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MAKING THE LAWFUL AWFUL: AMENDING BILLS OF RIGHTS TO ABOLISH OR DENY RIGHTS

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America's most important human rights documents are this country's 51 bills of rights—the Federal Bill Rights (the first 10 amendments to the U.S. Constitution), and the bills of rights in the constitutions of the 50 states. These documents protect the rights of individuals from abusive or excessive government power; they, in the words of William O. Douglas, “guarantee to us all the rights to personal and spiritual self-fulfillment.” They secure to us due process rights, freedom of speech, freedom of religion, free press, trial by jury, the right to counsel, protection against compelled self-incrimination and against unreasonable search and seizure, and other fundamental human rights.

In recent years, however, the ability of American bills of rights to protect liberty has been eroded due to actual or threatened constitutional amendments. The Federal Bill of Rights itself has not yet been amended, but several proposed federal constitutional amendments aimed at overturning court decisions based on the Bill of Rights have come perilously close to being approved by Congress, and one, the flag burning amendment, designed to overrule U.S. Supreme Court decisions holding that freedom of speech bars criminalizing the conduct of political protestors who burn the U.S. flag, may be soon be approved by Congress and sent to the states for ratification. The proposal gives the government a power now denied by free speech protections—the power to impose the criminal sanction on persons who commit the act of flag burning as a form of political protest. In 2004 President Bush endorsed a federal constitutional amendment to ban same sex marriage. The proposed flag burning amendment is intended to take away rights that now exist. The proposal to outlaw same sex marriage is intended to prevent the Bill of Rights from being interpreted to allow such marriages, and amounts to an endeavor to use the constitutional amendment process to deny rights.

Traditionally, federal constitutional amendments have expanded not restricted rights, and have empowered courts to find new rights rather than limited their power to do so. The proposed flag burning and marriage amendments indicate a disturbing new trend at the federal level favoring constitutional amendments that constrict rights.

Things are even worse with respect to state bills of rights, which are simpler to amend (in many states a constitutional amendment is easy to put on the ballot and becomes law if approved by a simple majority of who those cast ballots). Over 20 years ago I wrote a law review article in which I discussed 19 state constitutional amendments in 14 states which, between 1970 and 1984, had curtailed or abolished various criminal procedure rights secured to criminal defendants by state bills of rights provisions. See Wilkes, First Things Last: Amendomania and State Bills of Rights, 54 Miss. L.J. 223 (1984). Among other things, these amendments reinstated the death penalty, replaced bail with preventive detention, abolished the right to grand jury indictment, restricted jury trial rights, and enlarged the admissibility in court of evidence, e.g., confessions, obtained in violation of constitutional rights.

Since 1984, states have continued to adopt various state constitutional amendments restricting state bills of rights provisions in the field of criminal procedure, thereby abolishing or narrowing the rights of persons suspected of crime and giving more power to police and prosecutors. State bills of rights have also been amended in recent years to restrict non-criminal procedure rights. Since 1990 nearly 20 states have amended their constitutions to bar same sex marriage (Georgia did so in 2004); and more states will probably soon follow suit. Last year Florida voters amended that state's constitution to allow the state legislature to pass a law requiring parental notification before a minor may obtain an abortion, thereby overturning a Florida Supreme Court decision holding that such a law violates the right to privacy guaranteed by the state's bill of rights.

American bills of rights, which are supposed to protect minorities from the tyranny of majorities, and which are not supposed to be subjected to the vagaries of the popular vote, are losing their luster and becoming instrumentalities whereby unpopular and despised groups are denied protections due to the voting practices of the hostile groups who can muster a majority of the votes on election day.

“The results [of these recent elections approving amendments of state constitutions],”

Matt Foreman reminds us, prove that “it is always wrong to put basic rights up to a popular vote. In fact, even today, 214 years after the Bill of Rights was ratified, it is doubtful Americans could win our freedoms of speech, press and religion at the ballot box.”

The recent proposed or enacted constitutional amendments narrowing individual rights are frightening and bode ill for human rights protections in America. Bills of rights are being modified to restrict rather than expand rights; voter majorities are defining the rights of unpopular minorities; and the role of courts as protectors of the despised is being undermined. Bills of rights, once the glory of this country, less and less resemble fundamental law, and more and more look like noses of wax which are easily alterable by the majority to block constitutional protections for various minorities.

Thomas Jefferson once warned that “the natural progress of things is for liberty to yield and government to gain ground.” The rise of constitutional amendments revoking or limiting basic rights suggests that Jefferson’s warning is turning into a terrible, tragic reality.

Of course, bad as things are here, they are not—and never will be—as bad as it was in Nazi Germany. By violence and intimidation Adolf Hitler suspended the German constitution’s bill of rights; he also, by the same means, had the German constitution amended to confer on him alone the power to enact laws which had the force of constitutional amendments and thus could never be illegal or unconstitutional. By a process of constitutional amendment the will of Hitler became absolute law and individual rights were nullified.