Founded in 1983, Family Research Council is a nonprofit research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

Family Research Council relies solely on the generosity of individuals, families, foundations, and businesses for financial support. The Internal Revenue Service recognizes FRC as a tax-exempt, 501(c)(3) charitable organization. Donations to FRC are therefore tax-deductible in accordance with Section 170 of the Internal Revenue Code.

To see other FRC publications and to find out more about FRC's work, visit *www.frc.org*.

The Defense of Marriage Act:

What It Does and Why It Is Vital for Traditional Marriage in America

TONY PERKINS, PRESIDENT
801 G STREET NW
WASHINGTON, DC 20001
order line 800-225-4008
WWW.FRC.ORG

BC10D01

FAMILY RESEARCH COUNCIL
Washington, DC

Thank you for choosing this resource. Our pamphlets are designed for grassroots activists and concerned citizens—in other words, people who want to make a difference in their families, in their communities, and in their culture.

History has clearly shown the influence that the "Values Voter" can have in the political process. FRC is committed to enabling and motivating individuals to bring about even more positive change in our nation and around the world. I invite you to use this pamphlet as a resource for educating yourself and others about some of the most pressing issues of our day.

FRC has a wide range of papers and publications. To learn more about other FRC publications and to find out more about our work, visit our website at www.frc.org or call 1-800-225-4008. I look forward to working with you as we bring about a society that respects life and protects marriage.

Tony Perkins

President
Family Research Council

THE DEFENSE OF MARRIAGE ACT:
WHAT IT DOES AND WHY IT IS VITAL
FOR TRADITIONAL MARRIAGE IN AMERICA
BY CHRISTOPHER M. GACEK

PRINTED IN THE UNITED STATES

The Defense of Marriage Act:

What It Does and Why It Is Vital for Traditional Marriage in America

BY CHRISTOPHER M. GACEK, J.D., PH.D.

Introduction

The federal Defense of Marriage Act, signed into law in September 1996, is a vital element in preserving traditional marriage in America for two reasons. First, it protects the law-making capacity of the various states in the field of family law. It does this by making it possible for the states to define marriage as the union of one man and one woman without fear that the U.S. Constitution's Full Faith and Credit Clause will be used by the courts to trump their marital policies. Thus, the Defense of Marriage Act allows each state to formulate its own public policies, rather than be railroaded into accepting the marriage norms of a few outlying socially liberal states. Second, the Act defines marriage traditionally for purposes of federal law, thereby preventing novel and unjustified interpretations of federal statutes and regulations. This aspect of the law has ensured much-needed uniformity across federal law and programs.

In order to understand how and why the Defense of Marriage Act became law, it is necessary to look back at the history of judicial activism in the twentieth century, particularly as it relates to the sexual revolution, the divorce revolution, and the homosexual rights revolution.

CHRISTOPHER M. GACEK, J.D., PH.D., is the Senior Fellow for Regulatory Affairs at the Family Research Council. Dr. Gacek received a B.S. in Economics from Wharton School, University of Pennsylvania, a Ph.D. in Political Science from Stanford University, and a J.D. from the University of Virginia. He is the author of *The Logic of Force* (Columbia Univ. Press, 1994) and, more recently, "Conceiving 'Pregnancy': U.S. Medical Dictionaries and Their Definitions of 'Conception' and 'Pregnancy,'" in the Autumn 2009 issue of *National Catholic Bioethics Quarterly*.

The Judiciary Imposes Change on America

Over the past fifty years, the United States has witnessed a social revolution in which cultural and governmental elites have attempted to overturn – often successfully – age-old social-political institutions and mores. Quite often, the values under attack have dealt with familial and sexual relations. Though democratic change through legislative means has certainly been a part of the revolution, such changes in fundamental values could not always be accomplished democratically. Then, the courts have been more than willing

to step in and force social transformation on the nation.[1] It is not too much to say that the courts and the unelected bureaucracies of the administrative state – our new, fourth branch of government[2] – now constitute powerful elements of an oligarchy unapologetically resistant to democratic influences.

After the Second World War, the judiciary actively took aim at the then-current understanding of church-state relations and changed the relevant constitutional law – law that cannot be amended or overturned by legislatures. This process started with the U.S. Supreme Court's 1947 decision in *Everson v. Board of Education*.[3] *Everson* was highly significant for two reasons. First, it held that actions of the states must satisfy the principles of the Establishment Clause of the First Amendment to the U.S. Constitution, whereas until that decision the Establishment Clause was deemed to apply only to the actions of the federal government. Second, *Everson* promulgated a forceful secular approach to First Amendment law, captured by its repetition of Jefferson's phrase describing "a wall of separation between church and State."[4]

The line of cases following *Everson* invalidated many useful governmental policies and practices that were deemed by courts to have religious designs or effects. However, in recent years there has been a powerful intellectual counter-attack to the historical and legal foundation of *Everson* and its progeny.[5] Still in its early stages, this corrective effort has only begun to roll back the damage done by the courts in this area and probably awaits the advent of the next generation of lawmakers and jurists before its full impact will be felt.

Similarly, the secular elites of the legal profession and the political classes moved to revise the nation's laws and mores regarding marriage, the family, and sexuality. The sexual revolution, for example, was advanced by Supreme Court decisions involving contraceptives and the creation of a "right to privacy" (*Griswold v.*

Connecticut (1965)).[6] That right – for married couples to purchase and use contraceptives – was expanded to include unmarried persons in *Eisenstadt v. Baird* (1972).[7] This progression led to the Court's finding that the Constitution contains the right to abort an ongoing pregnancy and kill an embryo or fetus *in utero* (*Roe v. Wade* (1973); *Doe v. Bolton* (1973)).[8]

The institution of marriage was not left undisturbed by the social-sexual tsunami that began to sweep over American institutions in the first half of the twentieth century. Many decades before Associate Justice Antonin Scalia's 2003 observation that the U.S. Supreme Court "ha[d] taken sides in the culture war,"[9] the Court actively took steps making it easier for one marital partner to avoid the divorce laws of his or her state of marital domicile.

In these landmark cases, the foremost issues related to the recognition of out-of-state divorce decrees. Legal problems surrounding such factual circumstances existed for some time, but the Supreme Court began a dramatic revision of its interpretation of U.S. constitutional law starting in the 1940s.[10] In a law review article on federalism, divorce law, and the Constitution, Professor Ann Laquer Estin of the University of Iowa College of Law notes:

> American divorce law was transformed by the Supreme Court in a series of decisions beginning with *Williams v. North Carolina* in 1942. These constitutional full faith and credit cases resolved a long-standing federalism problem by redefining the scope of state power over marital status. With these decisions, the Court shifted from an analysis based on the competing interests of different states to an approach that highlighted the individual interests of the parties involved. This change fundamentally altered state power over the family by extending to individuals greater control of their marital status.[11]

Professor Estin notes that "[e]ditorial comments after [the 1942 *Williams* decision] viewed the case as a triumph for the Nevada divorce mills."[12] More significantly, the Supreme Court brought about an important change in divorce law that allowed

individual decisions to trump the interests of families and of the family as an institution. The "divorce revolution" of the 1960s and 1970s was made possible by, and flowed from, the logic of these earlier decisions.

At the same time that American courts were upending long-standing legal relationships as described above, sexual behavior in the United

States was undergoing a radical transformation. Not surprisingly, the "divorce revolution" occurred in parallel with the "sexual revolution." One aspect of the sexual revolution was the vigorous effort to have homosexual behavior accorded equal status with heterosexual behavior, despite three thousand years of Judeo-Christian orthodoxy - the foundation of Western moral law - arguing to the contrary.[13] Not surprisingly, discussions of the formal recognition of same-sex relationships have existed for some time. According to Peter Sprigg of the Family Research Council, "[d]iscussions of homosexual 'marriage' among homosexuals themselves can be traced back at least fifty years."[14] Public awareness

Supreme Court of Hawaii in Honolulu

of such intentions did not become known to mainstream America until the 1990s, however, when the real possibility arose that one state would legally recognize same-sex marriages.

Hawaii Prompts a National Defense of Marriage

In May 1993 it appeared that Hawaii would become the first state to enact same-sex marriage after the state's highest court indicated that limiting marriage to one-man–one-woman couples was probably unconstitutional under Hawaiian law.[15] A long process of litigation and state political upheaval followed.

Eventually, Hawaii retained its traditional definition of marriage in November 1998 after the state constitution was amended by referendum to read: "The legislature shall have the power to reserve marriage to opposite-sex couples."[16] In December 1999, the Hawaii Supreme Court held that "[i]n light of the marriage amendment, [Hawaii's 1985 traditional marriage statute] must be given full force and effect."[17] That ended Hawaii's marriage debate.

Nevertheless, the controversy had not been confined to Hawaii. Opinion leaders, legal scholars, and political leaders across the nation reacted to the 1993 court decision with the fear that Hawaiian same-sex marriages could be used by federal and state courts to overturn the marriage policies of the other forty-nine states. Thus, on September 21, 1996, three years before Hawaii settled its marriage debate, President William Jefferson "Bill" Clinton signed the Defense of Marriage Act ("DOMA") into law.[18]

DOMA was intended to defend traditional marriage at the federal and state levels. Consequently, DOMA enabled states – even in the face of claims made pursuant to the Full Faith

and Credit Clause (discussed below) – to decline to recognize same-sex marriages from other states. Furthermore, DOMA defined marriage traditionally in federal law. [19]

Defending Federal and State Definitions of Marriage

When the Constitutional Convention convened in Philadelphia in 1787, relations between the states were not ideal. In particular, there were

Independence Hall, Philadelphia, site of the Constitutional Convention

problems with states declining to recognize the financial judgments rendered by the courts of other states. If debts could not be enforced across state lines, the United States would have significant problems with respect to promoting interstate commercial activity. To rectify this problem and to assist in unifying the country, the new Constitution contained a provision known as the "Full Faith and Credit Clause" (Article IV, sec. 1), which states as follows:

> 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. [20]

During the ratification debates, James Madison discussed this provision of the Constitution, noting that it constituted "an evident and valuable improvement on the clause relating to this subject" over its treatment in the Articles of Confederation.[21] In addition to financial judgments, the Full Faith and Credit Clause has also been the basis for the interstate recognition of various decrees and judgments related to family law. As such, in 1996 it was regarded by Congress as the primary vehicle by which courts could compel states to recognize out-of-state same-sex marriages.[22]

In 1790 Congress acted pursuant to the enhanced powers granted by the Constitution's Full Faith and Credit Clause by passing legislation putting

Federal Hall, Wall Street, New York City - Home of the first Congress

the provision's intended purpose into effect. This law is often referred to as the "Full Faith and Credit Statute."[23] Amended most recently in 1948, the statute provides, in part, that properly authenticated "… Acts, records and judicial proceedings or copies thereof … shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

DOMA Section 2: Allowing States to Define Marriage

DOMA affirms the power of each state to make its own decision as to whether it will accept or reject same-sex marriages created in other jurisdictions.[24] This is accomplished by DOMA's second section, which amends the Full Faith and Credit Statute by adding this provision:

> 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.[25]

According to the House Report on DOMA, Section 2 of the act was intended "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[26] To that end, this section "provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex."[27]

Two contemporaneous written analyses of DOMA are noteworthy. The first was U.S. Representative Tom Campbell's (R-Calif.) *Washington Times* op-ed supporting the measure's constitutionality.[28] The article was published on July 12, 1996, the day of the House vote on DOMA. Campbell's opinion was significant because he had a substantial legal pedigree: prior to serving in Congress, Campbell had been a full professor on the Stanford Law School faculty.[29] Furthermore, he had always been regarded as a liberal Republican and had never been considered a member of the social conservative wing of the party. In fact, Campbell later ran unsuccessfully for the U.S. Senate in 2010 as a pro-tax, pro-abortion, pro-same-sex marriage Republican. Even so, in the closing days of his June 2010 primary race, Campbell reiterated his support for DOMA.[30]

In his article, the Congressman analyzed the Full Faith and Credit Clause. He paid special attention to its second sentence, which gives Congress the power "by general Laws" to "prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and

the Effect thereof" (emphasis added). Campbell noted that Congress needed this legislative power to determine its effect so it could "create exceptions to [the Clause's] mandate." Enacting such exceptions could become vitally important as a way to "smooth out the difficulties inherent in giving any one state the absolute power to dictate, through its statutes and court decisions, conduct in other states…." This legislative power was "essential to preserving a union of states."

Campbell observed that the "normal rule in common law makes a marriage that was legal where performed, legal everywhere else." Such a rule could produce "results contrary to the rules of other states, on issues regarding bigamy or age of adulthood, for example." He noted that Congress had exercised this power previously regarding child support "to [e]nsure that the law of the current residence controls, not the law of the place that made the first decree…." Similarly, Congress could constitutionally do the same with marriage "to ensure that the law of the current residence controls, thus preventing one state's recognition of same sex marriages from automatically applying in another." According to Campbell, DOMA was a reasonable response to a complex legal situation.

The second noteworthy analysis was written by Michael McConnell, a former federal judge and currently a Stanford Law School professor, who remains one of the foremost constitutional scholars in the nation.[31] Then a professor at the University of Chicago School of Law, Professor McConnell wrote to the Senate Committee on the Judiciary to counter the claims that the Full Faith and Credit Clause provision of DOMA was unconstitutional.[32] McConnell, like Campbell, noted that the obligation to accept another state's judgments can never be absolute, for as he observed, "When two states have inconsistent laws on the same subject, it would literally be impossible for each to be given effect throughout the country."[33] With respect to DOMA he noted that its purpose "is to ensure that each state continue to be able to decide for itself whether to recognize same-sex marriage – to ensure that one state is not able to decide this question, as a practical matter, for the entire nation."[34] McConnell argued that there was no doubt Congress could enact a statute like DOMA, the only qualification being that Congress must enact a "general law" – that is, one not directed at particular individuals.

DOMA Section 3: Defining Marriage in Federal Law

DOMA contains another, equally important, provision. Section 3 of the statute defines marriage in federal law as follows (1 U.S.C. § 7):

> 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.[35]

The House Report on DOMA summarizes this section of the statute as defining "the terms 'marriage' and 'spouse,' for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex."[36] The Report noted that "[t]he word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times."[37] Furthermore, it acknowledged that "[w]ith very limited exceptions, these terms are not defined in federal law."[38] Therefore, a uniform federal definition of these terms was needed.

Interestingly, neither Representative Campbell nor Professor McConnell commented on DOMA's Section 3, as it was so uncontroversial and clearly constitutional. It is ironic, then, that Section 3 has been the subject of recent legal attacks in Massachusetts.

However, both sections of DOMA can easily be defended from anti-discrimination challenges. As McConnell noted, Section 2 can withstand equal protection claims for the following reason:

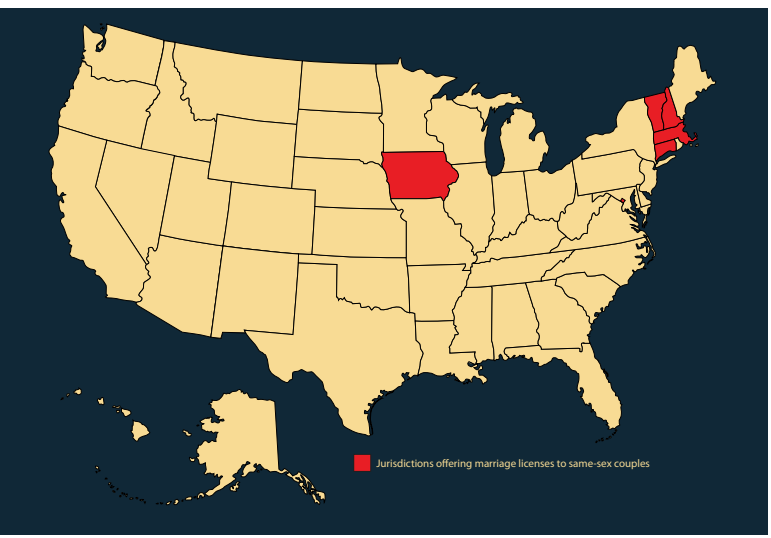
> As held in the recent case of *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996), laws that disadvantage individuals on the basis of sexual orientation will be upheld so long as they bear "a rational relation to some legitimate end." The provision struck down in *Romer*, the Court held, was not "directed to any identifiable legitimate purpose or discrete objective." *Id.* at 1629. By contrast, it is surely a legitimate legislative purpose to ensure that each state is able to make and enforce its own criteria for recognition of marriage.[39]

Arguably, if it is a legitimate purpose for the respective states to define marriage, then it must be appropriate for the federal government to do so, at the least, to promote uniformity across its various territorial possessions and myriad government programs.

The Effects of Repealing or Striking Down DOMA

As of June 2010 twenty-nine states had adopted constitutional amendments restricting marriage to a relationship between one man and one woman,[40] the first being Nebraska in 2000 and the most recent being California ("Prop 8"), Florida, and Arizona in 2008.[41] Twelve additional states have statutes restricting marriage to one man and one woman.[42] Thus, a total of forty-one states explicitly define marriage traditionally either through their state constitutions or by statutes. Some states also limit the scope of civil unions or domestic partnerships.[43] Others have taken no action and rely on their laws that predate the current, post-Hawaii push for same-sex marriage recognition.

On the other side of the ledger, five states and the District of Columbia issue marriage licenses to same-sex couples. They are: Connecticut (2008), District of Columbia (2010), Iowa (2009), Massachusetts (2004), New Hampshire (2010), and Vermont (2009).[44] Given the number of states recognizing same-sex marriage, it is inevitable that a same-sex married couple will travel or move to another state and seek recognition of their same-sex marriage pursuant to the Full Faith and Credit Clause. If a court were to strike down or Congress were to repeal DOMA's Full Faith and Credit Clause provision, it would be much more difficult for a traditional-marriage state to hold the line in not recognizing another state's same-sex marriages. There would no longer be a statutory provision telling courts that the Full Faith and Credit Clause cannot be used to require one state to give effect to another state's judgments with respect to the recognition of same-sex marriages.



Interestingly, proponents of same-sex marriage seem wary of launching a frontal attack on DOMA's Full Faith and Credit Clause provision. Rather, they have chosen to attack the federal definition of marriage – as they have with state definitions of marriage. Most notably, the Attorney General of the Commonwealth of Massachusetts, Martha Coakley, has challenged the constitutionality of DOMA's definition of marriage (1 U.S.C. § 7).[45] Additionally, some members of Congress would like to repeal the federal definition of marriage.[46]

As one Department of Justice brief noted, DOMA's traditional definition of marriage merely "continues the longstanding federal policy of affording federal benefits and privileges on the basis of a centuries-old form of marriage, without committing the federal government to devote scarce resources to newer versions of the institution that any State may choose to

recognize."[47] Furthermore, DOMA's traditional definition prevents federal bureaucrats from using rulemakings (regulations) to develop alternative definitions of marriage for federal programs. Uniform federal law is efficient and just. DOMA has kept federal and state definitions of marriage aligned for the overwhelming majority of states that define marriage as being between one man and one woman. Finally, as made clear by Professor McConnell, DOMA does not violate the equal protection requirements of the Fourteenth Amendment to the U.S. Constitution.[48]

Conclusion

The Defense of Marriage Act preserves the right of the states to govern themselves with respect to family law and domestic relations. DOMA impedes judicial activism regarding marriage and provides needed uniformity in federal law. It is an essential part of preserving traditional marriage in America, and as then-Congressman Tom Campbell noted in 1996, it is "essential to preserving a union of states." Therefore, it is vital that the Defense of Marriage Act be maintained as it was enacted and signed into law in 1996. All efforts to nullify it judicially or repeal it legislatively must be resisted with all available resources.

ENDNOTES

1 Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990): pp. 1-132; Mark R. Levin, *Men in Black: How the Supreme Court Is Destroying America* (Washington, D.C.: Regnery, 2005). Judicial activism is now becoming rampant at the state level as activist judges on state courts manipulate state constitutional law to impose their will on the populace. For example, in 2009 the Iowa Supreme Court mandated that the ability to marry be extended to same-sex couples in that state. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

2 Mark R. Levin, *Liberty and Tyranny: A Conservative Manifesto* (New York: Simon & Schuster, 2009).

3 *Everson v. Board of Education*, 330 U.S. 1 (1947).

4 Gerald V. Bradley, *Religious Liberty in the American Republic* (Washington, D.C.: Heritage Foundation, First Principles Series, 2008), p. 59; Daniel L. Dreisbach, "The Mythical 'Wall of Separation': How a Misused Metaphor Changed Church–State Law, Policy, and Discourse," published online (Washington, D.C.: Heritage Foundation, First Principles Report, June 23, 2006).

5 Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (New York: New York University Press, 2002); Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002); Levin, *Men in Black*, supra n.1, chapter 3 (pp. 35-53).

6 *Griswold v. Connecticut*, 381 U.S. 479 (1965). At his confirmation hearings and in his book, Robert Bork created a furor by refusing to accept the Left's factual narrative used to support *Griswold*. Bork, *Tempting of America*, pp. 95-100. An important book describing the campaign to use the courts to advance the sexual modernist agenda is: David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan, 1994).

7 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

8 *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). The classic criticism of *Roe v. Wade* as poor constitutional law may be found in John Hart

Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L.J.* 920 (an extended excerpt of which may be found in the Ely anthology, John Hart Ely, *On Constitutional Ground* (Princeton, N.J.: Princeton Univ. Press, 1996): pp. 281-297). For a discussion of the legal progeny of *Roe* and *Doe*, *see* Americans United for Life, Denise M. Burke (editor-in-chief), *Defending Life 2009* (Chicago, IL: AUL, 2009): pp. 47-61.

9 *Lawrence v. Texas*, 539 U.S. 558, 602 (2003).

10 The landmark case in this legal area was *Williams v. North Carolina* (*Williams I*), 317 U.S. 287 (1942).

11 Ann Laquer Estin, "Family Law Federalism: Divorce and the Constitution," 16 *Wm & Mary Bill of Rts. J* 381, 381 (abstract) (2007).

12 Estin, "Family Law Federalism," p. 401.

13 Tim Dailey, *The Bible, the Church, and Homosexuality: Exposing the 'Gay' Theology* (Washington, D.C.: Family Research Council, 2000). For a more detailed treatment of the subject, *see* Robert A. J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville: Abingdon Press, 2000). For a more in-depth discussion of the Jewish religious perspective, *see* Arthur Goldberg, *Light in the Closet: Torah, Homosexuality, and the Power to Change* (Beverly Hills, CA: Red Heifer Press, 2008); Dennis Prager, "Judaism's Sexual Revolution: Why Judaism Rejected Homosexuality," *Crisis* (Sep. 1993). *See also* Jeffrey Satinover, *Homosexuality and the Politics of Truth* (Grand Rapids, MI: Hamewith Books, 1996) (Chapter 14, "Homosexuality and Judaism," pp. 210-220; and Chapter 10, "The Unnatural Natural," pp. 146-167). While Satinover's entire book is highly insightful about human nature in general, these two chapters are of particular interest in this context.

14 Peter Sprigg, *Outrage: How Gay Activists and Liberal Judges Are Trashing Democracy to Redefine Marriage* (Washington, D.C.: Regnery, 2004): p. 3.

15 *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

16 Haw. Const. art. I, § 23.

17 *Baehr v. Miike,* 994 P.2d 566 (Haw. 1999) (table).

18 The July 12, 1996 vote in the House of Representatives was 342-67; H.R. 3396 then passed in the U.S. Senate on September 10, 1996, by a vote of 85-14. DOMA was signed on September 21, 1996 and is cited as Public Law No. 104-199, 110 Stat. 2419.

19 The legal purposes for DOMA – particularly as it relates to developments in Hawaii – are set forth in the related committee report. U.S. House. Committee on the Judiciary. *Defense of Marriage Act, (to Accompany H.R. 3396) Together with Dissenting Views*. (104 H. Rpt. 664) ("DOMA House Report"): pp. 4-11.

20 U.S. National Archives and Records Administration, U.S. Const. art. IV, § 1.

21 *The Federalist Papers*, No. 42.

22 DOMA House Report at pp. 8-9 and n. 26.

23 28 U.S.C. § 1738. The statute was amended in 1948 to give state statutes analogous interstate effect.

24 DOMA House Report at p. 2.

25 28 U.S.C. § 1738C (Pub. L. 104-199 Sec. 2, 100 Stat. 2419 (Sep. 21, 1996)).

26 DOMA House Report at p. 2.

27 DOMA House Report at p. 2.

28 Rep. Tom Campbell, "Marriage Is a Matter for the States to Decide," *Washington Times* (July 12, 1996): p. A21.

29 The main entries on Campbell's resume are extremely impressive: law clerk for U.S. Supreme Court Justice Byron White, Ph.D. in Economics from the University of Chicago, dean of the U.C. Berkeley Business School (Haas School of Business). Later, from 2004-2005, he served as Director of Finance for the State of California in Governor Arnold Schwarzenegger's Administration.

30 Campbell appears to have become more and more liberal over time. In 2008 he opposed the passage of the state ballot measure, Proposition 8 – the state constitutional amendment that defined marriage as being between one-man and one-woman. The measure passed in November 2008. In a written answer for the *Sacramento Bee* voter guide for the senate race – viewed on June 7, 2010 – Campbell responded in the negative when asked whether DOMA should be repealed. He

noted that "[s]tates should be free to decide about gay marriage on their own." He added, "I favor allowing gay marriage in California, but I also voted for the Defense of Marriage Act, because it allows this issue to be left to the decision of each state. If a state permits same-sex marriage, then the federal government should defer to that decision for that state." Thus, Campbell restated his support for DOMA while revealing no doubts as to its constitutionality almost fourteen years after the publication of his *Washington Times* article. It is possible to read Campbell's last sentence as a critique of DOMA's federal definition of marriage, but, more likely, he seems to be stating that the federal government should not be setting state marriage policy. I have not read of Campbell calling for repeal of DOMA's federal marriage definition, and he did not do so in the voter guide.

31 The high quality of Professor McConnell's resume matched Campbell's for its stellar quality. At the time of DOMA's passage, he was a full professor at the University of Chicago School of Law and had established himself as one of the foremost constitutional law scholars in the nation. McConnell focused his scholarship on studying the religion clauses of the First Amendment and authored numerous articles in this field. He served as a law clerk to Justice William Brennan on the U.S. Supreme Court and later worked in the Solicitor General's office (1983-1985). McConnell then taught at the University of Chicago, as noted above, from 1985-1996 and later moved to the University of Utah, S.J. Quinney College of Law in 1997. From 2002-2009, he served as a judge on the United States Court of Appeals for the Tenth Circuit. In 2009, he was appointed Director of the Stanford Constitutional Law Center at Stanford Law School.

32 Letter, Michael W. McConnell, William B. Graham Professor, University of Chicago School of Law, to Senator Orrin G. Hatch, Chairman (July 10, 1996). U.S. Senate. Committee on the Judiciary. *Defense of Marriage Act (on S. 1740, A Bill to Define and Protect the Institution of Marriage)*. July 11, 1996. (104 S. Hrg. 104-553) ("DOMA Senate Hearing"): pp. 56-59.

33 McConnell Letter, DOMA Senate Hearing at p. 56.

34 McConnell Letter, DOMA Senate Hearing at p. 57.

35 1 U.S.C. § 7 (Pub. L. 104-199, sec. 3(a), 100 Stat. 2419 (Sep. 21, 1996)).

36 DOMA House Report at p. 2.

37 DOMA House Report at p. 10.

38 DOMA House Report at p. 10.

39 McConnell Letter, DOMA Senate Hearing at p. 58.

40 For the states that have acted either constitutionally or statutorily, *see* the Human Rights Campaign's ("HRC") map of "Statewide Marriage Prohibitions" (< http://www.hrc.org/documents/marriage_prohibitions_2009.pdf >) (last updated January 13, 2010).

41 HRC's "Statewide Marriage Prohibitions" provides this list of the states that have passed statewide marriage amendments (as of Jan. 13, 2010): Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), California (2008), Colorado (2006), Florida (2008), Georgia (2004), Kansas (2005), Idaho (2006), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000), Nevada (2002), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006), and Wisconsin (2006).

42 HRC's "Statewide Marriage Prohibitions" provides this list of the twelve states that have statutory traditional marriage provisions (as of Jan. 13, 2010): Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming.

43 HRC's "Statewide Marriage Prohibitions" makes note of states whose marriage laws limit civil unions or domestic partnerships:

> States where the law or amendment has language that does, or may, affect other legal relationships, such as civil unions or domestic partnerships (18 states): Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

44 HRC, "Marriage Equality & Other Relationship Recognition Laws" (< http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf >) (last updated April 2, 2010).

45 On July 8, 2009, Attorney General Coakley "filed a lawsuit in United States District Court (D. Mass.) challenging the constitutionality of Section 3 of the federal Defense of Marriage Act." Press Release, Office of the Massachusetts Attorney General (July 8, 2009).

46 This was the introductory paragraph in a September 15, 2009, press release from the office of U.S. Representative Jerrold Nadler:

> Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Congresswoman Tammy Baldwin (D-WI) and Congressman Jared Polis (D-CO), along with Congressman John Conyers (D-MI), Congressman John Lewis (D-GA), Congresswoman Nydia Velazquez (D-NY) and Congresswoman Barbara Lee (D-CA), with a total of 91 original co-sponsors to date, introduced the Respect for Marriage Act in the House of Representatives. This legislation would repeal the Defense of Marriage Act (DOMA), a 1996 law which discriminates against lawfully married same-sex couples.

47 Defendant United States' Notice of Motion and Motion to Dismiss; Memorandum of Points and Auths. in Support Thereof at 2, Smelt v. United States, No. SACV09-00286 DOC (MLGx) (C.D. Cal. June 11, 2009). After the Department of Justice ("DOJ") filed this robust defense of DOMA in June 2009, a number of homosexual activist groups issued heated complaints to the Obama White House. Subsequently, DOJ briefs contained statements indicating the Administration's disapproval of DOMA. For example, in a later brief in the *Smelt* litigation, DOJ asserted:

> With respect to the merits, this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.

Reply Memorandum in Support of Defendant United States' Motion to Dismiss at 2, Smelt v. United States, No. SACV09-00286 DOC (MLGx) (C.D. Cal. Aug. 17, 2009). In a brief defending DOMA in the suit filed by the Commonwealth of Massachusetts, DOJ made a similar statement: "As the President has stated previously, this Administration does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal…." Memorandum of Points and Auths. in Support of Defendants' Motion to Dismiss at 1, Massachusetts v. U.S. Dep't of HHS, Civ. A. No. 1:09-11156-JLT (D. Mass. Oct. 30, 2009). Later in this same brief, DOJ made this statement as part of a lengthy footnote:

> In this case, the government does not rely on certain purported interests set forth in the legislative history of DOMA, including the purported interests in "responsible procreation and child-rearing" – that is, the assertions that (1) the government's interest in "responsible procreation" justifies limiting marriage to a union between one man and one woman, and (2) that the government has an interest in promoting the raising of children by both of their biological parents.

Id. at 30, n.16. The brief went on to make the following assertion regarding Justice Scalia's dissent in *Lawrence v. Texas*:

> Furthermore, in *Lawrence v. Texas*, 539 U.S. 558, 605 (2003), Justice Scalia acknowledged in his dissent that encouraging procreation would not be a rational basis for limiting marriage to opposite-sex couples under the reasoning of the *Lawrence* majority opinion – which, of course, is the prevailing law – because "the sterile and the elderly are allowed to marry." Thus, the government does not believe that DOMA can be justified by interests in "responsible procreation" or "child-rearing."

Id. at 31, n.16.

48 The Department of Justice's June 2009 brief in the *Smelt* litigation provided a list of federal cases that support FRC's contention that DOMA is constitutional. Here is the Department's description of the case law:

> DOMA codifies, for purposes of federal statutes, regulations, and rulings, the longstanding, traditional definition of marriage as "a legal union between one man and one woman as husband and wife," see 1 U.S.C. § 7…. As far as counsel for the defendants are aware, every court to address a federal constitutional challenge to this definition of marriage has rejected the challenge. *See, e.g., Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 864-69 (8th Cir. 2006); *Lofton v. Secretary of Dep't of Children & Family Servs.*, 358 F.3d 804, 811-27 (11th Cir. 2004); *Adams v. Howerton*, 673 F.2d 1036, 1041-43 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 331-33, 362-64 (D.C. 1995); *Baehr v. Lewin*, 852 P.2d 44, 55-57 (Haw. 1993); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed*, 409 U.S. 810…(1972) (mem).
>
> Indeed, a number of federal courts have specifically addressed the constitutionality of one or both sections of DOMA, and have expressly upheld them against all constitutional challenges. *See Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005) (Section 3), *vacated on other grounds*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (Section 2 and Section 3); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (Section 3), *appeal dismissed Kandu v. United States Trustee*, Case No. 3:04-cv-05544-FDB (W.D. Wash.)…; *see also Bishop v. Oklahoma*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006) (rejecting certain constitutional challenges but deferring others pending further development). This Court should do likewise here.
>
> * * * * *
>
> Nor does the Supreme Court's decision in *Lawrence v. Texas* overrule or otherwise undermine the precedents, cited above, that uphold DOMA. In *Lawrence*, the Supreme Court held that the government cannot criminalize private, consensual, adult sodomy. At the same time, the Court unequivocally noted that the case before it *did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."* 539 U.S. 558, 578…(2003) (emphasis added). Thus, in light of this limiting language, *Lawrence* simply does not address the affirmative right to receive official and public recognition of a same-sex relationship. Because *Lawrence* declined to address any question regarding marriage, it does not disturb prior precedents in which the courts have declined to recognize a federal constitutional right to same-sex marriage.

Defendant United States' Notice of Motion and Motion to Dismiss; Memorandum of Points and Auths. in Support Thereof at 23-25, Smelt v. United States, No. SACV09-00286 DOC (MLGx) (C.D. Cal. June 11, 2009).

FAMILY RESEARCH COUNCIL

The Family Research Council champions marriage and family as the foundation of civilization, the seedbed of virtue, and the wellspring of society. We shape public debate and formulate public policy that values human life and upholds the institutions of marriage and the family. Believing that God is the author of life, liberty, and the family, we promote the Judeo-Christian worldview as the basis for a just, free, and stable society.

Located in the heart of Washington, D.C., the headquarters of the Family Research Council provides its staff with strategic access to government decision-making centers, national media offices, and information sources.

ADDITIONAL RESOURCES FROM FAMILY RESEARCH COUNCIL

Post Abortion Suffering:

A Psychiatrist Looks at the Effects of Abortion
by Dr. Martha Shuping and Christoher M. Gacek
BC10A01

The growing weight of scientific studies and the voices of women themselves tell the story of abortion as a life-changing, adverse experience for many. Relying on Dr. Martha Shuping's experience as a psychiatrist, we can describe the psychological impact of abortion through the lens of her clinical counseling and the emerging scientific literature. Christopher M. Gacek, FRC's Senior Fellow for Regulatory Affairs, co-authored this pamphlet.

Politicized Science:

The Manipulated Approval of RU-486
and Its Dangers to Women's Health
by Christopher M. Gacek
BC07A01

RU-486's ability to bring an end to a human life developing in the womb is known to all, but the drug's considerable harmful effects on women's health have been minimized or ignored completely. Several organizations, including the Family Research Council, have unearthed a vast amount of information regarding safety concerns about the drug, as well as evidence documenting the Clinton Administration's manipulation of the FDA approval process. This pamphlet by Christopher M. Gacek, FRC's Senior Fellow for Regulatory Affairs, provides an overview of what we now know about the drug's approval and the dangers posed by RU-486 to women's health.

Washington Update WUSUB

Family Research Council's flagship subscription: a daily email update with the latest pro-family take on Washington's hottest issues. Complimentary

To order these resources or to see more FRC publications, visit our website at www. frc.org or call 800-225-4008.