Vermont's Supreme Court Weighs Same-Sex Marriage

Rule of Law

By Matthew Daniels

Public opinion polls show that most Americans regard the concept of homosexual "marriage" as an oxymoron. This is the principal reason that proponents are pursuing legalization through the courts in an effort to do an end run around popular opinion and the democratic process.

After initial court victories in Alaska and Hawaii were overturned at the polls in November, activists are now placing their hopes on a case known as *Baker v. Vermont*, currently before the Supreme Court of Vermont. At issue in *Baker* is whether to radically redefine the most fundamental institution in society.

If the court chooses to legalize same-sex marriage in Vermont, it is sure to have an impact in the other 49 states. Homosexuals from around the nation will travel to Vermont to obtain marriage licenses and then appeal to state courts in their home jurisdictions to grant legal recognition of those marriages.

Under the U.S. Constitution's Full Faith and Credit Clause, marriages recognized by one state traditionally are recognized by all; it's possible that some state courts may decide that they are constitutionally compelled to recognize same-sex marriages authorized in Vermont. The upshot will be that in some states, marriage will continue to be defined as it has been for thousands of years while in others, marriage will be redefined to include the union of persons of the same sex.

Proponents of same-sex marriage are hoping that the obvious legal and social conflict that such a situation would produce at the state level would encourage the federal courts to intervene and remove all remaining state barriers to same-sex marriage. Although family law has traditionally been a matter for state law, past federal intervention in the abortion debate provides ample evidence that this hope is not unfounded.

The plaintiffs in *Baker* were carefully chosen by attorneys for the national advocacy organizations involved in orchestrating the lawsuits challenging marriage laws around the nation. They include college professors, state employees and a lesbian couple who run a Christmas tree farm. All of these couples were encouraged to apply for marriage licenses from their respective town clerks. Predictably, they were turned down because their unions do not conform to the definition of marriage that equally applies to all citizens of Vermont. They sued under both state law and the state constitution.

In December 1997, a trial court found in favor of the state. Attorneys for the plaintiffs immediately appealed to the state Supreme Court. Ironically, because the lower court had ruled in favor of traditional marriage, the lawsuit didn't attract much attention in either the local or national media. On this point, same-sex marriage cases in Hawaii and Alaska provide an interesting contrast. There, lower-court rulings in favor of same-sex marriage received extensive media coverage, which in turn galvanized public opinion in defense of traditional marriage.

In Vermont, by contrast, the first many people will hear about the case will be when the Vermont Supreme Court issues its decision this summer. At that time, if the court rules in favor of legalizing homosexual marriage, it will be too late to pursue any of the political remedies that were available to the people of Alaska and Hawaii. Under Vermont law, the earliest that a state constitutional referendum could be scheduled would be the year 2002. This would mean that activists would have several years during which they would be able to use their potential victory in Vermont to export homosexual marriage to the nation as a whole.

Oral argument in *Baker* took place last November in a packed courtroom in Montpelier. Attorneys for the plaintiffs alleged that Vermont's marriage laws are unconstitutional under the state constitution because they are discriminatory and unrelated to a valid public purpose. Drawing an analogy to laws against interracial marriage in the South, one attorney for the plaintiffs told the court: "The state's justifications here are a sham. All you're left with is an impermissible preference for one part of the community."

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In response, attorneys for the state argued that the state has valid reasons for defining marriage as the union of a man and a woman including: furthering the link between procreation and child rearing, encouraging an institution that provides children with both male and female role models, and maintaining uniformity with the marriage laws of other states and nations. In addition, the defense argued that Vermont's marriage laws should not be subjected to heightened scrutiny under the Vermont Constitution for two reasons. First, homosexuals in Vermont do not have any of the traditional indicia of a discriminated class. Second, Vermont's marriage laws do not discriminate on the basis of gender since both sexes are equally affected.

Attorneys for the plaintiffs advanced the argument that Vermont's marriage statutes should be interpreted to encompass consensual unions among homosexuals. They produced research studies on the alleged benefits of homosexual parenting—despite the fact that this practice creates a permanently motherless or fatherless class of children. And they claimed that the behavior of two Roman emperors is evidence of the widespread acceptance of homosexual marriage in the ancient world.

During oral argument, three of the five judges on the court asked questions that seemed to indicate that they were favorably inclined to legalize same-sex marriage. The court asked the defense: "So what does the tradition of marriage demonstrate? Just that there is discrimination and that it is long-standing?" And: "Isn't this an artificial debate? This is a statute from the 1700s. Can't it become obsolete?"

And at one point, in response to the argument that the judiciary has no legitimate grounds for radically redefining marriage, one judge said: "Look. . . some state has to go first." He made the error of confusing the court with the state of Vermont—which is to say a democratic polity with a democratically elected government. If the state Supreme Court does decide to radically remake the moral, legal and social landscape of the state by judicial fiat, it will have done so by declaring our most important democratic institutions and traditions null and void.

Mr. Daniels is president of the Massachusetts Family Institute in Newton Upper Falls, Mass., which filed a friend-of-the court brief in Baker.