

MARRIAGE DISCRIMINATION

By William Nicoson

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...nor deny to any person within its jurisdiction the equal protection of the laws.

--Sec. 1, Amendment XIV of the U.S. Constitution.

There is growing disaffection throughout our nation for the proposition that marriage and its extensive rights and privileges must be limited to the union of a man and a woman. St. Anne's Episcopal Church in Reston recently undertook a study of the history, literature and current status of the sanctity of unions, including marriage, between partners of the same sex. Most, but not all, of the participating parishioners concluded that the church should not discriminate in its sacraments against partners of the same sex.

But of course same-sex marriages are prohibited by the Virginia Code of Laws. And most elected Virginia officials seem unwilling to consider revocation of the prohibition. A constitutional amendment, called the Federal Marriage Amendment, has been proposed in the U.S. Congress and supported by our President to the effect that "Marriage in the United States shall consist only of the union of a man and a woman..." The Virginia General Assembly adopted a resolution urging Congress to approve the Amendment.

On July 14, the U.S. Senate considered a cloture motion (ending debate to proceed to a vote) on the Federal Marriage Amendment. By the slim margin of 50 to 48 the Senate voted against cloture, in effect a vote against the Amendment. Both Virginia Senators Warner (R) and Allen (R) voted for cloture. The only Senators recorded as not voting were Senators Kerry (D) and Edwards (D). Only three Democrats voted Yea, while six Republicans and one Independent voted Nay, saving the day. For the moment it appears unlikely that any further action will be taken on the Amendment by Congress.

To many observers it seems odd that Republicans would seek to federalize marriage. The sanctity of states' rights has long been a favorite tenet of the Republican Party. In the past, conservatives have fought to maintain power as close to the people as possible. But it's also true that conservatives have generally been slow to accept change. And same-sex marriage does constitute major change.

The Federal Marriage Amendment, if adopted as written, would pose a troubling conflict with the equal protection clause of the 14th Amendment (quoted above). No doubt the FMA authors chose a constitutional amendment rather than legislation which might be held by judges to conflict with the equal protection clause. But the proposed separate Amendment also conflicts with the equal protection clause, and how jurists would rule on the constitutional conflict is

anyone's guess.

The Federal Marriage Amendment might have been drafted explicitly as an exception to equal protection, but that would no doubt have proved too embarrassing for the authors.

It is stunning irony that President G. W. Bush should seek to undermine application of the equal protection clause. That was the clause relied upon by seven justices of the Supreme Court in the case which anointed him President. If recounting ballots by hand in the absence of uniform county standards is discriminatory under the equal protection clause, then discrimination against gays by denial of all marriage rights and privileges would certainly seem a more invidious violation of the equal protection guaranteed by the Constitution.

William Nicoson practices law in the District of Columbia.