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April 20, 2005

Honorable Sam Brownback, Chair
Subcommittee on the Constitution, Civil Rights and Property Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chair Brownback:

On April 13, your subcommittee held a hearing titled "Less Faith in Judicial Credit: Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?" I am writing to express the views of the American Bar Association on this subject, and I request that you incorporate this letter into the hearing record.

While the American Bar Association has taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, we oppose attempts to restrict the ability of each state to determine the qualifications for civil marriage between two persons within its jurisdiction. We particularly oppose recently proposed constitutional amendments that seek to prohibit same-sex civil marriages by either dictating how state and federal courts should interpret state and federal constitutions or by explicitly stripping state and federal courts of their right to hear constitutional challenges to laws limiting civil marriage to heterosexual couples. Such proposals trample on the traditional authority of each state to establish its own laws governing civil marriage and debase our Constitutional system of checks and balances.

The authority to regulate marriage and other family-related matters has resided with the states since the founding of our country and is rooted in principles of federalism. This has enabled states to enact diverse marriage laws that respect and reflect the unique needs and views of their residents. Our federal system also gives states the authority to adopt their own state constitutions and to interpret its provisions to accord greater protection to individual rights than are granted under similar provisions of the U.S. Constitution. Over the years, we not only have successfully tolerated the fact that state laws and judicial interpretations governing marriage are not uniform, we have benefited from it. Variations among state laws governing same-sex unions have provided the opportunity to

examine the effect different laws have on a state's population, increased each state's exposure to new ideas, and served as guidance to those states that seek to modify their laws.

Further, the Constitution should not be amended absent urgent and compelling circumstances; and it certainly should not be amended to call a halt to democratic debate within the states or to prohibit state and federal courts from determining the constitutionality of certain laws.

Clearly, no national consensus has emerged over the legal ramifications of same-sex unions and no urgent need for action of this sort has been demonstrated. While the majority of state legislatures and courts currently are wrestling with this issue and considering various proposed changes, at present, 49 states grant civil marriage licenses exclusively to heterosexual couples and 18 states have adopted state constitutional amendments banning same-sex marriages. The states are not shirking their responsibilities or waiting for Congress to intervene; indeed, state legislatures are vigorously engaged in finding workable, legal solutions to one of the most socially charged issues of our time and are responding to the needs and wishes of their residents.

As Bob Barr, former U.S. Representative from Georgia, succinctly stated in testimony before the Senate Judiciary Committee this past spring, "We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place."

Congress should not rush to judgment and use the constitutional amendment process to impose on the states a particular viewpoint on this highly controversial issue. We urge restraint by Congress in this area as a demonstration of respect for and confidence in our state legislatures and our judiciaries.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc. Members of Subcommittee