

----------AMERICAN CONSTITUTION SOCIETY
FOR LAW AND POLICY

THE AMERICAN CONSTITUTION SOCIETY AND
THE CONSTITUTION PROJECT

THE FEDERAL MARRIAGE AMENDMENT:

WHEN SHOULD THE CONSTITUTION BE AMENDED?

PANEL DISCUSSION

Friday, March 19, 2004

12:40 p.m.

Paul Porter Room
Arnold & Porter
555 12th Street, N.W.
Washington, D.C.

A G E N D A

P R O C E E D I N G S

MS. BROWN: Welcome, my name is Lisa Brown. I'm the acting executive director of the American Constitution Society. On behalf of ACS, I want to welcome all of you here today.

We're excited to be partnering with the Constitution Project on today's panel, which I'm sure all of you will agree is going to address one of the most important issues of our time.

And today's panel is an example of what ACS is doing around the country: focusing attention and bringing expert voices to bear on the most critical legal and policy issues of our day.

I hope all of you will join us again, June 18 to 20, for our national convention when we will address not only gay marriage, but, also, issues ranging from the legacy of Brown versus Board, to Enron, to civil liberties issues following September 11, to the history of the 14th Amendment.

Many of you, I know, are familiar with ACS. For those of you who are not, there is literature outside. Please pick it up on your way out. And I want to now turn things over to Ginny Sloan who founded the Constitution Project in 1997 and is now its president, as well as serving on its Board of Directors.

Ginny leads the Constitution Project with passion and the wisdom that comes from years of experience working on constitutional and civil rights issues in all three branches of government and the private sector. The Constitution Project's lucky to have Ginny and we're thrilled to be working with her. Ginny.

MS. SLOAN: Thank you, Lisa. You make me feel hope. Good afternoon. And on behalf of the Constitution Project, thank you very much for coming and thank you, especially to ACS for co-sponsoring this event with us.

Seven years ago, the Constitution Project assembled a philosophically diverse and bi-partisan, blue-ribbon committee to address the explosion of proposed constitutional amendments on almost every conceivable topic.

Since our country was founded, there have been over 11,000 constitutional amendments that have been proposed; yet, only 27 have been actually adopted and have become a part of our Constitution.

The committee members were concerned--the favored, first-step panacea for all societal ills, whether or not there were other ways to address those ills.

"Great and Extraordinary Occasions" is the result of the committee's deliberations and there are copies out there and, more importantly, there are black-

letter guidelines, just one sheet of paper that if you want to use to follow along in the discussion, please help yourself, they're out at the table out in front.

As I mentioned, these guidelines are going to form the basis of our discussion today. They are simply questions that we urge policy makers on the federal and state level--and, also,
citizens--to ask themselves before deciding whether or not to support a constitutional amendment.

So we hope that you will join our panelists today applying the questions to the proposal on same-sex marriage that is before us today.

I doubt if there's anyone better to lead this discussion than our moderator, Harvard law professor Charles Ogletree. Professor Ogletree is the Jesse Clemente Professor of Law and Vice Dean for Clinical Programs at Harvard. He is, as many of you in this audience know, a prominent legal theorist, who's made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally, under the law.

I would also like to mention that All Deliberate Speed, which is Professor Ogletree's new book is out front if anyone is interested in purchasing a copy, you should make out your checks to the Washington Bar

Association. And we are just so grateful to have Charles Ogletree here to moderate this discussion. And with that, I will turn it over to you.

MR. OGLETREE: Thank you, Ginny. Welcome to this wonderful program this afternoon, and I'm delighted to moderate it.

I want to say a word about the four panelists, starting with the panelist to my far left, I'm speaking where they are seated, as opposed to their political perspectives, so I want to make that clear before we go, because he is to your right, but he's somewhere in the middle. My dear friend and colleague, Professor Mike Seidman, who is a professor of law at Georgetown Law Center; teaches Constitutional Law, Criminal Law and Procedure; graduate of the University of Chicago and Harvard Law School; clerked for Judge Skelly Wright on the D.C. Circuit and Thurgood Marshall in the Supreme Court; then did his most important work, ever: he was (as I was) a staff attorney at the D.C. Public Defender Service for many years before accepting a position at Georgetown, where he teaches and has authored books on constitutional law and articles on criminal justice and constitutional law, [including] recent books, Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review, published by Yale

in 2001 and Equal Protection Under the Law, published by Foundation Press, in the year 2002.

Next to Michael, is Walter Berns, who is the John Olin University Professor emeritus at Georgetown University; a resident scholar at the American Enterprise Institute. He's taught at the University of Toronto; Chicago; Cornell; and Yale Universities, earning his Ph.D. at the University of Chicago. He's also been a Guggenheim, Rockefeller, and Fulbright Fellow and a Phi Beta Kappa lecturer and is the author of many books and articles on American government; on politics, including, the books In Defense of Liberal Democracy, The First Amendment and the Future of American Democracy, Taking the Constitution Seriously, For Capital Punishment, and Making Patriots.

Next to him is former Congressman Mickey Edwards, who this past January joined the faculty of Princeton University's Woodrow Wilson School of Public and International Affairs; he's also affiliated with the school's Center for the Study of Democratic Politics. Congressman Edwards was the John Quincy Adams Lecturer in Legislative Politics at Harvard's J.F.K. School, where he taught for more than a decade. Before that, he was a member of Congress for 16 years and a senior member of the House Republican Leadership.

He's been one of three founding trustees of the Heritage Foundation; national chairman of the American Conservative Union; and national chairman of the United States Global Strategy Council.

Next to Congressman Edwards is Professor Deborah Hellman who is a professor of law at University of Maryland School of Law; she's been teaching there now for a decade. She's a graduate of Dartmouth College and Harvard Law School. She also has a Master's in Philosophy from Columbia University; and her research interests are in areas of articulating the criteria for distinguishing wrongful from permissible discrimination.

And she will be continuing her studies next year at Harvard; returning as a faculty fellow at the Center for Ethics and the Professions at Harvard University. And she'll be writing a book on general theories of discrimination. She also writes about moral and legal limits that ought to constrain clinical, medical research.

Please join me in welcoming all our panelists today.

[Applause.]

MR. OGLETREE: There are two big questions here, and we're going to try to address both of them. The way this is phrased is actually in the opposite order. The central question is: When should the Constitution be

amended? And then the more important question is, how do we address the issue of the federal marriage amendment that has been proposed and that's being widely discussed?

Each of the panelists are going to take a few minutes to give you a broad overview before I'll ask a few questions. And then we'll come to you.

I want to remind the panelists and the audience, it's very important since this session is being recorded that you speak clearly into the microphone for that purpose and that you also, try to be as specific as you can in your comments and in your questions.

I'm going to start with Professor Seidman, because he is one who's played an important role in a document called "Great and Extraordinary Occasions," a document that is the product of work between the Citizens for the Constitution (from the Century Foundation and the Constitution Project) and ask Professor Seidman, if he'll give us an overview about this committee's work before we talk about the specific questions. Michael?

MR. SEIDMAN: Thank you, Tree. I mentioned to Tree before we started, although, both of us were at the Public Defender Service, we did not overlap. My service there was roughly contemporaneous with the Spanish American War. He came a little later.

Because of the nature of this event, I'm not going to address questions about whether this amendment

is bigoted; whether it's homophobic; whether the people who are writing it are wreaking havoc with the private lives of American citizens for political gain. Although, I think, in the long-term those questions actually are more important, not whether it should be adopted.

But for our purposes, the more serious charge against the authors of this amendment is that they're bad lawyers. We can go through the individual guidelines during the course of the discussion if people are interested. But I think you might be able to summarize what the guidelines say, really in a single sentence, and that is: For goodness sake, before you amend the Constitution, think about what you're doing.

And that's, of course, what lawyers are supposed to do: think about the way you're using language; what outcomes you want to achieve; whether the language achieves the outcomes, and so on. And I think the most widely talked-about amendment, the Musgrave Amendment, simply fails that test.

So, the amendment is strikingly unclear about whether it's designed simply to make a single word unconstitutional, that is to say: marriage. Or whether it's designed to make the reality of marriage unconstitutional, whatever it's called.

The amendment is also unclear about what that reality is. It speaks about the “incidents of marriage,”

but doesn't say anything about what counts as an "incident of marriage."

The amendment is very unclear about whether it's meant to outlaw, simply, judicial imposition of gay marriage or a legislative decision regarding gay marriage. It's unclear about whether it's meant to control the states or simply control one state imposing it's view on another state.

Perhaps, most egregiously, the authors of the amendment haven't thought through the fact that the amendment leaves in tact the Supreme Court's recent decision in *Lawrence v. Texas*. *Lawrence*, of course, struck down the Texas criminal prohibition against sodomy. So, when you put the amendment together with *Lawrence*, you have the following bizarre situation: On the one hand, there is an absolute constitutional right—unbridgeable--to have sex with complete strangers in an unloving casual relationship. But on the other hand, there's an absolute constitutional prohibition against people getting together in stable permanent, loving and empathic relationships. In other words, the amendment taken with *Lawrence* constitutionalizes the one-night stand. [Laughter.] I wonder whether the framers of the amendment really meant to do this.

I think there is a final irony here, which I'll just mention and then I'll stop. Many of the advocates

of the amendment purport to be complaining about judicial activism, that the revolution that's occurring, with regard to our attitude toward gay men and lesbians is being led by judges, rather than political officials. And there may be something to that complaint. But judicial activism doesn't come from no place. Judicial activism arises because the people at some earlier time draft constitutional language which is broad, vague, ambiguous, and, in order to be applied, has to be interpreted in some way by courts. It is an irony bordering on contradiction for the framers of this amendment on the one hand to complain about judicial activism and then, on the other hand, to advocate adoption of an amendment that is so open textured and so unclear as to its meaning that inevitably courts will be free to do almost whatever they want to, should the amendment be adopted.

MR. OGLETREE: Dr. Berns, let me ask you, if you want to address any of the broad issues about this?

DR. BERNS: It's my turn now?

MR. OGLETREE: Yes.

DR. BERNS: Let me begin by saying, for my sins about 20 years ago, I served a term as the American Representative of the Human Rights Commission in Geneva. While there, I had occasion to count the number of countries in the world--and as I recall, there were, then

about 164, 165; there are more now. Of that total number of 165 countries, let's say, all but six had a written constitution.

Over half of those written constitutions have been written since 1974, which struck me as interesting, from an American point of view, because at that time, ours had been going on for almost 200 years. And it's now over 200 years. So there's something to be said for the American Constitution.

I'm interested in preserving it. And one way you preserve the Constitution is to prevent amendments to it. So, I've been opposed to amendments, in particular and in general. I was opposed to the so-called Equal Rights Amendment a few years ago, because of its failure to specify what rights we were to equally enjoy. And it seemed to me that was simply an invitation to the judges to do what they naturally do anyway.

More broadly, I'm opposed to constitutional amendments for reasons given by James Madison in "Federalist No. 49." Those of you who have read that and remember what he said. He was responding to a proposal of Thomas
Jefferson--in a way his mentor--but Madison was infinitely wiser politically than Thomas Jefferson.

And Jefferson had the idea of frequent constitutional amendments. And in Federalist 49, Madison

gives his reasons why that's a bad idea. It's a powerful statement. I won't even try to paraphrase it, I'll try to generalize his argument in a kind of metaphor.

In a way, Madison compared the Constitution to a plant or a seedling or a young tree. His argument was, if you pick up that tree too frequently and examine its roots, eventually, you're going to kill it. He felt that too frequent amendments to the Constitution would kill the Constitution, and he wanted it to be preserved.

That has been my attitude forever. That's why I belong to this organization originally. I just learned from Ginny that I was one of the founding members of it.

Now, I find myself having to make an exception. And I object to what that judicial--the four members of that Massachusetts court did and I am in favor of an amendment. Not the Musgrave Amendment, I think there's no point in wasting any time here talking about that Amendment. That amendment is, in effect, a violation of the Constitution because it deprives the states of the power that belongs to the states.

And besides that, to quote Bernie Wooster, that shot's not on the table. So there's no point in discussing that amendment.

I have another amendment that we of the American Enterprise Institute have devised and I would like to read it to you.

It reads as follows: The United States Constitution shall not be construed to require any state or territory to give effect to any public act, record, or judicial proceeding respecting a relationship between persons of the same sex that is treated as a marriage under the laws of another state or territory.

To put it simply, what this proposed amendment does is to constitutionalize the Defense of Marriage Act--DOMA. When that Act was originally adopted by the Congress, I had some doubts about its constitutionality, those doubts are now shared by a lot of famous lawyers, including colleagues of Professor Ogletree of Harvard. I think one has to respect those doubts, because I think there is some reason to doubt the constitutionality of that Act.

But if you want to protect some parts of the country from a decision made by four members one court in Massachusetts, as I do, I do not think it's proper for those four judges up there to impose on other parts of the country a view of this institution. And the only way you can make certain that these justices or these judges in Massachusetts do not succeed in imposing their view of this ancient institution of marriage on states, such as, say, Alabama and Texas, other Southern states that are vehemently opposed to this--if you want to preserve tranquility in this country, then it seems to me one way

to do that is to adopt the amendment that I have proposed here.

All it does is to say a state does not have to give full faith and credit to a decision of the Massachusetts court. What's so radical about that?

MR. OGLETREE: Thank you. Congressman Edwards.

MR. EDWARDS: Thanks. The issue obviously before us--it's either not gay marriage or it is certainly bigger than the issue of gay marriage--and the issue, as I see it, is whether or not we should proceed to change the fundamental nature of the United States Constitution, which is what some of the gay marriage prohibition proposals would do.

There is an underlying tension that exists in the United States between two of these great ideas that we revere: One of them is the idea of constitutionalism, which puts limits--is very limiting on the power of people in office and, also, limiting on the ability of the majority to impose the majority's will on the minority.

And that is why the Constitution is not a statute. It's not a city ordinance. The Constitution is a fundamental foundational and structural document that is very different from the concept of pure democracy--letting the people rule. It makes no difference if you take the constitutional point of view,

whether overwhelming majorities of the American people are for a prohibition on gay marriage or not, because that's not the system that the founders set up.

The problem that I have as a constitutionalist is that whether it is the Musgrave Amendment or another amendment that would set out to embody in the Constitution what is the proper social relationship between different peoples is a trivialization of the Constitution. It changes the Constitution from the overarching system that governs how the state relates to the people, into a means by which individuals, if they get enough votes and enough support can create the social structure, the social fabric that they would like to impose on their neighbors.

Now, this may be a bit of a stretch, but it occurred to me that the founders actually wrestled at one time with this question of whether or not one should proceed to create the ideal social structure that they might have envisioned by putting something in the Constitution. And that was on the question of religion.

And the founders decided, we're not going to touch that, it is not the place of this Constitution to tell people whether they should be religious, what religion, irreligious, atheist, whatever. That is the kind of an issue to be dealt with in the Constitution.

Now, if I can look more specifically for a moment, just at the--because we've got a very short time--just at the proposals that are before us in terms of this particular Amendment. It seems to me they fall short. You've seen the guidelines that we have put out from the Constitution Project listing eight different criteria that should be met before the Constitution is amended. And it seems to me that these amendments fail in at least two particular regards: One, is that they are fundamentally different in nature from the rest of the Constitution.

The rest of the Constitution underlines--I happen to be of the belief that the Constitution does not grant rights, it spells out rights that we already have--but it underlines a number of very specific rights of the people. This would be the first time, other than the only amendment that was ever quickly repealed by the people, that the Constitution was used to try to determine how people led their lives. I think it is so fundamentally different from the rest of the Constitution that it fails on that regard of meeting our standards.

And the other standard where I think it fails is that we propose that even though some amendments may be proper and just, you should not undertake a constitutional amendment until all other avenues have been exhausted. This is to begin at the beginning. You

don't amend the Constitution first. In fact, not only is it true that the other avenues have not been exhausted, just the opposite has happened.

The Defense of Marriage Act, passed by Congress, signed by President Clinton, has not been overturned. Perhaps there are scholars who think it will be. It certainly has not, yet. It's still the law, it's still on the table.

States that do not want to recognize, say Massachusetts law on marriage, are acting already in their state constitutions and their state statutes to provide that they don't have to. There's a strong legal argument that the full faith and credit clause doesn't apply to these kinds of issues anyway.

And so, it seems to me that we have two problems. One of them is that the Constitution is not for things like this. That's not why we have our Constitution. And the second is, if you accepted it as a potentially acceptable amendment, it fails to meet the criteria of being the last resort or of being in harmony with the nature of the rest of the document.

MR. OGLETREE: Thank you. Dr. Hellman.

MS. HELLMAN: I'm going to speak to one of the other guidelines, which is, how does the proposed amendment mesh with other parts of the Constitution. And the parts I want to focus on are, in particular the equal

protection clause, but what I have to say would be equally applicable to the due-process clause or, really, other aspects of the Constitution.

And when you think about--let's just take the equal protection clause, as an example--when you think about it, you know, from the 14th Amendment, nor shall any state deprive to any person within its jurisdiction the equal protection of the laws--obviously, there's been wide ranging controversy about what that amendment requires, both on the courts and among academics and citizens. We can all envision--imagine lots of, particularly recent controversies about what that amendment does or doesn't require.

But one thing I think about which we can all agree and one thing that's notable about that amendment, as well as some others--and this dovetails very well with the remarks you just heard--and that's the sort of open-ended and somewhat vague nature of the language of the amendment. What does it mean to say no state shall deprive to any person the equal protection of the laws? What does equal protection require? That's pretty open-ended, vague language.

If you think about the fact that such open-ended vague language was deliberately chosen, you want to say to yourself: what moral commitments are embodied in that or exemplified in that choice of such vague and open-

ended language? And I would say, too, which are important in assessing this particular proposed amendment. And that is, that the 14th Amendment embodies a kind of moral humility about our ability to know at any particular time whether a particular practice does or doesn't violate what it means to treat people with equal protection of the laws. So, a moral humility about our ability to know that we've got it right at any particular juncture.

Combined with a kind of faith or commitment to moral evolution; that is, over time we've actually changed our views about what equal protection requires. You only need think about issues like state-sponsored racial segregation, which at one time were not viewed as a violation of equal protection and now are viewed as the paradigmatic example of a violation of equal protection to see that, as a community or as a people we've evolved in our conception of what constitutes a violation of equal protection.

So, without getting into controversial positions about what equal protection requires, about which, obviously, I imagine, we disagree, I think we can all agree that the provision contains vague or open-ended language and that that reflects a kind of moral humility and a commitment to moral evolution.

And if you think about those two things and then you bring forth this proposed constitutional amendment one thing striking about the proposed constitutional amendment, and that is that it rejects both of those commitments to moral humility and moral evolution, because it tries to fix, at one particular time a commitment, an idea about what equal protection requires.

One way, though I agree with Mike, the amendment is somewhat vague itself, I think if we take it at its word of what we know it intends to do, it clearly intends to say that laws that outlaw same-sex marriage that require marriage to be between opposite-sex couples, those kinds of laws do not constitute a violation of equal protection.

And, obviously, the Massachusetts court, interpreting its own constitution, but took a different view about what equal protection requires.

So, what the proposed amendment does is, it says that interpretation of what equal protection requires is off the table; that can't be what equal protection requires. So it tries to fix, with a specificity one particular understanding of equal protection for all time, or at least until the amendment is further amended or the Constitution amended again.

So it enacts a kind of moral hubris in place of the moral humility that embodies the 14th Amendment. And

it also rejects the idea of moral evolution by fixing it as a part of the Constitution, rather than as a part of regular law.

And I would say the same could be said about other parts of our Constitution. I pick equal protection because that comes immediately to mind, but there are other parts of our Constitution that are equally open-ended. That's an aspect of constitutionalism, I think. And the amendment is troubling in rejecting those aspects.

MR. OGLETREE: Thank you very much. My first question--and I'll ask a few non-threatening questions--but clarifying questions to my panel. I don't like to be threatening, I just like to clarify. Now, I'll start with Dr. Berns and then ask anyone to respond to Part-B of my question to Dr. Berns.

Part-A is this: Your exception to your long-held view about not amending the Constitution and the AEI amendment that you propose--you gave a very specific complaint to justify it. That is: you said four judges of the Massachusetts Supreme Judicial Court issued this decision as they did in the *Goodrich* case and that's part of your response in proposing a rarely-sought, constitutional amendment.

Does it matter that there were four judges--would it matter if it had been unanimous? And would it

matter if this had been Alabama or Mississippi or North Carolina, rather than Massachusetts? That is: is your concern factual, in terms of your objection, to what happened in Massachusetts? Or is it more philosophical, no matter who would have decided a case based on what the judges thought was the appropriate constitutional venue? So, that's the question.

So, that's the question. Let me ask the second question because once you respond, I want the other panelists to respond to that.

DR. BERNS: The answer to that is, no.

MR. OGLETREE: Okay, and so I want you to elaborate on it. And here's the second question: Doesn't Dr. Berns have a good point? That is that there have been incredible efforts in recent years to amend the Constitution--flag desecration; balanced budget; term limits; tax increases; facilitation of state-proposed constitutional amendments; victims's rights; religious equality; the Electoral College; campaign finance, over and over and over again, among many others. And he says that we don't normally amend the Constitution, he would oppose those. And he's following James Madison's view in "Federalist No. 49"--it has to be a great and extraordinary occasion.

So, isn't he right that we don't do this lightly? And this is different? So, Dr. Berns, let me

see if you can explain the decision. What's so special about what Massachusetts did that makes you defy your long-held belief that we should not tinker with the Constitution?

DR. BERNS: Fair question. I suppose I'm concerned mostly with peace in this country. And I have a memory of--all of us should have the same memory--of what happened when the Supreme Court handed down the decision in *Roe v. Wade*. A very unpopular decision in some parts of the country, especially, leading to all kinds of anguish and all kinds of disruptions, including murder.

I don't want anything like a repetition of that. And it seems to me that we ought to respect the honest, legitimate opinions concerning the institution of marriage held by large numbers of people, in certain areas of the country, especially.

My amendment would leave Massachusetts to do what it would want to do; and Oregon can go its own way, so far as I'm concerned. Well, it just seems to me that the people of Oregon and of Massachusetts ought to respect the opinions of people in Tennessee, Alabama, and Texas, Mississippi, and so forth.

And I think there's a real possibility, as I look at public opinion in this country, a real possibility of real disruption in this country;

lawlessness in this country; if there's no way of stopping this Massachusetts decision from affecting the institution of marriage in other parts--in other states.

And my amendment--all I would do is say, if a state does not want same-sex marriage, it has the constitutional authority not to want it. That's all my amendment would do.

MR. OGLETREE: Okay, let me just ask one further clarification, then: If the Massachusetts law was not applicable outside of Massachusetts, you would not be proposing this constitutional amendment?

DR. BERNS: Y'all can do what you want to do in Massachusetts, right.

MR. OGLETREE: No, but is the answer if it only applied to Massachusetts, you would not violate Madison's advice?

DR. BERNS: No, no, no, of course not, because it's not amending the Constitution.

MR. OGLETREE: Okay, then the broader question. Dr. Berns is clear that this is an exception. This is the extraordinary occasion, and that is that there have been many occasions where even popular will suggested we should change the Constitution. He is opposed to that. This is a case that's different from many of those others that we've come before--responses? Yes?

DR. BERNS: I think the Constitution had to--

MR. OGLETREE: It was to the other panelists to respond to your view that this is rare. This fits the Madison exception.

MR. SEIDMAN: I'd like to make two points, if I could: First, when Walter was talking about peace and disruption and violence and so on, I have to say the case that went through my mind was not *Roe v. Wade*, it was *Brown v. Board of Education*. And it is, really, striking that what Walter just said is exactly what people from Southern states said in 1954. They said, “You know, if Massachusetts wants integration that's fine, but we have our way in Mississippi, and Massachusetts shouldn't force it on us.”

The second point I want to make is--I want to reinforce Mickey's point about the guideline that says we shouldn't amend the Constitution unless we really have to--This is not a great and extraordinary occasion if it's completely unnecessary. And I'm not an expert--I have to tell you--I'm not an expert on the full faith and credit clause, but I know a little about it. And, in general, the court has not treated marriages as judgments under the full faith and credit clause. So, in general, states don't have to recognize marriages any way.

Moreover, the full faith and credit clause gives Congress the power to determine the full faith and credit given to state judgments, even it is a judgment. So, I

think it's quite unlikely that DOMA, the Defense of Marriage Act, would be declared unconstitutional, except, maybe, on equal protection grounds. In which case, gay marriages, themselves, would be constitutionally protected under those grounds.

So, you might ask, well, what's the danger in doing this in advance, just in case they strike it down? It seems to me the danger, again, is illustrated by our experiences with the civil rights movement.

You know, before 1967, it was very uncertain as to the obligations of states to give full faith and credit to inter-racial marriages. And there was a lot of confusion and unhappiness from the various states about whether they had to give credit to those or not.

Imagine where we would be today, if a constitutional amendment were adopted in response to that, that said that no state should be obligated to give full faith and credit to an inter-racial marriage performed in another state. That would have been a terrible thing, precisely because of Deborah's point. It would have frozen a particular--and, in my view--insidious moral and political view into our founding document instead of allowing it to evolve over time.

MR. OGLETREE: Let me ask Dr. Berns to respond to your comments.

DR. BERNS: *Loving v. Virginia* took care of that.

MR. OGLETREE: It did, but his question is, the two questions, *Brown* was one example in 1954 about the reaction to an unpopular decision, the public's view was different from the Court's view. And the second question was whether or not the idea of a constitutional amendment to address the issue of inter-racial marriage is different from your amendment to address same-sex marriage. Dr. Berns.

DR. BERNS: The race question is simply by itself in this country. And there's no point in suggesting that, because I'm opposed to universalizing same-sex marriage, I would be opposed to getting rid of slavery or be opposed to *Brown v. Board* and so forth and so on.

We fought a civil war over that issue and there were certain questions left over that after the war; then Brown against the Board of Education settles one of those questions. And we're, on our way, I suppose to settling some of the others.

I'm quite aware of the disruption caused by *Brown v. Board*. That's something else.

What was the other question about?

MR. OGLETREE: You've answered both of them. Congressman Edwards.

MR. EDWARDS: Well I had two reactions. And coming to this meeting, I was hoping this wouldn't happen, because I really hate finding myself in a position of disagreeing with Professor Berns because I teach his stuff all the time, especially Taking the Constitution Seriously, because it was an absolutely marvelous book, but I want to at least make two points: One of them is simply timing. And that is that perhaps the amendment Professor Berns is proposing should wait until we see whether, in fact, the Defense of Marriage Act is overturned. Because I think it may be premature, to just simply assume that there's a need for something different.

But I am struck by--I really believe the Constitution has a very special kind of a purpose. It is important to maintain peace in the streets. But that's not the purpose of the Constitution. In fact, many of the things that we hold the most dear, tend to create violence in the streets.

We've talked about the race issue. I don't necessarily agree that the race issue is that special. You know, we've had the same problem when it was proposed that women should have full and equal rights. And the male society that had existed for almost 200 years excluding women, even from the right to vote, didn't particularly like that. And there was a lot of

opposition. People like Alice Paul were treated very, very violently.

Violence that met workers who claimed the right to strike. I don't think that keeping the peace is a sufficient reason to change the basic structure of our system.

DR. BERNS: A comment, the Preamble to the Constitution mentions, as one of the purposes of it--the Constitution--domestic tranquility.

MR. OGLETREE: Professor Hellman, do you have a response?

MS. HELLMAN: I have one small comment, which is, I do wonder a little bit about the full faith and credit issue--not the constitutional issue, but whether the idea that some states that oppose gay marriage would have to recognize the marriages of Massachusetts, etc. would be as disruptive as we imagine, in that, part of why states object to the idea of recognizing same-sex marriage is they want to make a pronouncement about what marriage means in their state. And they still get to do that. They still get to say--unless the Court were to strike down the current marriage laws on equal protection grounds, but given where we are now--they still get to say marriage is between a man and a woman. It's just that as to some of the legal protections that marriage offers, the state of Alabama has to give deference to the

Massachusetts court and let that couple who comes down to Alabama, you know, pass their property on in this way or that way. But those are very, sort of under-the-surface kinds of actions. Not that they're not important.

I think that the objections are more about what kind of statement Alabama wants to make about marriage, and they still get to make those statements. You can't get married in Alabama, unless you comply with the Alabama laws.

So, I don't know if it would be quite as disruptive of that state's sovereignty to define marriage as they want to, as is often suggested.

DR. BERNS: The question seems to me, certain to arise, when a person is married in Massachusetts or in Oregon, go back to Alabama and so forth. And for example, want to get divorced and the Alabama court says, “You can't be divorced in this state, because you're not married so far as this state is concerned.” What do we do about a thing like that? To say nothing about all the property difficulties.

No, the question is certain to arise, because people married in one of these states are bound to go back to another state, and then the question arises.

MR. OGLETREE: Any response? I mean, it will be messy, complicated, therefore, why should we do it? Professor Seidman?

MR. SEIDMAN: Well, that's just the point. I think it's exactly right that those questions are going to arise, and they have to be worked out. But I don't understand why it's a great and extraordinary occasion when they haven't arisen yet. Why don't we see what happens? And then, if what happens is bad enough, there will be time enough to do something about it.

MR. EDWARDS: Could I add one thing?

MR. OGLETREE: Sure.

MR. EDWARDS: It is true that the Constitution is established, partly, to ensure domestic tranquility. Although, that's different from saying that you should, therefore, use the Constitution to structure your laws in a way that people won't have objection.

But I wonder if that's a misreading of the American people. I'm not sure that what I see in the polls and the people I talk to indicate that large numbers of Americans are going to take to the streets. The taxi driver who took me to the train in Princeton, New Jersey, this morning, who--to give you an example of where he's coming from, he started off by defending Howard Stern and attacking Mike Powell-- was saying (I don't know how he got onto the gay marriage question), “Well, who cares if they get married? You know, what difference does it make to me?”

And I think, there's probably more feeling like that in the United States, than there is people ready to rise up in a fury if other people of the same sex get married.

MR. OGLETREE: Let me pose the question and shift the focus from Professor Berns to the other panelists, and to let the audience know after this and one final question, we'll be taking your question from the audience. There are two microphones and, please be prepared to do that.

And I know how difficult it is in a setting like this to do something as complicated as ask a question, but I want you to think about it real hard before you step up to the microphone and figure out precisely what you want to ask beyond which you would have said, if you had a chance to make a speech. [Laughter.]

So, prepare your questions, we'll be going to them very shortly and getting your responses.

As we think about both what the Constitution Project and the American Constitution Society and others have been doing trying to raise the public debate on this topic and clarify it for the public, here's the question: Why shouldn't we let the people decide? Are our objections procedural? That is that we shouldn't change the Constitution, because that's something that should only be done in an extraordinary context? Or are we

afraid that the people may decide something that we disagree with for a variety of reasons? Is it procedural or is it substantive? If the people want to change the Constitution, why should scholars stand in the way in telling them they shouldn't? Professor Hellman, do you want to start?

DR. HELLMAN: Yeah, I think those concepts of procedural and substantive are sort of intertwined at this level. I mean, obviously, the people should decide. They get to decide when they want to amend the Constitution and we're not proposing--those of us who are opposed to this amendment--that we change the structure for amending the Constitution. We're just saying a little something about what kinds of concerns should motivate or animate that discussion when the people think about amending the Constitution in this regard and they shouldn't just think: What do I think about gay marriage?

That's what they should think about when they think about whether they want to pass a law at the federal level or the state level, etc. that relates to marriage. They should think about what are the kinds of things that merit constitutional amendment and the kinds of considerations that we've talked about relate to that. But those are properly in the peoples' mind, I think--or

ought to be--when they think about whether they should amend the Constitution.

MR. OGLETREE: That's the answer I expected. So, let me follow up.

Can you, from your own point of view, think of any issue--not just as a legal scholar, but as a citizen of this country--any issue where you think there is a decent argument to amend the Constitution on any issue?

MS. HELLMAN: Well, I can make a general comment and a specific comment. I guess I think, generally speaking, I would rather see amendments that raise the floor rather than lower the ceiling. I think one of the panelists spoke about an amendment that sort of takes something away versus acknowledging rights. I would rather see amendments that say, “However, you're going to interpret the vague provisions of the Constitution, at least they require this,” rather, than ones say, “and they can't require that.”

And I would think that the 13th Amendment's abolition of slavery and the Amendments that increase the franchise are all Amendments that raise the floor rather than lower the ceiling.

And this one, I think is a lower-the-ceiling amendment.

The other thing I would say is, my own view, is that campaign finance is the most compelling potential

one because of its threat to democracy, which has to do with the structure of our government, rather than anything else that I've heard.

MR. OGLETREE: That's one where you'd say, that should be one that you would say is much more--

MS. HELLMAN: It's much more plausible.

MR. OGLETREE: --than all the others? That's it, there's nothing else on your list?

MS. HELLMAN: Not at the moment.

MR. OGLETREE: Okay, Congressman Edwards.

MR. EDWARDS: I'm not saying that these amendments should be passed, but they fit within the structure. If you had an amendment, for example, clarifying the war power, because the Constitution deals with that question. If you had an amendment, for example, one you mentioned that has been brought up frequently to require a balanced budget. I can certainly make the argument against a balanced budget amendment or for it, but the fact is that the process of who determines what the government spends and so forth, that's in the Constitution. Those are things that do not depart from the structure of what the Constitution is meant to be.

So, yeah, I mean, I think you could have amendments that properly fit within the scope in the way that these amendments do not.

MR. OGLETREE: Mr. Seidman, do you have any?

MR. SEIDMAN: Well, first of all, if these guidelines mean anything at all, it means that we should not off the top of our heads start talking about which amendments we favor and which we don't.

But I wanted to comment briefly about this business of letting the people decide. And I agree with what Deborah said, but I'd want to add one other point.

Constitutional amendments have the peculiar property of letting the people decide now, but only at the expense of preventing the people from deciding later. So they take issues off the table and remove them from public debate. That can be a good thing, it can be a bad thing, but it ought to be something, it seems to me, we ought to be very careful about.

I think that one of the problems--one of the kind of illusions of people who kind of favor constitutional amendments suffer from--is that we have these divisive issues, and we don't and we don't like disagreeing. We don't like arguing, we like things to be settled. So, there's this notion that somehow we can settle them now and for all time in a way that prevents people from arguing about them anymore. I can understand

why people want to do that, but I don't think that's really healthy even from a democratic perspective. We need to do the hard work of trying to convince each other and fighting these issues out, rather than trying to take them off the table.

MR. OGLETREE: Well, explain, and I'm sure you can, the unique position of prohibition. The 18th Amendment established prohibition, right, so the people decided--

MR. SEIDMAN: I think that's a very good example.

MR. OGLETREE: And then within a generation, they changed their minds.

MR. SEIDMAN: That's a very good example.

MR. OGLETREE: Doesn't that say it works? That even if we were to go forward with this amendment that if the people figured out in a decade or in 15 years that it doesn't make sense, they could change their mind?

MR. SEIDMAN: They could, and they did with the 21st Amendment repealing prohibition. But I would not have thought that was an experience we'd want to repeat. That is something of an embarrassment. Rather than having to go through the trouble of generating the extraordinary political energy necessary to amend the Constitution again, we would have been better off leaving it to ordinary political processes in the first place.

So, if states wanted to be dry or even if the federal government wanted to prohibit the sale of alcohol, that could be done by ordinary legislation. That has the virtue of leaving the matter open to be settled by the people, not just the people now, but the people in the future, as well.

DR. BERNS: Surely, there are some parts of the Constitution that we don't want changed. I don't suppose there's anybody on this panel, certainly, and no one in this audience, who would suggest that it would be all together proper to change the 13th Amendment, for example, hmm? You cannot change the 13 Amendment prohibiting slavery, without changing, fundamentally, the character of this country. That's what you would do. Of course, that was Lincoln's point against Stephen Douglas and his popular sovereignty. Douglas proposed to settle the slavery question in this country by leaving it to the majorities of the people of the territory to decide whether to be free or slaves.

Lincoln made the point--we fought a war on it, really--there are some questions you don't leave to popular determination.

As to amending the Constitution generally, I offer you another sort of--in this case, aphorism coming out of James Madison's "Federalist 49" and, again, an

aphorism suggesting, “Don't amend the Constitution.” We are knee-deep in midgets today, compared to 1787.

MR. OGLETREE: I guess that's across the political perspective, right?

DR. BERNS: Knee-deep in midgets compared to the men who wrote this Constitution, yeah. Which is to say, Madison suggested, we were lucky at the beginning. And one of the reasons that we were lucky was because of the character of the people who then wrote that Constitution. And we've never had a group of people of that calibre since. And that's an argument for not changing what they did.

MR. OGLETREE: Except this amendment that you're proposing? [Laughter.]

DR. BERNS: In a sense, the antislavery amendments were not amendments to the Constitution and Frederick Douglass made that case powerfully. They're only making clear what was implicit in the beginning.

MR. OGLETREE: Let's take some questions from the audience, if you will. And before we take the first question. No, go ahead, get up, get up, get up. I just want to ask the panel to give an honest response to this. If this amendment were to be voted upon, like all the others--what's your guess, not your wish or your hope--what's your guess whether an amendment to ban same-sex marriages, whether that would be ratified in the coming

years? Let me start off with Professor Hellman and go to my left. Professor Hellman.

MS. HELLMAN: I'm notoriously bad at this kind of thing, so, my guess isn't worth very much, but I don't think it'll pass because people take amending the Constitution quite seriously.

MR. OGLETREE: Congressman Edwards?

MR. EDWARDS: I think it will have a hard time, very hard time getting out of the Congress. Already a number of the leading conservatives have come out very strongly against it.

MR. OGLETREE: Dr. Berns?

DR. BERNS: As I said earlier, even to discuss the Musgrave Amendment is to waste time.

MR. OGLETREE: And Professor Seidman?

MR. SEIDMAN: My fear is that even that the people who proposed the amendment don't intend it to pass, and that the amendment process is being used for political purposes that have nothing to do with whether the amendment passes or not.

MR. OGLETREE: This will all be irrelevant in mid-November, is that what you're suggesting?

MR. SEIDMAN: Well, it's not going to be irrelevant, but one of the things that we have a history of with constitutional amendments is trying to buy off

interest groups by an act of symbolism which takes the substitute of actually doing something.

And if I were a Christian conservative--which, if this will come as a big surprise to you, I'm not--but if I were, I would be really annoyed at the Bush Administration for trying to buy me off with symbolism that I think even they are not all together taking seriously.

MR. OGLETREE: Congressman Edwards?

MR. EDWARDS: I just want to add one thought. I agree with what Mike is saying, and I think my own feeling is that neither the President, nor the Vice President, in their hearts really wanted this in the first place. I think they think they're buying off a particular constituency and by doing that they have misread their own constituency.

MR. OGLETREE: I'm glad this is being recorded because it's an extraordinary moment that everyone has said it's not going to pass, it's just for political ambitions and there's no chance of success and yet we have a room full of people scared to death that it might happen.

Let me take the first question.

PARTICIPANT: My question actually dovetails on your last comment, topic if you will--there's a history in our country of doing some things that are against the

will of the majority, particularly when it's protecting classes of people who have traditionally been repressed in our society. My question is how is this any different than a small minority of atheists getting up and exercising their First Amendment right to speak? Or how is this any different from Jews wanting to practice their religion in a majority Christian country? Why shouldn people be voting on the practices that two consenting adults are going to have with each other? And it seems to me you have to answer that particular question in order to support your argument that states of North Carolina or Mississippi have a right to decide this issue, set aside from what the Massachusetts SJC has done.

DR. BERNS: I'm not quite sure I understand your question. Your question has to do with the right of two people to get married?

PARTICIPANT: It sure does.

DR. BERNS: Well, I'm not opposed to that. If they want to get married, let them go to Massachusetts or Oregon.

PARTICIPANT: But it seems to me what you are in favor of is allowing states to decide this issue and how is this any different than states banning Judaism or banning as a policy matter not as a constitutional matter? Or banning people who they consider to be making

a speech against the United States government? What's the difference in your mind qualitatively of people of the same sex marrying versus people practicing a religion they choose to practice or speaking their mind as they will.

DR. BERNS: Those other activities or other relationships are protected already by the Constitution, are they not?

PARTICIPANT: I agree they are protected by the Constitution, but I still think that you have to make the case that some how the Constitution ought to be amended, not to protect gay marriage. And even as a policy matter, I don’t hear you doing that.

DR. BERNS: You've got to make the case that this ancient institution that regards marriage as restricted to an association of a man and a woman, that ancient institution, should be set aside. That's your job. You're the radical here, you're the one that's making the change. Make the case.

PARTICIPANT: So would you agree with an amendment that, enshrined in the Constitution the right for gay people to marry? Would you support that? Because that certainly would give us domestic tranquility. It would solve the problem, wouldn't it?

DR. BERNS: It sure would, try it.

PARTICIPANT: I guess your answer's, no, you wouldn't agree,

DR. BERNS: Yeah, that's right, but you can go ahead and try it.

MR. OGLETREE: There's a question in the back.

PARTICIPANT: I have a question, Dr. Berns, for your concern about tranquility. Professor Ogletree had asked whether or not your objection is principled or factual and the particular context in that question was whether or not four justices of the Massachusetts Supreme Court could permissibly bind the rest of the states.

I have a question assuming a different hypothetical. Let's say, hypothetically, an amendment along the lines of what you're proposing passes. And let's say that gay people get very upset and start engaging in civil disobedience, direct action. And let's say the tranquility is lost in that direction. It seems to me, then, that your proposal turns on a question of a political calculus as to which group has more of a capability to disrupt. Is it bigots in the South, or is it people who have different orientations?

And doesn't that, then, shift the character of the Constitution away from a binding commitment to protecting anti-majoritarian rights to a political calculus?

MR. OGLETREE: Mr. Seidman?

MR. SEIDMAN: Why don't you repeat the question, I don’t think Dr. Berns heard all of it.

MR. OGLETREE: Why don't you give a shorter version of it because there were three parts to it, and they’ve been hard for him to--

DR. BERNS: I forgot my hearing aid, I’m afraid, and I didn't hear your, that's all.

PARTICIPANT: I apologize, it's my own fault. A simple hypothetical. Let's say that your amendment passes and gay people become unrestful. There's a compromise of tranquility, not in the sense of Southern states and conservative states roiling over this question of recognition for same-sex marriages, but a repeat of the civil rights movement, if you will. If we have civil disobedience, if we have direct action by gay people disenfranchised essentially by the states rights principle your announcing. What if that's how tranquility is compromised? If that's how tranquility is compromised, we have to then determine who has more of a capability to disrupt, and if that's the question, it seems that we have launched ourselves out of a constitutional question and into a political calculus. It seems that your analysis is, itself, trivializing the Constitution.

MR. OGLETREE: Here's a very shorter version. This is not his question. This is my question. If

disruption is a factor that we have to consider, how significant is that to your view of an amendment?

DR. BERNS: I'm opposed to disruption. I deplore all the disruption caused by *Roe v. Wade*. But all I'm suggesting is, I'm obliged--and it seems to me that anyone in public policy is obliged--to take account of the possibility of it and try to prevent it if possible. That's all I'm suggesting here.

MR. OGLETREE: Next question.

PARTICIPANT: My question is addressed to anyone on the panel who wants to answer it. I'm wondering about the 18 years between the California Supreme Court decision in the late '40s about inter-racial marriage, and 1967, with *Loving v. Virginia*. What was the relationship in those 18 years, I believe, between the full faith and credit clause and the various state laws on marriage? And do you foresee that that will be the same in this country after May 17?

MR. SEIDMAN: Well, people are pointing to me. I am not an expert on the full faith and credit clause. My impression is that during that period, states were not forced to give full faith and credit to marriages--to inter-racial marriages from other states. The Supreme Court was asked to resolve that question immediately after *Brown v. Board* in a case called *Naim v. Naim*, in an act, depending on how you look at it, of either

remarkable political acumen or desperate fear, the Court simply ducked the case, because they were afraid of what the reaction would be in the South if they said that Southern states had to recognize marriages from other states. And the matter ended up being moot in 1967 when the Court decided *Loving v. Virginia* and struck down the anti-miscegenation statutes.

MR. OGLETREE: A question in the back?

PARTICIPANT: Can you hear me okay?

MR. OGLETREE: Yes.

PARTICIPANT: I wanted to build on that question from two questions ago. And that is to ask about Dr. Berns' proposed amendment. Will it work? You articulated this idea of resolving potential domestic, strife, and Professor Seidman also mentioned, as a rationale for constitutional amendments, this idea that it might be a good idea to take the debate off the table to resolve a social issue.

But, if people who oppose gay marriage live in Oregon--or people who live in Alabama who don't necessarily define their identity so much as Alabaman, as, maybe American, are they going to be satisfied that Alabama is permitted to pass legislation denying gay people the right to be married? Will it be successful in ending the debate and preventing domestic intranquility in the future, which relates I think to what the

gentleman was saying earlier also. What happens when the gay people in Alabama decide--or the people who support gay rights decide that they are going to commit acts of violence in response to Alabama's refusal to permit gay people to be married or to recognize the rights that, say, Massachusetts has given them.

DR. BERNS: I don't know whether they're going to be satisfied. All I can say is they jolly well should be satisfied.

MR. OGLETREE: Any other comments on that? Okay, up front, yes.

PARTICIPANT: My question is for Dr. Berns, and it just goes back to the factual basis for the entire premise of your argument, which is this unrest.

I want to know what you're basing your argument on, because all of the public opinion data that I've seen has shown that people of your generation, yes, overwhelmingly oppose gay marriage. But people of my generation, in the age range of, say, 18 to 29, support it by a majority, usually between 55 and 60 percent. And when you look at the polling data for high-school students, it's even larger than that. So where is this unrest and how could you presume to say that you should amend the Constitution so that future generations who are trending very heavily towards supporting this, why would

you foreclose that to them through constitutional amendment?

DR. BERNS: I could be wrong. We'll find out whether the amendment is adopted. Let me say one other thing here. About 20 years or so ago, I was lecturing at the Harvard Law School, I was on a panel there. And my eldest daughter who was a student there at the time, came up afterwards and said to me, “Daddy, why are you always on the unpopular side of an issue?” [Laughter.]

MR. OGLETREE: Would you care to share your response with us, Dr. Berns? Was it a matter of interpretation?

DR. BERNS: The fact that I'm unpopular doesn't mean I'm wrong.

MR. OGLETREE: There you go. Question in the back.

PARTICIPANT: I have a one sentence question: Do you see any similarities between the federal marriage amendment and the 19th century Blaine Amendments?

DR. BERNS: Well the Blaine Amendment was, actually, an anti-Catholic amendment and, incidentally, one of you lawyers name of Phillip Hamburger, University of Chicago up until a couple years ago here at G.W., has written a marvelous book on the separation of church and state, and proved what I just said about the Blaine Amendment. It was an attempt, really, to keep the

Catholics out of the school system. And that's all I have to say about that.

MR. OGLETREE: Professor Seidman or Professor Hellman?

MR. SEIDMAN: These are contested moral issues. So is discrimination against gays like discrimination against Catholics? Is it like discrimination against African Americans? There are disagreements within this room about that. I have my own views about it, but, again, I guess what I want to say is it's a real mistake that we ought to think twice about to try to fossilize a set of moral views and to prevent the kind of moral evolution that Deborah was talking about from going forward.

MR. OGLETREE: Dr. Hellman?

MS. HELLMAN: I was just going to pick up on that thought one of the refrains that you always heard after ***Roe v. Wade*** was--it was terrible the way the Court took that issue off the table rather than letting the people mull it over at the state level. And now that the people are starting to mull this over at the state level, we have this attempt to hijack it through a constitutional amendment. If that's what folks want for people to mull it over at the state level, let's let that happen. I completely support that idea that we're not going to have domestic tranquility unless we

substantively reach some sort of agreement about the underlying moral principles more or less with one another, like we have, more or less, I would say on issues of what racial equality demands. And the only way to do that is to really have that conversation. And I think the Massachusetts Supreme Judicial Court's pronouncement is the first foray into that, I hope, democratic conversation.

DR. BERNS: My amendment is precisely designed to leave it at the state level. That's what my proposed amendment would do.

MS. HELLMAN: That's true, I would agree with you, it's far less egregious in terms of the issues that I was talking about making something fossilized as Professor Seidman said and your amendment does that far less. I mean it's much more pluralistic in that sense, and so I find it far less problematic than the Musgrave Amendment. So I completely agree with that. But I think it has other problems that I'd have to actually think through a little bit more about what does it mean to say, well we have full faith and credits, except with regards to this one specific issue.

I'm not sure you can take a constitutional provision and say, “As to this topic, we don't have to apply that principle.” I think that that's a dangerous precedent in itself that I'd have to think through a

little bit more about whether I thought that was justified by the virtues of having states be able to go back and forth about what they think about the actual issue of gay marriage. Plus, as I said earlier, I don't think that requiring states to recognize the marriages of each other, is quite the same thing as requiring states to use their own judicial processes to say that you can get married in our state. Because part of what people object to is not just that we have to figure out property rights and custody and all that. But they object to having to state, as the State of Alabama, we recognize this marriage and we officiate at it.

So, I do think there's also a qualitative difference in what you're asking.

DR. BERNS: Deborah, let me read the one sentence of my amendment again. The Constitution shall not be construed to require any state to give full faith and credit. You can give full faith and credit if you want to, if you don't want to, you don't have to, that's all this amendment says.

MS. HELLMAN: It depends on what, and I'm not a scholar of full faith and credit--what we think that absent that amendment, the full faith and credit clause would require. If it wouldn't require that in the first place, then it's unnecessary. If it would require that, then what the amendment says is that, with regard to this

one specific issue, there's a carve out to the general principle, which is a principle of the relationship between the states of full faith and credits, and it seems a dangerous precedent to say, “We're going to take this one specific issue, very, very, specific, gay marriage, and we're going to say, as to that the general principle of full faith and credits doesn't apply.” That' seems odd to me.

MR. OGLETREE: Our time has expired, but we're going to get these last questions on the record all at once and give the panelists a chance to give one final response. And, Ginny, you can nod yes or no, and that is, will it be possible to have Dr. Berns proposed amendment on the Constitution Project's website so people could react and respond to it? I don't know if it's already there is that something that can be done? Dr. Berns can you give us the language of it so that will be something that could generate further discussion beyond event today.

And is that possible for the American Constitution Society website, as well? Somebody here with the authority to say yes or no? Any ACS? Yes. Let's get all these questions on, the line’s growing. Let's get all the questions at once and one response, try and pick up one of these questions, yes?

PARTICIPANT: My question is primarily addressed at Professor Hellman, but I'd certainly be interested to hear from the rest of the panel. You discussed a danger in fixing the meaning of the equal protection clause at one point in time. But, I guess it's not clear to me why that's so problematic, when we have an amendment that clarifies the meaning of previously enacted constitutional language. Why is that such a bad thing? It seems to me that an amendment clarifying something and removing vagueness is--greater legal specificity is a good rather than a harm, but I'd be interested to know.

MR. OGLETREE: Next question, in front.

PARTICIPANT: My question is regarding the Defense of Marriage Act. Considering the larger political scene that's going on right now, and assuming that a test case or a case gets to the Supreme Court challenging the constitutionality of the Defense of Marriage Act, what's the likelihood or the possibility that the Supreme Court could resort to the 9th or the 10th Amendments to get around the full faith and credit, to let the states and citizens to decide whatever they want to in this specific area?

MR. OGLETREE: Okay, question in the back, first question.

PARTICIPANT: Hi, my name is Michael Schizorelli, and I'm a student at Georgetown and although

I don't study law, I study history, art history, so you'll all pardon my question if it doesn't sound legalistic enough, but I understand Mr. Berns' perspective because I also happen to think that there aren't many great men left in our society, I mean the U.S., and I feel that people who are not great men have assumed the roles themselves and are writing laws that, really, are not to be written by men of their stature. My question is essentially, why shouldn't we change the definition of marriage in this country? So many things in this country have changed. We've created a society in which many different groups can live among themselves. I can think of no other country, really--and I've lived in several--where people live so well, and in such concordance with one another, as we do in this country.

So, I wonder really, why must marriage have some sort of sexual determinant to it? I don't understand when a union of two people who love one another, which is quite rare in this society, as I see it, why that should be restricted by any sort of measure.

And also, I guess I would like to make one more statement because we're right near the home of Henry Adams who was one of my favorite historians, he lived on H and 14th, so we're really right around the corner--he used to live in a town house and his house was destroyed in the '60s to build some sort of glass monstrosity sort

of post-modernist style. But that's an example of how we, in this country changed. We are a country where change is possible. So, I don't really see why the debate is so restricted. It's the overall question of why must sex be such a determinant in the marriage debate?

MR. OGLETREE: Let me get the final two questions on.

PARTICIPANT: Mark Agrast, at the Center for American Progress. Just to comment on Dr. Berns' proposal that I hope he'll consider. And that is that his amendment, while it doesn't contain all of the difficulties that the Musgrave Amendment contains, has, at the very least a portability problem. Why is it an equitable solution to say that the people of Massachusetts or some other jurisdiction should be able to dignify a marriage between two consenting adults and to have those two adults form a household and, perhaps, have children, and then cross state lines and find themselves no longer married? And what does that do to the children in that relationship of whom there are currently, some millions in this country? Thank you.

MR. OGLETREE: Final question?

PARTICIPANT: My question derives from constitutional theory. If the Musgrave Amendment or its equivalent prevails, then what happens to the 9th

Amendment? Are we then to infer that the right to marry is not one of those reserved to the people?

MR. OGLETREE: Okay. So, five different questions, some overlapping, some distinct and why don't you think of a minute closing which aspect you'd like to take. Dr. Hellman?

MS. HELLMAN: Well, I guess I'll address the one that was specifically directed at me, which was isn't specificity good? Isn't it good if we can clarify vague language? And I guess I would say, specificity is good in some kinds of laws. I would rather that the signs on the highway say drive 65 miles an hour rather than drive safely. That is, there are lots of contexts in which we don't want open-ended standard-like language. And there are other instance, like, I can think of an example in family law, where the operating standard is that judges ought to decide child custody issues according to the best interests of the child. That's because in that kind of a context, we don't think that specificity will serve us well, because it's hard to cash out in advance what is going to be in the best interests of the child.

I would say at the constitutional level, when we're trying to say something about what some principle of equality or of equal concern requires, that's the kind of case where we want to use broader, standard-like language, vaguer language, rather than more specific

language because we don't know for sure what kinds of practices really do violate the principle of equality, because we have a sort of moral humility, and we're committed to the proposition of moral evolution.

MR. OGLETREE: Congressman Edwards.

MR. EDWARDS: Three quick points. One, I completely agree on the question of specificity. Specificity is limiting, and then you end up with people like Judge Bork who think that the only rights you have are the ones that are listed in the Constitution, who, clearly he hadn't read the Constitution. Then, I just wanted to make an observation. My day has already been made successful by the fact that two people have already recognized, as so many people do not, that there is a 9th Amendment and a 10th Amendment to the Constitution, which are so frequently ignored.

And one serious point I did want to make and I guess it goes back to Professor Berns' point. Tranquility is a great virtue and something we should all aspire to. Peace is something we all want and should aspire to. Neither in international affairs, nor in domestic affairs is peace and tranquility the highest value. It is a value. We have always said, as a country, that in terms of international affairs, securing the liberty of the United States is the higher goal if we can do it without losing tranquility and peace, great.

While domestically the same thing. It's the rights of the people. And if the rights of the people are abridged in the name of keeping tranquility, then we have completely reversed the purpose of the Constitution.

MR. OGLETREE: Dr. Berns?

DR. BERNS: One comment about the difficulties of the different states having different rules with respect to marriage. There is a body of law having to do with full faith and credit. Little of it has to do with marriage, but much of it has to do with divorce. And it's entirely possible from looking at these cases, *Williams v. North Carolina I; Williams v. North Carolina II*; to go to Nevada, get divorced, come back, after having married somebody else and come back to North Carolina and be indicted for bigamy and be convicted of bigamy, under this full faith and credit difficulty.

So we have some experience living with this situation and it's a situation, that's implicit in full faith and credit.

MR. OGLETREE: Thank you. Professor Seidman, last word.

MR. SEIDMAN: Well, a boring legal point about the 9th and 10th Amendments and a boring point about constitutional theory. On the 9th and 10th Amendments, I don't believe that the Supreme Court would rely or would have to rely on the 9th and 10th Amendments to uphold

DOMA, because my understanding of the full faith and credit clause is that it's within Congress' powers in any event.

Yes, to the extent one believes that state control over marriage is currently within the 10th Amendment, the Musgrave Amendment would amend that, because it would limit state control over marriage. That seems pretty obvious.

On the point of specificity and clarity and ambiguity, I tend to agree with Deborah that it's not right to think that we should try to settle issues for all time through precise constitutional language, but I guess I want to end with the point I started out with. And that is, suppose one did believe that it was a good thing to clarify ambiguous language.

This amendment does not do that. The amendment is just full of unresolvable ambiguity. I think one of the reasons for that is because the people who wrote the amendment could not agree among themselves what they wanted to do. They knew they wanted to do something. But they couldn't agree what they wanted to do and so they wrote something that served immediate political purposes, but that if it were ever adopted and made part of the Constitution, would give rise to the very kind of judicial activism that they decry.

MR. OGLETREE: And Ginny Sloan will be giving the closing comments, and before she does that, please join me in thanking all of our panelists.

[Applause.]

MS. SLOAN: I just want to thank our wonderful panel and our wonderful audience, I think this has been a very important and provocative and enlightening debate and appreciate your coming. There are limited numbers of copies of "Great and Extraordinary Occasions," out front, if you'd like them and also information about how to download them from our website.

So, again, thank you so much to our panelists and to the audience.

[Whereupon, at 2:10 p.m., the proceedings concluded.]