Testimony of

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Karl. N. Llewellyn Distinguished Service Professor of Jurisprudence
Law School and Department of Political Science
University of Chicago

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On Amending the Constitution to Define Marriage

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I am grateful to have the opportunity to appear before you today to discuss some of the legal questions raised by the proposal to amend the Constitution to ban same-sex marriages. My basic conclusion is that from the standpoint of the constitutional structure, the proposed amendment is an unfortunate idea. Our constitutional traditions demonstrate that change in the founding document is appropriate only on the most rare occasions -- most notably, to correct problems in governmental structure or to expand the category of individual rights. The proposed amendment does not fall in either of these categories. Those who endorse the amendment fear that if one state recognizes same-sex marriages, others will be compelled to do so as well. But the fear is unrealistic; the federal system permits states to refuse to recognize marriages that violate their own policies. In short, the existing situation creates no problem for which constitutional change is the appropriate solution.

My testimony comes in two parts. The first explores constitutional amendments in general. The second responds to the suggestion that an amendment is necessary to eliminate the possibility that activist judges, at the federal or state level, will impose same-sex marriages on states that do not wish to recognize them.

I. The American Tradition of Constitutional Amendment

A. Stability and Passion: The View from the Founding

By intentional design, the Constitution is exceedingly difficult to amend. James Madison outlined the basic reasons. In the Federalist No. 43, he noted that amending the Constitution must not be made so difficult as to "perpetuate its discovered faults." But he warned "against that extreme facility" of constitutional amendment "which would render the Constitution too mutable." In the Federalist No. 49, he elaborating the point, stressing that amendment should be reserved for "certain great and extraordinary occasions."

Madison's thinking on this count had two principal strands. First, the national Constitution should be stable; a well-functioning republic works best if the text of the underlying framework remains essentially fixed. Thus Madison wrote that "the greatest objection of all" is that constitutional amendment would threaten "the constitutional equilibrium of

the government." Second, and more subtly, constitutional change creates the serious "danger of disturbing the public tranquility by interesting too strongly the public passions" in the issues proposed for constitutional change. Madison emphasized that the founding document had been adopted in a truly extraordinary period, "which repressed the passions most unfriendly to order and concord," and "which stifled the ordinary diversity of opinions on great national questions." The result was to ensure that "no spirit of party, connected with the changes to be made, or the abuses to be reformed," could distort the process. Madison thought that no "equivalent security" could be found in "future situations" - that in ordinary political life, "passions" that were "unfriendly to order and concord" could break out in constitutional debates. In Madison's view, constitutional change should be reserved for "great and extraordinary occasions" to keep our founding document stable and to reduce the level of national polarization and conflict.

B. Amendment Traditions: Rights and Structure

Since its ratification in 1789, the Constitution has been amended only twenty-seven times. Nearly every amendment falls into one of two categories. Most of them expand individual rights. The rest attempt to remedy problems in the structure of the government itself. Thus the nation has developed, over time, a firm tradition governing constitutional amendment, a tradition that elaborates Madison's concerns by restricting fundamental change to two categories of cases.

The first ten amendments, ratified in 1791, make up the Bill of Rights, which guarantees liberties ranging from freedom of speech, assembly and religion to protection of private property and freedom from cruel and unusual punishment. In the aftermath of the Civil War, three new amendments were ratified: to prohibit slavery, to guarantee African-Americans the right to vote, and to assure everyone a panoply of rights against state governments, including the "equal protection of the laws." During the twentieth century, a number of constitutional amendments have expanded the right to vote, which has become a centerpiece of the amendment process. Thus for example, the franchise was granted to women (1920) and to 18-year-olds (1971); poll taxes were forbidden in federal elections (1964); and the District of Columbia was granted representation in the Electoral College (1961).

Many other amendments fix problems in the structure of the government, sometimes by filling gaps in the original document, sometimes by increasing the democratic character of our basic charter. An early amendment, ratified in 1804, specifies the rules for the operation of the Electoral College. In 1913, the Constitution was changed to require popular election of senators; in the same year, an amendment authorized Congress to impose an income tax (and thus solved what the nation believed to be an important defect in the original document). A 1951 amendment, responding to Franklin Roosevelt's four terms as president, bans the president from serving more than two terms. A related amendment from 1967 specifies what happens in the event that the president dies or becomes disabled while in office. This amendment, like those just discussed, makes a clarification or correction to structural defects in the Constitution as originally designed.

Only two amendments fall unambiguously outside of the defining categories of expanding individual rights and responding to structural problems. Ratified in 1919, the 18th Amendment prohibits the sale of "intoxicating liquors." Ratified in 1933, the 21st Amendment repeals the 18th.

C. Theory and Practice: Stability, Polarization, and Clarity

What accounts for our remarkable unwillingness to amend the Constitution except to expand rights and to fix structural problems? The simple answer borrows from Madison. From the founding period, Americans have prized constitutional stability. The nation has agreed that the document should not be amended merely to incorporate the majority's position on the great issues of the day. For those issues, we rely on the federal system and on democracy. More than that, Americans have feared that large-scale constitutional debates could lead not only to ill-considered change but could also split and polarize the country. When our citizens differ, we use the other institutions that we have, not constitutional reform. And when the nation's citizens and leaders object to trends within the Supreme Court, or within other institutions of the federal or state government, they have almost always avoided constitutional amendment, even on concrete issues on which they feel deeply.

In the 1930s, for example, President Franklin Delano Roosevelt was repeatedly rebuffed by an aggressively conservative Supreme Court, which endangered the legislation of his New Deal. Change was made not through

constitutional amendment, but through the democratic process, which eventually helped lead to dramatic alterations in constitutional understandings. In the 1960s, President Richard Nixon sharply challenged an aggressively liberal Supreme Court; change was made not via constitutional amendment, but through political processes, which led the Court to shift its direction. The examples could easily be multiplied. More recently, the Constitution has not been amended in the face of many controversial Supreme Court decisions - protecting the right to choose abortion and striking down campaign finance regulation, the Violence Against Women Act, the Religious Freedom Restoration Act, and many more. (Indeed the Rehnquist Court has struck down more than two dozen Acts of Congress in recent years, and none of these invalidations has spurred serious calls for constitutional amendment.)

In short, the nation has built firmly on Madison's judgment about the need for caution in altering the founding document. The result was been to create a kind of common law tradition of constitutional change, reserving alterations to expansions in fundamental rights or to remedying important problems in governmental structure.

There is an equally general point in the background. Many constitutional amendments raise novel and complex questions of interpretation, in a way that produces grave uncertainty and a potentially significant increase in federal judicial power. Many American citizens, though committed to equal rights for women, opposed the proposed Equal Rights Amendment on the ground that it would create interpretive difficulties, amount to a bonanza for the legal profession, and produce unanticipated and unintended outcomes from the federal bench. The same arguments were made, plausibly, by critics of the proposed Balanced Budget Amendment. Any amendment dealing with family law is likely to create serious difficulties in this vein.

Consider two recent proposals. The language of the Musgrave/Allard proposal says that neither federal nor state constitutions, nor state or federal law, "shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Any lawyer is likely to wonder: What is meant by "the legal incidents thereof"? Does this provision ban civil unions? Does it forbid states from allowing people in same-sex relationships to have the (spousal) right to visit their partners in hospitals? Does it bear on rules governing insurance? At first glance, the term "legal incidents thereof" appears to forbid states from making cautious steps in the direction of permitting civil unions. And does the word "require" include "permit"? Or consider the recent Allard amendment, which says that neither the federal Constitution nor any state Constitution shall be construed to require that marriage or "the legal incidents thereof" must be "conferred" on same-sex marriages. The most serious difficulty is that the words "legal incidents thereof" raise the same questions about civil unions and spousal benefits and privileges.

These questions are merely illustrative of the grave difficulties of drafting a constitutional provision that does not produce unintended confusion. Such difficulties buttress the argument for reserving constitutional change to "great and extraordinary occasions."

II. Same-Sex Marriage: A Problem Requiring Amendment?

None of these points shows that the Constitution should never be amended for reasons that fall outside of the two basic categories that define our amendment tradition. We could certainly imagine situations in which the citizenry believed that formal amendment was necessary (for example) to overrule a damaging and egregiously wrong Supreme Court decision or to correct serious and otherwise irremediable blunders at the state level.

In this light, the impetus for the proposed amendment is easy to understand. The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const., art, IV, section 1. Suppose that one state - Massachusetts, for example -- recognizes same-sex marriages. Is there not a danger that other states, whatever their views, will be forced to accept same-sex marriages as well? Perhaps people will travel to Massachusetts, marry there, and effectively "bind" the rest of the union to one state's rules, forcing all states to recognize marriages that violate their policies and judgments. A national solution might seem necessary if one state's unusual judgments threaten to unsettle the practices of forty-nine other states. This is the hypothetical scenario that motivates some people to favor constitutional change.

A. Marriage and Public Policy

The response to the underlying fear here is simple. The hypothetical scenario is unlikely in the extreme. The central reason is that the full faith and credit clause has never been understood to bind the states in this way. For over two hundred years, states have worked out issues of this kind on their own. It is entirely to be expected that in a union of fifty diverse states, different states will have different rules governing marriage. American law has established practical strategies for ensuring sensible results in these circumstances, as each state consults its own "public policy," and its own connection to the people involved, in deciding what to do with a marriage entered into elsewhere. In short: States have not been bound to recognize marriages if (a) they have a significant relation with the relevant people and (b) the marriage at issue violates a strongly held local policy. In the particular context of marriages (involving licenses rather than formal judicial judgments), states have had room to pursue policies of their own.

Thus, for example, the first Restatement of Conflicts says that a marriage is usually valid everywhere if it was valid in the state in which the marriage occurred. But section 132 lists a number of exceptions, in which the law of "the domicile of either party" will govern: polygamous marriages, incestuous marriage, marriage of persons of different races, and marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state. The Second Restatement of Conflicts, via section 283, takes a somewhat different approach. It says that the validity of a marriage will be determined by the state that "has the most significant relationship to the spouses and the marriage." It also provides that a marriage is valid everywhere if valid where contracted unless it violates the "strong public policy" of another state that had the most significant relationship to the spouses and the marriage at the time of the marriage. Thus a state might refuse to recognize incestuous marriages, polygamous marriages, or marriages of minors below a certain age.

The two Restatements show that it is a longstanding practice for interested states to deny validity to marriages that violate their own public policy. For example, a state need not recognize a marriage that it deems incestuous, even if that marriage was valid in the state in which it was performed. See, e.g., Osoinach v. Watkins, 180 So. 577 (Ala. 1938) (marriage between nephew and widow of uncle) Petition of Lieberman, 50 F. Supp. 120 (EDNY 1943) (marriage between niece and uncle). In Osoinach, the Court quoted a general authority on the basic rule:

In Corpus Juris, Vol. 38, § 3, p. 1276, the rule as what law governs in determining the validity of marriage is thus stated: "The general rule is that validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the lex loci contractus, it will be held invalid wherever the question may arise. An exception to the general rule, however, is ordinarily made in the case of marriages repugnant to the public policy of the domicile of the parties, in respect of polygamy, incest, or miscegenation, or otherwise contrary to its positive laws."

Id. (emphasis in original). Under the same principle, states may refuse to recognize marriages by a person who has recently divorced, if such marriages violate their public policy. See Horton v. Horton, 198 P. 1105 (Ariz. 1921); Lanham v. Lanham, 117 N.W. 787 (Wisc. 1908). Many cases have reflected a general view of this kind. See, e.g., In re Vetas's Estate, 170 P.2d 183 (1946); Maurer v. Maurer, 60 A.2d 440 (1948); Bucca v. State, 43 N. J. Super 315 (1957); In re Takahashi's Estate, 113 Mont. 490 (1942); In re Duncan's Death, 83 Idaho 254 (1961); In re Mortenson's Estate, 83 Ariz. 87 (1957). There is no Supreme Court ruling or even suggestion to the effect that this view violates the Full Faith and Credit Clause.

All this demonstrates that the proposed amendment would respond to an old and familiar problem that has heretofore been settled through long-settled principles at the state level and without federal intervention. If some states do recognize same-sex marriage, the problem would be handled in the same way that countless similar problems have been handled, via "public policy" judgments by states having significant relationships with the parties. Different "public policies" will produce different results. This is consistent with longstanding practices and with the essential constitutional logic of the federal system. In the area of marriage, states have always been authorized to adopt diverse practices, consistent with the norms and values of their citizens. What one state has not been allowed to do is to bind other states to its preferred norms and values. Hence the hypothetical scenario rests on a misunderstanding of the applicable legal principles.

Might federal courts invalidate, on either grounds of equal protection or privacy, state court refusals to recognize same-sex marriages? Under existing law, it would not be frivolous to argue that such refusals are a form of discrimination, raising serious problems under the equal protection clause (a question discussed below). But there is a large distance between "not frivolous" and "likely to be convincing to current federal judges." If federal courts

accepted this argument, and ruled that the Constitution prohibits states from discriminating against same-sex marriages in this way, they would be essentially ruling that the Constitution requires states to recognize same-sex marriages. No such ruling should be anticipated.

B. The Defense of Marriage Act

The Defense of Marriage Act (DOMA), 28 USC 1738C, attempts to anticipate and to prevent the hypothetical scenario, expressly freeing states from whatever obligation they might have to recognize same-sex marriages. I have suggested that DOMA is unnecessary to produce this result; but if DOMA is taken in accordance with its terms, the scenario will not transpire. Some people urge that federal judges will strike down DOMA, and they are right to speculate that constitutional objections might be mounted. Notably, however, no such challenge has been made, and even if it were successful, the preceding discussion suggests that the hypothetical scenario would be most unlikely to occur.

In Romer v. Evans, 517 US 620 (1996), the Court did invalidate a unusual amendment to the Colorado Constitution, one that forbade state and local government from outlawing discrimination on the basis of sexual orientation. But Romer was an exceedingly cautious and narrow ruling, one that cannot plausibly be read to say that states must recognize same-sex marriages. In its most recent pronouncement, Lawrence v. Texas, 123 S. Ct. 2472 (2003), the Court invalidated a law making same-sex sodomy a crime. But the Court went out of its way to say that its ruling did not extend to the question of same-sex marriage. In my view, Lawrence is best understood as a narrow decision invalidating an outmoded law that no longer had support in public convictions, as reflected in a pattern of nonenforcement. So understood, or even if understood more broadly, Lawrence does not call for striking down DOMA.

But the more fundamental point is the one I have been emphasizing. Even if DOMA were invalidated, the longstanding tradition, outlined above, would be unaffected: States would be permitted to decline to recognize same-sex marriages that are inconsistent with their own policies.

C. Judicial Activism

Many proponents of the proposed amendment have voiced concerns about "activist judges," and especially about activist judges at the federal level, reading the federal Constitution to require states to permit same-sex marriages. I share this general concern. In the domain of family law, as elsewhere, judges should tread cautiously. This point is especially important for federal judges interpreting the national Constitution. At least if issued by the Supreme Court, such interpretations are final and binding until they are overruled, either by the Court itself or by constitutional amendment. Even those who favor same-sex marriages, or who do not object to them, should be skeptical about the idea that federal courts should require states to recognize them.

But here too the underlying concern is hypothetical in the extreme. No federal judge has said -- not once -- that the existing Constitution requires states to recognize same-sex marriages. No member of the Supreme Court has indicated that the equal protection clause imposes such a requirement. In both Romer and Lawrence, the Court has issued narrow, cautious rulings. To be sure, the picture is different in a very few state courts. Most important, the Supreme Judicial Court of Massachusetts has ruled that the state constitution forbids Massachusetts to refuse to give marriage licenses to same-sex couples. See Goodridge v. Department of Public Health, 798 N.E.2d 941 (2003). But even in Massachussetts, well-established processes are now underway for amending the state constitution, if the citizens wish, to overturn the court's decision. In fact constitutional amendments are far more common at the state than the federal level. (The Alabama Constitution, for example, has been amended over 700 times; the California Constitution, over 500 times; the Texas Constitution, over 300 times; and the New York Constitution, over 200 times.)

In the overwhelming majority of states, there is no effort to redefine marriage to include same-sex couples, and indeed about three-quarters of the states have defined marriage to preclude such marriages on their own. I have urged that constitutional amendments are inconsistent with our traditions if they fall outside of the two categories that have defined American practices. But even if those categories do not exhaust the proper grounds for changing our charter, there is no good argument for doing so here, simply because the current situation creates no problem that an amendment is necessary to solve.

Conclusion

By tradition, amendments to the constitution are limited to "great and extraordinary occasions." By tradition, amendments are almost always reserved to the expansion of individual rights and to the correction of serious problems in governmental structure. Whatever one thinks of same-sex marriage, the existing situation cannot plausibly be placed in either category. Issues of family law are best handled at the state and local level, as different norms and values give rise to differences in state and local law. This is an area in which federal judges have been treading exceedingly cautiously, as they should. The system of federalism is perfectly capable of resolving the issues that might arise if states seek, on grounds of public policy, to deny recognition to marriages that are valid where performed.

The proposed amendment responds to a situation that is best handled through existing institutions. It would violate the founders' commitments to constitutional stability and to eliminating unnecessary divisions among American citizens. And it would violate our tradition, based on over two centuries of practice, of resolving almost all of our disputes through the federal system and through democratic processes. For these reasons, the proposed amendment should be rejected.