

Testimony of

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Statement on the NAACP's Opposition to the Federal Marriage Amendment and Other Discriminatory Proposed Constitutional Amendments

Before the Senate Subcommittee on the Constitution
of the Senate Committee on the Judiciary
Presented by Hilary Shelton, Director of the NAACP Washington Bureau
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Introduction

The National Association for the Advancement of Colored People (NAACP), our nation's oldest and largest grass roots civil rights organization greatly appreciates the opportunity to testify before the Senate Subcommittee on the Constitution in order to express our firm and historical opposition to ever using the Constitution to discriminate against or deprive any person of his or her rights.

My name is Hilary Shelton and I am the Director of the NAACP's Washington Bureau, the federal legislative and national public policy arm of the NAACP. I would especially like to thank Chairman Cornyn and Senator Feingold for holding this hearing and for taking the lead in reviewing and examining this issue.

As an organization that has, since its inception, fought for and supported amendments to the Constitution to ensure and protect the most fundamental rights for all persons, the NAACP strongly opposes the so-called Federal Marriage Amendment and all other proposals that would use the Constitution to discriminate and restrict, rather than expand and protect the rights for any and all persons.

Founded in 1909, the NAACP currently has more than 2,200 membership units across the United States and has branches in every state in the nation. Our mission, over these past 95 years, has been to achieve equality of rights and eliminate prejudice among the people of the United States. The NAACP has consistently opposed any custom, tradition, practice, law or Constitutional Amendment that denies any right to any person.

The NAACP Opposes All Discriminatory Constitutional Amendments

The NAACP is greatly disappointed that President George Bush and others have decided to enter this election cycle by endorsing an amendment that would forever write discrimination into the U.S. Constitution, rather than focusing on the crucial problems and challenges that affect the lives of all of us. At a time of record high unemployment, diminishing job prospects, a ballooning budget deficit that is choking our economy and crucial social service programs, a public school system that is in great need of attention and a health care system that is failing over 43 million Americans that remain uninsured over the past three years. This discriminatory constitutional amendment appears to be nothing more than a highly divisive political ploy to distract the country from focusing on our overabundance of real problems and our tremendous lack of creative and effective solutions.

The NAACP recognizes that the issue of marriage rights for same-sex couples is a difficult and sensitive one, and people of good will can and do have heartfelt differences of opinion on the matter. The NAACP has not taken a position on this question. But the NAACP is extremely opposed to any proposal that would alter our nation's most important document for the express purpose of excluding any groups or individuals from its guarantees of equal protection. The NAACP strongly opposes the Federal Marriage Amendment, introduced by Senator Wayne Allard and Congresswoman Marilyn Musgrave, as well as any other proposals to amend the Constitution to discriminate against American families or any other persons.

The Federal Marriage Amendment would, for the first time, use an amendment to the Constitution as a tool of exclusion. It is so extreme that, in addition to prohibiting any state government from honoring domestic contractual agreements between persons of the same gender in their states, it would also bar state and local governments from providing basic protections of citizens of the same gender and their families, even such fundamental protections as hospital visitation, inheritance rights, predetermined child custody rights and health care benefits.

Although the potential discriminatory impact of the Federal Marriage Amendment is broader than several other constitutional amendment proposals discussed in the media, the NAACP is clear that even so-called "narrow" constitutional amendments to deny these basic family protections between people of the same gender or their

families is a dangerous and unnecessary approach to resolving the ongoing debate over this issue. Under no circumstances should the Congress reverse 225 years of constitutional history by using a constitutional amendment to restrict the civil rights of our citizens.

The Federal Marriage Amendment Is Extraordinarily Broad in Its Discrimination

Because the Federal Marriage Amendment is the only constitutional amendment introduced on this subject in the Congress, it deserves specific attention. Several recent press reports have characterized the amendment as "moderate" and as allowing states and cities to continue to enforce their civil union and domestic partnership statutes. The argument by many supporters of the amendment is that it would prohibit only court-ordered marriages and civil unions. This interpretation is incorrect. In fact, the amendment could forever eliminate a vast array of rights and protections already provided by states, counties, cities, and towns across the country.

The so-called Federal Marriage Amendment provides that:

"Neither this (US) Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or legal incidents thereof be conferred upon unmarried couples or groups."

One does not need to be a constitutional scholar to see the broad impact of the amendment. The only piece of legal knowledge that one needs to know is the fundamental principle that courts assign meaning to every word in the Constitution. There are no "extra words."

But reading the so-called Federal Marriage Amendment as prohibiting only marriages imposed by so-called "activist judges" would require the courts to find that the amendment has nine extra words that have no meaning at all. In fact, they are nine powerful words.

Five of those words, "nor state or federal law," can only mean that the Federal Marriage Amendment is prohibiting the enforcement of laws duly passed by federal, state, or local legislatures. If the goal of the amendment is nothing more than to stop so-called "activist judges" from imposing their will against democratic wishes, there is no need to bar the enforcement of laws passed through democratic legislatures.

The four other words, "or legal incidents thereof," as distinguished from marriage itself, means that the Federal Marriage Amendment would prohibit any unmarried couple from having any or all of the hundreds of rights included in the compilation of rights known as marriage. There is no reason to include "or legal incidents thereof" if the sole goal of the amendment is to have the federal government deny marriage to all same-sex couples in every state.

These extra nine words could destroy--and forever prohibit--every single right or protection available to people of the same gender working together to raise their families. The consequences will be severe for the health care, economic security, and probate concerns for millions of unmarried Americans and their children. The amendment could void laws passed by legislatures that provide fundamental rights to allow a person to visit other persons of the same gender in a hospital, participate in a person of the same genders medical decisions at his or her request, or even obtain health insurance.

Moreover, in many states, unmarried persons--including unmarried relatives, heterosexual couples, gay and lesbian couples, and even unrelated clergy members--have the same rights as married persons to jointly adopt or jointly provide foster care or kinship care to persons in need. These unmarried persons are providing loving and secure homes to countless children. By barring states from extending any "legal incidents" of marriage to unmarried persons, the amendment could take away every legal right and protection that states now provide to many American families. The amendment could also destroy a wide range of other rights that are important to the lives of unmarried persons. Those legal protections may include state and local civil rights laws prohibiting discrimination based on "marital status," state laws protecting unmarried elderly couples who refrain from marrying in order to hold on to their all too menial pensions, and even state laws allowing a person, in the absence of a spouse, to oppose the autopsy of a close friend because of the deceased person's religious beliefs.

Passage of a Discriminatory Constitutional Amendment on Marriage Rights Would Contradict the History of the Bill of Rights and Subsequent Amendments

Adoption of this so-called Federal Marriage Amendment or any other discriminatory constitutional amendment on marriage rights would mark the first time that a constitutional amendment has denied or diminished, rather than established or expanded, civil rights for groups and individuals. It would be a dangerous and a sorry departure from a long celebrated history of the expansion of rights important to all Americans. It would also be contradictory to all that the NAACP has fought for.

The principle constitutional source of individual rights is in constitutional amendments, not in the Constitution itself. As ratified by the states, the original text of the Constitution largely failed to protect the inalienable rights embodied in the philosophy of the Declaration of Independence. In fact, the fifth sentence of the Constitution declared that most African-Americans, who were then slaves, counted as three-fifths of a person, and most Native Americans were not counted at all. The inclusion of this provision in determining the apportionment of members of the House of

Representatives highlights how far our nation has had to travel on the path to equality.

The Bill of Rights was proposed, and ultimately adopted, to ensure that certain basic and fundamental rights would be guaranteed to the people of the United States of America. These ten Amendments were designed to broaden the scope of rights reserved to the people or the states, establishing a floor of protections upon which individual states could build.

However, it was not until after the nation went through a long and bloody civil war that the Constitution, at least on paper, began to provide its protections to all persons. The Thirteenth Amendment abolished slavery, the Fourteenth ensured all Americans equal protection under the laws, the Fifteenth provided voting rights regardless of race or previous condition of servitude, the Nineteenth guaranteed voting rights for women, the Twenty-Third provided voting rights in presidential elections for residents of the District of Columbia, the Twenty-Fourth eliminated discriminatory poll taxes in federal elections, and the Twenty-Sixth provided voting rights for younger Americans. All other constitutional amendments, with the notable exception of the amendments establishing and then repealing prohibition, have been simply ministerial, dealing with subjects such as judicial limits, payment of income taxes, and congressional pay increases.

There thus, with the instructive exception of the prohibition amendments, is no history of enacting constitutional amendments for the purpose of restricting individual freedoms. The Federal Marriage Amendment, and other discriminatory proposed constitutional amendments stand in stark contrast to the amendments that have been adopted in the spirit of freedom and liberty. As James Madison explained, constitutional amendments are reserved "for certain great and extraordinary occasions." Amending the federal Constitution to strip civil rights away from any group of persons is not such an occasion.

NAACP Urges Congress to Amend the Constitution to Ensure Equal Protection for All Persons

The opposition of the NAACP to the Federal Marriage Amendment and other discriminatory amendments should not be construed to mean that the Constitution should never again be amended. As I have been saying throughout this testimony, the NAACP firmly believes that the Congress should reject any amendment that would in any way restrict the civil rights of the people who have the privilege of living under the Constitution. The NAACP continues to support, however, amendments to the Constitution that would expand the ability of all Americans to pursue their inalienable rights and to meet needs that are still wanting in whole communities in America today.

For example, the NAACP believes that the Constitution should be amended to guarantee the right to a quality public education for our children. Despite the equal protection clause of the U.S. Constitution, the 1954 *Brown vs. Board of Education* decision, decades of civil rights laws and volumes of talk about improving our schools, a dramatic disparity in the quality of public education continues to plague our nation. The quality of our children's educations, and the amount of resources dedicated to our public schools, varies radically based on where you live. In short, there exists today a significant educational opportunity gap within states for low-income, urban, rural and racial/ethnic minority students. Congressman Jesse Jackson, Jr. (D-IL) has introduced such an amendment (H. J. Res. 29) and as recently as our annual meeting in mid-February of this year, the NAACP National Board of Directors reiterated our support for this proposed Constitutional amendment.

The Constitution should also guarantee the right to affordable, high quality health care for our nations families. Our country's health care system is failing millions of Americans every year. It costs too much, covers too little and excludes too many. Currently, one seventh of all Americans, 42 million people, lack insurance and suffer unnecessary illness and premature death. In fact, despite being first in spending, the World Health Organization has ranked the United States 37th among all nations in terms of meeting the health care needs of its people. Again, Congressman Jesse Jackson, Jr. has introduced an amendment (H. J. Res. 30) to guarantee all Americans safe, adequate and affordable health care.

And the Constitution should guarantee access to democracy for all of our citizens. While there are several provisions in our Constitution providing for nondiscrimination in voting on the basis of race, sex and age, there is no explicit affirmation of an individual's right to vote in the United States of America. This point was made painfully clear by the U.S. Supreme Court when, in deciding the outcome of the 2000 Presidential election it constantly reminded lawyers from both sides that "the individual citizen has no federal constitutional right to vote for electors for the President of the United States."

The right to an adequate education, the right to health care, and the right to make sure that all eligible Americans can vote and will have that vote counted are the rights we need to guarantee in order to build a firm foundation for the future success of our nation and they belong in our founding document. We would dare anyone to tell the millions of American families living without health care that they are better served by Congress debating whether to amend the Constitution to discriminate against families headed by two members people of the same gender. We would dare anyone to tell the millions of parents whose children are receiving sub-par educations at woefully under-resourced public schools that their primary concern should be care more about Congress dictating for all the states which

families are worthy of the law's protections and which ones are not. We would dare anyone to tell the thousands of American citizens who learned in the year 2000 that they have no Constitutionally guaranteed right to vote that they should be clamoring to see another group of Americans forever excluded from the guarantee of equal protection of the laws.

If Congress is feeling the need to amend the Constitution, then it should look to expand rights and not restrict rights. And Congress need look no further than three amendments, introduced in the House of Representatives and supported by the NAACP, H.J. Res. 28, H.J. Res. 29, and H.J. Res. 30, which constitutionally address some of the real needs in this country, without causing any harm to anyone's rights.

Conclusion

At a time when our nation has many important problems affecting the lives of millions of Americans, the Congress and this Subcommittee should waste no more time or energy on divisive and discriminatory constitutional amendments. The NAACP strongly urges you to reject the so-called Federal Marriage Amendment and all other proposed constitutional amendments that would permanently deprive any person in our great nation of his or her civil rights.