



Will gay rights be a state-by-state battle in the USA?

BY JEREMY D. MAYER

Does the 2004 presidential election, in which gay marriage appeared to some commentators as key to President Bush's victory, prove that the battle over gay rights in America will fundamentally evolve at the federal level?

Not at all. Not only is it far from certain that the gay marriage issue was central to Bush's reelection, the whole discussion misses the deeper truth that the struggle between advocates for gay rights and religious-based opponents of change continues to be primarily a state-by-state battle.

While Bush's endorsement of a constitutional amendment to ban gay marriage as well as civil unions probably helped rally his base, it was symbolic politics. There is almost no chance for this amendment to pass, even though a solid majority opposes gay marriage. A distinctive feature of American federalism is that the Constitution is remarkably difficult to alter. An amendment must pass both houses of Congress by a two-thirds vote, and be approved by three-quarters of the states, a challenging process that has occurred only 27 times in more than 200 years. In 1912, when the vast majority of white Americans fervently opposed interracial marriage, and many states made it illegal, an amendment to ban it failed. An America much more divided on gay marriage is not likely to pass an amendment banning it.

Action at the state level

It was upheaval at the state level that caused Bush to advocate the gay marriage ban. In 2000, Vermont became the first state to legalize gay civil unions and in 2003, the Massachusetts Supreme Court inflamed the issue by ruling that gay marriage was a state constitutional right. Activist mayors in New York and California even began marrying gays in direct disobedience of state laws.

Eleven states put gay marriage bans on the ballot and they passed in most by 2-1 margins. As none of these states were about to legalize gay marriage and the federal Defense of Marriage Act (DOMA) already protected states from being forced to recognize gay marriages contracted in other states, why the rush to absolutely prevent gay marriage?

Some conservatives worried that the Supreme Court's 2003 Lawrence v. Texas decision that struck down anti-sodomy

laws in the few states that still had them would be the precursor to federal courts mandating gay marriage or overturning DOMA. The former fear was raised by Justice Scalia in his Lawrence dissent, in which he noted that Canada's courts were leading that nation down that path. In the US, given the current American court, such a course is seen as unlikely.

The worst of both worlds?

In a very real sense, the gay rights movement has gotten the worst of both worlds in the 2004 elections. While legal guarantees for gay rights nationally appear unlikely, the Republican Party has rallied its base in state and national elections by running against gays, particularly on marriage. Republican brochures in several states went out during the election, claiming that a Democratic victory would mean an immediate move to legalize gay marriage.

Legal rights for gay Americans did not improve after September 11, 2001. Not only were the partners of gay victims of the September 11 attacks on New York and Washington in 2001 denied survivor benefits

by numerous state laws and insurance companies, the federal victims compensation fund initially decided to simply follow state policy. Yet the power of the issue was demonstrated when several states, such as New York and California, swiftly changed their compensation laws after the partners of gay terror victims crystallized the issue. If the focus of the gay rights movement had been on this persuasive injustice, election day would have produced better outcomes for the gay agenda.

Gay rights laws in the future?

Looking ahead, where does 2004 leave gay rights in American federalism? The parallel with the civil rights movement is again instructive. While ultimately most of the demands of 1954 were realized by 1994, the backlash against civil rights won many elections for the Republican Party in the interim.

The final irony of 2004 for gay Americans is that they lost ground while the acceptance of homosexuality in American culture has never been greater. Yet even President Bush has implicitly acknowledged that the tide of history is not with the anti-gay forces. In the last week of the campaign, he made a point of disagreeing with the constitutional amendment, saying that he didn't oppose civil unions. If the most religiously conservative president in modern American history doesn't oppose civil unions, the die is cast. ☺

What are other federal countries' laws on gay rights? See page 22.

Jeremy D. Mayer is an Assistant Professor at the School of Public Policy of George Mason University, Alexandria, VA, USA