Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 3, 2004

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Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Property Rights
Hearing on "Judicial Activism vs. Democracy:
What are the National Implications of the Massachusetts Goodridge Decision
And the Judicial Invalidation of Traditional Marriage Laws"
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There are at least two topics that this subcommittee and the Senate Judiciary Committee have ignored while preparations were underway to hold at least three hearings on federalizing marriage by way of a constitutional amendment.

First is the lack of ongoing and meaningful congressional oversight in connection with the war on terrorism. Tomorrow will mark one year since the Attorney General of the United States last appeared before the Senate Judiciary Committee in anything approaching congressional oversight of the USA PATRIOT Act or the war on terrorism. I have sought his testimony on PATRIOT Act implementation and the Administration's prosecution of the war on terrorism for months and have consistently been rebuffed. This subcommittee and the Senate Judiciary Committee have not fulfilled the responsibility to ensure the rights of the American people, and government's accountability to the American people, by providing vigorous oversight of the most insular and unilateral Administration in memory.

Second, this subcommittee has done nothing with respect to the fundamental protection of voting rights. Just last week, the Republican Leader offered and then had to withdraw a legislative amendment regarding certain bilingual and preclearance provisions of the Voting Rights Act. Chairman Hatch previously sought to offer but then withdrew a similar amendment. In all of 2003 and now 2004, this subcommittee has convened not a single hearing to provide the hearing record on making permanent the Voting Rights Act. Democratic Senators have offered to work on these important measures, most recently when Senator Kennedy extended that offer again last week. Given the standards recently imposed by the Supreme Court in federalism cases, it is the responsibility of this subcommittee to make that record in order to support such an extension of fundamental rights.

There also have been serious concerns that have arisen across the country that electronic voting machines being programmed by a company whose executives have strong commitments to partisan politics in favor of one party will unfairly skew the voting in the upcoming election. There have also been concerns about the quality, reliability, and security of electronic voting machines like these. There has been no attention to these pressing issues, either.

Instead, this subcommittee gathers today for the second in an extended series of hearings about federalizing marriage by tacking onto the United States Constitution a proposal to take authority over this traditional matter of State law away from the 50 States. When we last met on this topic, a number of us joined in opposing such an effort to use the Constitution for wedge politics, to take authority from the States, and to use the constitutional amendment process for the first time to limit instead of to expand the rights of the American people, to permanently confine millions of Americans now, and millions more tomorrow, as second-class citizens. My opposition to amending the Constitution in such a way is as strong today as it was then.

Vermont's Experience

In Vermont, over the last five years the people met this challenge. A bipartisan majority of the Vermont legislature in 2000 enacted and the Governor signed a "civil unions" law that provided those benefits and rights the State made available to married couples. That law was crafted jointly by Republicans and Democrats in Vermont's legislature.

The debate over civil unions in Vermont was without question emotional, and it proved to be a difficult period for my State. Some sought to make it divisive. Others of us sought to find consensus. I vividly recall the meeting Senator Stafford attended with Senator Jeffords and myself, in which he spoke so eloquently about love, commitment, tolerance and the Vermont way. Bob Stafford did a lot to calm what could have been choppy and destructive waters. There were many profiles in courage in Vermont. Many legislators - Democrats and Republicans - lost their seats, knowing they would, because they did what they believed was right and supported civil unions. Four years later, the Vermont civil unions law remains on the books, and there is no crisis in everyday life nor inside our statehouse over this issue. For many Vermonters, it has provided great happiness.

David Moats, the Pulitzer Prize winning editorial page editor of The Rutland Daily Herald in Vermont, has recently published "Civil Wars," a moving book about the creation of civil unions in Vermont. In it, he tells the stories of the same-sex couples who challenged Vermont law in State court, including Nina Beck and Stacy Jolles, a lesbian couple whose dedication to one another allowed them to cope with the death of their 2-year-old son, and Stan Baker, the named plaintiff in the case and a relative of Ethan Allen. Moats writes also of a Brattleboro man in his 70s who obtained a civil union license the day they became legal, telling the town clerk, "You'll just never know what this means."

I talk about the Vermont experience because I fear that some in this Congress - and the President - support reversing it. I will defend Vermont's rights to have met this challenge and to have resolved this issue on behalf of the people of Vermont. I talk about it because when we speak of the "national implications" of the Goodridge decision, and whether to amend the United States Constitution to limit the rights of individuals, we should not lose sight of the real people who would be directly affected by the restrictions that the President and some in Congress seek to enact.

An Invitation to the President

A recent editorial in the Rutland Daily Herald summarized the issue well. I ask that a copy be included in the record. The Rutland Herald noted: "There are genuine differences in our nation over gay marriage, and there always will be. But for [President] Bush to propose etching into the Constitution an amendment that would enflame those differences shows how low he is willing to stoop in pandering to our fears." The Herald went on to suggest: "Someone ought to invite [President] Bush to Vermont, to sit down with some of the hundreds of couples joined by civil union, to witness the goodness, but also the ordinariness, of their lives." Today I would like to publicly issue that invitation, so that President Bush can meet these Vermonters, and if he still feels it necessary, to tell them why he supports amending the Constitution to take away their rights.

Public Debate in Massachusetts

Today, through democratic debate and legislative action, Massachusetts is seeking to meet the challenge that Vermont met a few years ago. Unlike the President and some in this body, I have confidence that the people of Massachusetts and their representatives will meet that challenge. States have had authority throughout our history to regulate marriage. Consideration by Massachusetts of its marriage laws has begun; it has not concluded. There will be a public debate. I hope there will be statesmen in Massachusetts, like Bob Stafford in Vermont, who will point the way toward tolerance and consensus, and I hope that those who seek to fan the flames of division will be thwarted. I do not accept the premise that democracy has been defeated in Massachusetts; indeed, the people of Massachusetts - through their elected officials - are in the midst of deciding whether and, if so, how to amend their State Constitution. If the people decide that Goodridge was wrongly decided, they have a remedy.

The President and some in Congress seem to have no patience for democracy and have concluded that they know best and should decide for the people of Massachusetts and every other citizen in every other State what their laws should be by inscribing an inflexible prohibition into the Constitution of the United States. Indeed, this hearing appears to be an attack not only on the unsettled situation in Massachusetts but upon the settled law of Vermont.

Those now supporting a federal marriage amendment to the Constitution of the United States have reached their position preemptively and despite the fact that the federal Defense of Marriage Act - still the law of the land - allows States significant latitude about whether to recognize marriages from other States.

Amendments Before Congress

Thus far, only one proposed constitutional amendment has been introduced in Congress.
I understand that Senator Hatch will introduce a more limited amendment, to guarantee that states need not recognize same-sex marriages accepted in another state. The Defense of Marriage Act already accomplishes that purpose, and it remains the law of the land - any such Constitutional amendment would be premature, at the very least. And as the written testimony today of Professor Lea Brilmayer demonstrates, even if DOMA did not exist, states would still have wide discretion to disregard the decisions of other states on family law matters such as marriage. With DOMA, there is no reason to believe States will be forced against their will to recognize same-sex marriages. We should not preemptively amend the Constitution to address such a speculative concern.

The amendment now pending in Congress, introduced by Representative Musgrave in the House and Senator Allard in the Senate, would be a breathtaking imposition on our State governments. It says that no State Constitution or law "shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Under this language, even modest State laws designed to provide limited economic benefits to same-sex couples would be constitutionally suspect. Such language would almost certainly take away the rights of States to create domestic partnerships or civil unions.

It would undo the progress we have made in providing survivor benefits for those who serve our country and for those who died in connection with September 11. Consistent with DOMA, a few years ago I led an effort to extend survivors' benefits to the partners and families of the victims of the September 11 tragedy, and we ensured through enactment of the Mychal Judge Act that public safety officer benefits were available without discrimination. Extending benefits such as these, including hospital visitation rights and others, are at the heart of our caring society. We should want people to commit to each other in lasting relationships. We need to be mindful not to enshrine discrimination in our laws.

Uncertainty in the law and differences among the laws of the States is not a new feature of our federal union. It is not justification for preemptively declaring war on gay and lesbian Americans or tacking a statement of intolerance onto the Constitution of the United States.

Questions for the President

After the President changed his position and endorsed a federal marriage amendment to the Constitution of the United States, I wrote him a letter. I ask that a copy of my letter be included in the record. Given the importance of the language used in any constitutional amendment, I asked him whether he supported the language of the only constitutional amendment introduced at that time in the House or the Senate, or whether he proposed other language be added to the Constitution. I have not received a reply. Nor has the Administration sent a representative to testify here today. Given the apparent emergency that the President indicated inspired his change of position, I would have thought he would know what he wanted Congress to consider when he so dramatically called upon Congress to act. Act on what? Where is the President's proposal? Where is the language he endorses? How strident does he wish the language to be in restricting people's rights? How does he intend to provide expressly in the constitutional language the ability of States to extend rights and benefits to their citizens as they see fit?

Without a response from the White House and without an Administration spokesperson, we are left with little more than a political position without substance. The Constitution should not be used for partisan political purposes in my view. Proposing an amendment to the basic charter of rights is a serious matter and needs to be approached seriously. Otherwise, we risk diminishing respect for the Constitution and for all our basic institutions.

President's Skewed Definition of 'Activism'

Some seek to inflame passions by presenting this issue as one of "judicial activism." They do not mention that three of the four Massachusetts justices who made up the majority were appointed by Republican Governors. It is increasingly apparent that for this President "judicial activism" is defined as any decision with which he disagrees. Indeed, to justify his support for a federal marriage constitutional amendment at this time, the President must believe that the conservative United States Supreme Court is likely filled with unprincipled judicial activists who will overturn DOMA at their first opportunity.

These same critics of "judicial activism" support federal nominees who are among the most strident and ideologically driven in our history. Take for example the nomination of California Supreme Court Justice Janice Rogers Brown to the District of Columbia Circuit. Justice Brown has dissented from rulings to uphold State laws regulating economic activity that have offended her own devotion to laissez faire economic theory. She has been criticized for "judicial lawmaking," and a Republican colleague on the California Supreme Court has accused her of undermining confidence in the courts through her activist approach.

I retain confidence in the people of Massachusetts and their governing institutions. I see the people of the nation seeking ways to recognize the human dignity of all. Americans are a compassionate and tolerant people. They do not need this Committee, this Congress, or the President of the United States to foreclose debate or constrict their rights that are enshrined in the Constitution.

There are times in our history when the courts have been the bulwark that protected our civil rights and liberties. They did so in Brown v. Board of Education and again in Loving v. Virginia, in which the Supreme Court struck down 16 State laws seeking to ban interracial marriage. They are being called upon to do so in connection with this Administration's implementation of the USA PATRIOT Act and prosecution of the war on terrorism. I wish the Committee and the Senate were more actively interested in providing balance and accountability to Executive policies and practices through effective oversight, and that some were less devoted to political wedge politics that demean people and demean the governmental institutions needed in these difficult times.

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