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Legislative Bulletin……..……September 30, 2004

Contents:

H.J.Res. 106 — Marriage Protection Amendment (Musgrave)

Order of Business: The joint resolution is scheduled to be considered on Thursday, September 30, 2004, under a structured rule with two and one half hours of debate equally divided, and one motion to recommit made in order.

Summary: The resolution, following passage by two-thirds of both the House and the Senate, and ratification by three-fourths of the state legislatures would amend the United States Constitution with the following text:

> **"Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."**

	REDEFINITION OF MARRIAGE	QUASI MARITAL SCHEMES "Civil Unions" "Domestic Partnership"	OTHER BENEFITS ASSOCIATED WITH MARRIAGE	EMPLOYEE BENEFITS OFFERED BY PRIVATE BUSINESS
IMPOSED BY COURTS (State or Federal)	Sentence 1 Prohibits	Sentence 2 Prohibits	Sentence 2 Prohibits	Unaffected
ACTION OF STATE LEGISLATURE	Sentence 1 Prohibits	Decision of State Legislature	Decision of State Legislature	Unaffected

Source: http://www.allianceformarriage.org

Sentence 1: "Marriage in the United States shall consist solely of the union of a man and a woman."

The first sentence is designed to ensure that no governmental entity — whether in the legislative, executive or judicial branch — at any level of government shall have the legal authority to alter the definition of marriage such that it is made other than a union of one man and one woman.

Sentence 2: "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

The second sentence is designed to prevent any court from construing the federal Constitution, or a state constitution, to require any legislative body or executive agency to enact – or to recognize under the Full Faith and Credit Clause — so-called "civil unions" or domestic partnership laws, or any law that would confer a subset of the benefits, protections and responsibilities of marriage on unmarried persons. H.J.Res. 106 would not impose any restraint on legislatures with respect to their ability to pass civil union laws. The second sentence of H.J.Res. 106 would prevent abuses of judicial power, such as that committed by the Vermont Supreme Court in *Baker v. State* (which required the state legislature to pass a law either approving same-sex marriage or civil unions). Under H.J.Res. 106, the Vermont legislature would still have the power to enact a statute extending marriage benefits to same-sex couples, but the Vermont Supreme Court could not *require* it to do so.

The phrase "shall be construed" or "shall not be construed" is used four other places in the Constitution in ways that make clear it applies to judges charged with construing the legal meaning of constitutional commands. See Article IV, Sec. 3, clause 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution *shall be so construed* as to Prejudice any Claims of the United States, or of any particular State."; Amendment IX: "The enumeration in the Constitution, of certain rights, *shall not be construed* to deny or disparage others retained by the people."; Amendment XI: "The judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."; Amendment XVII: "This amendment *shall not be so construed* as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution" (emphasis added).

According to legal scholars, the phrase "legal incidents thereof" means the rights, benefits, protections, privileges, and responsibilities of marital status that have been historically provided by law.

WHY DOMA DOES NOT NEGATE THE NEED FOR THE MARRIAGE PROTECTION AMENDMENT:

Defense of Marriage Act (DOMA)

In 1996, the Defense of Marriage Act (DOMA) passed the House 342-67 and the Senate 85-14, and was signed into law by President William Jefferson Clinton on September 21, 1996 (Public Law 104-199). (House vote: http://clerk.house.gov/evs/1996/roll316.xml) DOMA states the following:

> SEC. 2. POWERS RESERVED TO THE STATES.
> …
> "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."
>
> …
> SEC. 3. DEFINITION OF MARRIAGE.
>
> Sec. 7. Definition of "marriage" and "spouse"
> "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."

State Defense of Marriage Acts Built on Federal DOMA:

Following the enactment of the federal DOMA law, 38 States have enacted a form of "DOMAs," either in their laws or by amending their state constitutions. These states are:

> Alabama, Georgia, Louisiana, Nevada*, Tennessee, Alaska*, Hawaii*, Maine, North Carolina, Texas, Arizona, Idaho, Michigan, North Dakota, Utah, Arkansas, Illinois, Minnesota, Ohio, Virginia, California, Indiana, Mississippi, Oklahoma, Washington, Colorado, Iowa, Missouri, Pennsylvania, West Virginia, Delaware, Kansas, Montana, South Carolina, Florida, Kentucky, Nebraska*, South Dakota
>
> *(constitutional amendments marked with *)*

Only Alaska, Hawaii, Nebraska, and Nevada have state constitutional amendments that prevent a state supreme court from ruling these "State DOMAs" unconstitutional. In the absences of the Marriage Protection Amendment, no State DOMA can prevent a federal court from striking down a state constitutional amendment under *federal* constitutional standards.

(Source: "Judicial Activism Forces Same-Sex Marriage on Nation -- Same-Sex Marriages Legal in Massachusetts on May 17" http://www.senate.gov/~rpc/index.cfm)

Massachusetts Ruling sets DOMA Challenges in Motion:

In *Goodridge v. Department of Pubic Health*, the 2003 Supreme Judicial Court of Massachusetts ruled that the State "may [not] deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." The Court ordered same-sex marriage licenses to begin to be issued on May 17, 2004. Same-sex couples from at least 46 states have received marriage licenses in Massachusetts, California and Oregon (though California has since negated their same-sex licenses). A number of these couples are suing in their home state arguing that their home states give "full faith and credit" to the judgment that recognizes their status. Same-sex couples are now challenging the marriage laws of California, Florida, Indiana, Nebraska, New Jersey, New Mexico, New York, Oregon, Washington, and West Virginia. In addition, lawsuits have been filed in Alaska and Montana to force those states to grant particular marital benefits to same-sex couples.

In July of this year, a lawyer in Florida filed a lawsuit directly challenging the federal Defense of Marriage Act on behalf of a lesbian couple who were granted a marriage license by Massachusetts and now would like Florida to recognize their union. Unlike previous challenges to DOMA, this is the first case where a couple has legal standing to file suit. If the suit is successful and the court in Florida strikes down the federal DOMA, then reports indicate this can lead to the court-imposed forced recognition of same-sex marriage in all 50 states. To date, there are at least six federal constitutional challenges to the federal Defense of Marriage Act pending in four states: Florida, Minnesota, Washington state, and California.

Legal scholars argue federal DOMA likely to be struck down:

The following example has been given as a likely scenario to the federal DOMA being invalidated:

A same-sex couple will marry in Massachusetts, move to another state ,Texas, for example, and claim the status and benefits of marriage there. They will cite the Full Faith and Credit Clause of Article IV of the Constitution, which declares that states must accept the public acts of every other state. Texas will refuse recognition, relying on the federal Defense of Marriage Act (DOMA), passed in reliance on Article IV's further provision that Congress may prescribe the effect of such out-of-state acts. The couple will respond with a challenge to DOMA under the federal Due Process and Equal Protection Clauses. The Supreme Court will then uphold their challenge by finding a federal constitutional right to same-sex marriage that invalidates DOMA. The Marriage Protection Amendment would prevent this almost-certain outcome.

State Efforts to Protect Marriage as between a man and a woman:

The following website, lists all the pending or recently passed state constitutional amendments (marriage protection amendments) which will be on the ballot this fall

(2004). (The list includes Missouri's amendment, which passed on August 3, 2004.) http://www.frc.org/get.cfm?i=DX04H02

CONSTITUTIONAL AMENDMENTS:

The Process:

The Constitution of the United States
Article V. - Amendment
"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Amendment History:

Throughout the history of the Constitution, 27 changes have been made through the Constititutional Amendment process.To read a list of successfully ratified Constitutional Amendments click here: http://www.usconstitution.net/constamnotes.html

Administration Position: The Administration supports passage of H.J.Res. 106 and issued the following Statement of Adminsitatrion Policy on September 30, 2004:

"The Administration strongly supports passage of H.J.Res. 106. Marriage is the foundation of society and should not be redefined by a few activist judges and local officials. Without a constitutional amendment, judges and local officials could continue to attempt to redefine marriages in their States. Judges could even strike down the Defense of Marriage Act that was passed by an overwhelming bipartisan margin and declare that same-sex marriages recognized in one State must be recognized as marriages everywhere else. The only alternative left for the people's voice to be heard is an amendment to the Constitution - the only law a court cannot overturn. The future of marriage in America should be decided through the democratic constitutional amendment process, which involves both the Congress and the States, rather than by court order. The Administration urges members of the House to promptly pass, and to send to the States for ratification, an amendment to protect marriage."

Committee Action: H.J.Res. 56, the predecessor to this version, was introduced on May 21, 2003 and referred to the Judiciary Committee. The Committee held hearings on the amendment.

H.J.Res. 106 is a slightly modified version, which was introduced on September 23, 2004, and not considered by the Committee.

Cost to Taxpayers: None.

Does the Bill Expand the Size and Scope of the Federal Government?: The joint resolution, if passed and ratified would amend the United States Constitution.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: The Constitutional Amendment, if ratified by three-fourths of the state legislatures, would restrict the ability of state legislatures to recognize marriage outside of that between one man and one woman, and would restrict judicial jurisdiction as outlined above.

Constitutional Authority: Although a House Judiciary Committee report citing authority is unavailable, Article V of the Constitution authorizes amendments to the Constitution.

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