Testimony of

# Mr Chuck Muth

March 3, 2004

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United States Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights

Subcommittee Hearing on
"Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? "

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Testimony of Chuck Muth

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I am here today not as a lawyer, a theologian or a constitutional scholar but as a simple conservative grassroots political activist who shares former Sen. Barry Goldwater's penchant for limited government. It is in that spirit that I come here today urging this Congress to reject a constitutional amendment banning same-sex marriages. This is not to say that conservatives such as myself necessarily favor gay marriage, but rather that we strongly oppose the notion of addressing this issue of social policy in our nation's governing document.

While this issue has far-reaching implications, I appreciate the opportunity to talk briefly about some of them here today and will certainly expound upon these points or answer any questions later in this hearing.

The name of this hearing, Judicial Activism vs. Democracy, is itself indicative of the problems we have addressing, let alone resolving the issue of gay marriage because of the differing definitions many have regarding the terms themselves.

Was the Massachusetts Goodridge decision an example of judicial activism? It certainly appears so, especially after the court determined that only gay marriage, and not some sort of civil unions or domestic partnerships which the legislature endeavored to create, were acceptable to the court. However, I found the Goodridge decision to be reasonably argued even if I disagreed with conclusion. The fact is, reasonable people can disagree as to whether or not this was an example of judicial activism.

On the other hand, I find it always important to point out that we do not live in a democracy, but rather, in a representative constitutional republic. The overuse and over-reporting of polls only confounds this problem and misperception.

The point is, even if 85% of people polled thought that bringing back slavery or taking away the right of women to vote in a particular state was a good idea, the Constitution simply doesn't permit it. With the exception of states in which citizen-initiated ballot measures are allowed, the people don't vote on issues as in a democracy; they vote for representatives who then vote on the issues. And even then, representatives are precluded from passing laws which

are violations of the nation's highest law, the Constitution.

Now, that being said, I've read accounts indicating that the legislature of Massachusetts, acting on a citizen-initiated petition, could have addressed this issue of gay marriage well before the supreme judicial court's ultimate decision and chose, instead, to punt the ball away. If these accounts are accurate, then the Massachusetts judiciary can hardly be held fully responsible for filling a vacuum created by legislative inaction and/or obstruction. If indeed the Goodridge decision is an example of judicial activism, it was aided and abetted by legislative neglect. In either event, the people of Massachusetts have not been well served.

Which brings me to the second point along these lines. If the Goodridge decision by the Massachusetts Supreme Court is in fact an example of un-elected activist judges imposing their will on the people of Massachusetts, that's a problem for the people of Massachusetts to resolve, not the people of the United States. This is the very essence of our nation's federalist system. The rights of the people of the individual states to enact policies and laws not in conflict with the U.S. Constitution was of paramount importance to the Founders. Indeed, the enumerated powers of the federal government are extremely limited.

Now, as surely as night follows day, whenever I bring up the states' rights argument on this issue, someone immediately whips out the "full faith and credit" clause of the Constitution to counter that argument. Three points:

1.) There are legal scholars who have made compelling arguments for why the full faith and credit clause would NOT apply to gay marriages. It's entirely possible that if challenged, the full faith and credit clause would NOT be interpreted to force other states to recognize same-sex marriages performed in Massachusetts or some other state.

2.) The 1996 Defense of Marriage Act (DOMA) specifically protects the rights of one state not to recognize the same-sex marriages of another state and DOMA has yet to be successfully challenged. Surely we should wait to see if DOMA is struck down before embarking on a path as extreme as amending our Constitution.

3.) Even if somewhere down the road DOMA is ruled unconstitutional by the Supreme Court, then the correct remedy would be a constitutional codification of DOMA's protection of states' rights, not a national one-size-fits-all prohibition on same-sex marriages.

As a constitutional conservative, I am very distressed at President Bush's recent statements on this issue. His position in the last presidential election reflected the federalist principle of letting the states decide. Yet by now embracing a federal constitutional amendment prohibiting same-sex marriages, he has rejected this principle. Should the Federal Marriage Amendment as currently drafted be approved, the people of individual states will forever be banned from coming to a different conclusion on this issue. The President had it right the first time.

Further, I believe this effort could be the first step toward the federalization of family law. Throughout history, government has used a "crisis" to expand their encroachment on liberty. In this case, under the guise of a homosexual crisis, can we expect a Federal Department of Family Affairs at the cabinet level by decades' end? Why not? It wasn't so long ago that education was understood to be the sole province of the states, and look where we are today. "Fair-weather federalists" who support this Amendment need to seriously consider the unintended consequences which may arise from the current gay-marriage panic.

If the problem is judicial activism, then let's have a discussion and debate on how to address judicial activism. To address the perceived problem of judicial activism ONLY on this one hot-button issue is akin to putting a band-aid on a compound fracture. To move forward on the Musgrave amendment as written is to invite, deservedly so in my opinion, the criticism that this is solely a punitive, discriminatory anti-gay measure. And as such, it has no place in the greatest governing document mankind has ever seen.

Sadly, though, this is not the first time a constitutional marriage amendment with such ugly undertones has been proposed. In preparing for my testimony here today, I came across a paper titled "Journal of African American Men" (http://www.csupomona.edu/~rrreese/INTEGRATION.HTML) which describes the objections many had in the early 1900s toward blacks marrying whites. According to this report, Rep. Seaborn Roddenberry, Georgia Democrat, proposed a constitutional amendment banning interracial marriages stating that, "Intermarriage between whites and blacks is repulsive and averse to every sentiment of pure American spirit. It is abhorrent and repugnant. It is subversive to social peace."

This is not unlike much of the rhetoric you hear from supporters to today's federal marriage amendment.

Of course, supporters of the current Federal Marriage Amendment will say, "That was way back then. You can't equate two gay guys getting married to the notion of a black man getting married to a white woman." However, taking into consideration the passions and context of the times, it's not much of a stretch to believe that people such as Rep. Roddenberry found the idea of interracial marriage just as unnatural and abhorrent then as many today find the idea of gay marriage.

Today we look at how people such as Rep. Roddenberry felt about interracial marriage a hundred years ago and cannot, in our wildest dreams, imagine such ignorance and bigotry. But if Congress moves forward with this current marriage amendment, I suggest that Americans one hundred years from now will likely look back on this distinguished body with equal amazement, if not disgust.

Then again, maybe not. Which brings me to my final point.

There's been a lot of talk in this debate over what the Founding Fathers would have thought about this issue. Let me stipulate that had the notion of gay marriage come up in 1776, it's highly unlikely our Founders would have smiled upon it. However, Thomas Paine, in his publication titled "The Rights of Man," left no doubt about his position with regard to one generation binding the hands of the next in matters of governance. He wrote...

"Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation a property in the generations which are to follow. ... Every generation is, and must be, competent to all the purposes which its occasions require. ... The circumstances of the world are continually changing, and the opinions of men change also; and as government is for the living, and not for the dead, it is the living only that has any right in it. That which may be thought right and found convenient in one age may be thought wrong and found inconvenient in another. In such cases, who is to decide, the living or the dead?"

And that is the final thought I wish to leave with you today. I could be personally opposed to gay marriage today. But I have two-year-old and four-year-old daughters who may very well come to a vastly different conclusion 20, 30 or 50 years from now, just as we in this room today have come to a vastly different conclusion in the matter of interracial marriage from that of Rep. Roddenberry.

Then again, maybe they won't. The point is, it's simply wrong for our generation to presume to dictate via a federal constitutional amendment how future generations of Americans address this social policy.

In conclusion, as a limited-government conservative I feel compelled to point out that this entire problem is the result of government getting involved with the institution of marriage in the first place. Had marriage remained in the domain of the churches and religious institutions, this debate would be moot. The whole thing reminds me of an earlier constitutional amendment effort to put prayer back in schools. But again, the problem wasn't that we kicked God out, but that we allowed government in. Maybe one day we'll learn this lesson.

Thank you for your time and the opportunity to speak here today.