LIBERAL CONSTITUTIONALISM, MARRIAGE, AND SEXUAL ORIENTATION

A Contemporary Case for Dis-Establishment

GORDON ALBERT BABST

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TEACHING TEXTS IN LAW AND POLITICS

David A. Schultz
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To the memory of Dante Germino (1931–2002).

Dante Germino, who passed away tragically on May 25, 2002, was an eminent political philosopher and close friend.

Preface

Liberal Constitutionalism, Marriage, and Sexual Orientation: A Contemporary Case for Dis-Establishment, uses constitutional theory and political philosophy to shed light on an elusive feature of American jurisprudence: the establishment of a sectarian preference in the law to the detriment of American citizens who happen to be gay or lesbian, and who wish to exercise their fundamental right to marry. This preference is uncovered through a broad-ranging examination of the rationale for the ban on same-sex marriage. Since marriage is considered a fundamental interest, an aspect of personal liberty, equal protection of the law should guarantee this right to all Americans, and allow each adult individual to marry the person of his or her choice. We argue that the State has no genuine interest compelling enough to override this fundamental liberty interest, but that it, instead, believes itself to be protecting what is substantially a religious value, the good of marriage.

Reviewing aspects of liberal-democratic theory, marriage law, and pertinent analogies that deal with the right to marry, we present the notion of the *shadow establishment* as that which makes the best sense of a constitutional affirmation of bias against same-sex marriage and also gay persons in the law. The freedom from religious establishment of some American citizens is violated by this *shadow establishment* of a generalized, widely-shared but nonetheless sectarian perspective regarding the institution of marriage. The *de jure* ban on same-sex marriage is, therefore, constitutionally suspect. The *shadow establishment,* a non-preferentialist sectarian bias, is revealed through discussions that include the no religious test clause, Sunday closing laws, and marriage law as it has related to mixed-race couples, Mormons, and gay or lesbian American citizens.

Supporters of the ban on same-sex marriage are cast as out-of-step with the nature of the American political regime, because they are opposed not merely to the full legal recognition of same-sex couples' right to marry, an exercise of any American citizen's fundamental liberty interest, but also to the public liberal-democratic values of our constitutionally ordered republic.

Contents

Preface ix

Introduction 1
Organization of the Book 5
Six Features of Contemporary Public Law 6

Part I
Marriage in the Law 11

Chapter One. Marriage as Contract and Status 15

Chapter Two. The Defense of Marriage Act and Recent Events in State Law 22

Part II
The Law and Morality Distinction, Violated 35

Chapter Three. Morals Discourse and Law 41

Chapter Four. Professor Richards Finds a Violation 51

Part III
How to Identify *Sub Rosa* Establishment and the Argument by Definition 61

Chapter Five. The Shadow Establishment *Has Its Day in Court* 67

Chapter Six. A Note Regarding the Appeal to the Dictionary 80

Part IV
The *Shadow Establishment*, "Gay Marriage" in the Courts, and the Analogies to Race and Polygamy 85

Chapter Seven. Interracial and Plural Marriage Analogies and Cases 91
The Miscegenation Analogy 91
The Polygamy Analogy 95

Chapter Eight. "Gay Marriage" in the Courts 100

Conclusion 107

Table of Cases 113

Notes 115

Bibliography 143

Index 153

Introduction

> *For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.*[1]

The argument of this book is that the notion of a continuing *shadow establishment* of religion in the United States today provides a very good explanation for the ongoing legal ban on same-sex marriage. This ban allows some Americans to maintain marriage as a legally frozen institution, and to keep gay persons, one to another, legal strangers in the eyes of the law. By "explanation," we mean to identify what gives the ban its core sense of "right," "good," or "reasonable" that its legality or constitutionality is taken suitably to protect. Religion is meant broadly, not to denote a full-blown institutionalization in the law of the tenets of a particular faith, but the presence of religious rather than secular persuasion. Furthermore, this religious persuasion is identifiable within a

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Judeo-Christian framework, rather than a generalized expression of any alternative faith, much in keeping with the nation's religious heritage. For our purposes it is not necessary to hazard a guess as to whether certain justices or legislators intend their decisions and lines of argument to be read as religious in nature, when they are not explicit about this aspect. An alternative explanation to that developed here is to assert that there simply is no underlying, cohesive, identifiable rationale or perspective to account for the soundness of the ban on same-sex marriage, or the good its supporters believe they are accomplishing; it just makes good public policy sense. One philosopher and legal scholar renders this sense of attributing a point-of-view as follows:

> These [religious] views are attributed to the Court not because the Court states them, but primarily because attributing them to the Court helps make sense of what the Court has stated and decided, much as attributing gravitational attraction to physical mass helps makes sense of lunar movements and tidal changes.[2]

The spirit of the laws here are best regarded as religious in nature or rationale, resulting in a *de jure* ban on same-sex marriage.

We suggest that this ban can best be made sense of in the light of the notion of the *shadow establishment*, which we identify as *an impermissible expression of sectarian preference in the law that is unreasonable in the light of the nation's constitutional commitments to all its citizens*. We understand *sectarian* to mean resting on perceptions internal to religious convictions, as opposed to a public justification that uses arguments accessible to all citizens and consistent with the United States Constitution. It is generally the case that people understand "sectarian" and "secular" as paired opposites, but these terms are better understood politically by their contrast with "public." Secular may indeed mean a comprehensive moral vision, just one that is not religious in nature. Public implies no adherence to a comprehensive moral doctrine of any kind, though in the United States it implies adherence to liberal-democratic values and principles such as characterize the American constitutional republic. Herein, whenever the term "secular" is used, it is not to imply any comprehensive moral doctrine, but as a shorthand for "public" and to emphasize its not being sectarian or religious.[3] It is our view that no existing sectarian or secular comprehensive moral vision or doctrine by itself supplies political reasons for public policy or law in the American context. Nevertheless, religion has been a prominent political issue in the nation's history, one especially contentious in those instances where this or that aspect of the

American citizenry has been legally estranged on a religious basis. In those instances, the dispute is clarified by understanding it not as about morality, but about political power and control of the political process. The notion of the *shadow establishment* clarifies when one party to the dispute, that side whose view of public law is overdetermined by religion, runs afoul of the Constitution.

In making the argument this essay surveys several representative lines of reasoning found in court decisions and scholarly discussions, and focuses attention on the First and Fourteenth Amendments to the U.S. Constitution, as well as the "no religious test" clause of Article VI. The latter is often forgotten by scholars when treating the relationship between church and state:

> Among the mountains of literature on church and state, only a handful of book chapters and articles focus on the Article VI, clause 3 prohibition. Indeed, the attention given the First Amendment has been so complete that one could be forgiven for concluding that the federal religious test ban was of little historical or substantive significance to the constitutional framework for church-state relations. It is curious. . . . The test ban was thus calculated to secure religious liberty, deter religious persecution, ensure sect equality before the law, and promote institutional independence of civil government from ecclesiastical domination and interference at the federal level. . . . It was among the truly innovative features of the American Constitution. . . . With uncommon boldness, the constitutional framers proposed a clause deliberately calculated to ensure sect equality before the law and promote institutional independence of civil government from ecclesiastical domination at the federal level.[4]

We use constitutional theory and political philosophy to shed light on an elusive feature of American jurisprudence: the establishment of sectarian preference for religion in the law. This preference is uncovered through a broad-ranging examination of the rationale for the ban on same-sex marriage, which, we will discover, is not coequal with a ban on "gay marriage," forms of which are recognized in the law.[5]

Since marriage is considered a fundamental right, equal protection of the law should guarantee this taken-for-granted liberty interest to all Americans, and allow each adult individual to marry the person of his or her choice. We argue that the State has no genuine interest compelling enough to override this fundamental liberty interest, but that it, instead, believes itself to be protecting what is substantially a religious value, a sectarian understanding of the good of marriage, the constitutional weight of which merits serious challenge. Not to appreciate the nature of the rationale supporting the ban, is not to understand it,

because no public policy considerations can provide the muscle necessary to overcome the liberty interest at stake—that of an adult to marry the loved one of her choice, not the liberty interest in maintaining the exclusivity of a sectarian heteronormative understanding of the marital relationship.

Reviewing aspects of liberal-democratic theory, marriage law, and pertinent analogies that deal with the right to marry, we present the notion of the *shadow establishment* as that which makes the best sense of a constitutional affirmation of bias against same-sex marriage in the law. The freedom from religious establishment of some American citizens is violated by this *shadow establishment* of a generalized, widely shared but nonetheless sectarian perspective regarding the institution of marriage. The injurious nature of the ban as well as its animating rationale, however, are not invisible to those who strive to understand it and who seek a statement of public justification for it. The *de jure* ban on same-sex marriage is, therefore, constitutionally suspect, as argued in the following chapters that seek out and make explicit this sectarian preference in Sunday closing laws and marriage law as it has related to mixed-race couples, Mormons, and American citizens who happen to be gay or lesbian.

Denying to American gay men and lesbians the considerable legal rights and benefits government bestows on married spouses merits studied consideration, especially given that these provisions are intended to encourage couples to marry.[6] Society's gradual unmooring of marriage from religious conceptions and from "heteronormativity," a term we discuss later, suggests a disconnect between the current state of the law and the American society it serves. The law's usefulness as a bar to a particular variety of potentially unjust discrimination has not been fully exploited until the nature of this disconnect is revealed, and an appropriate legal response crafted. In other contexts besides the issue at hand here, many people of goodwill find the effects of sexual orientation discrimination, no matter its precise genealogy, to be odious and un-American.

The argument presented here is not an argument "for" gay marriage; however, it is a disestablishment argument.[7] We neither recommend nor discourage individual same-sex couples, gay or otherwise, to enter into a same-sex marriage, nor do we comment on the desirability of the institution of marriage for any couple.[8] The controversy over the same-sex marriage question may provide Americans with an opportunity to reevaluate their social preferences for certain family formations, especially those ensconced in the law. Today the scaffold of legitimate

state interests surrounding the marriage ban are at sea, and the structure as such is at issue. Contemporary scholars are revealing a picture of marriage as having had many aims, which have proved mutable in both form and significance.[9] Indeed, the "purpose" of the marital relationship is being revealed as not self-evident, or at least not so obvious that denial of entry into it is automatic or just.[10]

Organization of the Book

In addition to the brief overview of the book already provided, the Introduction presents and discusses some public policy considerations that have been advanced in argument to suggest the legitimacy of the ban on same-sex marriage. In Part I we present the legal understanding of marriage (Chapter One), and review recent events in the law at the state level, as well as the Defense of Marriage Act or DOMA (Chapter Two). Part II presents and reviews some pertinent literature on morals discourse and law, and argues for the proposition that heterosexuality is not merely a sexual concept, but largely a normative one, imbued with religious significance (Chapter Three). We then focus attention on a unique law review essay that treats sexual orientation discrimination as unconstitutional under the religion clauses of the First Amendment (Chapter Four).[11] In Part III we denote how to identify *sub rosa* religious establishment, or *shadow establishment,* through the Supreme Court's reasoning in some key First Amendment/Establishment cases, where several members of the Court very ably exhumed the impermissible entanglement of church and state in the areas of Sunday closing laws and time set-asides for religious instruction in the public schools (Chapter Five). We next present and deconstruct the argument against same-sex marriage based on the purported definition of marriage (Chapter Six). Part IV presents the analogies arguably relevant to the *de jure* ban on same-sex marriage. These analogies are taken from cases involving miscegenation and Mormon polygamy, which, we argue, explicitly implicate a sectarian preference in the law (Chapter Seven). Finally, we review the issue of same-sex marriage in the courts, as well as draw and interrogate the distinction between same-sex marriage and "gay marriage" (Chapter Eight). The Conclusion reiterates the thesis that the ban on same-sex marriage is grounded in the continuing *shadow establishment* of religion in the United States today, and so is constitutionally infirm for want of legitimate public justification.

Six Features of Contemporary Public Law

Over the course of the last decade some public policy considerations have been advanced in argument to suggest the legitimacy of the legal ban on same-sex marriage. Below we present and discuss six public policy features of the law, some or all of which currently are present in several jurisdictions below the federal level. These features respond to the most frequently cited public policy bars to the legal recognition of same-sex unions; arguably exhaust the state's secular interest in maintaining the ban; and also provide the context for the argument of the entire book. In addition, as one would expect of public policy, these features are subject to open, empirical investigation.[12] Neither a secular argument, nor, of course, a sectarian argument, can carry the burden of legitimating the ban on same-sex marriage in the law, absent some legitimate and express public purpose, such as is incorporated in each of the six considerations that follow.

Feature # 1

No anti-sodomy statute is in effect, thus ruling out this sort of criminal sanction as a bar to same-sex marriage, as is the case in thirty-six states and in the District of Columbia.[13] Sodomy laws have affected the legal status of gay persons even in those states which have removed them, because they create a presumption of criminal behavior that may inhibit their ability not only to marry, but also to change residence and jobs.[14] As of July, 2001, only fourteen states continue to provide criminal penalties for sodomy in private and between consenting adults. In eleven of these states the antisodomy statute is directed at both same-sex and heterosexual practices, with the remaining three (Kansas, Oklahoma, Texas) criminalizing only homosexual sodomy.[15] Not all antisodomy statutes could be constructed to bar same-sex marriage in any case.

For example, Georgia Code Annotated Section 16-6-2 (1984), famously upheld by the Supreme Court in *Bowers v. Hardwick* (478 U.S. 186 [1986]), provided as follows:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of

> the offense of aggravated sodomy shall be punished by imprisonment for life or by not less than one nor more than 20 years.[16]

Note that this statute is facially neutral as regards the participants' sexual orientation, gender, and marriage status. This case has elicited innumerable response from the academic community.[17] Despite the neutrality of many anti-sodomy statutes, "there is apparently no reported judicial opinion in which a heterosexual has been denied custody, visitation, or other parental right based on a sodomy statute . . . despite the fact that . . . most heterosexuals violate them."[18] To the extent that sodomy laws bolster and support the ban, they have the effect of reducing marriage to sexual intimacy, and of conflating that with a certain physical act, reductions in the laudable stature of marriage its supporters ought to find discomfiting.

Given that as recently as 1960 all fifty states and the District of Columbia outlawed consensual sodomy in one form or another, this has been a sea change in the law that once served to brand gay and lesbian Americans as *de facto* criminals, as second-class citizens, fusing their identity and the conduct that purportedly best identifies them. The effects of sodomy laws reverberate far beyond their rare actual enforcement against parties to a particular sex act, and across state lines where respect is accorded them under the full faith and credit clause, ultimately to "achieve indirectly what the states cannot do directly: criminalize homosexuals."[19]

Feature # 2

An anti-discrimination ordinance is in place, banning discrimination on the basis of sexual orientation, thus indicating legislative will not to have the law treat gay and lesbian persons differently from heterosexual persons, or to treat the former with the same fairness as the latter. In the United States today, twenty states and the District of Columbia have a gay rights ordinance on the books banning the following specific kinds of discrimination based in sexual orientation: public employment (twenty States and DC); public accommodations (eleven states and DC); private employment (thirteen states and DC); education (seven states and DC); housing (nine states and DC); credit (seven states); and, union practices (nine states and DC).[20]

In those jurisdictions with gay rights statutes on the books, one cannot blithely assume that gay persons are moral outcasts warranting differential treatment in the law to reflect the community's bias against

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