

Testimony of
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Testimony on the Federal Marriage Amendment
Senate Judiciary Subcommittee on the Constitution
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Thank you for permitting me to present testimony to you today.

My name is Christopher Wolfe. I am a political scientist and I teach constitutional law and American politics at Marquette University in Milwaukee, and I have edited several books and written several law review articles on homosexuality and American public life.

Outline of the Amendment and Its Effects

The Federal Marriage Amendment which you are considering today would fix in the United States Constitution the principle that marriage in the United States means marriage between one man and one woman. Its text reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

Is the Proposed Amendment Necessary?

One objection that might be made to the amendment is that it is unnecessary, since U.S. law—specifically in the form of the Defense of Marriage Act—already defines marriage and prevents one state from imposing a different meaning of marriage on other states. It is simply a fact of our political and judicial life, however, that courts sometimes go out of their way to give highly controversial constructions to the Constitution, and it is certainly within the realm of possibility that federal judges might strike down the Defense of Marriage Act, as judges have struck down marriage defense laws in various states. The decisions of the Supreme Court in *Romer v. Colo.* and *Lawrence v. Texas*—despite the glaring weaknesses in their reasoning—will inevitably be invoked to argue that virtually any legal distinction between heterosexuals and homosexuals is unconstitutional. While it is conceivable that judges might reject such arguments, it is equally conceivable that they may accept them. In fact, I think it would be intellectually dishonest of anyone to deny that there is at least a very real possibility that some judges (including even the Supreme Court) might strike down the Defense of Marriage Act.

Given that fact, and given the existence of a well-organized and financed effort to legalize same-sex marriage in this country, backed by extensive ideological scholarship in the academy and in the legal community, it is only prudent to remove even the possibility that judges will intervene to strike down the Defense of Marriage Act and the states laws it was intended to protect.

Is This Proposed Amendment Necessary?

Another major objection to the Federal Marriage Amendment comes from those who argue that, even if an amendment is necessary, it ought to take a different form. It would be better, they say, for the amendment simply to guarantee the right of the states to deal with the issue of marriage, free of federal (including judicial) interference.

This would preserve the Defense of Marriage Act, but make explicit the already-existing power of states to define marriage as something other than a union of one man and one woman. But this does not really resolve the fundamental, underlying issue (and deliberately intends not to resolve it). It would rule out certain ways of introducing and expanding same-sex marriage, but it would fall short of defending traditional marriage by erecting effective barriers to the legitimization of same-sex (and polygamous) marriages.

Those who advocate a federalism amendment on the gay marriage issue, which simply returns the issue to the states, seeing it as a permanent solution to the dispute, apparently do not think that gay marriage is a fundamental issue. But the crux of the case for the FMA is that gay marriage (like polygamy) is precisely such a fundamental issue. The ready acceptance of a checkerboard pattern of state policies either does not understand or simply doesn't agree that defending certain essential features of marriage, such as gender complementarity, is essential for social and individual well-being.

The acceptance of varying state policies on same-sex marriage allows more than just the proverbial camel's nose into the tent. If some states authorize gay marriage, and if one considers the de facto nationalization of various media, then one can assume that formally "married" gay couples will become staples on TV, in movies, in books. But this "normalization" of gay marriage would act powerfully to undermine residual opposition to it, because there is a strong, though indirect, connection between the moral ideals of citizens and their sense of what is "normal" in their society. The backers of the "federalism amendment" either fail to recognize this corrosive effect on social norms, or they are content to live with it. Those who regard traditional marriage as an institution essential for social and individual well-being believe that we cannot accept such corrosion.

The Importance of the Principle of Marriage Between One Man and One Woman

Why is it so important that the U.S. make it clear beyond even unreasonable doubt that its policy is to promote marriage between one man and one woman? There are some people who believe that such a policy deprives homosexuals of their fundamental human and constitutional rights. They ask why the law should deprive them of the same opportunity to have what heterosexuals have, namely, the opportunity to marry the person they love.

The answer to that question has something to do with our understanding of marriage as a central social institution. Marriage is obviously a personal relationship. But it is much more than that.

Most importantly, it is the ordinary means by which new human beings are brought into the world and prepared to assume their positions as citizens of society. If marriage were not this-if it were only a personal relationship-there would be no essential reason for the state to have any concern about marriage, to recognize it at all. (For example, do we ask the state to formally recognize our friendships?)

One aspect of the context of this debate should be clear to anyone. That is the difficulty our society has had in sustaining stable marriages, especially in the last three or four decades. Illegitimacy is at an all-time high, approaching one-third of babies born in this country. Divorce has recently leveled off, but it has leveled off at a very high rate (and even this leveling off may be due simply to more people cohabiting rather than getting married to begin with). The result of these trends is that many children do not experience growing up with both their mother and father, which most Americans clearly recognize as the optimal framework for raising children. Even many social scientists, despite certain ideological blinders, have come to recognize that a marriage between a biological mother and father is the best context for raising children. Many supporters of same-sex marriage, in perfectly good faith, recognize the importance of marriage, and they simply want to extend its benefits to homosexuals. What they fail to see is that marriage is not just about a personal relationship and personal intimacy. Marriage is an institution that has certain intrinsic features, and those requirements must be honored. For example, even if three or four people sincerely loved each other, our law would not permit them to marry. Why? Because we believe that there is something about the very nature of marriage that precludes this. In the case of polygamy (or polyandry, or polyamory), it is the fact that marriage is understood to involve a complete reciprocal self-giving of each spouse to the other, and that such complete self-giving is impossible with multiple spouses. (It is no accident that polygamy was widespread especially in nations in which men dominated women in a particularly extreme way.)

Most Americans today also reject same-sex marriage, because they believe that gender complementarity is essential or integral to the meaning of the institution of marriage. Marriage is a union of two people whose physical union makes them, literally, a single unit, in the sense that this union of two complementary, engendered bodies is the ordinary way of bringing children into existence.

The recent debate about marriage, and the difficulties of the contemporary family, have led us to see more clearly that marriage is not simply a personal contract between two people, which can be adjusted or manipulated in whatever way they wish. It is a fundamental social institution, and the well-being of our society depends on its healthy functioning. Maintaining a respect for the essential features of marriage, including gender complementarity, in our law is an important way in which we can support the family and begin to reverse the unhappy trends we have observed. It should also be said, finally, that there is reasonable doubt as to whether the real goal of the same-sex marriage movement is to achieve the traditional goals of marital stability for homosexuals. It seems clear that many homosexuals pursue the goal of legalizing same-sex marriage simply as a symbolic achievement of equality, of society's affirmation of same-sex activity. (That helps to explain why, in some European nations that have legalized same-sex marriage, relatively few homosexual couples have actually availed themselves of the opportunity to have their unions formally recognized.) In fact, many homosexuals are opposed, in principle, to what they consider excessively narrow or stifling heterosexual views of marriage.

There are powerful social reasons, then, why our society should defend the institution of

marriage as a union of one man and one woman. While many people view this through the lens of expanding individual rights, the true result of such legal innovations may be undermining the notions which provide the very foundations of stable family life.

Will Marriage Continue To Be Available in Our Society?

People generally take it for granted that marriage will be "available," but, despite the powerful forces inclining people to marry, the availability of marriage as an institution they can choose to enter cannot be taken for granted. There are powerful forces inclining human beings to accumulate property, and there is a strong natural basis for (properly qualified) property rights, but in a given society such property rights may not be available. Property is both natural and pre-political, on one hand, and also a social institution essentially dependent on various legal arrangements, on the other. Likewise, marriage is natural and pre-political, but also a social institution dependent on various legal arrangements.

One of the ways in which marriage can become "unavailable" to people is for the law to offer people an institution called "marriage" that is not really marriage. By inculcating in its citizens-through social practices and laws-a notion of marriage that lacks some of its essential ingredients, a political society could, effectively, make "real marriage" impossible for most of its citizens.

One way to do this is to make "marriage" a contract that is temporary and terminable at the will of either party. Whatever the impact of the allowance of divorce in a certain limited number of cases has been, the shift to no-fault divorce has profoundly changed the very notion of marriage among Americans, and has deeply damaged it.

How does this change in law affect marriages? How easily people could say in 1970 "if I want to get divorced, that's my business - I'm not making anyone else [except my former spouse] do it. If others want to stay married, let them." The problem is that such an attitude ignores the subtle interplay of personal choice and social mores. So many of our conceptions are shaped by our sense of what is "normal," by the social ecology of which we are a part. No-fault divorce has created a world in which divorce is normal, and it is now a part of the ordinary psychological landscape of many people. For them, marriage is a permanently tentative and revisable commitment. And so, not surprisingly, more marriages break up, and more of the children they produce grow up without a father and mother working together to carry out that profoundly exalting, and often terribly difficult, task.

Another way to make real marriage unavailable to people-by changing social understandings of its very nature-is to make "marriage" essentially separable from children. This is what happens when homosexual "marriage" is legitimized despite the fact that homosexual unions are essentially-of their very nature-incapable of procreation. (There are, of course, many instances in which a heterosexual union is incapable in practice, by reason of age or physical defect, of leading to procreation; but the nature of the union remains the kind of union capable of producing children.)

Homosexual marriage is one more indication from society that marriage is whatever we want it to be: a malleable human institution that we can shape, rather than a natural institution, with its own internal dynamics and demands, to which we must submit. But if we go down the road of making marriage such a malleable institution, why should we be surprised if it doesn't fulfill the functions it is designed to fulfill?

The discussion of the Federal Marriage Amendment is a key moment in the public debate about

marriage stability. That goal will not be achieved if marriage is considered to be a malleable institution, revisable by society, and unfettered by deep natural requirements such as monogamy and gender differentiation--a view that is at the heart of the movement for gay marriage. Only by an amendment that directly addresses the core issue--the nature of marriage--can we achieve the goal of preserving marriage as a key social institution.

Nor is this merely an abstract academic discussion. The American people clearly want marriage to be protected. While they generally have come to be much more tolerant of homosexuals' private activities, they draw a sharp line at marriage. Thirty-seven states have laws or constitutional provisions that define marriage in the way that the Federal Marriage Amendment defines it. Many of those legal provisions have been passed in recent years, with full, free, and open public debate. It is most unfortunate that those who wish to establish same-sex marriage in defiance of popular will are willing to have recourse to the manipulation of law by judicial and legal elites. Under such circumstances, a Federal Marriage Amendment is the only reliable way to preserve the definition of marriage the American people have long recognized and are intent on defending.