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The Federal Marriage Amendment Threatens the Foundations of the U. S. Constitution

by Gordon A. Babst

On February 24, 2004, U. S. President George W. Bush called for a constitutional amendment to ban same-sex marriage, stating that we must "prevent the meaning of marriage from being changed forever." He expressed the fear of many Americans that activist judges and courts will fail to preserve traditional opposite-sex marriage, and so create "confusion on an issue that requires clarity," allowing for the rollback of "more than two centuries of American jurisprudence and millennia of human experience."

The tradition the president claims to be defending by depriving gay and lesbian people of the right to marry does not serve any legitimate public purpose. Rather, it is part of a continuing effort to maintain and further embed a barely articulated, nearly invisible religious preference in American law and to subvert principles articulated in the First Amendment to the U. S. Constitution. The Establishment Clause of the Constitution's First Amendment could not be clearer in its insistence that religion does not belong in American law: "Congress shall make no law respecting an establishment of religion"

The Constitutional Case for Same-Sex Marriage

There is no provision in the Constitution today that proscribes same-sex marriage, and the Fourteenth Amendment makes it clear that the right to marry the person of one's choice is one of the fundamental liberties all Americans should enjoy.

The Fourteenth Amendment, which applies to both the federal government and to the states, provides that no "state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Taken together, these two clauses, the Due Process Clause and the Equal Protection Clause, prevent the government from depriving Americans of fundamental liberties--including the right to marry--without due process of law and provide that such liberties belong to all Americans equally.

The Shadow Establishment of Religion in American Law

Despite the constitutional guarantees of due process and equal protection, most Americans find the proposition that marriage is necessarily a union between a man and a woman obvious and natural, and many believe that it should be inscribed in the Constitution. To most people, other marital arrangements seem unfamiliar, if not bizarre.

This widely held sentiment against same-sex marriage is often mistaken for a universal principle, but it can only come from fundamentally religious roots. There is no plausible non-sectarian way to justify it. Efforts to reflect religiously derived sentiments against same-sex marriage in the law continue the practice of the *shadow establishment* of a widely held sectarian perspective regarding the "sanctity of marriage."

The *shadowestablishment* of religion in American law is not new, but because it is derived from widely held, rarely questioned sentiments, it is often insidious and all but invisible. In the case of state sodomy trials, however, the *shadowestablishment* manifested itself vividly. In their rulings against gay plaintiffs and defendants, judges often used such religiously derived terms as "anathema" or "an abomination" to characterize homosexual sexuality and some even condemned the convicted with direct quotations from Christian scripture.

The Weakening Shadow Establishment

Two recent Supreme Court decisions have sharply limited the *shadowestablishment* by ruling that homosexual Americans are the legal equals of other Americans and that homosexual behavior *per se* is not criminal.

In the case of *Romer v. Evans* in 1996, the Supreme Court was asked to rule on Colorado's Amendment 2, a state constitutional amendment enacted by popular vote that denied lesbians and gay men the right to bring any claims of discrimination. The court ruled that Amendment 2 made homosexuals unequal to other citizens. "This Colorado cannot do," the court ruled.

In 2003, the court made a decision with even broader implications in the case of *Lawrence v. Texas*. Before *Lawrence v. Texas*, opponents of gay and lesbian rights and same-sex marriage argued that sodomy laws defined homosexuals as criminals. Therefore, they reasoned, the state can legitimately deny liberties--including the freedom to marry--to this criminal class. In its decision in *Lawrence v. Texas*, the court annihilated this argument by ruling that states cannot demean homosexuals "by making their sexual conduct a crime."

Conclusion

Supporters of the *shadowestablishment* of religion in American law as it relates to same-sex marriage find themselves in a difficult legal position in 2004. The Equal Protection and Due Process clauses of the U. S. Constitution's Fourteenth Amendment make it clear that the freedom to marry is a right that belongs to all Americans, and the traditional argument that homosexuals are criminals whose rights may be abrogated has been demolished by the U. S. Supreme Court.

Since same-sex marriage opponents find it increasingly difficult to create effective anti-gay laws, they have turned to the desperate and radical tactic of proposing to alter the U. S. Constitution in ways that compromise some of its most important principles. The Federal Marriage Amendment the Bush administration supports would deny a specific group of Americans equal protection and due process under the law in a way that starkly contradicts and compromises First Amendment guarantees against the official establishment of religion in the United States, and the fundamental principle of equal citizenship provided in the Fourteenth Amendment.

All Americans, especially those who harbor sentiments against same-sex marriage, must be educated to understand that the Federal Marriage Amendment the Bush administration proposes weakens key foundations of American law and politics.

Related Encyclopedia Entries

- Bowers v. Hardwick / Lawrence v. Texas
- Romer v. Evans
- Same-Sex Marriage
- Sodomy Laws and Sodomy Law Reform

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The U.S. Constitution
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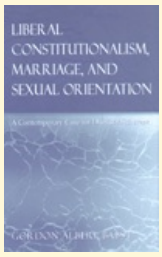

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