

Statement of

# **The Honorable Patrick Leahy**

United States Senator  
Vermont  
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Subcommittee on the Constitution, Civil Rights, and Property Rights  
Hearing on "An Examination of the Constitutional Amendment on Marriage"  
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As a nation, we are facing many pressing and problematic issues at this very moment -- the war in Iraq, devastation from flooding and hurricanes, record-high fuel prices, the threat of a flu pandemic, and a burgeoning national debt, to name just a few. This Committee is seeking to conduct expedited proceedings on President Bush's nominee to succeed Justice Sandra Day O'Connor on the United States Supreme Court. Perhaps as a distraction from these important matters, we now are asked to again turn to a divisive measure that will contribute nothing to rebuilding the homes that have been destroyed or saving the lives that are threatened or jumpstarting the economy.

As the Members of this Committee surely remember, proponents of the Federal Marriage Amendment last year could not even assemble a bare majority of Senators to move to consider the amendment. At that time we were warned that immediate action had to be taken to protect the fragile institution of marriage, which was said to be under immediate threat by those in black robes.

In the ensuing months, no States have been forced to recognize same-sex marriages. Rather, several States voted to amend their constitutions to ban same-sex marriage. The Defense of Marriage Act remains the law. Now, even more than last year, there is no imminent crisis that demands the diversion of Congress's attention from all these other urgent problems or that justifies an alteration of our founding document.

We heard a lot of rhetoric about "judicial activism" in last year's debate. The proponents of the FMA claimed that we had to pass it in order to prevent courts from inflicting same-sex marriage on the American people against their will. Ironically, the FMA - now renamed the Marriage Protection Amendment - would itself produce a wide range of litigation that judges would need to resolve.

We cannot say that other state courts will not someday follow the lead of the Republican-appointed judges in Massachusetts to interpret their State constitutions to allow gay marriage within their States, or to recognize same-sex marriages entered into in other States. If this is "judicial activism," however, it is of the State-based variety. We should not adopt a doctrine of

constitutional preemption. We should take the prudential course and respect State governments to be responsive to their citizenry.

As the Massachusetts experience has shown, State governments have the tools to respond to decisions they do not like without turning to the Federal government. As a general matter, State constitutions are more easily amended than our Federal Constitution, and in most States, judges are elected, providing an automatic check on their ability to act against the wishes of their citizenry.

By the same token, elected officials in a State may sometimes embrace a decision that the Senate Republican leadership would consider "judicial activism." That is exactly what happened in my State, when each of the justices on the Vermont Supreme Court found in *Baker v. Vermont* that Vermont's marriage laws were unconstitutional because they denied the benefits associated with marriage to same-sex couples. The Vermont Supreme Court referred the matter to the Vermont Legislature, which passed a civil unions law, on a bipartisan basis, after lengthy and often heated deliberation.

I remember a time when leaving States in control of such issues as family law was an easy decision for Members on both sides of the aisle. I am disappointed that our Republican colleagues would endorse this broadly drafted amendment since it so clearly violates the traditions of Federalism and local control that their party, at least in the past, has claimed to respect and cherish.

The particular Federal solution that has been proposed, meanwhile, is exceedingly confusing and subject to interpretation. For example, who would be bound by the provisions of the Marriage Protection Amendment - State actors, private citizens, or religious organizations? What would constitute the "legal incidents" of marriage? Can a legislature pass a "civil unions" law that mirrors its marriage law in all respects, save the word "marriage?" Can the people of a State put protections for civil unions in their State constitution? What State actors are forbidden from construing their own constitutions - the judiciary only, or executive branch officials as well? Of particular concern to me is the fate of the Vermont civil unions that have been formed under the color of state law. Despite an initially contentious debate, this State law remains on the books five years later, and there has been no ensuing crisis in the lives of Vermont families. It is not clear to me, however, whether the proposed amendment would make this law unconstitutional. In short, while the language of the amendment before us has changed slightly from the original version, it raises the same concerns. I look forward to receiving testimony today that will illuminate the problems with the proposed language.

Academic discussion of the proposed language will be helpful but for some time now I have been asking President Bush to explain what language he supports when he gives speeches on the need for a constitutional amendment. Is the language that this subcommittee is considering today endorsed by the President? I note for the record that the White House has not sent a representative to offer his support or concern for the scope of this drastic proposal.

In addition to my concerns that this effort will trample on States' rights, we should all be aware of how the discrimination in such a measure will affect American families that currently exist in this country who seek the protection of civil unions and the acknowledgment of their committed

relationships. As an American who has been married for 40 years, I am a great fan of the institution of marriage. I believe it is important to encourage and to sanction committed relationships. I continue to oppose measures such as the Federal Marriage Amendment. I do not think it is necessary and believe it would be a sad day for our nation if we amended our founding document for the first time to specifically disfavor a group of Americans. I hope that those who claim to care about healthy families will turn away from wedge politics and scape-goating so we can focus on, and I hope, properly address the variety of pressing issues already piling up on Congress's agenda.