

gation or the separate but equal doctrine? I further ask: Where would we be as a nation if Congress in 1967 made it unconstitutional for interracial couples to marry?" Lewis said. "I have fought too hard and too long against discrimination based on race and color not to stand up against discrimination based on sexual orientation."

During discussion, Allard said his intent in clarifying the language was "to remove any doubt that we were trying to limit" a state's authority to write laws governing civil unions or domestic partner arrangements for same-sex couples. He was simply trying to limit the actions of the courts on constitutional matters.

Sen. Dick Durbin, D-Ill., recalled the oath of office he had taken "to uphold and defend the Constitution of the United States." He was more than troubled by the fact that revisions they were discussing "had been delivered to us less than 24 hours ago."

"I disagree that they are just technical changes," Durbin said. He interpreted the phrase "or the legal incidence of marriage" to include health insurance coverage through domestic partner-type arrangements or benefits programs of private employers.

He wondered why the words "unmarried couples or groups" had been deleted and why the amendment no longer banned polygamy. He asked whether traditional marriage includes polygamy. Does it bar interracial marriage? He lamented that the bill's sponsors were not present to explain their intent.

Feinstein thought the revised FMA would turn existing principles of governance on their heads by "giving the legislatures more authority than the [state] constitution." She found it "puzzling" that the proposal "allows general law to trump the constitution. I believe this is unprecedented."

Cass R. Sunstein, a professor at University of Chicago Law School, agreed that the revised FMA "shows contempt" for the federal process. He believes if it were to become part of the U.S. Constitution, a ballot initiative passed by the voters of California to allow same-sex marriage would be legal if it took the form of a common law, but it would be unconstitutional if it took the form of an amendment to the California Constitution.



Cass R. Sunstein

Phyllis Bossin testified for the American Bar Association as chairwoman of its section on family law. She said the organization opposes "any constitutional amendment that would restrict the ability of a state to protect the rights of children by determining the qualifications for civil marriage between two persons within its jurisdiction."

She belittled fears that have led to the FMA. "One does not amend the Constitution on a hunch. One does not amend the Constitution to call a halt to democratic debate within the states. An amendment should be reserved for the most urgent and compelling circumstances. It is a last resort."

Toward the end of the hearing Sen. Jeff Sessions, R-Ala., revealed what was for him the principle rationale for the language of the FMA: It's a way to get at "activist" federal judges who find claims of equal protection in the U.S. Constitution for queers and other minorities.

"It goes to the separation of powers," he said. If we "allow the judicial branch to depart from the law...then we have lost our democracy." To Sessions, it was all about raw majority rule with no concern for minority protections.

But it seems most Republican members of Congress do not share his concerns. Focus on the Family had urged supporters to contact senators and have them ask tough questions; otherwise, the record "will tip in favor of homosexual activists." But the Republican members of the committee continued to stay away in droves, while the Democrats have appeared in force.

Musgrave appeared only briefly at the hearing to read a statement, while Allard left before the question session ended. Frank sees this as an indication that most Republicans do not want to deal with this issue. **JM**



"I disagree that they are just technical changes," said Sen. Dick Durbin, D-Ill.

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