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Examination of the Constitutional Amendment on Marriage: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary, 109th Cong., Oct. 20, 2005 (Statement of Professor Louis Michael Seidman, Geo. U. L. Center)

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U.S. Senate Judiciary Committee

Subcommittee on the Constitution, Civil Rights and Property Rights

Members of the Subcommittee:

Thank you for affording me the opportunity to testify concerning the so-called Marriage Protection Amendment. As you know better than I, the moral, ethical, and public policy questions posed by the Amendment generate strong emotions on all sides. Like most Americans, I have views about these questions, but I do not pretend to any special expertise about them. Therefore, I will confine my testimony to a subject I do know something about – the way in which courts are likely to interpret the amendment and its likely effect on the institution of marriage.

With regard to these matters, I am sorry to say that the amendment reflects remarkably poor lawyering. If adopted, the amendment will grant unelected federal judges untrammeled discretion that could be checked by neither Congress nor state legislatures regarding domestic relations law. Despite its title, the amendment would also have the perverse effect of weakening the institution of marriage. Because I cannot believe that the drafters of the amendment intended these results, I strongly urge you to reject the amendment being considered in this hearing and other similar amendments pending in this congress.

The amendment under consideration reads as follows:

Marriage in the United States shall consist only of the union of a man and a woman. 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.'

This proposed amendment creates a number of interpretive ambiguities. First, federal courts will be required to decide what the word "marriage" means. They will then have to decide what "the legal incidents thereof" means and what "construed" means. It is important to emphasize that the answers to these questions would become matters of federal constitutional law that would not be revisable by either the Congress or the

individual states.

Why do these words pose interpretive problems? Suppose we start by focusing on the word "marriage" in the first sentence of the proposed amendment. Clearly, the framers of the amendment meant to distinguish between "marriage" itself and its "legal incidents." This much is obvious because the first sentence defines only "marriage," while the second sentence refers to both "marriage" and its "legal incidents." This distinction is puzzling to say the least. Marriage is a legal institution. At least in the civil realm, the only thing that it consists of is a collection of "legal incidents." Apparently, the framers have in mind a distinction between core legal attributes, which make up "marriage," and an unspecified list of peripheral attributes, which make up its "legal incidents." Because the amendment is entirely silent about what is core and what is periphery, it gives federal judges unchecked power to place various aspects of marriage in one category or the other. Short of another constitutional amendment, neither the states nor Congress could do anything to reverse these decisions.

Some hypothetical situations illustrate the problems that this ambiguity is certain to cause. First, suppose that a state passed a statute that unambiguously created "civil unions" under which gay couples could enjoy most, but not quite all, of the benefits and burdens of marriage. Is this a "marriage," or does it confer only the "legal incidents" of marriage? The answer is important because if it is a "marriage," then the statute is unconstitutional under the first sentence of the amendment, whereas if it involves only the "legal incidents" of marriage, then it might well be constitutionally permissible under the second sentence.

As members of this Subcommittee know, this hypothetical is hardly far-fetched. A number of states have created, or are considering creating, various forms of civil union. Yet even the drafters of the amendment are apparently unsure about its effect on these statutes. Consider, for example, Professor Gerard Bradley's testimony before this Subcommittee last April. Professor Bradley, a proponent of the amendment who participated in its drafting, testified as follows:

[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 marriage in all but name, that is ruled out by the definition of marriage in the first sentence

How can a judge possibly determine whether or not a civil union that includes all but a relatively minor benefit of marriage is a "marriage in all but name" when even drafters of amendment are uncertain as to its meaning? Reasonable people might differ about whether civil unions are wise. It is simply irresponsible, however, to turn that question over to federal judges for them to decide for all time and for the entire country without any guidance from elected officials.

A similar problem is posed by the second sentence of the amendment, which provides that constitutions shall not be "construed" to require that either marriage—whatever the courts decide that is—or "the legal incidents thereof"—whatever they are—be conferred on anyone other than a different-sex couple. Suppose that a state court interprets a vaguely worded statute or constitutional provision to allow grandparents visitation rights. Again, this hypothetical is hardly far fetched. State courts throughout the country are considering this very question, and some courts have afforded grandparents these rights. But if visitation is an incident of marriage, and if this amendment is enacted, then the granting of these rights violates the federal Constitution. This is so because grandparents are not part of "the union of a man and woman," and are therefore not entitled to enjoy the incidents of marriage. Do the members of this subcommittee really intend this result? Do they really wish to give federal judges the discretion to impose this outcome or not as they choose?

The word "construed" is also ambiguous, and its vagueness is certain to cause more mischief. The most sensible reading of the amendment is that gay men and lesbians should not enjoy core marriage rights (whatever they are), but that states can create peripheral "incidents of marriage" for them, so long as no construal of a constitution is

necessary to create them. Even apart from the ambiguity of the word "construed," this provision creates truly bizarre results. Suppose that a state constitution contains an equal protection clause and a state court "construes" the clause to guarantee some of the incidents of marriage to gay men and lesbians. Apparently, this action would violate the amendment and is therefore void. Now suppose that a federal court so ruled and that, in response, the state legislature enacted an ordinary statute containing an identically worded equal protection provision. If a state court "construes" the state statute to provide incidents of marriage to gay men and lesbians, its actions are perfectly permissible. This is so because the Marriage Protection Amendment refers only to constitutions. Do the drafters really mean to accord less respect to state constitutions than to state statutes? So far as I am aware, this distinction is entirely unprecedented in this history of American jurisprudence and serves no function that I can imagine.

The second sentence of the amendment would also require federal judges to develop a jurisprudence that distinguished between the "construal" of a state constitutional provision and its mere "enforcement." Apparently, if the state provision explicitly and unambiguously granted incidents of marriage to gay men and lesbians, it would be permissible because no "construction" of it would be necessary. On the other hand, if the state provision is open textured and a court would be required to "construe" it, the court could not do so in a fashion that would extend the incidents of marriage to gay men and lesbians. The problem, of course, is that most cases will fall somewhere in the middle. Courts regularly consider constitutional provisions the meaning of which is not perfectly clear. Perhaps, for example, the wording is somewhat vague, but its legislative history leaves no doubt about the intent of the framers. How is a federal court to decide whether a state court's engagement with a particular provision constitutes a forbidden "construal" or mere enforcement? In order to make this determination, the word "construe" will, itself, have to be construed. Federal courts performing this task will be required to decide for state courts how state judges should go about interpreting their own constitutions. One wonders, yet again, whether the framers of this amendment really intend this result.

Perhaps the drafters of the amendment believe that this unprecedented transfer of power

to the federal judiciary is necessary to save the institution of marriage. The final irony, however, is that the amendment actually weakens that institution. This is true in two respects. First, the amendment has the remarkable, and no doubt unintended, effect of abolishing marriage in the State of Massachusetts. As I am sure members of this subcommittee know, the Massachusetts Supreme Judicial Court held in Goodridge v. Department of Public Health that the state's guarantee of equal protection required that gays and straights be treated equally with regard to access to marriage. It is important to understand that nothing in the proposed amendment reverses or modifies that decision. True, the amendment makes marriage unavailable for gay men and lesbians. The holding of the Massachusetts court, however, was that gays and straights must be treated equally. The Massachusetts constitution has not been amended since that holding was rendered, and nothing in the proposed federal amendment supercedes it. Hence, even after the amendment is adopted, Massachusetts courts will be under a continuing duty to provide this equal treatment. Equality can be created in one of two different ways: by granting the benefit to the disadvantaged group, or by withholding it from the advantaged group. In Goodridge, the Massachusetts court sensibly choose the first course. If adopted the proposed amendment would deprive the court of that option. If the Massachusetts court remains true to its reading of Massachusetts law, it would therefore have no choice but to choose the second course. The upshot would be civil unions for all citizens of Massachusetts and the abolition of marriage. I must ask again: Do members of this subcommittee really intend this result?

The amendment also undermines marriage in a second respect. It does nothing to change the Supreme Court's decision in Lawrence v. Texas, which invalidated sodomy statutes as applied to gay men and lesbians. Strikingly, that decision creates a constitutional right to engage in even casual sex with total strangers. When Lawrence is read together with this amendment, the upshot is a fundamental constitutional right to casual sex, but an absolute constitutional prohibition on long-term, committed gay relationships. The amendment, in effect, constitutionalizes the one night stand. Is this a sensible way to protect the institution of marriage?

Some years ago, I had the honor of serving as the Reporter for a bipartisan blue ribbon committee convened by The Constitution Project, under the chairmanship of two distinguished former members of Congress – the Honorable Abner Mikva and the Honorable Mickey Edwards. Our assigned task was to develop guidelines for the amendment of the Constitution. We did so in a document entitled "'Great and Extraordinary Occasions:' Developing Guidelines for Constitutional Change." Although members of the Commission disagreed among themselves about specific amendments, they were united in their commitment to some minimal standards before our foundational document was changed. Central among these was the requirement that proponents of proposed amendments "attempt to think through and articulate the consequences of their proposal including the ways in which the amendment would interact with other constitutional provisions and principles."

I am sorry to conclude that the proponents of this amendment have not met this minimal standard. If enacted, their handiwork is bound to produce outcomes that no one could have wanted or intended and an unprecedented transfer of power over domestic relations to federal judges. Although Americans disagree about gay marriage, surely they can agree that more care should be taken before the Constitution is sullied in this fashion.