Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
March 23, 2004

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Ranking Member, Senate Judiciary Committee
Hearing on "A Proposed Constitutional Amendment
To Preserve Traditional Marriage"
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Today's hearing is merely the latest in what has become a series of hearings on amending the Constitution in one manner or another. It would seem that members of the majority are obsessed with rewriting the Constitution. This is the fourth constitutional amendment to which this Committee has devoted significant time for debate in the 108th Congress, and this is the third hearing this month to debate a constitutional amendment seeking to limit rather than expand the rights of the American people. This proposal is one of 61 constitutional amendments introduced so far this session. Sixty-one amendments to the Constitution introduced in this Congress alone, and more than 11,000 since the 1st Congress was convened. We can only imagine what the Constitution would look like if we had adopted amendments at the wholesale rate seemingly favored by many in the 108th Congress.

I have stated my opposition to the Federal Marriage Amendment at our two previous hearings on this topic, and I state it again today. I oppose the Federal Marriage Amendment because it interferes in a fundamental State matter, and, worse yet, it does so for the purpose of disfavoring a group of Americans. We have never amended our Constitution for that purpose, and we should not start now. The proposed amendment we consider today creates division among the American people. In addition, the timing of these hearings raises concerns that the Constitution is being misused for partisan purposes. Of course, the Republicans who are in the majority in the Senate control the agenda, and this hearing and their concentration on this divisive issue is their choice.

It is all the more disturbing that this hearing takes place less than 24 hours after the sponsors of this amendment have unveiled a new version of it. Proposals to amend the Constitution of the United States that seemingly change as moodily as the latest focus group should give us all the more pause in this rush to amend our national charter.

Neither our witnesses nor the Members of this Committee have had sufficient opportunity to review the new language and the consequences of the multiple changes Senator Allard has proposed. Our witnesses already had prepared their testimony to the Committee before they had even had the opportunity to see this latest version. It is clear, however, that questions raised by the new amendment differ somewhat from the questions raised by the old amendment. As a result, our approach to this hearing would have differed as well. Despite this "bait and switch," the majority rejected our request to postpone this hearing so that we would have an opportunity to review the language and hold this hearing with the respect that is due to our Constitution. At the very least, fundamental fairness requires that the Committee hold a second hearing on this amendment before moving forward on it.

The pace of these hearings, the majority's refusal to postpone today's hearing, and the rhetoric of amendment supporters, including a President of the United States in the midst of a political year, suggests a crisis. Since our last hearing, however, the Massachusetts State legislature and the California Supreme Court have each taken actions that have served to undercut the recognition of same-sex marriage in their own States. Developments in the States have been away from recognition of same-sex marriage and toward recognition of civil unions, in line with the views of the American people. In addition, legal experts have made the case that no States will be made to recognize same-sex marriages from other States against their strong public policy.

Thus, this preemptive attack on the Constitution can no longer be validated by scary allusions to "activist judges." Do Republicans really contend that the United States Supreme Court is staffed by activist liberal judges intent on recognizing same-sex marriages? There is no indication that we are on the verge of such a ruling. There is no case on the Supreme Court docket - or on any federal appellate court docket - that would even raise that issue. We should not alter the Bill of Rights and our Constitution to avert judicial decisions that have not yet even been considered, let alone made, when such a constitutional amendment would hamstring our States in an unprecedented way.

In spite of recent developments, this Committee finds it necessary to return, again, to this divisive issue just days after our last discussion. This hearing has been billed as one focusing on the language of the Federal Marriage Amendment, which Senator Allard and Representative Musgrave have introduced. Given Republican insistence on proceeding with this hearing at this time, even after the 11th hour change in the constitutional language, I want to thank Senator Feinstein for rearranging her schedule to serve as the ranking Democratic member at this hearing.

Of course, we have yet to see the promised alternative constitutional amendment that Senator Hatch has suggested on this topic. Once that language is introduced, if Republicans are serious about actually proceeding to amend the Constitution, the Committee will need to hold hearings on its wording, meaning, and possible effects.

The Hearing

At the outset, I must, again, note for the record some of the important issues this Committee is ignoring while we focus on constitutional amendments to limit the First Amendment and stigmatize homosexual Americans. We are now completing our third month of a short legislative year, and we have still held no hearings on USA PATRIOT Act oversight, even as the President has called for a permanent extension of the law in his State of the Union address and in his campaign speeches. The Chairman and I agreed last year that the Committee should hold an aggressive series of oversight hearings on the PATRIOT Act and related topics, but those hearings have yet to materialize this year.

We have also done nothing about the fundamental protection of voting rights. Last month, 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, our Committee 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, but these offers have not been accepted.

I would hope that we could find at least "equal time" for legislative business and oversight as for the Republican majority's never-ending attempts to churn the text of our Constitution. I fear that this Committee has not fulfilled its responsibility to ensure the rights of the American people, and the Government's accountability to them, by providing vigorous oversight of the most insular and unilateral Administration in memory.

I must also note that the Constitution Subcommittee and this Committee have now all but abandoned earlier interest in questions of government continuity. Constitutional amendments on that topic portrayed as so vital and urgently needed at the beginning of the year have been shoved aside by partisan efforts to exploit the marriage issue for political advantage.

An Amendment That Disrespects States

Senator Allard's Federal Marriage Amendment is breathtaking both in the scope of its intrusion upon the traditional powers of the States and in the lack of clarity in its drafting. There have been press accounts that its wording was the result of conference calls among activists who themselves could not agree on language. I have written the Bush Administration and asked its representatives what language they endorse now that George W. Bush has changed his position and decided to endorse a constitutional amendment on this matter. Although it has been some time and I have provided numerous opportunities for the Bush Administration to respond, I have yet to receive an answer. The Bush Administration has not told me what words they endorse adding to the Constitution on the United States. Perhaps the President supports the old Allard amendment. Perhaps he supports the new Allard amendment, as some news reports suggest, and his Administration was involved in the "bait and switch" that was perpetrated on this

Committee yesterday afternoon. Perhaps he supports a third version entirely that has yet to be introduced in this Congress. He has informed neither this Committee nor the American people.

President Bush has called upon Congress to alter our fundamental charter. We in Congress deal in written proposals and not just convenient political slogans for re-election campaigns. The words of our Constitution are particularly important. The President has still not responded to my February 25 letter or to my questions of his Assistant Attorney General two weeks ago. For the third hearing on this topic, the Bush Administration has chosen not to send a representative to testify. 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. What is it President Bush is for, what proposal does he endorse, where is the language that he endorses be added to the Constitution? How strident does he wish the language to be in restricting people's rights? How restrictive is the language he endorses to constrict the ability of our States to extend rights and benefits to their citizens as they see fit? I know how much this White House is driven by poll numbers. I want to be sure they have seen the Washington Post-ABC News poll earlier this month which found that 53 percent of Americans believe that States should make their own decisions about marriage.

Of course, without a thoroughgoing response from the White House about what it is the President is endorsing, and without an Administration witness, we are left with little more than a political posture without substance. The Constitution should not be used for partisan political purposes. Proposing an amendment to our 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. The Administration's refusal to answer such basic questions and to send a witness to testify suggests a lack of seriousness and a surplus of political motivation about this drive to amend the Constitution that is highly regrettable.

I now turn to the proposal before the Committee. The first sentence of Senator Allard's amendment would create a federal constitutional definition of marriage. Congress has already adopted a definition of marriage for the purposes of Federal law, in the Defense of Marriage Act ("DOMA"). No court has questioned DOMA, and even the advocates of this amendment have not seriously argued that that provision of DOMA is at risk in the courts or that it will be thrown out by the United States Supreme Court. As such, the proponents of this amendment are seeking to define marriage for the States, whether they like it or not. While the political and judicial processes in Massachusetts, California, and elsewhere continue their review of marriage laws, the proponents of this proposed constitutional amendment rush to take those decisions out of the hands of the people and the States for all time. As Professor Lea Brilmayer put it in The Wall Street Journal earlier this month, "In our 200-year constitutional history, there has never yet been a federal constitutional amendment designed specifically to reverse a state's interpretation of its own laws." I ask that a copy of The Wall Street Journal essay by Professor Brilmayer, published on March 9, 2004, be included in the record.

To the extent that this amendment's proponents argue that we need a national definition of marriage to prevent States from being forced to recognize same-sex marriages entered into in other States, they ignore the thoughtful testimony offered by Professor Brilmayer at our last hearing on this topic. The Full Faith and Credit Clause has not been interpreted to require States to recognize other States' marriage licenses that violate their own public policies. States have refused to recognize marriages between cousins, between uncles and nieces, and even marriages entered into within a year of the divorce of one of the parties. In other words, States have always had an inherent right to follow their own policies about marriage, regardless of what other States do. Federal law in the form of DOMA enhances that right by giving specific congressional approval to States that decline to recognize same-sex marriages.

The brand new second sentence of the Allard amendment is no less troubling for the last-minute tinkering of its sponsors. It forbids the Federal Government and any State government from construing the Constitution of the United States and any State Constitution to allow the "legal incidents" of marriage to "any union other than the union of a man and a woman." As such, it would put legal recognition and protection of same-sex couples outside the scope of all 50 State Constitutions - even if the people of a State freely voted to include civil unions or same-sex marriages in their Constitution. In other words, States could pass a law allowing civil unions but could not pass a Constitutional provision doing so. This is extraordinary micromanagement.

In addition, courts would be prevented from recognizing any right traditionally associated with marriage that is not explicitly recognized by a Federal or State statute. This is a breathtaking invasion on the traditional province of courts, State or Federal.

I do not understand how anyone could support this amendment if they believe in the rights of States, the integrity of the Constitution or in fundamental fairness.

The people's representatives in Vermont passed a law governing civil unions and various benefits four years ago. They did so after a Vermont Supreme Court ruling in Baker v. Vermont found that it violated a provision of the Vermont Constitution (one that does not have a Federal parallel) to deny same-sex couples the benefits provided to opposite-sex couples. That Vermont decision would have violated the Federal Constitution were this Amendment then in place. I will never stop defending Vermont's rights to govern Vermont according to our constitution, laws, and tradition, and to have made the decision to provide civil unions for same-sex couples. As we conduct this debate, I remember the real people - in Vermont and elsewhere - who would be directly and adversely affected by this cavalier and ever-changing drive to amend the Constitution.

I think Georgetown law professor Michael Seidman was correct when he stated in written testimony to the Constitution Subcommittee earlier this month that "[t]he first obligation we should impose on people who want to amend our Constitution is that they think clearly about what they are doing and be careful with the words they use." Professor Seidman predicted that the amendment would "produce endless litigation about its meaning," and would "give judges total freedom to do virtually anything they want." I do not think that the changes Senator Allard and Representative Musgrave announced yesterday afternoon have changed this analysis. For those who purport to be concerned about so-called activist judges, this vague language about the "legal incidents" associated with marriage provides a vast playground of possibilities at the expense of State government and our citizens. Will it affect laws like the Mychal Judge Act, by which we allowed public servants to designate recipients of benefits? Will it prohibit State law developments allowing same-sex partners additional rights traditionally associated with marriage? Will it federalize divorce, alimony, child custody and other laws that our States have traditionally provided?

We must not forget that this is a constitutional amendment we are considering. Every word counts.

Bipartisan Opposition

I hope that Republicans will speak out against this effort. No less an authority than Vice President Cheney said during the 2000 Vice Presidential debate: "I don't think there should necessarily be a federal policy in this area." I suspect we will not hear from him, again, on this issue. When the President abandoned his State of the Union caution to, a month later, endorse this constitutional amendment, the Administration put its political interests above the Constitution.

Our former colleague on this Committee, Senator Alan Simpson, wrote last year: "Like most Americans, and most Republicans, I think it's important to do all we can to defend and strengthen the institution of marriage. And I also believe it is critically important to defend the integrity of the Constitution. But a federal amendment to define marriage would do nothing to strengthen families - just the opposite. And it would unnecessarily undermine one of the core principles I have always believed the GOP stood for: federalism." I thank Senator Simpson for speaking out on this matter. I look forward to hearing the views of Republican Senators currently serving who oppose this effort and will rise to the defense of the Constitution.

I understand that Governor Schwarzenegger of California and a few other Republican Governors, along with former New York City Mayor Rudy Guiliani, have likewise noted that they support "legal incidents" associated with marriage being accorded same-sex couples. I hope they will speak out forcefully on this effort to amend the Constitution that would straightjacket all levels of representative government on these matters.

Conclusion

This proposed constitutional amendment is seriously flawed not only in its words but also in its design. We have amended the Constitution to limit the rights of our citizens only once, with the 18th Amendment, which imposed Prohibition. And that amendment is the only constitutional amendment subsequently repealed. We have never amended the Constitution to limit the rights of a minority group of Americans. If we pass the Allard amendment, we will permanently define millions of Americans today and millions more tomorrow as second-class citizens.

There is an alternative to writing discrimination into our Constitution, and it is as old as our system of government. We can tolerate differences among our States on this issue. Two centuries of law and DOMA protect the right of each State to decide for itself. Some States may allow civil unions or even civil marriage for same-sex couples. Yet others will choose to maintain the status quo. We leave the definition of marriage to religious interpretation and implementation by our great and multiple religious traditions. Americans are free to choose whatever religion they wish. Likewise, our national government has tolerated differences among the States for our entire history. This is no justification for preemptively declaring war on gay and lesbian Americans or tacking a statement of intolerance onto the Constitution of the United States. We need not - and we must not - allow tinkering with the Constitution to become merely the latest election year tool. We should reject this amendment, and we should reject wedge politics.

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