Statement of

The Honorable John Cornyn

United States Senator
Texas
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U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"A Proposed Constitutional Amendment to Preserve Traditional Marriage"

Tuesday, March 23, 2004, 10 a.m., Russell Senate Office Building Room 325

This hearing of the Senate Committee on the Judiciary shall come to order.

Before I begin my statement, I want to thank Senator Hatch for scheduling this hearing, and for inviting me to chair it. It is timely and appropriate for this hearing on the preservation of traditional marriage to be held in the Judiciary Committee. After all, this is the only committee that has jurisdiction over both constitutional issues and judicial issues. And of course, the only reason we are here today is that activist judges have inserted their personal political agenda into our nation's most important legal document, our U.S. Constitution. So I commend Chairman Hatch for wanting to address this constitutional and judicial problem.

I also want to thank Senators Leahy and Feinstein and their staffs for working with my office on today's hearing. Today's topic triggers the strong passions and emotions of well-meaning people on both sides. It is important that we acknowledge the hard work of all parents who are raising children in traditional and nontraditional environments alike - while at the same time we adhere to the dream we have for every child, to be raised by their own mother and father, under the shelter and protection of the traditional institution of marriage. Likewise, it is important that today's hearing is the culmination of bipartisan cooperation. The general custom for hearings in this committee is a 2 to 1 ratio for witnesses. But Senator Leahy requested, and I was happy to agree to, a 1 to 1 ratio today, for both members and legal experts. On such an important issue, I would like to work in a bipartisan fashion, as was done with the Defense of Marriage Act back in 1996.

OPENING STATEMENT

Today's hearing will consider and examine carefully "A Proposed Constitutional Amendment to Preserve Traditional Marriage."

CONSTITUTIONAL AMENDMENTS

The United States Constitution cannot and should not be amended casually. Indeed, our Founders deliberately designed the Constitution to make it difficult to amend. But difficult does not mean impossible - nor does it mean improper. To the contrary, our Founders recognized that situations would arise when an amendment would become necessary and appropriate. George Washington, the President of the Constitutional Convention, said that "[t]he warmest friends and the best supporters the Constitution has do not contend that it is free from imperfections. . . . The People . . . can, as they will have the advantage of experience on their Side, decide with as much propriety on the alterations and amendment which are necessary."

Indeed, our Constitution has been amended no fewer than twenty-seven times in our nation's history - most recently in 1992. Sometimes, we amend in order to alter the allocation of power between federal and state government, or

between different branches of the same government. Today's amendment, however, does not seek to alter the allocation of power at all, but rather to reinforce the original allocation of power that the Founders themselves designed. Indeed, today's amendment is one of a long line of constitutional amendments that have been ratified as a democratic response to judicial decisions rejected by the American people - a list that includes the 11th, 14th, 16th, 19th, 24th and 26th amendments.

As members of Congress, we must never disparage our role in the democratic process. In the vast majority of circumstances, we can discharge our duties through the introduction, consideration, and enactment of statutes. On a few occasions, however, statutes are not enough. On a few occasions, a constitutional amendment may be the only mechanism available to the American people to participate in self-government.

THE DEFENSE OF MARRIAGE

Today presents one such occasion. And the issue is not legally complicated. Today we will hear from legal experts who have carefully studied recent U.S. Supreme Court decisions and analyzed the extent to which they pose a serious federal judicial threat to traditional marriage laws around the nation. We certainly look forward to their testimony. But the issue can be summed up quite simply, without need for legal jargon or case citation. The issue is simply this:

The traditional institution of marriage is not about discrimination - it is about children. However, activists in the streets and on the bench insist that marriage is about discrimination. Indeed, it is precisely because they believe that traditional marriage is about discrimination, that they believe that all traditional marriage laws are unconstitutional and must be abolished by the courts. These activists have left the American people with no middle ground. As I have often said, most Americans firmly believe that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection. And certainly, no one likes to be unfairly accused of intolerance. But the only way for people of good faith to defend democracy and the traditional institution of marriage against this judicial onslaught - based on false charges of discrimination - is a constitutional amendment.

That is the issue in a nutshell. Either you believe that traditional marriage is about discrimination and therefore must be invalidated by courts, or you believe traditional marriage is about children and must be protected by the Constitution.

The ongoing discussion about marriage in America must be conducted in a manner worthy of our country. It should be (1) bipartisan, (2) respectful, and (3) honest.

BIPARTISANSHIP

Indeed, there is bipartisan consensus on a number of fronts. The traditional institution of marriage has always been the law in all 50 states, and no state legislature has ever suggested otherwise. Just eight years ago, overwhelming Congressional majorities - representing over three-fourths of each chamber - joined President Clinton in codifying a federal definition of marriage through the bipartisan Defense of Marriage Act. This historic and bipartisan consensus exists because, across diverse civilizations, religions and cultures, mankind has consistently recognized the institution of marriage as society's bedrock institution. After all, as a matter of biology, only the union of a man and a woman can reproduce children. And as a matter of common sense, confirmed by social science, the most stable environment for raising children is through the union of the child's mother and father.

The U.S. Supreme Court itself recognized the fundamental importance of the traditional institution of marriage nearly 120 years ago in Murphy v. Ramsey. In that case, the Court unanimously concluded that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than . . . the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." As the Court further noted, the union of one man and one woman is "the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

In light of the strong bipartisan consensus in favor of traditional marriage, it is offensive for anyone to charge supporters of traditional marriage - a group that includes President Clinton and the vast majority of Democrats and Republicans in Congress - with intolerance. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of prejudice, while abolishing American traditions by judicial fiat.

Moreover, Republican and Democratic legal experts alike recognize that the only way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, in previous hearings, Republican and Democratic witnesses alike have recognized the problem and suggested constitutional amendments to defend marriage against judicial activism. It was a Democrat who first proposed a federal amendment to protect marriage in the last Congress. So both the discussion, and the search for constitutional solutions, have been bipartisan.

RESPECT

The discussion should also be respectful. Parents are doing the best job that they can. Relationships based on love, friendship and mutual respect deserve respect. Supporters of traditional marriage also deserve respect - they don't deserve false charges of discrimination. In 1996, Senator Kennedy pointed out that "there are strongly held religious, ethical, moral beliefs that are different from mine with regards to the issue of same-sex marriage which I respect and which are no indications of intolerance." I hope that that spirit continues today.

HONESTY

Finally, the discussion must be honest. Unfortunately, a number of myths have been put forth which demand correction. In my remaining time, I would like to quickly respond to three of those myths.

The first myth is that "my marriage doesn't affect your marriage." That statement does not describe reality. How we arrange the building blocks of our society affects all of us. As the archbishop of Boston, Sean P. O'Malley, recently wrote: "[I]deas have profound effects on our society. A casual attitude toward divorce and cohabitation has had serious consequences for the institution of marriage in the last 20 years. Redefining marriage in a way that reduces it to a financial and legal arrangement of adult relationships will only accelerate the deterioration of family life." Archbishop O'Malley's concerns are substantiated by recent studies in Scandanavia, where the abolition of traditional marriage laws has caused a dramatic increase in the number of children born out of wedlock. If the national culture teaches that marriage is just about adult love, and not about the raising of children, then we should be troubled, but not surprised, by the results.

The second myth is that "we don't need to amend the Constitution to defend traditional marriage." I would like to believe that courts will always enforce traditional marriage laws against lawless officials. The track record is not promising, however. Last year, amendment opponents promised that courts would enforce traditional marriage laws. But they have clearly been proven wrong by recent events. The problem is that a majority of justices today apparently no longer believe in traditional marriage laws. Legal experts across the political spectrum, including some on our second panel today, have predicted that as many as six justices are ready to abolish traditional marriage nationwide - the same six that ruled in Romer and Lawrence. Indeed, one of those six justices - Justice Ruth Bader Ginsburg - has already opined that courts should abolish laws against polygamy.

So the myth that federal constitutional action is unnecessary to preserve traditional marriage is precisely that - a myth. It is a myth that the states can take care of this problem on their own - because under our federal system of government, states have no power to override federal constitutional decisions. Lawsuits to dismantle traditional marriage, as a matter of federal as well as state constitutional law, have already been filed in federal and state courts in Massachusetts, New York, Nebraska, Utah, Florida, Indiana, Iowa, Georgia, West Virginia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, Oregon, Washington, California, and Vermont, as well as my home state of Texas. According to the New York Times, we can expect lawsuits in 46 states by residents who have traveled to San Francisco in recent weeks. Hawaiians and Alaskans took preemptive action when they were faced with state constitutional challenges to their traditional marriage laws. Citizens of Nebraska, Nevada, and other states took preemptive action before suits were even filed. Now that the threat is a federal threat, a federal constitutional amendment is the only way to preserve traditional marriage laws nationwide - before it is too late. America needs stable marriages and families. The institution of marriage is just too important to leave to lawyers and to chance.

The third and final myth is that proponents of traditional marriage are "writing discrimination into the Constitution." This argument is both curious and offensive. In testimony earlier this month, the NAACP declined to oppose traditional marriage laws - and I notice today that the ABA is neutral as well. If marriage were about discrimination, surely both the NAACP and the ABA would oppose it. But it is not, and they did not. At that same hearing, Reverend Richard Richardson of the Black Ministerial Alliance and Pastor Daniel de Leon of Templo Calvario offered powerful testimony about the importance of traditional marriage to their communities - communities that are all too familiar with the scourge of discrimination.

But there is something even more pernicious about this claim of "writing discrimination into the Constitution." Let me repeat what I said earlier: it is precisely because some activists believe that traditional marriage is about discrimination, that they believe that all traditional marriage laws are unconstitutional and therefore must be abolished by the courts. These activists have left the American people with no middle ground here. They accuse others of writing discrimination into the Constitution, yet they are the ones writing the American people out of our constitutional democracy.

So supporters of traditional marriage are faced with an unhappy task. Either we give up the traditional institution of marriage to activists in the streets and on the bench, who see marriage as nothing more than discrimination - or we enshrine the traditional institution of marriage with the constitutional protection that our children need and deserve.

The traditional institution of marriage is too important. It is worth defending. So today, an important constitutional process begins.