Testimony of

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"A Proposed Constitutional Amendment to Preserve Traditional Marriage"

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Mr. Chairman, Ranking Minority Member Leahy, members of the committee - thank you for the opportunity to testify today. As a law school professor who has devoted over thirty-years of her life to the study of family law, I cannot imagine a more important topic for this committee and for the United States Senate to consider than the institution and definition of marriage. In my home state of Louisiana, I have worked hard to strengthen the institution of marriage. I have served as the reporter for the Revision of the Law of Marriage of the Louisiana State Law Institute since 1981. I am a longtime active member of the American Law Institute's Committee on the Principles of Family Dissolution. In 1997, I helped draft Louisiana's landmark covenant marriage legislation. So the defense of marriage is not a new topic for me - it is my life's work.

I can honestly tell this committee that, when I entered the area of family law over thirty years ago, I never imagined that I would be here in the United States Senate, endorsing a constitutional amendment defining and defending the traditional institution of marriage. With all my years working at the state legislative level, I am well aware of the prominent role that the states play in the area of family law. So it is fair to ask: Why do I support the federal marriage amendment?

Law professors are fond of giving long-winded answers, and in my written testimony, I try to provide a more extensive response. But the answer is really quite simple: If this body does not approve a federal constitutional amendment defending marriage, the courts will take this issue away from the American people, and they will abolish traditional marriage. It is really that simple. It is, with regret, my considered legal opinion that the courts have left us with no middle ground for this body and for the American people. I see that over three-fourths of this body - including the distinguished Ranking Minority Member, Senator Leahy - voted for the federal Defense of Marriage, which defined marriage as the union of one man and one woman for purposes of federal law. If those votes sincerely expressed the views of members of Congress, then the only choice you have is to support a federal constitutional amendment.

Until the last few months, every citizen in this country shared a common understanding of what marriage is, a social institution, consisting of a union of a man and a woman. Every dictionary defines marriage in those well understood, millennia-old terms. As a public institution, marriage serves society's most basic function - the acculuration of children, which is a time-intensive, exceedingly expensive proposition - marriage serves that societal purpose efficiently, and we have all understood it to be a union of a man and a woman. A union that biologically is the only one that can create the children that must be acculurated if we as a society are to survive. In my thirty years of experience in family law, I can attest that the traditional institution of marriage is important in every American community - across different races, cultures, and religions.

I was moved by the testimony of Reverend Richard Richardson and Pastor Daniel de Leon at the last hearing. They explained that, as far as their communities are concerned, marriage is not about discrimination - it's about children. And of course they are right. But there are law professors, lawyers, and judges who clearly view things differently. Those who say that the federal marriage amendment "writes discrimination into the Constitution" clearly believe that

traditional marriage must be abolished by courts. For the rest of us - the vast majority of Americans who respect and love all people, as well as the institution of marriage - we are left with no middle ground, no other option than to either acknowledge defeat and give up traditional marriage, or support a constitutional amendment defending it.

Despite these false charges of discrimination, there seems to be bipartisan consensus that the traditional definition of marriage is worth defending - and worth defending at the federal level and at the constitutional level. The federal Defense of Marriage Act was signed by President Clinton with the support of over three-fourths of the Senate. The federal marriage amendment was first introduced by a Democrat in the House. And I notice that, in previous hearings, Democratic witnesses have agreed with Republican witnesses in supporting at least some version of a constitutional amendment defending (if not defining) marriage - including Rev. Richard Richardson, Professor Dale Carpenter, and Chuck Muth.

There also seems to be bipartisan consensus that, without a constitutional amendment, traditional marriage laws across the country - including the federal DOMA - will likely be invalidated by activist judges around the country. Indeed, that is already happening. And the reason is simple. I have carefully examined the Supreme Court's recent decision in Lawrence v. Texas. That decision gives activist courts and local officials all the excuse they need to abolish traditional marriage laws nationwide. In Lawrence, the Court stated that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." The Court specifically identified "marriage" as a federal constitutional issue, and analyzed it, if not explicitly in terms of equal protection, nonetheless in terms of discrimination. Not once did the Court indicate that marriage is about children - and not about adult love, or discrimination. Indeed, at least one Supreme Court justice has already taken the position that traditional marriage laws may infringe upon the right of privacy and thus must be abolished by courts. In 1974, Justice Ruth Bader Ginsburg wrote that any polygamy law or by inference any other traditional marriage law "is of questionable constitutionality since it appears to encroach impermissibly upon private relationships."

Because activist lawyers and judges see marriage as about discrimination, rather than about children, courts have begun to abolish traditional marriage laws under Lawrence. Just look at the Massachusetts court. Rather than affirm traditional marriage, it characterized it as a "stain" on our laws that must be "eradicated" by judges. It recognized that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman," language virtually identical to that in the Lawrence decision. Not surprisingly, just as the Supreme Court in the Lawrence decision rejected those convictions as a consideration in deciding what constitutes the protected "liberty" interest, the Goodridge court found "no rational reason" for such laws, and said that traditional marriage is "rooted in persistent prejudices" and based on "invidious discrimination." It even suggested that "[i]f ... the Legislature were to jettison the term 'marriage' altogether, it might well be rational and permissible." And throughout its analysis, the court in the Goodridge case repeatedly and consistently relied on federal constitutional law and the Lawrence decision.

The nation's top constitutional law scholars don't often agree, but in this area, there appears to be a rare consensus. Harvard Law School Professor Laurence Tribe has said that "You'd have to be tone deaf not to get the message from Lawrence" that traditional marriage laws are now "constitutionally suspect." Tribe has said that under Lawrence marriage is now "a federal constitutional issue," and predicts that the U.S. Supreme Court will follow the Massachusetts court. Another constitutional law expert, Yale Law School's William Eskridge, has said that "Justice Scalia is right" that Lawrence signals the end of traditional marriage laws. Eskridge has repeatedly stated that, under the Court's rulings, "DOMA is unconstitutional." Erwin Chemerinsky has similarly written that "Justice Scalia likely is correct in his dissent in saying that laws that prohibit same-sex marriage cannot, in the long term, survive the reasoning of the majority in Lawrence."

And of course, my fellow panelist, Professor Cass Sunstein, has expressed the view that "the ban on same-sex marriages is unconstitutional." Prof. Sunstein testified as early as 1996 - even before Lawrence - that courts would strike down the federal Defense of Marriage Act. He testified that "there is a big problem under the equal protection component of the due process clause, as construed just a few weeks ago by the U.S. Supreme Court in Romer v. Evans." Prof. Sunstein has argued that "the prohibition on same-sex marriages, as part of the social and legal insistence on 'two kinds,' is . . . deeply connected with male supremacy," and "has everything to do with constitutionally unacceptable stereotypes about the appropriate roles of men and women." He has said that

"Massachusetts [got] it right." Notably, he has said that "the [Massachusetts] court drew some support from federal precedents."

There is, of course, no way to prevent what has been predicted by these professors other than a federal constitutional amendment. As Senator Cornyn has correctly noted, throughout history we have approved a number of constitutional amendments to reverse judicial decisions with which the American people disagree. The reason why the defense of marriage is a federal issue, and not a state issue, is simple: Because the courts have made it a federal issue. My written testimony goes even further, by explaining why in any event, family law has largely been federalized for some time now. I will not belabor the point here, but simply ask that that written testimony be submitted for the record. And with that, I would be happy to answer any questions the committee may have. Thank you.

Why not permit states to define marriage in state law?

Even though the subject matter of marriage and family law has historically been left to the states, the differences among states' laws (other than divorce laws, which narrowed after Williams v. North Carolina in 1942 and now are very similar) have varied at the edges of the common understanding of marriage - can first cousins marry? is a blood test required? who can perform the ceremony? But the core common understanding of marriage - that marriage bridges the differences in the sexes, a bridge that is essential to procreation - has never been touched, until now.

State experimentation as fifty individual laboratories has not been permitted when the question is as fundamental as what is marriage. Consider the examples in the Wall St. Journal opinion editorial by Ed Meese. We don't permit a state to experiment with socialism or printing its own currency. Denying such experimentation is especially prevalent if there is concern for the welfare of children - such as Congress' response to the aftermath of the divorce revolution in the 1980's and low, inconsistent child support awards. Congress enacted laws essentially requiring the states to adopt child support guidelines and more recently efficient uniform child support collection mechanisms. Children's welfare is central and at stake in a common understanding of marriage.

Furthermore, it is not as if marriage law has not been increasingly a concern of a branch of the federal government. U.S. v. Reynolds concerned Congress' regulation of marriage in the territory of Utah and whether polygamy as a religious practice was protected by the constitutional provision respecting the free exercise of religion. Marriage as a union of one man and one woman unaffected by religious practice was affirmed - a common, and most (but surely not all) would argue, fundamental understanding about the meaning of marriage. But, NOT as fundamental, or at the heart or core of marriage, as the understanding that marriage is a union of a man and a woman. Marriage is a societal method for managing heterosexual bonding. Or as we now even more clearly understand and uniformly acknowledge, the need a child has for his mother and his father.

The Reynolds case is surely not the only example of the federal judiciary's concern with and affecting of a state's (territory's) law of marriage. In a series of more recent cases the court as a federal instrumentality affected marriage with Loving v. Virginia declaring unconstitutional a Virginia statute prohibiting interracial marriages; Zablocki v. Redhail striking down a Wisconsin statute regulating entry into marriage by a person owing child support; and subsequently, Turner v. Safley declaring a Nevada prison regulation of the marriage of inmates unconstitutional.

Why a state definition of marriage in a statute or state constitutional provision may not survive even if state experimentation was desirable?
With the "right to marry" as a fundamental right guaranteed by the Fourteenth Amendment's "liberty" clause, the definition of what is marriage within that context is ultimately within the purview of the United States Supreme Court. A state statutory definition, even a state constitutional definition of marriage, may not survive even if state experimentation were desirable. In Turner v. Safley, the description of the aspects of marriage inmates in prison continue to enjoy, contains no mention of children whatsoever in the description. Nonetheless, until the Supreme Court's decision in Lawrence v. Texas less than a year ago, I relied on Bowers v. Hardwick to anchor the "liberty" interest, the fundamental right to marry, in the history and traditions of our country (reaffirmed to an extent in footnote 6 in Michael H. v. Gerald D.) - thus the right to marry could only be defined as the right of one woman to marry one man. After the Lawrence decision explicitly overruled Bowers, the court unmoored the "liberty" interests. "Liberty" defined in Lawrence is a radical right of individual autonomy without the tempering language of "the common good." This radical right of autonomy has been substituted for the anchor of earlier interpretations of "liberty," our country's

history and traditions. I can no longer predict what the definition of marriage will be. My state's statutory definition of marriage is at risk as would be my state's constitutional definition. The federal statutory definition of marriage in DOMA is at risk. In fact Lawrence v. Texas poses a potential and serious threat to virtually the entire body of state statutory family law, law which regulates marriage and the family and often elevates the "best interest of the family" over that of any individual member.

Let the People Decide

Ultimately, what the proponents of the FMA are asking is simply, let the American people decide if marriage should be remain defined as a union of a man and a woman. The issue of what should be the definition of marriage is not a difficult, hyper technical, or legally complicated one. The American people can easily understand what it is that they are asked to consider. The process of amendment is purposefully difficult, potentially tedious and lengthy. If the American people are not permitted to decide the meaning of the word "marriage," the judiciary, state judges and ultimately the United States Supreme Court, will decide for us. And, among the judiciary, many individual judges at the state and federal level, are openly hostile to traditional marriage and the deeply held convictions of the majority of the American public. they are ready to redefine marriage, if not immediately in the near future. Even though, as the Supreme Court in Lawrence opines, it is unwilling to consider the deeply held moral and religious convictions of American citizens, in interpreting our Constitution, the Court may instead consult the laws of other countries--such as the Western European countries who have adopted laws redefining traditional marriage--or international declarations crafted and released by international bodies, including the United Nations.

Furthermore, those same judges often are highly disdainful of the People's decision making ability. Although the simple act of a majority of judges of a single court ordering the legislature to enact particular legislation is astounding in light of the separation of powers recognized in both state and federal systems, how much more astounding is it to find in those same opinions (Baker v. Vermont and Goodridge v. Massachusetts) sincere reluctance to permit the legislature, who represent the People, ANY limited prerogative afforded it by the court. You need only look at the dissenting opinion in Baker v. Vermont decided in 1999 to find an example in which a dissenting judge urged the majority not to offer the citizens of Vermont the option in the legislative arena to consider another legal relationship with the rights of traditional marriage.

The only safety that can be afforded traditional marriage is the safe harbor of the United States Constitution, but only if the People of this country decide to create it. Why not ask the People themselves, directly? We do not have to rely on a court's unscientific determination of whether the opinion of the People has evolved to the point of relinquishing the common understanding of traditional marriage. After all, should we leave the issue to the courts, the moment in time is chosen by the litigants. Let the People decide; they will do so in a localized venue where both proponents and opponents have realistic options by which to exert influence and to persuade those making the decision. Only those issues about which there is a substantial and sustained consensus are ultimately resolved by a constitutional amendment. Is marriage worthy of that national focus and resulting debate? Yes--never more so than at this point in our nation's history. We, the citizens, need to know if we live in and can rely on a strong marriage culture focused on the welfare of children free from the risk of experimentation.

Let them vote. That is all we ask--let the People vote.