Testimony of

Mr. Bob Barr

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Georgia
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Thank you for offering me the opportunity to tender my views on the perspective from the states on same-sex marriage.

My name is Bob Barr and, until last year, I had the pleasure and the honor of serving in Congress, and on the House counterpart to this august committee, as the representative from the Seventh District of Georgia.

Prior to my tenure in Congress, I served as a presidentially appointed United States Attorney for the Northern District of Georgia, as an official with the U.S. Central Intelligence Agency, and as an attorney in private practice.

Currently, I am again a practicing attorney, Of Counsel to the Law Offices of Edwin Marger, in Jasper, Georgia. I also hold the 21st Century Liberties Chair for Privacy and Freedom at the American Conservative Union. I am on the boards of the National Rifle Association and the Patrick Henry Center, serve on the Legal Advisory Board of the Southeastern Legal Foundation, and consult on privacy issues for the American Civil Liberties Union.

Before I begin, I would like to commend the committee for its willingness to thoroughly deliberate on this issue during four hearings. In the midst of a heated presidential campaign, it would have been very easy for this debate to suffer from the vague sound-bites and generalized talking points that surround so many contentious issues these days.

But I am disturbed by speculation that, in a rush to get the Federal Marriage Amendment to the floor, its supporters intend to bypass any further consideration by this Committee. I respectfully submit that it would be a mistake to cut out the Committee most qualified to assess the wisdom of a fundamental change to our nation's most important document. I urge you, Mr. Chairman, to oppose efforts to circumvent your Committee on an issue of such monumental, lasting and wide-ranging importance.

I appear before you today as a proud conservative whose public career has long been one dedicated to preserving our fundamental constitutional freedoms and ensuring that basic moral norms in America are not abandoned in the face of a creeping "contextual morality," especially among our young.

I am not new to my conservative principles. No one has ever tried to accuse me of being a liberal Republican or a moderate Republican; I have only been a conservative Republican. And, as a conservative Republican, I have never compromised my basic principles - limited government, the free market, steadfast adherence to civil liberties including the right to keep and bear arms

and the rights of the states - in the search for higher office. I appear before you today in that spirit of consistency with conservative ideals.

In-line with those conservative principles, I authored the Defense of Marriage Act, which was signed into law by President Clinton in 1996. DOMA, as it's commonly known, was designed to provide individual states individual autonomy in deciding how to recognize marriages and other unions within their borders. For the purposes of federal benefits only, DOMA codified marriage as a heterosexual union.

In the states, it allowed legislatures the latitude to decide how to deal with marriage rights themselves, but ensured that no one state could force another to recognize marriages of same-sex couples.

It was a reasonable and balanced measure, mindful of federal interests but respectful of principles of federalism. It has never been successfully challenged.

Importantly, at the time of its drafting, many of my colleagues in Congress tried to make DOMA a pro-active, punitive law that would force one particular definition of marriage on the states.

We rejected such an approach then, and we ought to now as well. Simply put, DOMA was meant to preserve federalism, not to dictate morals from Washington. In our federal system, the moral norms of a given state should govern its laws in those areas where the Constitution confers sovereign power to the states or does not expressly grant it to the federal government.

Part of federalism means that states have the right to make bad decisions - even on the issue of who can get married in the state. Resisting the temptation to use the federal government to meddle in state matters is the test of this conservative principle. Indeed, it is the test separating conservative federalists from hard-line social conservatives, willing to sacrifice the Constitution in their understandable anxiety over the sorry state of modern morality.

DOMA was and is faithful to federalism. Even with the maverick actions of a few liberal judges and rogue public officials, the self-correcting balance embedded in federalism remains in place. Already, we are seeing state supreme courts and state legislatures refusing to go along with any broad changes in their marriage laws.

By many accounts, it looks like reasoned argument and democratic deliberation, not unilateral action by misguided activists, will win the day in the marriage debate.

That said, however, we also cannot repeat Gavin Newsomian mistakes by going too far in the opposite direction. The Massachusetts Supreme Court and the mayor of San Francisco were wrong because they took the decision-making process out of the hands of the people.

Matters of great importance, such as marriage, need to reflect the will of the people, and need to be resolved within the democratic process. People need to be able to weigh the merits of the opposing arguments, and vote on those merits. They do not deserve - as Americans - to have one side foisted on them by fiat.

And the states themselves have checks in place against a few rogue individuals. The California state courts are putting the brakes on Mayor Newsom--and the state legislature in Governor Romney's state has already had a lengthy constitutional convention to debate democratically this very issue.

However, some of my fellow social conservatives are today pulling a Newsom with the Federal Marriage Amendment, and even more indefensible from a conservative perspective, they are trying to use the Constitution as their tool.

Conservatives must ask themselves why they abhor the actions of a few "black-robed usurpers," as I called the members of the Massachusetts Supreme Judicial Court when it declared same-sex marriage unconstitutional. We reject this judicial activism because it ignores, outright, general public sentiment and the long-standing values of the community.

Yet, the amendment supported by Governor Romney does the exact same thing. It takes a moral decision out of the states, where it is most likely to be made with the optimal benefit to everyone, and hands it to a couple of lone elected officials. To be frank, I do not appreciate their presumption to dictate morals to my fellow Georgians through misuse of the federal Constitution.

To be clear, I am absolutely not a supporter of granting marriage rights to same-sex couples, which makes my decision to oppose the FMA all the harder. I do not enjoy opposing people who I agree with in substance on matters of process.

Yet, the Constitution is worth that lonely stand.

As currently drafted, the Federal Marriage Amendment would impose a single constitutional definition of marriage for the entire country, and also prohibit any court from applying the U.S. Constitution or any state constitution to provide any of the "legal incidents" of marriage to same-sex couples.

Governor Romney essentially is here to ask the Congress to step in and have the federal government invalidate the actions of the highest state court in his state, and also to strangle before its birth the proposed state constitutional amendment that his own state legislature passed this year. That state constitutional amendment, if passed next session and ratified by his state's voters, would deny marriage rights to same-sex couples, but also provide civil unions. The Federal Marriage Amendment, however, would invalidate any civil union provided by the Massachusetts state constitution, and of course would also invalidate all same-sex marriages in the state.

Thus, the Governor is pleading for this Congress and the federal government to protect him against the Massachusetts state constitution, the Massachusetts legislature, the Massachusetts Supreme Judicial Court, and most ironically, the people of Massachusetts if they eventually ratify the proposed Massachusetts constitutional amendment. I urge this Committee to refuse this request and have Massachusetts resolve its own problems without invoking the full weight of the federal government.

I, along with many other conservative opinion leaders and lawmakers, strongly oppose the Federal Marriage Amendment for three main reasons.

First, by moving what has traditionally been a state prerogative - local marriage laws -- to the federal government, it is in direct violation of the principles of federalism. Second, in treating the Constitution as an appropriate place to impose publicly contested social policies, it would cheapen the sacrosanct nature of that document, opening the door to future meddling by liberals and conservatives. Third, it is unnecessary so long as DOMA is in force.

I will deal with each of these objections in order.

First, marriage is a quintessential state issue. For the purposes of federal laws and benefits, a measure like DOMA is certainly needed. However, individual states should be given an appropriate amount of wiggle room to ensure that their laws on non-federal issues comport with their values. The Federal Marriage Amendment is at fundamental cross-purposes with such an idea in that, simply put, it takes a power away from the states that they have historically enjoyed.

As conservatives, we should be committed to the idea that people should, apart from collective needs such as national defense, be free to govern themselves as they see fit. State and local governments provide the easiest and most representative avenue to this ideal. Additionally, by diffusing power across the federal and state governments, we provide impersonal checks and balances that mitigate against the abuse of power.

To be clear, I oppose any marriage save that between one man and one woman. And, I would do all in my power to ensure that such a formulation is the only one operative in my home state of Georgia. However, do I think that I can tell Alaska how to govern itself on this issue? Or California? Or Massachusetts? No, I cannot. Those states are free to make their own decisions, even if they are decisions I would characterize as bad.

Federalism means that, unless the Constitution says otherwise, states are sovereign. This pertains to marriage.

The second argument against the Federal Marriage Amendment is just as damning. We meddle with the Constitution to our own peril. If we begin to treat the Constitution as our personal sandbox, in which to build and destroy castles as we please, we risk diluting the grandeur of having a Constitution in the first place.

The Founders created the Constitution with such a daunting amendatory process precisely because it is only supposed to be changed by overwhelming acclamation. It is so difficult to revise specifically in order to guard against the fickle winds of public opinion blowing counter to basic individual rights like speech or religion.

Not cluttering the Constitution, and not setting the precedent that it can be changed to promote a particular ideology, is doubly important for us conservatives.

We know that the future is uncertain, and our fortunes unclear. I would like to think people will think like me for a long time to come, but if they do not, I fear the consequences of the FMA

precedent. Could liberal activists use the FMA argument to modify the Second Amendment? Or force income redistribution? Or ban tax cuts?

Quite possibly.

And the dangers are even greater when we have not fully thought through the ramifications of an amendment. I am particularly disturbed that the first sentence of the Federal Marriage Amendment is not limited to state actors. In other words, it appears to bind everyone in the United States to one definition of marriage. From reviewing transcripts of previous hearings, it does not appear that any member of the committee or any witness explored the potential impact of extending a federal constitutional prohibition to private persons. In my review of the Constitution, it appears to me that only the Thirteenth Amendment's abolition of slavery binds even private parties, and appropriately so.

Finally, changing the Constitution is just unnecessary -- even after the Massachusetts decision and the San Francisco circus. DOMA is a perfectly good law on the books that defends marriage on the federal level, and protects states from having to dilute their definitions of marriage by recognizing other states' same-sex marriage licenses.

As its author and sponsor, I have perhaps more pride than most that DOMA has never been invalidated--and have great confidence that the careful deliberations that resulted in DOMA have more than adequately prepared the statute for its eventual journey to Supreme Court review.

We should also take note that the recent attempts to recognize same-sex marriages do not, despite broad media coverage, prefigure any sort of revolution against traditional marriage.

In addition to the federal DOMA, 38 states prohibit same-sex marriage on a state level and, invoking the federal DOMA, refuse to recognize any performed in other states. A handful of states recognize domestic partnerships, most with only minimal benefits like hospital visitation or shared health insurance. One state authorizes civil unions and a couple of others may or may not have marriage on the horizon. Rumors of traditional marriage's untimely demise appear to be exaggerated.

And, truthfully, this is the way it should be. In the best conservative tradition, each state should make its own decision without interference from Washington. If this produces different results in different states, I say hurray for our magnificent system of having discrete states with differing social values. This unique system has given rise to a wonderfully diverse set of communities that, bound together by limited, common federal interests, has produced the strongest nation in human history.

In spite of his second-term election change on the issue, I think Vice President Cheney put this argument best during the 2000 election:

"The fact of the matter is we live in a free society, and freedom means freedom for everybody. And I think that means that people should be free to enter into any kind of relationship they want to enter into. It's really no one else's business in terms of trying to regulate or prohibit behavior in

that regard. . . . I think different states are likely to come to different conclusions, and that's appropriate. I don't think there should necessarily be a federal policy in this area."

I worry, as do many Americans, about the erosion of the nuclear family, the loosening influence of basic morality, and the ever-growing pervasiveness of overtly sexual and violent imagery in popular entertainment. Divorce is at an astronomical rate - children born out of wedlock are approaching the number born to matrimony. The family is under threat, no question.

Restoring stability to these families is a tough problem, and requires careful, thoughtful and, yes, tough solutions. But homosexual couples seeking to marry did not cause this problem, and the Federal Marriage Amendment cannot be the solution.

Thank you again for inviting me to submit comments.