of May 26, 1790 set forth the substantive standard to be applied by the states under the Full Faith and Credit Clause. See Act of May 26, 1790, ch. 11, 1 Stat. 122. In particular, Congress provided that properly authenticated records and judicial proceedings should be accorded the same "faith and credit" as they would receive "by law or usage in the courts of the state from whence the said records are or shall be taken." *Id.* It is unclear whether this provision was intended simply to repeat the self-executing rule embodied in the Full Faith and Credit Clause or whether it was intended to give the rule some additional force through the exercise of Congress' power under the Effects Clause. Under either reading, however, the First Congress was plainly doing what Professor Tribe says Congress cannot now do: It was either clarifying for the states its understanding of the meaning of the Full Faith and Credit Clause -- as we believe Congress would be doing in enacting the Defense of Marriage Act -- or it was using its power under the Effects Clause to modify the operative rule. Given the special weight given to early congressional enactments in interpreting the Constitution, see *Myers v. United States*, 272 U.S. 52, 175 (1926); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), it seems clear that Professor Tribe's argument proves too much.

We also disagree with Professor Tribe's suggestion that our construction of the Act would render the Act meaningless. As an initial matter we note that it is not meaningless for Congress to pass a law that seeks to clarify existing constitutional standards. As discussed above, the Full Faith and Credit Clause works to constitutionalize existing conflict of law rules. These rules, however, are by no means clear. In *Federalist No. 42*, Madison noted that the meaning of the Full Faith and Credit Clause, which had appeared in substantially the same form in the Articles of Confederation, was "extremely indeterminate" and that the power conferred on Congress under the Effects Clause would accordingly work "an evident and valuable improvement on the

clause," apparently by empowering Congress to render the Clause more determinate. The Federalist No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961). It is thus apparent that the Framers envisioned, at a minimum, that Congress would have the power to clarify the effect of the Full Faith and Credit Clause. The Act serves this purpose by making clear to the states that they are not required, as a matter of federal constitutional law, to give effect to same sex marriages.

Second, although it is unsettled whether Congress may enact legislation under the Effects Clause that restricts the measure of full faith and credit that one state must accord the acts, judgments or records of another state, Congress has enacted legislation that expands upon the protection of full faith in particular circumstances,⁶ and at least four justices of the Supreme Court have indicated that Congress has the power to do so.⁷ Courts have at times, moreover, applied section 1738 in a manner that was arguably more expansive than required by the text of the Full Faith and Credit Clause standing alone. See, e.g., Thomas v. Washington Gas Light Co., 448 U.S. 261, 270 (1980) (four Justice plurality) ("This rule, if not compelled by the Full Faith and Credit Clause itself, . . . is surely required by 28 U.S.C. § 1738"). To the extent any question exists as to whether section 1738 requires more than would be required by the Full Faith and Credit Clause alone, Congress surely has authority to clarify that, in the case of same sex marriages, this greater measure of full faith and credit will not apply.

B.

Professor Tribe asserts that "Congress has no constitutional power to confer" authority on the states to decline to recognize acts, records or judicial proceedings of other states where, absent legislation, the Full Faith and Credit Clause would require recognition. This conclusion is not self-evident. N.Y. Times at E11. Yet, even if Professor Tribe is correct, his argument simply provides support for our belief that the courts will reasonably interpret the Act in a manner that avoids this constitutional issue.

⁶ See 28 U.S.C. § 1738A (child custody determinations); 28 U.S.C. § 1738B (child support orders); and 18 U.S.C. § 2265 (protection orders).

⁷ In Thomas v. Washington Gas Light Co., 448 U.S. 261, 273 n.18 (1980) (four Justice plurality), Justice Stevens wrote:

[W]hile 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.

In Thompson v. Thompson, 484 U.S. 174 (1988), moreover, the Court assumed, without discussing, that Congress acted within its power when it enacted the Parental Kidnapping Prevention Act, which was intended to provide greater full faith and credit protection to child custody determinations than required by the common law rules given constitutional force through the Full Faith and Credit Clause. See id. at 182-84.

Professor Tribe seems to argue that, as he construes it, the Act would limit the scope of the full faith and credit one state need afford another state's law. The Supreme Court has observed that the question whether the Effects Clause authorizes Congress to "cut back on the measure of faith and credit required by" judicial interpretation of the Full Faith and Credit Clause is unsettled. Thomas, 448 U.S. at 273 n.18. It can be reasonably argued, however, that the Full Faith and Credit Clause constitutionalized conflict of laws principles, see Sun Oil Co., 486 U.S. at 723 n.1; that "[t]he conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development;" id. at 724 n.1 (dicta); and that Congress may, in fact, alter the conflicts laws under the Effects Clause, see id. at 729 (dicta). See also Pacific Employers Ins. Co., 306 U.S. at 502 (Congress has not prescribed "extra-state effect" of statutes, but "may [do so] under the constitutional provision").

Concededly, such a construction would confer a substantial power on Congress that to date has gone without clear recognition, and it would allow Congress to adopt laws arguably inimical to the "very purpose of the full faith and credit clause" of "alter[ing] the status of the several states as independent foreign sovereignties," Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). The failure of early Congresses to enact national conflict of laws statutes pursuant to the Effects Clause is arguably relevant as evidence of the Framers' intent. However, as Justice Robert Jackson wrote, "it cannot be doubted that Congress is invested with a range of power greatly exceeding that which it has seen fit to exercise," and the failure of early Congresses to enact conflict of laws statutes is not at all surprising in light of the "hazy knowledge" that the Framers had regarding the subject. Robert H. Jackson, The Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 6, 21 (1945). The constitutional goal of "alter[ing] the status of the several states," similarly, does not compel the conclusion that Congress may not enact conflict laws that give effect to the competing policies of different states. Rather, the status of the states as separate sovereigns was altered by giving Congress the authority to dictate the governing law. See Sun Oil Co., 486 U.S. at 723 n.1.

Regardless of which argument in the end prevails, there can be little doubt the constitutional issue presented is the sort of difficult question of first impression that courts, where possible, avoid through statutory construction.⁸ As the Supreme Court has observed:

"Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly

⁸ Assuming that Congress may alter the conflicts laws under the Effects Clause, we are still left with the difficult question whether the Full Faith and Credit Clause establishes some fundamental, overriding principles of conflicts that are beyond common-law or congressional development or modification. See, e.g., Robert H. Jackson, Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 30 (1945). The existence of this substantial question, however, simply reinforces our conclusion that the Act should be construed in a manner that is consistent with settled law.

possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 62 [(1932)]." Machinists v. Street, 367 U.S. 740, 749-750 (1961). Cf. Parsons v. Bedford, 3 Pet. 433, 448-449 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804) (Marshall, C.J.).

Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 629 (1993). This is not to say that a statute may be construed in a manner that "is plainly contrary to the intent of Congress," Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988), but unless left with "no reasonable alternative," courts will avoid "serious constitutional questions," United States v. Five Gambling Devices, 346 U.S. 441, 448-49 (1953) (plurality opinion).

Here, we believe that Professor Tribe's construction of the Act would raise a serious constitutional question and that our proposed reading of the Act reasonably avoids this question. Thus, even if Congress cannot enact substantive conflicts rules that limit the measure of full faith and credit that the courts would otherwise require, the courts will almost certainly construe the Act in a constitutional manner.



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DATE: May 21, 1996

FACSIMILE TRANSMISSION SHEET

FROM: Walter Dellinger OFFICE (202) 514-2051
PHONE: _____TO: Jack Quinn OFFICE (202) 456-2632
PHONE: _____NUMBER OF PAGES: 4 PLUS COVER SHEETFAX NUMBER: (202) 456-6279

REMARKS:

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN
MURPHY OF KEVIN SMITH ON 514-2057OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563
FTS NUMBER: (202) 368-0563

Romer v. Evans

● At issue was a state constitutional amendment that rescinded and repealed existing state and local laws offering protection from discrimination on the basis of sexual orientation and prevented the passage of new such measures without a change in the state constitution. The Colorado Supreme Court had ruled that amendment was unconstitutional because it impermissibly infringed the fundamental rights of homosexuals to participate in the political process.

● The opinion of the Court, written by Justice Kennedy and joined by five other members of the Court, declared the amendment to be a violation of the Fourteenth Amendment's Equal Protection Clause. Justice Scalia issued a dissenting opinion, in which the Chief Justice and Justice Thomas joined. While affirming the state court judgment, the Court based its decision on the conclusions that the provision is a violation of the letter and spirit of the equal protection clause and fails to satisfy the requirements of the rational basis test.

● The Court rejected as "implausible" the state's argument that the amendment does nothing more than put gays and lesbians in the same position as all other persons. To the contrary, the Court found that the amendment put "homosexuals . . . in a solitary class with respect to" the "limitless number of transactions and endeavors that constitute ordinary civic life in a free society." As such, the Court found, the amendment imposed a "special disability upon those persons alone."

● The Court concluded that such a disability denies equal protection for two reasons. First, the amendment contravened a central principle of our constitutional guarantee of equal protection -- that the government "must remain open on impartial terms to all who seek its assistance." Thus, a law (like the amendment) that makes it more difficult for one group of people to seek aid from the government "is itself a denial of equal protection of the laws in the most literal sense."

Second, the Court rejected the state's argument that the law bore a rational relationship to a legitimate governmental purpose. Rather the Court concluded that the "breath of the Amendment" was "so far removed from" the justifications offered by the state -- such as preserving resources to fight discrimination against other groups -- that it was unwilling "to credit" the proffered justifications.

Questions and Answers

Question: How does this decision impact the litigation involving the government's "Don't Ask, Don't Tell" policy for gays in the military?

Answer: The Court's decision in Romer should have little or no impact on such litigation. In those cases, the government has argued (and courts have held) that the policy bears a rational relationship to the legitimate government interest of creating and maintaining unit cohesion in the armed forces. Nothing in Romer changes that.

Question: Does this decision mean that classifications based on sexual orientation will be entitled to some heightened level of scrutiny?

Answer: No. The Court in Romer applied rational basis scrutiny. Thus, it remains the law that equal protection challenges to classifications based on sexual orientation are subject to rational basis scrutiny -- the lowest level of scrutiny applied in equal protection analysis. Likewise, Romer did not change the way the Court applies the rational basis test -- the classification is valid if it is a rational means of pursuing a legitimate governmental interest.

The Court has seldom invalidated a statute or policy on the basis of rational basis scrutiny. In Romer, however, the Court confronted a provision that it found could not be credibly related to any legitimate governmental interest.

Question: What are the implications of this decision for similar laws in states like Ohio?

Answer: To the extent that other states or localities have enacted bans that exclude gays and lesbians from seeking, on impartial terms, the assistance of the government, Romer calls into question their continued validity.

Question: What are the implications of this decision with respect to the "Defense of Marriage Act" that is presently pending before Congress?

Answer: The decision in Romer should not change or affect the conclusion that the proposed legislation would survive an attack on its constitutionality. Section 2 of the proposed legislation appears to track existing law with regard to the recognition of foreign marriages under the full faith and credit clause. Nothing in Romer addresses, even indirectly, such issues.

Section 3 of the proposed legislation defines "marriage" for the purposes of federal statutes. In litigation challenging this classification as a violation of equal protection, the government

would be required to meet the rational basis test. There is nothing in Romer to suggest that such a classification would not be sustained.

Question: Does the Court's holding in Romer require the states to enact legislation to protect homosexuals?

Answer: No, it does not require government to enact any special legislation to protect the rights of homosexuals or any other group. Rather, it stands for the simple proposition that states may not enact legislation intended to prevent any group of citizens -- not just gays and lesbians -- from seeking assistance from the government and securing the rights that all other citizens have (and probably take for granted).

Question: Does this opinion mean that Bowers is no longer "good law?"

No. Bowers upheld the constitutionality of a criminal sodomy statute. That issue was not before the Court in Romer, and the Court did not modify or discuss Bowers.

(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



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 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



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).

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



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

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"); Kadiash, *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) ("The 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



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.



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.

END OF DOCUMENT

Jack:

I tried to reach you this morning to discuss the DOJ letter on the gay marriage bill.

The letter was sent to Congress last night, *without* the sentence setting forth the President's position on gay marriage. John Schmidt said that this deletion from the text had not been authorized by him.

At the same time, the letter appears to be causing consternation both on the part of Congressional Democrats (e.g., Kennedy) and gay and lesbian advocates. Some are interpreting the letter as the functional equivalent of an endorsement of the gay marriage bill, although that clearly is not a fair characterization.

Steve



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

May 14, 1996

Gay Manning

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 Foiss
Assistant Attorney General

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

Gay
marriage

To: Jack Quinn
From: George R. Stephanopoulos 16-7128
Re: Gay Marriage Talking Points

Please respond with comments ASAP.

Thank you.

REVISED
ATTACHED

Push to George
Stephanopoulos

Gay Marriage Talking Points

-- The President ^{strong} has long opposed gay marriage based on his ~~personal~~ belief that the institution of marriage should be reserved for unions between one man and one woman. ~~This is consistent with the President's values and the values of most Americans.~~

(Query: he shouldn't let his "personal" beliefs guide policy, should he?)

^{also} -- The President ^{strongly} believes that ~~the federal government should not discriminate against gay and lesbian individuals, 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 by granting them legal recognition.

should not be subject to unfair discrimination which is why he has

[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 ~~the President does not believe that scarce federal resources should be devoted to providing spousal benefits to partners in gay and lesbian relationships.~~

^{need not}

note - feds don't do the discriminating.

Since the President does not believe that the federal government should recognize gay marriage, it also seems to him

Gay Marriage Talking Points

To GS, JD
Here is a proposed
change on George's
draft.
Steve Yount

- The President has long opposed gay marriage based on his personal belief that the institution of marriage should be reserved for unions between one man and one woman.
- The President strongly believes that the federal government should not discriminate against gay and lesbian individuals, 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 by granting them legal recognition.

[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 the President does not believe that ~~scarce federal resources should be devoted to providing spousal benefits to partners in gay and lesbian relationships.~~

the federal government should affirmatively ~~provide~~ and provide spousal benefits to partners in gay and lesbian relationships.

THE WHITE HOUSE

Sack -

This is the legal
analysis from our
gay/lesbian friends.

Sack

Cc Walter D.
Stone Jr.

cc: wagner, stone - 5-14/82



Lambda Legal Defense
and Education
Fund, Inc.

National Headquarters

666 Broadway, 12th Floor
New York, NY 10012
212/995-8585 (voice)
212/995-2306 (fax)

GAY
MARSHALL

FROM: Evan Wolfson
Director of the Marriage Project
Lambda Legal Defense & Education Fund

Michael F. Melcher
Cooperating Attorney¹

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.

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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's 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 defects 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.²⁰ 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).

²⁰ 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."

- H.R. 3396

- 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 Pennoy 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. Harnel, 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 DeSilva, 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.

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 means 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).

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.

6 PM
11/14/2016

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.

TO: Jack Quinn
FROM: David Fein
RE: Supreme Court Decision on Commercial Speech
DATE: May 13, 1996

Handwritten:
St. J. - 11-1-96

The Supreme Court today struck down a Rhode Island law that banned the advertisement of retail liquor prices except at the place of sale. This decision, based on the First Amendment, has implications for the FDA's proposed regulation on cigarette advertising, although there are many distinctions between the Rhode Island case and the proposed regulation.

The Court was unanimous in finding the ban violated free-speech rights, although the decision produced four separate opinions. In short, the case seems to be a strong statement by the Court that regulations affecting commercial speech will be scrutinized almost as stringently as other protected speech. Justice Stevens wrote: "When a state entity prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."

Rhode Island argued that the price advertising ban advanced the state's interest in promoting temperance, but the Supreme Court found no "evidentiary support whatsoever" for that assertion. The state also failed to satisfy the requirement that the ban be "no more extensive than necessary", because the Court found that there were obvious, less restrictive alternatives that would more likely achieve the state's goal.

The relevant sections of the proposed FDA regulation differ substantially from the price ban. First, the proposed regulation contains only one, even arguably similar outright ban, namely, on billboard advertising within 1000 feet of a school; otherwise, the restrictions are far short of absolute, such as a text-only requirements for advertising and labeling to which children and adolescents are exposed. Second, the proposed regulation seeks to deter conduct that is illegal in every state -- adolescent smoking; the Rhode Island ban sought to deter purely legal conduct. Third, less restrictive alternatives have been attempted but have failed to reduce adolescent use of cigarettes; Rhode Island was unable to identify any efforts at less restrictive alternatives.

THE PRESIDENT HAS SEEN

5-14-96

96 MAY 13 49:02

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

6/24
17/11/2016

THE WHITE HOUSE

WASHINGTON

May 10, 1996

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_____ AGREE

_____ DISAGREE

_____ DISCUSS

GAY
MARRIAGE



GOP: Gay Weds Not An Issue

Monday, May 13, 1996 0143EDT
© The Associated Press

WASHINGTON (AP) -- Republican activists have called opposition to same-sex marriages a "sleepier" election-year issue, but some GOP leaders are rebuffing efforts to make it a presidential campaign topic.

"I don't think that should be in the (party) platform," Sen. Alfonse D'Amato, R-N.Y., said Sunday on NBC's "Meet the Press." "That's exactly the kind of thing that sends the wrong message and it slams the door on faces."

And commentator Pat Buchanan, a strong social conservative who remains nominally in the Republican presidential race, said the party shouldn't emphasize the issue.

"We should probably speak out against it (same-sex marriage) and say 'no' to that, definitely," Buchanan said on NBC. "But I don't look upon this, as someone suggested, as a national campaign issue."

That contradicts advice given recently by William Kristol, editor of The Weekly Standard conservative magazine, and GOP activist William Bennett, who have urged certain Republican presidential nominee Bob Dole to use the issue to gain support.

Last week, Dole co-sponsored a Senate measure to define "marriage" in federal law as a "legal union between one man and one woman." The legislation, which also was introduced in the House, is a reaction to a Hawaii Supreme Court ruling favoring marriage rights for gay men and lesbians. If it stands, that decision could require other states to recognize homosexual marriages from Hawaii.

Dole didn't trumpet the measure, however.

Rep. Barney Frank, D-Mass., called the legislation "a desperate Republican ploy" to use the same-sex marriage issue to tar Democrats as radical liberals and to deflect attention from serious topics, including attempts to balance the budget.

In an effort to close the gap on Clinton's lead over Dole in polls, Republicans are using conservative issues -- including abortion and judicial appointments -- to emphasize differences between the candidates.

→ President Clinton has said he is opposed to same-sex marriages but is not ready to sign a federal bill specifically outlawing such unions?

Buchanan said Republicans view legal recognition of same-sex marriages as another threat to America's traditional family values and thus "a country that is not decadent ought to reject" the idea.

But Frank, who is openly gay, objected to the notion that homosexuals are anti-family or harmful to American society.

"Many people will also say Elvis is alive and the Earth is flat and somehow I am a threat to the culture," Frank said on ABC's "This Week With David Brinkley." "It's nonsense. Most gay men and women grew up in heterosexual households."

Gary Bauer, president of the conservative Family Research Council, called the movement to legalize

'same-sex marriages' "one of the most radical ideas to come down the pike in a number of years." He said endorsing marriages other than between men and women goes against societal norms.

"Healthy societies endorse heterosexual relationships between men and women," Bauer said on ABC. "It's not just Americans in the 1990s. It's every major culture on the face of the Earth. ... I believe that Bob Dole ought to make an issue of this."

But San Francisco Mayor Willie Brown, who presided over a "commitment ceremony" for 200 gay couples this spring, said the only issue is equal rights and respect. "I don't understand what the problem is with two people of the same sex being treated the same as heterosexuals," Brown said on the ABC program.

No states recognize same-sex marriages, although cities such as San Francisco allow homosexuals to register as "domestic partners," giving them certain marriage-like legal rights regarding health insurance and benefits.

Since the 1993 Hawaii court decision, 33 states have taken up bills attacking same-sex marriage, but only eight have outlawed them so far. Under the Constitution, other states must recognize any Hawaii marriage as legal -- unless specifically outlawed in their states.

5-08-1996 3:25PM FROM REP. BOB BARR-C. C.

P. 2

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H.L.C.

[Signature]
Original Signature of Member

104TH CONGRESS
2D SESSION

H. R. 3396

IN THE HOUSE OF REPRESENTATIVES

Mr. BARR of Georgia (for himself, Mr. LARGENT, and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on *SUE MYRICK,*
HAROLD VOLKMER,
4 AND IRE SEENTH,
7 ED BRYANT,
8 BILL EMERSON

A BILL

To define and protect the institution of marriage.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

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

6 SEC. 2. POWERS RESERVED TO THE STATES.

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

S-08-1996 3:25PM FROM REP. BOB BARR-D.C.

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ILLIC

2

1 "§ 1738C. Certain acts, records, and proceedings and
2 the effect thereof

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

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

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

15 SEC. 3. DEFINITION OF MARRIAGE

16 (a) IN GENERAL.—Chapter 1 of title 1, United
17 States Code, is amended by adding at the end the follow-
18 ing:

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

20 "In determining the meaning of any Act of Congress,
21 or of any ruling, regulation, or interpretation of the var-
22 ious administrative bureaus and agencies of the United
23 States, the word 'marriage' means only a legal union be-
24 tween one man and one woman as husband and wife, and

5-28-1996 3:26PM FROM REP. BOB BARR-C.C.

P. 4

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H.L.C.

3

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

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

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

GAY
MARRIAGES

THE WHITE HOUSE
WASHINGTON

May 1, 1996

MEMORANDUM FOR HAROLD ICKES
GEORGE STEPHANOPOULOS

FROM: JACK QUINN
KATHLEEN WALLMAN

RE: SAME SEX MARRIAGE

You recently asked whether the Constitution required other states to recognize Hawaii's same sex marriages. The attached memorandum from the Department of Justice explains that it does not.

We will stay abreast of this issue and the various ways it may arise so that we may be prepared to respond appropriately.



Attachment

g:\data\samesex.mem



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

April 24, 1996

MEMORANDUM

To: Jack Quinn
Counsel to the President

Kathleen Wallman
Deputy Counsel to the President

From: John R. Schmidt *TRS*

Re: Same-Sex Marriage/Full Faith and Credit Clause

You have asked us to take a quick look at whether the Full Faith and Credit Clause of Article IV of the Constitution would require states to recognize Hawaiian same-sex marriages (assuming that such relationships soon may be authorized under the laws of Hawaii).

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Recognition by the courts and legislature of Hawaii of the validity of same-sex marriages would constitute "Acts, Records, and judicial Proceedings" within the meaning of the Full Faith and Credit Clause. However, applying basic principles set forth by the U.S. Supreme Court, the Full Faith and Credit Clause would not obligate the other 49 states to give effect to Hawaiian same-sex marriages if such action would contravene the public policy of those states.

A complete assessment of the Full Faith and Credit Clause implications of the recognition of same-sex marriages by Hawaii would require a state-by-state inquiry. Based on our limited research into the matter, it appears that a large number of states would be able to show an existing public policy against same-sex marriages. This would obviously be the case in states that, by statute, bar same-sex marriage -- either through an explicit statutory prohibition or through other provisions that limit the scope of permissible marital relationships. Even where the issue cannot be resolved through an analysis of relevant state statutes, a public policy against same-sex marriage might also be reflected in state administrative rules and practices and state court decisions refusing to recognize such relationships.

Wedding bells

Campaign '96

Clinton's stated opposition to same-sex marriage places the president squarely on the horns of a political dilemma

By J. Jennings Moss

Back when he was Arkansas's governor as well as a presidential candidate, Bill Clinton went on record as being opposed to same-sex marriage. More than three years into his presidency, Administration officials repeat that Clinton remains convinced that marriage is an institution to be shared by a man and a woman. The White House is said, however, to be undertaking a sympathetic review of the legal problems encountered by same-sex couples.

The issue is a risky and sensitive one for Clinton. Stick to a flat "Gay marriage is wrong" answer, and the gay and lesbian voters who proved a crucial force in his 1992 victory could stay home. Appease guys and lesbians by calling for changes in federal laws to help same-sex couples, and the religious right will scream in protest. Try to find a compromise, and risk another "gays in the military" fiasco where neither side is pleased and those in the middle see the president as waffling and weak.

"The gay and lesbian marriage issue is striking fear into the hearts of the political handlers at the White

GREGG NEWTON/MLU/IFR

FILE
GAY
MARRIAGE

MAY 14, 1996

I blues

House," said Bob Hattoy, an openly gay Department of the Interior official who rose to national prominence through his 1992 Democratic convention speech as a gay man with AIDS. "This is a loser, politically."

Knowing that at some point Clinton will be forced to address the increasingly newsworthy subject, officials at the White House and the Justice Department are getting ready. At the White House, gay and lesbian political liaison Marsha Scott and others have looked at the options available to the president. Justice staffers in the office of policy development also have worked on the subject.

Hattoy described the debate as one between the "straight white boys," who consider any steps toward gay marriage as steps to the political gallows, and social progressives, who believe gays and lesbians in relationships face unfair discrimination. A small percentage within the White House support same-sex marriage, he said. "To me, the straight white boys always win at the White House," Hattoy added. "To me, the president will lessen their impact. He struggles with those kinds of profound issues, like hospital-visitation rights."

On the political front Scott has met with openly gay administration appointees and congressional staffers as well as others inside and outside government. The meetings have at times been hostile, especially when Scott has stated Clinton's opposition to same-sex marriage. "If this is the president's position, then I find it insulting," Jim Jones, an openly gay member of Sen. John Kerry's staff, recalled telling Scott during one such meeting.

Several sources said the Administration had initiated a probe of legal issues faced by same-sex couples and that the White House counsel's office was closely involved in the review. But the president's head counsel,

Jack Quinn, said his office was doing no work on the issue. "The president feels strongly that in these days of various and sundry stresses in society, the institutions of traditional marriage and the family face tremendous pressures and we need to do everything we can to strengthen those relationships," Quinn said—adding, however, that Clinton is well aware of what some governments, corporations, and institutions have done to acknowledge same-sex couples in providing some of the same benefits extended to married couples. Said Quinn: "He believes those are important issues that can be addressed in a way that remains sensitive to traditional values while preserving the federal right to live free from unjustifiable discrimination."

Quinn also argued that in modern times, issues surrounding marriage "have exclusively been the domain of other levels of government." Several sources, however, said that White House officials have been advised about a number of steps the federal government could take to help out gay couples. One would be to change immigration law so that same-sex relationships are treated the same as traditional families. Another would be to make tax laws the same for couples regardless of marital status. But none of these sources said they believe the Administration will come close to adopting such ideas.

"The Administration has made no commitments at all on this, and I think, quite frankly, none will be made," said one gay official who was consulted by the White House on the marriage issue but asked not to be identified. "They don't want to box themselves in." The main task for Administration staffers working on the issue is to find the right mix of words for Clinton to speak, said

the official: "He has to have an answer. He needs to be able to speak consistently when the issue comes up, and it will come up. If he shows any signs of waffling or inconsistency, it will become an issue."

Such a concern is very real in view of Clinton's track record on gay issues. He promised to open the military's doors to gays and lesbians but then fell back on a policy that keeps them nearly closed. He went on record opposing antigay initiatives that appeared in several states, yet his administration stayed out of the Supreme Court fight on a Colorado measure. "They don't want any hemorrhaging going on," Hattoy said. "They feel very nervous about this being another major mistake or rift with the gay community."

In Jones's view "the White House is very concerned that this is going to be an issue driven by the radical right. The White House is not going to be caught off guard, and the gay community ought not be caught off guard," he said. Even though he was upset by Clinton's position, Jones said he felt that gays and lesbians need to "pick our fights judiciously."

Gays and lesbians need to figure out how to divert public attention away from the image of homosexuals storming churches and toward the issue of benefit rights for same-sex spouses, said Brian Bond, lesbian and gay outreach director for the Democratic National Committee. "We have to figure out what we're going to do, what we're going to say about it," said Bond. "We can't make this a litmus-test issue."

Even Evan Wolfson, senior staff attorney for the gay group Lambda Legal Defense and Education Fund and one of the nation's most passionate supporters of same-sex marriage, believes the White House needs

"The straight white boys always win at the White House."

space. "Trying to put Clinton on the spot right now is a mistake," Wolfson said. "Our struggle is going to be education and reaching out to the public, not the president. Right now, he has no role in this other than as a moral leader."

But some gay political leaders think that a crucial way of getting the public's support is to get the White House's backing. "Clinton has to say he backs gay marriage," said Helen Gonzales, public policy director for the National Gay and Lesbian Task Force. "It's an issue of 'Do you in fact feel that gays and lesbians should have any support if they want to have families?' This really comes down to gays and children."

Politically, the model President Clinton could follow is the one Colorado governor Roy Romer established when he became the first governor to veto a bill banning same-sex marriages. In his veto message Romer said that while he backed the idea of keeping marriage the way it is now, he described the legislative move as "mean-spirited and unnecessary" and called for a commission to look at the legal and policy issues that same-sex marriages raise. "Let's find out how we can live together with our differences rather than divide over the issue of sexual orientation," Romer wrote. Other governors, however, have gone the other way, with Governor Bill Graves making Kansas the fifth state to ban recognition of same-sex marriage.

Some of Clinton's opponents would like nothing more than to link him with gay marriage, a concept a vast majority of the public opposes. After a White House spokeswoman made the comment late last year that Clinton "doesn't think that same-sex marriages should be outlawed," some conservative groups concluded that Clinton eventually would endorse gay marriage. "Mark my words, if Bill Clinton is reelected, he will fight for this tooth and nail," said Martin Mawyer, president of the Christian Action Network, a conservative group that is heavily involved in efforts to stop gay marriage.

Mawyer is encouraging Sen. Bob Dole, who will be the Republican presidential nominee, to raise the issue in the coming debate with Clinton. In fact, Mawyer says that if Dole steers clear of the topic, he will lose the elec-

tion. "We already see that Dole wants to make this an election about competence, not ideology. The last guy who tried that is shucking clams on Martha's Vineyard," Mawyer said.

Like Clinton, Dole opposes same-sex marriage. But unlike Clinton, Dole publicly supported a campaign to ban gay marriages across the United States. And he sent a letter to gay-marriage opponents saying the pledge "does not go far enough" to strengthen the family. Dole's point here had nothing to do with homosexuality—he went on to say, for example, that government should lower the tax burden for families with children—but gay rights leaders remain angry over his choice of words.

But will Dole make gay marriage a campaign issue? Bond said Republicans "are going to have to turn to wedge issues." But Daniel Zingale, political director of the Human Rights Campaign, a gay political group, said he was not convinced Dole would go that far. He noted, nevertheless, that "time and time again his response is to pander" to the religious right.

"Fortunately, we've already won the nomination," said Vin Weber, a former Wisconsin congressman who is now a national cochairman of the Dole campaign, when asked if the party's socially conservative wing could push Dole to campaign against gay marriage. "Dole's history tells us that this is not the sort of issue he would like to elevate to high-profile status," Weber added that Dole does not want to see the Republican convention in San Diego be overwhelmed with divisive social matters such as gay rights or abortion.

James Pinkerton, a White House aide during the Reagan and Bush administrations who is a heterosexual Republican backing gay marriage, agreed. Pinkerton said Dole will leave the issue alone if it leaves him alone. "It's sort of like abortion," said Pinkerton. "Unprompted, you don't hear Dole say a lot about abortion"—or about gay marriage.

And if Dole won't talk about it, neither will Clinton—leaving gays and lesbians who want to support both Clinton and same-sex marriage wondering what to do next. Hattoy's answer: "Grab your boyfriend or girlfriend by the hand, run off to church, and get married." But don't expect the president to come to the wedding. ●

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When writing to us, please

TALKING POINTS ON GAY MARRIAGE

- 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.

TYPES OF STATUTES THAT MIGHT BE PROPOSED

Analog to Colorado constitutional provision:

Neither the United States, through any of its branches or departments, nor any of its agencies, shall enact, adopt or enforce any statute, regulation 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, any claim of minority status, quota preferences, protected status or claim of discrimination.

Tie-in to federal funding:

Notwithstanding any other provision of federal or state law, no state or state agency that receives federal funds shall be required to expend such funds in a manner that recognizes gay marriage or same sex partnerships.

Precatory statute:

It shall be federal policy that a state may decline to recognize same-sex marriages.

TALKING POINTS ON GAY MARRIAGE

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Sheri:

Consult Geo
your note

A more detailed follow-up to my message to you earlier:

The Advocate is writing a story about gay marriage, and it will focus, among other things, on the Administration's position on this topic.

While Jack was on vacation last week, Kathy Wallman approved proposed Presidential talking points on gay marriage. The President never reviewed them, but Marsha Scott and I described them (without giving a copy) to some Congressional staffers with whom Marsha has been working.

Marsha's office has learned that the Advocate has been told, presumably by one of the Congressional staffers, that the White House Counsel's office is working on this issue for the President. I don't know if the reporter was told that we have drafted talking points.

The question for Jack is whether he, or anyone else from the White House, should talk to this reporter. As I told you earlier, the reporter's deadline is tomorrow.

A copy of the proposed talking points for the President is attached.

Steve Newirth

THE WHITE HOUSE
WASHINGTON

March 28, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: KATHLEEN WALLMAN
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: GAY MARRIAGE

In the event that you are asked about gay marriage at tomorrow morning's coffee, Jack Quinn recommends that you respond along the following lines. These talking points were prepared with input from Marsha Scott.

- 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. I have previously said that I do not personally support same-sex marriages.
- I am aware that many communities and institutions are considering ways, outside the context of traditional marriage, to address issues relating to same-sex partnerships, including whether certain basic benefits can be provided to same-sex partners. 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 issues relating to same-sex partnerships continue to be best resolved at this level of civil discourse.

THE WHITE HOUSE
WASHINGTON

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

THE WHITE HOUSE
WASHINGTON

May 9, 1996

MEMORANDUM FOR LEON PANETTA
GEORGE STEPHANOPOULOS
MIKE MCCURRY

FROM: JACK QUINN *JQ*
STEVE NEUWIRTH *SN*

SUBJECT: GAY MARRIAGE LEGISLATION

Yesterday, a bill was introduced in the House that would alter the definitions of "marriage" and "spouse" under federal law to cover only heterosexual marriage. Although we have not yet received a copy of the bill itself, we understand that the purpose of the bill would be to ensure that federal funds, including federal funds distributed by states, are not made available to same sex couples, regardless of whether those couples are recognized as "married" under state law. We understand that the bill also would provide that states need not give "full faith and credit" to other states' recognition of gay marriage -- although DOJ has already opined to us, internally, that the Constitution does not require states to recognize gay marriages granted by other states.

The House bill was sponsored by six Republicans, including Bob Barr, and two Democrats. We understand that Bob Dole and Don Nickles will be introducing a Senate version of the bill **today**.

We think the President may be asked about the gay marriage bill at his press conference this afternoon. One option would be for the President to say that he has not yet had an opportunity to review this legislation, but that he has long made clear that he is opposed to gay marriage.

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 *Jack Quinn*
COUNSEL TO THE PRESIDENT

SUBJECT:

GAY MARRIAGE

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- 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

April 9

Jack:

As you will see on the attached, the President has formally approved the talking points on gay marriage. I think George and Marsha understood that this would make it appropriate for an Administration official to talk to the reporter from The Advocate.

It seems to me that you are the most appropriate person to have that conversation with the reporter.

The reporter is Josh Moss (phone: 202-462-4660).

As we discussed yesterday, the deadline for The Advocate story is today.

Please let me know if you will make the call or if this requires further discussion.

Thanks,

Steve Neuwirth

THE PRESIDENT HAS SEEN
4/9/96THE WHITE HOUSE
WASHINGTON

96 APR 8 97:01

April 8, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN *Jack*
COUNSEL TO THE PRESIDENT

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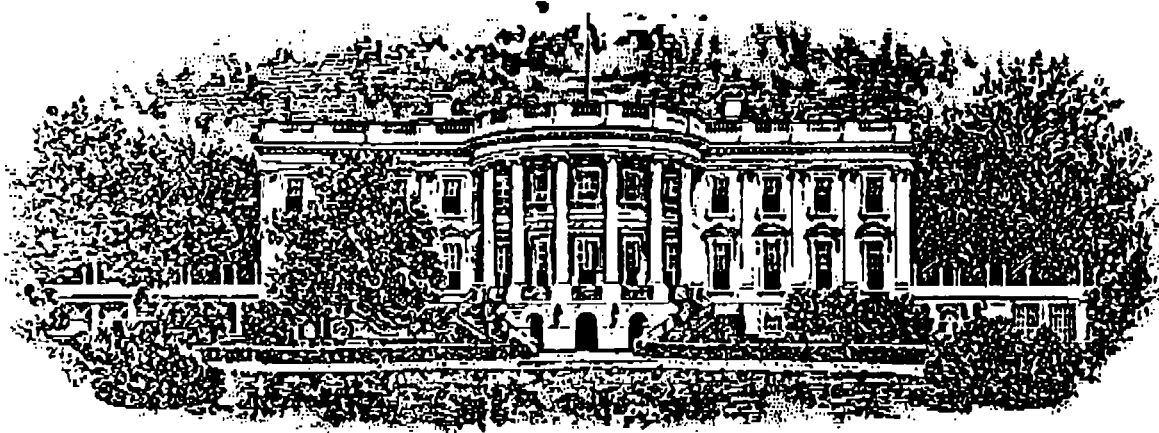
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Recommendation

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☒ AGREE☐ DISAGREE☐ DISCUSS

The White House



COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE:

4/9

TO:

Sheri Sweitzer

FACSIMILE NUMBER:

66279

TELEPHONE NUMBER:

FROM:

Steve Neuwirth

TELEPHONE NUMBER:

67903

PAGES (WITH COVER):

3

COMMENTS:

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THE WHITE HOUSE
WASHINGTON

April 8, 1996

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Recommendation

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____ AGREE ____ DISAGREE ____ DISCUSS