



Legislative Bulletin.....July 18, 2006

Contents:

H.J.Res. 88 — Marriage Protection Amendment

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: 0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

**H.J.Res. 88 — Marriage Protection Amendment — *as introduced*
(Musgrave, R-CO)**

Order of Business: The joint resolution is scheduled for consideration on Tuesday, July 18, 2006, under a structured rule with 60 minutes (equally divided) to debate the rule, 90 minutes (equally divided) of general debate for the bill, and one motion to recommit made in order.

In the 108th Congress, the House passed H.J. Res. 106, with virtually identical resolution text (the word “solely” has been changed to “only”) by a vote of 227 – 186 ([Roll no. 484](#)).

Summary: The resolution, following passage by two-thirds of both the House and the Senate, and ratification by three-fourths of the state legislatures, would amend the United States Constitution with the following text:

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.

Sentence 1: Marriage in the United States shall consist only of the union of a man and a woman.

The first sentence is designed to ensure that no governmental entity whether in the legislative, executive, or judicial branch at any level of government shall have the legal authority to alter the definition of marriage such that it is made other than a union of one man and one woman.

Sentence 2: 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.

The second sentence is designed to prevent any court from construing the federal Constitution, or a state constitution, to require any legislative body or executive agency to enact or to recognize under the Full Faith and Credit Clause so-called “civil unions” or domestic partnership laws, or any law that would confer a subset of the benefits, protections and responsibilities of marriage on unmarried persons. H.J.Res. 88 would not impose any restraint on legislatures with respect to their ability to pass civil union laws. The second sentence of H.J.Res. 88 would prevent abuses of judicial power, such as that committed by the Vermont Supreme Court in *Baker v. State* (which required the state legislature to pass a law either approving same-sex marriage or civil unions). For example, under H.J.Res. 88, the Vermont legislature would still have the power to enact a statute extending marriage benefits to same-sex couples, but the Vermont Supreme Court could not *require* it to do so.

The phrase “shall be construed” or “shall not be construed” is used four other places in the Constitution in ways that make clear it applies to judges charged with construing the legal meaning of constitutional commands. See Article IV, Sec. 3, Clause 2: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution *shall be so construed* as to Prejudice any Claims of the United States, or of any particular State.”; Amendment IX: “The enumeration in the Constitution, of certain rights, *shall not be construed* to deny or disparage others retained by the people.”; Amendment XI: “The judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.”; Amendment XVII: “This amendment *shall not be so construed* as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution” (emphasis added).

According to legal scholars, the phrase “legal incidents thereof” means the rights, benefits, protections, privileges, and responsibilities of marital status that have been historically provided by law.

WHY DOMA DOES NOT NEGATE THE NEED FOR THE MARRIAGE PROTECTION AMENDMENT:

Defense of Marriage Act (DOMA)

In 1996, the Defense of Marriage Act (DOMA) passed the House 342-67 and the Senate 85-14, and was signed into law by President Clinton on September 21, 1996 (Public Law 104-199). (House vote: <http://clerk.house.gov/evs/1996/roll316.xml>) DOMA states the following:

SEC. 2. POWERS RESERVED TO THE STATES.

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

SEC. 3. DEFINITION OF MARRIAGE.

Sec. 7. Definition of marriage and spouse

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word marriage means only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife.

Massachusetts Ruling sets DOMA Challenges in Motion:

In *Goodridge v. Department of Pubic Health*, the 2003 Supreme Judicial Court of Massachusetts ruled that the state may [not] deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. The Court ordered same-sex marriage licenses to begin to be issued on May 17, 2004. Same-sex couples from at least 46 states have received marriage licenses in Massachusetts, California, and Oregon (though California has since negated their same-sex licenses). A number of these couples are suing in their home state arguing that their home states give “full faith and credit” to the judgment that recognizes their status. Same-sex couples are now challenging the marriage laws of several states, and both the Georgia and New York Supreme Court recently ruled in favor of traditional marriage, upholding state prohibitions against homosexual marriage.

Legal scholars argue federal DOMA likely to be struck down:

The following example has been given as a likely scenario to the federal DOMA being invalidated:

A same-sex couple will marry in Massachusetts, move to another state, Texas, for example, and claim the status and benefits of marriage there. They will cite the Full Faith and Credit Clause of Article IV of the Constitution, which declares that states must accept the public acts of every other state. Texas will refuse recognition, relying on the federal Defense of Marriage Act (DOMA), passed in reliance on Article IV's further provision that Congress may prescribe the effect of such out-of-state acts. The couple will respond with a challenge to DOMA under the federal Due Process and Equal Protection Clauses. The Supreme Court will then uphold their challenge by finding a federal constitutional right to same-sex marriage that invalidates DOMA. The Marriage Protection Amendment would prevent this likely outcome. Although both Georgia and New York courts recently upheld state law regarding traditional marriage, efforts are underway in dozens of states and various state and federal courts to overturn state and federal DOMA laws and state constitutional amendments.

Summary of Current State Laws:

- 20 states now have constitutional amendments protecting marriage as only between a man and a woman.
- 26 other states have statutes designed to protect traditional marriage by defining marriage only as a union of a man and a woman.
- Five states have no statutory or constitutional protection for traditional marriage: Massachusetts, New Jersey, New Mexico, New York, and Rhode Island.
- 6 states (California, New Jersey, Connecticut, Hawaii, Maine, and Vermont) have adopted a domestic partnership or civil union law without any mandate from courts (except in Vermont, where the state supreme court intervened to force the creation of same-sex civil unions or marriage).

(Source: Senate Republican Policy Committee)

Pending Efforts to Strengthen Protection for Traditional Marriage Laws

- Voters in 6 states will vote on constitutional amendments in 2006: Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin.
- Another 4 state legislatures (Colorado, Indiana, Iowa, and Massachusetts) are considering sending constitutional amendments to voters in 2006 or 2008, and ballot initiatives are currently underway in three states – Arizona (2006), Florida (2008), and Illinois (2006).

(Source: Senate Republican Policy Committee)

Pending Lawsuits

State cases

- 9 states face lawsuits challenging traditional marriage laws — California, Connecticut, Iowa, Maryland, Nebraska, New Jersey, New York, Oklahoma, and Washington.
- In 4 of those states (California, Maryland, New York, and Washington), trial courts have found a right to same-sex marriage in state constitutional provisions relating to equal protection and due process — in each case relying in part on the Massachusetts decision.
- State supreme courts will decide appeals of those decisions in 2006 or 2007.

Federal cases

- In Nebraska, a federal district court in 2005 found unconstitutional a state constitutional amendment passed by 70 percent of Nebraska voters. The U.S. Court of Appeals for the 8th Circuit heard oral arguments for the state's appeal in February 2006.
- Federal district court challenges to federal DOMA are pending in Washington and Oklahoma, and were previously filed in Florida and California.

(Source: Senate Republican Policy Committee)

The following websites summarize marriage on a state-by-state basis:

http://rpc.senate.gov/_files/May2306MarriageChartSD.pdf.

<http://www.heritage.org/Research/Family/Marriage50/Marriage50States.cfm>.

CONSTITUTIONAL AMENDMENTS:

The Process:

The Constitution of the United States

Article V. – Amendment

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, **when ratified by the Legislatures of three fourths of the several States**, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Amendment History:

Throughout the history of the Constitution, 27 changes have been made through the Constitutional Amendment process. To read a list of successfully ratified Constitutional Amendments click here: <http://www.usconstitution.net/constamnotes.html>.

When a vote is requested on a vetoed bill, the question is: “Will the House, on reconsideration, pass the bill, the objections of the President to the contrary notwithstanding.” Thus, it is as if the bill is up for normal consideration again, only the threshold for passage is now 2/3 of those voting. If a member opposes the bill and voted NO when it was originally considered and passed, then a he would vote NO again (still opposing the bill, thereby voting to sustain the President's veto).

Administration Policy: Though an official Statement of Administration Policy is not available, the Administration has been on record as strongly supporting the definition of marriage as the union of a man and a woman, as has called on Congress to pass a constitutional amendment

stating such. The official SAP for the Marriage Protection Amendment in the 108th Congress (with virtually identical text) stated the following:

“The Administration strongly supports passage of H.J.Res. 106. Marriage is the foundation of society and should not be redefined by a few activist judges and local officials. Without a constitutional amendment, judges and local officials could continue to attempt to redefine marriages in their States. Judges could even strike down the Defense of Marriage Act that was passed by an overwhelming bipartisan margin and declare that same-sex marriages recognized in one State must be recognized as marriages everywhere else. The only alternative left for the people's voice to be heard is an amendment to the Constitution - the only law a court cannot overturn. The future of marriage in America should be decided through the democratic constitutional amendment process, which involves both the Congress and the States, rather than by court order. The Administration urges members of the House to promptly pass, and to send to the States for ratification, an amendment to protect marriage.”

Committee Action: H.J.Res. 88 was introduced on June 6, 2006, and referred to the Committee on the Judiciary, which took no official action.

Cost to Taxpayers: A CBO score of H.J.Res. 88 is unavailable, but the bill does not authorize new expenditures.

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: A committee report citing constitutional authority is unavailable. House Rule XIII, Section 3(d)(1), requires that all committee reports contain “a statement citing the *specific* powers granted to Congress in the Constitution to enact the law proposed by the bill or joint resolution.” [*emphasis added*]

RSC Staff Contact: Derek V. Baker; derek.baker@mail.house.gov; 202-226-8585
