COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 01963

REQUEST FOR ADVISORY (A-107)

BRIEF OF THE AMICUS CURIAE KELLY CUNNINGHAM

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INTEREST OF THE AMICUS CURIAE

Kelly Cunningham, acting Pro Se, respectfully submits this brief as Amicus Curiae pursuant to Rules 17, 19, and 20 of the Massachusetts Rules of Appellate Procedure and the invitation of this Court dated December 15, 2003.

Amicus is a concerned resident of the Commonwealth of Massachusetts who believes that Senate No. 2175, entitled “An Act Relative to Civil Unions”, will create a second-class citizenry and in so doing insidiously undermine the basic liberties and freedoms of all residents of the Commonwealth. Amicus is in many ways a typical citizen of the Commonwealth: married, with children, who believes that same-sex marriage is an appropriate, fair, and non-threatening mechanism to allow a significant number of citizens to enjoy, without detriment to others, their lives and liberties as they see fit.

Amicus presents this brief to the court with the hope that it may serve to inform the court’s decision in this matter.

STATEMENT OF THE ISSUES

The Massachusetts Senate has asked the Justices of the Supreme Judicial Court for the Commonwealth for an advisory opinion relative to Senate No. 2175. Specifically, the Senate has asked the Justices if the provisions of Senate No. 2175: "which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12, and 16 of the Declaration of Rights?" The Senate request was made as a result of the Court's ruling in Hillary Goodridge, et al vs. Department OF Health and another (herein Goodridge).

Amicus adopts the issues of compliance with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12, and 16 of the Declaration of Rights as set forth by the Senate in its request

for an advisory opinion as a subset of the issues to be considered.

Amicus, however, does not accept the assertion in the request for an advisory opinion that Senate No. 2175 allows same-sex couples: “to form civil unions with all ‘benefits, protections, rights and responsibilities’ of marriage”. Amicus believes the veracity of that claim is itself an issue to be examined by the court in considering the ramifications of Senate No. 2175.

Amicus contends that the court should also consider if Senate No. 2175 fully complies with Article 4 and Article 11 of the Declaration of Rights as stated in the Constitution of the Commonwealth.

STATEMENT OF THE FACTS

The Supreme Judicial Court for the Commonwealth in Goodridge has ruled that the Commonwealth may not deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry

and that the Massachusetts Constitution forbids the creation of second-class citizens.

INTRODUCTION

The court's ruling in Goodridge has set off a firestorm of protest in the Commonwealth as well as across the country. The rhetoric is similar in vitriol and defiance as that which followed many initially unpopular civil rights decisions handed down by the U.S. Supreme Court (i.e. Loving vs. Virginia, Brown vs. Board of Education, Romer v. Evans). The current Governor of the Commonwealth has insisted he has "3000 years of recorded history"[1] on his side in opposing same-sex marriage while another political figure has suggested that the court has no power to enforce its ruling.[2] That there were at one time thousands of years of recorded history to justify both slavery and the subjugation of women should provide some perspective on the former argument while the latter raises the haunting specter of Orval

[1] The Boston Globe. November 19, 2003. Lawmakers are divided on response. Frank Phillips and Rick Klein.
[2] IBID. The Globe reported State Representative Philip Travis doesn't think the court can force clerks to issue marriage licenses to gay couples.

Faubus and George Wallace. Additionally, others have proclaimed the decision a threat to the very institution of marriage, though there is virtually no evidence for such dire predictions.

Now the court has been asked by the Massachusetts Senate to opine if the "separate but equal" approach reflected in Senate No. Senate No. 2175 would be an acceptable implementation of its decision in Goodridge.

Giving the level of animosity and political opposition that has accompanied the court's decision, it would be understandable and all too human for the court to look upon Senate No. 2175 as an opportunity to strike a compromise that would *award* same-sex couples some of the tangible benefits afforded married couples today while leaving unchallenged the thousand of years of recorded history where same-sex couples have been unjustly discriminated against and condemned. There is, however, no safety, no courage, and ultimately no satisfaction in compromising with

discrimination and oppression, no matter how well established or widely accepted the rationale.

SUMMARY OF THE ARGUMENTS

Amicus contends that "separate but equal" solutions to problems involving civil rights have historically been suspect remedies and serve primarily to hide and thus sustain the inequities they purportedly alleviate. Senate No. 2175 would allow the discrimination against individuals who enter into a same-sex "civil union" to continue and would provide neither the tangible nor the intangible benefits of civil marriage.

The federal General Accounting Office(GAO) has tallied 1,049 federal laws in which marital status is relevant.[3] Many of these laws confer tangible benefits on individuals classified as "married". Because of the intersection of Federal and State laws regarding the definition, meaning, and benefits of marriage, Senate No. 2175 will not -- because it cannot -- provide

[3] Defense of Marriage Act (Letter Report, 01/31/97, GAO/OGC-97-16).

same-sex couples joined in civil union the same benefits currently afforded opposite-sex couples joined in civil marriage. Federal law recognizes only civil marriage not civil union in determining eligibility for many Government programs and benefits.

Additionally, Senate No. 2175 does not address the issue of intangible benefits. Senate No. 2175 will only guarantee that same-sex couples -- as well as the children they love and care for -- will continue to be second class citizens. Preference should not be given to a solution that has historically failed where the more direct remedy of allowing same-sex couples to marry is available and affords individuals who wish to marry an equal opportunity for self-determination.

The Defense of Marriage Act (herein DoMA) has unconstitutionally preempted the right of individual states to define marriage. The only way to secure equal protection and treatment for all citizens of the Commonwealth is to allow

same-sex couples to be joined in a legal civil marriage. This in turn will provide same-sex couples so joined the standing needed to challenge discriminatory federal laws (i.e. the DoMA). Massachusetts Constitution Article 4 and Article 11 secure to the people of the Commonwealth the right to challenge the usurpation of their rights in an expeditious manner.

ARGUMENT

I. Senate No. 2175 offers an inadequate "separate but equal" solution to the issue of same-sex marriage.

In Brown v. Board of Education, the U.S. Supreme Court rejected the doctrine of "separate but equal" first explicitly adopted in Plessy v. Ferguson. The court did so by considering not only the tangible benefits at stake but the intangible ones as well:

> Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational

> opportunities, even though the physical facilities and other "tangible" factors may be equal.

The opinion noted that the court had used a similar standard regarding "qualities that are incapable of objective measurement" in Sweatt v. Painter, supra.

Amicus submits that the same "tangible and intangible benefits" standard should be used to evaluate Senate No. 2175. When this standard is applied it is clear that a civil union for same-sex couples is not equal to a civil marriage for opposite-sex couples. Same-sex couples joined together in a civil union will enjoy fewer tangible and fewer intangible benefits than those enjoyed by opposite-sex couples joined in civil marriage.

A. 2175 cannot provide individuals who enter into civil union the same tangible benefits as individuals who enter into marriage.

Many of the tangible benefits accorded married individuals arise from Federal

Government programs and statues. The list of programs and statues that specifically impact individuals as a result of being married is long. The Government Accounting Office (GAO) has categorized the programs and statues[4] as follows:

1. Social Security and Related Programs, Housing, and Food Stamps
2. Veterans' Benefits
3. Taxation
4. Federal Civilian and Military Service Benefits
5. Employment Benefits and Related Laws
6. Immigration, Naturalization, and Aliens
7. Indians
8. Trade, Commerce, and Intellectual Property
9. Financial Disclosure and Conflict of Interest
10. Crimes and Family Violence
11. Loans, Guarantees, and Payments in Agriculture
12. Federal Natural Resources and Related Laws
13. Miscellaneous Laws

The sheer number of programs and statues related to marriage and conferring some type of benefit or

[4] IBID.

obligation are too numerous to list without being overwhelming. Of the first category, Social Security and Related Programs, the GAO states:

> In many of these programs, recognition of the marital relationship is integral to the design of the program.

Of Veterans programs, the GAO concludes:

> Husbands or wives of veterans have many rights and privileges by virtue of the marital relationship.

Regarding Taxation:

> The distinction between married and unmarried status is pervasive in federal tax law

Regarding Federal Civilian and Military Service:

> Marital status is a factor in these laws in many ways.

Regarding Employment Benefits and Related Laws:

> Marital status comes into play in many different ways in federal laws relating to employment in the private sector.

Regarding Immigration, Naturalization,

and Aliens:

The law gives special consideration to spouses of immigrants and aliens in a wide variety of circumstances.

Regarding Federal programs and statues affecting Indians:

Most relevant to this discussion is the right of a surviving spouse who is neither an Indian nor a member of the deceased spouse's tribe to elect a life estate in property that he or she is occupying at the time of the death of the other spouse.

Regarding Trade, Commerce, and Intellectual

Property:

It expressly permits spouses to file jointly for bankruptcy protection.

Regarding Financial Disclosure and

Conflict of Interest:

Federal law imposes obligations on Members of Congress, employees or officers of the federal government, and members of the boards of directors of some government-related or government-chartered entities, to prevent actual or apparent conflicts of interest. These individuals

are required to disclose publicly certain gifts, interests, and transactions. Many of these requirements, which are found in 16 different titles of the United States Code, apply also to the individual's spouse.

Regarding Crimes and Family Violence:

This category includes laws that implicate marriage in connection with criminal justice or family violence.

Regarding Loans, Guarantees, and

Payments in Agriculture:

Under many federal loan programs, a spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the program.

Regarding Federal Natural Resources and

Related Laws:

Federal law gives special rights to spouses in connection with a variety of transactions involving federal lands and other federal property.

Regarding Miscellaneous Laws:

Fourteen statutes in the Code that prohibit discrimination on the basis of marital status are listed in this category.

These summaries[5] make it abundantly clear that marriage confers extensive tangible benefits to married couples. Since federal programs and statues do not mention or recognize civil unions, access to these benefits will be immediately denied individuals who are joined together in such. Only civil marriage will allow same-sex couples access to these benefits.

Amicus grants that for same-sex married couples access to these benefits may be problematic due to the DoMA. Amicus contends, however, that the DoMA should not be understood as the final word regarding the right of a state to define marriage or the final word regarding equal access to the benefits of federal programs that accrue to individuals because of their marital status (This issue is examined further in Section II). Senate No. 2175,

[5] IBID.

however, would preclude such access for couples joined together in a civil union. Senate No. 2175 would thus fail to provide the same tangible benefits of marriage to same-sex couples. That access to such benefits may be problematic at the Federal level does not justify the certain prevention of access that would result from Senate No. 2175.

B. 2175 will not afford individuals who enter into civil union the same intangible benefits as individuals who enter into marriage.

Homophobia has been called "the last acceptable prejudice."[6] The Governors' Task Force on Hate Crimes reported that there were 111 reported hate crimes based on sexual orientation in 1999 in Massachusetts and 102 such crimes reported in 2000.[7] The Task Force has also stated that such crimes are believed

[6] Homophobia-A History. Picador USA, Byrne Fone.
[7] Governor's Task Force on Hate Crimes. 2000 Annual Report.

to be consistently underreported[8]. Nationwide, in 2002, 16.6 % of the 7314 hate crimes reported were based on sexual orientation.[9]

By creating a separate legal edifice (civil unions) to give same-sex couples some of the benefits of marriage, Senate No. 2175 will stigmatize, as a separate class, individuals wishing simply to enter a legal, permanent, and monogamous relationship with someone they care for deeply. Such a stigma provides no redeeming social value and only encourages an "us against them" view of Gays and Lesbians.

In Brown the U.S. Supreme Court held:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually

[8] IBID.
[9] Crime Index Offenses Reported. Federal Bureau of Investigation Report on Hate Crimes.

> interpreted as denoting the inferiority of the negro group.

The separation of same-sex couples and opposite-sex couples through the legal edifice of civil union would likewise have extensive and far-reaching intangible deleterious effects throughout the Commonwealth on same-sex couples and their children. Amicus contends that discrimination experienced by homosexuals and same-sex couples will be reinforced or even encouraged by Senate No. 2175 in part because it will be seen as the last line of defense against the radical "homosexual agenda"[10] and not as an attempt to guarantee equal protection and due process under the law for same-sex couples. To paraphrase the U.S. Supreme Court:

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[10]. *This phrase was used by U.S. Supreme Court Justice Antonin Scalia, dissenting in* Bowers v. Hardwick: *Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.*

> Separation of same-sex couples and opposite-sex couples in society has a detrimental effect upon same-sex couples. The impact is greater when it has the sanction of the law, for the policy of separation is usually interpreted as denoting the *moral* inferiority of same-sex couples.

Though the history of civil rights and the fight for racial equality under the law in the United States should inform the court's understanding of the likely consequences of Senate No. 2175, Amicus also urges the court to apply simple common sense to the matter. This court has ruled that same-sex couples must be treated the same under the law as opposite-sex couples. If a civil union and a civil marriage afford the same benefits, where is the need for two separate legal edifices? Senate No. 2175 contends that creating a separate legal edifice for same-sex couples will preserve "the traditional, historic nature and meaning of the institution of

civil marriage."[11] The nature of marriage, however, has changed often over time. Throughout most of history a wife was considered a possession of her lawful husband. Many marriages are often arranged and involve a dowry. Ancient Hebrew law required a man to become the husband of a deceased brother's widow. [12] Many states in this country forbade interracial marriage until 1967 when the United States Supreme Court struck down such laws and declared that the "freedom to marry" belongs to all Americans. (Loving v. Virginia) The Court described marriage as one of our "vital personal rights" which is "essential to the orderly pursuit of happiness by a free people". Additionally, this court has already stated in Goodridge that there is no "constitutionally adequate reason for denying civil marriage to same-sex

[11] Senate, No. 2175. SECTION 1.

[12] There are multiple resources available on the Internet by searching for "History of Marriage" using a search engine tool such as Google. The information sited here was drawn in part from: A Brief History of Marriage by Janet Thompson (http://www.sexscrolls.net/marriage.html); and History of Marriage. Sheri and Bob Stritof (http://marriage.about.com/cs/generalhistory/a/marriagehistory.htm).

couples." Amicus further contends that the entire historical preservation argument *de facto* recognizes that civil unions and civil marriages will not be perceived by society at large as the same and will therefore not provide the same intangible benefits as civil marriage.

The court should not sanction a law whose basic justification ensures that individuals wishing to enter a committed, monogamous, and legally recognized same-sex relationship will be perceived differently than individuals wishing to enter a committed, monogamous, and legally recognized opposite-sex relationship.

II. Senate No. 2175 prevents citizens of the Commonwealth from challenging the usurpation of states rights guaranteed in the U.S. Constitution.

Until the passage into law of the DoMA in September 1996, the Federal government deferred to each individual state's

definition of marriage to decide questions of applicability and eligibility regarding its many statues and programs. The DoMA changed this practice, defining marriage for Federal programs and statues as a union between a man and a woman. Essentially, the DoMA precluded the possibility that the benefits of marriage that result from the many Federal governments statues and programs would be extended to same-sex couples. The DoMA also allowed states not to recognize same-sex marriages legally sanctioned in other states. Thus it created a theoretically possible situation where a same-sex couple legally married in one state could drive across the border into another state and no longer be legally married. Amicus contends that the DoMA:

- Violates the Fourteenth Amendment to the U.S. Constitution guaranteeing equal protection.
- Violates the Tenth Amendment to the U.S. Constitution by usurping the right of the state to define marriage.
- Violates the U.S. Constitution's Full Faith and Credit clause, which requires that official acts and

> proceedings of each state be recognized by other states.[13]

The Constitutionality of the DoMA has yet to be challenged because no state to this point has fully recognized the right of individuals to enter into a same-sex civil marriage. By creating the separate legal edifice of civil unions, Senate No. 2175 would prevent such a challenge, thereby ensuring that a whole group of tax paying, law abiding citizens of the Commonwealth would be sentenced to permanent second-class status. Amicus contends that this violates Article 4 and Article 11 of the Massachusetts Constitution. Massachusetts Constitution Article 4 states:

> The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United

[13] See Addendum A. Lamda Legal Memo dated 9/1/1996. This memo addresses in depth the Constitutional issues related to the DoMA and is submitted to demonstrate the reasonableness of Amicus's assertion that the DoMA would be held to be unconstitutional once reviewed by the U.S. Supreme Court thus securing to same-sex married couples the many benefits of marriage arising from federal programs and statues.

> States of America in Congress assembled.

Massachusetts Article 11 states:

> Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Read together, these Articles ensure that the people of the Commonwealth have the right to not only challenge the usurpation of their power, jurisdiction, and rights but the right to do so promptly and without delay. Senate No. 2175 would deny these rights by ensuring that a specific class of citizens of the commonwealth who wish to marry a same-sex partner will have no legal standing to challenge an arguably discriminatory and unconstitutional Federal law (the DoMA).

To have clearly stated that same-sex couples have the right to marry and then to not allow

> them to do so within a legal edifice that has the potential to secure to these couples all the benefits of civil marriage -- to which this court acknowledges they are entitled -- is for the court to render impotent its own ruling.

CONCLUSION

The consequences of allowing Senate No. 2175 to stand as an acceptable implementation of this court's ruling in Goodridge will be to deprive same-sex couples of the same tangible and intangible benefits that accrue to those allowed to unite in civil marriage and to deny same-sex couples the standing to challenge the discriminatory and unconstitutional DoMA.

Amicus respectfully urges this court to reject Senate No. 2175 as an unacceptable implementation of both the letter and the noble intent of Goodridge.

ADDENDUM A.

Lambda Legal
Memo 09/01/1996

Constitutional and Legal Defects in H.R. 3396 and S. 1740, the Proposed Federal Legislation on Marriage and the Constitution

This is a preliminary memorandum on the possible legal ramifications of current proposals to have the federal government bar and subvert the recognition of selected lawful marriages, something never done before in U.S. history.[1]

Summary

The proposed bills (H.R. 3396 and S.1740) have two key provisions: (1) exempting interstate recognition of selected lawful marriages from the constitutional command of full faith and credit, and (2) creating a federal definition of marriage so as to distinguish among lawful marriages. The attempt to circumvent the Constitution's provision for interstate full faith and credit, and the unprecedented federal intrusion into the law of marriage, get the role of the federal government wrong in both directions. If passed, the bills would create a "house divided" in which many Americans would not know from day to day, state to state, or agency to agency, whether they are legally married or not. The Constitution does not permit this violence to its federal-state balance, or the injury these bills would inflict upon real-life, lawfully married couples.

I. The Attempt to Circumvent Full Faith and Credit Is Unprecedented, Unwise, and Unconstitutional.

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State,

territory, possession, or tribe, or a right or claim arising from such relationship".

- H.R. 3396

The Constitution contains several federalist provisions intended to make the United States one nation. One such provision is Article IV, section 1, the "full faith and credit" clause.[2] The "very purpose" of the full faith and credit clause was "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation."[3] As the Supreme Court has explained, "it is a Constitution we are expounding -- a constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."[4]

The full faith and credit clause is intended to promote national unity, to assure that people (including lawfully married couples) can move throughout the country without being stripped of their legal rights, and to help Americans avoid repeated and burdensome litigation and relitigation of settled issues or established legal status.[5] As Supreme Court Justice Robert Jackson stated in 1945, "the policy ultimately to be served in application of the clause is the federal policy of 'a more perfect union' of our legal systems."[6]

A. Because Congress Does Not Have The Power To *Limit* Full Faith And Credit, The Proposed Statutes Are Unconstitutional.

The Constitution provides a role for Congress in assuring the full faith and credit to be granted by states to the acts, records and judicial proceedings of sister states.[7] Although legal commentators and Supreme Court justices have occasionally mentioned this power in passing, Congress has rarely -- indeed, virtually never -- acted on its authority. In fact, the two

principal pieces of implementing legislation date back to 1790 and 1804.

The first provides for ways to authenticate acts, records and judicial proceedings, and repeats the constitutional injunction that such acts, records and judicial proceedings of the states are entitled to full faith and credit in other states, as well as by the federal government.(8) The second provides methods of authenticating non-judicial records.(9) Each served a true "full faith and credit" purpose, i.e., promoting and facilitating uniformity.(10)

Since 1804, Congress has passed *only* two pieces of implementing legislation: 28 U.S.C.A. § 1739A, the Parental Kidnapping Prevention Act of 1980 ("PKPA"), which provides that custody determinations of a state shall be enforced in different states, and 28 U.S.C.A. § 1738B, "Full Faith and Credit for Child Support Orders" (1994). Although Senator Nickles, the sponsor of S.1740, suggests that the PKPA gives a precedent for his bill, neither the 1980 and 1994 laws, nor the original enactments, purported to *limit* full faith and credit; to the contrary, each of these statutes reinforced or *expanded* the faith and credit given to state law.(11)

The plain meaning of the constitutional provision itself is that Congress can enact "supplementary and enforcing" legislation, but only where it has an actual and legitimate "full faith and credit" purpose as a whole.(12) Congress has never before sought to abridge the mandate of the full faith and credit clause, and, in fact, lacks the power to do so. Congress can neither circumvent full faith and credit, nor attempt to make the second sentence of Article IV, section 1 swallow the clear and central mandate of the first sentence.(13)

Prior to the bills introduced last week, nearly all proposals for applying the powers authorized in the Constitution have focused on expanding or assuring faith and credit.(14) The occasional political effort to introduce legislation that

would have limited full faith and credit (arising, historically, most often during past controversy over civil divorce) have consistently failed.[15]

Because of this clear understanding throughout our history, and thanks to Congress' proper constitutional restraint (at least prior to the proposed bills), the Supreme Court has never had to scrutinize Congress's power under the clause.[16] Called upon to review the constitutionality of legislation such as that proposed here, the Supreme Court would undoubtedly strike it down as inconsistent with the spirit, plain meaning, intent, and history of the Constitution.

In short, the proposed statute represents an attempt to subvert the requirements of the full faith and credit clause. Any such change in the meaning of the Constitution requires a constitutional amendment, not an abrupt election-year act of Congress.[17]

B. Because The Supreme Court Has Already Clarified That The Mandate Of Full Faith And Credit Extends Beyond The Scope Of The Proposed Statutes, They Are Unconstitutional.

The full faith and credit clause is self-executing.[18] Congress obviously may not rewrite the clause and its reach without a constitutional amendment. Nor is its power exclusive; it is shared with the Supreme Court, and bounded by Court holdings.[19] Although the Supreme Court has not yet passed on the manner in which marriages *per se* are entitled to full faith and credit,[20] the proposed statutes would contradict standards set by a host of Supreme Court rulings on the reach of the full faith and credit clause.[21]

For example, the bills subvert the Court's longstanding holdings on faith and credit for judgments, the most frequent context for issues of faith and credit in matrimonial relations. The Supreme Court first recognized full faith and credit for judgments in 1813, *Mills v. Duryee*, 7

Cranch 481 (U.S. 1813), and in the succeeding 183 years has regularly restated its position. States have virtually no discretion to deny full faith and credit to judgments. *Restatement Second Conflict of Laws*, § 103. Cases have established that even judgments arising from causes of action that could not be brought in the forum state must be recognized.[(22)] The Court has again and again clarified that the clause has this reach.

And yet, even in terms of judgments alone, the proposed statute would upset the rule of law, repeated in scores of decisions, that judgments are valid everywhere. The proposed statute, therefore, is unconstitutional because, in this case, the Congress is not simply seeking to reverse a Supreme Court interpretation of a statute, but rather the Supreme Court's long-settled interpretation of the Constitution itself, which can only be changed by amendment.

Furthermore, the Court has made clear that, when asked to recognize an unfulfilled or general right or duty based on another state's statute or case law, states may weigh competing interests before deciding which rule of law to apply. But, when state acts, records, or judicial proceedings have been applied to the facts of a particular case to determine the rights, obligations, or status of *specific parties*, the other states *must* give those acts, records, or proceedings the same effect they would have at home. Once the status has been created, the judgment rendered, the record recorded, and rights established, the full faith and credit clause makes other state's legal regimes immaterial (because they are not at issue). What is then at stake is the protection of the partners, their expectations, their *res*, and the acts taken in reliance on state law by third parties.[(23)]

Since a civil marriage -- whether as a certificate, an act, or a judgment-like *res* -- falls into the category of such adjudications or creations, there is no appropriate policy "balancing" regarding recognition. Full faith and credit must be granted under the clause itself,

and Congress may not vitiate that central command, short of an amendment to the Constitution itself.[24]

C. Because The Proposed Statutes Would Nationalize Domestic Relations Law, Shattering Historical Predecent, They Are Unconstitutional.

Without exception, domestic relations has been a matter of state, not federal, concern and control since the founding of the Republic.[25] It is well established that "there is no federal law of domestic relations." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). *See also In re Burrus*, 136 U.S. 586 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."). *See also* Section II (1), *infra*.

As a result, Congress has never before passed legislation dealing purely with domestic relations issues, especially marriage. Federal courts maintain no jurisdiction over domestic relations issues. For example, despite similar political agitation and congressional grandstanding at other points in our nation's history, there is no federal divorce law. Nor, even with the PKPA cited by Senator Nickles as a "precedent" for his proposed bill, has there been any attempt to create federal jurisdiction over child custody.

In fact, prior to this election year, every attempt to nationalize domestic relations, whether through constitutional amendment or act of Congress, has been rebuffed as an unconstitutional or ill-advised intrusion of the federal government into an area left to the states.[26] In this area, the proper role of the federal government is simply to permit people and their families to travel, and businesses and others to function, throughout the country -- with certainty and respect, and without discrimination.

The proposed statutes thus have radical implications far more vast even than stymieing interstate recognition of same-sex couples' lawful civil marriages. Under the guise of protecting states' interests, the proposed statutes would infringe upon state sovereignty and effectively transfer broad power to the federal government. Departing from the restraint it has shown since its last significant full faith and credit legislation in 1804, Congress would be setting a precedent; it could easily act again to disregard the interest of particular states by setting forth criteria for full faith and credit that would have implications in any number of areas -- *e.g.*, divorce, child custody, adoption, gambling and abortion.

There is no guarantee that such future statutes would have effects that are either "conservative" or "liberal"; rather, they would be inherently political and would effectively transfer power from the states to Congress.[(27)] This unprecedented transfer of power to the federal government would be a dangerous, and especially ironic, legacy of the self-proclaimed "pro-local-control" 104th Congress.

D. The Proposed Statutes Would Make Existing Law Inconsistent And Disorderly, Creating An Untenable Legal And Practical Situation For Lawfully-Married Couples And The Rest Of Society.

The proposed statutes would clash with and contradict existing legislation. Although the existing statutes that implement full faith and credit do not refer directly to marriage, marriage and the incidents thereof are entitled to full faith and credit as acts, records or as a judgment-like *res.* For example, if Pat and Chris are married in Hawaii, they can be divorced in Hawaii, but also in any other state. Divorce is a judgment that is already granted full faith and credit.[(28)] Determinations on adoption, child custody and child support, all of which are as relevant to same-sex married couples as to other married couples, are also judgments that are already granted full faith and credit.

Inheritance law adjudicates judgments. Authenticated birth certificates are considered public records to which full faith and credit must be given. The proposed statutes would call all of these into question.

The result of limiting full faith and credit pursuant to the proposed statutes would thus be a legal and practical nightmare, whereby at least some Americans would in effect have to get a "marriage visa" stamped when they cross a state border, or where they (or their parents) would be simultaneously married and unmarried in different reaches of the country. Such a situation is simply untenable, both in terms of federalism and the meaning and expectations around marriage, itself a fundamental right.[(29)]

For example, imagine if married couples had to worry if their right to inherit from each other remained valid, or their right to make medical decisions for each other (or their children) would be respected, or their family health plan was in force -- merely because they chose to move to or visit another state. Imagine the difficulty for a bank in their home state that had loaned money based on a spousal guarantee that was enforceable in that state, only to learn it would not be enforced by a sister state. How could a company maintain coherent personnel policies if its offices were required by conflicting state laws to treat the same employee differently depending on the office in which he or she is working? How could a couple be sure their expectations for social security or veterans' benefits, child or spousal support, property and insurance rates would be honored? The full faith and credit clause, the constitutional right to interstate travel, and other federalist provisions prohibit a state from putting individuals (and their families, employers, and creditors) in such dilemmas.

Furthermore, not only are the proposed statutes inconsistent with both implementing acts of Congress passed nearly two centuries ago, they directly clash with the PKPA, which, as stated,

seeks to assure enforcement of custody determinations and prevent "parental kidnapping" (protections which, presumably should apply to the children of same-sex couples, but which, under the proposed bills, would not). The result of this proposal, a slipshod, politically motivated congressional act, would be a mishmash of contradictory law giving rise to multiple, long, confusing, and costly lawsuits. Marriage, the legitimacy of children, the security of inheritance, the validity of wills, the guarantee of loans, the obligation of contracts -- all would be up for grabs in every state.

As Justice Robert Jackson wrote during similar political controversy long ago, "**If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom**."(30) America is not a country where people can be legally married in one state, then forcibly unmarried when they cross into the "wrong" state.

E. The Proposed Statutes Run Afoul of Other Constitutional Protections, Including The Right To Marry And The Right To Travel.

By attempting to eliminate the constitutional means of assuring interstate recognition of lawful marriages, the proposed statutes would place a direct and tangible obstacle in the path of interstate travel, and thus severely burden people's right to marry, a fundamental constitutional right in itself. Licensing such a national "free for all" would also implicate other constitutional provisions relating to due process, the right to travel and move freely throughout the nation, equal protection (sex discrimination as well as sexual orientation discrimination), interstate commerce, the freedom of intimate association, the privileges and immunities clause, as well as the fundamental right to marry itself.

The rights to marry and to have that marriage recognized are of fundamental importance, both in

and of themselves, and in part because marital status includes substantial economic and practical protections and benefits, upon which may depend the couple's ability to live as they want, raise children as they want, contract with others or even subsist.(31) A couple lawfully married in Hawaii who wished to travel in or to another state should not have to choose between their marriage and their right to travel.

The Constitution should not be used as an election-year soapbox. The political effort to target gay and lesbian couples in fact would drive gaping holes through the Constitution, and radically alter the proper balance of federal-state relations. The proposed statutes are radical rather than conservative, seeking to trump 200 years of established precedent and history -- all to serve a transitory political (and extraordinarily discriminatory) agenda.

Whatever one's stand on equal marriage rights for all Americans, as former Justice Jackson said, "the [full faith and credit] clause would not seem to lend itself to sociological, ethical or economic ends or implications, other than certainty and order."(32) All lawfully married couples are entitled to that certainty and order, and to protection of their lawful marriages throughout the country.

II. The Unprecedented Federal Intrusion into Decisions about Civil Marriage -- Traditionally Left to the States and to Individual Couples -- Is Unconstitutional, Unwise, and Unfair.

"In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

- H.R. 3396

A. The Constitution And U.S. History Place The Definition And Regulation Of Civil Marriages With The States, Not The Federal Government.

The Tenth Amendment, federalism, the absence of enumerated congressional power, and history all make clear that states, not the federal government, define and regulate civil marriage, subject only to U.S. constitutional constraints.(33) As the court stated in *United Ass'n of Journeymen Local 198 AFL-CIO Pension Plan v. Myers*, 488 F. Supp. 704, 707 (M.D. Louis. 1980):

We start with the proposition that the delicate relationships of husband-wife, parent-child and family-property arrangements are traditionally matters of exclusive state concern. *No provision of Article I of the Constitution confers power on the Congress to legislate in these sensitive state fields. Any general federal law attempting to regulate such relationships would be constitutionally infirm.* (emphasis added)

"The power to regulate marriage is a sovereign function retained by the states; it has not been granted to the federal government." *Salisbury v. List*, 501 F. Supp. 105, 107 (D. Nev. 1980) (striking down a Nevada prison regulation denying inmates the ability to marry). Over a hundred years ago, the Supreme Court held that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890).(34)

More recently, in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), the Court reaffirmed that "*nsofar as marriage is within temporal control, the States lay on the guiding hand." (emphasis added) Direct regulation of the validity, formation, and dissolution of civil marriages is emphatically a matter of state, not federal, prerogative and jurisdiction.*

Even a purported desire of the federal government to achieve its most legitimate concern in this area, uniformity in the effect of federal legislation (a motivation clearly not present in these proposed statutes[(35)]), cannot alter the status of preexisting rights. For example, in Ensminger v. Commissioner of Internal Revenue, 610 F.2d 189, 191 (4th Cir. 1979), the court held:

The regulation of marriage, family life and domestic affairs "has long been regarded as a virtually exclusive province of the States." In its application of the tax laws there has been a consistent deference by Congress to state laws in such matters.[(36)]

Status and interests in domestic relations are determined by state law. Although federal law may (subject to other constitutional limitations) then decide how that lawfully-determined status or that state-created interest is treated, for example in taxation, it cannot create or destroy the underlying status itself. See Burnet v. Harmel, 287 U.S. 103, 110 (1932) ("state law creates legal interest but the federal statute determines when and how they shall be taxed."). As the Supreme Court explained in DeSylva, 351 U.S. 580:

The scope of a federal right is, of course, a federal question, but that does not mean its content is not to be determined by state, rather than federal law.... This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

This is particularly true of civil marriage -- an act that, once having occurred, creates a res, an actual ongoing status that remains unless abrogated by legal adjudication, i.e., divorce, by the proper legal authority (i.e., the states, not the federal government).

The proposed statutes would, for the first time in U.S. history, purport to declare that as a

general matter (and not just for a particular purpose), Congress and every federal agency will not recognize a whole group of people's marriages -- marriages that are fully, equally, and lawfully valid under applicable state law. The proposed statutes in effect define marriage itself and thus unconstitutionally usurp state control of domestic relations, while placing couples and others in an untenable situation.

B. Recognizing Federalist Imperatives, Congress Has Historically Deferred Questions Of Defining Domestic Relations To State Law.

Even were Congress somehow to thread its way around these constitutional and historical boundaries, perhaps invoking its power over federal programs,[(37)] most federal statutes do not define domestic relations terms (especially terms such as "spouse", "husband," or "wife"), and courts generally found that Congress intended such terms to be defined by reference to state law (even with disparities from state to state).[(38)] This policy -- followed by Congress for more than two hundred years -- is not simply a result of deference, but rather is part of our system of federalism. As the Fourth Circuit wrote in Ensminger, 610 F.2d at 191, "Federal deference in matters within the state police power reflects more than a policy of comity. In fact, it represents a constitutionally derived recognition of the essential character of state government within our federal system."

Legislation in which Congress has, accordingly, left the definition of domestic relations to state law covers a vast range of topics and familial relationships.[(39)] Despite disparities in state law regarding marriage, and historical periods of disagreement among the states, however, this consistent approach of congressional deference has served the states, the couples, and the nation well. It is ironic that the first such congressional proposal in decades to depart from this historic respect for federalism and states' power would come from this purportedly pro-"devolution" Congress. And it is

telling that the proposal comes in an election year.

C. Congress Is Bound By Additional Constitutional Provisions That Preclude Its Meddling With The Definition Of Marriage, Or Interposing Its Own Discriminatory Selection Criteria Among Lawfully Married Couples.

Congress is bound not just by the Tenth Amendment and the federalist imperative of not encroaching upon the lawful domain of the states, but also by other constitutional constraints. These include the fundamental right to marry, equal protection, the right to intimate association, and the privileges and immunities clause.[(40)] The proposed statutes burden lawful marriages and discriminate among married people, and thus violate each of these constitutional guarantees.

To give just a few brief examples, consider the burden these anti-marriage bills impose on the fundamental right to marry itself. Marriage is not just a most important personal choice, but also a fundamental constitutional right.[(41)] Any laws that infringe upon a fundamental right, including a law that allows the federal government to exclude a class of people from the definition of marriage, are subject to strict scrutiny. Strict scrutiny is nearly always fatal to the law in question.

Courts will strike down federal regulations which burden the freedom to marry and marriage itself.[(42)] Moreover, the Supreme Court has identified "the receipt of government benefits..., property rights, ... and other less tangible benefits," for which, as it noted "marital status is often a precondition," as one of the four defining and "important attributes of marriage."[(43)] Burdening such access across the board is undoubtedly one of the most massive burdens on marriage ever proposed.

Likewise, the proposed bills violate the constitutional guarantee of equal protection, as they would deny federal protections and

entitlements to a discrete group of people, and authorize federal agencies across-the-board to pick and choose among lawfully-married couples, discriminating against same-sex married couples for any and all purposes. The bills flagrantly discriminate on the basis of sex and sexual orientation, and violate the "fundamental rights" prong of the Equal Protection Clause.

While "fundamental rights" analysis requires strict scrutiny, and sex discrimination triggers at least heightened scrutiny, it is clear that the government "interest" in this extraordinary, across-the-board discrimination against selected married people cannot meet even the lowest level of scrutiny, so-called "rational basis" review. The only government "interest" is the sponsors' dislike of gay men and lesbians, and disapproval of women and men who fall in love with, choose to marry, and undertake the responsibilities and commitment of civil marriage with a person of the "wrong" (that is, their same) sex. As former U.S. Solicitor General Rex E. Lee has written, despite his own personal disapproval, "[l]aws prohibiting homosexual marriages are the classic case of discrimination based on sex."[(44)]

Moreover, since the proposed statutes would with one stroke alter the content of hundreds of federal laws addressing a myriad of purposes and contexts, it cannot be argued that the legislation is even rationally related to any legislative end, let alone all the ends reflected in the statutes affected. Whatever the stated intention, the result would be an irrational system of conflicting and incomplete rights, and indeterminate obligations.

For example, imagine a same-sex couple who are lawfully married in Hawaii, but where both spouses work for the federal government. The couple will be simultaneously married for state purposes, but not married for federal purposes. For state taxes, they would file as "married," but for federal they would have to file single returns. Benefits from state worker's compensation and disability insurance would

accrue on the basis of their married status, but the federal taxation of those benefits would be determined on the basis of single status. Since state and federal statutes frequently intertwine, the couple would perpetually be in a paradoxical state of being married and not married at the same time in the same place. This hardly serves any "rational" end as to the couple, let alone to the states, the couple's children and dependents, their employers, creditors, or others, including the United States (of which they, too, are citizens).[45]

Denying social security benefits to lesbians and gay men who retire after decades of marriage has nothing to do with the intent of the social security laws; preventing pension benefits of senior same-sex couples from vesting has nothing to do with the purposes of ERISA; preventing custodial parents from enforcing child custody decrees has nothing to do with the legislative intent of the Parental Kidnapping Prevention Act; preventing a lesbian or gay man to be at a same-sex spouse's hospital bedside furthers no legitimate Veterans Administration policy; nor do any such discriminatory exclusions and burdens fairly reflect the married couple's interest in equal participation in, or contribution to, society.

The proposed statutes' wholesale exclusion of lawfully-married same-sex couples from literally every "Act of Congress, [and] any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States" would be perhaps the most sweeping and radical revision of federal law in history -- drawing a caste-line through each and every federal law or action that touches upon marriage.

D. The Proposed Bills Set A New Low For Congress, An Abdication Of Its Historic Role In The Federal System As An Enforcer Of Private Rights.

The radical nature of the proposed statutes is underscored by recalling what Congress' role is supposed to be in the area of individual rights.

Since the Civil War, Congress has, at its finest, used its powers to ensure that states and others do not infringe on the established rights of Americans, beginning especially with those protected by the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution. The Civil Rights Acts, the Religious Freedom Restoration Act, the Equal Access Act all are examples where Congress moved to ensure that Americans -- even minority Americans, even unpopular Americans -- are protected in their individual freedoms at least as much as, if not more than, is guaranteed by the Constitution.

Indeed, the Supreme Court has ruled that where Congress has constitutionally-based enforcement power it is to strengthen protection of individual rights. In Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966), the Court considered the scope of congressional power in the context of its enforcement powers under the Fourteenth Amendment, and explained that:

Section 5 [of the Fourteenth Amendment] does not grant Congress the power to exercise discretion in the other direction and enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' (emphasis added)

By contrast, the proposed legislation harkens back to the shameful chapters of our history where the federal government targeted and took action against vulnerable minorities, reinforcing, or, in the worst cases, creating, their second-class citizenship. The legislation sets a new low standard for federal discrimination, and overtly invites states to discriminate as well.

Moreover, the proposed statutes potentially set the federal government in direct opposition to many states, not just civil rights leaders such as Hawaii. For example, the demise of the "different-sex restriction" on marriage now being challenged in Hawaii will likely be based on the Hawaii state constitutional guarantee of freedom

from discrimination on the basis of sex.[(46)] At least fifteen other state constitutions have such an explicit guarantee as well; all states have some requirement of equal protection. Over time, more and more states are likely to end sex discrimination in marriage.

And meanwhile, even apart from full faith and credit, at least eight states have signed the Uniform Marriage and Divorce Act, and numerous states have already enacted their own statutes governing the recognition of out-of-state marriages that would not have been performed in-state. For Congress to define civil marriage as excluding large numbers of individuals lawfully married in many states goes against Congress's historic role, and constitutional obligation, to help unify the country, provide for clarity and certainty as people travel, and assure the equal rights, privileges, and immunities of all Americans.

CONCLUSION

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

- Griswold v. Connecticut, 381 U.S. 479, 486 (1965)

Civil marriage -- with the responsibilities, privileges, protections, and commitment it entails -- is not a limited commodity. When same-sex couples finally partake of the same freedom to marry as other Americans, they will not "use up" or "harm" marriage, nor will they take anything away from non-gay married couples. Marriage and all its incidents will remain fully available for heterosexual couples.

Allowing lesbians and gay men to share in the commitment of civil marriage is not an attack on marriage; indeed, the instability, uncertainty,

and radical discrimination introduced by this so-called "defense of marriage act" are themselves the real attack.

Whatever one's stand on equal marriage rights for same-sex couples, it should be clear that Congress would never even consider such a radical, unconstitutional, discriminatory, and impractical redefinition of marriage and the federal-state balance, were it not targeting a very vulnerable minority -- today, lesbian and gay Americans. If marriage needs "defense," it is not from same-sex couples in love; it is from politicians willing to subvert the Constitution to discriminatory or political ends, and from others unwilling to stand up for what is right.

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ENDNOTES

[1] This memorandum should be read together with the Lambda Legal Defense & Education Fund "Summary of Legal Issues" (March 20, 1996) (available from Lambda).

[2] Article IV, section 1 of the Constitution states that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[3] Williams v. North Carolina, 317 U.S. 287, 295 (1942), quoting Milwaukee County v. White Co., 296 U.S. 268, 276-277.

[4] Williams, 317 U.S. at 302-303.

[5] Sutton v. Lieb, 342 U.S. 402 (1952).

[6] *Justice Robert Jackson, "Full Faith and Credit -- the Lawyer's Clause of the Constitution," 45 Columbia L. Rev. 1, 27 (1945).*

[7] *"Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Art. IV, section 1.*

[8] *28 U.S.C.A. § 1738. Prior to a 1948 amendment, the statute addressed full faith and credit only as regards records and judicial proceedings.*

[9] *28 U.S.C.A. § 1739.*

[10] *Professor Lea Brilmayer of New York University School of Law, a leading national Conflicts of Law expert, explains that the proper analysis is not whether a bill in any respect limits "faith and credit," but whether the purpose is to promote faith and credit. In her words, if the result of an enactment would be to leave only a "proper subset" of acts, records, and judgments receiving full faith and credit (rather than having the effect of according faith and credit to X, while leaving out Y), then it is unconstitutional; such an enactment would not serve the purpose of giving effect to full faith and credit, but rather would be an attempt to erode full faith and credit without a net gain in uniformity. Such an enactment -- and the proposed statutes are the perfect example -- would be an improper attempt by Congress to poach on another substantive area of law (i.e. domestic relations) in the guise of enforcing full faith and credit.*

[11] *Subsequent case law has established that the PKPA neither limits full faith and credit, nor establishes any kind of federal cause of action in child custody; rather, the PKPA facilitates parties' enforcement of judgments from state to state. Senator Nickles' ability to cite only the PKPA as a "precedent" for his proposed legislation thus in fact underscores its unconstitutionality.*

[12] *Corwin, "The Full Faith and Credit Clause," 81 U. Penn. L. Rev. 371, 373-74 (1933).*

[13] *See Freund, "Chief Justice Stone and the Conflict of Laws," 59 Harv. L. Rev. 1210, 1229-30 (1946). See also Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980) ("while Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.").*

Moreover, even under Professor Brilmayer's more limited, less stringent formulation, it is clearthat Congress lacks power to do what it is seeking to do here: arbitrarily abolish faith and credit for a subset of lawful acts, records, and judicial proceedings, without any legitimate federalist purpose of uniformity.

[14] *See, e.g., Cook, "Powers of Congress under the Full Faith and Credit Clause," 28 Yale L.J. 421 (1918-19). As outlined by Professor Cook, Congress has the potential power to provide (i) service in other states of state process in civil suits; (ii) the direct enforcement of state judgments in other states; (iii) for legislation compelling states to enforce judgments of other states by rendering new judgments; and (iv) compulsory recognition by the states of rights created by legislative acts of other states. Id. at 428-434.*

[15] *See note 27, infra.*

[16] *See, e.g., Williams, 317 U.S. at 303; Scherrer v. Scherrer, 334 U.S. 343 (1948).*

[17] *The bills also run afoul of the requirement that Congress' enactments in furtherance of the full faith and credit command be in the form of "general" laws. The fact that the bills single out marriage, their facial discrimination based on sex, and their impact and purpose in creating a disadvantaged caste of lawfully-married people*

based on their sexual orientation, all make them far from "general." An additional constitutional defect arises from the vagueness of the proposals, targeting any "act, record, or judicial proceeding ... respecting a relationship between persons of same sex that is treated as a marriage... or a right or claim arising from such relationship." Yet another defect lies in their potential interference with rights of Indian tribes and native Hawaiians established by treaty and customary law.

[18] *Justice Jackson, 45 Columbia L. Rev. at 11.*

[19] *See, e.g. Thomas, 448 U.S. at 272 n.18 ("it is quite clear that Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation").*

[20] *Lawfully-performed civil marriages qualify for recognition under each prong of the Full Faith and Credit Clause, partaking as they do of each of the elements of the three enumerated categories (public acts, records, and judicial proceedings):*

(1) The creation of a marriage is a "public Act" both because it occurs pursuant to a statutory scheme, and is performed in most states by a public or legally-designated official, and because the marriage is itself an act -- a res, a thing or status itself created by a state (which thus acts);

(2) The marriage certificate is the "Record" of that res, recording (with delineated legal effect) that a marriage has been validly contracted, that the spouses have met the qualifications of the applicable marriage statutes, that they have lawfully consented, and that they have duly become legally "married." (Along with marriage certificates, analogous public records of even lesser consequence, ranging from birth certificates to automobile titles, have been accorded full faith and credit); and

(3) Finally, celebrating a marriage is arguably a "judicial proceeding" in at least those sixteen states in which judges, court clerks, or justices of the peace officiate. Perhaps more important, marriage partakes of important elements of a "judgment," the state "act" or "judicial proceeding" that has received with least question the greatest "full faith and credit" from the Supreme Court.

No court, including the Supreme Court, has held to the contrary; several courts have so held. For a fuller discussion and underlying authorities, see Lambda Legal Defense & Education Fund, "Summary of Legal Issues" (March 20, 1996) (available from Lambda).

[21] See, e.g., Thomas, 448 U.S. at 258 n.18. See also Reynolds, "The Iron Law of Full Faith and Credit," 53 Maryland L. Rev. 412 (1994).

[22] See, e.g., Fauntleroy v. Lum, 210 U.S. 230, 237 (1908); Williams, 317 U.S. at 294; Scherrer, 334 U.S. at 354. See also Restatement Second Conflicts of Laws, § 117.

[23] See, e.g., Hughes v. Fetter, 341 U.S. 609, 611 (1951). The issue in Hughes was whether Wisconsin could under its wrongful death statute deny a cause of action to the estate of an Illinois descendant, where Illinois law would have permitted the suit. The court noted that "if the same cause of action had previously been reduced to judgment, the full faith and credit clause would compel the courts of Wisconsin to entertain an action to enforce it" without balancing any policy interests. 341 U.S. at 612 n.4.

[24] Even were the Supreme Court ultimately to conclude that civil marriages do not constitute acts, records, or judicial proceedings, and are not otherwise subject to full faith and credit, it is clear that Congress cannot unilaterally attempt to usurp that determination by an end-run around the full faith and credit clause (especially not through a selective measure that

on its face discriminates between lawful marriages).

Ironically, the religious-political extremist groups behind these bills are busily pushing anti-marriage-recognition legislation in state legislatures, presumably believing that they already have all the authority they need under current faith and credit law. See Human Rights Campaign, "Wedded to Intolerance: Extremists Lead Nationwide Assault on the Lives of Lesbian and Gay People" (May 8, 1996) (documenting organized effort behind the anti-marriage backlash legislation proposed in Congress and the states). To date, bills purporting to deny recognition to prospective lawful marriages of same-sex couples have been adopted in eight states, and rejected in seventeen, with several more still pending.

[25] Scherrer, 334 U.S. at 362, (Frankfurter, J., dissenting); Ankenbrandt v. Richards, 112 S.Ct. 2206 (1992) (no subject matter jurisdiction in federal courts for domestic relations cases).

[26] As former Justice Frankfurter explained in his Scherrer dissent, 334 U.S. 343, the first constitutional amendment to allow Congress to have authority over domestic relations was proposed (and rejected) in 1884. Through 1948, seventy similar amendments were proposed, prompted by an analogous national controversy over whether to allow civil divorce. Supra, at note 16. All such proposals failed, and, after a period of needless (and untenable) uncertainty, in which Americans literally did not know from state to state whether they were legally married (or divorced) or not, the U.S. Supreme Court clarified that lawful determinations as to marital status, through divorce, must be respected throughout the country. E.g., Cook v. Cook, 342 U.S. 126 (1951).

[27] Faith and credit is a two-way street. Where faith and credit is weak, states are not required to recognize the law of other states but at the same time find it difficult to have their own laws respected elsewhere. Where faith and credit

is strong, states must recognize the law of other states but are also more likely to have their own law respected.

[28] *See, e.g., Williams, 317 U.S. 287; Scherrer, 334 U.S. 343; Dunham v. Dunham, 44 N.E. 841, 847-48 (Ill. 1896).*

[29] *Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978).*

[30] *Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) (emphasis added).*

[31] *Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (unconstitutional to "unduly interfere with the right to migrate, resettle, find a new job, and start a new life"); see also Edwards v. California 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. 35 (1867).*

[32] *45 Columbia L. Rev. at 25.*

[33] *Senator Dole, S.1740's original co-sponsor, often extols the Tenth Amendment while campaigning, and frequently reads it in full from a laminated palmcard: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. And as the Courts have made clear,"f the Tenth Amendment reserved any power to the states, it must be the power to legislate rules applicable to marriage, separation and divorce, community property and succession." United Ass'n of Journeymen, 488 F. Supp. at 707; see also Neustein v. Orbach, 130 F.R.D. 12, 14 (E.D.N.Y. 1990); In re Knabe, 8 B.R. 53, 56 (Bankr. S.D. Ind. 1980).*

[34] *See also Pennoyer v. Neff, 95 U.S. 714 (1877) ("The State, for example, has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930).*

[35] *The proposed statutes do not embody a federal promotion of uniformity; indeed, in an affirmative congressional act without precedent, they expressly license a "free-for-all" amongst the states. Similarly, with regard to federal status, they give new meaning to the phrase "house divided," literally making a couple sitting in their home, their children at their feet (and maybe their employers, or creditors, at the door) simultaneously married and "unmarried" depending on whether a state or federal agency is making the determination.*

[36] *Id. at 191 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)) (emphasis added); see also Boyer v. Commissioner of Internal Revenue, 732 F.2d 191, 194 (D.C. Cir. 1984).*

[37] *Although Congress indisputably has significant power to legislate within its own spheres of competence, when a law interferes with an area outside congressional power, it must in the first instance at least be "reasonably adapted" to a permitted end. United States v. Darby, 312 U.S. 100, 121 (1941). Here, for the first time ever, Congress would be sweepingly rejecting an entire group of marriages, not because of any specific, legitimate statutory purpose, but because it does not like the sexual orientation of the people marrying or the sex of the spouses they marry. Aside from being discriminatory, this is in essence an ultra vires regulation of marriage rather than treatment of a matter "reasonably adapted to a permitted end," and is therefore unconstitutional.*

For instance, in United States v. Parker, 911 F.Supp. 830 (E.D. Pa. 1995), Judge Bechtle dismissed an indictment under the Child Support Recovery Act, holding that Congress has no power to regulate or govern payment of child support. Following the approach taken in United States v. Lopez, 115 S.Ct. 1624 (1995), the court held that the regulation of family relationships has insufficient connection to the regulation of enterprise permitted Congress under the Constitution's commerce clause. There are limits

to what Congress can do, even in the exercise of its enumerated powers, powers it lacks in the area of marriage.

[38] See, e.g., Ryan-Walsh Stevedoring Co, Inc. v. Trainer, 601 F.2d 1306, 1313 (9th Cir. 1964) ("To determine whether a claimant is decedent's "wife," state law is dispositive because the [federal act] does not define this operative term"); Yarbrough v. United States, 341 F.2d 621, 623 (Ct. Cl. 1965) (in enacting the statute in question, Congress undoubtedly left the determination of whether or not an employee was married up to individual state law); Seaboard Air Line Ry. v. Kenney, 240 U.S. 489, 494-96 (1916) (in construing the Federal Employers' Liability Act, the words "next of kin" should take their meaning from applicable state law); Lembecke v. United States, 181 F.2d 703, 706 (2d. Cir 1950) (definition of "widow" for Federal employee life insurance statute determined by reference to state law); Prudential Insurance Co. v. Dulek, 504 F.Supp 1015 (D. Neb. 1980) (definition of "widow" for purposes of federal statute governing serviceman's group life insurance policy determined by reference to state law); Albina Engine & Machine Works v. O'Leary, 328 F.2d 877, 878 (9th Cir. 1964) (definition of "surviving wife" for Longshoremen's and Harbor Workers Act determined by reference to state law); Nott v. Folsom, 161 F.Supp. 905, 907 (S.D.N.Y. 1958) (definition of "remarriage" for Social Security Act benefits determined by reference to state law); Huff v. Director, United States Office of Personnel Management, 40 F.3d 35, 36-7 (3rd Cir. 1994) (definition of "spouse" for federal survivor benefits determined by reference to state law); Bell v. Tug Shrike, 215 F.Supp. 377 (E.D. Va. 1963) (determination of valid legal status for merchant marine benefits is question of state law); Davis v. College Suppliers Co., 813 F.Supp. 1234, 1237 (S.D. Miss. 1993) ("For purposes of ERISA, 'spouse' means the person to whom one is lawfully married").

These and other cases reflect the historical deference and restraint heretofore shown by

Congress with regard to civil marriage, and thus do not themselves directly resolve whether Congress could under certain circumstances seek to impose a definition other than those legally established under state law; many, in fact, suggest that "when the Congress exercises the legislative powers vested in it by the Constitution, it may prescribe the rules which will apply." E.g., United Ass'n of Journeyman, 488 F. Supp. at 707.

The defect in the proposed statutes, however, lies in the degree to which Congress is exceeding its proper powers, transgressing Tenth Amendment and other federalist constraints, and violating other constitutional provisions such as the prohibition against discrimination. As such, even cases supporting congressional latitude cannot be relied on to support such a flagrantly ultra vires abuse.

[39] See note 37. One case bears additional discussion. In Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), an Australian man in a long-term committed relationship with an American man applied for American citizenship, claiming status as a "spouse" under the Immigration Act. The INS rejected his application with a letter that stated, "You have failed to establish a bona fide marital relationship can exist between two faggots." Bill Jordan, "Boulder Vows of Homosexuals Termed Invalid," Boulder Daily Camera, Dec. 4, 1975, p.1.

With linguistic alteration, the Ninth Circuit agreed, holding that "[s]o long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued." Id. at 1039-40. The court asserted that its decision was based "primarily on the [Immigration and Nationality] Act itself," id. at 1040, and was seemingly influenced by Congress's singularly "broad power over immigration and naturalization [in the exercise of which] Congress regularly makes rules that would be unacceptable if applied to citizens.'" Id. at 1042 (citations omitted). The court

concluded that whatever the validity of the couple's marriage under state law, and despite the silence of the federal statute, Congress did not intend "spouse" to include a same-sex spouse.

This part of Adams is distinguishable today based on changes in both federal and state law. Whatever the "ordinary, contemporary, common meaning" that civil marriage or spouse may have seemed to have then, developments in Hawaii and other states make clear that "marriage" no longer automatically excludes same-sex couples. Moreover, claiming it should "strive to interpret language in one section of a statute consistently with the language of other sections," id. at 1040, the Adams court placed great weight on the infamous "homosexual exclusion" provision in the immigration statute, since repealed. Pub.L.No. 101-649, 194 Stat. 4978 (1990). According to the House Report for the Immigration Reform Act of 1990, the repeal demonstrated that "the United States does not view personal decisions about sexual orientation as a danger to other people in our society." H.R. Rep. No. 723, at 56.

Moreover, the bulk of the Adams opinion can fairly be regarded as dicta, since at the time, same-sex couples were unable to marry under Colorado law, and thus did not qualify for federal immigration protection. Indeed, the statute itself provided that for a marriage to be valid, it had to be "entered into in accordance with the laws of the place where the marriage took place." 8 U.S.C. Section 1186a(d)(1)(A)(i)(I).

[40] U.S. Const., art. IV § 2. See, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985); see also Evans v. Romer, 882 P.2d 1335, 1351 (Colo. 1994) (Scott, J., concurring).

[41] Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 438 (1965); Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987). See also Evan Wolfson, "Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men, and the Intra-Community

Critique," 21 N.Y.U. Rev. of L. & Soc. Change 567, 568 n.2, 571-81 (1994).

[42] See, e.g., O'Neill v. Dent, 364 F. Supp. 565, 569 (E.D.N.Y. 1973) (federal regulations of the U.S. Merchant Marine Academy prohibiting attendance by married cadets unduly restricts the fundamental right to marry guaranteed by the First, Fifth, Ninth and Fourteenth Amendments). The court noted, "[t]he Government does not deny that the power to regulate marriage is a sovereign function retained by the states, and not vested in Congress. Thus, subject to constitutional limitations, the ... States are authorized to regulate the qualifications of the contracting parties[.]" Id.

[43] Turner v. Safley, 482 U.S. 78, 95-96 (1987) (holding that even convicted murderers share important interests in exercising the freedom to marry, without arbitrary restriction).

[44] Rex E. Lee, A Lawyer Looks At the Equal Rights Amendment, p. 65 (Brigham Young University Press 1980).

[45] Similarly, the proposed statutes define marriage as solely a "legal union" between one man and one woman. Since it does not, and indeed cannot, define what a "legal union" is, courts will have to turn to the states for guidance. And, because the hundreds of federal statutes that would be covered deal with a variety of familial relationships that are not defined (including "children," "survivor," "next-of-kin," "widow," "beneficiary" -- to name a few), courts would have to examine state law for those meanings as well. Thus, for instance, courts or agencies may find themselves compelled not to accept a Hawaii wife as a "wife" for "federal purposes," while acknowledging that woman's son as the couple's "child" for federal as well as state purposes. The result would be a legal and administrative mess, and a true stigma and hardship to the families involved.

[46] *Baehr v. Miike, 852 P.2d 44, 74-75 (Haw. 1993) (formerly "Baehr v. Lewin"). A final result is still at least two years away, as the case is just now heading toward trial in the lower court, currently scheduled for September 1996.*