Testimony of

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I.
The Future of DOMA

The task I have undertaken today is an aspect of legal practice that is difficult at best. I am called upon to make predictions about what may happen to the federal Defense of Marriage Act (DOMA) in light of predictable legal challenges to its constitutionality. The maxim of the stockbroker seems appropriate, "Past performance is no guarantee of future results." But lawyers for private clients are often called upon to predict what may happen in the course of litigation so that their client can assess the risks they are about to assume.

No one can say for certain what the outcome will be of constitutional challenges to the Defense of Marriage Act. As much as I would like to see it held to be constitutional, and while I can construct a credible legal argument to support that outcome, a lawyer must give weight to other factors to make a reasonable prediction of what may happen. These other factors certainly include trends in the law and the dominant scholarly view of the issue at hand.

The constitutionality of the Defense of Marriage Act cannot be seriously challenged until one state legalizes same-sex marriage. Thus, the fact that DOMA has not been judged unconstitutional to this point tells us nothing about its long-range prospects when faced with a proper legal challenge.

It may be instructive to review the circumstances which are required before a proper challenge to DOMA can be raised. If the Supreme Judicial Court of Massachusetts, the Supreme Court of New Jersey, or the supreme court of some sister state, rules that same-sex marriages are required under their respective state constitutions then the stage is set. Couples who are married in the wake of one of these rulings will then seek to move or return to another state and have that marriage recognized. If the second state wants to recognize that same-sex marriage, DOMA does

not prevent such recognition. However, if the second state refuses to recognize the out-of-state same-sex marriage, then the argument will be raised that the Full Faith and Credit Clause requires its recognition. The state will then employ DOMA as a part of its defense against such a constitutional challenge.

If we assume that a proper challenge is mounted, what then is the likely outcome? Again, I can argue, and do below, that DOMA should survive such challenges. But let us consider the legal trends and the dominant scholarly view as criteria for judging what the courts are likely to do on this issue in the foreseeable future. I will consider these two categories separately.

Legal Trends

The flow of a river might be an appropriate metaphor to assess the strength of a legal trend. Six months ago, the legal trend in favor of a successful constitutional challenge to DOMA might well be described as a small stream. The principle case in this era was Romer v. Evans, 517 U.S. 620 (1996). In Romer, the voters of Colorado enacted an initiative that limited the ability of citizens to obtain legal protections in civil rights laws on the basis of sexual orientation. The Supreme Court held that this law was based upon a clear animus toward homosexuals and violated the principles and requirements of the 14th Amendment's Equal Protection Clause.

It is one thing to hold that a recent law with a particular political background possesses such a clear and intentional animus. It is quite another thing to hold that a state's marriage law that has been on the books for decades if not centuries possesses the same unconstitutional animus.

As we shall see in the next section, the legal commentators jumped to the conclusion that Romer presaged or required judicial rulings in favor of same-sex marriage and against the constitutionality of DOMA. But a careful lawyer would look upon such predictions with a decree of skepticism because Bowers v. Hardwick, 478 U.S. 186 (1986), was still good law and was not explicitly reversed by Romer. A distinction could be made. Romer was about political rights, not gay rights. Bowers held that there was no constitutional right to engage in homosexual sodomy and therefore the law stood with the long-standing tradition of marriage as a uniquely heterosexual institution.

That was before June 26, 2003 when the Supreme Court released its opinion in Lawrence v. Texas, 123 S. Ct. 2472 (2003). The legal trend is no longer a small stream. It is a river raging with floodwaters, and not just any flood, but the hundred-year flood against which all future events will be judged.

At issue in the Lawrence case was the nature of liberty as set forth in the Due Process Clause of the Fourteenth Amendment. In considering whether this clause of the Constitution was violated by the Texas statute, the majority, quoting from a dissent from Justice Stevens in an earlier case, declared that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Lawrence, 123 S. Ct. at 2475.

Let me put this proposition another way: the Supreme Court has determined that the traditional views of the majority of the people of this country are not good enough to justify law. I should note at this point that this now largely irrelevant majority was the same majority which drafted, ratified, and from time to time amended the freedom-granting constitution the court is interpreting. If you think about it, this is astounding. Under the "reasoning" of the court, how can we know with any certainty what is legally right and what is legally wrong? How can we know what our Constitution, or any of its amendments, really mean? How will we know what will be persuasive in a court of law?

In the Lawrence case, the majority notes concern that the European Court of Human Rights did

not follow our earlier jurisprudence, but followed its own decisions. Lawrence, 123 S. Ct. at 2483 (citing Dudgeon v. United Kingdom, See P. G. & J. H. v. United Kingdom, App. No. 00044787/98, 56 (Eur. Ct. H. R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H. R. (1993); Norris v. Ireland, 142 Eur. Ct. H. R. (1988)). Are we now to turn to Europe to ascertain the nature of our own Constitution? If we cannot turn to our own heritage and the intent of the drafters of our Constitution and its amendments, where really can we turn at all? What is left as the basis of law other than what the judges feel on a particular day?

This is why none of us here can say with any certainty what the future of DOMA really is.

The dramatic change in the flow of water in this particular stream has been noted by both those who support and those who oppose the Lawrence decision. MSNBC reported:

Speaking shortly after that ruling, Elizabeth Birch, the executive director of the leading gay rights advocacy group, the Human Rights Campain, said, "Every once in a while in the history of a people there is a monumental paradigm shift. ...it allows for a breakthrough to a deeper understanding to a nation as a whole. I believe we are in such a gay moment in terms of history.

Matt Foreman, the executive director of the National Gay and Lesbian Task Force wrote:

In just a few short weeks, the confluence of legal marriage in Canada, the Lawrence v. Texas decision abolishing sodomy laws, and the expected marriage ruling from the Massachusetts supreme court has dramatically altered the national and intra community debate about our lives, our families, and our legal rights.

But the most dramatic prediction of the impact of Lawrence is found in the pages of that decision in Justice Scalia's strong dissent.

One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts--and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action, so that that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See Halpern v. Toronto, 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion--after having laid waste the foundations of our rational-basis jurisprudence--the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Ante, at 17. Do not believe it.

There is a recognized branch of Full Faith and Credit law that has been directly and seriously undermined as a result of the decision in Lawrence. States have not been required to recognize decisions or decrees of other states if a strong state public policy interest prohibited such recognition. According to the Restatement (Second) of Conflict of Laws Sec. 283 (1971), a state that had a "significant relationship to the spouses and the marriage at the time of the marriage" need not recognize a marriage if the marriage contravenes "the strong public policy" of that state. In Lawrence, the Supreme Court adopted the utterly unprecedented notion that a law cannot be held to be constitutional in the face of a substantive due process challenge if the state's interest in enacting the law was nothing more than traditional morality.

While lawyers can make arguments about anything and find state interests that never entered the

minds of the legislators who made the law, any honest person would say that laws prohibiting same-sex marriage, just as laws prohibiting bigamy, were based on traditional majority views of morality.

Accordingly, it will be difficult for a court to accept an argument asking for a public policy exception to the Full Faith and Credit Clause when that public policy is based on a motivation that has been labeled by the Supreme Court as violating the Equal Protection Clause.

Let me be clear about my own views of proper constitutional interpretation. The Supreme Court in Lawrence cannot plausibly be said to have interpreted the 14th Amendment in a manner that is consistent with the original meaning of the words that compose the clauses of that Amendment. The Bowers Court got the history right. The power of the states to legislate sexual crimes outside of marriage was unquestioned at any relevant point in American history. To be sure there were contrary theories of history presented in briefs of the amici in Lawrence that were largely accepted by the Supreme Court.

The idea that anti-sodomy legislation is of recent duration and a change from a much more tolerant era of the late 1700s and early 1800s is nothing more than a mix of advocacy and wishful thinking with a thin veneer of Ivy League scholarship. Anywhere else it would be called "spin" and recognized for what it is.

The attitude of that era is far better captured in the following language by James Wilson, who said, "The crime not to be named, I pass in a total silence." James Wilson, 2 The Works of James Wilson (1967) (from lectures given in 1790 and 1791).

This is not to say that the states were not free to adopt new positions on matters concerning homosexuality. The political trends have been strongly in favor of the gay movement. But the Supreme Court is not supposed to be a venue in which political trends are translated into judicial edict. The theory of judicial review necessarily depends upon faithful adherence to the meanings and intentions of the drafters of the Constitution and its amendments for any claim to legitimacy in a constitutional republic.

Simply stated, in a democratic republic only the legislative branches may legitimately make law. New political paradigms should not be accomplished by a judicial decision. When a court announces a decision that is contrary to the intentions of the framers of the Constitution, it is engaging in raw judicial legislation which any member of the founding generation would label as tyranny.

Only our elected legislative officials have the authority to make new law. Lawrence is new legislation in a diaphanous cloak of legal interpretation.

Only those people who value a particular transient political goal more than the preservation of American democracy should be pleased with this outcome. Self-government is essential to the preservation of all our liberties. This nation was founded on the notion that self-government is essential to liberty. Establishing a pet theory of liberty at the expense of the fundamental principle of self-government threatens the long-range survival of our Constitution. The American people will not long accept the idea that fundamental policy change can be made by anyone other than their elected legislators.

Law Review Analysis

The writers of articles in several law reviews and journals have opined that DOMA is, or may well be, unconstitutional. Anyone who knows the production schedule of a law review recognizes that all of these articles and comments were written prior to the Supreme Court's decision in Lawrence.

The following is a sampling of the opinion of the constitutionality of DOMA as reflected in legal

journals:
Paige Chabora argues that a textual interpretation of the Full Faith and Credit Clause results in a determination that DOMA is unconstitutional. Two theories underlie her conclusion: the "procedures theory" and the "ratchet" theory.
Under the procedures theory, Congress may only utilize Article IV's Full Faith and Credit clause to regulate the procedures by which judgments and decrees are recognized. Congress may not use Article IV to regulate substantive law.
Under the ratchet theory, Congress can give a decision from one state enhanced significance in another, but not lesser. The ratchet theory is based on dicta in a 1980 Supreme Court decision.
[W]hile Congress clearly has the power to increase the measure of full faith and credit that a State may accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980).

The "ratchet" theory has been labeled "a powerful argument."
Professor William Eskridge of Yale, who authored a prominent brief in Lawrence, predicts the ultimate demise of DOMA. After describing a very modest path of the gradual enactment of Vermont-styled civil unions, Eskridge says: "Over time--perhaps a generation or two--enough states may follow this modest step to persuade the U.S. Supreme Court to make it mandatory for the country. And at that point, if not before, DOMA's requirement that federal law discriminate against same sex couples will be constitutionally vulnerable."
Other theories calling into question the constitutionality of DOMA have been set forth. Julie Johnson doubts that DOMA represents "general legislation", which she considers a requirement for any proper use of the Full Faith and Credit Clause. Barbara Robb suggests that DOMA violates the equal protection value of the Fifth's Amendment's Due Process Clause. Lewis Silverman, of Touro College, takes the position that: "Because the words of DOMA, at least regarding interstate recognition, are permissive rather than mandatory, the statute appears to offer nothing beyond a 'sense of Congress' which is non-binding."
The issues surrounding DOMA evoke deep concern. Professor Mark Strasser of Capital Law School calls DOMA "an embarrassment" and "the antithesis of a full faith and credit measure." In another journal, he describes DOMA as a "mean-spirited enactment" but reserves the final conclusion as to its constitutionality to the reader. James Donovan, of Tulane University School of Law, goes so far as to call DOMA an unconstitutional establishment of fundamentalist Christianity.
There are more articles to the same effect. The voices in opposition are essentially silent.
It is not a stretch to say that the dominant reviews in today's law reviews will more than likely be the dominant view in the courts within a generation. I am dubious that DOMA will survive even a few years. I am absolutely certain that it will not last a generation.

II.
In Defense of DOMA

I would like to see DOMA succeed. Setting aside, for the moment, my concerns over the changing nature of law and its effect on predictability, I also think that, given a fair read, DOMA

is constitutional.

Marriage is one of the foundations that the majority of people in the United States cherish. Even the Supreme Court has described traditional marriage as a "basic civil right." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Marriage is "fundamental to our very existence and survival" and is a revered institution "older than the Bill of Rights--older than our political parties, [and] older than our school system." Loving v. Virginia, 388 U.S.C. 1, 12 (1967).

Article IV of our Constitution provides that full faith and credit shall be given in each State to the public proceedings of every other state, and that, and this is the critical issue: "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Const. Article IV.

Of this clause, James Madison wrote:

The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated in any stage of the process within a foreign jurisdiction.

The Federalist, No. 42, at 271 (James Madison) (Clinton Rossiter, ed., 1961).

Congress has only exercised its Article IV § 1 authority four times. In 1790, Congress codified the functions of the Full Faith and Credit clause (28 U.S.C. § 1738). In 1980, Congress passed the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A). In 1994, the Full Faith and Credit Child Support Orders Act of 1994 (28 U.S.C. § 1738B) became law. Finally, in 1996, Congress passed DOMA.

Congress' exercise of its authority to legislate under the Full Faith and Credit Clause has never been successfully challenged in any court. Since there is no legal precedent by which the constitutionality of DOMA can be measured, the best available standard is found in these prior acts of Congress.

The law of 1790 was merely procedural in character. It does not serve as a precedent for DOMA. However, the 1980 and 1994 laws established clear legislative precedents that demonstrate that Congress is fully within its authority to enact DOMA.

Both of these prior enactments deal with disputes arising in the area of family law. Both of these statutes are closely connected to the legal issues of marriage. The 1980 Parental Kidnapping Act was designed to bring national uniformity to the recognition of child custody decrees. Citing a growing number of cases which involved interstate disputes over child custody decrees and the alarming practice of "frequent resort to the seizure, restraint, concealment, and interstate transportation of children," Congress passed this law to determine which decrees would be given full faith and credit.

Congress made a substantive policy decision that child custody decrees would not be granted full faith and credit if the child had not lived in the forum for at least six months prior to the events in question. 28 U.S.C. § 1738A(b)(4) and (c)(2). A supplemental rule was adopted governing residency questions when the child had been removed from his home state by a contestant to the proceeding, i.e., parental kidnapping. §1738A(c)(2)(A)(ii).

The 1994 enactment was designed to settle disputes between states over which decrees granting child support would be enforced. 28 U.S.C. §1738B. Similar policy questions were answered to bring uniformity to a hopelessly conflicted area of litigation.

These congressional acts have guided the courts in thousands of cases. The issue of the constitutionality of these provisions has never been raised successfully.

There is nothing in the language or history of Article IV § 1 of the Constitution that would indicate that Congress must wait until there is a morass of existing cases and numerous bad experiences to bring peace and uniformity to the interstate practice of family law. In enacting the Defense of Marriage Act, Congress has acted preemptively to settle problems before they arise. Congress either has the power to establish rules concerning the full faith and credit recognition of family law acts of the several states or it does not. There is no logical basis for concluding that, on the one hand, Congress can decree that child kidnapping shall never form the basis for a valid custody determination, yet it cannot dictate which marriages shall be deemed valid for the purposes of full faith and credit recognition.
Advocates of same-sex marriage will argue that there is a world of factual difference between such a marriage and parental self-help in a custody dispute. Such differences may indeed make a difference to courts in evaluating equal protection challenges to DOMA, but they should have no effect on a determination of whether Congress had the authority to act under Article IV § 1. Congress has made a policy decision concerning the recognition of valid decrees concerning the custody of children. It can certainly make other policy determinations connected to the interstate recognition of other decrees and acts of other aspects of family law.
The Congressional Research Service opines in its exhaustive The Constitution of the United States of America: Analysis and Interpretation,

[I]t does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

Id. at 870.

DOMA should be construed consistently with the laws concerning uniformity of custody decrees and child support awards. Congress can declare which decrees are enforceable in other states and which are not. Congress could, consistent with this legislative precedent, say that same-sex marriages will not be recognized in the United States by any jurisdiction other than the one in which it was originally performed. Congress has taken a much more modest approach. All it has said is that sister states are not compelled to recognize such marriages.
In my view, DOMA is perfectly consistent with the precedent created in the legislative history and should be held to be constitutional.

III.
Conclusion

There are times when a prudent lawyer should take his client aside and say, "[t]here are significant forces arrayed against you that have been extraordinarily successful in similar recent litigation and their arguments need to be taken very carefully. You may want to find another way to achieve your real objective." If the elected legislative representatives of this nation truly what to defend traditional marriage against an assault from the forces of judicial activism, then it seems apparent that another vehicle other than DOMA must be found.