Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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At the Senate Judiciary Constitution Subcommittee Markup
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Mr. Chairman, the Constitution of the United States is a historic guarantee of individual freedom. It has served as a beacon of hope, an example to people around the world who yearn to be free and to live their lives without government interference with their most basic human decisions. I took an oath when I joined this body to support and defend the Constitution. I am saddened, therefore, to be once again debating a constitutional amendment that is inconsistent with our Nation's history of expanding freedom and liberty.

The proposed constitutional amendment we will debate today has no better chance of getting a two-thirds majority in the Senate than it did last year. I want to thank the Chairman for his willingness to hold this subcommittee markup. However, I fear that the rush to mark it up in this subcommittee so quickly after our last hearing, which exposed numerous uncertainties about its meaning, is simply the beginning of an effort to tee it up for an election year floor vote, regardless of whether these uncertainties are resolved. That is unfortunate. We should not play politics with the Constitution. Nor should we play politics with the lives of gay and lesbian Americans who see this constitutional amendment as an effort to make them permanent second class citizens.

This debate is also a distraction from the serious issues facing this Congress. Health care, the war in Iraq, high gas prices, relief to the victims of Hurricane Katrina -- these are the issues which the American people are demanding that Congress address. But instead, we will spend our time debating this poorly thought out, divisive, and politically motivated constitutional amendment that everyone knows has no chance of success in the Senate. Even more troubling is that this effort risks stoking fear and encouraging bigotry toward one group of patriotic and law abiding Americans.

This debate is not really about supporting marriage. We all agree that good and strong marriages should be supported and celebrated. The debate on this floor today is about whether we should amend the U.S. Constitution to define marriage. The answer to that question has to be no. We do not need Congress to legislate for all States, for all time, on a matter that has been traditionally handled by the States and religious institutions since the founding of our Nation. For that reason alone, this amendment should be defeated.

There is no doubt that the proposed federal marriage amendment would alter the basic principles of federalism that have served our nation well for over 200 years. Our Constitution granted limited, enumerated powers to the Federal Government, while reserving the remaining issues of government, including family law, to State governments. Marriage has traditionally been regulated by the States. As Professor Dale Carpenter told the Constitution Subcommittee in its

first hearing in the fall of 2003, "never before have we adopted a constitutional amendment to limit the States' ability to control their own family law."
Yet, that is exactly what this proposed amendment would do. It would limit the ability of states to make their own judgments as to how best to define and recognize marriage or any legally sanctioned unions. Surely both Republicans and Democrats can agree that marriage is best left to the States and religious institutions.
One of our distinguished former colleagues, Republican Senator Alan Simpson, opposes an amendment to the Constitution on marriage. In an op-ed in the Washington Post, he stated:
"In our system of government, laws affecting family life are under the jurisdiction of the states, not the federal government. This is as it should be. ..... [Our Founders] saw that contentious social issues would be best handled in the legislatures of the states, where debates could be held closest to home. That's why we should let the states decide how best to define and recognize any legally sanctioned unions--marriage or otherwise."
Columnist William Safire has also urged his conservative colleagues to refrain from amending the Constitution in this way. Commentator George Will takes the same position.
I recognize that the current debate on same-sex marriage was hastened by a decision of the highest court in Massachusetts issued in late 2003. That decision, in a case called Goodridge, said that the state must issue marriage licenses to same-sex couples. But the court did not say that other States must do so, nor could it. And it did not say that churches, synagogues, mosques, or other religious institutions must recognize same-sex unions, nor could it. Even Governor Romney of Massachusetts, who testified before the full committee last year, admitted that the court's decision in no way requires religious institutions to recognize same-sex unions. No religious institution is required to recognize same-sex unions in Massachusetts or elsewhere. That was true before the Goodridge decision, and it remains true today.
Indeed, as time has passed since the Massachusetts court ruling, I think it has become clear that passing a constitutional amendment would be an extreme and unnecessary reaction. Voters in several states passed marriage initiatives in the last election. The legislature in Connecticut recently passed a civil union bill and the Governor signed it. In California, a bill passed by the legislature to permit same sex marriages was vetoed but new protections for domestic partners were signed into law. These developments tell me that the states are capable of addressing the issue, and they will do so in different ways, which is how our federal system generally works. Federal intervention would not be a good idea.

I was particularly struck by reports on what happened recently in the Massachusetts legislature. The legislature narrowly passed a constitutional amendment last year to prohibit same-sex marriage, but when the issue returned this year, as the Massachusetts Constitution requires in order to put the issue on the ballot, the legislature rejected it by a vote of 157 to 39. Clearly, many supporters of the amendment changed their minds.
So I believe we should think long and hard about pre-empting state legislatures or state initiative processes through a federal constitutional amendment. There is certainly no crisis warranting a federal constitutional amendment on this issue. Nor is there evidence that the courts are poised to strike down marriage laws.
Notwithstanding what has happened since gay couples began to marry in Massachusetts, the supporters of the Federal marriage amendment would have Americans believe that we will soon see courts in other states requiring those States to recognize same-sex marriages, too. Of course, no such thing has happened in the 18 months since the Goodridge decision went into effect in

May 2004. So this is a purely hypothetical concern; hardly a sound basis for amending our Nation's governing charter.

As Professor Lea Brilmayer testified before this subcommittee, no court has required a State to recognize a same-sex marriage performed in another State. And as Professor Carpenter testified, "the Full Faith and Credit Clause has never been understood to mean that every state must recognize every marriage performed in every other state. Each state may refuse to recognize a marriage performed in another state if that marriage would violate the public policy of that state."

In fact, Congress and most States have already taken steps to reaffirm this principle. In 1996, Congress passed the Defense of Marriage Act, a bill I did not support, but that is now the law. DOMA is effectively a reaffirmation of the Full Faith and Credit Clause as applied to marriage. It states that no State shall be forced to recognize a same-sex marriage authorized by another state. In addition, 38 States have passed what have come to be called "State DOMAs," declaring as a matter of public policy that they will not recognize same-sex marriages.

There has not yet been a successful challenge to the Federal or State DOMAs. Of course, it is possible that the law could change. A case could be brought challenging the Federal DOMA or a State DOMA, and the Supreme Court could strike it down. But do we really want to amend the Constitution simply to prevent the Supreme Court from reaching a particular result in the future? What kind of precedent would such a preemptive strike against the governing document of this Nation set? Do we really want to open the door to preemptive constitutional amendments? I don't think so.

Former Representative Bob Barr, the author of the Federal DOMA, strongly opposes amending the Constitution on this issue. He believes that amending the Constitution with publicly contested social policies would "cheapen the sacrosanct nature of that document."

He also warned:

"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."

My colleagues, those are the words of the author of the Federal DOMA statute. That is what he said about the wisdom of trying to amend the Constitution in this manner.

Mr. Chairman, so far I have been discussing the general arguments against a constitutional amendment against marriage. I think they are compelling. But I also want to take some time today to discuss the specific text we are now considering: S.J. Res. 1, the so-called Marriage Protection Amendment. The amendment states; "Marriage in the United States shall consist only of the union of a man and a woman." That is what we have come to refer to as "Sentence One." The amendment continues in "Sentence Two": "Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

Before I discuss some of the ambiguities in this language, let me first remind my colleagues that this whole effort has often been portrayed by its proponents as a reaction to so-called "liberal activist judges" reinterpreting marriage. Time after time, we are told that judges have made law, in cases like the Supreme Court's decision in Lawrence v. Texas that state sodomy laws are unconstitutional, in the Massachusetts decision in Goodridge, and in the Vermont state court decision that forced the state legislature to adopt a civil union law. This amendment is needed, we are told, to counteract and correct those missteps and to make sure they don't happen again. Keep that underlying concern in mind as we discuss the ambiguities of this language and who will ultimately decide how they are to be resolved.

A question that is important to many Senators, and to many Americans, as they consider this constitutional amendment is how it will apply to laws passed by state or local governments granting same sex couples the right to enter into civil unions or domestic partnerships to become eligible for government recognition of their relationships and for certain benefits. One of the witnesses at the last hearing we held, Prof. Michael Seidman, from Georgetown University Law Center, testified quite convincingly I thought about the ambiguity of the language of this amendment on that question. And so the Chairman asked if he had thought about how to draft the amendment to, as he put it, "hit the mark."
Prof. Seidman responded:
Part of the problem is I think the people behind the amendment themselves are not in agreement on how to go. So I think there are some Americans who are--many, many Americans, actually, who are offended by the use of the word "marriage" but want to extend to gay men and lesbians everything else. There are other people who are in favor of this amendment, I think Professor Wilkins may be one of them, who want to go further than that and want to prohibit the creation of things that look a lot like marriage, but they are a little vague in their mind as to how much like marriage it has to look. So with respect, Senator, I think you guys have to get straight what you want before you tell me how to go about drafting it.
I wanted to be very concrete, not just rely on hypotheticals. So I asked the witnesses you called at the last hearing questions on this issue and then I asked them to respond to written questions about how they believe S. J. Res. 1 would apply to a challenge brought against specific state legislative actions. I have asked these questions of previous witnesses as well, and I have seen statements from many of the supporters of the amendment. I think Prof. Seidman is absolutely right. It is simply not clear what the sponsors of this amendment intend.
Let's start with civil unions. Would this amendment outlaw civil unions? Specifically, would the recently passed Connecticut statute that provides as follows:

"Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman."

Prof. Richard Wilkins, from Brigham Young University, who I understand was consulted in the drafting of the amendment answered my written question as follows: "The language quoted from Section 14 of the Connecticut statute would not be unconstitutional under the proposed amendment." But Prof. Gerard Bradley, from Notre Dame, another drafter of the amendment, testified as follows at our hearing in April:

"The amendment leaves it wide open for legislatures to extend some, many, most, perhaps all but one, I suppose, benefit of marriage to unmarried people, but I would say if it is a marriage in all but name, that is ruled out by the definition of marriage in the first sentence."

And Prof. Christopher Wolfe, from Marquette University, another witness from our most recent hearing, agrees with Prof. Bradley. He said the following in answer to my written question:

"I think Connecticut's civil union scheme, which was enacted by the General Assembly without any judicial involvement, would be unconstitutional under the Marriage Protection Amendment,

because it effectively authorizes marriage for unions of two men or two women, since the only difference between civil unions and marriage is the name."

Groups supporting the amendment like the Alliance for Marriage and Concerned Women for America seem to think the amendment will permit legislatures to enact civil union legislation. In a radio interview during the Senate's consideration of the amendment, Bob Knight, the head of that Concerned Women for America, suggested that wasn't such a good thing. He said:

The second sentence was so convoluted that many legal scholars disagreed about what it actually meant, and its backers assured everyone that it meant states could pass civil unions, which is not the way to protect marriage. Civil unions are gay marriage by another name.

The website of the Alliance for Marriage has the following explanation of a chart in which it says that "quasi-marital schemes" such as civil unions would be permitted if adopted by a state legislature rather than imposed by court:

"The second sentence ensures that the democratic process at the state level will continue to determine the allocation of the benefits associated with marriage."

I could go on and on here Mr. Chairman, but let me mention Prof. Scott Fitzgibbon of Boston College Law School, who also testified in support of the amendment at our most recent hearing. Mr. Fitzgibbon simply declined to answer when I asked him at the hearing whether the amendment would allow a state employer to give benefits to unmarried domestic partners of its employees. And he also refused to answer a followup written question on the question of whether Connecticut's civil union law would be constitutional. But he did say the following at the hearing:

"I am just going to say that the degree of ambiguity ... isn't such a terrible thing. This isn't part of the tax code. It is proposedly [sic] a part of the United States Constitution and constitutional provisions rightly leave some scope for later determination."

So there you have it Mr. Chairman. The supporters and drafters of this amendment can't agree on how it would affect civil union laws like the one recently enacted by the democratically elected legislature of the State of Connecticut. And at least one of them says that ambiguity is not such a terrible thing.

So who will decide this question, which everyone can anticipate will be raised if this amendment becomes part of the Constitution? You guessed it ... the courts! Given how this whole exercise of trying to define marriage in the governing document of this country started - outrage over a state court's interpretation of a state constitution and fear of "activist judges" taking it upon themselves to redefine marriage -- that is ironic indeed.

Now Prof. Wolfe had an interesting suggestion when he answered my written questions concerning the California and New Jersey domestic partner statutes. This summer the California legislature enacted a statute that grants all the same rights to domestic partners as it does to married spouses, except the right to file a joint tax return. All the rights and benefits but one. Under Professor Bradley's interpretation, that's probably ok. Professor Wilkins agrees that

California's statute would survive a challenge. The Alliance for Marriage website also agrees. But Prof. Wolfe isn't so sure. He says in his written response to my question:

"It could be argued that it is unconstitutional under the Marriage Protection Amendment for the same reason that the Connecticut civil union law is unconstitutional, since-even though one provision provides one exception-the general principle of the law (in SEC. 4) defines the domestic partnership as being equivalent to marriage. The single exception could easily be viewed as merely an evasive maneuver to avoid a pure equivalence that would make the statute constitutionally vulnerable.

"It could also be argued, however, that there is a difference between this domestic partnership law and marriage (beyond just the name), and therefore domestic partnership is not marriage in everything but name, and therefore it is within the constitutional power of the California legislature to pass. (Once the statute is acknowledged to have some difference, it could be argued that it is not within the competence of judicial construction to say what "degree" of difference would be necessary to determine the statute's constitutionality-that decision would be left to legislatures.)

"In a close case like this, I think the legislative history would be likely to play a determinative role in the final decision.

He goes on in an answer concerning the New Jersey domestic partnership statute to make his suggestion:

Of course, it would be desirable to clarify this question, if possible. For example, offering an unambiguous statement of the meaning of the amendment in the legislative history (e.g., the committee report on the amendment, and representations-uncontradicted by other supporters of the amendment-of the amendment's sponsors in floor debate) would be likely to have a substantial impact on how the amendment would be understood by those who have to vote on it, in Congress and in state legislatures. (Emphasis added.)

Well there's a novel idea -- some unambiguous statement of the meaning of the amendment. Professor Wolfe, a supporter of the amendment, doesn't know what it is. This amendment has been around for nearly two years and we still don't have one. Will we get one today? I don't know. I do know that some of the most ardent supporters of the amendment in the Senate are strongly opposed to civil unions as well. But will the amendment they wrote to protect marriage outlaw civil unions and domestic partnerships? So far, they won't say.

I would think that the full Committee, the Senate, state legislatures, and the American people deserve clear and reliable answers to these questions before they are asked to decide whether to amend the Constitution. So I would hope, Mr. Chairman, that every Senator who is planning to vote Yes on this amendment today will tell us before we conclude this meeting what he thinks the amendment means.

Even though Prof. Wolfe answered my question as if it were a law school exam - "it could be argued on the one hand.... But on the other hand" - this is not just an academic exercise. It will have an impact on the lives of millions of Americans. We heard in our first hearing this year from

Dr. Kathleen Moltz, a pediatrician who moved to Michigan and took a job at a public university there in part because of the health benefits offered by the state employer to her domestic partner and their two children.

Then the voters of the state of Michigan passed a marriage initiative in 2004. Ads taken out by the promoters of amendment assured voters that it would not affect domestic partnership benefits, but soon afterward the state's Attorney General issued an opinion that domestic partner benefits could no longer be offered by state employers. And so, again, it was up to the courts to decide. The Michigan courts have now rejected that opinion, but what happened in Michigan must give pause to anyone who might vote for this amendment based on assurances on how it would affect state laws in this area.

Mr. Chairman, as you can tell, I am very concerned about the rush to report this amendment out of the Constitution Subcommittee without any certainty about what it means or how it will be applied. Fortunately, it seems clear that you don't have the votes to pass it in the Senate.

We should not seek to amend the Constitution in a way that would reduce its grandeur. Under our longstanding system of federalism, we should leave the regulation of marriage to the States and religious institutions.

As we stand here, there are Americans across our country out of work, languishing in failing schools, struggling to pay the month's bills, or worrying about their lack of health insurance. Instead of spending our limited time this session on a proposal that is destined to fail and will only divide Americans from each other, we should be addressing the issues that will make our Nation more secure, our communities stronger, and the future of our families brighter.

I urge my colleagues to oppose this divisive and poorly thought out constitutional amendment.

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Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Subcommittee on the Constitution
On the Federal Marriage Amendment

October 20, 2005

Thank you Mr. Chairman. I appreciate, once again, the collegial manner in which have handled this hearing, including the advance notice of it that you gave us and the 3-2 ratio for witnesses.

When you held your first hearing on this topic in April, I had conducted 20 of my annual listening sessions in Wisconsin and only four of the 950 people who came out to ask me questions had raised the topic of same sex marriage. Three of them opposed the constitutional amendment. Now I have held listening sessions this year in all but four counties in Wisconsin, 68 in all. Over 3,400 people have attended these sessions and only about a dozen have raised this issue.

So despite all the attention the proposed constitutional amendment has received in the Senate - four hearings in the last Congress and a vote on the floor last year and two out of the total of four hearings we have held in this subcommittee this year -- the issue of same sex marriage does not seem to be something that the public is all that concerned about. The issues that my constituents want to talk about, and want Congress to take action on, are the war in Iraq, health care, and spiraling gas prices. They really aren't interested in passing judgment on the private lives of their neighbors, and they don't feel that their marriages or families are threatened by same sex marriages in Massachusetts or civil unions in Vermont or Connecticut.

One of the main problems with the constitutional amendment that we will discuss today, S. J. Res. 1, is that we still don't really know what effect it will have if it becomes part of the Constitution. That became clear when its proponents brought it to the floor last year, without allowing a markup in the Judiciary Committee. Uncertainty still remains, for example, as to whether the language of the amendment would permit states to offer domestic partner benefits or the option of civil unions to same sex couples. I hope our witnesses can shed some light on these important questions today.

As time has passed since the Massachusetts court ruling, I think it has become clear that passing a constitutional amendment would be an extreme and unnecessary reaction. For more than two centuries, family law has been the province of the states and that is as it should be. Voters in several states passed marriage initiatives in the last election. The legislature in Connecticut recently passed a civil union bill and the Governor signed it. In California, a bill to permit same sex marriages was vetoed but new protections for domestic partners were signed into law. These developments tell me that the states are capable of addressing the issue, and they will do so in different ways, which is how our federal system generally works. Federal intervention would not be a good idea.

I was struck by reports on what happened in the Massachusetts legislature last month. The legislature narrowly passed a constitutional amendment last year to prohibit same-sex marriage, but when the issue returned this year, as the Massachusetts Constitution requires in order to put the issue on the ballot, the legislature rejected it by a vote of 157 to 39. Clearly, many supporters of the amendment changed their minds.

So I believe we should think long and hard about pre-empting state legislatures or state initiative processes through a federal constitutional amendment. There is certainly no crisis warranting a federal constitutional amendment on this issue. Nor is there evidence that the courts are poised to strike down marriage laws.

Mr. Chairman, our Constitution is an historic guarantee of individual freedom that every day stands as an example to the world. Except for the 18th Amendment on prohibition, which was

later repealed, it has never been amended to limit basic rights or discriminate against one group of our citizens. I look forward to the testimony today from which I hope we will learn more about what this amendment will actually do, but I continue to strongly oppose this amendment because I think it is unfair, unwise, and unnecessary.

Mr. Chairman, again, thank you for your courtesy.