Testimony of

Professor Dale Carpenter

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Subcommittee on the Constitution, Civil Rights, and Property Rights

Hearing on "What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?"

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Written Testimony of Professor Dale Carpenter, University of Minnesota Law School

To the Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify on the question of whether any action should be taken to defend the Defense of Marriage Act of 1996 (DOMA). I will address my testimony to the question whether a constitutional amendment might be appropriate. I oppose amending the Constitution to forbid same-sex marriages, and in particular I oppose the proposed Federal Marriage Amendment, H.J. Res. 56 (the "FMA"). In this testimony I will discuss four principal reasons for that opposition.

To summarize my four main points: First, a constitutional amendment is unnecessary because federal and state laws, combined with the present state of the relevant constitutional doctrines, already make court-ordered, nationwide same-sex marriage unlikely for the foreseeable future. Therefore, an amendment banning same-sex marriage is a solution in search of a problem. Second, a constitutional amendment defining marriage would be a radical intrusion on the nation's founding commitment to federalism in an area traditionally reserved to state regulation. Third, a constitutional amendment banning same-sex marriage would be peculiarly anti-democratic, cutting short an ongoing national debate over what privileges and benefits, if any, ought to be conferred on same-sex couples, and preventing democratic processes from expanding individual rights. Fourth, the proposed FMA is constitutional overkill that reaches well beyond the stated concerns of its proponents. Whatever one thinks of same-sex marriage as a matter of policy, no person who cares about our Constitution should support this unnecessary, radical, unusually anti-democratic, and overly broad departure from the Nation's traditions and history.

First, a constitutional amendment is unnecessary. Advocates of the proposed FMA claim it is needed to prevent both state and federal courts, at the request of gay-rights advocates, from imposing same-sex marriage on the whole country. Yet neither state nor federal courts have done so thus far. Nor, given the present state of the relevant constitutional doctrines, are they likely to

do so for the foreseeable future. Anyone with a printer and enough money for a filing fee can file a lawsuit, of course, but winning is a different matter. Here, I will not address my personal view of the merits of the legal arguments for same-sex marriage, but only the likelihood that such arguments will be persuasive to courts of final resort in the near future.

Let us start with a basic fact. No state in the union has ever recognized same-sex marriages. Thirty-seven states have explicitly declared same-sex marriages contrary to their own public policy, barring recognition of same-sex marriages under state statutes or state constitutions. DOMA bars recognition of such marriages for federal purposes.

It is unlikely courts will impose immediate, nationwide gay marriage contrary to this powerfully expressed legislative and popular will. Even if and when a state court ordered same-sex marriage in its jurisdiction, that should be a matter for a state to resolve internally, through its own governmental processes, as the states have so far done. Neither federal nor state courts are likely to order same-sex marriage under the traditional interpretation of the Constitution's Full Faith and Credit Clause. Nor, for the foreseeable future, are courts likely to mandate same-sex marriage under substantive federal constitutional doctrines, such as the Fourteenth Amendment's Due Process Clause or the Equal Protection Clause. Let me now address each of these points in greater detail.

Substantive state constitutional law

Going back to the early 1970s, in cases challenging state marriage laws under substantive doctrines of state constitutions, such as state constitutional equal-rights provisions, most state courts have rejected arguments for same-sex marriage. See, e.g., Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, review denied, 84 Wash.2d 1008 (1974). The strong resistance of state courts to same-sex marriage should not be surprising since 87 percent of all state court judges are subject to some form of election. Thus, state courts are accountable to a public that in most jurisdictions still opposes same-sex marriage by fairly large margins.

On the three occasions that state courts have seriously considered ordering the recognition of same-sex marriage in their states under their own substantive state constitutional doctrines - in Alaska, Hawaii, and Vermont - the democratic processes in those states immediately dealt with the issue by preventing the imposition of full-fledged gay marriage. In Hawaii, for example, the state legislature and the people themselves voted to amend their own constitutions to permit the state legislature to define marriag. In Vermont, the state legislature created a system of civil unions that extends the benefits and responsibilities of marriage (under state law only) to same-sex couples, but reserves marriage itself for opposite-sex couples. Historically, the states themselves have been entrusted to rein in the activism of their state courts. The states certainly have the power to do so, whether or not they choose to use it. They have not asked for, or received, the assistance of federal authorities to deal with their own state statutes and state constitutions.

The Massachusetts Supreme Judicial Court is currently considering a case, Goodridge v. Massachusetts Dep't of Public Health, involving a challenge to that state's restriction of marriage to opposite-sex couples. I do not hazard a guess at what the outcome might be, though the record so far for same-sex marriage supporters has not been promising. Even if the Massachusetts court,

or any other state court, were to order the recognition of full-fledged, same-sex marriage in a state, the ruling would be limited in its reach to the state itself. A hypothetical state court ruling favoring same-sex marriage could not require other states to recognize such marriages. That would require additional hypothetical rulings by courts-of-last-resort in the other states. A pro-gay-marriage ruling, as in Massachusetts, would likely be based on the state, not federal, constitution. Thus, the immediate legal effect of the decision would be confined to the state itself.

Could a pro-gay-marriage ruling in a state affect the outcomes of such challenges in other states by influencing other states' substantive interpretations of their own constitutions? Again, this presents a hypothetical, not existing, question. Certainly such a ruling would not bind other states' interpretation of their own state constitutions. Though courts in sister states might regard the pro-gay marriage ruling as persuasive authority in the interpretation of their own state constitutions, they would also have a much larger body of contrary authority from other states to follow. The lone state to recognize same-sex marriage would hold the minority view for a very long time. And, of course, in most states courts would be both accountable to the state's voters and would be reversible by popular democratic processes. Both of these factors would make them reluctant, as they historically have been, to impose immediate gay marriage even in their jurisdictions.

The Full Faith and Credit Clause

Supporters of the FMA argue that if a state court imposes same-sex marriage on a state, then courts in other states or federal courts might require states in their jurisdiction to recognize such marriages under the Constitution's Full Faith and Credit Clause (FFCC), Art. IV, Sec. 1. This fear, too, is hypothetical and exaggerated.

As a nation, we have already addressed this issue. In 1996, in reaction to litigation for same-sex marriage in Hawaii, Congress passed, and President Clinton signed, DOMA. DOMA defines marriage as the union of one man and one woman for purposes of federal law, such as entitlement to Social Security benefits and for federal taxation. DOMA also provides that states may refuse to recognize same-sex marriages performed elsewhere. A state court decision recognizing same-sex marriages in a given state does not by itself make DOMA invalid.

Supporters of a constitutional amendment warn that Adam and Steve, or Sue and Ellen, will go to a state that has just recognized same-sex marriages, get married there, and then return to their home state demanding recognition of their union under the FFCC. By this method, they conjecture, gay marriage would gradually sweep the nation.

However, the FFCC has never been interpreted to mean that every state must recognize every marriage performed in every other state. It is true that, under the place-of-celebration rule, states usually recognize marriages validly performed in other states. But each state also reserves the right to refuse to recognize a marriage performed in another state (or performed in a foreign country, like Canada) if that marriage would violate the state's public policy. Under this public-policy exception to the general rule of recognition, states will generally overlook small or technical differences in the marriages laws of other states. For example, the fact that a marriage was witnessed by only two people (as required in a sister state), instead of three (as required in

the home state), would not usually prevent recognition of a marriage validly performed in the sister state.

But under the public-policy exception, states do not ordinarily overlook major differences in the marriage laws of foreign jurisdictions. Thirty-seven states have already declared by statute and/or state constitution that it is their public policy not to recognize same-sex marriages. Even in the other thirteen states, state policy is probably adequately declared on the issue of whether same-sex unions will be recognized. In that sense, DOMA and the 37 "little DOMAs" passed by the states were probably redundant, a form of insurance against the recognition of same-sex marriage by activist judges. In any event, even former Republican congressman Bob Barr, who opposes same-sex marriage on policy grounds, wrote recently that DOMA is more than adequate to prevent the imposition of nationwide same-sex marriage.

Under the traditional understanding of the FFCC and choice-of-law principles, then, it is doubtful state or federal courts would require states to recognize same-sex marriages performed elsewhere. This does not mean, of course, that litigants might not be able to find a state or federal court judge willing to do so. But it does mean that the chances of having such a ruling withstand appellate review are slim.

Substantive federal constitutional doctrines

It is also unlikely the Supreme Court or the federal appellate courts, for the foreseeable future, would declare a constitutional right to same-sex marriage under present understandings of substantive doctrines arising from the Fourteenth Amendment's Due Process Clause or the Equal Protection Clause. No federal or state appellate court, to date, has declared such a right under any substantive federal constitutional doctrine. Thus, once again, we are dealing with a purely hypothetical fear of a possible future ruling by a court of last resort.

Lawrence v. Texas, 123 S. Ct. 2472 (2003), the recent Supreme Court decision using the Due Process Clause to strike down Texas's law criminalizing homosexual sex, has somehow been transformed by the popular press and by FMA supporters into a gay-marriage decision. It is not that. In Lawrence, the Court emphasized that the Texas law violated the right to liberty insofar as it intruded on private sexual relations between adults in the home. The interest involved was the liberty to avoid state intrusion into the bedroom via criminal law. It did not involve the liberty to seek official state recognition of the sexual relation, along with all the benefits state recognition entails. Lawrence involved the most private of acts (sexual conduct) in the most private of places (the home); marriage is a public institution freighted with public meaning and significance. The Court noted explicitly that it was not dealing with a claim for formal state recognition. Especially in light of Justice Scalia's fretting that same-sex marriage may soon be the child of Lawrence, these qualifications signal a Court that seems very unlikely even to address the issue in the near future, much less to take the bold step of ordering nationwide same-sex marriage.

The Equal Protection Clause hardly seems more promising in the near term for gay-marriage advocates. The only Justice in Lawrence to embrace this seemingly more gay-marriage-friendly argument, Justice O'Connor, made clear her unwillingness to take the doctrine that far.

Romer v. Evans, 517 U.S. 620 (1996), has, so far, not had much generative force in fighting legal discrimination against gay people. That may be because of the unprecedented nature of the law the Court confronted in Evans: a state constitutional amendment that (1) targeted a single class of people (homosexuals) and (2) sweepingly denied them all civil rights protections in every area of life, from employment to housing to education. Because the law was so overly broad, the narrow justifications the state offered could not sustain it, leaving only impermissible animus as a motivating force behind the law. Evans was one of the few times in the Court's history when a law failed the lowest level of constitutional scrutiny, the rational basis test.

Unless the Court were to apply strict scrutiny to laws that fence out gay couples from marriage, a step neither it nor any federal court has taken, states will need to show only a rational basis for their marriage laws. This test requires the state only to show that the law is rationally related to a legitimate governmental end. That is ordinarily not a difficult task. Thus, there is little reason to believe a court would strike down all 50 state marriage laws or DOMA on Equal Protection grounds, at least under the present state of those doctrines. Certainly no court has yet done so.

Aside from the merits of a constitutional claim for same-sex marriage, it is unlikely for practical and historical reasons the Court would impose it on the nation in the near future. The Court rarely strays far or long from a national consensus on any given issue. When it does, it risks its own institutional standing and credibility. Lawrence is no exception to this rule since sodomy laws existed only in a minority of states (13 of 50) and were opposed by most Americans. By contrast, no state has recognized same-sex marriage and laws limiting marriage to opposite-sex couples enjoy broad popular support in most states and nationwide. If the Court were to order same-sex marriage, whether under the FFCC or a substantive constitutional doctrine, it would be taking on almost the entire country. I cannot think of another time the Court has done that in modern times, with the instructive and chastening exception of Roe v. Wade.

In short, the fear of court-imposed, nationwide gay marriage is exaggerated and hypothetical. To amend the Constitution now to prevent it would be to do so based on fear of a future, hypothetical adverse decision by an appellate court or the Supreme Court, in a case that has not been filed, by litigants who do not have standing, and will not get standing until another future, hypothetical adverse decision by a state court succeeds in making its pro-gay marriage ruling stick, something no state court in the history of the country has yet managed to do.

The Constitution is the Nation's founding blueprint. We should not trifle with it. There have been more 10,000 proposed constitutional amendments, all supported by advocates who no doubt sincerely believed that their causes required immediate constitutional support in order to save the Republic. Yet leaving out the extraordinary founding period that produced the ten amendments known as the Bill of Rights and the extraordinary post-Civil War period that produced three amendments, we have amended it only 14 times in more than two centuries. It should not be tampered with to deal with hypothetical questions as if it were part of a national law school classroom. It should be altered only to deal with some clear and present problem that cannot be addressed in any other way. We are nowhere near that point on the subject of same-sex marriage. The "problem" of nationwide same-sex marriage is neither clear nor present. At the very least, we should wait until an issue actually arises before we address it by changing the Constitution.

Second, a constitutional amendment would be a radical intrusion on federalism. From the founding of the Nation, the design of our federal system has been that the federal government has limited and enumerated powers and that state governments have residual powers. The states have been free to legislate on all matters not reserved for federal authority, such as interstate commerce or waging war. State power has been limited only insofar as necessary to protect nationhood, the national economy, and individual rights. Specifically, states have traditionally controlled family law, including the definition of marriage, in their jurisdiction. The Nation's commitment to this federalism is enshrined in the Constitution's enumeration of congressional powers in Article I and in the reservation of other powers to the states in the Tenth Amendment.

Concern over preserving the traditional authority of the states over matters like family law has been a central theme of the Court's recent jurisprudence. In its recent commerce-clause cases, the Court has emphasized the need for limits on federal power in the interest of preserving states' domain over areas like criminal law and family law. See, for example, United States v. Lopez, 514 U.S. 549 (1995). These recent decisions upholding the role of the states have been supported by the Court's most conservative justices, like Chief Justice William Rehnquist and Justices Clarence Thomas and Antonin Scalia.

Federalism is not valuable simply as a tradition. It has a practical benefit. Federalism has served the country well insofar as it has allowed the states to experiment with public policies, to determine whether these policies work or need to be amended, and then to follow or decline to follow the example of other states. Acting as laboratories of social change, the states have been responsible for some of the most important innovations in American law. These innovations have included allowing women to vote, setting maximum hours for working, adopting minimum wage requirements, and prohibiting child labor.

Repudiating this long history, the FMA would impose a single, nationwide definition of marriage as the union of one man and one woman. It would prohibit state courts or even state legislatures from authorizing same-sex marriages. The supporters of the FMA freely acknowledge this much. But additionally, it would tell states how to interpret their own state constitutions and state statutes by prohibiting them from "construing" their own laws so as to permit same-sex marriages or grant marriage-like benefits to same-sex couples. Although state legislatures would presumably be free to adopt "marriage-lite" institutions like domestic partnerships or civil unions that accord some of the benefits of marriage to same-sex couples, these laws might be practically unenforceable in state courts. State courts, asked to referee a dispute between the couple and the state over whether they qualified for benefits under a domestic-partnership law, would be prohibited by the FMA from "construing" the law to grant "the legal incidents [of marriage]" to the couple. Purporting to protect the states from gay marriage, the FMA tramples federalism.

Yet federalism is working on this subject. A national debate is underway on whether to grant some form of legal recognition to same-sex couples. States and localities are trying a variety of approaches, from complete non-recognition to domestic partnerships that grant some benefits to civil unions that grant many of the benefits of marriage. These experiments test whether encouraging stable same-sex unions through some formal legal recognition and support is, on balance, a good or bad thing. Under federalism, states have the opportunity to see whether such recognition truly has the ill effects predicted by opponents.

It is true that there have been limited historical exceptions to the general rule that states control their own family law, including the definition of marriage. The Supreme Court decided in Loving v. Virginia, 388 U.S. 1 (1967), for example, that a state antimiscegenation law was unconstitutional. That decision was grounded in the fundamental right to marry and in the anti-racist principles of the Equal Protection Clause, which explicitly restrains state power. The decision altered state law to uphold individual rights and make the institution of marriage more inclusive, not to derogate individual rights and make marriage more exclusive. The decision was thus distinct in substance and spirit from the FMA. Additionally, Congress required Utah and a few other states to relinquish polygamy as a condition for entering the union as a state. Yet in so doing, Congress was dealing with an actual controversy then extant. It was not dealing with the hypothetical possibility that Utah might some day recognize polygamous marriages. Congress was also arguably exercising its constitutional power to admit new states, an issue not present in the FMA context.

In short, there is simply no precedent for amending the Constitution to intrude on states' structural constitutional power to shape their own family law. Vice President Dick Cheney has argued that states should decide the issue of same-sex marriage for themselves. Prominent American conservatives - including Bob Barr and legal scholar Bruce Fein - oppose the FMA on federalism grounds. Under federalism principles, this is not an area where federal policy needs to intrude.

Third, a constitutional amendment would be peculiarly anti-democratic. A constitutional amendment would have the effect of allowing the people of some states to order the people of other states not to experiment with their own state family law. The people of the states, traditionally free to act either through popular initiative or through their own state legislatures, would lose their right to consider the issue of same-sex marriage (or, as a practical matter, domestic partnerships or civil unions). Their family law would be frozen by the will of people in other states or, alternatively, by the will of people in their own state from an earlier generation.

Further, domestic partnership laws and civil unions in states and localities across the country would be effectively repealed. Democratic outcomes would be reversed. Public debate through normal democratic processes would be cut short.

As conservative legal scholar Bruce Fein recently wrote in the Washington Times: "The amendment would enervate self-government . . . . Simple majority rule fluctuating in accord with popular opinion is the strong presumption of democracies. But that presumption and its purposes would be defeated by the constitutional rigidity and finality of a no-same-sex-marriage amendment."

Of course, in certain areas democratic experimentation should be limited, including by constitutional provisions if necessary. States should not be free, for example, to experiment with racial segregation or with denying women the right to vote. But these limitations on the democratic process should be imposed, and historically have been imposed, only to vindicate individual rights, not to deny individual rights. Limitations on democratic decisionmaking have been imposed to broaden the stake that individuals and groups have in our Nation, not to fence them out. The FMA would mark the first time in the Nation's history that the Constitution was

amended to limit democratic decisions to make the states more inclusive and more affirming of individual rights. This is yet another peculiar and unprecedented property of the FMA.

Moreover, although proponents of the FMA are no doubt sincere in their defense of traditional marriage, the FMA appears to be a cynical means by which to defend it. It appears to be an effort by opponents of same-sex marriage to constitutionally cement their current advantage in popular opinion before they lose that advantage. This strategy reflects a deeply anti-democratic impulse, a fundamental distrust of normal political processes.

Fourth, the FMA is constitutional overkill. If the fear prompting serious consideration of the FMA is that a state court decision in favor of same-sex marriage might be leveraged onto other states via Full Faith and Credit Clause principles, the FMA is an overreaction. As discussed above, it would do far more than prohibit such impositions via the FFCC. Even if I have been wrong about the likelihood of an FFCC-led marriage revolution, the FMA is not a carefully tailored response to that problem. A much narrower amendment, dealing only with the federalism issue, could be proposed. In my view, even such a narrower amendment would be unnecessary to prevent the imposition of court-ordered nationwide same-sex marriage for the foreseeable future. But at least it would not amount, as the FMA does, to killing a gnat with a sledgehammer.

In sum, the FMA is not a response to any problem we currently have. The solemn task of amending the Nation's fundamental law should be reserved for actual problems. Never before in the history of the country have we amended the Constitution in response to a threatened (or actual) state court decision. Never before have we adopted a constitutional amendment to limit the states' ability to control their own family law. Never before have we dictated to states what their own state laws and state constitutions mean. Never before have we amended the Constitution to restrict the ability of the democratic process to expand individual rights. This is no time to start.