THE ADVOCATE

# Feldman draws critics across political spectrum

By James Gill
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Notwithstanding its well-established reputation as a gay mecca, New Orleans is home to the federal judge who upheld a requirement that marriage involves a man and a woman.

Judge Martin Feldman's counterparts have practically fallen over one another to approve unisex marriage in other states, and five federal appeals courts have agreed that the Constitution does not permit it to be banned. The United States Supreme Court has declined to intervene.

Meanwhile, Feldman is under attack across the ideological spectrum.

In an amicus brief, the libertarian Cato Institute has joined forces with the pinkish Constitutional Accountability Center to urge the appeals court here to follow the tide and throw Feldman's ruling out.

Feldman is unlikely to lose any sleep because he is way out on a limb; veteran federal judges are seldom prone to self-doubt and he certainly won't feel any after reading the amicus brief. Given the intellectual firepower and legal prowess of the august institutions that filed it, your humble correspondent feels some trepidation in saying this, but this brief misconstrues Feldman's ruling and consists largely of irrelevant platitudes.

Louisiana voters in 2004, with 78 percent in favor, approved a constitutional amendment embracing the traditional concept of marriage and forbidding courts and officials to recognize same-sex unions solemnized in other states. Feldman rejected the argument that forbidding gay marriage violated the equal protection clause of the 14th Amendment.

In doing so, according to the amicus brief, Feldman concluded that a vote of the people could abrogate a constitutional right. We are then treated to a lengthy dissertation on why this cannot happen.

Do me a favor! Surely nobody — least of all federal judges — needs to be told that constitutional rights cannot be abridged by state legislatures or referenda. Feldman did not aver that voters had a right to deny fundamental rights; he merely concluded that gay marriage is not yet established as one. Whether he is right or wrong is debatable, but it is absurd to suggest he has failed to grasp the elementary principle that "constitutional guarantees that protect the individual from abuse by the government cannot be left to the democratic process."

Equal protection, according to the brief, means that gay marriage must be placed on the same footing as the heterosexual variety, and that proposition is evidently on its way to being the law of the land. No doubt we will have a fairer society when it is.

But we are not there yet, according to Feldman, who concludes that "any right to gay marriage" is not "so entrenched as to be fundamental." Thus, it is the right to marry someone of the opposite sex that the 14th Amendment guarantees. That is not the kind of equal protection that gays will appreciate, but, with a majority of the states sharing Louisiana's concept of marriage, Feldman is not convinced that evolving standards have put them beyond the constitutional pale.

Attitudes toward homosexuality have certainly become much more liberal at an astonishing pace — which is presumably why Feldman could not accept gay marriage as an "entrenched" right. Homosexual acts were a crime in Louisiana and 13 other states until the U.S. Supreme Court ruled the statutes illegal a mere 11 years ago. That was not a decision much welcomed in Louisiana.

Not only did voters amend the constitution to ban gay marriage the next year, but the Louisiana statute making sodomy a felony remains unenforceably on the books. After it turned out that sheriff's deputies had persisted in making sodomy arrests anyway, attempts were made to repeal the law but got nowhere, with legislators arguing it was our protection against AIDS and child molesters.

The Supreme Court can throw out our laws but cannot stop us from being stupid.

It may be that, when the Supreme Court gets around to gay marriage, Feldman will be on the losing side, but it will not be because he believes that legislators or voters have the right to "oppress disfavored minorities." He just finds that there is "no fundamental right to same-sex marriage," although "someday" it may "become part of this country's history and tradition." That, he avers, is "not a choice this court should make."

It is hard to believe the appeals court will agree that means he denies the supremacy of the U.S. Constitution.