Testimony of

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Subcommittee on the Constitution, Civil Rights, and Property Rights

"Less Faith in Judicial Credit:
Are Federal and State Marriage Protection Initiatives Vulnerable to Judicial Activism?"

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I am honored to have been invited to testify before this important Subcommittee of the U.S. Senate Judiciary Committee this morning about a subject of great importance. My name is Lynn D. Wardle; I am a professor of law and for nearly 27 years I have taught Family Law and other courses including Conflict of Laws and the Origins of the Constitution. Both the Defense of Marriage Act (DOMA) and the proposed Federal Marriage Amendment concern all of those fields. Thus, I have been asked to give my professional analysis regarding the sufficiency of federal and state DOMAs, and need for a federal marriage amendment. Of course, the opinions I express are my own professional views; I do not speak for any of the institutions or organizations with which I am associated.

In the summer of 1996, I was privileged to testify before a subcommittee of the Judiciary Committee of the U.S. House of Representatives in favor of the proposed Defense of Marriage Act. I entitled my remarks "Protecting Federalism in Family Law," because one of my major concerns with the effort to legalize same-sex marriage then was that it threatened a serious erosion of federalism in family law, as well as substantive flaws. Later that summer, I also was privileged to testify before the Senate Judiciary Committee in support of the proposed DOMA. I entitled my statement "A More Perfect Union - Federalism in American Marriage Law," again emphasizing the threat to structural federalism. I explained that if any state legalized same-sex marriage (as state courts in Hawaii were then threatening to do), gay and lesbian activists, and other supporters of same-sex marriage, would try to force other states to import and accept same-sex marriage under federal full faith and credit doctrines. I urged Congress to pass the Defense of Marriage Act to clarify and establish as a matter of congressional authority under the "Effects Clause" of the constitutional provision regarding Full Faith and Credit that each state could determine for itself whether or not to treat same-sex unions as marriages. Congress saw the need, and passed the Defense of Marriage Act by overwhelming, bipartisan votes of 85-14 in the Senate, and by 342-67 in the House of Representatives, and DOMA was signed by President Clinton on September 22, 1996. Congress was wise to anticipate the developments that have driven more that forty states to pass state DOMAs either by legislation, by constitutional amendment, or both (including 14 of 14 proposed state marriage amendments approved overwhelmingly by voters in the past year alone).

I remain a firm believer in the value and validity of the Defense of Marriage Act. It is a critical piece of legislation. As we approach the end of the first decade of DOMA, however, it appears that DOMA alone will no longer be sufficient to prevent the judicial federalization and coerced imposition of same-sex unions on the states. That is why a Federal Marriage Amendment (FMA) is necessary. A Federal Marriage Amendment is necessary (1) to constitutionally protect and preserve DOMA, (2) prevent the broad federalization of family law, (3) to prevent judges from constitutionally mandating same-sex marriage or marriage-equivalent civil unions (herein called collectively "same-sex marriage"), and (4) to protect the substructure of the Constitution.

DOMA Is In Danger

DOMA is primarily a structural federalism law. DOMA prevents federal full faith and credit principles (constitutional, statutory or judicial) from being used to force states to recognize and accept same-sex marriages created or recognized in other states. It also prevents courts and others from mis-interpreting or stretching federal statutes or common law so as to import same-sex marriage into federal law. Thus, it preserves the policy power of the states and of Congress to decide this issue for themselves as against full faith and credit and statutory or common law interpretation claims. That was and is very important.

DOMA was intended to preserves the right of Congress and of each state to determine for itself whether same-sex marriage should be recognized, and to what extent. Section 2 of DOMA was enacted in response to the open strategy of many gay and lesbian activists asserting that if any one state allowed same-sex marriage, they would invoke federal full faith and credit principles to force all other states to accept and recognize them. It resolves that potentially serious controversy concerning federal Full Faith and Credit marriage recognition rules by clarifying that if a state chooses to legalize same-sex marriage, it may not force that radical redefinition of marriage upon the other states. It preserves the right of each state to choose for itself whether to recognize same-sex marriage. Section 3 eliminates a potentially serious ambiguity in federal statutes, regulations, and programs regarding the meaning of "marriage" in federal law, preventing the back-door importation of same-sex marriage into federal law without the approval of Congress. Both sections leave undisturbed the power of each state to define marriage for itself, and to control the incidents of marriage provided by state law.

However, DOMA is only a statute, and "[m]any commentators argue that the second section of DOMA violates multiple provisions of the U.S. Constitution, including the Full Faith and Credit Clause, the equal protection component of the Due Process Clause, the Equal Protection Clause, the Bill of Attainder Clause, and the Privileges and Immunities Clause." Appendix 1 to this statement lists 30 articles, comments and notes asserting that DOMA is unconstitutional which I found from reviewing a sample of 20% of 269 "hits" of law review and journal pieces. Law professors and legal commentators are not the only ones making this assertion. Court decisions in New York and Iowa have recently called into question DOMA's constitutionality. Moreover, in decisions that have serious implications for the federal Defense of Marriage Act, two state courts in Washington have ruled that a state DOMA is unconstitutional state constitutional doctrines, and a federal court in Nebraska has ruled that that state's DOMA violates the prohibition against bills of attainder in the U.S. Constitution. DOMA is clearly constitutional, but the motivation to promote and establish same-sex marriage has become so strong in certain segments of our society, including apparently in some courts, that the fair, honest, and consistent interpretation and application of precedents and doctrines can no longer be taken for granted.

Efforts to Legalize Same-Sex Marriage Seriously Threaten Federalism in Family Law

Second, power centers have shifted, requiring federalists to adjust to the new threat to the principle of federalism in family law from judges who have gone further and quicker toward compelling legalization of same-sex marriage than anticipated. Less than two years ago, at an academic conference at the University of Oregon Law School in June, 2003, I presented a paper in which I criticized the proposed Federal Marriage Amendment because I wanted to protect and preserve the important principle of federalism in family law. However, since then, many state and federal courts made radical rulings using various constitutional doctrines to force states to legalize same-sex marriages or unions. The lawyers seeking to legalize same-sex unions cited at least eight broad constitutional doctrines to support their claims, and those courts relied upon elastic interpretation of at least six expansive constitutional doctrines in ruling in favor of same-sex unions. The use of such wide constitutional premises to define marriage as a matter of judicial interpretation of constitutional doctrine and to impose same-sex unions on the states makes a mockery of federalism in family law and would effectively destroy what is left of that important principle of federalism. Courts in eight states already have ruled in favor of same-sex marriage (though some have been overturned or are not final), and cases are currently pending in eight states challenging marriage laws disallowing same-sex marriage.

The threat to federalism of a narrow, focused federal marriage amendment is small indeed compared to the threat to federalism from the growing practice of judges giving expansive interpretation to already broad constitutional doctrines (such as equal protection, due process, privileges and immunities, and even such historically narrow ones as full faith and credit and bill of attainder) as a pretext for imposing their personal political preferences (such as for same-sex unions) upon the people. That is why I have changed my own view about a proposed Federal Marriage Amendment in the past two years, from opposition to strong support. I still advocate federalism in family law, but it is

now clear that the best (perhaps only) way to preserve and protect the heart and core of federalism in family law is to pass a Federal Marriage Amendment.

From a federalism perspective, it might be preferred if the issue of same-sex marriage were not constitutionalized at all. Regrettably, however, the same-sex marriage issue has already been constitutionalized by these court decisions under a variety of constitutional doctrines, and the pace and tempo of political judges ordering same-sex unions is increasing. It is too late to say that the issue should not be constitutionalized - it already has been constitutionalized by nearly a dozen court decisions.

While many of the state courts have acted under the state constitutions, the state constitutional doctrines they have applied have close federal counterparts, the tissue separating the state and federal versions of the constitutional doctrine is very thin and porous. Thus, the use of state constitutional doctrines to mandate legalization of same-sex unions is only the first step of a simple two-step process leading to the interpretation of comparable federal constitutional doctrines to mandate legalization of same-sex marriage or unions.

Accordingly, it is now absolutely clear that the issue whether to legalize same-sex marriage or equivalent status and benefits is well on its way to being constitutionalized and federalized. The only questions are (1) who will decide what the constitutional rule will be - the courts, acting through constitutional interpretation, or the people, acting through constitutional amendments, and (2) what the controlling constitutional rule will be - preservation of the historic and unique legal status, rights, and benefits of the institution of conjugal marriage, or extension of all or most or some of the rights, status and benefits of marriage to same-sex relationships. In these circumstances, advocates of federalism in family law must ask which method of deciding what the matter will be will best preserve and revitalize the principle of federalism in family law - if federal courts extend broad constitutional doctrines to mandate the legal creation of same-sex marriage, or if a narrow constitutional amendment addressing the specific issue of same-sex marriage is proposed, passed, and ratified. The judicial extension of broad constitutional doctrines (such as those noted above) to mandate legalization of same-sex unions would open the door to judicial determination of many other (virtually all) family law issues because the federal constitutional doctrines involved are broad and general. By comparison, the adoption of a narrow constitutional amendment establishing a definition of marriage as the union of one man and one woman would have relatively minimal spillover effect on other family law issues. Just as the Loving v. Virginia decision imposing a constitutional standard on the definition of marriage did not undermine federalism in family law, so also adoption of a Federal Marriage Amendment to reject an extraneous definition of marriage that promotes "gay rights" will not undermine federalism in family law. Thus, from the perspective of protecting federalism in family law, the enactment of a federal marriage amendment is necessary and crucial.

Judicial Rulings Attempt to Cram-Down Same-Sex Marriage By Creative Interpretation of Substantive Constitutional Provisions

Since DOMA it only a statute, it does not address or redress claims that substantive constitutional provisions or doctrines - such as equal protection, due process, privileges and immunities, freedom of religion, establishment clause, or the bill of attainder clause - trump DOMA because they are constitutional doctrines and DOMA is merely a statute. In 1996 it was believed that a mere structural statute would be sufficient to preserve the issue of same-sex marriage for the people to decide. It seemed unlikely that courts would stretch and distort substantive constitutional doctrines so far as to force the American jurisdictions to legalize same-sex marriage. Sadly, in recent years, the situation has changed dramatically.

A mere structural statute is no longer sufficient. In less than a decade, the movement to legalize same-sex marriage has succeeded in constitutionalizing the substantive issue, and activist judges have turned a political position into a substantive constitutional requirement - by irresponsibly radical misconstruction of equal protection, substantive due process, privileges and immunities, and other doctrines. With arrogance and intellectual gymnastics not seen in decades, some courts today are ruling against the civil rights embodied in the institution of conjugal marriage, holding that laws restricting marriage to union man-woman are "irrational" and dumping loads of ad hominem pejorative rhetoric on the unique and millenia-old social institution of conjugal marriage.

The reason for this push to constitutionally mandate same-sex marriage is obvious. Marriage is the great prize. It is the primary mediating structure through which values are transmitted to society in general and to the rising

generation, in particular. It is such a powerful social institution that political movements seek to capture marriage in order to mainstream and spread their political agendas. Marriage has always been an appealing target for social reform movements because the institution of marriage is so crucial to the organization of society and the transmission of social values. The effort to legalize same-sex marriage is just the latest political movement seeking to remake society by capturing (redefining) marriage. At least twice before extraneous ideological movements have succeeded in capturing marriage for the purpose promoting their ideologies, and those stains on our nations marriage laws were only finally repudiated in 1967 in Loving. Just as the Constitution was used to protect the institution of marriage then, it is appropriate for the Constitution to protect the institution of marriage now from the latest campaign to "capture" marriage.

Since the values and legal policy preferences of the people about such fundamental social institutions as marriage are not irrelevant in a democracy, it is important to emphasize that whenever the people of this country have been given the opportunity to express their position about legalizing same-sex marriage, they have unequivocally rejected it. The voters in Hawaii and Alaska in November, 1978 rejected same-sex marriage by 70%, and the voters in Kansas last week (April 5, 2005) also rejected same-sex marriage by 70%. In every state in which the people have been allowed to vote on a constitutional amendment to the state constitution to prohibit and reject same-sex marriage, they have ratified such amendments by overwhelming majorities, ranging from 57% in Oregon to 86% in Mississippi. Not a single one of the eighteen proposed state marriage amendments that have been taken to the people for a vote has failed to be ratified. State constitutional amendments protecting the institution of conjugal marriage are scheduled for popular vote in three additional states this year or next, and similar amendments are pending in the political process in thirteen (13) other states. Additionally, 26 other states have some statutory protections for the institution of conjugal marriage; only six states lack any state constitutional or statutory protection for the institution of conjugal marriage. Clearly, the people strongly favor constitutional protection for the institution of conjugal marriage as a matter of their civil rights.

Protecting the Substructure of the Constitution

Finally, the radical redefinition of marriage poses tremendous risks for not only the institution of conjugal marriage, which is the basic unit of society, but also for our constitutional system of protection for basic rights and liberties. A wise commentator nearly 170 years ago observed about the new American republic:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . . No government could be established on the same principle as that of the United States with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single letter in the Constitution in order to vary the whole form of their government.

Thus, enactment of a Federal Marriage Amendment is a prudent and necessary remedy to the dangers that threaten both the institution of conjugal marriage and the principle of federalism in family law. Marriage is the primary mediating structure through which values are transmitted to society in general and to the rising generation, in particular. As Grund perceived nearly 170 years ago, it is critical to protect that basic social unit in order to preserve our Constitutional system.

For these reasons, I urge the Senate Judiciary Committee to report to the Senate that there is a critical need for Congress to prudently consider and promptly propose a carefully-drafted federal marriage amendment.

Appendix 1: A Partial Listing of Some of the Law Review Publications
Asserting that DOMA Is Unconstitutional

(A Westlaw search of the law journals and reviews database on April 5, 2005, identified 269 separate articles, essays, comments, notes, etc., published in American law reviews that use the term "unconstitutional" within 50 words of "DOMA" or "Defense of Marriage Act." The sample of 30 pieces here listed, found by reviewing the most recent 55 hits, supports the inference that a large portion of those 269 pieces assert that DOMA is or should be declared unconstitutional.)

Mark Strasser, "Defending" Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jursiprudence: Why DOIMA Cannot Pass Muster After Lawrence, Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA, 38 Creighton L. Rev. 421 (February, 2005).

Emily J. Sack, The Retreat From DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause, Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA, 38 Creighton L. Rev. 507 (February, 2005).

John Bash, Recent Development, Abandoning Bedrock Principles?: The Musgrave Amendment and Federalism, 27 Harv. J.L. & Pub. Pol'y 985 (Summer, 2004).

Emily J. Sack, Article, Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders, 98 Nw. U.L. Rev. 827, (Spring, 2004).

Kathy T. Graham, Article, Same-Sex Unions and Conflicts of Law: When "I Do" May be Interpreted as "No, You Didn't!", 3 Whittier J. Child & Fam. Advoc. 231 (Spring, 2004).

Bobbie L. Stratton, Comment, A Prediction of the United States Supreme Courts Analysis of the Defense of Marriage Act, After Lawrence V. Texas, South Texas Law Review, Texas Symposium Issue (Winter, 2004).

Edward Stein, Introducing Lawrence V. Texas: Some Background and a Glimpse of the Future, 10 Cardoza Women's L.J. 263 (Winter, 2004) Symposium: Privacy Rights in a Post Lawrence World: Responses to Lawrence v. Texas.

Thomas Prol & Daniel Weiss, Lifting A Lamp Will New Jersey Create A Safe Harbor for Gay and Lesbian Immigration Rights?, 227 N.J. Law. 22 (April, 2004).

Note, Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage, 117 Harv. L. Rev. 2684 (2004).

Association of the Bar of the City of New York, Report on Marriage Rights for Same-Sex Couples in New York, 13 Colum. J. Gender & L. 70 (2004).

Mark Strasser, Marriage Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation, 3 Hou. J. Health L. & Pol'y 301 (2003).

Sarah C. Courtman, Note and Comment, Sweet Land of Liberty: The Case Against the Federal Marriage Amendment, 24 Pace L. Rev. 301 (Fall, 2003).

Veronica C. Abreu, Note, The Malleable Use of History in Substantive Due Process Jurisprudence: How the "Deeply Rooted" Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment's Due Process Clause, 44 B.C. L. Rev. 177 (2002).

Mark Strasser, Some Observations about DOMA, Marriages, Civil Unions and Domestic Partnerships, 30 Cap. U.L. Rev. 363 (2002).

Stanley E. Cox, DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law, 32 Creighton L. Rev. 1063 (1999).

Kristian D. Whitten, Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?, 26 Hastings Const. L.Q. 419 (1999).

Andrew Koppelman, Same-Sex Marriage, Choice of Law, and Public Policy, 76 Tex. L. Rev. 921 (1998).

Mark Strasser, Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence, 64 Brook. L. Rev. 307 (1998).

Heather Hamilton, Comment, The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause, 47 DePaul L. Rev. 943 (1998).

Paige E. Chabora, Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 Neb. L. Rev. 604 (1997).

Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965, 1986 (1997).

Andrew Koppelman, Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional, 83 Iowa L. Rev. 1 (1997)

Jon-Peter Kelly, Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution, 7 Cornell J. L. & Pub. Pol'y 203 (1997).

Scott Ruskay-Kidd, The Defense of Marriage Act and the Overextension of Congressional Authority, 97 Colum. L. RevV. 1435, 1447 (1997).

Melissa Rothstein, The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages, 31 Fam. L.Q. 571 (1997).

James M. Donovan, DOMA: An Unconstitutional Establishment of Fundamentalist Christianity, 4 Mich. J. Gender & L. 335 (1997).

Melissa Provost, Comment, Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act, 8 Seton Hall Const. L.J. 157 (1997).

Julie L. B. Johnson, Comment, The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and Constitutionality of the Defense of Marriage Act, 145 U. Pa. L. Rev. 1611 (1997).

Barbara A. Robb, Note, The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans, 32 New Eng. L. Rev. 263 (1997).

Evan Wolfson & Michael F. Melcher, Constitutional and Legal Defects in the "Defense of Marriage" Act, 16 Quin. L. Rev. 221 (1996).

*See also Mark Strasser, The Challenge of Same-Sex Marriage 190-91 (1999).