



Statement of Senator Dianne Feinstein on Proposed Federal Marriage
Constitutional Amendment
March 23, 2004

Washington, DC -- *The Senate Judiciary Committee today convened a hearing examining a proposed Federal Marriage Constitutional Amendment. Senator Dianne Feinstein (D-Calif.) served as Democratic Ranking Member of the hearing. The following is the prepared text of Senator Feinstein's statement:*

“Today we have before us a Constitutional amendment not to expand or protect the rights of a group of Americans, but to limit those rights instead.

This amendment, if passed by the Congress and ratified by the States, would become the 28th Amendment to the Constitution since that document itself was first completed in 1787. In those intervening 218 years, the Constitution has been amended infrequently, and almost always for the purpose of expanding, protecting, or guaranteeing the rights Americans.

But today this amendment is different – for it would, if enacted become the first amendment to limit rights. I believe this is ill-timed, and ill-advised, and I'd like to briefly discuss why.

First, the issue of marriage and domestic law has always been one under the purview of the states – not of the federal government. And throughout this nation's history, the states have proven entirely capable of dealing with this issue.

As early as 1890, in In Re Burrus, the Supreme Court of the United States, in a child custody dispute, stated ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.’ Later, in a 1979 Supreme Court decision, Hisquierdo v. Hisquierdo, the Court stated ‘Insofar as marriage is within temporal control, the States lay on the guiding hand.’ The Court in that same decision also restated the language I just quoted from In Re Burrus.

Even now, as voices are raised at the prospect of same-sex marriages in Massachusetts and California, our traditional, state-centered processes have begun.

In Massachusetts, the recent court ruling allowing for same-sex marriages does not even take effect until May, yet the state legislature is at work on a state constitutional amendment to bar same-sex marriages but allow civil unions. This amendment is certainly not guaranteed to pass, but it is clear that the people of Massachusetts will be dealing with this issue without need of assistance from Washington.

And in California, there is Proposition 22, a ballot initiative which was passed by Californians in 2000 by a 23% margin. Statewide, over 4.5 million votes, sixty-one percent, voted in favor of the initiative while almost 3 million, or 38 percent voted against the initiative. This initiative amended the California family code to state that ‘only marriage between a man and a woman is valid or recognized in California.’

A few weeks ago, the Mayor of San Francisco decided this law was unconstitutional and ordered the county clerk to issue marriage licenses to same-sex couples. The State Supreme Court has since enjoined the county clerk from issuing any further marriage licenses and the county has complied. The Mayor will now have to show cause as to why he believes he has not exceeded his legal authority.

Despite this evidence, some still fear that there may be a state or two that does eventually allow same-sex marriages to take place, and that every other state will then be forced to recognize those marriages regardless of their own laws to the contrary. But the long history of marriage law belies that claim.

The courts have long held that no state can be forced to recognize a marriage that offends a deeply held public policy of that state. States, as a result, have frequently – and constitutionally – refused to recognize marriages from other states that differ with their public policy.

Polygamous marriages, for instance, even if sanctioned by another state, have consistently been rejected. Marriages between cousins or other close relatives have also been rejected by some states, even if those marriages are accepted in other parts of the country. And until the Supreme Court ruled on different, equal protection grounds that no such discrimination was acceptable, even mixed-race marriages were often not recognized in many states.

In no case that I know of has the Full Faith and Credit Clause of the US Constitution been used to require a state to recognize a type of marriage that would violate its own strong public policy.

Because several dozen states have already passed prohibitions on same-sex marriage, it seems clear that in those states an argument could be made that strong public policy would lead to a refusal to recognize out-of-state, same-sex marriages. Mr. Chairman, I would note that Texas, and my state of California as well, are both among the 37 or so states that have laws on the books today defining marriage as between a man and a woman.

So, this is not a problem demanding an immediate solution, because no state currently faces any risk whatsoever of having to recognize a same-sex marriage performed in another state. It is just that simple.

As we sit here today, the people of this nation are greatly divided on the issue of same-sex marriage. One recent poll suggested that only about 20 percent of the American people support a constitutional amendment banning same-sex marriage like the one we discuss today. Considering that the amendment would need two-thirds of the Congress and then three-fourths of the states to ratify it, both its passage in this body and its enactment by the states seems unlikely.

Additionally, the text of the amendment before us today is problematic in its own right. Although supporters claim that the amendment is limited to the word ‘marriage,’ many constitutional scholars and family law experts believe that as written, the original language of the amendment would also ban civil unions and domestic partnerships as well.

University of Chicago Professor Jacob Levy, for example, criticized the text of the previous version of the amendment because it would prevent the very type of civil unions that the amendment's supporters claim it would allow, based on language in the amendment stating clearly that '*Neither this Constitution nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples...*'

In a new version of the amendment introduced by Senator Allard just yesterday, this language has been changed. I think this change of language is a good indication of how controversial and complex this issue is – here, on the eve of a hearing into the text of one amendment, we see a change in language so dramatic that we are now really confronted with a different amendment altogether, with its own unique problems.

I can tell you, as one who has devoted a great deal of time to working on a constitutional amendment to expand the rights of crime victims, this is a very long and detail-oriented process. We have been through literally dozens of drafts – perhaps as many as 100 – over the course of many years, and with the help of many constitutional experts. This is not a process best done overnight, on a moment's notice.

In any event, under this new amendment's language, it does now appear, contrary to the previous draft, that civil unions might be acceptable under certain state laws. Yet still, the amendment's text is highly ambiguous, and may even suggest, as I read it, that a constitutional amendment passed by a State specifically allowing civil unions would be invalid, because the plain text of the amendment we discuss today would state that '*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...*'

So the effect of even this new amendment is still very much an open question, and I hope that today's hearing can shed some light on the details of the text, as well as the advisability of pursuing any similar amendment to the Constitution.

On a personal note, Mr. Chairman, I should say that I have always believed that a marriage is between a man and a woman. However, I also believe that this remains an open and evolving issue in America, and that attitudes have changed even in the last few years. But regardless of what you, or I, or anyone thinks of the issue before us, it is hard to understand why we should impose a federal, constitutional prohibition on it, or on civil unions.

Marriage has always been, and should continue to be, an issue that is considered, debated and controlled by states, localities, and religious leaders. The federal government spoke once on this issue, in 1996, with the 'Defense of Marriage Act'.

The Defense of Marriage Act, or DOMA as it is called, defines 'marriage' as a union between a man and a woman, and it explicitly allows states to refuse to recognize same-sex marriages performed in other states. As a result, DOMA is considered even by its principal architect, former Republican Congressman Bob Barr, to go 'as far as is necessary in codifying the federal legal status and parameters of marriage.'

That law is still in place. It has never been successfully challenged or overturned. We need not re-address this issue with a constitutional amendment. Let's let the State processes work. Let's let the

courts look at this issue over time. Let's not jump to the first constitutional amendment in our history that would limit, rather than expand, the rights of American citizens to be free."

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