

RESOLUTION 06-10-2007

DIGEST

Civil Rights: Federal Prohibition Against Sexual Orientation Discrimination

Amends United States Code Title 42 section 1981 to include equal protection under the law for non-heterosexual persons.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends United States Code Title 42 section 1981 to include equal protection under the law for non-heterosexual persons. This resolution should be approved in principle because it further clarifies the civil rights laws of the United States that provide full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white heterosexual citizens.

This resolution brings into sharp focus that civil rights can no longer be measured simply by race. As currently written, section 1981 provides the full and equal benefit of all laws as is enjoyed "by white citizens." Current federal civil rights laws do not contain any express prohibition against discrimination on the basis of sexual orientation, though many states and local jurisdictions do.

Civil rights, and the protections afforded by non-discrimination laws, should not be left to the serendipity of local or regional interpretations, but rather should be enshrined in federal law without regard to regional predilections. Issues of civil rights have, for the last half-century, been designed to move prejudice out from the shadow of the law despite local and regional perspectives. For many years, the bellwether civil rights issue was race. As members of our society, and specifically our policymakers, become more politically and socially sophisticated, we, the people, need to accept that race is no longer the only or primary target of discrimination in need of eradication, and that equity with regard to sexual orientation is a critical component of a just and free society.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that Congress amend Section 1981 of Title 42 of the United States Code as follows:

- 1 §1981
- 2 (a) Statement of equal rights
- 3 All persons within the jurisdiction of the United States shall have the same right in
- 4 every State and Territory to make and enforce contracts, to sue, be parties, give evidence,
- 5 and to the full and equal benefit of all laws and proceedings for the security of persons and

6 property as is enjoyed by white heterosexual citizens, and shall be subject to like
7 punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
8 (b) “Make and enforce contracts” defined
9 For purposes of this section, the term “make and enforce contracts” includes the
10 making, performance, modification, and termination of contracts, and the enjoyment of all
11 benefits, privileges, terms, and conditions of the contractual relationship.
12 (c) Protection against impairment
13 The rights protected by this section are protected against impairment by
14 nongovernmental discrimination and impairment under color of State law.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Does not include sexual orientation as a prohibited basis of discrimination under the federal civil rights laws.

This Resolution: Would provide that all Americans shall be accorded the same civil rights regardless of sexual orientation.

The Problem: Unlike the laws in many states, the federal civil rights laws do not contain an express prohibition against discrimination on the basis of sexual orientation. Protection of civil rights should be a national concern instead of being dependent upon local sentiments. The well-known Section 1981, which mandates equal civil rights for all, is an appropriate vehicle for enshrining these protections.

The federal Constitution’s guarantees of due process and equal protection have recently been extended to persons in same-sex relationships in another context. In *Lawrence v. Texas* (2003) 539 U.S. 558, the Supreme Court struck down a Texas statute that outlawed certain sexual acts between persons of the same sex. One of the arguments in opposition, which was also a basis for the Court’s previous holding in *Bowers v. Hardwick* (1986) 478 U.S. 186, was that same-sex relations have long been restricted in American law. However, after observing that modern societal distinctions between “heterosexuality” and “homosexuality” did not occur until the late 19th century, Justice Kennedy wrote for the majority:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

As the Court made clear, discrimination on the basis of the private sexual conduct of two persons of the same sex is morally offensive and constitutionally unsupportable. Those principles must apply with even more force to the discrimination that is routinely practiced against Americans on no other basis than the immutable fact of their sexual orientation.

When Section 1981 was enacted, a person's race determined whether he or she would receive equal treatment under the law. Sexual orientation has since joined color among the most prevalent grounds for discrimination. The two are equally offensive and should be addressed with the same legislative vigor.

IMPACT STATEMENT

This resolution would affect multiple areas of federal and state law that distinguish personal civil rights on the basis of sexual orientation.

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COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

This resolution is not germane to the Mission, Goals and Organizational Values of the CDCBA. It does not propose any specific state legislation, and the CDCBA would have no means of implementing this resolution. This resolution seeks to recommend to Congress that it amend Section 1981 of the Title 42 of the United States Code. The CDCBA has no lobbyist or means of following through with this resolution if passed. The resolution does not fall within the definition of the mission of the CDCBA. The "mission" of the CDCBA is to "serve justice in California by bringing together attorney volunteers from across the State . . . to seek, debate, and promote creative, non-partisan solutions to law-related issues." (Emphasis added.) While Orange County recognizes that the new structure of the Conference permits us to debate issues more freely, even the new rules do not go this far.

The only thing that this resolution accomplishes is to make the CDCBA look ineffective, self important and inept, in contradiction of its stated Mission, Goals, and Organizational Values, which further undermines the true work that many are seeking to accomplish through the CDCBA.