

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
March 3, 2004

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At the Constitution Subcommittee of the Senate Judiciary Committee Hearing on Marriage Laws

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Mr. Chairman, this is the second time in six months that this Subcommittee has held hearings on the issue of whether the federal government should regulate marriage. Proponents of a federal marriage amendment say that traditional marriage is under attack. They would have the American people believe that there is a national crisis and that renegade judges have run amuck over the will of the people, the laws, and the Constitution. Nothing could be further from the truth.

I believe a constitutional amendment on marriage is unnecessary, divisive, and utterly inconsistent with our constitutional traditions, which this subcommittee has a special responsibility to protect. I object to the use of the constitutional amendment process for political purposes. And I am sorry to say that I believe that is exactly what is going on here. The President supports a constitutional amendment; the Chairman of the Judiciary Committee says he is going to force an amendment through the Committee; and the Chairman of the Republican Conference said this weekend that there will be a vote on the Senate floor on the amendment this year. Yet few believe the effort will be successful. This is a divisive political exercise in an election year, plain and simple.

The regulation of marriage has traditionally been left to the states, and to religious institutions. In addition, our nation has a long tradition of amending the Constitution only as a last resort, when all other means to address an issue have been exhausted and found inadequate. With only one state having recognized same sex marriage, and no state having ever been forced against its will to recognize a same sex marriage from another state, we are miles away from reaching that point on the issue of gay marriage.

The title of this hearing is "Judicial Activism vs. Democracy." On the issue of same-sex marriage, I am especially troubled when I hear this label used because it is not only a gross mischaracterization of the current legal landscape, but it sounds as though advocates of a constitutional amendment think that judges should have no role in our constitutional democracy.

If the Goodridge decision, which was based on the Massachusetts state constitution, is really a case of judges imposing their will on the people of Massachusetts, then the people of Massachusetts, through their elected representatives, will surely overrule the court and amend their state constitution. That process, whatever its outcome, is already underway. Similarly, if the people of California or New York disagree with the mayors of San Francisco or New Paltz, and if the courts don't strike down these actions based on current law, the people have ways of making sure their will is carried out.

No one in this room knows what the outcome of these state processes will be. But we do know this: In no state have the people been deprived of their ability to resolve the issue for themselves. The legal and legislative battles, as well as the public debate, have barely begun.

And yet we in the Congress are now being asked to intervene, to answer all these questions, for all states and, effectively, for all time. It is the proponents of this constitutional amendment, not so-called activist judges, who threaten to take this issue away from the American people. It is true that the constitutional amendment process ultimately involves the people through their representatives in the Congress and again, more specifically, in the state ratification process. But I simply fail to see how it is more democratic to have three quarters of the states decide this issue for Massachusetts than to let the people of Massachusetts, or for that matter Wisconsin, decide for themselves.

The proponents of a constitutional amendment say they are worried that same-sex couples will marry in Massachusetts and move or return to other states, demanding recognition of their marriages. But again, no court has yet decided such a case. And, as Professor Dale Carpenter testified at our last hearing, and as we will hear this morning from Professor Lea Brilmayer, it is entirely possible, if not likely, that under the Full Faith and Credit Clause, no court will require a state to recognize a same-sex marriage conducted under another state's laws.

Furthermore, Congress has already acted in this area, and its action so far stands unchallenged. The Defense of Marriage Act, which was enacted in 1996, is effectively a re-affirmation 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. Although I voted against it, I thought DOMA was passed to prepare for the possibility of one state recognizing gay marriage, as Massachusetts has now done. Why do we now need a constitutional amendment when we don't even know yet whether DOMA successfully addressed the problem it was supposed to address?

Of course, it is possible that the law could change. A case could be brought challenging the federal DOMA, and the Supreme Court could strike it down. But do we really want to amend the Constitution just in case the Supreme Court reaches a particular result? Do we want to launch what amounts to a pre-emptive strike on our Constitution? That should give every American pause.

There is another reason I will oppose a constitutional amendment. An amendment regarding same-sex marriage would write discrimination into the governing document of our nation. The Framers of our Constitution created a document that establishes the structure of our government and protects the liberty of every American. In addition to the Bill of Rights, our Constitution now includes 17 amendments. Leaving aside the misguided prohibition amendment and the amendment that repealed it, some of the amendments adjust the structure of our government, while the rest protect fundamental rights of our citizens. In stark contrast, this amendment targets a specific group of Americans and permanently excludes them from certain rights and benefits.

The most often discussed text for a marriage amendment would not only ban same-sex marriages, it would threaten civil union and domestic partnership laws at the state and local levels. These are laws that have been enacted by and for the people of those particular states and localities through the democratic process. They have allowed same-sex couples and their families to avail themselves of certain benefits that cannot be provided for by contract no matter how much they spend on lawyers.

Mr. Chairman, in the audience today, we have families who would be directly affected by such drastic action. These are families headed by same-sex couples who already do not enjoy the benefits and privileges of marriage that opposite sex couples enjoy. They would be further harmed by a constitutional amendment that stigmatizes them and belittles their aspirations for their families.

The proponents' of a marriage amendment, including the President of the United States, say they want to conduct the debate in a civil manner with respect for those in our society who are gay or lesbian. But taking away a group of people's rights forever can never be done in a civil manner.

The Constitution is meant to protect rights, not deny them. That is our tradition.

Finally, Mr. Chairman, I am concerned that this Subcommittee is again focused on a remote, hypothetical issue, when there are real problems facing American families today - not a year from now, or a few years from now, or sometime in the future, maybe, but today.

Each year, I visit all 72 counties in Wisconsin and hold a listening session. Those meetings are not organized around a specific topic. Instead, my constituents can come and speak with me about any topic on their minds. In my first 33 listening sessions this year, 1638 people attended and 786 asked questions or made statements. Of the people who stood to ask me questions or offer opinions, 139 people were concerned about Medicare, prescription drugs and the high cost of health care, 83 were concerned about jobs, trade, and the economy, and 76 expressed concern about the situation in Iraq and other foreign affairs issues. Only 11 people raised the issue of gay marriage. Six expressed support for a constitutional amendment, four were opposed, and one person just asked about my position on the issue.

Today, Americans are losing jobs or facing the fear that their jobs will leave the U.S. at any moment. Today, American families are struggling to afford health care and to send their children to college. Today, American families are watching their sons and daughters, husbands and wives, fathers and mothers, go off to serve in Iraq, hoping and praying that they will come home alive.

The American people desperately want us to address these issues. Instead, we are holding our second hearing in six months on a constitutional amendment to address court decisions that may some day be issued, or legislatures that may some day reach conclusions with which some disagree.

This constitutional amendment debate will only divide our country when we need to be united to face and solve our problems.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses.

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