Congressional Testimony of Bruce Fein on the Constitutionality of the Defense of Marriage Act before the House Judiciary Committee

Tuesday, March 30, 2004

Dear Mr. Chairman and Members of the Subcommittee:

I am grateful for the opportunity to share my views on the constitutionality of the Defense of Marriage Act of 1996 (DOMA). In my judgment, DOMA legitimately declares the meaning of the Full Faith and Credit Clause as applied to state same-sex marriage laws; and, its singling out same-sex marriages from other state public acts and records violates neither equal protection nor due process.

The Supreme Court of the United States has construed the Full Faith and Credit Clause to permit a State to withhold recognition of laws or public acts of sister States that would subvert a strong public policy to the contrary of the host jurisdiction. At present, every State but Massachusetts confines marriage to opposite-sex couples to advance compelling societal interests in optimal procreation and child nurturing. Procreation is necessary for the preservation of the species. Traditional marriage laws encourage procreation by offering both material legal advantages and social esteem for opposite-sex unions. Same-sex couples cannot procreate. Some opposite-sex couples may also decline to procreate, but that can seldom if ever be known at the time of marriage. Moreover, privacy values would be offended by official inquiries into the procreative intent of marriage applicants. And if

child bearing intent were required for a license, couples would be inclined toward deception; and, the State would hold no constitutional means to force a married couple to procreate in any event.

Intuition and experience make rational a belief that children will more likely mature and flourish mentally, emotionally, and physically if raised by a husband and wife than by a same-sex couple. And rationality is sufficient to uphold a classification based on sexual orientation, at least in the context of marriage. Roemer v. Evans (1996); Lawrence v. Texas (2003). On that score, the fact that in some cases same-sex couples or single parents might prove superior to a husband and wife in raising a child does not disprove the child rearing rationality of opposite-sex marriage definitions. Virtually every law of general application suffers from inexactness between the objective and exceptional situations; for example, laws prohibiting polygamy or statutory rape despite the fact that in some circumstances their objectives would not be served by a prosecution. Thus, the United States Court of Appeals for the Eleventh Circuit has upheld the constitutionality of a Florida statute that excludes homosexuals from adoption, even though some homosexuals might prove superior in rearing a particular child than a married opposite-sex

couple. Lofton v. Secretary of the Department of Children and Family Services (January 28, 2004).

Supreme Court decisions have tacitly assumed the rationality of state efforts to promote traditional monogamous family structure. In Reynolds v. United States (1878), the Court sustained the constitutionality of anti-polygamy laws, and explained: "An exceptional colony of polygamists under exceptional leadership may sometimes exist for a time without disturbing the social condition of the people who surround it; but there cannot be a doubt that unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." The Eleventh Circuit similarly explained in Lofton: "Although the influence of environmental factors in forming patterns of sexual behavior and the importance of heterosexual role models are matters of ongoing debate, they ultimately involve empirical disputes not readily amenable to judicial resolution—as well as policy judgments best exercised in the legislative arena. For our present purposes, it is sufficient that these considerations provide a reasonably conceivable rationale for Florida to preclude all

homosexuals, but not all heterosexual singles, from adopting."

Homosexual sodomy prohibitions held unconstitutional in Lawrence are sharply distinguishable from opposite-sex marriage limitations. The former punished private intimate action; enforcement required invasions of the bedroom; and, the state interest behind the law was to uphold traditional moral prejudice against homosexuals. The latter entail no punishment of private intimacies; enforcement implicates no privacy interests; and, their purpose is not placation of homophobia, but to encourage an optimal child rearing environment.

DOMA is not constitutionally flawed simply because it probably does no more than declare by statute what the Full Faith and Credit Clause means as regards same-sex marriage. The Supreme Court commonly gives some deference to the views of Congress, which make federal statues presumptively constitutional. Thus, the DOMA declaration regarding the Clause is more than decorative.

DOMA also furthers the purpose of Full Faith and Credit: namely, state-to-state comity and federalism. It is enshrined in Article IV, which also guarantees equal state treatment for out-of-state citizens regarding state privileges and immunities. DOMA reinforces the right of

each State to chart an independent course regarding same-sex marriage unwarped or vitiated by sister State policies. DOMA neither encourages nor discourages States from recognizing same-sex unions. It is scrupulously neutral on that score. The only policy promoted by DOMA is the federalism celebrated by the Tenth Amendment.

Even if DOMA granted States marginally more constitutional space to refuse recognition of out-of-state same-sex marriages than permitted by the Full Faith and Credit Clause, it would nevertheless be sustainable under the necessary and proper clause of Article I as helpful to strengthening federalism. No State enjoys a legitimate interest in the marriage rules for residents of a sister jurisdiction. Similar to DOMA and the reach of the Full Faith and Credit Clause, the Supreme Court upheld the power of Congress to authorize States to discriminate against interstate commerce in ways that would violate the Commerce Clause in the absence of congressional action. Prudential Insurance Co. v. Benjamin (1946).

For the reasons elaborated above, DOMA rationally advances the government interest in optimal conditions for procreation and child nurturing. That Congress did not attempt to address other potential Full Faith and Credit marriage issues is constitutionally undisturbing to either

equal protection or due process. Congress may treat problems piecemeal based on the urgency of the evil or experimentation necessary for learning. Wholesale or blanket solutions are not constitutionally mandated. Williamson v. Lee Optical Co. (1955).

In sum, DOMA is constitutionally irreproachable and contributes to the federalism saluted by the Tenth Amendment and the Full Faith and Credit Clause.

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Contemporary consensus amendment

By Bruce Fein
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The U.S. Constitution needs amending to prevent state court judges from usurping legislative power to ordain same-sex "marriages" through exotic interpretations of state constitutions or statutes.

The Supreme Judicial Court of Massachusetts exemplifies the usurpation, and has provoked a proposed amendment to the state constitution to undo its judicial caper.

But curative political remedies are unsatisfactory. To apply them retroactively to dissolve homosexual marriages legally entered under a judicial roof would be both wrenching and unfair to the affected same-sex couples. Accordingly, a constitutional amendment to forestall state judicial outlandishness in same-sex "marriage" litigation is justified.

By insisting the subject remain with legislatures or the people through popular initiative or referendum, the contemporaneous consensus amendment would address a salient feature of democratic governance, the customary yardstick for determining whether an issue is worthy of enshrinement in the U.S. Constitution.

But for the Bill of Rights (a virtual codicil of the original Constitution), amendments have generally concerned major issues of self-government, republican architecture: federal-state relations; emancipation; the franchise; direct election of senators; a two-term presidency; presidential disability or succession; the electoral college; the federal power to levy an income tax; and, congressional compensation. The ill-fated Prohibition Amendment is the exception that proves the rule.

The raging controversy over same-sex "marriage" raises a nontrivial question of democratic governance: whether the policy will be determined by unrepresentative courts or by a contemporary consensus that finds expression in legislative bodies or popular initiatives or referenda.

Enlightened government generally resists abrupt changes except through commanding majorities. Same-sex marriage would mark a sharp break from centuries of celebrating matrimony as a union between man and woman to promote optimal procreation and child-rearing. Whether such a dramatic departure in marriage law should be taken is thus a decision more fit for legislatures than for courts.

Bans on same-sex marriages are persuasively distinguished from miscegenation laws held unconstitutional by the United States Supreme Court in Loving vs. Virginia (1967). Criminal penalties for interracial marriages were then part of a larger network of white supremacy laws calculated to subjugate blacks, including discrimination in the franchise, education, employment, housing, law enforcement, and otherwise. Their odious purpose was white racial purity.

In contrast, contemporary prohibitions on same-sex marriages seek to further procreation and optimal emotional and psychological nurturing of children. Unlike Jim Crow laws, the prohibitions do not relegate homosexuals to subservience denied the franchise, equal educational opportunity or constitutional due process. Furthermore, social prejudices against homosexuals are receding daily.

A contemporaneous consensus amendment is necessitated by same-sex marriage

exponents asking state courts to distort the original meanings of state constitutions, anti-discrimination or domestic relations statutes to prohibit the reservation of matrimony to opposite-sex couples. The provisions invoked before the courts were enacted in an era when discrimination based on sexual orientation was passe. To interpret them today as mandating recognition of same-sex "marriage" does violence to the meaning intended by their authors and improperly crosses the line between judging and legislating.

The Massachusetts Supreme Judicial Court is exemplary, where a narrow 4-3 majority fatuously interpreted the state constitution as intended to erase any distinction between opposite-sex and same-sex marriage applicants. A few years before the Massachusetts caper, the Hawaii Supreme Court had tortured the language of the Hawaii state constitution in favor of same-sex marriages. A state constitutional amendment swiftly followed to correct the judicial adventurism.

At present, a Massachusetts copycat suit is pending before the California Supreme Court occasioned by same-sex "marriage" licenses issued by the mayor of San Francisco despite a recent California initiative defining marriage as a union between husband and wife. New Mexico, New Jersey, New York, and Oregon are also ripe for avant-garde judicial decrees requiring official recognition of homosexual "marriages" performed within their respective jurisdictions or elsewhere.

Democratic governance principles, however, counsel support for entrusting that controversy to legislatures or popular vote. Both sides are fairly represented in public debate and legislative chambers. No artificial barriers impede the enactment of laws sanctioning same-sex marriages, a proposition corroborated by impressive state and municipal legislation that have banned discrimination based on sexual orientation, repealed prohibitions on homosexual sodomy and penalized as hate crimes violence motivated by homophobia.

Further, social change is invariably less jarring and more acceptable to the community when the agent is popular consensus forged from all viewpoints as opposed to unrepresentative courts listening only to a handful of litigants.

The contemporary consensus amendment should thus prohibit judges from interpreting any pre-existing state constitutional provision or law as requiring official recognition of same-sex marriages. The prohibition would permit courts to implement new additions to state constitutions and statutes that expressly endorse homosexual marriage.

The demarcation line between old law and new law would, however, ensure that if same-sex marriage proponents prevail, they will do so by convincing popular majorities, not by persuading a handful of judges bent on social engineering.

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