AMERICAN BAR ASSOCIATION

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STATEMENT

of

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on behalf of the

AMERICAN BAR ASSOCIATION

presented to the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

concerning

S. J. RES. 26

PROPOSING A CONSTITUTIONAL AMENDMENT
RELATING TO MARRIAGE

March 23, 2004

Mr. Chairman and Members of the Committee:

Good morning. I am Phyllis Bossin, Chair of the American Bar Association Section of Family Law. I am here at the behest of ABA President Dennis Archer to express the views of the ABA on this important issue.

The ABA has a longstanding interest in the development of state laws that safeguard the well-being of families and children. While these laws vary among the several states, their common purpose is to ensure that, wherever possible, children have the opportunity to grow up in stable family units and to benefit from child support and other legal protections that derive from a legal relationship with each of their functional parents. Among the primary means by which the states have accomplished this purpose is by establishing the rules that govern civil marriage.

The ABA opposes any constitutional amendment that would restrict the ability of a state to protect the rights of children by determining the qualifications for civil marriage between two persons within its jurisdiction. While we have taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages, the ABA opposes S. J. Res. 26 and other similar amendments that would usurp the traditional authority of each state to determine who may enter into civil marriage and when effect should be given to a marriage validly contracted between two persons under the laws of another jurisdiction.

This authority has resided with the states since the founding of our country, enabling the courts and legislatures to fashion rules that are well suited to local needs and creating varied approaches that benefit the nation as a whole. As Justice Louis Brandeis

famously explained:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social experiments without risk to the rest of the country. This Court has the power to prevent an experiment. [But] in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[1]

The federal system has also enabled the states to look to their own constitutions in the effort to define and protect the rights and liberties of their citizens. As Justice Rehnquist said in the case of *Arizona v. Evans*, "[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[2] The constitutional amendment process should not be used to impede that freedom, writing into our national charter for the first time a provision denying rights to one group of Americans.

S. J. Res. 26 (and its House counterpart, H .J. Res. 56) proposes an amendment to the Constitution that would declare:

> Marriage in the United States shall consist only of the union of a man

[1] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, dissenting).
[2] Arizona v. Evans, 514 U.S. 1, 8 (1995). In the Court's opinion, Justice Rehnquist also said: "They [the states] also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in in his dissenting opinion in New State Ice Co. v. Liebmann."

> 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.

While the proposed amendment is far too vague to ascertain its full meaning with certainty, S. J. Res. 26 most certainly would have sweeping consequences for the laws of our states. In addition to barring all state courts and legislatures from taking steps to permit same-sex couples to enter into civil marriage, it appears to prohibit states from extending to unmarried couples legal protections comparable to those accorded to married spouses. Among these are the right to sue for wrongful death, to inherit under intestate succession laws, to visit a partner in a hospital, to make medical decisions on behalf of a person who is not able to make his or her own decisions, to qualify for family medical leave and dependency presumptions for workers' compensation, and even to control the disposition of a deceased's remains.

The proposed amendment would limit the ability of states to fashion their own responses to meet the needs of residents in their states. It is likely that the amendment would nullify Vermont's civil union system, California's new domestic partnership law, Hawaii's protections for reciprocal beneficiaries, and scores of laws and ordinances granting various benefits to unmarried couples throughout the country.

Such laws are among the varied responses developed by the states since the early 1970's as their courts and legislatures have sought to take account of evolving societal norms regarding gay men and lesbians and their families. The first challenge to the

exclusion of lesbian and gay couples from civil marriage was decided in 1971. Since then, there have been challenges across the country. All were unsuccessful until 1993, when the Hawaii Supreme Court held that denying same-sex couples the right to marry may constitute unlawful sex discrimination.[3] While the case was working its way back up to the Hawaii Supreme Court, the voters of Hawaii passed a state constitutional amendment allowing the state legislature to limit marriage to different-sex couples. The Court subsequently dismissed the litigation as moot. While the litigation was pending, the Hawaii legislature passed a statute permitting couples to register as "reciprocal beneficiaries" entitled to approximately 60 rights and responsibilities that are automatically accorded to married spouses.

In 1999, the Vermont Supreme Court held that refusing to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Vermont Constitution's Common Benefits Clause.[4] In response to the Court's instruction to remedy this constitutional infringement, the Vermont legislature enacted a law permitting same-sex couples to enter into civil unions. Couples in a civil union are granted all of the state-conferred rights, benefits, and responsibilities of marriage, and private entities are required to treat marriages and civil unions equally. Persons in a civil union, however, are not granted any of the 1,138 federally conferred rights, benefits, and responsibilities of marriage.[5]

In 2003, the Massachusetts Supreme Judicial Court held that same-sex couples have a right to marry and that limiting civil marriage to opposite-sex couples violates

[3] Baehr v.Lewin, 852 P.2d 44, 57 (Haw. 1993).
[4] Baker v. State, 744 A.2d 864 (Vt. 1999).

principles "of individual liberty and equality under law protected by the Massachusetts Constitution."[6]

Other state legislatures also have been involved in considering these issues. In the 2002-2003 Session, bills were introduced in at least ten states to provide a variety of rights to same-sex couples, ranging from healthcare-related protections to civil unions and civil marriages.

At the other end of the spectrum, 38 states have enacted their own "defense of marriage" laws that prohibit marriages between same-sex couples or provide that such marriages shall not be recognized.

Variations among the states laws governing same-sex unions have provided the opportunity for states to examine the effect of different laws on society and provide guidance to other states that seek to modify their laws to reflect changing views of their residents. A constitutional amendment would offer none of these benefits. Instead, it would freeze the law and usurp the historic responsibility of the states in this area of law.

The first federal intervention in this area came in 1996, with the enactment of the Defense of Marriage Act (DOMA). That law contains two substantive provisions. The first purports to relieve states of any obligation to accord full faith and credit to same-sex marriages that are lawfully entered into in other jurisdictions. The second provides that the federal government will not recognize such marriages. DOMA does not bar any state from recognizing marriages between same-sex couples, nor does it prohibit states from conferring upon such couples the "legal incidents" of marriage. The proposed amendment

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[5] GAO-04-353R (Jan. 23, 2004).

[6] Goodridge v. Department of Public Health, 440 Mass. 309, 342, 798 N.E.2d 941 (2003).

would do both. It is because of these differences that one of the authors of DOMA has opposed the amendment as an infringement on traditional state prerogatives:

> Marriage is a quintessential state issue. The Defense of Marriage Act goes as far as is necessary in codifying the federal legal status and parameters of marriage. A constitutional amendment is both unnecessary and needlessly intrusive and punitive. . . . As any good federalist should recognize, [DOMA] leaves states the appropriate amount of wiggle room to decide their own definitions of marriage or other similar social compacts, free of federal meddling.[7]

While the ABA took no position with respect to DOMA, that statute surely is sufficient, together with state defense of marriage laws, to address the concerns of amendment proponents that the Full Faith and Credit Clause might require a state to recognize a same-sex marriage contracted in another state. In addition, the argument that a constitutional amendment now is necessary because DOMA might one day be challenged and eventually overturned is, at the very least, premature. One does not amend the Constitution on a hunch. One does not amend the Constitution to call a halt to democratic debate within the states. An amendment should be reserved for the most urgent and compelling circumstances. It is a last resort.

As noted above, the ABA has taken no position either favoring or opposing laws that would allow same-sex couples to enter into civil marriages. However, it is the position of the ABA that states should not be precluded from adopting such laws if they

[7] BOB BARR, *Leave Marriage to the States,* WASH. POST, Aug. 21, 2003.

so choose. At a time when millions of children are being raised by same-sex couples, the states should have the flexibility to protect these children by conferring legal recognition on the families in which they are being raised. Without a legal relationship to both of their functional parents, these children may not be entitled to child support from the nonlegal parent; they are not entitled to inherit through the nonlegal parent in the absence of a will; they may not be entitled to survivor benefits; and they may be prevented from ever seeing this parent, should the parents separate or the biological parent die. The states should be permitted to enact laws and policies they deem appropriate to protect these children.

Allowing the states to craft their own solutions in this area requires both confidence and humility: confidence in the wisdom of the people and their representatives, and the humility best expressed by Judge Learned Hand, who said, "The spirit of liberty is the spirit that is not too sure that it is right."[8] If the Constitution is to continue to embody the spirit of liberty for future generations, we must not seek to use it to enshrine still-evolving societal views.

The Constitution has been amended only 27 times in 215 years. That is a testament to its vitality and to Congressional restraint. We hope you will exercise the same restraint today and oppose S. J.Res. 26.

Thank you for this opportunity to testify. I will be happy to answer any questions.

[8] *The Spirit of Liberty [–] Papers and Addresses of Learned Hand*, at 190 (3d ed. Enlarged, University of Chicago Press 1960).