Testimony of

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Good morning Mister Chairman, Members of the Committee, and other distinguished guests. I am pleased to have been given the opportunity to testify in favor of S.J. Res. 26 regarding the need to amend the United States constitution to define marriage as the union of one man and one woman. My testimony represents my professional knowledge and opinion as a law professor, who writes on the subjects of marriage and family. I am the author of over thirty professional articles, a textbook, and a member of the American Law Institute. I have testified before committees of the United States House of Representatives, as well as the legislatures of six states. My testimony today represents my own views, and is not intended to represent the views of my employer, the University of St. Thomas School of Law, or any other organization or person.

There are three fundamental questions that must be answered in deciding how to vote on this proposed constitutional amendment. Two are procedural. One is substantive. The first procedural question is whether the legal definition of marriage is a proper subject for a constitutional amendment. The second is whether a federal constitutional amendment is appropriate. The substantive question is, assuming a constitutional amendment is desirable, what should such an amendment say.

Is a Legal Definition of Marriage a Proper Subject of Constitutional Concern?

The simple answer to this question is yes. Regardless of whether as a matter of constitutional theory, marriage should be a question of constitutional law, the United States Supreme Court has made it a question of constitutional concern for over a century. For example, in 1878 the Court addressed the role that marriage and family play in preparing children to assume their responsibilities as citizens when it upheld the federal ban on polygamy. Suffice it to say that in the intervening century, the view of those who serve as Justices on the Supreme Court has changed so that the unanimous conclusion of the Court in Reynolds that polygamy can be outlawed is no long assured as evidenced by Justice Ginsburg's writings before she took the bench.

Marriage also has become a question of state constitutional law through the unrelenting attacks on marriage statutes in the courts. Judges in Hawaii, Alaska, Vermont, and Massachusetts have already mandated recognition of same-sex marriage. In Hawaii and Alaska the people responded by amending their state constitutions. The Vermont legislature resisted in so far as it created civil unions, rather than extending marriage to same-sex couples.
The most recent and troubling ruling, however, is Goodridge v. Dept. of Public Health, an opinion of the Massachusetts Supreme Judicial Court declaring that state's marriage laws unconstitutional. Chief Justice Margaret Marshall opens her opinion with a review of the recent United States Supreme Court opinion, Lawrence v. Texas. Finding there was no rational reason supporting traditional marriage, she gave the legislature 180 days to "take appropriate action" in light of the opinion, which was widely interpreted as an "order" to create a "gay marriage". Under this ruling, it is expected that marriage licenses will begin to be issued to same-sex couples in May, 2004. On February 3, 2004 the Massachusetts Court advised the state senate that enacting a civil unions law similar to that of Vermont would not satisfy the equal protection and due process provisions of the state constitution. The Massachusetts Legislature is moving forward with a state constitutional amendment, but the people of that state will not be allowed to vote on it until fall of 2006.

Unfortunately Massachusetts is not the only state in which activists are currently demanding that judges redefine marriage. At this time Arizona, California, Florida, Indiana, Nebraska, New Jersey, New York, Oregon, Utah, Washington, and West Virginia are defending their marriage laws in the courts. Based on news reports, it is likely that Pennsylvania , South Carolina, and Tennessee will be defending their statutes in the courts soon as well. Add to these fourteen states, the three states of Hawaii, Alaska and Vermont that have already responded to judicial overreaching on this issue and Massachusetts that remains embroiled in a political fight to return the issue to the people, as well as the states of Connecticut, Iowa and Texas where activists present the issue as one of dissolving a relationship rather than affirming one--- and you have almost half the country's laws under attack by a small group who want to force their will on the people in the guise of constitutional adjudication.

This number will only increase without a constitutional amendment given the acts of civil disobedience of city and county officials and the aggressive litigation tactics of activists. For example, in San Francisco Mayor Gavin Newson decided the California law was unconstitutional and directed county officials to "determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation." For a month, county officials performed ceremonies and issued documents that purported to be marriage certificates to 4,037 same-sex couples from forty-six states. After the Supreme Court of California ordered San Francisco to stop issue licenses, some couples altered their travel plans and went to Oregon where the courts have refused to stop county officials from issuing documents that purport to be marriage licenses while the legality of such actions are considered. These illegal acts by public officials pose the threat of lawsuits in at least forty-six states challenging the definition of marriage.

So while there may be some limited academic value in pursing the theoretical question of whether the civil institution of marriage is a proper subject of constitutional law, the fact is that lawless local officials like the mayor of San Francisco and the county officials in Oregon have rendered this question academic. Marriage is an issue of constitutional law, both on the federal and state level. The only questions that remain are who will determine the nature of marriage and what will that nature be.

Why Amend the Federal Constitution?

At the present time there are efforts underway in twenty states to amend the state constitutions to define marriage as the union of a man and a woman. Four states, Hawaii, Alaska, Nebraska, and Nevada, already define marriage as the union of a man and woman in their constitutions, although as the Attorney General of Nebraska testified before this committee earlier this month, Nebraska's provision is being challenged in federal court.

My home state of Minnesota is one of the states where legislators are considering a state constitutional amendment. While I fully support the state constitutional amendment, I do not believe it is sufficient to insure that the people retain the ability to decide issues as fundamental as whether the state should continue to regulate marriage and if so, what unions should be recognized as constituting a marriage.

This is because of the very real possibility that the United States Supreme Court will impose an obligation on states to recognize same-sex unions as marriages in the guise of constitutional adjudication. Building on the Court's statements in Lawrence v. Texas equating heterosexual and homosexual experiences, and its statements in Romer v. Evans attributing animus to those who would make any distinctions, many constitutional law scholars have opined that the Court appears poised to mandate same-sex marriage in the upcoming years.

In commenting on the Lawrence opinion's relationship to judicial recognition of same-sex marriage, Professor Laurence Tribe of Harvard said "I think it's only a matter of time". Professor Erwin Chemerinsky of USC has observed, "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in Lawrence." Prudence demands that that matter be addressed by the people, before the Court takes the issue away from them.

What Should the Amendment Do?

Assuming there is a need for a federal constitutional amendment, what should such an amendment do? I believe the amendment must do three things. First it must protect the most important right of each of us as citizens - the right of political self-governance. This is assured by providing the states the opportunity to vote on the adoption of a constitutional amendment.

Second, the amendment must insure that marriage is recognized as only the union of a man and a woman. This is because we know that children flourish when raised by their mother and father united in marriage.

Third, the amendment must leave it to the states to craft compassionate alternative legal arrangements for unmarried people. The American people are a compassionate people, who want to serve the needs of all of the unmarried while preserving the traditional institution of marriage. This amendment will allow the states to continue to do what they are doing in this area.

Let me be clear. Of course there are loving committed relationships between same-sex couples throughout America. I have witnessed them myself, through my gay and lesbian friends. Marriage is for children, but we can -- and we should -- make
other compassionate legal arrangements available to take care of the diversity of human relationships we find throughout our great nation, and indeed throughout the world.

I think of a recent report from India, where a twenty-year old man actually married his grandmother, in order to ensure that he could take care of her. Surely the hearts of all Americans reaches out to that dutiful grandson. Yet just the same, surely we can offer compassionate alternative legal arrangements to people, without redefining the institution of marriage itself. I endorse the amendment because it allows the states to continue to
experiment in that regard.

I feel this so strongly, in part because of the career I had prior to becoming a law professor. I used to practice law in the area of trusts and estates. And so I have a lot of experience crafting compassionate alternative legal arrangements for clients and their loved ones.

I served many elderly clients, and I know that there is a real need for a legal status such as "reciprocal beneficiaries" enacted in Hawaii, which allows those who cannot marry to publicly register their willingness to care for each other, and receive various legal rights and obligations. This status need not be dependent upon a sexual relationship, or even cohabitation. In fact, to be inclusive and compassionate to all manner of relationships throughout our nation, such arrangements should not be dependent on such things -- but instead, they should be available to anyone who is willing to provide care and support to another human being. We should establish compassionate legal arrangements to include, for example, two elderly widows who want to
care for each other, but have no sexual relationship, or the low income elderly brother and sister who could also benefit from shared support and decision-making.

Response to Common Objections

The Federal Marriage Amendment Is About the Nature of Marriage, Not Discrimination

Being involved in the effort to obtain a state constitutional amendment in Minnesota, it is clear to me that one of the great difficulties we face in conducting any debate on this issue is the emotional tenor of the discussion. Both sides believe the protection of their families is at stake, and so both are given to emotional rhetoric. That is understandable.

What is not understandable, and should not be tolerated in the civil discourse, is the constant charge that prejudice and bias motivate those of us who believe the legal institution of marriage is, and should remain, focused on insuring that children are raised by their mother and father.

In Goodridge, notwithstanding the Court's admission that its decision "marks a change in the history of our marriage laws", the Court equated those who support traditional marriage with racists, stating "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Such unfounded attacks on the good-faith of citizens who disagree with judicial political preferences unfortunately can also be found in U.S. Supreme Court opinions. In Romer v. Evans, Justice Kennedy, not content to strike down a popularly enacted Colorado referendum restricting the enactment of anti-discrimination laws on the basis of sexual orientation to statewide enactment, goes on to speculate about the motives of those who supported the referendum, "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."

The attribution of malice to defenders of traditional marriage is both wrong and dangerous. As members of this committee heard during its last hearing, the NAACP is unwilling to equate defense of traditional marriage with race discrimination as are other prominent civil rights leaders. The willingness of many of this Committee just a few short years ago to vote for the federal Defense of Marriage Act does not equate with bigotry and any attempts to do so are merely activists' attempts to cut-off public debate regarding the need of a child to be raised by his or her mother and father..

The Federal Marriage Amendment Responds to Judicial Overreaching

It is common to use the amendment process to correct a judicial error. As Professor Sunstein himself as noted, it is also proper to use the amendment process to forestall erroneous constitutional decisions. Constitutional amendments have been ratified "in response to actual or anticipated decisions."

Examples of federal constitutional amendments responding to judicial decisions that did not reflect the will of the people are plentiful. The first sentence of the Fourteenth Amendment was ratified to reverse the result of Dred Scott v. Sandford, and thereby guarantee U.S. citizenship to all persons born in the United States. The Fourteenth Amendment was also ratified to reverse the rule of Barron v. City of Baltimore, which held that the Bill of Rights applies only to the federal government. The Sixteenth Amendment, ratified specifically to authorize a federal income tax, effectively reversed Pollack v. Farmer's Loan and Trust Co. The Nineteenth Amendment, guaranteeing the right to vote against sex discrimination, reversed the outcome of Minor v. Happersett, which had held that the U.S. Constitution, under the Privileges and Immunities Clause of the Fourteenth Amendment, did not guarantee female suffrage. The Twenty-Fourth Amendment, prohibiting poll taxes, reversed the outcome of Breedlove v. Suttles, which upheld poll taxes against challenges under the Fourteenth and Nineteenth Amendments. The Twenty-Sixth Amendment, guaranteeing the right to vote against age discrimination for individuals eighteen years old or over, reversed the outcome of Oregon v. Mitchell, which held that Congress had no authority to give 18-year-olds the right to vote in state and local elections. In the case of the Federal Marriage Amendment, the process is being initiated preemptively in order to insure that the people have the opportunity to express their will on the issue.

Conclusion

The reality of our situation is that activist judges are increasingly willing to disregard the text of the laws, as well as the political will of the people, in judicial efforts to remake the institution of marriage to suit the judges' particular political views. This is not the proper process to be followed in a democratic republic. It is the people who should determine the meaning and structure to marriage through the process of political debate and democratic voting. It should not be imposed upon us by judicial fiat.

I urge members of this committee to give the people the opportunity to express their will on this matter directly through offering them a constitutional amendment.

Thank you, Mister Chairman, for allowing me the time to appear before the committee and to extend my remarks in the form of this written testimony.