EXHIBIT 2

S. HRG. 104–533

THE DEFENSE OF MARRIAGE ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1740

A BILL TO DEFINE AND PROTECT THE INSTITUTION OF MARRIAGE

JULY 11, 1996

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THE DEFENSE OF MARRIAGE ACT

THURSDAY, JULY 11, 1996

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Nickles, we will turn to you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator NICKLES. OK.

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

Senator NICKLES. I will do that.

[The letters follow:]

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

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

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

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

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

Sincerely,

(Signed) Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

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

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

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

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

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

Sincerely,

(Signed) For Andrew Fois

(Typed) ANDREW FOIS,
Assistant Attorney General.

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

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

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

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

Are there any questions?

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

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

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

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

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

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

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

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

Thank you.

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

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

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

STATEMENT OF GARY L. BAUER

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

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

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

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

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

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

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

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

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

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

Mr. BAUER. That is OK.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bauer follows:]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you very much.

The CHAIRMAN. Thank you, Mr. Bauer.

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

STATEMENT OF LYNN D. WARDLE

Mr. WARDLE. Thank you, Chairman Hatch.

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

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

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

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

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

Thank you very much.

[The prepared statement of Mr. Zwiebel follows:]

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

Honorable Members of the Senate Judiciary Committee:

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

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

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

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

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

SECTION 2

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

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

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

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

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

SECTION 3

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

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

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

THE SOCIAL IMPORTANCE OF THIS LEGISLATION

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

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

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

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

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

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

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

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

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

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

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

TOWARD A LESS PERFECT UNION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

(Signed) Michael W. McConnell

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

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

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

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

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

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

The CHAIRMAN. Thank you.

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

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

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

The CHAIRMAN. Thank you.

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

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

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

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

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

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

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

The CHAIRMAN. My time is up.

Senator Kennedy?

Senator KENNEDY. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. BAUER. I think that the States——

Senator KENNEDY. Can you answer that yes or no?

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

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

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

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

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

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

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

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

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

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

Senator KENNEDY. So you——

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

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

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

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

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

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

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

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

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

Mr. BAUER. I am against it, Senator——