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Before the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Property Rights

"An Evaluation of Professor Michael Seidman's October 20, 2005 Testimony regarding the Proposed Federal Marriage Amendment"

Members of the Subcommittee:

Thank you for this opportunity to testify concerning this crucial matter, a matter that literally touches upon the very fabric of American society: marriage. My expertise centers on the legal and philosophical implications stemming from those who advocate redefining marriage by altering its long recognized structure. My testimony will particularly evaluate Professor Seidman's assertions.

At the outset, it should be emphasized what is, and what is not, at issue when considering the proposed Federal Marriage Amendment ("FMA"). What is at issue is preserving the external ***structure*** of marriage. What is not at issue is "civil rights" for those practicing homosexual behavior. Professor Seidman ignores this first point and then bases much of his testimony on this irrelevant second point. Permit me to explain.

What is marriage's structure and why does it matter? Marriage, as the basic societal unit, is not like a wax nose or Play-doh. Marriage has a definite structure. That structure is comprised of two components. Marriage has a ***quantitative*** component (two persons) and it has as ***qualitative*** component (who are male and female).

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1 Institutional affiliation is noted for identification purposes only. Mr. Ventrella has been published as well as formally debated the legal and philosophical implications of same-sex marriage nearly 50 times at various national law schools. He has also presented special lectures and/or debates involving this issue and other constitutional matters at various law schools, including Harvard, Stanford, Berkeley (Boalt Hall), Georgetown, Hastings, Duke, Illinois, et al. He also teaches Ethics and Apologetics at the graduate level.

The United States Supreme Court, when faced with a challenge to alter this structure, rejected that challenge and again affirmed these twin components:

> *[Marriage is] [t]he union for life of one man and one woman [which is] the sure foundation of all that is stable and noble in our civilization. [2]*

This is the federal definition of marriage—articulated and repeatedly sustained by the high Court. Thus, for Professor Seidman to contend that the FMA would require *"federal courts . . . to decide what the word 'marriage' means,"* presumes that the federal courts would overlook binding precedent that already decided this question judicially. Professor Seidman has sounded an alarm where no fire exists.

Murphy involved an attempt to modify the ***quantitative*** component of marriage. Today's challenges to marriage attempt to modify the ***qualitative*** component—but the arguments in both cases are the same. They are same in that in each case, the structure of marriage is being altered. To reject the FMA, as Professor Seidman suggests, is to put into play the philosophical and legal predicates to legitimize polygamy and polyamory [3].

When the qualitative component of marriage becomes negotiable, the quantitative component likewise must be negotiable. Thus, both components must be protected, or none of them remain protected. This is what would abolish marriage—not the FMA.

And, history teaches, that the failure to protect marriage's structure produces—over time--verifiable societal degradation [4]. Instead of acknowledging this settled pattern, Professor Seidman speculates

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2 Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

3 *First Trio "Married" in The Netherlands*, accessed September 27, 9005, from the desk of Paul Belien. The Netherlands legalized same-sex marriage a few years ago and as a result of altering the *qualitative* component of marriage, the *quantitative* component is now up for grabs.

4 Carl Zimmerman, **FAMILY AND CIVILIZATION** (1947); *see also*, Joseph Daniel Unwin, Ph.D., **SEXUAL REGULATIONS AND CULTURAL BEHAVIOR** (Library of Congress HG12.U52; Frank M. Darrow ed., Trona, California; 1969), (1935) (finding that when a culture abandons absolute monogamy, harm inexorably results after 40 years).

about hypothetical consequences—none of which is substantiated by empirical evidence.

Professor Seidman's testimony is also flawed because it never references, let alone discusses, the key interests that the State possesses in recognizing marriage, nor does that testimony relate those interests to the FMA. Now, does the State have an interest in a uniform marriage structure? Decidedly yes. Certainly this is pragmatically true with respect to immigration and taxation policies. But, a more fundamental State interest also exists.

Why does the State not license friendships? Or a fiscally dependent aunt and nephew? Or care-taking siblings? The reason is that marriage is different; it is special and the State possesses an interest in it because the State possesses an interest in its own future.

Same-sex relationships in contrast are not equivalent to marriage. Rather, they are inherently futureless. With marriage, however, the State is acknowledging what should be obvious: that when men and women interact—intimately—whether by design or otherwise, children will result. This is not to say that the purpose of marriage is for procreation, but rather, it is to say that a functional State should seek to channel responsible procreation into the most stable and best suited environments for issue of those male/female relationships. This means in part, that the State should not seek to create by design motherless and/or fatherless environments. Absent the FMA, such environments will increase.

As one jurist recently explained:

> *When plaintiffs, in defense of genderless marriage, argue that the State imposes no obligation on married couples to procreate, they sorely miss the point.* ***Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences****—the so-called "private welfare" purpose.* ***To maintain otherwise is***

> ***to ignore procreation's centrality to marriage****. [5]*

An earlier court similarly concluded:

> *Many variations of style can be accommodated within the concept of marriage and the family, but style should and cannot be confused with substance.* ***The essence of marriage is the coming together of a man and woman for the purposes of procreation and the rearing of children, thus creating what we know to be the traditional family.*** *A goal of society, government and law is to protect and foster this basic unit of society. It therefore is entitled to a presumption in its favor over any other form of lifestyle, whether it be polygamy, communal living, homosexual relationship, celebrate utopian communities or a myriad of other forms tried throughout the ages, none of which succeeded in supplanting the traditional family.* ***The test of equality between the traditional family and the homosexual relationship cannot be met by the homosexual relationship.*** *Simply put, if the traditional family relationship (lifestyle) was banned, human society would disappear in little more than one generation, whereas if the homosexual lifestyle were banned, there would be no perceivable harm to society. It is clearly evident that the concept of family is essential to society; homosexual relationships are not.* ***A primary function of government and law is to preserve and perpetuate society, in this instance, the family.*** *It,*

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5 ***Lewis v. Harris***, ___ A. 2d ____ (N.J. App. Div., June 14, 2005) Slip Op. 5, (J. Parrillo, concurring)(emphasis added).

> *therefore, is required to protect and support that family, which means it must be given every reasonable presumption in its favor. [6]*

How is the State's interest expressed? Regarding marriage, the State does two things, neither of which is mentioned by Professor Seidman: The State (1) ***recognizes*** marriage; and the State (2) ***regulates*** marriage. Critically, it must be understood that the State does not "create" marriage; marriage is not a product of the State. Rather, the State recognizes it [7], as the Court did in ***Murphy***.

Second, once ***marriage's structure*** is ***recognized***, the several states are free to ***regulate*** that pre-existing structure. This is why state marital laws have different standards for residency, degrees of consanguinity, ages of consent, grounds for divorcement and annulment, capacity, etc. None of these "changes" to marriage over the years involves structural change or legal evolution. Regulation always occurs in the context of the marital structure—one man and one woman. The FMA is a means at putting to rest challenges to this fundamental structure, leaving marriage regulation freely to the several states.

In the 19th century challenges to marriage focused on the ***quantitative*** component—polygamy. Today, that challenge seeks to undermine the ***qualitative*** component—same-sex marriage. [8]

This leads to the second point: what this issue is not. Throughout his testimony, Professor Seidman opines that the FMA would burden "gay couples" would deprive "gay men and lesbians" of enjoying marital rights and that marriage would be "unavailable for gay men and lesbians." This is a colossal red herring. The FMA does no such thing.

The FMA—begins and ends--by protecting marriage's external structure—one man and one woman. It travels no farther. That is,

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6 ***Constant A. Paul*** C.A., 496 A.2d 1, 6 n.6 (Pa. Super.Ct. 1985).

7 ***Meister v. Moore***, 96 U.S 76, 78 (1877).

8 Notably, after the quantitative challenge was resolved federally—no polygamy—Congress required five newly admitted states—Idaho, New Mexico, Utah, Arizona, and Oklahoma—to constitutionally proscribed polygamy as a condition for admission to the Union, again, protecting a uniform marital structure. Critically, these state constitutional provisions cannot be amended absent Congressional consent.

the proposed amendment is completely silent on the subjective orientation or preference of those who choose to marry.

Put differently, sexual orientation is completely irrelevant to the legal ramifications the FMA. And, with good reason. Consider this: First, no one should want the State to probe any person's subjective motive and affection for marrying. How horrid would it be for the State to inquire about and pass upon the quantity of love two people purport to share? This is precisely why "love" is not a legal component to marriage; subjective affection is not structural. [9]

In the same way, sexual attraction or orientation is likewise irrelevant. On structural considerations alone, two men cannot marry, irrespective of their sexual orientations. [10] Otherwise, those advocating same-sex marriage would necessarily by force of logic also need to permit two brothers to marry under the law.

Professor Seidman also attempts to turn the issue to one of "benefits." This is subtle, but still mistaken. The law has never conceived of marriage as being a bundle of rights, as if marriage is a form of welfare for co-habitants. Rather, marriage has always been legally conceived as being the union of one man and one woman. Now, benefits clearly flow from marriage, but marriage is not simply a package of benefits. The law favors marriage because marriage as a structural matter, benefits the society. Otherwise, the marriage laws would wrongly discriminate against other fiscally dependent relationships. But, no one seriously contends that a faithful nephew who compassionately to his own fiscal detriment cares for his aging aunt should thereby be entitled to marry his aunt.

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9 Rather obviously no extant application for a marriage license inquires as to the sexual orientation of the applicants; that orientation is irrelevant. What is relevant is whether the applicants satisfy the structural demands of marriage.

10 Thus, to emotively intone that the FMA prevents homosexuals from marrying is legally incorrect. In fact, many self-identified homosexuals have been heterosexually married: Julie Cypher, Anne Heche, Sinead O'Connor, all former lesbians, are now married to men. Similarly, WNBA MVP Sheryl Swopes, formerly married and a pregnant posture child for why the WNBA is not populated with lesbians, is now divorced and is self-identifying as a lesbian. www.espn.org, accessed October 26, 2005. How same-sex marriage advocate explain this alternation of a supposedly immutable sexual orientation is beyond the scope of this testimony, but these examples do demonstrate that this issue is not analogous to the miscegenation cases. Confirming this conclusion is ***Baker v. Nelson***, 409 U.S. 810 (1972), where the Court on the merits rejected a claim predicated upon ***Loving v. Virginia***, 388 U.S. 1 (1967); there exists no federal constitutional right to same-sex marriage. The FMA simply makes this correct conclusion untouchable by subsequent judicial fiat.

Professor Seidman lastly issues a "Chicken Little" declaration, contending that the FMA will lead to the "abolition of marriage." And, that it would spawn a "an absolute constitutional prohibition on long-term committed gay relationships." Both points are mistaken.

First, notice that Professor Seidman is equivocating when using the term "marriage." Note carefully: By opposing the FMA, he is not thereby advocating that persons (1) should be chaste before marriage; (2) should be sexually expressive only within marriage; (3) should be faithful within marriage [11]; and (4) should only rear children within the context of marriage [12]. What he means is something like this: something called "marriage" should be one co-habiting option among many—none being superior to any of the others. The State however, does have an interest in preserving structural marriage precisely because marriage benefits society and its future.

Though Professor Seidman rhetorically castigates the drafters of the FMA for their "remarkably poor lawyering," the reality, however, is this. Advocating same-sex marriage is like telling a geometry expert to draw a square circle. Someone may sincerely believe in square circles, but he will never be able to draw one. Professor Seidman's invitation to, in effect, draw square circles should be politely, but firmly, declined. No one reading this testimony believes—in their heart of hearts—in square circles. It is time to stop pretending that the law can draw them. The FMA does exactly that.

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11 Compare: Wyatt Buchanan, October 21, 2005, ***San Francisco Chronicle***, *Marriage can be right for us all, says Dan Savage, But let's not get carried away with monogamy.* Accessed October 24, 2005 via SF Gate on-line. This article notes that "commitment" within the homosexual community in not a matter of fidelity, but rather, a matter of keeping an agreement regarding "how often" to be unfaithful with one's primary sexual partner.

12 Sotirior Sarantakos, "Children in Three Contexts: Family, Education and Social Development," **CHILDREN AUSTRALIA**, 1996, Volume 21, Number 3, pages 23-61.